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SLEGS SUID AFRIKANERS – SOUTH AFRICANS ONLY? A REVIEW AND EVALUATION OF THE INTERNATIONAL CRIME OF APARTHEID

Adriaan Barnard*

The international crime of apartheid was created in 1973 by the community of nations to express its abhorrence of the practices of apartheid in South Africa, which commenced in 1948 and lasted until 1994. The South African apartheid policies institutionalised racial discrimination as a pervasive system of state-imposed racial segregation. The international crime of apartheid was created to bring the South African perpetrators to account but also to discourage similar practices from occurring elsewhere. This article asks whether the crime of apartheid is still relevant today as an international crime and, if so, how? The article concludes that, while the crime of apartheid does not add substantively to the list of internationally proscribed acts, the crime performs a valuable declaratory and deterrent role and should be retained in the catalogue of international crimes. In order to enhance the effectiveness of the crime, the article recommends that it be elevated to customary international law status and that numerous definitional issues be clarified. The article further recommends that systematic human rights abuses manifesting in inhumane acts are best addressed by the international community through a truth and reconciliation process, supplemented by international criminal law.

I INTRODUCTION

Unlike the English in India and the Dutch in Indonesia, the Afrikaner has nowhere else to go. For him there is no Britain and no Holland to return to; for him no central shrine of national existence to survive

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> the death of the outposts. On the soil of Africa he, and with him his history, culture and language, stay or perish.[1]
>
> As [Isaac] More and six hundred other villagers stumbled out into the early morning darkness, they saw scores of police and officials milling about, some holding revolvers. The village had been cordoned off during the night and declared an "operational area" to prevent reporters and other interfering elements from entering. A convoy of trucks drew up and the people were ordered to load their belongings and climb aboard. By noon they were gone. A few days later bulldozers came and demolished their little cut-stone houses. Magopa was no more.[2]

South Africa's history is one of two major races and untold peoples trying to exist in the same part of Africa: whites desperate for a homeland; blacks segregated and displaced when they did not fit into the white ideal.[3]

The racial struggle in South Africa was epitomised by the official government policy of apartheid or "separateness":[4] a state doctrine of separation for the independent, parallel development of races in South Africa.[5] Apartheid manifested in grievous, state-orchestrated breaches of human rights – such as that Isaac More experienced, and far worse.

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1 Schalk Pienaar and Anthony Sampson *South Africa: Two Views of Separate Development* (Oxford University Press, London, 1960) 3-4.

2 Allister Sparks *The Mind of South Africa* (Alfred A Knopf, New York, 1990) 206.

3 This article concentrates on the competing aspirations of the black and white races but this should in no way diminish the story of the other races, such as those of Asian descent, and their experiences. Their journeys are simply outside the scope of this article.

4 D B Bosman, I W van der Merwe and L W Hiemstra *Tweetalige Woordeboek: Bilingual Dictionary* (Tafelberg, Kaapstad, 1984) 38; see also Roger S Clark "Apartheid" in M Cherif Bassiouni (ed) *International Criminal Law Volume I* (2 ed, Transnational Publishers Inc, Ardsley, 1999) 643-662, 643 [Clark, "Apartheid"]; J K Feimpong and S Azadon Tiewel "Can Apartheid Successfully Defy the International Legal System?" (1977) 5 Black Law Journal 287, 287; Patti Waldmeir *Anatomy of a Miracle: the End of Apartheid and the Birth of the New South Africa* (W W Norton & Company, New York, 1997) 10; "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" (1981) E/CN.4/1426, 5 in M Cherif Bassiouni (compiled by) *The Statute of the International Criminal Court: A Documentary History* (Transnational Publishers, Ardsley, 1998) 678 [Implementation Study]; Clive Parry and others *Parry and Grant Encyclopaedic Dictionary of International Law* (Oceana Publications, New York, 1986) 24.

5 The concept has been variously described as: the "legalised separation of the races": Guy Arnold *Africa: A Modern History* (Atlantic Books, London, 2006) 331; "an interdict against the development of a social formation": Mark Sanders "Remembering Apartheid" (2002) 32 Diacritics 60, 61; a "model for separate development of races, though it served only to preserve white superiority": Steven R Ratner "Apartheid" in Roy Gutman and David Rieff (eds) *Crimes of War: What the Public Should Know* (W W Norton & Company, New York, 1999) 26-27, 26 [Ratner, "Apartheid"]; "a system of racial discrimination created,

In 1973, the international community expressed its abhorrence of the practices of apartheid in South Africa by giving the name "apartheid" to a distinct international crime through the International Convention on the Suppression and Punishment of Apartheid (Apartheid Convention).[6] Under the crime of apartheid, international criminal law proscribes the systematic oppression of one racial group by another. The crime has since been included in numerous international instruments, most notably the Rome Statute of the International Criminal Court (Rome Statute).[7]

Now, nearly four decades since the creation of the international crime of apartheid and in light of the new era of international criminal justice embodied by the International Criminal Court (ICC),[8] this is an opportune moment to take stock of the international crime of apartheid.

In order to understand the crime of apartheid in its historical context, this article first remembers apartheid. Part II provides an overview of the practice of apartheid in South Africa, including a brief discussion of its colonial roots and the legal structure that defined "comprehensive apartheid".[9]

Part III reflects on the international community's response to apartheid in South Africa by considering the numerous United Nations General Assembly (UNGA) and United Nations Security

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maintained and intended to be perpetuated by governmental design": Feimpong and Tiewel, above n 4, 287; "a special type of discrimination and separation of peoples or groups of individuals along racial lines as it is exercised in the Republic of South Africa and under its auspices in the former colony of South-West Africa, now known as Namibia": Rudolf Bernhardt (ed) *Encyclopedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law, North-Holland, Amsterdam, 1992) vol 1, 192.

6 International Convention on the Suppression and Punishment of Apartheid (30 November 1973) 1015 UNTS 243, art 1 [Apartheid Convention]; annexed to UNGA Resolution 3068 (30 November 1973) A/RES/28/3068; see generally David Weissbrodt and Georgina Mahoney "International Legal Action Against *Apartheid*" (1986) 4 Law and Inequality 485, 495-496; Newell M Stultz "Evolution of the United Nations Anit-Apartheid Regime" (1991) 13 Human Rights Quarterly 1, 16-17 ["Evolution"]; Ronald S Slye "Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission" (1999) 20 Mich J Int'l L 267, 269; Lennox S Hinds "The Gross Violations of Human Rights of the Apartheid Regime Under International Law" (1999) 1 Rutgers Race and the Law Review 231, 245-248; G N Barrie "The Apartheid Convention after Five Years" (1981) J S Afr L 280, 280-283; Ratner, "Apartheid", above n 5, 26.

7 Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 90, arts 7(1)(j) and 7(2)(h) [Rome Statute]; Rome Statute also contained in International Crimes and International Criminal Court Act 2000 (NZ), schedule; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (26 November 1968) 660 UNTS 195, art 1(b) [Limitations Convention]; International Convention Against Apartheid in Sports (3 April 1988) 1500 UNTS 177, preamble [Sports Convention].

8 Rome Statute, above n 7, art 1.

9 Arnold, above n 5, 331.

Council resolutions and the imposition of sanctions on South Africa. It examines how international frustration was finally manifested in the creation of the crime of apartheid as a mechanism for holding the perpetrators to account.

The crime of apartheid, as defined by the international community, is reviewed in Part IV to determine whether the crime is still relevant today: what does the crime add to international criminal law, how effective is it, and are there any practical or definitional issues that have to be resolved to make it more effective?

The article concludes that the international crime of apartheid, while not adding anything substantive to the international catalogue of prohibited acts, nevertheless performs a valuable declaratory and deterrent role. The crime is still relevant today, but its efficacy could be enhanced by remedying a number of definitional issues and adopting a holistic international response to systematic racial discrimination.

II REMEMBERING APARTHEID

A Apartheid's Origins and Development

1 Colonial roots of racial segregation

In 1910, when the Union of South Africa was founded as a British dependency,[10] South Africa was already a racially divided state.[11] Informal separation of the races (white and black) and colonial discrimination dated back to the arrival of the first European colonists in 1652.[12] In a sign of things to come, the Transvaal *Volksraad*[13] in 1899 prohibited blacks from walking on street sidewalks.[14]

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10 Waldmeir, above n 4, xv; Arnold, above n 5, 10; and Hinds, above n 6, 259.

11 South Africa's population comprises whites (those of European descent, commonly divided between English and Afrikaans speakers), blacks (including Xhosa, Swazi, Sotho, Tswana, Venda, Tsonga and Ndebele groups), coloureds (including the indigenous San and Khoi) and Indians (mostly descendants of Indian migrant workers brought to South Africa by the United Kingdom): see generally D T Cole "Bantu Peoples of Southern Africa" in Eric Rosenthal (ed) *Encyclopaedia of Southern Africa* (6 ed, Frederick Warne & Co, London, 1973) 39-40.

12 Waldmeir, above n 4, 10.

13 Literally "Council of the Nation", the Volksraad was the independent Boer Republic of Transvaal's legislature: Rosenthal, above n 11, 622.

14 Martin Meredith *In the Name of Apartheid: South Africa in the Post War Era* (Harper & Row, New York, 1988) 33; and Sparks, above n 2, 142.

After the Anglo–Boer War ended in Afrikaner defeat in 1902, Afrikaners became second-class citizens.[15] Blacks, moreover, did not even warrant inclusion in the class system.[16] Blacks had no political rights or voting rights in the Transvaal or Orange Free State republics, and only very limited rights in the Natal and Cape colonies.[17]

Racial segregation took on a political dimension after the South African Native Affairs Commission, established by the British authorities in 1903, recommended that "whites and blacks should be kept separate in politics and in land occupation and ownership on a permanent basis."[18] Thus, status quo separation became a "political doctrine."[19]

2 The beginnings of formulation

Between 1910 and 1948, South Africa was dominated by the largely English-speaking or English-sympathising white South Africans – Afrikaners struggled throughout this period to attain an "Afrikaner state".[20] This political tension was played out almost in ignorance of the black population, although formalised discrimination against blacks was emerging in the political and legal system. The South Africa Act 1909, enacted by the Parliament of the United Kingdom, restricted the electoral franchise to whites and it also limited blacks' economic and political rights.[21] Land ownership was segregated in 1913.[22] As one contemporary wrote: "Awakening on Friday morning, 20 June 1913 … the South African Native found himself not actually a slave, but a pariah in the land of his birth."[23]

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15 For example, Lord Milner, the British Governor, wanted to anglicise the Afrikaners and made English the official language. Afrikaans only became an official language in 1925, despite Afrikaners forming the majority of the white population: Meredith, above n 14, 11.

16 Waldmeir, above n 4, 9; Meredith, above n 14, 11.

17 Sparks, above n 2, 136, 14, 190; Meredith, above n 14, 33. At this stage, the modern South Africa comprised two Boer republics (Transvaal and the Orange Free State) and two British colonies (Natal and the Cape). After the Boer War, all four areas came under British control. The Union of South Africa, in 1910, created a new British dependency composed of four provinces (Natal, Cape, Transvaal and Orange Free State).

18 Meredith, above n 14, 34.

19 Ibid.

20 See generally Sparks, above n 2; Meredith, above n 14; Arnold, above n 5; Hinds, above n 6.

21 South Africa Act 1909 (UK), s 44(c); Arnold, above n 5, 330; Hinds, above n 6, 259.

22 Natives Land Act 1913 (RSA); Meredith, above n 14, 35-37; Sparks, above n 2, 136. The Natives Urban Areas Act 1923 (RSA) established the principle that towns and cities were reserved for white residents only.

23 Sol Plaatje *Native Life in South Africa* (1916), quoted in Meredith, above n 14, 35; see also Sparks, above n 2, 136.

By 1924, a "civilised labour" policy had been implemented, meaning that blacks employed in the public service were to be replaced by whites. In the state-owned railways, for example, 15,000 black and coloured workers were replaced by 13,000 whites between 1924 and 1933.[24]

While South Africa's racial policies were similar to practices in many other European colonies in Africa at the time, after 1945 these colonies moved steadily towards "ideas of racial equality and colonial freedom".[25] South Africa, however, moved the other way. The crucial turning point in apartheid's development occurred in 1948.[26]

3 "Comprehensive apartheid"

In 1948, the Afrikaner National Party won the general election. The victory was seen as the final Afrikaner triumph over British domination.[27] Political attention now turned towards the *swart gevaar* or "black peril":[28] the fear that blacks, streaming into the cities as a result of an economic boom, would swamp the Afrikaners' new-found political and economic freedom.[29]

The National Party cemented de facto segregation with "a vast legal superstructure to enforce separation",[30] envisaged as a system to achieve "the separate development of all races and ethnic groups based on mutual respect for their cultural identities."[31] This system of codified racial separation became known as apartheid.[32]

Apartheid ideology grew out of Geoff Cronje's book *'n Tuiste vir die Nageslag*.[33] This text promoted population registration by race, ethnic councils and homelands, separate residential areas and a prohibition on cross-cultural sexual relations.[34]

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24 Meredith, above n 14, 18 and 56.

25 Meredith, above n 14, 1; see also Sparks, above n 2, 183; Hinds, above n 6, 238.

26 See generally Arnold, above n 5; Meredith, above n 14; Sparks, above n 2.

27 Heribert Adam "The Nazis of Africa: Apartheid as Holocaust?" (1997) 31 CJAS/RCEA 364, 365.

28 Meredith, above n 14, 46; Sparks, above n 2, 148.

29 See Arnold, above n 5, 332; Hinds, above n 6, 259; Meredith, above n 14, 31; Sparks, above n 2, 147-148.

30 Waldmeir, above n 4, 10; Hinds, above n 6, 258; Arnold, above n 5, 331.

31 Bernhardt, above n 5, vol 1, 193.

32 Apartheid has been described as "the most elaborate racial edifice the world has ever seen": Meredith, above n 14, 1; see also Newell M Stultz "The Apartheid Issue at the General Assembly: Stalemate or Gathering Storm?" (1987) 86 African Affairs 25, 25 ["The Apartheid Issue"].

33 Geoff Cronje *'n Tuiste vir die Nageslag – Die Blywende Oplossing van Suid-Afrika se Rassevraagstuk* (Pro-Ecclesia-Drukkery, Stellenbosch, 1945). The title means "A Home for Posterity"; Cronje was an "influential apartheid thinker": Sanders, above n 5, 64.

The apartheid system established in 1948 was qualitatively different to the segregation existing before that time: "the new government set out to segregate every aspect of political, economic, cultural, sporting and social life, using established legal antecedents where they existed and creating them where they did not."[35]

B The Legal Structure of Apartheid

Apartheid was entrenched in every sphere of the South African legal system, entailing racial classification,[36] separation of land and living areas (the "homelands"),[37] restriction of movement,[38] economic marginalisation,[39] morality restrictions and censorship[40] and widespread police enforcement powers.[41] Many of these practices of apartheid were contrary to the body of international human rights law emerging at the time (though South Africa refused to accede to the human rights instruments until after the end of apartheid).[42]

1 Racial classification

Every South African was classified as Bantu (black),[43] coloured,[44] Asian,[45] or white.[46] A Race Classification Board had power to determine a doubtful pedigree; practices included examining "a

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34 Cronje, above n 33, 42-90.

35 South Africa Truth and Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report* (Truth and Reconciliation Commission, Cape Town, 1998-2003) vol 1 29-30 [SATRC Report]; Sanders, above n 5, 63; see also Hinds, above n 6, 241; Sparks, above n 2, 150.

36 Population Registration Act 1950 (RSA).

37 Native Land Act 1913 (RSA); Native Trust and Land Act 1936 (RSA); Bantu Authorities Act 1951 (RSA); Promotion of Bantu Self-Government Act 1959 (RSA); Bantu Laws Amendment Act 1963 (RSA).

38 Natives Abolition of Passes and Coordination of Documents Act 1952 (RSA); Native Urban Areas Act 1952 (RSA).

39 Mines and Works Act 1911 (RSA); Industrial Coalition Act 1956 (RSA); Bantu Education Act 1953 (RSA); Extension of University Education Act 1959 (RSA); Master and Servant Act (RSA); Industrial Conciliation Act 1956 (RSA); Native Labour Regulation Act 1911 (RSA).

40 See for example the Police Amendment Act 1979 (RSA).

41 Terrorism Act 1967 (RSA); Internal Security Act 1982 (RSA); Internal Security Amendment Act 1976 (RSA).

42 South Africa abstained from the final vote on the Universal Declaration of Human Rights in 1948 and only signed in 1994 the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention Against Torture: United Nations Treaty Collection treaties.un.org (accessed 30 May 2009); Johannes Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, Philadelphia, 2000).

43 "Bantu" included a further 10 tribal groups, distinguished mainly by linguistic characteristics.

questionable person's cuticles and eyeballs for traces of pigmentation."[47] Flouting numerous international human rights instruments guaranteeing equality and non-discrimination,[48] this classification affected all areas of a person's life, including voting rights.[49]

2 *Separation of land and living areas – the "homelands"*

Despite the internationally recognised rights to freedom of movement,[50] freedom of association[51] and the right to own property,[52] racial classification determined where a person could live in apartheid South Africa. Blacks accounted for between 70 and 80 per cent of the population, but only 13.7 per cent of the land was available for black ownership.[53] "Black spots" – areas where blacks lived in the larger cities – were gradually reclassified as white areas, forcing 3.5 million urban blacks to the "homelands".[54]

The "homelands" were areas reserved for independent Bantu states, demarcated along historical tribal lines.[55] Blacks remaining in South Africa (outside the homelands) had temporary migrant

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44 "Coloured" was further divided into "Grigua", "Cape Malay", "Cape Coloured" and "Other Coloureds".

45 "Asian" was mostly people of Indian descent.

46 Population Registration Act 1950 (RSA); Ratner, above n 5, 26l; Sparks, above n 2, 189; Hinds, above n 6, 240 and footnote 25, 260.

47 Sparks, above n 2, 189.

48 Universal Declaration of Human Rights, UNGA Resolution 217 (10 December 1948) A/RES/3/217, arts 1 (equality), 2 (discrimination), 6 (right to recognition before the law), 7 (equality before the law), 21 (right to public participation) [UDHR]; International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, arts 2 (non-discrimination), 3 (equality), 14 (equality before the courts), 16 (recognition as a person before the law), 25 (right to access public services) and 26 (equality before the law) [ICCPR].

49 South Africa Act 1909 (UK), s 44(c); Arnold, above n 5, 330; and Hinds, above n 6, 259. This is directly contrary to ICCPR, above n 48, art 25 (right to vote).

50 UDHR, above n 48, art 13; ICCPR, above n 48, art 12.

51 The rights to free association and assembly are contained in the following: UDHR, above n 48, art 20; ICCPR, above n 48, arts 21 and 22.

52 UDHR, above n 48, art 17 (right to own property); ICCPR, above n 48, art 17 (respect of family privacy and a person's home).

53 Native Land Act 1913 (RSA); Native Trust and Land Act 1936 (RSA); Hinds, above n 6, 292; Waldmeir, above n 4, 31.

54 Arnold, above n 5, 335.

55 See Bantu Authorities Act 1951 (RSA); Promotion of Bantu Self-Government Act 1959 (RSA); Arnold, above n 5, 334, 337; Meredith, above n 14, 73; see Waldmeir, above n 4, 11; Sparks, above n 2, 199; Hinds, above n 6, 293; Bernhardt, above n 5, vol 1, 193 describing the process as "forced resettlement".

worker status: the aim was to ensure that "eventually there [would] be no black South Africans".[56] These practices seem reminiscent of the de-naturalisation laws of Nazi Germany,[57] which effectively stripped Jews and other minorities of their German citizenship.[58]

3 Restriction of movement

The creation of the homelands enabled the government to limit the presence of blacks in white urban areas. Black men had to carry a reference book containing "details of birth, employment, taxation, movement and fingerprints".[59] This information was used to enforce the Section Ten provisions preventing a black person from being in "an urban area for longer than seventy-two hours without a permit unless he or she had lived continuously for fifteen years or served under the same employer for ten years."[60]

In white areas, blacks could not use the same public facilities as whites: buses, post offices, stations, trains, schools, universities, taxis, park benches, … theatres, restaurants, "and even … the ocean"[61] were all segregated.[62]

These provisions potentially breached a number of rights, including freedom of movement,[63] association,[64] residence,[65] and expression,[66] as well as the right to equality and non-discrimination.[67]

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56 Cornelius Mulder, Cabinet Minister in charge of black affairs in 1976, quoted in Sparks, above n 2, 137; see also Hinds, above n 6, 294; Bantu Laws Amendment Act 1963 (RSA); Arnold, above n 5, 335.

57 See Nuremberg Laws on Citizenship and Race of 15 September 1935 (Germany), art 2(1); First Supplementary Decree of 14 November 1935 (Germany), art 4(1); Telford Taylor *The Anatomy of the Nuremberg Trials* (Alfred A Knopf, New York, 1992) 21.

58 The denaturalisation laws formed part of a matrix of conduct amounting to crimes against humanity: International Military Tribunal *Trial of the Major War Criminals* (Secretariat of the Tribunal, Nuremberg, 1947) 247-255 (Judgment) [IMT Judgment]; Taylor, above n 57, 560. The practices are also contrary to the right to have a nationality: UDHR, above n 48, art 15 (right to a nationality).

59 Natives Abolition of Passes and Coordination of Documents Act 1952 (RSA); Meredith, above n 14, 56; Sparks, above n 2, 191.

60 Meredith, above n 14, 56; Sparks, above n 2, 194; see generally Hinds, above n 6, 283 and footnote 269; see Native Urban Areas Act 1952 (RSA).

61 Sparks, above n 2, 189.

62 Reservation of Separate Amenities Act 1953 (RSA); Meredith, above n 14, 56; Hinds, above n 6, 261.

63 UDHR, above n 48, art 13; ICCPR, above n 48, art 12.

64 UDHR, above n 48, art 20; ICCPR, above n 48, art 22.

65 UDHR, above n 48, art 13 (freedom of residence within borders of the state); ICCPR, above n 48, art 12.

4 *Economic marginalisation*

Blacks were restricted from participating freely in the South African economy.[68] Jobs could be reserved for whites in certain industries,[69] education was largely restricted to whites[70] and blacks received lower wages than whites.[71] Trade unions were segregated[72] and inciting strike action was illegal.[73] Finally, the pass laws meant that blacks could not move freely within the economy to sell their labour.[74]

5 *Morality restrictions and censorship*

Mixed marriages were prohibited and "sexual relations between consenting adults of different skin colours [was] a criminal offence,"[75] even though the right of any man and woman to marry is

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66 UDHR, above n 48, art 19; ICCPR, above n 48, art 19.

67 UDHR, above n 48, arts 1 (equality), 2 (discrimination), 6 (right to recognition before the law) and 7 (equality before the law); ICCPR, above n 48, arts 14 (equality before the courts), 16 (recognition as a person before the law) and 26 (equality before the law).

68 For general economic rights violated by these practices, see the following: UDHR, above n 48, arts 22 (right to realisation of own dignity and free development of personality), 23 (employment rights) and 25 (standard of living); International Covenant on Economic, Social, and Cultural Rights (16 December 1966) 993 UNTS 3, arts 6 (right to work), 7 (work conditions including equal opportunity) and 11 (adequate standard of living) [ICESC].

69 Mines and Works Act 1911 (RSA); Industrial Conciliation Act 1956 (RSA); Meredith, above n 14, 57; see Hinds, above n 6, 278; Sparks, above n 2, 191.

70 Bantu Education Act 1953 (RSA); Extension of University Education Act 1959 (RSA); Meredith, above n 14, 73-74; Sparks, above n 2, 196. The practice was contrary to the international right to education: UDHR, above n 49, art 26 (right to free education); ICESC, above n 68, art 13 (right to education).

71 Hinds, above n 6, 278.

72 Industrial Conciliation Act 1956 (RSA); Meredith, above n 14, 57; Hinds, above n 6, 278. Trade union membership has been considered a human right: ICESC, above n 68, art 8 (right to form and join trade unions). Free assembly and association is also threatened: see UDHR, above n 48, art 20; and ICCPR, above n 48, arts 21 and 22.

73 Riotous Assemblies Act 1956 (RSA) and Hinds, above n 6, 282.

74 Sparks, above n 2, 191; see Part II B 3 above.

75 Ibid, 190; Meredith, above n 14, 46-47.

an internationally recognised right.[76] Similar policies were implemented in Nazi Germany, prohibiting marriages "between Jews and nationals of German or kindred blood."[77]

Further, despite the almost universally accepted right to free expression,[78] the South African Publications Control Board could ban any film, publication, record or art piece for showing intermingling of whites and blacks.[79] Moreover, the South African police could arrest any journalist who "did not conform to the police's definition of the official 'truth'".[80]

6 Widespread police enforcement powers

The South African police's widespread powers to enforce the apartheid regime[81] led Hinds to describe the police as an "army of occupation [imposing] curfews and documentary controls."[82] Many of these powers, including the censorship powers described above, were inconsistent with the rule of law and basic human rights (as those concepts were understood throughout much of the world at that time).[83] Many truths were uncovered by the South African Truth and Reconciliation Commission:[84]

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76 UDHR, above n 48, art 16 (right to marry); ICCPR, above n 48, art 23 (right to marry and found a family); ICESC, above n 68, art 10 (right to marriage and family).

77 Law for the Protection of German Blood and German Honour of 15 September 1935 (Germany), art 1(1): forbid marriages "between Jews and nationals of German or kindred blood"; IMT Judgment, above n 58, vol 1, 175 and 254 (Judgment). While the IMT was not satisfied that the practices were crimes against humanity because the connection to anther crime (aggression, for example) was not proved, the practices were described as "revolting and horrible". See however *United States of America v Alstötter et al* ("The Justice Case") 3 TWC 1 (1948), 6 LRTWC 1 (1948), 14 Ann Dig 274 (1948) in respect of defendant Rothaug who was convicted for enthusiastically applying the racial purity provisions of Nazi law.

78 UDHR, above n 48, art 19 (freedom of opinion and expression); ICCPR, above n 48, art 19 (freedom of expression).

79 Meredith, above n 14, 114-115. For example, 1283 films were submitted to the Board in 1974. Of those, 507 were restricted to persons of a particular race only, 395 had to be edited before exhibition and 129 were banned: Arnold, above n 5, 571. Additionally, Anna Sewell's *Black Beauty* was banned in 1955 because the title contained the word "black".

80 Hinds, above n 6, 302; see Police Amendment Act 1979 (RSA), s 27(b).

81 The South African Government "reserved the right to make warrantless searches, control essential services, close businesses, and censor domestic and foreign press": Weissbrodt and Mahoney, above n 6, 503.

82 Hinds, above n 6, 249.

83 UDHR, above n 48, arts 3 (right to life, liberty and security of person), 9 (right not to be arbitrarily arrested or detained) and 10 (right to a fair hearing); ICCPR, above n 48, arts 9(1) (arbitrary arrest) and 10 (respect for inherent dignity whilst in detention).

84 Sanders, above n 5, 67-68.

> It was only in early 1990, when police captain Dirk Coetzee made disclosures about originating the covert activities from Vlakplaas near Pretoria, that the family gained an inkling about what had actually taken place. Siphiwo Mtimkhulu and Topsy Madaka had allegedly been drugged and shot, and their bodies burned to ash on a pyre of wood and old tires … The poison secreted into his food by the police was what caused Siphiwo Mtimkhulu's hair to fall out.

The retrospectively applicable Terrorism Act 1967 allowed incommunicado detentions without charge for indefinite periods of time.[85] Torture and murder took place and were even legally sanctioned in some cases,[86] despite the prohibition on torture being an important rule of customary international law which at the time bound every State regardless of treaty obligations and which subsequently became recognised as *jus cogens*.[87]

Police powers were largely discretionary:[88] the Minister of Justice had the power to ban any organisation from holding meetings,[89] for example, and the police were removed from judicial scrutiny in 1982.[90]

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85 Terrorism Act 1967 (RSA); Goler Teal Butcher "Legal Consequences for States of the Illegality of Apartheid" (1986) 8 Human Rights Quarterly 404, 412; Arnold, above n 5, 334-335; Hinds, above n 7, 272. For the principle of non-retrospectivity *nullum crimen sine lege*, see the following: Rome Statute, above n 6, art 22; A P Simester and Warren J Brookbanks *Principles of Criminal Law* (Brookers, Wellington, 1998) 22; Andrew Ashworth *Principles of Criminal Law* (Clarendon Press, Oxford, 1991) 59; M Cherif Bassiouni *Crimes Against Humanity in International Criminal Law* (2 ed, Kluwer Law International, The Hague, 1999) 137 [*Crimes Against Humanity*]; ICCPR, above n 48, art 15 (non-retrospectivity).

86 Internal Security Act 1982 (RSA); Hinds, above n 6, 241.

87 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85 (Torture Convention); UDHR, above n 48, art 5 (right not to be subjected to torture or cruel, inhuman or degrading treatment); ICCPR, above n 48, arts 6 (right to life) and 7 (right not to be subjected to torture or cruel, inhuman or degrading treatment); Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *International Committee of the Red Cross: Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005) vol 1, 315 and vol 2, 2106-2149; *Prosecutor v Anto Furundzija* (Judgment) (10 December 1998) IT-95-17/1-T (Trial Chamber, ICTY) para 153.

88 Discretionary exercise of executive power has long been criticised: Montesquieu "The Spirit of the Laws" in A Lijphart *Parliamentary Versus Presidential Government* (Oxford University Press, Oxford, 1992) 48-49; A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan Education: Basingstoke, 1959) 188-203; Geoffrey Palmer and Matthew Palmer *Bridled Power* (4 ed, Oxford University Press, Melbourne, 2004) 8-9.

89 Internal Security Amendment Act 1976 (RSA) (previously the Suppression of Communism Act); Arnold, above n 5, 331, 334; Hinds, above n 6, 266-267.

90 Internal Security Act 1982 (RSA), s 28(7): "No court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the replacement of any persons detained in terms of the provisions of this section"; see also Hinds, above n 6, 270.

7 Legal contradiction

An odd dichotomy existed within the South African legal system, however: the fact that the apartheid abuses were founded in law meant that the courts sometimes compensated victims of government abuse[91] and at times affirmed victim's rights by invalidating "racist actions by the executive or legislature, such as segregation of public accommodations".[92] The South African government often pointed to such court decisions when claiming, domestically and internationally, that the government respected the rule of law in South Africa.[93]

Additionally, the strict legal control in South Africa meant that vigilante violence against blacks was rare.[94]

This situation where the law both oppressed and sometimes protected (to some extent at least) a racial group within South African society is unlike that which existed in Nazi Germany, where Jews were expressly placed "outside the law and [which] thereby legitimised arbitrary terrorism",[95] both government-sanctioned and otherwise.

C The Demise and Aftermath of Apartheid

After decades of internal unrest and increasing international pressure and sanctions, the dismantling of the apartheid apparatus commenced in 1986.[96] In 1990, then-President F W de Klerk formally announced the government's decision to abandon apartheid.[97] As a result, the majority of the apartheid laws were repealed by 1991.[98]

Apartheid formally dissolved in 1994 through a "negotiated revolution", which culminated in the first free elections in South Africa, installing Nelson Mandela as President.[99] Two years later, South Africa adopted a new Constitution to "recognise the injustices of [the] past" and "establish a

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91 Adam, above n 27, 369; ICCPR, above n 48, art 9(5) (right to compensation).

92 Richard Abel *Politics by Other Means: Law and the Struggle Against Apartheid 1980-1994* (Routledge, New York, 1995) 2-3.

93 Abel, above n 92, 2-3; John Dugard "Silence is not Golden" (1982) 46 Foreign Policy 37, 39.

94 Adam, above n 27, 369.

95 Ibid.

96 See Bernhardt, above n 5, 195; Arnold, above n 5, 725 and 736.

97 Arnold, above n 5, 610, 618, 709.

98 Ibid, 780.

99 Ibid, 783-785; Adam, above n 27, 370.

society based on democratic values, social justice, and fundamental human rights."[100] It is unusual for a Constitution to set out so clearly the wrongs of the past and in doing so the Constitution not only reaffirmed the many rights and freedoms suppressed under apartheid, but has provided a useful domestic yardstick against which to judge those abuses.[101]

The South African Truth and Reconciliation Commission (SATRC) was established in 1995 to provide a process of national healing through "amnesty for truth" and "nation-wide acknowledgement of the illegitimacy of apartheid".[102] The SATRC's purpose was to present a true account of the apartheid regime and the human rights violations that occurred.[103] After 140 public hearings and 20,000 written and oral submissions, the Commission released its 2,739 page report in 1998:[104] a "by whom, to whom, [and] why" account of 40 years of abuses.[105]

The SATRC had authority to grant criminal and civil amnesties to perpetrators of apartheid-era acts or offences committed for political – rather than simply "criminal" or "personal" – objectives, but only to individuals who specifically applied for amnesty and who fully disclosed the facts of

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100 Constitution of the Republic of South Africa Act 1996 (RSA), preamble.

101 See for example: Constitution of the Republic of South Africa Act 1996 (RSA), ss 9 (equality before the law), 11 (right to life), 33-35 (rights to just administrative action), 12 (freedom and security of the person, including prohibition of torture and arbitrary arrest), 14 (right to privacy, including right to integrity of property), 16(1) (freedom of expression), 17 and 18 (freedom of association), 20 (right not to be deprived of citizenship), 21 (freedom of movement and residence), 22 (professional and economic freedoms), 23(2)(1) (right to form and join a union), 25 (prohibition on arbitrary deprivation of property). The Constitution entitles those who had property dispossessed since 19 June 1913 to equitable redress (s 25(7)).

102 Kadar Asmal "International Law and Practice: Dealing with the Past in the South African Experience" (2000) 15 Am U Int'l L Rev 1210, 1225; Arnold, above n 5, 787.

103 Promotion of National Unity and Reconciliation Act 1995 (RSA), s 3; Asmal, above n 102, 1214. The SATRC consisted of three committees, namely Human Rights Violations, Amnesty, and Reparations and Rehabilitation.

104 Michael P Scharf "The Amnesty Exception to the Jurisdiction of the International Criminal Court" in Olympia Bekou and Robert Cryer (eds) *The International Criminal Court* (Ashgate Publishing Company, Aldershot, 2004) 438-457, 440.

105 Asmal, above n 102, 1214.

their apartheid crimes.[106] No general amnesty was granted.[107] The Commission was also able to provide reparations and rehabilitation for victims.[108]

The SATRC's design was a necessary compromise between holding the perpetrators to account and creating a new, unified South African society, but it worked because there was overwhelming support for the process from the South African people.[109] Although the Commission was not always universally popular,[110] it provided a domestic solution to the human rights violations of the past and an effective way of ensuring a peaceful transition to democracy, thus preventing a potential civil war.[111]

Following the SATRC process, the South African National Prosecuting Authority was given discretionary power in 2003 to prosecute the over 800 apartheid-era cases referred to the Authority by the SATRC.[112] A number of high-profile, complex and costly cases have been brought before the courts,[113] but these have been for historical "ordinary crimes", such as murder, albeit politically

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106 Promotion of National Unity and Reconciliation Act 1995 (RSA), s 20 (1) (a)-(c). Amnesty can be given by the SATRC if the application relates to an act, omission, or offence "associated with a political objective in the course of the conflicts of the past" and the SATRC determines that the applicant has made a "full disclosure of all relevant facts".

107 Shaun Benton *New Policy on Apartheid* www.southafrica.info/services/rights (last accessed 29 June 2008).

108 Promotion of National Unity and Reconciliation Act 1995 (RSA), ch 5 (dealing with reparation and rehabilitation).

109 Larry May *Crimes Against Humanity: A Normative Account* (Cambridge University Press, Cambridge, 2005), 231 and Asmal, above n 102, 1224.

110 See generally Lyn S Graybill *Truth and Reconciliation in South Africa: Miracle or Model?* (Lynne Reinner Publishing, Boulder CO, 2002); Richard A Wilson *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, Cambridge, 2001); Deborah Posel and Graeme Simpson (eds) *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Witwatersrand University Press, Johannesburg, 2002).

111 Scharf, above n 104, 440.

112 President Thabo Mbeki "Statement to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission" (15 April 2003) www.anc.org.za/ancdocs/ (last accessed 15 September 2008); SABC "NPA, SAPS Squabbles Lead to Apartheid Era Case Backlog" (19 November 2009) www.sabcnews.com (last accessed 6 March 2010).

113 See for example the trial of Dr Wouter Basson, the former head of the apartheid regime's biological and chemical weapons programme. The presiding judge dismissed the 67 charges after a 30 month trial. The South African Constitutional Court overturned the aquittal, however, and referred the matter back to the National Prosecuting Authority. No action appears to have been taken since: *S v Basson* [2005] ZACC 10 (Judgment of the Court). Also, Adriaan Vlok, the Minister in Charge of Law and Order between 1986 and 1991, and former Police Special Branch commanding officer Johan van der Merwe both received suspended 10 year sentences after pleading guilty to charges of attempted assassination: *In the Matter between the State and Johan van der Merwe et al.* (17 August 2007) High Court of South Africa (Transvaal Provincial

motivated, committed during the apartheid era, rather than the specific (and arguably more serious) "crime of apartheid".[114] This, in itself, highlights the potential difficulties with holding individuals accountable for a pervasive and long-term system like South Africa's apartheid.

Thus, given the costs and difficulties, it seems improbable that any attempt will be made to prosecute someone for the international crime of apartheid, despite the mechanisms appearing to be in place[115] and a majority of the South African Constitutional Court stating, in 2004, that there is an international obligation on the State to prosecute international crimes against humanity, including the crime of apartheid.[116]

So in spite of the tragic history of apartheid as set out in this paper, the strength of the international community's reprobation of the offence and the mountain of evidence at our disposal, one stark fact remains as we look back at the history of this crime: to date, not one person has been prosecuted for the crime of apartheid, either in South Africa or internationally.[117]

Division), Plea and Sentence Agreement. See also Harvard Law School International Human Rights Clinic "Prosecuting Apartheid Era Crimes?" (June 2008) <www.law.harvard.edu> (last accessed 2 September 2008).

114 For a very detailed discussion of the policy, see Harvard Law School International Human Rights Clinic, above n 113.

115 The Rome Statute has been incorporated into domestic legislation and South Africa has signalled an intention to accede to the Apartheid Convention: Rome Statute, above n 8, arts 7(1)(j) and 7(2)(h); incorporated into South African law by the Implementation of the Rome Statute of the International Criminal Court Act 2002 (RSA). Note, however, that the Rome Statute does not apply retrospectively: art 11; Penuell Maduna "Statement by the Minister of Justice and Constitutional Development in connection with South Africa's Accession to the International Convention on the Suppression and Punishment of the Crime of Apartheid as approved by Cabinet" (19 July 1999) www.info.gov.za/speeches (last accessed 14 September 2008).

116 *S v Basson* [2004] ZACC 13, para 37 (Ackermann, Madala, Mokgoro, Moseneke, Ngcobo, O'Regan JJ); The court appeared to be implying that charges for "ordinary" politically motivated crimes committed during the apartheid era was a way of meeting this international obligation. The judgment references John Dugard "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" 13 (1997) SA Journal on Human Rights 258, 263; and *Prosecutor v Dusko Tadic* (ICTY) (1996) 35 ILM 32, 72; see also *Nkadimeng and Others v National Director of Public Prosecutions and Others* [2008] ZAGPHC 422 (12 December 2008).

117 Clark "Apartheid", above n 4, 659; Henckaerts and Doswald-Beck, above n 87, vol 2, 2058 and 2060; Geoffrey Robertson *Crimes Against Humanity* (Penguin Books, Camberwell, 2008) 272.

III REFLECTING ON THE INTERNATIONAL COMMUNITY'S RESPONSE TO APARTHEID: ESTABLISHING A CRIME OF APARTHEID

> Apartheid in Southern Africa represents one of the greatest challenges, one of the greatest success stories, and one of the most frustrating defeats of the international human rights movement.[118]

A Political Actions of the International Community

As discussed above, the practices of apartheid in South Africa violated international law.[119] Nevertheless, the international community was largely powerless to intervene. Apartheid's discriminatory policies, while breaching international human rights, were essentially "domestic" matters.[120] Relying on Article 2(7) of the United Nations Charter (UN Charter),[121] which prevents the UN from intervening in member States' domestic matters, South Africa claimed that the international community, embodied by the UN, could not even discuss apartheid in the UNGA, let alone intervene.[122]

Notwithstanding South Africa's claims, the international community relied on the general obligations imposed on member States by the UN Charter, to protect human rights and prevent discrimination,[123] to determine that the UNGA had the competency to consider South Africa's

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118 Weissbrodt and Mahoney, above n 6, 485.

119 See the discussion above. For further information see Slye, above n 6, 288; Sanders, above n 5, 63; SATRC Report, above n 35, vol 1, 29: the Truth and Reconciliation Commission found that "[c]onceptually, the policy of apartheid was itself a human rights violation". See also the Charter of the United Nations (26 June 1945) 1 UNTS xvi, arts 55 and 56 [UN Charter]. The International Court of Justice ruled that distinctions based on race violate the United Nations Charter (however, the judgment was limited to apartheid in Namibia): *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 15, 45-46.

120 The IMT, for example, could only express abhorrence at pre 1939 practices in Germany. The bulk of the crimes against humanity therefore comprised acts committed in occupied countries, especially Eastern Europe: IMT Judgment, above n 58, 247-255. Although after Rwanda, the United Nations Security Council is more prepared to acknowledge with actions the threat posed to international peace and security by internal breaches of human rights, the principle of respect for sovereignty was (and remains) one of the underpinning fundamentals of the UN and worked consistently to the advantage of states such as South Africa (see UN resolutions below under Part III A 1).

121 UN Charter, above n 119, art 2(7).

122 Stultz "The Apartheid Issue", above n 32, 28.

123 UN Charter, above n 119, arts 55 and 56.

domestic situation.[124] The Sharpville incident in 1960,[125] in particular, galvanised international opinion. The United Kingdom, for example, reversed its opposition to the UN discussing apartheid and "conceded that apartheid was 'so exceptional as to be *sui generis*'."[126]

1 Rhetoric

Between 1952 and the early 1990s, the UNGA discussed apartheid at every session except one[127] and issued a series of declarations deploring apartheid and South Africa's apartheid regime.[128]

The language used in UNGA resolutions reflected the international community's increasing frustration with South Africa's apparent apathy towards criticism. References to apartheid became increasingly severe between 1946 and 1969.[129]

Earlier resolutions considered it in "the higher interests of humanity to put an immediate end to … racial persecution and discrimination"[130] and expressed "opposition to the continuance or preservation of racial discrimination in any part of the world."[131]

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124 See for example UNGA Resolution 1598 (13 April 1961) A/RES/15/1598, para 4: "*Affirms* that the racial policies being pursued by the Government of the Union of South Africa are a flagrant violation of the Charter of the United Nations … and are inconsistent with the obligations of a Member State"; UNGA Resolution 1664 (1961) A/RES/16/1664; Stultz "The Apartheid Issue", above n 32, 28; Stultz "Evolution", above n 6, 3-4; Hinds, above n 6, 286.

125 On 21 March 1960, a small group of white South African Police officers fired upon a group of 20,000 black protesters (according to the official report) in the black township of Sharpville, resulting in 69 fatalities and 178 wounded. "Public outrage was intense and world-wide": Stultz "The Apartheid Issue", above n 32, 31; Rosenthal, above n 11, 510.

126 Comment by the representative for the United Kingdom of Great Britain and Northern Ireland (1960) *Yearbook of the United Nations*, 148; cited in Stultz "The Apartheid Issue", above n 32.

127 Melquiades J Gamboa *A Dictionary of International Law and Diplomacy* (Central Lawbook Publishing Co Inc, Quezon City, 1973) 14-15; Meredith, above n 14, 84; Stultz "The Apartheid Issue", above n 32, 25; Bernhardt, above n 5, vol 1, 194.

128 "Declaration on the Special Responsibility of the United Nations and the International Community Towards the Oppressed People of South Africa", UNGA Resolution 3411 (1975) A/RES/30/3411; "Assistance to the National Liberation Movement of South Africa", UNGA Resolution 32/105J (1977) A/RES/32/105J; "Declaration on South Africa", UNGA Resolution 34/93 (1979) A/RES/34/93; see also "Declaration of the World Conference to Combat Racism and Racial Discrimination", UNGA Resolution 33/100 (1978) A/RES/33/100.

129 See generally Stultz "The Apartheid Issue", above n 32, 29.

130 UNGA Resolution 103 (19 November 1946) A/RES/1/103; UNGA Resolution 377A (3 November 1950) A/RES/5/337A; UNGA Resolution 616B (5 December 1952) A/RES/7/616B; affirmed in UNGA Resolution 721 (8 December 1953) A/RES/8/721.

Following the Sharpville incident, the UNGA "deprecate[d]"[132] and "condemn[ed] policies based on racial superiority".[133]

By the late 1960s, the "policies of apartheid practised by the Government of South Africa", also referred to as the "…illegal racist regimes in southern Africa…"[134] by the UNGA, were condemned as a crime against humanity and "a grave threat to international peace and security."[135]

2 *Taking action*

The international community did not stop at rhetoric. In 1962, the UNGA set up a special committee to monitor the situation in South Africa.[136] This committee was later assisted by a dedicated Centre Against Apartheid within the UN Secretariat.[137]

The UN also attempted to apply economic and military pressure to South Africa through sanctions.[138] The efficacy of the sanctions was hampered, however, because South Africa's key trading partners (including the United States, West Germany, and the United Kingdom) did not

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131 UNGA Resolution 1375 (17 November 1959) A/RES/14/1375, para 1.

132 UNGA Resolution 1598 (13 April 1961) A/RES/15/1598, para 2. The resolution was passed 95–1 and described as "a strong but familiar resolution": Stultz "The Apartheid Issue", above n 32, 32.

133 UNGA Resolution 1663 (28 November 1961) A/RES/16/1663, para 3.

134 UNGA Resolution 2547 (11 December 1969) A/RES/24/2547; including Angola, Southern Rhodesia, Mozambique, Portuguese Guinea, Cabinda, and Sao Tome and Principe: UNGA Resolution 2144 (26 October 1966) A/RES/21/2144; UNGA Resolution 3411 (December 1975) A/RES/30/3411: declared the South African Government "illegitimate", adopted 101–15 with 16 abstentions; Stultz "The Apartheid Issue", above n 32, 44.

135 UNGA Resolution 2202 (16 December 1966) A/RES/21/2202, paras 1 and 2; see UNGA Resolution 2396 (2 December 1968) A/RES/23/2396; UNGA Resolution 2506B (21 November 1969) A/RES/24/2506; see also Apartheid Convention, above n 6: annexed to UNGA Resolution 3068 (30 November 1973) A/RES/28/3068.

136 Special Committee on the Policies of Apartheid of the Government of South Africa: UNGA Resolution 1761 (6 November 1962) A/RES/17/1761; Stultz "The Apartheid Issue", above n 32, 33; Arnold, above n 5, 329.

137 This was set up in 1966 as a special unit on apartheid within the UN Secretariat and renamed "Centre Against Apartheid" in 1975; UNGA Resolution 2144 (26 October 1966) A/RES/21/2144; Stultz "The Apartheid Issue", above n 32, 33.

138 See Bernhardt, above n 5, vol 1, 194; Stultz "The Apartheid Issue", above n 32, 36; Stultz "Evolution", above n 6, 20; the UNSC decided that South Africa's apartheid polices were a breach of the peace, enabling action to be taken under Chapter VII of the UN Charter: UNSC Resolution 311 (1972) S/RES/311/1972, 10; UN Charter, above n 119, ch VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression); Weissbrodt and Mahoney, above n 6, 497.

implement the sanctions as vigorously as the UN desired.[139] Sanctions also extended to the creation of the International Convention against Apartheid in Sports (Sports Convention),[140] prohibiting sporting contact with South Africa.[141]

Furthermore, the international community isolated South Africa by restricting her involvement with and membership of international organisations,[142] and refusing to recognise the South African representatives' credentials to the UNGA in 1974.[143]

The declarations, sanctions and rhetoric appear to have gone largely unheeded by the South African government, which continued to persevere with its apartheid regime despite the mounting international pressure.

B Criminal Accountability

As well as pursuing change through diplomatic, economic and political channels, the international community sought to hold apartheid's perpetrators criminally liable.[144] Even though apartheid arguably already violated international criminal law, the international community wanted to go further.

1 Already an international crime

The acts of racial oppression, arbitrary detention and torture, displacement of persons based on race, and widespread breaches of fundamental human rights arguably already satisfied the international crime of "persecution on … racial grounds" (as well as the "other inhumane acts" category of crimes against humanity).[145]

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139 See Stultz "The Apartheid Issue", above n 32, 36.

140 Sports Convention, above n 7.

141 "The international boycott against athletic competition either against South African teams or in South Africa has really brought home the world's abhorrence of *apartheid* to the average white South African": Weissbrodt and Mahoney, above n 6, 499-500.

142 Bernhardt, above n 5, vol 1, 194: including the World Health Organisation (1964), the International Telecommunications Union (1973), the International Civil Aviation Organisation (1974), the Universal Postal Union (1974), and the World Meteorological Organisation (1975).

143 UNGA Resolution 3206 (30 September 1974) A/RES/29/3206; Bernhardt, above n 5, vol 1, 195.

144 Robertson, above n 117, 271.

145 For a discussion on the elements required for "persecution" and the application to apartheid see Slye, above n 6, 279-282; see also Hinds, above n 6, 250; International Military Tribunal Charter (8 August 1945) 82 UNTS 284, art 6(c); Allied Control Council Law No 10 (20 December 1945) reprinted in (1946-1949) 1 *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10* xvi, art II(1)(c).

Furthermore, but more tenuously, the United Nations Economic and Social Council (ECOSOC) went so far as to determine that "[t]he way in which [apartheid] has been enforced in South Africa … is an act of genocide."[146] Similarly, an ad hoc working group of experts (set up by the UN Commission on Human Rights[147]) reported that a number of acts constituting genocide occurred in apartheid-era South Africa.[148] Despite such suggestions, it seems that the general consensus is that, however abhorrent apartheid in South Africa was, it did not constitute genocide.[149]

2 A separate crime

In the absence of a Nuremberg-style international tribunal, there was no way for the international community to hold the perpetrators of apartheid criminally liable. Therefore, the UNGA created the stand-alone Apartheid Convention in 1973 in part to provide a mechanism for the international prosecution of those persons responsible for implementing and maintaining apartheid in South Africa.[150]

The Apartheid Convention attempted to accomplish this aim in two ways. First, the Convention created the new "crime of apartheid" as an international crime against humanity.[151] Secondly, the Convention purported to provide universal jurisdiction over the crime of apartheid.[152]

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146 ECOSOC Decision 1985/14 (1985); Hinds, above n 6, 235.

147 UN Commission on Human Rights Resolution 14 (1983) E/CN.4/1984/14.

148 ECOSOC Decision 1984/14 (1984). The practices included: institution of group areas, which affected the African population by restricting them to areas which were totally lacking the preconditions of their traditional professions; the regulation of the movement of Africans in urban areas and "especially the forcible separation of African [men] from their wives during long periods, thereby preventing African births"; the policies in general, which were said to include "deliberate malnutrition of large population sectors and birth control of the non-white sector" in order to reduce their numbers; and the imprisonment and ill treatment of non-white political leaders and of non-white prisoners in general: Hinds, above n 6, 245; see also a list of acts in Weissbrodt and Mahoney, above n 6, 496 footnote 68; see generally Bassiouni *Crimes Against Humanity*, above n 85, 189.

149 See Slye, above n 6, 269-270 and 296-300: "Although apartheid is one of the worst examples of human rights abuses that humans have endured, it may not fit within the specific, narrow definition of genocide" which is limited to physical, not cultural or economic, destruction of a group (at 299); Hinds, above n 6, 241-248; Adam, above n 27, 368.

150 Apartheid Convention, above n 6, preamble.

151 Ibid, art 1.

152 Slye, above n 6, 293-294; Apartheid Convention, above n 6, arts 3, 4(b) and 5. The Apartheid Convention granted universal jurisdiction over any individual or organisation who, regardless of motive or place of residence, abetted, encouraged or cooperated in the crime of apartheid and gave states mandatory jurisdiction to prosecute, regardless of nationality or situs. This enforcement regime goes beyond that of the Genocide Convention, which limits jurisdiction to the courts of the place where the acts occurred or an

The notion of a separate crime of apartheid was not entirely new. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Limitations Convention) included apartheid as a crime against humanity in 1968.[153] A number of UNGA resolutions had also referred to apartheid as a crime against humanity from 1965 onwards.[154] Even so, the Security Council did not declare apartheid a crime against humanity and a threat to international peace until 1976.[155]

The purported universal jurisdiction set out in the Apartheid Convention, however, was a relatively novel concept in 1973. Jurisdiction was established over any individual or organisation that, regardless of motive or place of residence, abetted, encouraged or cooperated in the crime of apartheid.[156] Furthermore, States that acceded to the Convention undertook to adopt measures to "prosecute, bring to trial, and punish" persons accused of the crime of apartheid, regardless of nationality or *situs*.[157] The Apartheid Convention thereby effectively imposed an obligation on member States to prosecute any person responsible for implementing apartheid in South Africa (and others if a similar situation arose elsewhere) if those persons entered the member State's jurisdiction. No link, either to place of commission or nationality of offender or victim, was required between the occurrence of the alleged crime and the prosecuting State.

The jurisdiction outlined in the Apartheid Convention went beyond most notions of jurisdiction at the time. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide[158] (Genocide Convention), for example, limited jurisdiction to prosecution in either the courts of the

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international tribunal: Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277, art 6 [Genocide Convention].

153 The Limitations Convention, above n 7, art 1(b) refers to "inhuman acts resulting from the policy of apartheid".

154 See for example UNGA Resolution 2022 (5 November 1965) A/RES/20/2022; UNGA Resolution 2074 (17 December 1965) A/RES/20/2074; UNGA Resolution 2144 (26 October 1966) A/RES/21/2144; UNGA Resolution 2202 (16 December 1966) A/RES/21/2202, cl 1; UNGA Resolution 2307 (13 December 1967) A/RES/22/2307, cl 1; UNGA Resolution 2396 (2 December 1968) A/RES/23/2396, cl 1.

155 UNSC Resolution 392 (1976) S/RES/392/1976; UNSC Resolution 473 (1980) S/RES/473/1980. See also references to these two resolutions, passed unanimously, in UNSC Resolution 417 (1977) S/RES/417/1977; UNSC Resolution 418 (1977) S/RES/418/1977; UNSC Resolution 421 (1977) S/RES/421/1977; UNSC Resolution 556 (1984) S/RES/556/1984; UNSC Resolution 591 (1986) S/RES/591/1986; Slye, above n 6, 296. Bassiouni believes that apartheid did in fact constitute a threat to international peace and security: M Cherif Bassiouni (ed) *International Criminal Law Volume I* (2 ed, Transnational Publishers Inc, Ardsley, 1999) 58 [*International Criminal Law*]; Bassiouni *Crimes Against Humanity*, above n 85, 365.

156 Apartheid Convention, above n 6, arts 3, 4(b) and 5 and Slye, above n 6, 293-294.

157 Apartheid Convention, above n 6, art 4(b).

158 Genocide Convention, above n 152.

State where the acts occurred or an international tribunal.[159] Both the United States[160] and the United Kingdom[161] objected to the Apartheid Convention's universal jurisdiction. The United States was especially concerned that wide jurisdiction could extend liability to United States companies trading in South Africa.[162] (Interestingly, these fears appear to have recently resurfaced in the civil jurisdiction of the Unites States' domestic courts.)[163]

The prosecutorial mechanism established by the Apartheid Convention was never utilised directly to hold the perpetrators of apartheid to account.[164] Given that there have been no prosecutions for the crime of apartheid, and given that the Convention was designed to address the specific situation existing in South African at the time, is the crime of apartheid still a relevant (and useful) international crime today?

IV REVIEWING THE CRIME OF APARTHEID

The international crime of apartheid proscribes "inhumane acts … 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."[165] The "inhumane acts" have to be similar in character to murder, extermination, enslavement, deportation, "severe deprivation of physical liberty", torture, enumerated sexual offences, persecution or enforced disappearance.[166]

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159 Ibid, art 6.

160 UNGA (1973) Records A/28/PV2185, 12-15: the United States argued that universal jurisdiction could not be extended in such a "broad and ill-defined manner" and could not accept apartheid as a crime against humanity. See Barrie, above n 6, 281-282.

161 UNGA (1973) Records A/28/PV2185, 23-25: the United Kingdom referred to an "illegal" extension of universal jurisdiction. See Barrie, above n 6, 282.

162 Weissbrodt and Mahoney, above n 6, 496 and 498 and Hinds, above n 6, 313.

163 See the ongoing series of *In re South African Apartheid Litigation* cases, including *In re South. African Apartheid Litigation* (2004) 346 F. Supp. 2d 538 (S.D.N.Y.); *In re South. African Apartheid Litigation* (2002).238 F. Supp. 2d 1379 (J.P.M.L.); *In re South African Apartheid Litigation* (2009) 02 MDL 1499 (SAS). Numerous claims against international companies have been consolidated in the District Court of the Southern District of New York.

164 Just as there have been no prosecutions within South Africa for the acts committed under apartheid, there have also been no prosecutions, either internationally or domestically, for the crime of apartheid; see Part II C above and accompanying footnotes.

165 Rome Statute, above n 7, art 7(2)(h).

166 Rome Statute, above n 7, art 7(1).

In order to review this international crime's relevance today, three questions need to be addressed. First, what does the crime of apartheid, designed to address systematic and usually state-sponsored discrimination, add to international criminal law?

Secondly, if the crime of apartheid does add to international criminal law, how effective is the international law proscribing the practices of apartheid: how widely have States accepted the crime of apartheid?

Finally, are there any practical and definitional issues that need to be resolved in order to make the crime of apartheid a more effective international crime?

A What Does the Crime of Apartheid Add to International Criminal Law?

The crime of apartheid's definition shows that it is focused on institutionalised racial discrimination and was closely tailored to address the apartheid regime that existed in South Africa until 1994.

Given that apartheid in South Africa has ended and given that, when the crime was created in 1973, the practices of apartheid already violated international law, as outlined above, what does the crime of apartheid add to international criminal law? Why should it be retained in the 21st century?

1 Amalgamation with another crime?

The crime of apartheid may, at first glance, appear superfluous and could be amalgamated with another, more established crime. All of the practices that may amount to apartheid, as it is defined in the Apartheid Convention, are already covered by other crimes against humanity. The act in question must be an inhumane act,[167] so will presumably at least fall within the "other inhumane acts" category of crimes against humanity.[168] Additionally, the acts may satisfy the requirements for the crimes of torture, the sexual offences or persecution.[169] The crime of apartheid's exclusion from recent formulations of international criminal law instruments, such as the statutes of the international tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR),[170] the Statute of the

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167 The act must be either similar in character to those listed in Article 7(1) of the Rome Statute or must be one of the acts listed in the Apartheid Convention: Rome Statute, above n 7, art 7(2)(h) and Apartheid Convention, above n 6, art 2.

168 Rome Statute, above n 7, art 7(1)(k): "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

169 Ibid.

170 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, annexed to UNSC Resolution 827 (25 May 1993) S/RES/827/1993, art 5 [ICTY Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International

Special Court for Sierra Leone[171] and the Statute of the Iraq Special Tribunal,[172] reinforces the notion that the crime might not be necessary.

With this possible duplication in mind, and referring specifically to the International Law Commission's (ILC) 1991 Draft Code of Crimes Against the Peace and Security of Mankind (1991 Draft Code), Bassiouni suggests that the crime of apartheid shares similarities with the crime of genocide and that the two crimes should have been integrated in "sound progressive codification".[173] One of the inhumane acts listed in the Apartheid Convention, for example, includes acts which were "calculated to cause *[a group's] physical destruction in whole or in part*",[174] reflecting genocide's requirement of "acts committed with intent to *destroy [a group], in whole or in part*".[175] Despite this similarity, the other inhumane acts envisaged under the crime of apartheid are not as grave as the physical destruction of a group, so conflating the two crimes is probably not practical.

Alternatively, the crime of apartheid could be combined with the crime of persecution.[176] The acts that have been found to amount to the crime of persecution are very similar to the acts that

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Humanitarian Law Committed in the Territory of Rwanda, annexed to UNSC Resolution 955 (6 November 1994) S/RES/955/1994, art 3 [ICTR Statute]; Bassiouni *Crimes Against Humanity*, above n 85, 363.

171 Statute of the Special Court for Sierra Leone (16 January 2002) 2178 UNTS 137 [Sierra Leone Statute].

172 Statute of the Iraqi Special Tribunal (10 December 2003) 43 ILM 231, art 12(a) [Iraq Statute]. The Statute was set up in 2003 by the Coalition Provisional Authority: Charles Garraway "The Statute of the Iraqi Special Tribunal: A Commentary" in Susan C Breau and Agnieszka Jachec-Neale (eds) *Testing the Boundaries of International Humanitarian Law* (British Institute of International and Comparative Law, Biddles Ltd, London, 2006) 169.

173 Bassiouni *Crimes Against Humanity*, above n 85, 189. M Cherif Bassiouni is an eminent scholar and practitioner in the international criminal law field. He has been closely involved in attempts to criminalise the practices of apartheid: in 1980 he drafted (for the UN) a statute for the creation of an international criminal court to prosecute the perpetrators of apartheid, and he was chairman of the Drafting Committee of the 1998 Diplomatic Conference on the Establishment of an International Criminal Court: see www.law.depaul.edu (last accessed 6 March 2010); see also the Final Report on the Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid (19 January 1980) UN Doc/E/CN/4/1426 (1981).

174 Apartheid Convention, above n 6, art 2(b) (emphasis added).

175 Rome Statute, above n 7, art 6 (emphasis added).

176 Ibid, art 7(1)(h). See also ICTY Statute, above n 170, art 5(h); ICTR Statute, above n 170, art 3(h); Iraq Statute, above n 172, art 12(a)(8); Sierra Leone Statute, above n 173, art 2(h); and United Nations Transitional Administration in East Timor "UNTAET Regulation No 15 of 2000 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences" (2000) UNTAET Regulation No 2000/15, s 5(1)(h) [UNTAET Regulation].

occurred under apartheid (and the acts listed in the Apartheid Convention).[177] For example, the International Military Tribunal found that the "exclusion of members of an ethnic or religious group from aspects of social, political, and economic life … and the creation of ghettos" amounted to persecution.[178]

Similarly, the ICTY has held that the following acts qualify as persecution:[179]

(a) seizing, terrorising, segregating, and forcibly transferring civilians to camps;[180]
(b) destroying a population's livelihood, including "economic measures of a personal, as opposed to industrial type";[181]
(c) physical injury, murder, and mass executions;[182]
(d) burning homes and "destruction and plunder of property";[183]
(e) causing mental injury, through constant "harassment, humiliation, and psychological trauma";[184] and
(f) denying fundamental human rights to a particular group, including "the right to employment, freedom of movement, right to proper judicial process or right to proper medical care."[185]

The ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind (1996 Draft Code) incorporated an even wider definition of persecution, capturing any acts that deny human

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177 See Part II B above, Part IV C 1 below and Apartheid Convention, above n 6, art 2.

178 Mohamed Elewa Badar "From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity" (2004) 5 San Diego Int'l L J 73, 128 and IMT Judgment, above n 58.

179 See also Badar, above n 178, 128.

180 *Prosecutor v Tadic* (Opinion and Judgment) (7 May 1997) IT-94-1-T, para 717 (ICTY); *Prosecutor v Krstic* (Judgment) (2 August 2001) IT-98-33-T, para 537 (ICTY); compare with Part II B above.

181 *Prosecutor v Kupreskic* (Judgment) (2000) IT-95-16-T, paras 628-631 (ICTY); *Prosecutor v Tadic*, above n 180, para 707. The Nuremberg Tribunal found Herman Göring "guilty of crimes against humanity … for being [t]he active authority in the spoliation of conquered territory and for imposing the fine of a billion Reich marks on the Jews": Badar, above n 178, 129 and IMT Judgment, above n 58, 279-282.

182 *Prosecutor v Blaskic* (Judgment) (3 March 2000) IT-95-14-T, paras 218, 233, 234 (ICTY); *Prosecutor v Tadic*, above n 180, para 717 and *Prosecutor v Krstic*, above n 180, para 537.

183 *Prosecutor v Krstic*, above n 180, para 537; Badar, above n 178, 132 and *Prosecutor v Stakic* (Judgment) (31 July 2003) IT-97-24-T, paras 809-810 (ICTY).

184 *Prosecutor v Kvocka* (Judgment) (2 November 2001) IT-98-30/1-T, para 192 (ICTY); *Prosecutor v Blaskic*, above n 182, paras 218, 233, 234; *Prosecutor v Tadic*, above n 180, para 717 and *Prosecutor v Stakic*, above n 183, paras 807-808.

185 Badar, above n 178, 131 and *Prosecutor v Stakic*, above n 183, paras 306, 770, 817.

rights recognised in the UN Charter (articles 1 and 55) and the International Covenant on Civil and Political Rights.[186] Even without this broad definition, the similarities between the acts enumerated by the ICTY and the acts of apartheid outlined in Part II B above, arguably mean that the crime of persecution already criminalises most or all of the apartheid practices.

Therefore, while the crime of apartheid arguably should not be amalgamated with the crime of genocide, subsuming the crime of apartheid into the crime of persecution provides a more logical alternative. As both the crime of apartheid and the crime of persecution are crimes against humanity and cover similar acts, the practical difference between the two crimes, in terms of each crime's gravity and sentencing, is arguably negligible.[187]

Nevertheless, although the crime of apartheid does not appear to add to the substantive acts prohibited under international criminal law from a purely legal perspective, the crime of apartheid may perform a valuable declaratory and deterrent effect. These are arguably the most important purposes of punishment and the criminal law, international or otherwise,[188] and so a strong argument can be made to retain the crime of apartheid as a separate crime.

2 Declaratory and deterrent effect

In classifying apartheid as an international crime, the international community declared that systematic racial discrimination is abhorred and unacceptable.[189] The declaratory value of international criminal law is important to prevent impunity[190] and, in doing so, to reinforce the international legal order.[191]

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186 ICCPR, above n 48; UN Charter, above n 119; International Law Commission "Draft Code of Crimes Against the Peace and Security of Mankind, 1996" in *Report of the International Law Commission on the Work of its Forty-Eighth Session*, UNGA Resolution 10 (1996) A/RES/51/10 [ILC 1996 draft Code] and see Badar, above n 178, 128.

187 The ICC can impose sentences of up to 30 years imprisonment or life imprisonment where "the extreme gravity of the crime" justifies such a sentence. Hence the level of punishment depends on the actual acts committed, rather than the label attached to it: Rome Statute, above n 7, art 77. For a general discussion of punishment under the Rome Statute see Robertson, above n 117, 458-460.

188 Margaret McAuliffe deGuzman "The Road from Rome: the Developing Law of Crimes against Humanity" (2000) 22 Human Rights Quarterly 335, 339.

189 Steven R Ratner and Jason H Abrams *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Clarendon Press, New York, 1997), 295-96 and DeGuzman, above n 188, 340.

190 William A Schabas "Sentencing by International Tribunals: A Human Rights Approach" (1997) 7 Duke J Comp & Int'l L 461, 516.

191 DeGuzman, above n 188, 339. This is said to be in the same way as domestic society does so: Michael Allen *Textbook on Criminal Law* (8 ed, Oxford University Press, Oxford, 2005) 3.

The Apartheid Convention's preamble shows that the sponsoring States believed that a convention, creating an international crime with universal jurisdiction, "would make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid."[192] Criminalising the practice of apartheid symbolised "the heinous nature of it, as seen by the international community."[193]

Criminalisation also meant that the crime could have a deterrent as well as hortatory effect, especially as universal jurisdiction was envisaged. The deterrent effect of international criminal law has, however, been questioned. Asmal, for example, points out that the atrocities perpetrated in Kosovo during the 1990s were committed after the ICTY was established to try offenders from the Bosnian conflict, even though Kosovo was included within the ICTY's jurisdiction.[194] After all, wars are only started "on the theory and in the confidence that they can be won."[195] Apartheid's architects, too, probably never thought that the system would fail and hence that they would never be brought to trial.

Whether or not the Apartheid Convention and the attendant threat of international prosecution contributed to the demise of apartheid, the fact that no replicating regime has emerged since may indicate that the crime of apartheid meets its aim as a deterrent within the international community (even though attempts have been made to apply the apartheid label to contemporary situations.)[196]

The value of the crime of apartheid therefore lies not in criminalising conduct that was previously legal, but in emphasising that the conduct is especially unacceptable. As Stultz phrased

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192 Apartheid Convention, above n 6, preamble and Bassiouni *Crimes Against Humanity*, above n 85, 365.

193 Bassiouni *Crimes Against Humanity*, above n 85, 365 and Clark "Apartheid", above n 4, 645.

194 Asmal, above n 102, 1221.

195 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg (14 November 1945 – 1 October 1946), vol 2, 153-54, quoted in Asmal, above n 102, 1221-1222.

196 See for example Robert Hughes and Chetan Laksman "Fiji Islands: Failure of Constitutionalism?" (2001) 32 VUWLR 915; Ved P Nanda "Ethnic Conflict in Fiji and International Human Rights Law" (1992) 25 Cornell Int'l L J 565; Margot Salomon "Masking Inequality in the Name of Rights: The Examination of Fiji's State Report under the International Convention on the Elimination of Racial Discrimination" (2003) 4 Asia Pacific Journal on Human Rights and the Law 52; Jimmy Carter *Palestine Peace not Apartheid* (Simon & Schuster, New York, 2006), 215; Gerald M Steinberg "NGOs Make War on Israel; Nongovernmental Organisations" (22 June 2004) Middle East Quarterly; Alan Dershowitz *The Case for Peace: How the Arab-Israeli Conflict can be Resolved* (John Wiley & Sons, Hoboken, 2005) 136; Sherry Cable and Tamara L Mix "Economic Imperatives and Race Relations: The Rise and Fall of the American Apartheid System" (2003) 34(2) Journal of Black Studies 183; Brenda Norrell "Border Apartheid Documented in United Nations Report on Indigenous Peoples" www.americaspolicy.org (last accessed 16 June 2008); and Gerard Goggin and Christopher Newell *Disability in Australia: Exposing a Social Apartheid* (University of New South Wales Press, Sydney, 2005).

it, the Apartheid Convention "might better be seen as anti-apartheid regime promotion rather than as a part of regime implementation."[197] Retention of the crime of apartheid will raise the likelihood that future perpetrators will be discouraged because it stigmatises the specific practice and educates individuals and States by reminding them of apartheid and the international response to it.[198]

A further pitfall remains, however, namely, is the crime of apartheid limited in application to the situation existing in South Africa between 1948 and 1994? If so, the declaratory and deterrent value of the crime is essentially rendered nugatory.

3 Does the crime of apartheid have universal application, beyond pre 1994 South Africa?

The crime of apartheid is forever likely to be linked to South Africa. Both the Apartheid Convention and the Sports Convention refer to South Africa when defining the crime of apartheid.[199] Does this mean, though, that the crime is limited to South Africa, as Bassiouni suggests?[200]

Not necessarily. Clark maintains that while South Africa was mentioned, this was as an example only; the definition of the crime of apartheid applies generally.[201] The UNGA had in 1966 expressly included Southern Rhodesia, Angola, Mozambique, Portuguese Guinea, Cabinda and Sao Tome and Principe as States or colonies practising racial discrimination, thereby indicating that it was addressing a problem specifically in South Africa but with wider implication.[202]

Additionally, an international study in 1981 on the implementation of the Apartheid Convention noted that, while Southern Africa was the "chief concern", apartheid should be "recognised and dealt with for what it is," wherever it occurred.[203] Similarly, there have been some academic

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197 Stultz "Evolution", above n 6, 17.

198 For a theoretical discussion on the role of criminal law, see Bassiouni *International Criminal Law*, above n 155, 28; DeGuzman, above n 188, 341; Allen, above n 191, 2; and Gerry Simpson *Law, War & Crime* (Polity, Cambridge, 2007) 79-104.

199 Apartheid Convention, above n 6, art 2: "similar policies and practices of racial segregation and discrimination as practised in southern Africa". Sports Convention, above n 7, art 1(a): "such as that pursued by South Africa".

200 See Bassiouni *International Criminal Law*, above n 155, 78.

201 Clark "Apartheid", above n 4, 643.

202 UNGA Resolution 2144 (26 October 1966) A/RES/21/2144; see also Weissbrodt and Mahoney, above n 6, 493.

203 Implementation Study, above n 4, 1; M Cherif Bassiouni (compiled by) *The Statute of the International Criminal Court: A Documentary History* (Transnational Publishers, Ardsley, 1998) 675-741, in particular 676 [*Documentary History*].

attempts over the last two decades to categorise Fiji's Constitution as an apartheid-like instrument based on racial discrimination.[204]

Furthermore, since the ILC's 1991 Draft Code,[205] definitions of the crime of apartheid have not referred to South Africa.[206] Thus, the likely conclusion is that the crime was not originally intended to apply only to South Africa or is no longer limited to South Africa.

Nevertheless, the omission of the crime of apartheid from the Iraqi and Sierra Leonean lists of crimes against humanity, and the absence of any prosecutions and more recent UNGA resolutions accusing other countries of practising apartheid, raise doubts about the crime's universal application.[207]

The use of the term apartheid, synonymous with South Africa but almost unanimously adopted, may also discourage the application of the crime of apartheid outside the South African context, thereby limiting its declaratory and deterrent effect.

As a generic alternative, the ILC's 1996 Draft Code therefore substituted the term "institutionalised discrimination"[208]. Institutionalised discrimination may be a better label to apply to the crime of apartheid because it provides clearer, more objective terminology. Such a shift may also increase the likelihood that serious international attention will be turned towards cases of widespread or state-orchestrated discrimination occurring today.

On the other hand, the terms "genocide" and "slavery" have taken on abhorrent connotations in themselves, connotations that "widespread murder" and "selling human chattels" simply do not convey. The term "apartheid" may provide the same vilifying connotations to the international crime of systematic, institutionalised racial oppression. Additionally, retention of the term apartheid preserves the South African link and so helps maintain the memory of apartheid, increasing the declaratory and deterrent impact of the crime.

Given that the crime of apartheid was not intended to apply only to South Africa, should the crime be limited to racial discrimination?

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204 See for example Hughes and Laksman, above n 196; Nanda, above n 196; and Salomon, above n 196.

205 International Law Commission "Draft Code of Crimes Against the Peace and Security of Mankind, 1991" (1991) YB Int'l L Comm'n vol 2, 94, art 20 [ILC 1991 draft Code]; Clark "Apartheid", above n 4, 660.

206 ILC 1996 draft Code, above n 186; Rome Statute, above n 7, art 7(2)(h); Ratner, above n 5, 26-27; and UNTAET Regulation, above n 176, s 5.2(g) (mirrors Rome Statute definition).

207 Iraq Statute, above n 172; Garraway, above n 172; Sierra Leone Statute, above n 171; see also footnote 193 above and accompanying text.

208 ILC 1996 draft Code, above n 186. Ratner described "institutionalised discrimination" as "a sort of generic version of apartheid": Ratner, above n 5 26 and Slye, above n 6, 279.

4 Should the crime of apartheid be limited to racial discrimination?

The crime of apartheid was created to address a specific breach of a people's human rights based on racial discrimination. Accordingly, the crime's definition is limited to racial discrimination:[209] as May states, international crimes cannot be explained by objective, underlying principles but by their specific historical contexts,[210] and the crime of apartheid's origins are rooted in historic widespread discrimination based on race.

It is difficult to draw a distinction, however, between inhumane acts committed because of racial discrimination and those same acts committed because of religious discrimination, for example. Both are, ostensibly, equally deplorable and yet only the former is recognised by the international community as a specific crime against humanity.

There is no doubt that racial discrimination based on colour, physical characteristics, ancestry and other distinguishing features is still widespread today, albeit not as well known or as "shocking" as that in apartheid South Africa.[211] Nevertheless, there are numerous other grounds of discrimination that could also be included within the scope of apartheid.

The ILC's 1996 Draft Code, for example, extended the definition of apartheid, or "institutional discrimination", to include political, religious or ethnic discrimination.[212] Furthermore, the similar international crime of persecution can be committed against any group, identifiable on "political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognised as impermissible under international law".[213]

Despite these many forms of discrimination that could be included within the crime of apartheid, extending the crime's definition beyond racial discrimination would arguably detract from the value that the crime of apartheid brings to international criminal law. Limiting the crime of apartheid to racial discrimination memorialises the particular link with the apartheid system in South Africa, based on racial discrimination on an extreme scale, and enhances the deterrent and declaratory value of the crime.

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209 Rome Statute, above n 7, art 7(2)(h); Apartheid Convention, above n 6, art 2; Sports Convention, above n 7, art 1(a).

210 May, above n 109, 67.

211 See for example: UNICEF *Child Protection from Violence, Exploitation, and Abuse* <www.unicef.org> (last accessed 18 August 2008); Ratner, above n 5, 27; Hinds, above n 6, 237-238; Cable and Mix, above n 196; Norrell, above n 195; Hughes and Laksman, above n 196; Nanda, above n 196; and Salomon, above n 196.

212 ILC 1996 draft Code, above n 186; see also Ratner, above n 5, 26 and Slye, above n 6, 279.

213 Rome Statute, above n 7, art 7(1)(h); see also ICTY Statute, above n 170, art 5(h); ICTR Statute, above n 170, art 3(h); Iraq Statute, above n 172, art 12(a)(8); Sierra Leone Statute, above n 171, art 2(h); UNTAET Regulation, above n 176, s 5.1(h); and see Part IV B 1 and accompanying footnotes.

5 *Conclusion*

It appears reasonably clear, therefore, that the crime of apartheid does not necessarily add to the substantive coverage of international criminal law but adds to the body of international law by performing a valuable declaratory and deterrent role.

The crime will also forever be closely linked with the historical, formalised segregation in South Africa, but it has wider application and is not limited to the specific instance that gave rise to the crime of apartheid.

Despite the potential to include other grounds of discrimination within the crime of apartheid's ambit, it would be advisable to preserve the specific nature of the crime and retain the special link to racial discrimination manifesting in inhumane acts.

B How Effective is the Crime of Apartheid in its Declaratory and Deterrent Roles: How Widely Accepted is the Crime?

The crime of apartheid today performs a declaratory and deterrent role in international criminal law. The efficacy of the criminalisation of apartheid at international law, however, largely depends on how widely accepted and respected the crime is by the international community. A crime cannot be universally effective if States can choose to be bound by it or not.

The crime of apartheid is reasonably well accepted by States. The international crime of apartheid has been incorporated into numerous countries' domestic legislation and included in various international instruments.

The practices of apartheid constitute an offence under the national laws of 32 States.[214] Furthermore, apartheid has been referred to as a crime against humanity in the following international criminal law instruments since the Apartheid Convention:[215]

(a) the Sports Convention;[216]

(b) the ILC's draft articles on the Responsibility of States for Internationally Wrongful Acts;[217]

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214 See Henckaerts and Doswald-Beck, above n 87, vol 2, 2055-2058.

215 See generally Weissbrodt and Mahoney, above n 6, 495; Butcher, above n 85, 404; Slye, above n 6, 290, 295; and Stultz "Evolution", above n 6, 13.

216 Sports Convention, above n 7, preamble, recalling the Apartheid Convention and the crime of apartheid.

217 International Law Commission "Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 1981" in *Report of the International Law Commission*, UNGA Resolution 10 (1981) A/RES/32/10, art 19: crime may result, among others, from "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human rights being such as those prohibiting slavery, genocide, apartheid". Hinds, above n 6, 249. The ILC's 1996 draft was limited to genocide and aggression, while the 2001 draft appears to have removed the provision altogether: International Law Commission

(c) the ILC's 1991[218] and 1996[219] Draft Codes;

(d) the Rome Statute;[220] and

(e) the United Nations Transitional Administration in East Timor's list of crimes against humanity, adopted in 2000 (UNTAET Regulation).[221]

The crime of apartheid is also defined as a war crime under international humanitarian law.[222] The "practices of apartheid" is listed as a grave breach of Additional Protocol I to the Geneva Conventions of 1948 (Protocol I)[223] but, incongruously, is not included in the Protocol's substantive provisions. The Rome Statute does not include apartheid as a war crime.[224] The omission may be because the United States' opposition to the inclusion of Protocol I definitions not stemming from the 1907 Hague Convention IV[225] meant that apartheid's inclusion as a war crime was not seriously discussed.[226]

"Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001" <www.un.org> (last accessed 2 September 2008).

218 ILC 1991 draft code, above n 205, art 20.

219 ILC 1996 draft code, above n 186 and Ratner, above n 5, 26. The ILC expressly included "institutionalised discrimination on racial… grounds" (as a form of generic name for apartheid) in order to "reflect the opinion of the ILC that apartheid by definition is a crime against humanity." Slye, above n 6, 279.

220 Rome Statute, above n 7, arts 7(1)(j) and 7(2)(h).

221 UNTAET Regulation, above n 176, s 5(1)(j); see Henckaerts and Doswald-Beck, above n 87, vol 2, 2054;

222 Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, 42, art 85(4)(c) [Additional Protocol I]; Henckaerts and Doswald-Beck, above n 87, vol 1, 568 and 588-589; Hinds, above n 6, 248; Ratner, above n 5, 26; see also UK Ministry of Defence *The Manual of the Law of Armed Conflict* (Oxford University Press, Oxford, 2004) 426 and François Bouchet-Saulnier *The Practical Guide to Humanitarian Law* (2 ed, Rowman & Littlefield Publishers Ltd, Lanham, 2007) 8.

223 Additional Protocol I, above n 222, art 85(4)(c). The Protocol has 168 ratifications: "Ratifications" www.icrc.org/ (last accessed 13 August 2008).

224 The crime of apartheid was originally included in early drafts of the Rome Statute. However, it appears that apartheid was removed from the list of war crimes once the crime of apartheid was included in the list of crimes against humanity, despite a number of States expressing a preference for including apartheid in the list of war crimes (including South Africa, Thailand and Turkey). For official summaries of the proceedings see Bassiouni *Documentary History*, above n 203, 115-210, 221-313, 369-384; M Cherif Bassiouni *The Legislative History of the International Criminal Court: Volume 3 Summary Records of the 1998 Diplomatic Conference* (Transnational Publishers, Ardsley, 2005) 99 114, 116, 124, 420 [*ICC Legislative History*].

225 Laws and Customs of War on Land (Hague IV) (18 October 1907) 187 CTS 227; Michael F Lohr and William K Lietzau "One Road Away from Rome: Concerns Regarding the International Criminal Court" (1999) 9 USAF Acad J Legal Stud 33, 35. See generally Max du Plessis "Seeking an International

Furthermore, the UNGA resolutions condemning apartheid indicate an international opinion that international law should prohibit the practices of apartheid.[227] These anti-apartheid resolutions have had "overwhelming support",[228] with an average 83.7 per cent of member States voting in favour, achieving a peak support rate of 91.9 per cent in 1970.[229] Only South Africa and Portugal consistently opposed the resolutions (with a limited number of abstentions, mostly for reasons unrelated to the crime of apartheid itself).[230] Additionally, resolutions within the Security Council,[231] UN Commission on Human Rights[232] and the World Conference on Human Rights in 1993[233] condemned apartheid as a crime against humanity.

International Criminal Court – Some reflections on the United States' Opposition to the ICC" (2002) 15 S Afr J Crim Just 301. The United States was opposed to overly broad definitions, the anticipated inclusion of the crime of aggression, the inability to register reservations and the possible future inclusion of nuclear weapons: United States Department of State, Daily Press Briefing 20 July 1998 included in M David "Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law" (1999) 20 Michigan J Int Law 337, 350.

226 Thomas Graditzky "War Crime Issues Before the Rome Diplomatic Conference on the Establishment of an International Criminal Court" in Olympia Bekou and Robert Cryer (eds) *The International Criminal Court* (Ashgate Publishing Company, Aldershot, 2004) 127-146, 132.

227 Stultz notes that a norm emerged, with "substantial support in the General Assembly" and the ECOSOC, that apartheid "is a crime against humanity, not just against persons of color within South Africa": Stultz "Evolution", above n 6, 13; UNGA Resolution 2202A (1967) A/RES/21/2202A; UNGA Resolution 2671F (1970) A/RES/25/2671F; UNGA Resolution 2189 (13 December 1966) A/RES/21/2189, 6; UNGA Resolution 2326 (16 December 1967) A/RES/22/2326, 5; UNGA Resolution 2262 (3 November 1967) A/RES/22/2262, 2; UNGA Resolution 183B (24 January 1979) A/RES/33/183B, preamble; and UNGA Resolution 34/93A (12 December 1979) A/RES/34/93A, preamble.

228 Bassiouni *Crimes Against Humanity*, above n 85, 364.

229 Stultz "Evolution", above n 6, 14.

230 Bassiouni *Crimes Against Humanity*, above n 85, 364; Stultz "Evolution", above n 6, 14. For example, some resolutions expressly condemned Israel's links with South Africa, leading a number of States (such as the United States) to abstain or oppose the resolutions. Portugal was implicated in earlier UNGA resolutions because of practices in its Southern African colonies (Angola, Mozambique, Portuguese Guinea, Cabinda, and Sao Tome and Principe): UNGA Resolution 2144 (26 October 1966) A/RES/21/2144. See also Weissbrodt and Mahoney, above n 6, 493.

231 UNSC Resolution 329 (19 June 1976) S/RES/329/1976, 3 and UNSC Resolution 473 (13 June 1980) S/RES/473/1980, 3.

232 UN Commission on Human Rights Resolution 19 (21 February 1992) E/CN.4/RES/1992/19, 1 and UN Commission on Human Rights Resolution 11 (26 February 1993) E/CN.4/RES/1993/11, 1.

233 World Conference on Human Rights in Vienna (14-25 June 1993); Vienna Declaration and Programme of Action (12 July 1993) A/CONF.157/23, cl 1(30). The Vienna Declaration and Programme of Action expressed dismay and condemnation at a number of violations of human rights, including apartheid.

1 *The crime of apartheid: customary international law?*

Taking this evidence into account, one can conclude that the crime of apartheid is widely accepted by the international community. However, despite some academic suggestions that the crime of apartheid has attained customary international law status,[234] the level of state practice and *opinio juris*[235] does not necessarily lead to such a conclusion.

The fact that no State other than South Africa has openly implemented an apartheid system may indicate a state practice of refraining from policies of legislative racial separation.[236] But the extent to which this arises from a sense of legal obligation (*opinio juris)* is difficult to quantify. Four arguments pointing to a conclusion that the crime of apartheid may not have customary international law status arise. These are set out below. Similarly, despite the views of a number of authors,[237] the *opinio juris* shown through state practice, academic writings and UNGA resolutions[238] is not sufficient to conclude that the crime of apartheid necessarily has customary international law status.

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234 Hinds, above n 6, 248, 253; Slye, above n 6, 295; Henckaerts and Doswald-Beck, above n 87, vol 1, 308-311, 400-403, 586, 588-589; Butcher, above n 85, 438; May, above n 109, 87. See generally Weissbrodt and Mahoney, above n 6, 494-495; Clark "Apartheid", above n 4, 655, 658; Bassiouni *International Criminal Law*, above n 154, 142; and Leila Nadya Sadat "Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute" (2000) 49 DePaul L Rev 909, 919.

235 Proving *opinio juris* requires "statements that certain conduct is required or forbidden, giving rise to an international legal obligation": Weissbrodt and Mahoney, above n 6, 495 footnote 63. State practice must be motivated by a "sense of legal obligation, as opposed to motives of courtesy, fairness, or morality": Ian Brownlie *Principles of Public International Law* (5 ed, Oxford University Press, Oxford, 1998) 7. The ICJ generally assumes *opinio juris* "on the bases of evidence of a general practice, or a consensus in the literature, or the previous determinations of the Court or other international tribunals": see *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* [1984] ICJ Rep 244, paras 91-93 (Judgment of the Chamber). However, two cases appeared to require positive proof of *opinio juris*: *The Case of the SS "Lotus" (France v Turkey)* (Judgment) [1927] PCIJ (Series A, No 9) 4 and *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, 32-41 and 43.

236 This is not to say that state practices elsewhere have not been subject to claims that they are similar to apartheid: see n 196.

237 Henckaerts and Doswald-Beck, above n 87, vol 1, 308-311, 400-403, 586, 588-589. See Butcher, above n 85, 438; Hinds, above n 6, 248, 253. See generally Weissbrodt and Mahoney, above n 6, 494-495.

238 Barrie, above n 6, 282; Brownlie, above n 235, 14. UNGA resolutions may also provide "strong evidence" of States' *opinio juris*, but will not provide "irrefutable proof": *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14, paras 187-195 and 203-205 [*Nicaragua Case*]. This is consistent with the UN Charter and the ICJ Statute, which provide that the UNGA may "initiate studies … encouraging the progressive development of international law and its codification" but resolutions are not a binding source of international law: UN Charter, above n 119, art 13; Statute of the International Court of Justice, annexed to the Charter of the United Nations (26 June 1945) 1 UNTS xvi, art 38.

First, the inclusion of the crime in the national laws of 32 States does not indicate "substantially universal" domestic incorporation. By comparison, the prohibition of torture, considered a customary international law rule,[239] has been incorporated into the domestic laws of at least 90 States.[240]

Secondly, the treaties that include the crime of apartheid, although quite widely accepted,[241] do not appear to enjoy the "substantially universal"[242] level of participation that would cause the prohibition on apartheid to be treated as customary law.[243] Notably, no major western State, including the United States, United Kingdom, France, Germany, Canada, Australia or New Zealand, has signed or ratified the core anti-apartheid conventions (Limitations Convention, Apartheid Convention, and Sports Convention).[244] Perceived lack of universal acceptance detracts not only from a conclusion that the crime has customary law status but also the deterrent nature of the crime.

Thirdly, since its creation, the crime of apartheid has been included in only one special tribunal list of crimes against humanity, that of East Timor in 2000.[245] The crime has been omitted from four other special tribunal statutes, namely the statutes of the international tribunals for the former

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239 See Henckaerts and Doswald-Beck, above n 87, vol 1, 315 and vol 2, 2106-2149.

240 Ibid, vol 2, 2121-2134.

241 The Limitations Convention currently has 51 State parties, the Apartheid Convention has 107 parties and the Sports Convention has 60 parties. There are 192 member States in the UN. The prohibition of torture is considered to be part of customary international law and the Torture Convention has 146 parties. Clark described the Apartheid Convention's 99 parties at the time he was writing as constituting a remarkable level of support: Clark "Apartheid", above n 4, 655; "UN Membership" www.un.org (last accessed 28 September 2008); "Ratifications" www2.ohchr.org/ (last accessed 13 August 2008); "Ratifications" www.hrweb.org/ (last accessed 13 August 2008).

242 See Brownlie, above n 235, 5.

243 Accession to or ratification of treaties and conventions provide clear evidence of state practice: Weissbrodt and Mahoney, above n 6, 495. See also Slye, above n 6, 290; Henckaerts and Doswald-Beck, above n 87, vol 1, xlii; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)*, above n 235; *Nicaragua Case*, above n 238; and Sadat, above n 234, 917-918.

244 "Ratifications" <www2.ohchr.org> (last accessed 13 August 2008). The reasons why a large number of influential States have not signed the instruments may be unrelated to the crime's status. The Soviet-sponsored Apartheid Convention may have been a victim of Cold War politics. Western nations, particularly the United States, were concerned that a new South African Government would be less friendly to Western interests than the apartheid-era regime: Weissbrodt and Mahoney, above n 6, 496, 498. See Hinds, above n 7, 313. The United Kingdom and United States were also reluctant to accept the Apartheid Convention's purported universal jurisdiction, largely for political reasons: Slye, above n 6, 293-294; Apartheid Convention, above n 6, arts 3, 4(b), 5; and Weissbrodt and Mahoney, above n 6, 496, 498; and see Hinds, above n 6, 313.

245 UNTAET Regulation, above n 176, s 5(1)(j).

Yugoslavia (ICTY) and Rwanda (ICTR),[246] the Special Court for Sierra Leone (2002)[247] and the Iraq Special Tribunal (2003).[248] The latter two in particular are worth noting because both effectively replicate the Rome Statute's list of crimes against humanity.

Considering that both the Yugoslav and Rwandan situations included elements of institutional racial discrimination and persecution,[249] there appears to be at least a prima facie case that the crime of apartheid could have been applied to either situation, if there had been an international will to do so.

Furthermore, the crime of apartheid is one of the few international crimes excluded from the Sierra Leone and Iraq statutes' replication of the Rome Statute's list of crimes against humanity.[250] It is unclear why the crime of apartheid was excluded when other crimes were included that also, prima facie, may not have been relevant to the specific situations in Sierra Leone and Iraq.

Finally, to date there have been no prosecutions, either internationally or domestically, for the crime of apartheid.[251] This could be for a number of reasons, including definitional issues, lack of

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246 ICTY Statute, above n 170, art 5; ICTR Statute, above n 170, art 3; and see Bassiouni *Crimes Against Humanity*, above n 85, 363.

247 Sierra Leone Statute, above n 171, art 2. The Tribunal was set up by the United Nations and the Sierra Leonean Government in 2002.

248 Iraq Statute, above n 172, art 12(a). See Garraway, above n 172, 169.

249 For example, Rwandans had to carry identity cards stating their ethnicity. This information was used to segregate and ultimately massacre Tutsis in 1994: *Prosecutor v Akayesu* (2 September 1998) ICTR-96-4-T, para 123 (ICTR); see also Mark Huband "Rwanda – The Genocide" in Roy Gutman and David Rieff (eds) *Crimes of War: What the Public Should Know* (W W Norton & Company, New York, 1999) 312-315, 312. Additionally, Pajic commented that the situation in the former Yugoslavia and the resulting peace settlement, including the geographic separation of ethnic groups, was similar to the situation in South Africa under apartheid (Pajic was a member of the Ad Hoc Group of Experts on Southern Africa at the United Nations Commission on Human Rights): Zoran Pajic "Bosnia Herzegovina: From Multiethnic Coexistence to 'Apartheid'… and Back" in P Akhavan and R Howse (eds) *Yugoslavia: The Former and the Future* (Brookings Institute, Washington, 1995) 156-157; and Pajic Zoran "A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina" (1999) 20 Human Rights Quarterly 125.

250 Note, both statutes exclude "enforced sterilisation" and the Sierra Leone statute also excludes "enforced disappearance of persons": Sierra Leone Statute, above n 171, art 2; Iraq Statute above n 172, art 12(a). Compare Rome Statute, above n 7, art 7(1).

251 Clark "Apartheid", above n 4, 659; Henckaerts and Doswald-Beck, above n 87, vol 2, 2058, 2060; and Robertson, above n 117, 272. Nevertheless, in a dissenting opinion at the ICJ, Judge Tanaka stated that the "norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law". However, this statement appears to refer more to the status of the practices *of* apartheid under public international law rather than the status of the crime *of* apartheid: *South West Africa Cases (Ethiopia v South Africa) (Libya v South Africa)* Second Phase [1966] ICJ Rep 4, 293 (dissenting opinion of Tanaka J); see Butcher, above n 84, 410. There is a passing mention to the crime in *Prosecutor v Akayesu*,

evidence or absence of political will. Despite the numerous potential reasons, the lack of prosecution may suggest that the crime is not a very "practical" crime and so, arguably, cannot readily be considered as customary international law.

Within the domestic South African context, however, the presence of the SATRC and its amnesty provisions may also be part of the reason for the lack of prosecutions, meaning that the lack of prosecution sheds little light on the crime's status under international law.

Dugard states that the international community "was in no mood to set up an international tribunal" in 1994 and domestic prosecution was impossible because "there were no victors in the process that brought an end to apartheid".[252] Hence a conditional amnesty arrangement, through a TRC process, was a necessary compromise to achieve the same ends as criminal prosecutions – declaring domestic society's repugnance and deterring future offences – but in a more conciliatory manner.[253]

However, the threat of criminal sanction is still needed: it is unlikely that the SATRC would have achieved the level of success that it did, in terms of confessions, if there had been a blanket immunity granting perpetrators impunity, rather than a selective amnesty process.[254]

While outside the scope of this paper, the link between a TRC process and international law can be explored further, as can the desirability of a TRC process versus international criminal prosecution. In particular, further points to consider are:

(a) the make-up of a TRC process;

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however, referring to "… imposing a system of apartheid, which is declared a crime against humanity in … the Apartheid Convention": *Prosecutor v Akayesu*, above n 249, para 81. For context see Badar, above n 178, 108.

252 Dugard, above n 116, 258.

253 A number of countries have made use of TRC programmes, including Sierra Leone, the United States, Canada, Chile and Liberia: Truth and Reconciliation Commission of Sierra Leone www.trcsierraleone.org (last accessed 26 September 2008); Greensborough Truth and Reconciliation Commission www.greensborotrc.org (last accessed 26 September 2008); Indian Residential Schools Truth and Reconciliation Commission www.trc-cvr.ca (last accessed 26 September 2008); Truth and Reconciliation Commission of Liberia <www.trcofliberia.org> (last accessed 26 September 2008); and Eric Brahm *The Chilean Truth and Reconciliation Commission* www.beyondintractability.org (last accessed 26 September 2008).

254 See Mark Lattimer "Enforcing Human Rights through International Criminal Law" in Mark Lattimer and Philippe Sands (eds) *Justice for Crimes Against Humanity* (Hart Publishing, Oxford, 2003) 387-415, 398; see also "Mandela: No Blanket Apartheid Amnesty" (25 February 1999) www.bbc.co.uk (last accessed 18 August 2008); see also Alex Boraine "PW Botha Before South Africa's Truth and Reconciliation Process" in Mark Lattimer and Philippe Sands (eds) *Justice for Crimes Against Humanity* (Hart Publishing, Oxford, 2003) 336-347, 337.

(b) the factors that a successful TRC requires;[255] and
(c) the relationship between TRC-granted amnesties and international criminal law, including the efficacy of such domestic amnesties to foreclose international or ICC jurisdiction.[256]

Finally, in contrast to these four arguments, the Rome Statute is widely accepted[257] and was intended to provide a collation of existing customary international law prohibitions,[258] so "represents compelling evidence of the customary international law of crimes against humanity" – amongst which apartheid was accepted with little controversy.[259] No delegation argued against the proposition that apartheid's inclusion as a crime against humanity was "desirable in order to demonstrate the international community's disapprobation, and to provide a specific label for prosecution of such acts."[260]

Although the Rome Statute renders the question moot for parties to that treaty, the four arguments above detract from the universality of state practice relating to the crime of apartheid and diminish arguments that the crime can be said to enjoy sufficient state practice to have attained customary international law status.

Achieving customary international law status will enable the perpetrators of future apartheid-like acts to be more easily brought to justice (putting aside the Apartheid Convention's unpopular and unworkable notions of universal jurisdiction). After all, those who want to break the law will not, if a choice is available, subject themselves to it.

More can be done by the international community to make the crime of apartheid more useful and relevant today. One particular way that this could be achieved is to clarify a number of the

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255 See for example Margaret Popkin and Naomi Roht-Arriaza "Truth as Justice: Investigatory Commissions in Latin America" (1995) 113 Law & Soc Inquiry; and see Jonathan Thompson Horowitz "Racial (Re)Construction: The Case of The South African Truth and Reconciliation Commission (2002) 17 National Black LJ 67, 68.

256 See for example Rome Statute, above n 7, art 17(2); Lattimer, above n 254, 398; and Asmal, above n 102, 1214.

257 There are 108 ratifications including most major states except the United States, the Russian Federation and China: "Ratifications" <www.iccnow.org> <www.icrc.org> (last accessed 13 August 2008).

258 "Customary status was generally the touchstone for determining which offenses would be included in the Statute": Lohr and Lietzau, above n 225, 35 and endnote 8; "Report of the Preparatory Committee on the Establishment of an International Criminal Court" (1996) UN DOC 1/51/22, 16; and Darryl Robinson "Defining 'Crimes Against Humanity' at the Rome Conference" in Olympia Bekou and Robert Cryer (eds) *The International Criminal Court* (Ashgate Publishing Company, Aldershot, 2004) 111-126, 123.

259 DeGuzman, above n 188, 353.

260 Robinson, above n 117, 123 and footnote 74. No State objected "on the record" to apartheid's inclusion as a crime against humanity: see summary of discussions in Bassiouni *ICC Legislative History*, above n 224.

practical and definitional issues that surround the proscription of apartheid, thereby making it a more prosecutable offence and hence more effective as an international legal mechanism.

C *Are there Practical and Definitional Issues that Need to be Addressed in order to Make the Crime of Apartheid a more Effective International Crime?*

While not exhaustive, there appear to be four issues that need to be addressed in order to make the crime of apartheid a more effective international crime:

(a) the ambiguous meaning of the phrase "inhumane acts of a character similar"[261];
(b) the high threshold posed by the "institutional regime" and "systematic oppression and domination"[262] requirements;
(c) the crime's unclear and troublesome *mens rea* elements; and
(d) the more fundamental question of whether individual criminal responsibility is the appropriate way to address apartheid.

1 "Inhumane acts of a character similar"

The words "of a character similar to" mean that, technically, acts that are the same as those referred to in Article 7(1) are excluded from the crime of apartheid.[263] This produces the seemingly ridiculous result that an act similar in character to murder may amount to apartheid; murder may not. One might speculate that the drafting imprecision is indicative of the relative lack of attention paid to the crime when the decision to include it in the Statute was made.[264]

The Elements of Crimes, adopted in 2002 by an Assembly of the Parties to the Rome Statute, seem to have remedied this by stating that the act must be one "referred to in [Article 7(1) or must be] an act of a character similar to any of those acts".[265] This clarification is an ambiguous

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261 Rome Statute, above n 7, art 7(2).

262 Rome Statute, above n 7, art 7(2)(h).

263 "Similar" is defined as "having a marked resemblance or likeness; of a like nature of kind": J A Simpson and E S C Weiner (eds) *The Oxford English Dictionary* (2 ed, Clarendon Press, Oxford, 1991) vol 15, 490. In contrast, "same" refers to two or more things that are "exactly like each other": John Sinclair, Patrick Hanks, and Gwyneth Fox (eds) *Essential English Dictionary* (Collins, London, 1989) 702.

264 For the Rome Statute's drafting process, see Bassiouni *Documentary History*, above n 203; Bassiouni *ICC Legislative History*, above n 224.

265 Assembly of the Parties to the Rome Statute of the International Criminal Court, First Session, New York (3-10 September 2002) *Official Records* (United Nations Reproduction Section, New York, 2002) ICC-ASP/1/3, 123-124 [Elements of Crimes]. Apartheid is the only crime in the Rome Statute in respect of which it was felt necessary to introduce extra words into the "elements" in order to make sense of the crime as originally set out.

interpretation of the language in the Rome Statute, however, and might be challenged in the ICC during a future trial. The UNTAET Regulation definition, mirrored on the Rome Statute's definition, has unfortunately not remedied the potential problem.[266]

Furthermore, how similar in character do acts have to be to amount to practices of apartheid? The acts have to be inhumane,[267] usually judged from a reasonable person standard.[268] Guidance may come from the Apartheid Convention. The Convention provides a detailed list of "inhumane acts" that amount to apartheid:[269]

(a) murder;

(b) infliction of serious mental or physical harm through torture, cruel treatment or infringement of freedom or dignity;

(c) arbitrary arrest and illegal detention;

(d) "[d]eliberate imposition on a racial group … of living conditions calculated to cause its … physical destruction";[270]

(e) prevention of a group's participation in a country's political, social, economic, and cultural life;

(f) deliberate prevention of a group's full development;[271]

(g) division of population along racial lines;[272]

(h) labour exploitation such as forced labour; and

(i) persecution of individuals and organisations "because they oppose apartheid."[273]

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266 UNTAET Regulation, above n 176, s 5.2(g).

267 Rome Statute, above n 7, art 7(2)(h).

268 Slye, above n 6, 283. See for example *The Queen v Finta* [1994] 1 SCR 701, 820 (Canada).

269 Apartheid Convention, above n 6, art 2.

270 Ibid, art 2(b).

271 This includes denying the following basic human rights: "the right to work, the right to form recognised trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to peaceful assembly and association": Apartheid Convention, above n 6, art 2(c).

272 This includes the creation of separate ghettos, the prohibition of mixed marriages and confiscation of land: ibid, art 2(d).

273 Apartheid Convention, above n 6, art 2(e).

The listed acts (largely reflected in the ILC's 1991 Draft Code),[274] may provide an indication as to what particular acts are contemplated by the Rome Statute definition.[275]

Furthermore, as noted above, the reference in the Apartheid Convention[276] and the Sports Convention[277] to South Africa may provide justification for using the situation in South Africa[278] as a model for future comparisons and for what acts are required.

However, the principle of legality discourages the creation of crimes by analogy: crimes should be clearly and expressly defined to increase certainty.[279] The reference to acts of a similar character and resorting to comparisons with South Africa create room for criminalisation by analogy (for example, expansion of the list of acts that may be sufficiently inhumane to amount to apartheid) and reduces certainty: the crime can be unfairly enlarged or a "guilty" person may escape liability. Ideally, the definition of the crime of apartheid should exhaustively define the acts that would give rise to liability, provided that the other elements are met. Such a clear definition in the Rome Statute is especially important given that the Statute provides a definitional precedent for other international criminal law instruments, such as the UNTAET Regulation.[280]

The "inhumane acts" requirement also places a high threshold on the crime. Situations of historical segregation and discrimination, for example, would probably not suffice unless the discrimination manifests in torture, murder or total exclusion from political or economic involvement.[281] Given the gravity of crimes against humanity, however, such a high threshold is necessary.

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274 ILC 1991 draft Code, above n 205, art 20(2)(a)-(f).

275 Max du Plessis "ICC Crimes" in Ben Brandon and Max du Plessis (eds) *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (Commonwealth Secretariat, London, 2005) 51 note 91.

276 Apartheid Convention, above n 6, art 2: "[S]imilar policies and practices of racial segregation and discrimination as practised in southern Africa".

277 Sports Convention, above n 7, art 1(a): "[S]uch as that pursued by South Africa".

278 Discussed in Part II B above.

279 See Bassiouni *Crimes Against Humanity*, above n 85, 123-124. Romanist–Civilist–Germanic systems prohibit reliance on judicial analogy, yet common law, Islamic law and Marxist–Socialist systems allow judicial analogy. However, no one should be criminally responsible for something that was not an express crime at the time that the offense was committed, in line with the maxim *nullum crimen sine lege*: Simester and Brookbanks, above n 85, 22 and Ashworth, above n 85, 59.

280 UNTAET Regulation, above n 176, s 5.2(g). See discussion above.

281 Apartheid Convention, above n 6, art 2.

2 *"Institutionalised regime" and "systematic oppression and domination"*

The phrases "institutionalised regime" and "systematic oppression and domination" pose a high threshold for the crime of apartheid, apparently limiting it to state-orchestrated or state-sponsored practices.

"Institutionalised" means "carrying the mandate or authority of an institution", a "pattern of thought or behaviour" or "established in practice or by custom and usage".[282] "Regime" raises notions of a "system of rule or government" or a system "having widespread influence or prevalence".[283] The use of "systematic oppression", meaning "methodically"[284] governing "by tyranny",[285] emphasises the state-level perpetration of the acts, and the moral turpitude that must follow the acts.

These phrases' inclusion in the definition of apartheid is presumably intended to indicate that isolated inhumane acts based on racial discrimination are not sufficient to amount to the crime of apartheid. Instead, the acts must either be part of a pattern, established practice or be carried out under the mandate of some sort of authoritative institution (presumably a state organ or de facto governmental entity with significant influence). Most likely, for practices of apartheid, they must be sanctioned or entrenched by law, as in apartheid-South Africa.

Such a restriction may in fact be unnecessary because, to amount to a crime against humanity, the acts already have to be "part of a widespread or systematic attack directed against any civilian population"[286] and generally crimes against humanity cannot be committed without "state action or a state-favoring policy."[287] It seems, though, that while the crime of apartheid was not intended to apply only to an "official government policy labelled 'apartheid'",[288] the crime apparently has a much higher threshold than other crimes against humanity, requiring a higher degree of coordination and established practice than other crimes.

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282 Simpson and Weiner, above n 263, vol 8 1046-1047.

283 Ibid, vol 8, 508.

284 Ibid, vol 17, 498.

285 This refers to "exercise of authority or power in a burdensome, harsh, or wrongful manner" or "unjust or cruel treatment of subjects": Lorna Gilmour (ed) *Collins Pocket Dictionary and Thesaurus* (HarperCollins Publishers, New York, 1999) 391; and Simpson and Weiner, above n 263, vol 10, 870-871:

286 "Systematic" means part of "a pattern of conduct or methodical plan" and "widespread" means "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims": *Prosecutor v Akayesu*, above n 249, para 580; Badar, above n 178, 109 and 111; and Rome Statute, above n 7, art 7.

287 Bassiouni *International Criminal Law*, above n 155, 98.

288 Implementation Study, above n 4, 1; Bassiouni *Documentary History*, above n 203, 676.

This specific threshold may unduly restrict[289] the crime's application to apartheid South Africa – or situations that are almost exactly the same. It would be nearly impossible to prove that an individual or group of individuals committing a series of rogue but nevertheless widespread, racially motivated attacks meet the standard of the crime of apartheid.

Similarly, it would be nearly impossible to establish that a State was responsible for a de facto apartheid system. For example, if a State ostensibly maintained equal rights legislation but, unofficially, put in place policies effectively excluding a racial group from society, then the crime of apartheid would probably not apply. Even if many of the unofficial policies and practices may appear to fall within the acts enumerated in the Apartheid Convention, it is unlikely that such unofficial or indirectly oppressive policies would qualify as "systematic oppression".

3 Mens rea: who can be responsible?

The Apartheid Convention states that:[290]

> International criminal responsibility shall apply, irrespective of the motive involved, to individuals, … whenever they commit, participate in, directly incite or conspire … [or] … directly abet, encourage or co-operate in the commission of the crime of apartheid.

The Apartheid Convention also includes a qualifying *mens rea* element stating that the crime of apartheid includes the listed inhumane acts committed "for the purpose of establishing and maintaining [racial] domination".[291]

According to Robertson, "this broad definition would incriminate most of the white population of South Africa for 'co-operating' with their own government by obeying its laws".[292] The *mens rea* element is troublesome because it is unclear whether it requires subjective intent on the part of the offender or whether an objective, "State-level" or "institutional" intention, attaching to the individuals who are part of the State or institution, would suffice.[293]

Clark uses the following hypothetical to illustrate.[294] A police officer from an apartheid-State acts on a superior's order to commit an inhumane act. Under a subjective, specific intent

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289 A crime's definition should not unduly restrict the likelihood of prosecution: DeGuzman, above n 188, 340.

290 Apartheid Convention, above n 6, art 3.

291 Ibid, art 2.

292 Robertson, above n 117, 272.

293 Roger S Clark "Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg" (1988) 57 Nordic Journal of International Law 49, 74 ["Offenses of International Concern"]; and Clark "Apartheid", above n 4, 647.

294 Clark "Offenses of International Concern", ibid, 74.

interpretation, the prosecution would have to prove that the officer was acting with the intention of maintaining that apartheid regime. Under an objective "state" intention standard, the officer may be presumed to be acting with the requisite intent if the police force as a whole was tasked with upholding the regime. Clearly, the subjective intent requirement is more consistent with Western European notions of criminal law, including the principle of construing penal statutes in favour of the accused.[295]

Nevertheless, the "absurd"[296] implication of the Apartheid Convention, according to Robertson, is that a person may be criminally responsible for unintentionally or unknowingly cooperating in the commission of an inhumane act being committed (by others) for the purpose of maintaining racial domination.

Fortunately, the Rome Statute definition includes a clarified and more stringent *mens rea* element for the crime of apartheid. The inhumane act must be committed with the intention of maintaining the "institutionalised regime of systematic oppression".[297] Additionally, the offender must be aware of the factual circumstances in which the acts are committed [298] and must know that the conduct is part of a widespread or systematic attack on a civilian population.[299] The Rome Statute definition does not expressly state that intention to commit the underlying act is required, but the definitions of many of the acts, such as torture or murder, include a specific intention requirement.[300] Presumably this requirement will have to be satisfied as part of proving the crime of apartheid.

Nonetheless, the requirement that the offender must intend to maintain the racially oppressive regime creates some problems, limiting the crime's practical applicability.

First, it would be factually difficult to prove that a particular individual, when committing an inhumane act, has the requisite intention to maintain the regime within which the act is committed.

Secondly, it is still unclear exactly what level of intention is required. The offender must intend to maintain ("carry on", "observe",[301] or "support"[302]) the apartheid regime. Unlike the Apartheid

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295 Clark "Apartheid", above n 4, 647-648; and Clark "Offenses of International Concern", above n 293, 74. See generally Simester and Brookbanks, above n 85 and Ashworth, above n 85.

296 Robertson, above n 117, 272.

297 Rome Statute, above n 7, art 7(2)(h). The Rome Statute is essentially extending the limited purpose element from the Apartheid Convention to all the elements of the crime.

298 Elements of Crimes, above n 265, 123-124, item 3.

299 Rome Statute, above n 7, art 7(1).

300 See for example ibid, art 7(2)(e).

301 Simpson and Weiner, above n 263, vol 9, 223.

Convention, the Rome Statute appears to require subjective intent on the part of the offender. The Elements of Crimes support this interpretation, stating that the "perpetrator intended to maintain" the regime, but the Statute's wording may still leave open the possibility for a presumed, objective "State" intention.[303] The Rome Statute has, therefore, significantly clarified the crime of apartheid's *mens rea* element, but a definitive interpretation will probably have to be expressed in a judicial decision.

4 Is individual criminal responsibility appropriate?

Is individual criminal responsibility the appropriate criminal mechanism to use to punish apartheid? It would be very difficult to prove all the elements of the crime of apartheid against a particular individual, even a Head of State or State official. The apartheid system in South Africa was constructed over decades by successive governments. The system may fall within what Bassiouni describes as responsibility transcending "the one or the few or the group of decision-makers to become collectively ascribable to the entire State," responsibility carried by all the State's citizens, whether or not they "participated, shared, or even agreed" to the practices of racial segregation.[304] Without a Slobodan Milosevic or a Saddam Hussein,[305] the risk is that guilt for the entire system will be imputed to individual police officers or lowly State officials, responsible only for "isolated" inhumane acts.

The Apartheid Convention accordingly adopted a wide scope of criminal liability, declaring that individuals, organisations and institutions committing the crime of apartheid are criminals.[306] Clark suggests that this wide definition may capture government agencies, but is arguably not wide enough to include the State as such.[307] "Organisations" is likely to include bodies analogous to Nazi Germany's SS.[308] Any State official (including executive, legislative and even judicial) may also fall within the Convention's scope.[309]

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302 Gilmour, above n 285, 345.

303 Elements of Crimes, above n 265, 123-124, item 5.

304 Bassiouni *International Criminal Law*, above n 155, 28.

305 See generally Simpson's discussion on individual responsibility and collective guilt: Simpson, above n 198, 54-78.

306 Apartheid Convention, above n 6, art 1(2); and Clark "Apartheid", above n 4, 645.

307 Clark "Apartheid", above n 4, 646.

308 Ibid, 646 and IMT Judgement, above n 58, vol 1, 255-279. A South African example may be the Security Branch: see SATRC Report, above n 35, vol 2 325-399 ("The State Inside South Africa 1960-1990").

309 Clark "Apartheid", above n 4, 649.

In contrast to the Apartheid Convention, the ILC's 1991 Draft Code narrowed the scope by restricting liability to the leaders or organisers of apartheid practices.[310] The Rome Statute finds a middle ground, applying to all individuals, not just leaders or organisers, but not extending to organisations.[311] Hence the focus of international criminal law, reflected in the scope of all three instruments, is still on the individual[312] rather than on the State.

Particular outrages may be committed by individuals,[313] but the full system of apartheid in South Africa resulted from decades of legislative and social refinement. This "institutionalised" nature of the abuses is what sets the crime of apartheid apart from most other international crimes. In such a situation, individual criminal responsibility might not be appropriate for the victims, the perpetrators or the country. While beyond the scope of this study, the international community may have to develop a system for holding States or governments responsible.

Even without changes to international criminal law, the apartheid State might be responsible for civil damages under the ILC's Draft Articles on State Responsibility for Internationally Wrongful Acts, albeit through its agents.[314] Finding state responsibility may achieve the same goals of denunciation, justice (in the form of reparation) and deterrence, but is more readily obtainable than criminal sanction.[315] There may also be other civil alternatives, such as the *In Re South African Apartheid* torts claims brought in the United States against international companies that allegedly aided and abetted the practices of apartheid.[316]

D Conclusion: The Crime of Apartheid 37 Years On

The discussion above attempted to answer each of the three questions posed at the beginning of this part.

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310 ILC 1991 draft Code, above n 205, art 20(1) and see Clark "Apartheid", above n 4, 660.

311 Rome Statute, above n 7, art 25(1): "The Court shall have jurisdiction over natural persons …". Robertson, above n 117, 459.

312 For a discussion on individual criminal responsibility, see Bassiouni *International Criminal Law*, above n 155, 12 and 21-22; and see Brownlie, above n 235, 36, 565-568.

313 IMT Judgment, above n 58, 223: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

314 Clark "Apartheid", above n 4, 645; see also Bassiouni *International Criminal Law*, above n 155, 28; and "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001", above n 217, arts 1, 2, 31, 34.

315 Bassiouni *International Criminal Law*, above n 155, 28.

316 See the ongoing series of *In Re South African Apartheid* cases, above n 163.

First, the crime of apartheid adds value to the body of international criminal law by providing a unique recognition of the deplorable injustices that occurred, declaring such practices criminal and deterring future recurrences. The crime is not limited in application to South Africa, but should retain the specific focus on racial discrimination – not to ignore other forms of discrimination but to specifically memorialise the injustices of apartheid in South Africa.

Secondly, the crime of apartheid is reasonably widely accepted by the community of nations but state practice and *opinio juris* is not sufficient to automatically conclude that the crime has customary international law status. More could be done by the international community to raise the value and efficacy of the crime of apartheid.

Thirdly, in order to enhance the effectiveness and prosecutability of the crime of apartheid a number of issues need to be addressed. In particular, it is unclear exactly what acts would amount to "inhumane acts" and what is meant by "institutionalised regime" and "systematic oppression". Additionally, the Rome Statute has clarified the Apartheid Convention's intention elements to some extent but some ambiguity as to the form and level of intention still remain.

Arguably more needs to be done to determine whether individual criminal responsibility is the appropriate mechanism for addressing situations of systemic racial discrimination manifesting in inhumane acts.

The answers to these three questions show that the crime of apartheid is relevant today, as a memorial and a deterrent but also with the potential to become a valuable, prosecutable offence.

The crime's onerous requirements, coupled with the fact that the acts already qualify as other crimes against humanity, mean that prosecutors are unlikely to base prosecutions on the crime of apartheid. As a crime's deterrent effect is only as great as the likelihood of prosecution and punishment,[317] an unduly restrictive or troublesome definition is counterproductive:[318] the responsible individuals (or, more likely, States) may even develop a sense of impunity and be encouraged in their human rights-breaching endeavours.

The crime of apartheid should be refined by exhaustively listing the inhuman acts that would suffice and by clarifying the "systematic regime" of "racial oppression" and intention elements. However, given the largely symbolic role of the crime, international effort can be better spent elsewhere. Instead, drafters should bear the experience in mind and promote clearer drafting in future.

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317 Bassiouni *Crimes Against Humanity*, above n 85, 217.

318 DeGuzman, above n 188, 340. Nevertheless, the deterrent effect is still arguably achieved through the other crimes against humanity because the crime of apartheid essentially duplicates the scope of those crimes: see Part IV B 1.

V CONCLUDING REMARKS

Criminalisation of apartheid was a specific response by the international community to the human rights abuses taking place in South Africa between 1948 and 1994. In the 37 years since its creation, no one has ever been prosecuted for the crime of apartheid. Yet the crime is still relevant today because it performs an important declaratory and deterrent role. Through the crime, the international community remembers and reinforces its abhorrence for the practices of apartheid, both in South Africa and wherever similar acts are or may be committed.

The crime of apartheid's practical value has been limited, however, because of ambiguous drafting and doubt for some decades about whether its application is limited to South Africa. Furthermore, as South Africa presents such a paradigm example of the crime, the crime of apartheid will be very difficult to apply to any other situation, reflected in the lack of prosecutions. Finally, the success of the SATRC suggests that more consideration should be given to the role that a TRC process could play as a domestic alternative to international criminal law in situations of systematic human rights abuses.

In order for the crime of apartheid to present a realistically prosecutable offence, a number of the definitional issues identified in this article will need to be addressed. In particular, the Rome Statute should exhaustively list the acts that would suffice for the commission of the crime. Secondly, the "institutionalised regime", "systematic oppression" and intention elements have to be clarified, most likely through judicial interpretation. This article has provided some initial comments as to what the requirements may entail. Such changes would be fairer towards the accused (in line with western criminal law theory) and would probably increase the likelihood of prosecutions. Similar lessons can be applied to the drafting of most international crimes.

Finally, despite the envisaged universal jurisdiction, the crime of apartheid will probably have to attain customary international law status if it is ever to be practically applied to other apartheid-like regimes. As the crime can only realistically be committed by or on behalf of a State, any sensible apartheid-like State would not sign or ratify an instrument that contains a prohibition on the crime of apartheid. Such States would only be bound if customary international law proscribed the practices of apartheid.

Just as the judgment of the International Military Tribunal has "not eliminated the resort to war",[319] criminalising apartheid has not brought racial discrimination to an end. Yet both that judgment and the creation of a crime of apartheid have emphasised that the international community condemns widespread human rights abuses as crimes not just against the victims, but against all of humankind.

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319 Whitney R Harris "International Human Rights and the Nuremberg Judgment" (1972) 12 Santa Clara Lawyer 209, 210.