

CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

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The Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter Apartheid Convention) has its roots in the opposition of the United Nations to the discriminatory racial policies of the South African Government – known as apartheid – which lasted from 1948 to 1990. Apartheid was annually condemned by the General Assembly as contrary to Articles 55 and 56 of the Charter of the United Nations from 1952 until 1990; and was regularly condemned by the Security Council after 1960. In 1966, the General Assembly labelled apartheid as a crime against humanity (resolution 2202 A (XXI) of 16 December 1966) and in 1984 the Security Council endorsed this determination (resolution 556 (1984) of 23 October 1984). The Apartheid Convention was the ultimate step in the condemnation of apartheid as it not only declared that apartheid was unlawful because it violated the Charter of the United Nations, but in addition it declared apartheid to be criminal. The Apartheid Convention was adopted by the General Assembly on 30 November 1973, by 91 votes in favour, four against (Portugal, South Africa, the United Kingdom and the United States) and 26 abstentions. It came into force on 18 July 1976. As of August 2008, it has been ratified by 107 States.

When the Apartheid Convention was being drafted in the Third Committee of the General Assembly there was a division of opinion over the scope of the Convention. Most delegates saw the Convention as an instrument to be employed only against South Africa. Others, however, warned that the Convention was wide enough to cover other States that practised racial discrimination (Twenty-eighth session of the General Assembly, Summary record of the 2004th meeting of the Third Committee, held on 23 October 1973, (A/C.3/SR.2004), paragraph 4).

The Apartheid Convention declares that apartheid is a crime against humanity and that “inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination” are international crimes (art. 1). Article 2 defines the crime of apartheid – “which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa” – as covering “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them”. It then lists the acts that fall within the ambit of the crime. These include murder, torture, inhuman treatment and arbitrary arrest of members of a racial group; deliberate imposition on a racial group of living conditions calculated to cause it physical destruction; legislative measures that discriminate in the political, social, economic and cultural fields; measures that divide the population along racial lines by the creation of separate residential areas for racial groups; the prohibition of interracial marriages; and the persecution of persons opposed to apartheid.

International criminal responsibility is to apply to individuals, members of organizations and representatives of the State who commit, incite or conspire to commit the crime of apartheid (art. 3).

Although consideration was given in 1980 to the establishment of a special international criminal court to try persons for the crime of apartheid (E/CN.4/1426 (1981)), no such court was established. Instead it was left to States to enact legislation to enable them to prosecute apartheid criminals on the basis of a form of universal jurisdiction. The Apartheid Convention allows State parties to prosecute non-nationals for a crime committed in the territory of a non-State party where the accused is physically within the jurisdiction of a State party (arts. 4 and 5).

No one was prosecuted for the crime of apartheid while apartheid lasted in South Africa. And no one has since been prosecuted for the crime. Apartheid was abandoned in 1990 by the regime that had introduced it and in 1994 a democratic South Africa came into being as a result of a peaceful negotiated settlement between the apartheid regime and movements opposed to apartheid. Consequently, there were no prosecutions of the leaders or agents of the apartheid regime for crimes of apartheid. Instead a Truth and Reconciliation Commission was established with the tasks of achieving reconciliation and supervising the granting of amnesty to those who had committed serious violations of human rights during the apartheid years. Significantly, post-apartheid South Africa has not become a party to the Apartheid Convention.

That the Apartheid Convention is intended to apply to situations other than South Africa is confirmed by its endorsement in a wider context in instruments adopted before and after the fall of apartheid. In 1977, Additional Protocol I of the Geneva Conventions of 1949 recognized apartheid as a “grave breach” of the Protocol (art. 85, paragraph 4 (c)) without any geographical limitation. Apartheid features as a crime in the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission on first reading in 1991 without any reference to South Africa and in 1996 the Draft Code adopted on second reading recognized institutionalized racial discrimination as species of crime against humanity in article 18 (f) and explained in its commentary that this “is in fact the crime of apartheid under a more general denomination”(Report of the International Law Commission on the work of its forty-eighth session (A/51/10), p. 49). In 1998, the Rome Statute of the International Criminal Court included the “crime of apartheid” as a form of crime against humanity (art. 7). It may be concluded that the Apartheid Convention is dead as far as the original cause for its creation – apartheid in South Africa – is concerned, but that it lives on as a species of the crime against humanity, under both customary international law and the Rome Statute of the International Criminal Court.

Related Materials

A. Legal Instruments

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, United Nations, *Treaty Series*, vol. 1125, p. 3.

Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, p. 3.

B. Documents

Study on ways and means of insuring the implementation of international instruments such as the Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of international jurisdiction envisaged by the Convention, 19 January 1981 (E/CN.4/1426).

Third Committee of the General Assembly, Summary record of meeting No. 2004, held on 23 October 1973, (A/C.3/SR.2004), paragraph 4.

Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991 (A/46/10).

Promotion of National Unity and Reconciliation Act, No. 34 of 1995, establishing the Truth and Reconciliation Commission in South Africa.

Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996 (A/51/10).

C. Doctrine

M.C. Bassiouni & D. Derby, "Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments", *Hofstra Law Review*, vol. 9, 1981, p. 523.

H. Booyesen, "Convention on the Crime of Apartheid", *South African Yearbook of International Law*, vol. 2, 1976, p. 56.

R.S. Clark, "The Crime of Apartheid" in *International Criminal Law* (ed. M.C. Bassiouni) vol. 1 (Crimes), Dobbs Ferry, N.Y., Transnational Press, 1986, p. 299.

J. Dugard, "L'Apartheid" in *Droit International Pénal* (eds. H. Ascensio, E. Decaux & A. Pellet), Paris, A. Pedone, 2000, p. 349.