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Racial Segregation in International and National law: From South Africa to the Occupied Palestinian Territories

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Introduction

In the legal history of human rights, discrimination was almost always at the basis of their violations. Discrimination which in itself is a denial of right to legal equality of all human beings, a right which has become one of the guiding principles of the post-war and contemporary international community. History of discrimination is a long one and concerning a number of side effects that appeared in different contexts at different moments in history around the world. Slavery, persecutions and even genocides can be easily traced back to discrimination on various grounds. The differentiation in treatment often results in an unbalanced distribution of rights within the same community in which the majority (or governing minority) imposes rules to their advantage at the cost of minority's (or marginalized majority's) basic rights. Such situation can sometimes reach critical levels which leads to the creation of a segregated society in which one group is inevitably subordinated to another. Usually this is done through discriminatory legislation sometimes backed by a social belief or prejudice and takes a form of a system dividing society in every aspect of public life.

This study will focus on the most prominent and controversial case of such system – South Africa's notorious racial segregation legislation known as Apartheid. It aims to explain how and why were such measures adopted as well as what was the reaction of the international community to it, in other words how did the South African case relate to what was the establishment of modern international legal order, especially in protection of human rights against racial discrimination and prosecution of crimes regarding such form of discrimination. In order to understand the thinking behind the implementation of apartheid, it is fundamental to analyse briefly the history of South Africa and its inter-cultural, ethnic and religious relationships throughout the ages, beginning from the establishment of Cape Colony up to the present uneasy situation. Next step will be reviewing single pre-apartheid and apartheid acts and cases among which Population Registration Act (1950), Mines and Works Acts, Bantu Education Act (1953) and more. Such an outlook will aim to prove that apartheid can only be comprehended in its wholeness as a multi-levelled system of separation and segregation.

This will lead to the core part which is the establishment and evolution of concept of apartheid as an infringement of international law and the international crime of apartheid through conventions such as International Convention on the Elimination of All Forms of Racial Discrimination (1965), International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) and art.7(j) of the Rome Statute of the International Criminal Court. Further an analysis of international and regional organisations and courts' opinions and case-law will be provided in order to understand racial discrimination and apartheid's role in today's legal proceedings. This part will conclude with presentation of some of the measures that contemporary South African national legislation introduced in order to confront the problem of discrimination.

Last but not least a suitable comparative study needs to be done to better understand how to identify analogies to apartheid in the contemporary context. First, the differences between South African Apartheid and the American Jim Crow's laws will be laid out in order to answer the question of whether a system of "separate but equal" can be treated in the same way as Apartheid. Secondly the case of strong military regime of the Israeli administration in the Occupied Palestinian Territories which is the most reminiscent of Apartheid in today's world, will be taken under consideration. Finally a short passage will be dedicated to the situation in Sudan and possible expansion of the classical notion of apartheid.

CHAPTER I: History of South Africa and Apartheid[1]

1. Birth and development of Afrikaner identity

To fully understand reasons standing behind the introduction of apartheid, it is necessary to take a better look on the historical evolution of the Boer (descendants of the first Dutch colonists) societies that mainly had place in the XIX century. The most influential element of this evolution was the Great Trek – a mass immigration eastwards, a result of a strong dissatisfaction regarding British administration of rural and remote areas of Cape Colony. The Trek occurred between 1835 and 1845 and had great influence on the formation of Afrikaner national identity. Both social and economic factors were at the basis of this phenomenon: the abolition of slavery and lack of equal and effective compensation system brought the rather poor farmers, living on the frontier and in the rural areas, to the edge of survivability. The temporary apprenticeship system that was introduced to replace slavery didn't bring the desired effects and the ideas of gradual abolition of slavery proposed by the burghers were swiftly rejected by the Cape government. The less restricting policy regarding coloured and black people was also another factor that hasn't met burgher approval. Another concerning aspect for the Afrikaners was the gradual anglicisation of the Colony and tendency to slowly eradicate Dutch language from the public sphere. Thus the so called Trekboers decided to migrate in search of new grazing lands where they could install their own government, independent of London.

The first successful expedition had place in 1838 and it had as destination the region of Natal. With the Retief-Dingane treaty they were granted some lands, but soon after a war broke out between Trekboers and the Zulu kingdom. After the war the Republic of Natalia was born, becoming the first independent Boer republic, and the first African republic in history. Notwithstanding this, the Republic was annexed by the British in 1843 and later transformed into Colony of Natal where thousands of Indians were imported and thus another important group became part of South African history. The Boers (as Cape citizens called them) were stripped of their land and forced to look for

[1] Much of the content regarding historical background is based on compilatory work of several authors contained in Pretorious A. (ed.) (2014) *A History of South Africa*, Pretoria, Protea Book House, which is the main source for historical part.

another home. This led to another expedition northwards of the Vaal river and another near the Orange river, which thanks to Trek leaders like Andries Pretorius, had had successful results. After turbulent negotiations with the British two conventions were signed: the *Sand River Convention* (1852) establishing the Zuid-Afrikaansche Republiek (ZAR)(Republic of Transvaal) and the *Bloemfontein Convention* (1854) establishing the Orange Free State Republic (OFS). Despite early periods of internal instability, these republics were meant to last for half a century before becoming part of the South African Union in 1910.

The attitude of the colonists towards the local black communities was rarely an aggressive one. Both groups tended to live in separate areas and so the republican governments applied the reserves and separation policies thus granting local tribes right to self-government which led to a somehow peaceful co-existence. On the other hand these communities did not seek representation within republican authorities. Some individuals left the reserves in order to find job on colonists' farms. They were treated fairly well in accordance with "patriarchal protectionism" policy.

The development of the two republics was immensely boosted by the discovery of rich diamond and gold deposits during the "mineral revolution" period, which gave life to several phenomena including rapid urbanisation, industrialisation and mass immigration of fortune seekers from all over the world called Uitlanders (foreigners) by the Boers. The main cities became Bloemfontein (OFS), Pretoria (ZAR) and later Johannesburg (ZAR). Wealth began to flow through the land, new markets opened to South African agricultural products and first railways were built. Although economically the republics were growing the same couldn't be said about the social dimension, especially in the ZAR where tensions between Uitlanders and burghers began to arise. As for the diamond fields any claims presented by different parties were put aside when Britain gained interest and decided to annex the contested area renaming it West Griqualand (from the name of the local Griqua people). It is worth mentioning that the Afrikaners living in the Cape Colony weren't eager to interfere with two republics' affairs, and some even sympathized them, and so the Cape government decisions weren't always in compliance with imperial policy. As for the gold-rich areas in Witwatersrand in the ZAR the issue regarded large numbers of Uitlanders (supported by Cecil Rhodes) which posed a threat to the Boer identity within the country. They

were regarded as strong materialists and they aimed to establish British rule in Transvaal which would favour their economic interests (the ZAR imposed high taxes). The relationship between the Empire and the ZAR was also rather poor, especially after the annexation of Transvaal and Transvaal War of Independence (First Anglo-Boer War)(1880-1881) which successfully granted ZAR's autonomy. However, the situation was still unstable and under president Paul Kruger, ZAR entered in an alliance with OFS (Orange Free State) and made ready for another war.

Afrikaner nationalism, which laid grounds to the later implementation of Apartheid, was initially a form of resistance against British imperialism, a struggle for the survival of identity, but in the later period it became a true beacon of unity even for the Afrikaners loyal to queen Victoria. The involvement of an Afrikaner organization, Genootskap van Regte Afrikaners (GRA) and the introduction of *Die Afrikaanse Patriot* newspaper helped to consolidate Afrikaans language and favoured it's development as common language for all Cape inhabitants. Religion also played a crucial part as for some, South Africa was seen as "promised land" given by God to the Afrikaners. Teachings of Afrikaner legacy were to be put in the educational system. GRA was followed by Afrikaner Bond (AB) (1879), the first Afrikaner political party which quickly gained many supporters and installed it's enclaves in the Cape Colony and both republics. S.J. du Toit and later Jan H. Hofmeyr, leaders of AB, promoted the idea of an Afrikaner community composed by white peoples of all different origins "who recognize Africa as their fatherland"[2] as to create a common South African identity without compromising warm relations with the British Crown. The AB also tried to attract coloured and black voters, but it wasn't yet ready to accept their political representatives among their ranks and because of that it failed to get greater attention. Hofmeyr's ultimate goal was to peacefully unite Cape Boers with the republican ones, in a single country under protection of the British Empire. This was not the case of Britain itself to which any prolonged existence of the wealthy and minerals rich republics posed a threat to its international position and prestige. Under these circumstances the second Anglo-Boer war broke out in 1899. The British Empire stroke

[2] Giliomee H. Afrikaner Nationalism, 1875-1899, (2014) *A History of South Africa,* Pretoria, Protea Book House, 230

with all its might and brought a fatal blow to the republics forcing them to give up on their independence in 1902. The notorious concentration camps installed by the British during the war only deepened the antagonism between the two sides. However, any attempts of further anglicisation failed. In fact, the Afrikaner nationalism and the will of vengeance was stronger than ever, even if the republican spirit was broken. Boers had to change tactics: they decided that the only way of gaining an upper hand in the cultural war was taking over the power in Cape Colony. In such climate, XX century and the prelude to what will be known as apartheid began.

2. Apartheid's precursor: Slavery in and out of South Africa

The concept of Slavery, unfortunately, is almost as old as civilization itself. Although being an efficient way to boost economy, it was based on most inhuman treatments of enslaved people with very limited or without any rights. Their legal status changed throughout the ages, and among the oldest legal sources regarding slavery there is *Institutiones* of a Roman jurist Gaius, which placed slaves among *rei* (things), thus considering them part of their owner's assets. With the rise of Christianity, slavery has been wiped out of Europe, but at the same time it became an economic engine of Colonial world in which white settlers *de facto* discriminated native population[3]. Mentioning slavery as reference to apartheid is due to the fact, that the latter could be seen as a successor of the former. In fact, generally speaking, the social image of an ex-slave didn't change radically after his or her emancipation[4], which also affected subsequent racial legislation. This is particularly evident in the case of southern states in the USA, where the ex-slaves, following their emancipation after American Civil War, couldn't hope for any real equality measures to be adopted by local legislator.[5] In fact, as an answer to slavery abolition with the 13th amendment to US Constitution, many State legislators adopted the so called Jim Crow's laws in order to separate ex-slaves from the rest of society.[6]

[3] Clark, N. L., & Worger, W. H. (2011). *South Africa: The Rise and Fall of Apartheid*. Hoboken: Taylor and Francis, 2nd ed., 3

[4] In the southern United States "a South Carolina [black] code stated that, in contracts, 'persons of color shall be known as servants and those with whom they contract shall be known as masters.'" – Fremon D. (2015) The Jim Crow Laws and Racism in United States History, Enslow Pub Inc., 11

[5] *Ibidem*., 9-12

[6] For further information *see* Chapter III, para.1

2.1 Slavery in South Africa: Origins and early structure

As for slaves and slavery in general, South Africa resembled the case of other colonies which lacked manpower to efficiently extract natural resources or provide food production. In Cape colony, slavery system lasted for two and a half centuries and it has with no doubt affected the later society development. While the men were appointed to serve on farms and vineyards or in gardens and as artisans in the urban area, the women usually served as cooks, nannies or wet nurses. The slave children were playmates of their masters' children. For the most part slaves came from Africa, India and Indonesia and between 1653 and 1808 about 63 000 were imported. There were different groups of slaves: those who belonged to VOC[7] and it's officials, those owned by colony's burghers, which were the majority, and the small amount of slaves owned by free blacks. The Company's slaves usually served for town maintenance purposes: they worked at market garden's plantations, in hospitals, or at coast building fortifications. They lived in a large, prison like building called the Slave Lodge. Their mortality was high and the punishments harsh especially for desertion. As for the privately owned slaves the authority limited their punishment to "domestic correction" which consisted in the same type of punishment a husband and a father could apply to his wife and children. Chains and whips were forbidden. The best status a slave could hope for was "sort of child of the family" which was perceiving slaves as "part of family". Such slaves had the highest chance of being emancipated and were better treated and even respected although forever seen as dependant and far from equal to their masters. Slaves' baptism was allowed although their owners rarely decided to provide for such sacrament as it decreased the slave's overall value (Christian slaves couldn't be sold to heathens). In 1685 mixed relationships were forbidden, however several exceptions occurred. The slaves which were capable of escaping their masters often organised stable fugitive societies which were able to set a number of hideouts. The number of slaves set free through manumission was very limited in comparison to other colonies. Freed slaves faced problems similar to detribalised Khoekhoen, namely difficulty in finding a gainful employment due to a more profitable use of slaves.

[7] Dutch East India Company

2.2 British reforms and the end of slavery

The arrival of the British marked the slow sunset of slavery in the Cape Colony and eventually in the whole colonial world. In 1807 new imports of slaves have been forbidden but the system continued to persist for almost three more decades. The difficult livelihood of slaves and performed duties didn't change much at the beginning of XIX century. Even the slave uprising of 1808 brought nothing more than bloodshed and punishment of rebels. The first signs of change came from the old world and Britain itself where from 1815 Enlightenment ideas were about to rise among the rulers and the society's upper class. In 1822 a slave owner was for the first time sentenced to death for torturing and slaying his slave. Despite causing an uproar among the burghers, the judgment served its purpose of tempering the owners' behaviour towards their slaves. In 1823 a new proclamation was adopted introducing prohibition of slave work on Sundays, a set of economical easements concerning baptized slaves, obligation of sending slave children to Free Schools, norms concerning slaves marriages and family, property and other acquired rights, food and clothing issues. It also introduced the twelve hours per day slave worktime limit.[8] In 1826 an ordinance laid down that any slave who was seriously maltreated had to be set free immediately and an office of slave protector was established in Cape Town which encouraged slaves to come forward with alleged offences by owners. A compensation was offered as an exchange for emancipating slave children (females were emancipated for free).[9] In 1830 corporal punishments on females and whipping were prohibited and a punishment book was to be set. Finally in 1833 the British parliament passed the historical act of abolition of slavery[10]

[8] Colonial Proclamation of 18th March 1823, *Proclamations, Advertisements and other Official Notices published by the Government of the Cape of Good Hope from Jan. 10th, 1806 to May 21st, 1825*, Cape of Good Hope Govt. Press, 1827, 594-598

[9] J. de Villiers, Cape colonial society under British rule, 1806-1834, (2014) *A History of South Africa,* Pretoria, Protea Book House, 91

[10] "(WHEREAS) Divers Persons are holden in Slavery within divers of His Majesty's Colonies, and it is just and expedient that all such Persons should be manumitted and set free, and that a reasonable Compensation should be made to the Persons hitherto entitled to the Services of such Slaves for the Loss which they will incur by being deprived of their Right to such Services: And whereas it is also expedient that Provision should be made for promoting the Industry and securing the good Conduct of the Persons so to be manumitted, for a limited Period after such their Manumission: And whereas it is necessary that the Laws now in force in the said several Colonies should forthwith be adapted to the new State and

Slavery officially ended on December 1st 1834, and the freed slaves remained as apprentices under their former masters for a period of four years. Compensations that were provided to former owners were usually significantly below the slaves' former market value and weren't easy to obtain. The situation of former slaves also proved to be difficult: with limited skills and mostly without any wealth and poor wages, the struggle for survival became a major challenge.

3. Pre-apartheid

After The Anglo-Boer war, the race relations were somehow complicated. The blacks and coloured supported Britain in hope of achieving a better position in a new country under British administration (which also made such promises). However, they were far less influent than the Boers, which appeared as better partners to the British despite animosities between the two. Reconciliation and quest for unification became priorities. Paradoxically one of the crucial aspects of this political debate was the status of black, coloured and Asian inhabitants of the four post-war colonies (Cape, Natal, Orange State Colony and Transvaal Colony). Considering different franchise rights in the colonies and the need to preserve white rule over the new-born country, it was decided that no member of the above mentioned groups would have the right to vote or to be elected to the Parliament[11], in fear of destabilising the worked out consensus between the two white groups. Commissions like South African Intercolonial Native Affairs Commission (Lagden Commission) began to submit reports on possible land distribution and work in mines regarding native populations.

3.1 South Africa Act, 1909

In 1909 the final draft constitution was approved first by the National Convention and subsequently by the British Parliament and thus the South Africa Act has been adopted, establishing the Union of South Africa officially in 1910. Political rights have been strictly reserved to whites, especially for representation matters. The number of seats in the chambers was based on the census of white population and qualifications for being

Relations of Society therein which will follow upon such general Manumission as aforesaid of the said Slaves; and that, in order to afford the necessary Time for such Adaptation of the said Laws, a short Interval should elapse before such Manumission should take effect" – Slavery Abolition Act 1833 (3 & 4 Will. IV c. 73)

[11] Scher D. Post-war race relations, 1902-1948, (2014) *A History of South Africa*, Pretoria, Protea Book House, 265

elected to the Senate were restricted to "British subjects of European descent" (art. 26(d)).[12] Art. 35 regarding voting rights in the province of the Cape of Good Hope, provided that no person registered as a voter or being capable to be registered as a voter at the moment of the establishment of the Union, could be disqualified or removed from such register by reason of his race or colour only, unless a bill with special majority of two thirds in both houses is passed. Also, art.147 foresaw that the natives affairs shall be administrated by the governor general.[13]

The costs of unification were drastic for the excluded black, coloured and Asian population which found themselves deprived of most political rights. Following the Imperial Conference of 1926 where with the Balfour Declaration the legal status of the Dominions[14] (comprising South Africa) as independent subjects was settled, the internal matters, including racial policies, took priority. With the consolidation of power by three major parties, namely, South African Party, Labour Party and National Party any more liberal voices regarding extended franchise for the eventual non white voters were rejected. Segregation measures hit labour and residence sectors in the first place.

3.2 Racial Laws 1911-1947

The 1911 Native Labour Regulation Act criminalised the break of labour contracts by non whites, while the 1912 Mines and Works Regulations Act, reserved certain mining occupations to whites only, even if totally unqualified or unprepared. This was also extended to the possibility of gaining adequate certificates in order to perform certain jobs. The Native Land Act (No.27/1913) was a major step towards officialising the so far performed reserves policy. It meant that "existing reserves, mission reserves, traditional tribal lands and some farms that were in private possession, were identified for black people's exclusive possession. However, black people were not allowed to buy land outside these demarcated areas unless specific permission to do so was granted by the governor general […] Furthermore, the governor general could grant additional

[12] There were some minor provisions that addressed other races' position, though they had more of a formal meaning. For example, art. 24(ii) provided that "One-half of their (senators) number shall be selected on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa."
[13] South Africa Act, 1909
[14] Imperial Conference 1926, Inter-Imperial Relations Committee, Report Proceedings and Memoranda E, (I.R./26) Series, *Full text at* https://www.foundingdocs.gov.au/resources/transcripts/cth11_doc_1926.pdf

land to black people if the need arose; in the years that followed this became a fairly common practice."[15] This provision resulted to be a double edged blade: on the one hand the blacks were granted inviolable right to their own land with the possibility of following their customs and preserving their social structure, on the other hand although, it definitely restricted their right to free movement and residence. Some minority opinions[16] argued that this act also had labour nature: it was necessary to confront shortage of labour on white farms and control the flow of workforce in a way similar to Hottentots Code (which forced natives to reside, and thus work, in certain areas[17]). This act was followed by Urban Areas Act (1923) which followed a similar pattern although it was even more restricting. The municipal authorities were required to control the black immigration into the cities, manage trade licences and establish separate residence locations (which were to be controlled by white Superintendent together with Advisory Board). Blacks weren't allowed to possess freeholds within the city itself as they weren't seen as permanent residents, but temporary workers in service of white citizens. The 1924 Industrial Conciliation Act, No.11 set up a series of conciliation instruments for employer-employee relationship and thus paved way to the establishment of trade unions. However blacks weren't considered employees in the same terms and so their access to recognised trade unions was denied. Further developments on political scene within the country led to other changes in the franchise. J. B. M. Hertzog, South African prime minister between 1924 and 1939, leader of the National Party and later United Party (fusion of National Party and South African Party) sought to somehow elevate coloureds position to match that of whites as to economic and political rights, without rejecting segregation policy though. The goal was to acquire a handful of possible votes as a counter-measure to more radical voters. These attempts failed due to lack of support from other members of NP. Furthermore, the formation of the United Party by joining ranks with Jan Smuts' (one of the architects of the covenant of the League of Nations) pro-imperialist and more liberal South African Party, caused the creation of radical Purified National Party with D. F. Malan as the

[15] Scher D. Post-war race relations, 1902-1948, (2014) *A History of South Africa*, Pretoria, Protea Book House, 271
[16] Davenport, T. R. H. (1979). South Africa: a modern history (3rd ed.), Hampshire, England : Macmillan Press, 531
[17] O' Malley Archieves entry *at* https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01649.htm

leader, which would later set its mark on history. As for black people, the situation differed as Hertzog managed to trigger the parliamentary majority clause contained in art. 35 of 1909 South Africa Act, and remove blacks from common voters' roll and put them on a special dedicated one from which they could elect three white representatives to Parliament, two to the provincial council. Local representatives could also elect four whites to the Senate. The law[18] also provided for the institution of Native Representative Council with advisory functions[19]. Similar acts were later adopted in regard to Indian populations, namely The Pegging Act (1943) substituted by The Asiatic Land Tenure and Indian Representation/Ghetto Act (1946) of which the former one limited the business competition for the Indians and forbade their residence in white areas and the latter one prohibited Indians from purchasing land from non-Indians except in specified areas, although it also introduced representation system similar to the one mentioned above. Among other acts worthy of mention, there are: Educations Proclamation No.16 (1926) which separated mission schools for coloureds and natives respectively; Mines and Works Amendment Act of the same year put coloureds working in mines in a privileged position, in theory equal to that of whites, in consideration of their partial affiliation to European culture; Native Administration Act No.38 (1927) aimed to value black customs law as to propriety administrated under local tribal law, and enhanced chiefs judicial powers within designated territories; Native Trust and Land Act No.18 (1936) extended reserves land from 7,3% to 13% of national territory (although this provision was never fully executed).

It's important to underline that the above mentioned acts had mostly non-social dimension, that is, they didn't quite affect the direct relationship and communication between different racial groups. Most of that kind of laws were adopted after the introduction of apartheid in 1948, but the Immorality Act of 1927 was among the first acts issued in these matters. It forbade "illicit carnal intercourse between Europeans and natives and other acts in relations thereto"[20], and regarded them as a criminal offenses

[18] Representation of Natives Act No.12 (1936)
[19] Brookes E. H. (1936), *The South African Native Bills*, Journal of the Royal African Society, Vol. 35, No. 138, 66-67
[20] Immorality Act No.5, 1927

punishable by up to five years for men and four years for women of imprisonment. [21] By "illicit" the act intended "other than between husband and wife." [22]

Further political developments led to a prelude of Apartheid. The siding with the British during the Second World War, an increasing popularity of Malan's National Party and perhaps most of all, the governments status quo and unwillingness to introduce any substantial changes to race laws, paved the way to a major dissatisfaction among both Afrikaners, coloured and blacks.

3.3 Africans' Claims

As for the political reaction from the blacks to the before mentioned acts and issues, the early organisations like South African Native National Congress (later known as African National Congress) and Industrial and Commercial Workers' Union attempted to issue protests against government segregation policies, but they didn't manage to reach any desirable goal. However the representatives of the ANC were aware of political changes that were happening in the world during and after the second world war. In 1941 the Atlantic Charter was signed by the President of the USA Franklin D. Roosevelt and the British Prime Minister Winston Churchill concerning the picture of the post-war world.[23] Dragging inspiration from its content a special committee appointed by ANC's President A. B. Xuma, stipulated a document known as Africans' Claim in which points present in the Charter were addressed from the South African point of view.

In the preface it is written: "This is our way of conveying to them our undisputed claim to full citizenship. We desire them to realise once and for all that a just and permanent peace will be possible only if the claims of all classes, colours and races for sharing and for full participation in the educational, political and economic activities are granted and recognised." (sic!)[24]

[21] *Ibidem* Art. 2-3
[22] *Ibidem* Art. 7
[23] Atlantic Charter, *Joint declaration by the President of the United States and the Prime Minister of the United Kingdom August 14 1941,* 55 Stat.. 1603, Executive Agreement Series 236.
[24] Africans' Claim (1943), Congress Series No. II. Issued and Published by the African National Congress, Rosenberg Arcade, 58 Market Street, Johannesburg, and Printed by the Liberty Printers, 325, 6th Street, Asiatic Bazaar, Pretoria.

Some particular observations made by the special committee are worthy of a deeper analysis. As for the 3rd point of the Charter – The Right to Choose the Form of Government – the committee recalls President Wilson's Fourteen Points and the right to self-determination[25] adding that it does not only encompass autonomous existence, but also political status and political rights of minorities. It also refers to the controversial electoral laws and a need for a proper African administration not dependant on the European group.

As for Economic Collaboration and Improved Labour Standards – has been interpreted by the committee as a reference to the principles established by the International Labour Office. The committee regretted that many of the adopted ILO conventions by African states including the Union didn't meet with an actual proper implementation considering the labour discriminatory provisions, and urged for compliance by providing: "(a) the removal of the Colour Bar; (b) training in skilled occupations; remuneration according to skill; (d) a living wage and all other workers' benefits; (e) proper and adequate housing for all races and colours."[26]

The document also contained a draft of a Bill of Rights that mainly addressed the issues deriving from implementation of Urban Areas Act (1923), Native Land Act (1913) and Natives Law Amendment Act (1937) which represented obstacles to freedoms of residence, movement, full rights to own and trade land property and also lack of recognition of the sanctity or inviolability of the home as a right of every family, equal political rights in matters of representation and public employment, right of freedom of press, right to free and compulsory education and access to social services, right to equal justice and equal labour rights. Further sections regard various of the above mentioned sectors and present a series of demands to be implemented as a

[25] Woodrow Wilson's "Fourteen Points", outlined at the speech to the Congress 8 January 1918, points V, VII, XII, XIII.
[26] Africans' Claim (1943), Congress Series No. II. Issued and Published by the African National Congress, Rosenberg Arcade, 58 Market Street, Johannesburg, and Printed by the Liberty Printers, 325, 6th Street, Asiatic Bazaar, Pretoria, The Atlantic Charter from the standpoint of African within the Union of South Africa, Fifth Point

remedy including the abrogation of discriminatory acts and amendment of the Constitution (South Africa Act,1909) as to its' discriminatory provisions.[27]

4. The Apartheid

"Today South Africa belongs to us again. South Africa is our own for the first time since the Union of South Africa. May God grant that it will always be ours." – said the newly elected prime minister D. F. Malan after the elections of 1948.[28] His words referred to the (Purified) National Party mindset, by which it was the first time in history when South Africa could be considered as fully independent from foreign influence and under complete Afrikaner control. This would mean that the country entered an era of complete white supremacy without any political or jurisdictional boundaries and which continued for almost 50 years despite international interventionism more or less capable of influencing South African politics. On the one hand this would lead to an incredibly swift industrialisation, development of infrastructure and a quest for an economic self-sufficiency, on the other, it would contemplate a very strict social structure and racial segregation system with not much room for personal and class development.

4.1. Apartheid Theory

The main difference between Hertzog – Smuts governments' racial policies and the apartheid introduced by Malan are of ideological basis. Whereas Malan's belief was that a strict segregation is necessary to prevent chaos deriving from mixing races living on a different social and cultural advancement level and to emphasize Boer legacy as the foundations of the country's history and peoples' identity, Hertzog and Smuts tended to simply maintain white control over the State and to build its position in the world. Smuts, in particular, somehow preferred the White Man's Burden approach and was ready to seek progressive, but separate development of native and coloured societies, without prejudicing white supremacy within the Union. It is possible that the worldwide liberal awakening after the second world war, also influenced Smuts' approach: During

[27] Africans' Claim (1943), Congress Series No. II. Issued and Published by the African National Congress, Rosenberg Arcade, 58 Market Street, Johannesburg, and Printed by the Liberty Printers, 325, 6th Street, Asiatic Bazaar, Pretoria, Bill of Rights
[28] Giliomee H. Afrikaner Nationalism, 1902-1948, (2014) *A History of South Africa*, Pretoria, Protea Book House, 311

his second term he attempted to ameliorate the non-Europeans living conditions by improving services quality. In 1946, Smuts appointed the Fagan Commission whose task was to reconsider whether the pass system and residence restrictions present in the Urban Areas Act (1923) were still valid and necessary measures.

The commission took a liberal stance and in 1948 it drafted a report: The total segregation was rejected, and a model of employment coordination through effective urban administrative bodies was endorsed.[29] Thus, the commission supported theory of a gradual eradication of discriminatory norms following the argument of economic efficiency with limited State interventionism as to pass system.

Still, the liberal opinion ignored the social extent of such a process. The ideological and ethnic differences could result impossible to conciliate, especially considering the rise of African and Afrikaner nationalism, and a theory of "separate ways" which inspired Malan's policies. In 1947, this theory found support in the Sauer Commission report which, contrary to Fagan's opinion, supported an interventionist State focusing on full segregation between racial groups with a well organised system of autonomous reserves in which each group would be able to develop at its own pace while being as self-sufficient as possible. The last aspect proved to be the most problematic as it involved separating black labourers from their white employers, which as a result would cause massive levels of unemployment and lack of workforce at the same time.[30]

[29] "It rejected the policy of total territorial segregation as 'utterly impractical' and brushed aside the allied view that 'migratory labour should therefore be regarded as normal and the only desirable form of Native labour in the urban areas.' The report advocated an 'elastic policy' of transitional segregation premised on a less rigid pass system, which would gradually be relaxed to a point where race would be eroded as an organizing principle in South Africa's socioeconomic structure. 'Labour stabilisation' in the urban areas therefore dominated the recommendations put forward in the report. The second broad issue that undergirded the report's recommendations was a call for the rationalization of urban administrative structures, principally through the establishment of a centralized system of labour bureaus. However, this structure would be implemented on a voluntary basis, since its function would be merely to 'guide and regulate the labour stream', not to 'direct' labour across the economy. Nevertheless, the report noted that administrative arrangements could indeed be used to distinguish 'the settled, well-known Native' from 'other Natives' whose transience in urban areas made the evasion of law and authorities easier. In the interests of efficiency, the report recommended that the central state—more specifically, either the Department of Labour or the Department of Native Affairs —should control the centralized pass system." – Evans I. (1997) *Bureaucracy and Race: Native Administration in South Africa.* Berkeley, University of California Press., 76-77

[30] *Ibidem* 78-79

4.2 Apartheid Acts (1948-1994)

Apartheid policies had different purposes and were implemented in different sectors of social structure. Sometimes they were used as propaganda tool, in other cases they served as an economical measure. In this paragraph several dimensions of apartheid will be discussed in order to understand how legally binding racial acts influenced human rights of different racial groups.

4.2.1 *Family and Identity Rights*

This category of rights was mainly affected by immorality acts which aimed to establish a barrier between racial groups in order to preserve their respective cultural traits by first limiting and then excluding the possibility of mixed marriages and relationships. This has been provided by Prohibition of Mixed Marriages Act (1949) which was the successor of the before mentioned Immorality Act (1927)[31]. It foresaw that any "marriage between a European and a non-European may not be solemnized, and any such marriage solemnized in contravention of the provisions of this section shall be void and of no effect"[32]. Still, it was difficult to exactly classify racial group membership in some particular cases. Article 3 of the act provided for presumption of race based on the obviousness of appearance which lacked any detailed description and thus proved to be insufficient in practical terms. This interpretative hole has been partially covered by the infamous Population Registration Act No. 30 (1950) which introduced legal notion of three different racial groups. A coloured person was the one not belonging to either native or white group, a "native" was identified as "a person who in fact is or is generally accepted as a member of any aboriginal group or tribe of Africa" whereas a "white person" was "a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person."[33]

This last definition gives an interesting social dimension to the interpretation issue: it does not limit itself to the mere cognition of genetic and physical aspects of an

[31] Moreover, Immorality Amendment Act (1950) extended the prohibition of illicit carnal intercourse between races to all non-European (instead of just natives)
[32] Prohibition of Mixed Marriages Act (No. 55 of 1949), Art.1
[33] Population Registration Act (No. 30 of 1950), Art.1, para iii, x, xv

individual, but it also emphasises his/her social appearance based on reputation and private life, thus potentially amplifying the interpretative extension.

In the long term this classification proved to be problematic and ineffective in some cases. Nonetheless, it "established a rigid system of racial classification and identification which determined any individual's access to legal rights in South Africa."[34]

As for the marriages between the natives, they were usually managed by customary law in accordance with the early Shepstonian system of customary law and the later policy introduced by Native Administration Act (1927) which, as previously noted, delegated these matters to local leaders. However matters of conjugal life were also influenced by several regulations of different nature. Acts like Native Land Act (1913) and Urban Areas Act (1923) were able to indirectly manipulate family life by, for example, allowing migration to the cities to males only (for labour purposes). Perhaps the most widespread effect was to remove many husbands and fathers from their families for much of the year, leaving wives as de facto rural household heads but also rendering them vulnerable to dispossession, especially if widowed or abandoned.[35] According to Dugard by following this law "persons belonging to different racial groups are (were) not only denied the right to marry in South Africa; they are (were) also denied the right to cohabit."[36]

Following the reasoning introduced by its predecessors the Immorality Act of 1957 succeeded them, by tightening up regulations on interracial sexual intercourse. In fact, though the main provisions regarded prostitution and procuration, article 16 reproduced the already existing provision referring to intercourse between white and coloured people, while article 22 extended the maximum penalty for such an offence from 5 to 7 years of imprisonment.

As for the implementation of Immorality Acts, considering their socio-cultural importance for the Afrikaner society, the police found itself with wide investigative

[34] Clark, N. L., & Worger, W. H. (2011). *South Africa: The Rise and Fall of Apartheid*. Hoboken: Taylor and Francis, 2nd ed., 49
[35] Yarbrough, M. W. (2015). South African marriage in policy and practice: A dynamic story. *South African Review of Sociology, 46*(4), 11
[36] Dugard, J. (1978). *Human rights and the South African legal order,* Princeton, Princeton University Press, 69

powers and were able to “peep through the curtains” in order to detect potential offenders, effectively stripping them of rights to private life and exposing them to social disgrace. Several hundreds of prosecutions and convictions were done on a yearly basis.[37]

Another aspect of this State controlled social order was the access to medical abortion. The need for proper abortion regulations wasn’t directly dictated by religious or moral limits as it had place in other countries around the world. The main scope was to adopt them as an intimidation measure, which would dissuade white women from having sexual relationships with members of other races. Whereas before 1975, in accordance with common colonial policy, abortion was accessible only to women whose life was in danger due to the pregnancy, the introduction of Abortion and Sterilization Act (1975) changed this situation. The prelude to this introduction had strongly ideological background and was characterised by two aspects: the wave of ideological liberalism flowing through the Western world in 1970s and the rapid demographic growth of blacks. The first aspect put in danger the heteropatriarchal social order, which characterised Afrikaner society and was the beacon of NP’s approach. As for the second one the government in order to limit black births secretly administered contraceptives.[38]

Before the enactment of the law, the judicial itself called for a change.[39] Initially the 1975 bill had a liberal content based on the British law from 1968, but a Select

[37] Immorality Act of 1957 tightened up regulations on interracial sexual intercourse in terms of a criminal offence and extended the maximum penalty from 5 to 7 years of imprisonment.

[38] “in 1974 white fear of black ‘overpopulation’ was translated into a racist ‘family planning’ program targeted at black women. Among other measures, the program aggressively promoted the injectable contraceptive Depo Provera; an unknown number of black women were injected without their knowledge or consent” – Klausen, S. M. (2010). "reclaiming the white daughter's purity": Afrikaner nationalism, racialized sexuality, and the 1975 abortion and sterilization act in apartheid south africa. *Journal of Women's History*, *22*(3), 42

[39] "In 1971 there were two important, highly publicized judicial pronouncements that demonstrated […] the courts were beginning to interpret the existing abortion law liberally. In one widely-reported case a doctor was acquitted after performing an abortion on a fifteen-year old girl who had become pregnant after being raped by her brother. When handing down his judgment the magistrate declared “it was of the utmost necessity that the abortion laws be reformed.” In the second case a Supreme Court judge convicted a doctor for providing abortions to two white teenagers but was highly sympathetic to the doctor, saying, ‘It is extremely clear that the medical profession should have greater clarity on the judicial attitude to abortion. A doctor or physician who is asked by a woman to end her pregnancy immediately finds himself in the middle of a minefield . . . . It is clear that there are several grounds on which it must be possible for therapeutic abortions to be performed lawfully.’ ” – *Ibidem with reference* to S. A. Strauss (1978), “Therapeutic Abortion: Two Important Judicial Pronouncements,” SAMJ 46, no. 11: 275–76.

Committee modified much of its content by implementing several restrictions. In the Apartheid context this was meant to obtain a double effect. On the one hand this system had to cut short any tendencies to pre-martial and, potentially, inter-racial sexual relations, on the other it had to promote responsibility, pregnancies and marriages among white women in order to balance the demographic weight.

4.2.2 *Labour rights*

The control over manpower allocation was crucial as for creating a stable and developing economic apparatus. During the Apartheid, South Africa's economy benefited from rapid growth periods. This growth came at a cost which involved creating separate work places and positions for whites and non-whites. The labour sector was regulated by both statutes and conventions. Throughout time, both white employers (vast majority) and white trade unions tended respectively to prioritize and to protect white employees and were free to do so in accordance with free market rules. However, this possibility must be reconnected to the origins of legal jobs separation dating back to Mines and Works Act of 1912 and its successor of 1926 and 1956 which, as seen before, laid grounds to this phenomenon. The Bantu Building Act (1951) introduced the certificates system for skilled work within building industry in urban areas, that limited access to a vast number of trades like masonry and carpentry, although this wasn't valid for townships. This arrangement worked in connection with Native Services Levy Act (1952) which obliged employers to pay a monthly fee for every employee working under him in urban areas as a contribution to their housing construction. A very elastic provision was present in Section 77 of Industrial Conciliation Act (1956) that enabled The Minister of Labor to reserve certain classes of work to specified races upon an investigation or recommendation from the industrial tribunal established under the Act. The Industrial Conciliation Act of 1956 introduced a system of registration and benefits for trade unions and self-governance in the industry. However, for the definition of "employees" the Act intended all workers except Bantu (Africans). This didn't mean banning of black trade unions, but it simply didn't consider their existence. The Act also forbade unions activity in political matters and prohibited workers strikes in certain industry sectors. Strikes for Africans remained illegal until the implementation of Bantu Labour Relations Regulation Amendment Act of 1973.

4.2.3 *Free movement, Access to facilities and Residence Rights*

The most important objective of apartheid was a complete separation between races also in strictly physical terms. Whether it was with the reserves system officialised with Native Land Act (1913) or limited access to cities procured by Urban Areas Act (1923), the measures adopted to keep "the separate development" theory alive were already present decades before the implementation of the Apartheid. The rapid demographical growth of non-white population proved to be problematic, as the reserves were getting too small: "The government-appointed Tomlinson's Commission had concluded in 1956 that the areas set aside for Africans would never, even under the best of conditions, be able to support more than two-thirds of the African population. Moreover, without further land purchase the reserves could not even support the 50 per cent of the African population then resident in them."[40]Also, the two above mentioned acts, did not encompass the whole context of rapid urbanization, industrialization and development of social services and amenities, as they limited themselves to the separation of "living areas". In contrast to the Southern States in USA and their constitutionally restrained "separate but equal" approach, initially the South African legislator was rather negligent about differences in service quality for different races. This changed in 1934 with *Minister of Posts and Telegraphs v. Rasool* case in which the Appellate Division sanctioned the necessity of equal quality services, nonetheless separate, but it also emphasised the element of "substantial inequality" and excluded "mere technical inequality of treatment"[41]. Subsequently, the judicial acted as a kind of restrain for the National Party legislator, by adopting the same attitude in a series of cases that followed. The Reservation of Separate Amenities Act (1953) managed to bypass this restrain by regulating the matter in the following way: " (Article) **2.** (1) Any person who is in charge of or has control of any public premises or any public vehicle, whether as owner or lessee or whether by virtue of his office or otherwise, or any person acting under his control or direction may, whenever he deems it expedient and in such manner or by such means as he may consider most convenient for the purpose of informing all persons concerned, set apart or reserve such premises or such vehicle or any portion of

[40] Clark, N. L., & Worger, W. H. (2011). *South Africa: The Rise and Fall of Apartheid*. Hoboken: Taylor and Francis, 2nd ed., 64
[41] R. v. Carlese, 1943 C.P.D. 242 at 253; R. v. Abdurahman, 1950 (3) S.A. 136 (A.D.) at 145

such premises or such vehicle or any counter, bench, seat or other amenity or contrivance in or on such premises or vehicle, for the exclusive use of persons belonging to a particular race or class." Any violation of this norm by a client or user was foresaw as a criminal offence punishable by fine or even imprisonment. No such separation could be enforced upon a member of a foreign government representation or foreigners traveling on official business, which gave it a strictly internal meaning. In 1960 this policy was also extended to sea and shore areas, hence the presence of white only beaches. In 1970s some of municipal authorities in the bigger cities abolished some of these restriction and several public spaces were opened to all races, although many others, following Urban Areas Act, and as such depending on the central government, remained separated. Again, just like in case of judicial, the "insubordination" of local authorities was to be answered with Reservation of Public Amenities Amendment Bill (1977) which would give the Minister of Community Development the power to enforce upon the responsible of public amenity the racial and class separation when deemed necessary. The extent of "public amenity" meaning in the Bill was also immense: it included almost every kind of public parcel except public roads or streets". Despite the government's desperate attempt to seize direct control of public amenities the Bill itself was never adopted. The Reservation of Separate Amenities Act (1953) has been repealed in 1990. The evolution of access rights, shows how the racial segregation stance adopted by NP's Government wasn't always compatible with other branches of State's (judicial and regional) ideas and it reflects on how the central power struggled for maintaining a high level of centralization.

As for separate freedoms, and in particular, freedom of free movement, it is possible to identify legally binding documents dating back to 1809's Hottentots Code introducing a pass system in the Cape Colony. In Apartheid South Africa freedom of movement rights differed from race to race. Whites and coloured had an almost complete freedom of movement, with a single requirement of permission when entering a native reserve, as defined in Prevention of Illegal Squatting Act (1951). Notwithstanding, the Indians had had need for a permission when traveling between provinces until 1973 when legislation was adopted that mostly abolished the permits system (necessary permit for long period residence in Orange Free State and Northern Natal). At the basis of legislation regulating the native Africans' rights to free

movement there was an opinion that black population in a serfdom like social structure and mentality was closely bound to their place of employment and were rarely induced to travel if not for such reason. Similar approach was adopted in Hottentots Code which justified the need of permissions as a way of avoiding vagrancy. The 1952 Bantu (Abolition of Passes and Co-ordination of Documents) Act substituted traditional pass system with the requirement for the blacks to carry "reference books" which in practical terms were identity documents containing specific information which included "their photographs, and information about their places of origin, their employment records, their tax payments and their encounter with the police".[42] The requirement had been extended also to women in 1956. A failure to comply with such a requirement was considered a criminal offence punishable with a fee and even imprisonment up to one month. Statistically, violations of this Act were among the most prosecuted in South Africa with several hundred prosecutions issued daily by South African Police. Despite this fact, the Appellate Division struggled to ameliorate black citizens conditions by stating that there's no requirement of carrying the reference books at all time and reasonable opportunity to fetch such a document should be given, for example it's retrieval from family abode under police escort when the distance isn't considerably long.[43] Considering the large number of prosecutions, and subsequent prolonged detentions of supposed offenders, some aid centres were established to act as a filter for prosecutions and providing for an immediate release if no offence was detected. It was this system of reference books that infuriated African citizens which in 1960 protested against it at Sharpeville police station, an event leading to the infamous massacre which left several dozens of dead and wounded.

As for residence in the cities, the Urban Areas Act (1923) permitted only temporary black migration to the cities, intended as a workforce and not permanent residents. The Bantu (Urban Areas) Act (1945) and continued this legacy by introducing at Section 10 the case of criminal offence if an African person remains longer than seventy two hours in an urban area unless one of the particular conditions is satisfied. Such conditions included permanent residence in urban area since birth or for 15 years, continuous work

[42] Davenport, T. R. H. (1979). *South Africa: a modern history* (3rd ed.), Hampshire, England : Macmillan Press, 374.
[43] Ncube v. Zikalala, 1975 (4) S.A. 508 (A.D.) .

in such area for the same employer for 10 years, being a family member of a person legitimated to live in such area, and special permission released by a labor bureau. A legitimate residence inside an urban area still didn't guarantee freedom of movement. In fact, an urban Bantu affairs board or the Minister of Bantu Administration or Development, were able to impose curfew on Africans introducing time bars to their freedom of movement (if no proper permit was released). Also the two organs could limit African access to public places outside of African residential area, if "the presence of Bantu on such premises or in any area traversed by Bantu for the purpose of attending at such premises is causing a nuisance to residents in the vicinity of those premises" as sanctioned by Section 9 of the above mentioned Act. Even if complying with these rules, the resident's rights still weren't always safe. Section 29 "permits a police officer to arrest without warrant in an urban area any African whom he 'has reason to believe' is 'an idle or undesirable person' and to bring him before a Bantu Affairs commissioner, who 'shall require such Bantu to give a good and satisfactory account of himself.' After an administrative inquiry the commissioner may declare the African to be 'idle' if he is habitually unemployed, or 'undesirable' if he has been previously convicted for criminal offences, and order him to be sent to his homeland to a rehabilitation centre, or to a farm colony for a period not exceeding two years, or, with his consent to an approved employer on a contract for a specified period. Administrative decisions under this section are, however, subject to judicial review."[44] Later introduced Section 29*bis* extended this practice towards persons disturbing public order (political agitators), this time without even judicial appeal clause.

Following the introduction of Native Land Act (1913) some other legislative measures were adopted to further enhance the reserves and land separation system. In practical terms, its implementation, meant large-scale population removals from lands surrounding white living areas and transferring them to respective reserves without their consent and lacking any prospect of employment. Within Johannesburg this was achieved through Natives Resettlement Act of 1954 which removed the so called "black spots"[45].Nonetheless, in this case it is necessary to underline the fact that the

[44] Dugard, J. (1978). *Human rights and the South African legal order,* Princeton, Princeton University Press, 69

[45] Scher D. M. The consolidation of the apartheid state, 1948-1966, (2014) *A History of South Africa*, Pretoria, Protea Book House, 337

government provided for (limited in numbers) housing of legitimately residing urban black population which was granted basic family "matchbox" houses, sized 40 square meters and provided basic means of survival. Groups of such houses formed part of the first townships within Johannesburg outskirts and were sided by hostels for the temporary residents.[46]

The constant urbanisation of South Africa and growing population in the cities could no longer be ignored and the traditional reserves system proved to be outdated in that case. The Group Areas Act (1950) aimed to create separate living and working areas for each race and included regulations for the propriety ownership within such areas. In reference to specification of races, it adopted the same content present in Population Registration Act (1950), thus the division in white, native and coloured population, but it also gave the possibility to Governor-general (upon the approval of the Parliament) to define any other groups and areas assigned to them that were not specified in the Act[47]. However, in respect of the older legislation, he could not modify any territory being part of a reserve or native location or village. Despite the lack of expressly discriminant provisions in this act, in reality any white resettlements were made on a much inferior scale as compared to other races. Also, the term "occupation" as in meaning of a criminal offence was never sufficiently specified and presented interpretative issues. Furthermore, whereas in previous legislation, the reserves were subjugated to some extent to local traditional authorities[48], in the metropolitan context this proved to be no more possible so the core concept of "separate development" had been challenged. Ultimately, the implementation of this Act and the ones that followed in 1957 and 1966 never managed to create completely separated and auto-sufficient district urban areas as "separate development" theory prescribed and instead it created more of a ghetto areas with different standards of living for each of the specified groups and aggravating their mutual relations.

[46] Crankshaw O. (2005) Class, Race and Residence in Black Johannesburg, *Journal of Historical Sociology* Vol. 18 No. 4, 357
[47] Group Areas Act no.41 (1950) sec. 2(2)
[48] See ref. to Native Administration Act No.38 (1927) at p. 17

4.2.4. *Education Rights*

Again, one of the aspects of government's society shaping policy was the separation and different quality of education establishments. The simple logic behind it was that the intellectual class was to be reserved to whites only and although there was a black minority raised with a higher education, they rarely were able to break through the glass ceiling. Minister of Native Affairs, Hendirk Voerwerd, known as the architect of apartheid, claimed that "There is no place for Africans in the European community above the level of certain forms of labour"[49]. Separated education was practiced before and black education in particular was still dependant on missionary activity for many aspects, but in 1953 the Bantu Education Act was passed and the schools became officially separated for different races. The enactment of this regulation was preceded by works of the Eiselen commission which in its report pushed for separation and subjugation of Native schooling to Minister of the Native Affairs instead of Minister of Education. As a result, missionary schools had been demonetised and closed and different facilities had been given different levels of financing (with an average per capita governmental spending of one tenth for every black student compared to the white[50]) which led to a differentiation in education and facilities quality (low-paid teachers, cases of lack of electricity or running water and plumbing). Lack of compulsory education for black children was also a problem, although in later years "the government introduced a new program whereby children who attend school are required to stay for at least four years and this has been described as part of a move towards compulsory education for Africans".[51] In the government's eyes the education issue had as its sole purpose the creation of a properly prepared worker aware and accepting of his position within society. Voerwerd justified this by stating that "by blindly producing pupils trained on a European model, the vain hope was created among Natives that they could occupy posts within the European community despite the country's policy of 'apartheid'. This is what is meant by the creation of unhealthy 'White collar ideals' and the causation of widespread frustration among the so-called educated Natives. […] The Bantu teacher must be integrated as an active agent in the

[49] Giliomee, H., & Mbenga, B. (2007). *New history of South Africa*. Cape Town: Tafelberg, 360
[50] Byrnes R.M. (1997), *South Africa: A Country Study*. Washington: GPO for the Library of Congres, 56
[51] Dugard, J. (1978). *Human rights and the South African legal order,* Princeton, Princeton University Press, 83

process of the development of the Bantu community. He must learn not to feel above his community, with a consequent desire to become integrated into the life of the European community. He becomes frustrated and rebellious when this does not take place, and he tries to make his community dissatisfied because of such misdirected ambitions which are alien to his people"[52]. Some few universities lifted colour bars and pushed towards admission based on merits, but these trends were halted by the Extension of University Education Act (No. 45) (1959) which provided that no black student could attend a white university unless a special permit from the minister was released. This also led to "ethnicization" of universities, as many of them served only some particular ethnic groups like Xhosa or Zulu.

4.2.5. *Political and Civil Rights*

The political representation laws were among the crucial ones in the "grand apartheid" sphere. It was the political supremacy obtained in State bodies that ensured that no harm could be done to the segregation system being introduced and developed. Desperate to remove unlikely supportive coloured voters from the Cape[53] (of whom the franchise had been entrenched by the South Africa Act of 1909) the NP[54] pushed for the adoption of Separate Representation Bill in 1951. Initially the appellate division of the Supreme Court, challenged the validity of the Act in *Harris v. Minister of the Interior* case[55], but through a series of legislative statutes, first by establishing High Court of the Parliament for revision of the Supreme Court decisions (declared invalid by the Appellate Division), secondly by extending the number of judges in the appellate division from five to eleven, and then by extending the number of seats in the Senate from forty four to eighty nine, ultimately the NP government managed to trigger the majority clause present in South Africa Act (1909) and in 1956 the act was finally approved. This meant that the coloured citizens had been deprived of one their most basic democratic rights just as Representation of Natives Act No.12 (1936) had done in reference to the black population of the Cape. Perhaps the most significant legal acts of Voerword's[56]

[52] Clark, N. L., & Worger, W. H. (2011). *South Africa: The Rise and Fall of Apartheid*. Hoboken: Taylor and Francis, 2nd ed., 51
[53] Region
[54] National Party
[55] 1952 (2) S.A. 428 (A.D.)
[56] South African Minister of Native Affairs 1950-1958; Prime Minister 1958-1966.

"separate development" vision were adopted in political and administrative representation sector. In 1951 the Bantu Authorities Act was introduced which dismantled the Native Representative Council (established by 1936 Representation of Natives Act), as it appeared too westernised and insufficiently connected with the real needs of Native population. In its place greater powers were given to traditional leaders such as chiefs, but in case insubordination to central authorities, they could be removed from their office and substituted. The already mentioned Tomlison commission's report stated that it is necessary to spend 104 million pounds within a ten year time lapse in order to convert the reserves into fully self-sufficient homelands.[57] Voerwoerd rejected this plan, claiming that it would exceed the level of desired State interventionism, and it would create inter-race dependencies. Still, to appease the growing unrest among the black population dangerously increasing in numbers and to react to the growing African nationalistic sentiment, the government's policy had to change its direction. Focus had been given on regulated autonomy of black communities. In fact, "the preamble of the Promotion of Bantu Self-Government Bill made it clear that the government did not consider the African a homogenous group but a number of separate national units on the basis of language and culture. Initially, eight homelands (Bantustans)[58] would be created in which black people would be able to develop to their full capacity as independent communities."[59] This "independence" came at a price: the white representation of native population at the national Parliament was to be withdrawn. Critics argued that the Bantustans were considerably disproportionate as they mostly covered areas of the old reserves, amounting only to around 13% of the overall territory[60]. The adoption of Promotion of Bantu Self-Government Act in 1959 was a step towards not only physical but also administrative and political separation. The most developed as to its institutional elements was the Transkei bantustan in south-east part of the country, which had been given its own constitution, language, flag and later legislative body. Of course, it wasn't an independent political entity on its own and

[57] Scher D. M. The consolidation of the apartheid state, 1948-1966, (2014) *A History of South Africa*, Pretoria, Protea Book House, 338
[58] For the map *see* Appendix 1
[59] *Ibidem*, 339
[60] See Native Trust and Land Act No.18 (1936) at p. 17

acted like a federative State within the Union of which the central authorities had an ultimate veto power and reserved competency in some matters like security.

Although not directly affecting the apartheid system, the transition of South Africa from the Union to the Republic, also played an important role. The process begun with a republican referendum in 1960 in which by a number of few thousands votes, the republican form of government had been chosen over the monarchy. In 1961 a new constitution had been adopted which switched the position of the monarch and the governor-general with that of the State president. Nonetheless, the changes went much further than that: any progressive voices calling for an addition of a bill of rights to the constitutional draft were rejected, instead of that, the document focused on ensuring an almost absolute power of the Parliament by drastically shrinking the powers of revision of the judicial over the acts adopted by the legislator[61], thus challenging the balanced separation of powers. For this reason, the new constitution represented a perfect tool enabling the unhindered implementation of the racial segregation free of internal threats. The endorsement of the constitution was accompanied by the declaration of definitive withdrawal from the Commonwealth, more and more ideologically distant from South Africa.

4.2.6. *Conclusion for the apartheid legislation*

Apartheid lived its golden age in the 50's and the 60's of the XX century, but despite being relentlessly developed in various sectors, it failed to stand the test of time. Even without a strong international disapproval that emerged in the later years, it is unlikely that a system of "separate yet unequal development" would be able to persist. From the social point of view, differences in quality of life, limited access to public services and the growing demographic disproportion would eventually lead to instability and even internal conflicts. From the legal perspective, as professor Dugard stated "the apartheid was very comprehensive, it covered most branches of law, but it didn't cover everything and there were gaps in the law which lawyers were able to exploit so when it came to the interpretation of the apartheid laws, lawyers were able to advance progressive interpretations"[62]

[61] Republic of South Africa Constitution Act (no.32), 1961 sec.59
[62] Duguard J. in Creamer Media TV, uploaded on 31.10.2018

5. The Fall and Transition

The decline of apartheid occurred on two levels. In the first place, the growth of social dissent especially within the most oppressed black population reached its peak after the Sharpeville massacre in 1960 when bloody clashes between protestants against the pass system and the South African police, left an ugly mark on inter-racial relations. In response to this event, the government decided to enact several security measures (like Terrorism Act No. 87 of 1964[63]) extending the powers of the public security forces and to ban ANC[64] and its sister organisation PAC[65] which promoted the protests. Several conferences organised by members of the two banned organisations and the liberal party, didn't bring any progress in dialogue with the government which continued to act on its own. In 1961 the ANC created Umkhonto we Sizwe (MK) which was its armed wing focused on sabotage missions and led by Nelson Mandela, already a strong leader within the ANC. Arrested more than once for his activity, Mandela and others important representatives of the organisation were sentenced to life imprisonment in 1964. There were many other African organisations which pursued similar goals with more or less radical approach. Another breaking point was the Soweto uprising of 1976, which evolved from students' protests and left around 700 dead victims. As the situation continued to slip out of the hand of NP's government, the black national consciousness continued to grow and to gain new allies in the international field as the case of Harold MacMillan's speech has shown[66].

It was, perhaps, the very tendency of international isolationism and somehow ineffective foreign policy that definitely closed the white rule chapter in South African history. This didn't happen instantly: after the end of the Second World War and a still uncertain fate of the world, South Africa was able to hide itself from international criticism in the shadow of the early Cold War as one of the winning allied powers. This

[63] This Act allowed a police senior officer to arrest and detain a suspect of terrorism until "no useful purpose will be served by his further detention "(sec.6.1). Such measure was excluded from judicial review (sec.6.5)
[64] African National Congress
[65] Pan Africanist Congress – more radical and black only party
[66] "The most striking of all the impressions that I have formed since I left London a month ago is of the strength of this African national consciousness. In different places it takes different forms, but it is happening everywhere. The wind of change is blowing through this continent and whether we like it or not, this growth of national consciousness is a political fact. And we must all accept it as a fact, and our national policies must take account of it." – Harold MacMillan's speech to the Parliament of South Africa, held 3rd February 1960.

was also assisted by the protective cloak that British Commonwealth granted over its dominions. When in the 1960's the process of decolonization begun and new alliances began to form. The government's aimed to promote the country's image as a good industrial and economical partner by allowing large scale international investments. The decolonization brought rather negative effects: the British under pressure from other international subjects decided to abandon its colonial policies and to focus on the development of the Commonwealth of Nations in a more liberal way instead. This was what caused South Africa's withdrawal from the Commonwealth and the declaration of the Republic completely free of foreign influence. The newly created African States in many cases followed a Marxist ideology, dangerous for South African apartheid system. The military intervention during the civil war in Angola didn't bring the desired stabilisation effect. After the fall of Rhodesia in 1979 and the changes on political scene in the USA, South Africa was virtually left without any allies. The situation wasn't improved by the conflict with the United Nations and the International Court of Justice in 1966 with reference to the South West Africa (Namibia) case, in which, despite expiring UN trust territory mandate, South Africa continued to occupy and implement apartheid in the aforementioned country. The discussion on the case will be expanded in the following chapter. For the most part, apartheid inventors ignored completely the development of the international law especially in the human and citizen's rights field. In a paradoxical way, although, it was the very case of South African "social experiment" that helped establish new rules in the in international humanitarian law.

5.1 The End of Apartheid

In the 1980's it became clear that apartheid could not survive in its unchanged and sterile form. Because of that a desperate attempt to make significant amendments to the existing system, became the main objective of the elected in 1978 prime minister P.W. Botha. He followed a policy of "adapt or die" which foresaw that the only way to save the Afrikaners and their control over the country was an agreement with other races and a higher level of democracy of rights. He emphasised the need of a warmer and more solidary approach towards the Native group by saying: "If people are oppressed, they fight back. We must respect the rights of other people and free ourselves by giving to

others in the spirit of justice, what we Afrikaners asked for ourselves."[67] This still didn't mean that there was an intention of any radical changes to the homeland system or black representation within the government. The situation was still dire as ANC's military activity continued to escalate. The economy also found itself in a bad shape, as there weren't enough skilled and qualified workers to preform certain jobs. Lack of workforce led to smaller gaps in wages between different races. This also provoked the slow fading away of the class barriers which characterised the racially divided society up to this point. Despite opposition from a more radical wing of the NP in 1983 a small revolution occurred when following a successful popular referendum yet another constitution was approved. It established a three chambered parliament with separate chamber for white, coloured and Indian group. "Each chamber had its own cabinet and budget to deal with 'own affairs' in its particular community, such as education, housing and social services . There were also 'general affairs' which included defence, law and order, and economic policy. Bills were discussed separately by each house and were duly passed or rejected. The only power sharing element was in the requirement that all three chambers had to approve a bill and the fact that coloured and Indian representatives could serve in the general affairs cabinet."[68] The new constitution helped to picture a better diplomatic image for South Africa. The ultimate goal of the ongoing and future reforms was to create a balanced division of power between races without prioritizing one over the other. This was contrary to the ANC's approach aiming to take a complete control over the country by securing an absolute majority in the Parliament. As a compensation for not including blacks in the parliamentary representation, the government promoted the local self-independent black authorities, however these were mostly underfunded and unable to meet the expectations of the citizens.

In 1984 the country found itself on a verge of a civil war when violent protests had place almost in its every part. Botha stood his ground, not intending to go for far-reaching concessions considering them as a significant threat for the white population's security in the country (this again worsened the international relations and led to more sanctions). Both the ANC and the government weren't powerful enough to overthrow

[67] Giliomee H. "Adapt or die", 1978-1984, (2014) *A History of South Africa*, Pretoria, Protea Book House, 397
[68] *Ibidem*, 406-407

one another in an armed struggle and negotiations appeared to be the only reasonable option. ANC demanded the release of Nelson Mandela as the condition to start the negotiations. Meanwhile, Botha was succeeded by F.W. De Klerk[69]. The Solidarity movement in Poland, the fall of the Berlin Wall and the failed economic recovery programme led to the dissembling of the Soviet Union, which meant that the ANC lost one of the main promoters of the communist ideology within the organisation and was dragged back towards a more moderate stance. As a result, De Klerk lifted the banning orders on the ANC and PAC and he released several political prisoners, among which Mandela in 1990. "Mandela possessed exceptional characteristics which were well suited to the circumstances. He had a great deal of personal presence and was able to combine seriousness towards life and charisma with a sense of humour and humility [...] He had an autocratic streak-a combination of the styles of a tribal chief and a democratic leader – but his actions were always accompanied by courtesy and good manners. [...] He condemned apartheid as a serious crime against humanity, but he regarded Afrikaner nationalism as a legitimate indigenous movement."[70] In a referendum in 1992 the majority of whites agreed with the NP's policy endorsing a new constitution with equal power sharing and thus the abandonment of apartheid. "Afrikaners had handed over the power with a measure of grace. They had relinquished sole dominance before they were defeated."[71] However, the NP's hope to maintain a balanced power sharing stance faded away when the ANC gained an upper hand in the negotiations and pushed towards majority's rule. The weakened NP had lost almost all its black support and was forced to accept ANC's proposals in various matters. The works on an interim constitution were concluded and in 1994 for the first time in the country's history, completely free and universal elections had place. The ANC secured a majority of over 62% of votes and Mandela was appointed as the State President, which focused on reconciliation between races, and reconstruction of South Africa's position in the international field (in 1994 the country rejoined the Commonwealth of Nations). Despite this incredible and for the most part bloodless change, Mandela's clever

[69] South African State President 1989-1994
[70] Giliomee H. Uprising, War and Transition, 1984-1994 (2014) *A History of South Africa*, Pretoria, Protea Book House, 421-422
[71] *Ibidem*, 425

leadership and a hopeful start, the renewed Republic continued and to this day continues to struggle with various issues also in the human rights protection sector.

Still, the joint legacy of Mandela and De Klerk's cooperation and the implementation of democracy's security measures helped to prevent scenarios which occurred in several other parts of Africa, presenting a dramatic picture of almost endless civil wars, human sufferings, complete anarchy or ruthless dictatorships. Years after the fall of apartheid De Klerk said: "I think that together we gave the RSA[72] strength. We managed to do it because we reached an agreement and worked out a very good constitution for South Africa, implementing the ideals of human rights. We have created a state where the constitution is the highest law. The constitution has mechanisms to prevent the abuse of power, such as a constitutional court, which, if parliament adopts a law that violates the constitution, has the right to order its rejection. And the Court did so, many times."[73]

5.2 The Role of Truth and Reconciliation Commission

Whereas the new constitution and free elections were symbols of the political transition in the country, the establishment of the Constitutional Court and the Truth and Reconciliation Commission (TRC) presented the judicial dimension of such transition. TRCs have been established in order to prevent scenarios of one side judging and prosecuting another being in a subordinate and somehow helpless position, for example through mass scale criminal proceedings. TRCs use "truth telling to build and strengthen processes of development, reparation, reconciliation and healing of painful memories"[74] in order to restore social order and heal individual victims.[75] The issue was addressed by the Interim Constitution (1993): "The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society."[76] The South African TRC was established in accordance with Promotion of National Unity and Reconciliation Act

[72] Republic of South Africa
[73] Press Interview at Warsaw's World Summit of Peace Nobel Laureates
[74] Burton M., (2004), *Custodians of Memory: South Africa's Truth and Reconciliation Commission*, 32:2 INT'L J. LEGAL INFO, 417.
[75] Clark J.N., (2011), *Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship*, II INT'L CRIM. L. REV, 241 .
[76] South Africa's Constitution, Act no.200 (1993)

(1995) and was tasked with the investigation of "gross human rights committed during the period from 1 March 1960 (the Sharpeville massacre) to 1994. The TRC was divided into three committees: the Committee for Human Rights Violations, the Amnesty Committee, and the Committee on Reparation and Rehabilitation."[77] The Commission's work were carried in accordance with constitutional provisions granting amnesty to the perpetrators but at the same time identifying their victims and establishing contact between the two. One of the problems that the South African TRC faced was the incapacity of including all necessary subjects into the process which would favour not only nation wide reconciliation but would also help in personal psychological rehabilitation. The Commission managed to identify 28,750 victims and detect 33,713 cases of serious human rights violations, however, these didn't include violations committed by different organisations outside RSA's territory and many incriminating documents were destroyed before the process could begin.[78] Many criticised the TRC's work claiming that justice had not been properly delivered and that Nuremberg[79] model should have been adopted. The Commission's president, archbishop Desmond Tutu rejected these objections claiming that the Nuremberg model was a fruit of the will of the winners, whereas in South Africa where the transition was an effect of a compromise such option was not possible and its eventual adoption would have brought catastrophic consequences for the society.[80] Undoubtedly, the Christian profile of several of the Commission's members gave it more of a "redemption and forgiveness" character without the will of pressing punitive claims. Considering sometimes completely terrible mental and physical state of the victims the Reparation and Rehabilitation Committee issued for the creation of urgent interim reparations before the final provisions in the matter are adopted. These came in 2003 when "eight years after the TRC started its work - the government passed Regulations 1660, which

[77] Francis, V. F. (2016). *Designing emotional and psychological support into truth and reconciliation commissions.* Willamette Journal of International Law and Dispute Resolution, 23(2), 283.
[78] *Ibidem* 284.
[79] Nuremberg trails – a series of criminal prosecutions conducted by allied powers after the end of the II World War against war criminals of the III German Reich. The war criminals with the highest State and military rank were brought before the International Military Tribunal (1945) where, for the first time in history, they were prosecuted for crimes against humanity among others.
[80] TRC Report, vol. 1, 5

entitled each identified victim to a paltry ‘once-off reparation grant in the amount of R30 000 [US$200] as final reparation’.”[81]

5.3 Current Challenges

Despite the initial eagerness and active reconciliation policy, the shadow of apartheid still looms in South African society today. The analysis of all effects that the apartheid had on the contemporary South Africa would be rather extensive so in this concluding part, the question of how it affected the respect of human rights and inter-racial relations will be discussed. Corruption, Fear of radicalisation of the ANC, which is currently in an almost complete control of the country, the uncontrolled and violent attacks on the white farms combined with the hate speech[82] and land expropriation issue are among the biggest concerns. The last case regarding land expropriation without compensation of mainly white owned farms is particularly dangerous: proposed by radical Economic Freedom Fighters party, the plan of expropriation would follow a similar path to that of Mugabe's Zimbabwe where such acts led to serious grievances for the Zimbabwean economy. Although any initial propositions were blocked by the Constitutional Court, in February 2018 section 25 of the Constitution has been reformed by the National Assembly eliminating one of the main obstacles in the implementation of this controversial legislation. It is important to underline, however, that the expropriation would concern labour and not living areas and would be subject to certain conditions.[83]

An interesting overview of the current problems and needs relating to inter-racial relations was given by the UN Committee on the Elimination of Racial Discrimination. In its report on South Africa from 2016 the Committee pointed out the need of proper implementation of the legislation fighting the hate speech, called for just treatment of refugees and targeted immigrants and insisted on protection of indigenous groups and

[81] Francis, V. F. (2016). *Designing emotional and psychological support into truth and reconciliation commissions.* Willamette Journal of International Law and Dispute Resolution, 23(2), 291.
[82] Chung F. (March 2017) *‘Bury them alive!’: White South Africans fear for their future as horrific farm attacks escalate,* Retrieved from: https://www.news.com.au/finance/economy/world-economy/bury-them-alive-white-south-africans-fear-for-their-future-as-horrific-farm-attacks-escalate/news-story/3a63389a1b0066b6b0b77522c06d6476
[83] Staff Writer, (July 2019) *New proposals for how land expropriation without compensation should work in South Africa,* Retrieved from: https://businesstech.co.za/news/government/331747/new-proposals-for-how-land-expropriation-without-compensation-should-work-in-south-africa/

marginalised women with emphasis on those subject to harmful practices like kidnap and forced marriage.[84]

[84] Committee on the Elimination of Racial Discrimination (5 October 2016), *Concluding observations on the combined fourth to eighth periodic reports of South Africa,* CERD/C/ZAF/CO/4-8

CHAPTER II: Racial Segregation in International Law

1. Apartheid, Racial Segregation and Racial Discrimination

In terms of international law, apartheid can be interpreted as a particular and aggravated form of racial discrimination exercised through segregation and conducted by State bodies against a particular racial group or groups. However, whereas the legal problem of racial discrimination received much more interest from the international community, the concept of an apartheid system somehow struggles for such attention especially within regional organisations of which Member States didn't experience such or similar systems. For this reason, several paragraphs below will also treat about general racial discrimination and its relationship with the specific case of apartheid. Being a manifestation of discrimination, the racial segregation as enforced by the apartheid tends to absorb some of the norms regarding the former.

In its autonomous form the concept of apartheid has been mainly developed by the UN or the UN related organisations in international criminal law which defined it as a "crime against humanity"[85]. In the international law on human rights, in more general terms, it has been discussed in numerous UN resolutions and rather simply mentioned by the art.3 of the International Convention on the Elimination of Racial Discrimination (ICERD).

Prohibition of racial discrimination and discrimination on other grounds on the other hand, has managed to find its place among the *jus cogens*, constitutional principles and general legislation of States, charters and statutes of regional organisations, and universal conventions on human rights among which ICERD above all.

As the two concepts remain strictly connected, it is necessary to analyse some of the instruments used to define discrimination within the identification of elements that could possibly affect the evolution of the concept of apartheid to a broader definition.

[85] Through the use of ICSPCA, Draft Code of Crimes against the Peace and Security of Mankind and Rome Statute

2. Racial Segregation in XX century

The concept of legal racial segregation was not limited to apartheid's South Africa and presented itself in several other cases around the world in different forms and manners whether *de jure* or *de facto*. State promoted discriminations in history were based mostly on religious, ethnic, cultural, social and also racial foundations. In the Colonial era, slavery was not the only manifestation of this phenomenon, as in most colonies even free people had to accept social divisions based on origin. For example, in Spanish colonial Mexico a caste system was introduced that aimed to facilitate the recognition of a person's origin if of mixed heritage[86] which to this day continues to have its effect on the society. In Europe, the "landless" populations such as Roma and Jews were particularly vulnerable to unfair treatments when being identified as an "external element".

The development of racial philosophy and the rise of Nazi and fascist ideologies in the Third German Reich and Kingdom of Italy led to the implementation of the most oppressive racial norms especially in the former case. Before the outbreak of the Second World War and the adoption of the "Final Solution" in terms of mass exterminations of Jews (and not only), racist provisions were endorsed in the Nuremberg Laws (1935) which included Law for the Protection of German Blood and German Honor and Reich Citizenship Law. According to the former one, Jews were prohibited to marry Germans and the extramarital relationships between the two groups was forbidden. The latter law, in combination with secondary sources, provided for very strict racial origin classification in accordance to blood connections which was decisive for the right to citizenship.[87] The applicability of the law was extended also to Romani and Black people. Other provisions included exclusion from military service and economic activity restrictions. Contrary to the South African case where the judiciary tended to contrast apartheid laws in some situations, the ordinary judges of the Reich became the very tool used to legitimize the abuse of power of the NDSAP[88]. In fact, "The Nazis corrupted a

[86] *Racial Classifications in Latin America*, Retrieved from: http://www.zonalatina.com/Zldata55.htm
[87] "Reichsbürgergesetz und Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre ["Nürnberger Gesetze"]" (in German). Friedrich-Alexander Universität Erlangen-Nürnberg. 14 November 1935. Retrieved from: https://www.1000dokumente.de/index.html?c=dokument_de&dokument=0007_nue&object=translation&st=&l=de
[88] Nationalsozialistische Deutsche Arbeiterpartei (National Socialist German Workers' Party)

system of justice and turned it into a weapon of terror, hate and a false justification for acts against Jewish people, their businesses and their very existence."[89] Similar regulations were adopted in the occupied eastern territories and those annexed directly by the Reich inhabited by Slavic populations perceived as "sub-human". In occupied cities separate amenities in public places were organised and marked with signs "Nur für Deutsche". The difference between the apartheid and discrimination outlined by Hitler and the NSDAP is found in the ultimate goals of these systems. Both claimed that they acted in protection of race and civilization and its "struggle for survival", however whereas in South Africa concept of "separate development" of different societies was at the centre of the system, in Germany the message was much more aggressive and depicted Semites and, in a long term, all the other races, as the "ultimate evil" of which the very existence posed a threat to Arian race. This means that genocide or a system of death camps was never a valid option in the South African context, an element which has to be taken into account when analysing similar situations. It is interesting to note how in the Italian case, racist policies were implemented in a scientific rather than purely sociological or political key. The "Manifest of The Racist Scientists"[90] acknowledged the existence of races in a biological sense and promoted the need of protection of racial integrity. In its colonial empire, Italy adopted racial separation acts which legitimised the discriminatory provisions, although these measures were also unofficially present in other colonies of the European powers where they were developed in customary way after several decades of colonial domination.[91] Although Jewish minorities in Italy were much smaller and much more integrated into society than in the German case, from 1938 onwards, under political pressure from its northern ally, Italy passed a series of royal decrees prohibiting the Semites from joining the army, possessing major industrial or agricultural plants, working in public services and attending to and teaching in Italian schools.[92] [93] Many other nations being part of the

[89] Heideman, R. D. (2016-2017). Legalizing Hate: The Significance of the Nuremberg Laws and the Post-War Nuremberg Trials. *Loyola of Los Angeles International and Comparative Law Review, 39,* 16.
[90] Publicated in journal *La Difesa Della Razza, no.1* (in Italian), (5.VIII.1938)
[91] Barrera G. (2003) *Mussolini's colonial race laws and state-settler relations in Africa Orientale Italiana* (1935-41), Journal of Modern Italian Studies, 8:3, 432
[92] Cohen C.N.H. (2018) 1938 *Leggi Antiebraiche La storia attraverso i documenti* (In Italian), Pearson Italia, 2-3 https://it.pearson.com/content/dam/regioncore/italy/pearsonitaly/pdf/storia/ITALY%20-%20DOCENTI%20-%20STORIALIVE%202018%20-%20Cultura%20storica%20-%20PDF%20-%20Nizza%20Leggi%20razziali.pdf
[93] Regio Decreto Legge n. 1390 (5.IX.1938)

Axis, except Japan, were partially forced to implement similar provisions in their legal systems.

3. International Organisations' Involvement

The aftermath of the Second World War is widely considered as a turning point in humanity's and human rights' history. The terms "international war crimes" and "crimes against humanity" were mentioned before, for example in occasion of Hague Conferences of 1899 and 1907 and in a joint statement condemning the Ottoman genocide of Armenians. The creation of the United Nations at San Francisco conference in 1945 and formation of several regional organisations in the following years, as well as consolidation of global powers and the decay of old colonial empires set a new mark on history. In the following paragraphs an analysis of the evolution of international protection of human rights in racial discrimination and segregation context will be performed.

After the end of the war, a common effort was made to maintain international peace and order and prevent further conflicts at all cost, even if it meant limiting independent States' sovereignty in some matters in favour of international community (identified in the UN and later other organisations). This was accompanied by the need of creating a common human rights policy that would be valid worldwide and thus an international system of protection of such rights. This self-restrains policies proved to be revolutionary. In fact , "Arrangements to adjudicate human rights internationally thus pose a fundamental challenge not just to the Westphalian ideal of state sovereignty that underlies realist international relations theory and classical international law but also—though less-frequently noted—to liberal ideals of direct democratic legitimacy and self-determination. The postwar emergence of these arrangements has rightly been characterized as the most 'radical development in the whole history of international law.' "[94] The first successful international judicial initiative was the Nuremberg International Military Tribunal. Despite some voices questioning its legitimacy, the tribunal managed to achieve its primary goal and prosecute all major representatives of the Nazi regime. The major criticism of the tribunal regarded the fact that it lacked a

[94] Moravcsik, A. (2000). *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*. International Organization, 54(2), 218

precise legal source as for classification of crimes against humanity. It became clear that a need for an internationally recognized set of rights should be redacted. This task fell mainly upon the UN which in its Charter claims that its purpose is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"[95] The Charter itself stated that the UN respects domestic jurisdiction of Member States (MS) and shall not require any Member to submit internal matters to settlement under the Charter[96], giving clear signal that it does not want to exceed the acceptable level of interventionism. This rule, however, didn't apply to the main objective of the UN which is maintenance of peace and prevention of war, expressed through Security Council's decisions present in Chapter VII of the Charter.[97] Nonetheless, it is necessary to underline that according to the Charter, the organisation by promoting the respect of human rights[98] also expects other MS to pledge themselves to take joint and separate action in co-operation with the Organization to achieve such purpose[99]. These provisions were of not binding nature. In fact, Simma argues that in contrast to art. 25 and the obligation for MS to accept and carry out the decisions of the Security Council, art. 56[100] is far less rigid and concerns only purposes to be followed (art. 55) rather than substantive obligations[101]. Human rights thus remained excluded from any formal international protection.

Nonetheless, with time, the HR topic began to influence public discussion and became a political and diplomatic tool capable of measuring States' international reputation and their level of civilizational progress. In such conditions the Universal Declaration of Human Rights (UDHR) was born. Proposed by Panama's delegation at

[95] U.N. Charter, Art. 1 para.3
[96] The UN Charter can be interpreted as a 'frame' or fundaments for dealing with human rights issues and the UDHR followed by the two Convenants on Civil and Political rights and on Economic, Social and Cultural Rights is what gives substance to the HR and their protection – Simma B. (Ed.) (2002) *The United Nations Charter: a Commentary,* 2nd Edition, Oxford University Press, Oxford, 924-925
[97] *Ibidem*, Art. 2. para.7
[98] *Ibidem*, Art. 55 para.(c)
[99] *Ibidem*, Art. 56
[100] It is safe to say that the interpretation of the legal value of art.56 could change various times throughout decades depending mainly on the political position of the UN.
[101] Simma B. (Ed.) (2002) *The United Nations Charter: a Commentary,* 2nd Edition, Oxford University Press, Oxford, 942

the first meeting of General Assembly, the Declaration was passed at the third one with 48 votes in favour and 8 delegations abstaining from voting. Most of them were countries of the future Warsaw Pact, but the abstention was also made by Saudi Arabia and, unsurprisingly, South Africa.[102] A brief analysis of UDHR is necessary to understand how it affected the discrimination issue.

3.1 Apartheid in the context of the Universal Declaration of Human Rights

There were some provisions particularly able to undermine the apartheid system. Art. 1 provides that "All human beings are born free and equal in dignity and rights" and such provision is strengthened by art. 2 stating that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Whereas these two provisions addressed the applicability of the UDHR and identified the protected subjects (individuals), there are several rights protected by the Declaration which weren't compatible with the racial segregation system. For instance, in South Africa the apartheid didn't guarantee equality before the law and equal protection without discrimination[103] and through Land and Urban Acts and the pass system it restricted right to freedom of movement and residence sanctioned in art. 13(1). The Immorality Acts violated norms regarding freedom of marriage without distinction of race, nationality or religion.[104] The various acts regarding representation and the early constitutions to some extent were in contrast with freedom to political representation especially considering the formula present in art. 21 para.3: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.". This meant that even measures implemented to establish certain basic self-representation and self-administration bodies like the homelands system, weren't sufficient as these bodies were dependant anyway on the central government to which access by non-white racial groups was constantly denied and to which the

[102] *Ibidem*, 925
[103] Universal Declaration of Human Rights, Art.7
[104] *Ibidem*, Art.16 para.1

elections were limited to only one part of society. Discriminatory acts hit also equal work[105], education[106] and propriety ownership[107] rights.

Considered as one of humanity's greatest legal achievements, the UDHR has been adopted in December of 1948 and implemented in many constitutional systems worldwide. Despite not having legally binding nature at the beginning, with time it became a fundamental part of international customary law. The rising legal validity and authority of the Declaration was confirmed in occasion of International Conference on Human Rights held at Teheran in 1968. "Today the Declaration not only constitutes an authoritative interpretation of the Charter obligations but also a binding instrument in its own right, representing the consensus of the international community on the human rights which each of its members must respect, promote and observe."[108] Simma also adds to this list, the binding validity of UDHR in view of general principles of law according to art. 38(1)(c) of the ICJ Statute.[109]

UDHR challenged what was at that time the race question regarded as internal issue. In fact, racial equality, as proposed by China, was already to be included in the UN Charter, however according to some MS such provision would be considered a breach of inviolability of domestic jurisdiction (art.2.7 UN Charter)[110]. The authoritative role of the Declaration, was mainly focused on its political value, as it couldn't count on any international legal protection at the time. Also its implementation was questioned in consideration of different social and cultural mindsets that ruled different parts of the world, in a moment when modern understanding of globalization was still a distant concept. The violation or deprivation of human rights can have different backgrounds and be caused by different reasons.[111] The extent of such deprivation is also important.

[105] *Ibidem*, Art.23
[106] *Ibidem*, Art.26
[107] *Ibidem*, Art.17
[108] Sohn, L. B. (1977). *The human rights law of the charter*. Texas International Law Journal, 12(2-3), 133.
[109] Simma B. (Ed.) (2002) *The United Nations Charter: a Commentary*, 2nd Edition, Oxford University Press, Oxford, 926
[110] Banton M. (1996) International Action against Racial Discrimination. : Oxford University Press, Chapter 3
[111] "The objectives of deprivors may relate to common interests, both inclusive (importantly affecting a number of participants or the whole community) and exclusive (importantly affecting only a single participant), or to special interests (asserted on behalf of particular participants against the community) ; they may be conservative (of the interests sought to be protected) or destructive (of the interests of others). The magnitude of deprivation contemplated may also radically vary from instance to instance. It

Technically in South Africa, the marriage policy didn't forbid entering into marital relationship to any citizen, however it limited this possibility to marriages among people belonging to the same racial group, discrimination which in itself could be contemplated as a violation. On the other hand there were also provisions limiting freedom of movement of all different racial groups, but not in an equal measure. Question is whether there is a minimum threshold in the concept of human rights beyond which the level of respect of HR is acceptable despite differences in treatment of different groups. The government's policy in SA, tended to create a situation of apparent "equal discrimination" which to an extent was a synonym of "separate development". In their actions, the country's authorities tended to give minimum possible protection to the most discriminated groups which was limited to their basic rights and survivability and challenged their dignity in view of different racial barriers and treatment. What this means, is that even if the minimum basic rights were equally distributed to everyone, their effective level of protection could vary, thus some citizens would enjoy those same rights to a greater extent. This is strongly connected to the early concept of right to development which was later developed in the African Charter of Human and Peoples' Rights. In the UDHR this could correspond to art. 22[112]. One of the main scope of apartheid wasn't to exterminate or enslave the non-whites, but to maintain Afrikaner identity and role by controlling the country and society, control which, according to apartheid governments, would be only achieved by limiting access to the important positions in political, industrial and cultural sectors to whites only.

The universality of human rights was contested more than once. The UN enjoyed a significant amount of appraise, but it simply wasn't able to consider and include all aspects of societies living in completely different social, cultural and political settings. This is why the UDHR in its content was rather rudimental and focused on basic rights,

is of particular importance that latent (or disguised) objectives be distinguished from manifest (proclaimed) objectives.[…] The cultural matrix of deprivations may or may not be institutionalized. Deprivations may be organized or unorganized, patterned or unpatterned, centralized or decentralized, secret or open." – McDougal, Myres S.; Lasswell, Harold D.; and Chen, Lung-chu (1969), "Human Rights and World Public Order: A Framework for Policy Oriented Inquiry", Faculty Scholarship Series. 2575, 242-243

[112] Universal Declaration of Human Rights, Art. 22 –"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

in order to consolidate stable international foundations of what could be globally intended as set of moral principles that characterized any civilized nation. For this reason, a major role should be given to regional organisations, which created their own developed versions of human rights protection measures. Among these, a particular attention should be given to the Council of Europe founded in 1949 with the Treaty of London and Organisation of American States founded with the treaty of Rio de Janeiro in 1948. An important role is also covered by African Union, which, considering the considerable instability in some parts of the continent, is charged with a peculiar responsibility of promoting the protection of HR within perspective of internal conflicts. The regional organisations operating in a local context have space for a much more flexible policy making and for this reason they can be also more efficient when it comes to finding remedies to violations. Their authority in the region is greater and more direct than the UN control and thus the HR enforcement can be applied on a smaller individual scale.

The last important actors are the States which are mainly the executors of the HR protection acts. When the UDHR was adopted, several of them were in the eve of creating new constitutions which adopted HR principles. However, in some cases, in consideration of particular circumstances or political culture, even States themselves can come up with inventions which could later be applied in the international doctrine.

3.2 The UN action against South African Apartheid

The UN was fully aware of the situation in South Africa and it wasn't long until the first resolutions in the matter were issued. Initially the situation concerned purely political context and the main issues regarded the brutality of repression by police enforcement against protesting victims of the system.[113] In the UN treatment of the apartheid the South African government claimed the violation of the above mentioned art. 2.7 (inviolability of domestic jurisdiction) of the Charter, however the UN rejected such objection, without providing any justification. Nonetheless, Cassese states that the UN acted in a doctrinal derogation to the aforementioned norm in consideration of grave infringement of the principle of respect of human rights[114] which justified its

[113] Pierson-Mathy, P. P. (1970). Action des nations unies contre l'apartheid. Revue Belge de Droit International Belgian Review of International Law, 6(1), 206 (in French)
[114] Principle present also in the art. 55(c) of the Charter

intervention.[115] Initially the General Assembly (GA) limited itself to the discussion of the problem in terms of violation of principle of cooperation between the States and the Organisation as to promotion and respect of human rights as provided by Chapter IX of the Charter[116] ("a questionable interpretation").[117] In 1954 the GA took a conciliatory stance and invited the South African government to cooperate with and adopt ideas of the UN Commission on the Racial Situation in the Union of South Africa.[118] Such an approach, nevertheless, didn't produce any desirable results.

While the UN begun to expand as to its composition to African and Asian countries, much more critical of the Apartheid, the in South Africa the segregation system entered its "golden age". This led to a more decisive and interventionist approach of the Organisation. In 1961, The GA openly condemned the apartheid system and explicitly affirmed that it represented violation of both the Charter and the UDHR.[119] Questions arose as to what strategy should be adopted in order to enforce changes in the apartheid system. This is when the interpretative classification of apartheid slowly began to shift from violation of Chapter IX to a violation of Chapter VI regarding maintenance of peace and international security, a position which opened the stage for Security Council's (SC) intervention, however without going as far as to consider the use of measures present in Chapter VII[120]. This is also the period in which South Africa began to suffer from international isolationism which further worsened its position in the international community.[121] This reclassification has been confirmed by the SC which held that the situation in South Africa "led to international friction and if continued

[115] Cassese A (1970) L'azione delle Nazioni Unite contro l'Apartheid. Comunità Internazionale 25(3-4), (In Italian), 621
[116] UN Charter, art. 56 (in connection with art 55 (c))
[117] Cassese A (1970) L'azione delle Nazioni Unite contro l'Apartheid. Comunità Internazionale 25(3-4), (In Italian), 622
[118] UN General Assembly, Question of race conflict in South Africa resulting from the policies of *apartheid* of the Government of the Union of South Africa, A/RES/820(IX) (14 December 1954)
[119] UN General Assembly, Question of race conflict in South Africa resulting from the policies of *apartheid* of the Government of the Union of South Africa, A/RES/1598(XV) (13 April 1961), para. 4
[120] If there exists a serious threat to international peace and security there are two categories of instruments that can be implemented by the Security Council. These are present in UN Charter's Art. 41 (Measures not involving the use of armed force which "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations") and in Art.42 (Measures involving the use of armed force, which "may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").
[121] *See at* 35-36

might endanger international peace and security"[122] (similar conclusions were made by the GA in the resolution 1598) and thus solicited the government to abandon the discriminatory policies.[123]

The first to call for sanctions was the General Assembly which in 1962 expressly listed several measures of economic and diplomatic nature to be issued by Member States upon South Africa. Among such measures there were: breaking of diplomatic relationships, the closure of sea and air ports for South African units and bans on trade imports and exports including all arms and ammunition.[124] The Security Council responded with a similar resolution however limiting itself to call all States (not only MS) to cease sale and shipment of arms, ammunition and vehicles to South Africa.[125] The measures adopted by the Security Council, had a hybrid nature: on the one hand there were above mere recommendations issuable by the SC in the international dispute settlement (art. 36 UN Charter) and on the other they were not measures adopted expressly under Chapter VII despite having similar content.[126]

Cassese explains on how the two organs were guided by different purposes when recommending sanctions. General Assembly aimed to the dismantling of apartheid through the process of international "suffocation" of South Africa, which in view of total isolation, would be forced to change its policies in order to save its economy. Security Council looked for a more subtle result of weakening the military and police forces of the country – main executors of the apartheid regime.[127]

The recommendations issued in this way by both organs, however, do not enjoy the superiority over other international obligations in the same way the Charter itself [128] or

[122] The use of word "might" is fairly important: The Security Council avoids considering apartheid as an instant violation of or threat to international peace and security, but rather prefers picturing such threat as "eventual" or "possible" danger in case of its persistence.
[123] UN Security Council, Question relating to the situation in the Union of South Africa, S/RES/134 (1 April 1960)
[124] UN General Assembly, The policies of *apartheid* of the Government of the Republic of South Africa, A/RES/1761(XVII) (6 November 1962)
[125] UN Security Council, Resolution 181, S/RES/181 (7 August 1963), para. 3
[126] Cassese A (1970) L'azione delle Nazioni Unite contro l'Apartheid. Comunità Internazionale 25(3-4), (In Italian), 628
[127] Three permanent members of the SC distinguished between armaments of external and internal use, specifying particular need on ban on exports of the latter. – *Ibidem*, 627-628.
[128] UN Charter, Art 103

SC decisions under Chapter VII [129] do. Nonetheless, the recommendations may derogate fully or partially the contents of, for example, a bilateral treaty, if both parties have accepted the content of such recommendations (in accordance with general principle of cooperation implicitly present in the Charter). Ultimately, this phase of "recommendations" didn't prove to be extremely efficient and only African, Asiatic and socialist States embraced fully the recommendations of the GA (SC recommendations were more successful and worldwide applied). Instead, a major progress was made in the research and spread of public information on apartheid and the humanitarian activity against it.[130]

Whereas initially the SC for political reasons[131] wasn't yet able to act against South Africa under Chapter VII, such fate met one of South Africa's closest and only allies which practiced a semi-analogous system to apartheid: Rhodesia. The British colony of Southern Rhodesia almost immediately after its Unilateral Declaration of Independence in 1965 was hit by a wave of international criticism as to its illegitimate status. The SC claimed that the "racist (white) minority regime" in the ex-colony shouldn't be recognized by the Sates worldwide[132] (in fact it violated the emerging rules on self-determination) and that such a "rebellion" constituted a threat to international peace and security. The diplomatic and political situation of the non-recognized Rhodesian Republic was even worse than that of South Africa, and thus it was easier for the SC to act in accordance with Chapter VII. For this reason the Resolution 253 of 1968 which established mandatory sanctions towards Rhodesia, can be considered as historical, being one of the first in which the SC acted under art. 41 of the Charter.[133]

After Rhodesia, In the late 60' and subsequently in the 70's the strategy towards South Africa again had to take a different path. Whereas, the General Assembly began to support local anti-apartheid activists and groups like ANC condemning the

[129] UN Charter, Art. 25
[130] Cassese A (1970) L'azione delle Nazioni Unite contro l'Apartheid. Comunità Internazionale 25(3-4), (In Italian), 632-634
[131] Despite the country's poor reputation, the Western Powers weren't excessively determined to depose the ruling regime. In fact, "Apartheid South Africa served as an anti-communist bulwark in the war against Russian-Cuban meddling in the civil wars of Angola and Mozambique." - Carisch, E., Rickard-Martin L., Meister S. (2017). *The Evolution of UN Sanctions From a Tool of Warfare to a Tool of Peace, Security and Human Rights* /. Cham :: Springer International Publishing, 1170
[132] UN Security Council, Resolution 216 ,S/RES/216 (12 November 1965); Resolution 217, S/RES/217(20 November 1965)
[133] UN Security Council, Resolution 253, S/RES/253 (29 May 1968)

government's repressive and mass imprisonment actions in order to completely abolish the existing regime, the Security Council was still more leaned towards the (still unreachable) mandatory sanctions system which would force the existing government to apply changes. Finally after years of pressure, in 1977 the Security Council had managed to arrange mandatory sanctions on armaments supply to South Africa and forbade any assistance on nuclear weapons development program[134]. In this way any still subsistent doubts on the violation of non-interference principle have been utterly resolved because of the derogatory nature of measures adopted under Chapter VII[135]. The last resolutions aiming to dismantle apartheid through sanctions date back to the 80's. Security Council through resolution 569 in 1985 called for other economic restrictions.

The usefulness of sanctions in today's world is sometimes contested[136] especially by public opinion. In a strongly globalized world it is difficult to imagine a State functioning effectively without support of international trade and self-sufficiency is a rare attribute. For a country like South Africa which, despite its "separateness" and isolationism policies, was strongly dependant on economic ties with Europe and America, economic sanctions when widely applied were able to change the direction in which the apartheid was going, and ultimately such sanctions proved to be a good supporting tool for the change of regime.

3.2.1 South West Africa (Namibia) Experience

A major focus, was also placed upon the question of South West Africa (Namibia) which in its own way represented a milestone in international law development. South Africa gained control of the German colony of Namibia in 1915 and in 1920 it was granted League of Nations (LON) administration mandate.[137] In accordance with art.77(1) of the UN Charter in 1950 and an advisory opinion of International Court of Justice (ICJ)[138] the previous mandate was converted in the UN trusteeship mandate in

[134] UN Security Council, Resolution 418, S/RES/418 (4 November 1977)
[135] Venturini G., *La vicenda sudafricana e l'evoluzione del diritto internazionale*, 134
[136] *See* https://www.weforum.org/agenda/2015/02/how-effective-are-economic-sanctions/
[137] In accordance with art. 22 of the Covenant of the League of Nations (1924)
[138] International Court of Justice, International status of South-West Africa, Advisory Opinion : I.C.J. Reports 1950, p. 128.

consideration of the UN as natural successor of the LON. The framework of the International Trusteeship System was delivered in Chapter XII of the UN Charter and it aimed "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence […] (and) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world."[139] The status of trust territories in terms of search for self-determination was also strengthened by the General Assembly with the Declaration on the Granting of Independence to Colonial Countries and Peoples[140]. Also the Assembly in consideration of somewhat difficult relationship and lack of co-operation between South African Government and UN supervisory body of the mandate identified as South West Africa Committee adopted a resolution in which it called for an intervention of Security Council (SC)[141] which expressed that the situation in the country might disturb international peace and security if persisting,[142] and condemned South Africa's interference with the internal matters of the neighbour States[143]. Consequentially, this led to diplomatic (among which request not to recognize South African authority over Namibia) and economic (mainly investment) sanctions issued upon South Africa by the SC in relation to the South West Africa matter[144].

3.2.2 Apartheid and the right to self-determination

Another interpretation by which art. 2(7) of the Charter can be derogated regards the right to self-determination of peoples. Whereas, normally such right is triggered in case of "external" nature of foreign domination or occupation, the South African scenario introduced an "internal" case in terms of strongly disproportionate minority rule over the majority[145]. Right to self-determination is generally accepted as a peremptory norm

[139] U.N. Charter, Art. 76 para (b),(c)
[140] U.N. General Assembly Resolution, Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV) (14 December 1960)
[141] U.N. General Assembly Resolution Question of South West Africa, A/RES/1596(XV) (7 April 1961)
[142] U.N. Security Council, Security Council resolution 134 (1960) (Question relating to the situation in the Union of South Africa), S/RES/134 (1 April 1960)
[143] Carisch, E., Rickard-Martin L., Meister S. (2017). *The Evolution of UN Sanctions From a Tool of Warfare to a Tool of Peace, Security and Human Rights* /. Cham :: Springer International Publishing, 169
[144] UN Security Council, Resolution 283, S/RES/283 (29 July 1970)
[145] Venturini G., *La vicenda sudafricana e l'evoluzione del diritto internazionale*, 135

of international law[146]. The concept of the right itself is rather vast and supported by various theories and will not be discussed here, however the most basic definition should be given: The two International Covenants on human rights state that "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[147] Such a definition followed the one presented by General Assembly in the above mentioned Declaration on the Granting of Independence to Colonial Countries and Peoples.

The violation of right to self-determination appears to be particularly evident in the political self-representation rights sphere of apartheid. Historically speaking, on the one hand starting from the formation of the Union, there was none or a very limited and indirect representation of non-whites within the State or regional authorities, on the other, the ANC, biggest political representative of black populations, couldn't hope for any serious dialogue with the government.

It would be wise to take in consideration the primary rights that make up the notion of self-determination: "the right to recognition, and the rights of dependent peoples, which may be subdivided into: (a) the liberty to take steps to achieve full self-government without hindrance, (b) the right to interim protection, (c) the right of permanent sovereignty over their natural wealth and resources."[148]

As for the former right, the UN claimed that the status of self-determination right holders defined as "dependent people", and the point in which it could be said that they're actually enjoying such right, is to be established by the Organization itself.[149] Once such status is granted, it is possible to begin the process of self-liberation and achievement of self-government through negotiations with the central authorities. It is noteworthy however, that self-government doesn't necessarily mean independence and

[146] Klug, H. (1989). Self-determination and the struggle against apartheid. Wisconsin International Law Journal, 8(2), 275-276
[147] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 360 (1967).; Art.1(1)
International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368 (1967). Art.1(1)
[148] Klug, H. (1989). *Self-determination and the struggle against apartheid*, Wisconsin International Law Journal, 8(2), 289
[149] *Ibidem*, 290

can assume various forms of autonomy. In case in which the government denies a recognized right to self-determination, the UN is most likely to take side of the oppressed group in accordance with The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States.[150] Moreover, it is known that the armed struggle in case of denial of self-determination should be considered legitimate[151] and such a conflict does not constitute a civil war.[152]

The South African government relied on the argument that the system of "homelands" or "Bantustans" was enough to satisfy the right to self-determination of non-white population. This opinion, however, didn't find UN's approval, which perceived the system as contrary to the Charter and to the Decolonisation Declaration which sanctioned the territorial integrity principle.[153] The case in South Africa might be seen as an exception to the general rule: usually it would be the oppressed group to seek the territorial independence, whereas in the present case, it is the governing regime that seeks to isolate the undesired groups in a particular portion of territory. Furthermore the Bantustans weren't created as a response to the non-white population needs of self-government, but rather as a tool of separation and were still somehow dependant on the central government.

In conclusion the question of whether self-determination can be connected to apartheid appears to have a positive answer. Instead of classifying it only as a violation of human rights, Klug argued that the extension of decolonization rules on self-determination to South Africa's apartheid (as was the case in South West Africa) could have opened many more possibilities as to dealing with the system among which the legitimization of an armed struggle[154]. In the last years of Apartheid his view found

[150] "[E]very State has the duty to refrain from any forcible action which deprives peoples ...of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter." – UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, A/RES/2625(XXV) (24 October, 1970), 124

[151] UN General Assembly, *Definition of Aggression*, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9631 (1975).

[152] Protocol Additional I to Geneva Conventions 1949, Art.1(4)

[153] U.N. General Assembly Resolution, Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV) (14 December 1960), para.6

[154] "While limiting the struggle against apartheid to issues of civil or human rights would: 1) allow the white minority, who continue to hold state power, to determine a future constitutional framework or to

support in the Commission on Human Rights' resolution of 1990[155] which acknowledged that the apartheid represented a gross violation of the right to self-determination, however it didn't have a major effect on the further developments in the matter.

4. Role of Declarations, Treaties and Conventions in the Universal Context

The international legal acts of universal extent like treaties and conventions are best fitted to influence doctrinal and theoretical development of HR. The examination of conventional doctrine may be helpful in order to better understand the position of apartheid in the international law. Moreover, the

4.1 International Convention on Elimination of All Forms of Racial Discrimination

The legal journey undertook by the UDHR, was continued in later decades, both on conceptual and applicative grounds. From the doctrinal point of view the interpretation of discrimination was already proposed in 1949 by the UN Secretary-General's memorandum "The Main Types and Causes of Discrimination". It followed a pattern developed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities which stated that: "Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish."[156]

4.1.1 "The Main Types and Causes of Discrimination" memorandum and the UN Declarations

The memorandum focused on classification of elements which would be found at the basis of a discriminatory behaviour and its prevention. In preliminary considerations it

limit political and social change to ensure continued white domination or alternatively the perpetuation of white economic power; 2) allow those who have legitimately taken up arms against apartheid to be excluded as "terrorists"; and 3) does not require that the South African people exercise their right to self-determination. Asserting a right to self-determination would: 1) ensure the complete eradication of apartheid; 2) recognise the legitimacy of the armed struggle in the struggle against apartheid; 3) ensure that the majority of South Africans have a right to determine their own future; and 4) provides a basis for claims of economic rights, as self-determination implies civil, political and economic rights." – Klug, H. (1989). *Self-determination and the struggle against apartheid,* Wisconsin International Law Journal, 8(2), 298

[155] UN Commission on Human Rights, Situation in southern Africa., 19 February 1990, E/CN.4/RES/1990/8

[156] Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report Submitted to the Commission on Human Rights,* E/CN.4/52 (6 December 1947), Section V(1)

was provided that the prevention of discrimination was based upon "certain guiding principles" and "actual social conditions". The principle of equality in global context is expressed through an ethical criterion of human dignity, which, in itself, is founded on principles of individual freedom and equality of all human beings before the law.[157] The sociological analysis of the matter and the understanding of social conditions helps to distinguish three categories of behaviours: "(a) those discriminatory practices which may be directly prevented by legal action; (b) those practices which may be curtailed or restricted by administrative actions; and (c) those practices which, although harmful, cannot be effectively controlled except through long-term educational programmes"[158]. In other words to each of such practices there is a different remedy which could be of juridical, administrative or educational nature. Subsequently, in order to effectively fight discrimination a common effort and coordinated action of the various State bodies is required and cannot be performed separately. The discrimination is usually professed in collective and not individualistic key, which means that even though in legal proceedings the victim is often identified as a singular or a group of persons the ultimate addressee of the discriminatory behaviour is a whole specific community. The memorandum gives an interesting overview of the psychological aspect of discrimination which is founded on prejudice (intended as a complex of rational and irrational emotions and experiences) which can become a "social pattern through contagion and imitation". As for the "equality" it retraced UDHR content and acknowledged equality in dignity, formal equality in rights, and equality of opportunity, but not necessarily material equality as to the extent and content of the rights of all individuals. In a singular formula the document defines discrimination as: "any conduct based on a distinction made on grounds of natural or social categories, which have no relation either to individual capacities or merits, or to the concrete behaviour of the individual person."[159] There are nine elements that characterise different categories of discrimination: race, colour, cultural circle, language, religion, national circle, social class, political or other opinion and sex.[160] The scientific interpretation present in the memorandum rejects the distinctive race characteristics as a basis for divisions or

[157] *The Main Types and Causes of Discrimination* (Memorandum submitted by the Secretary-General), E/cCN.4/Sub2/4O/Rev.1 (7 June 1949), para.14-15
[158] *Ibidem*, para.16
[159] *Ibidem*, para.33
[160] *Ibidem*, p. 17-25

considerations of superiority of one race over another. In practical terms the discrimination can be manifested by public or private actors. Public actors, among which the State and administrative authorities, can express discrimination in three forms: (*a*) Inequality in treatment which takes the form of imposing disabilities, (b) inequality in treatment which takes the form of granting privileges and (*c*) inequality of treatment which takes the form of imposing odious obligations.[161] In the South African Apartheid scenario it seems that the most used form was the first one as any privileges that the white population obtained were but a consequence of restrictive laws enacted towards black and coloured population.

The UN General Assembly pushed for the enactment of Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) which was perceived as the official international community's statement on the decolonisation process. Such Declaration forbid subjugation and was also a sign of approval for the right to self-determination[162] of peoples which until this moment in history lived almost always under foreign influence especially in Africa and Asia. This meant that the old colonial powers had to accept the fact that they could no longer protect their right to extra-continental territory by promoting "mission to civilize" or "White Man's burden" theories endorsed so far. Being accompanied by subjugation, segregation and exploitation, the colonialism in itself could be easily connected to the discrimination topic. This of course didn't directly apply to South Africa as it was one of the few free non colonial countries operating in the continent since XX century. Following this pattern the GA went a step forward and in 1963 it adopted Declaration on the Elimination of All Forms of Racial Discrimination which finally took a more decisive stance and dispelled any doubts on the racial matter within the Charter and UDHR matrix. In fact, it explicitly emphasised that any discrimination on the ground of race, colour or ethnic origin would be seen as an offence in violation of the above mentioned acts.[163] The States would be obligated not only to act passively and not implement racial laws, but also to protect the fundamental freedoms of different racial groups, to prevent

[161] *Ibidem*, para.89
[162] Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV) (14 December 1960), Art.2
[163] Declaration on the Elimination of All Forms of Racial Discrimination, A/RES/1904(XVIII) (20 November 1963), Art.1

any forms of discrimination and to grant judicial remedies against any violations.[164] This meant, that the protection of HR began to shape also in form of individual protection and not only collective one, a concept which was later developed by institutions like European Court of Human Rights. Some provisions were directly targeting apartheid system[165] and sanctioning separate facilities as depicted in The Reservation of Separate Amenities Act (1953).[166] Attention has also been placed on the promotion of non-discrimination both by the national and international entities.[167]

4.1.2 An Overview of the International Convention on Elimination of All Forms of Racial Discrimination

The GA's Declaration was but a first step towards the stipulation of International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1965 which also envisaged the implementation of elements of Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960[168]. The logic behind ICERD was not only to build international legal understanding of what discrimination is, but also to create legally binding instruments that would be able to enforce the principles of non-discrimination. When comparing with the Declaration, the Convention takes an even more decisive stance on the issue giving clear indications and forming legal interpretation of "racial discrimination". In fact, according to the Convention, "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[169] It went further on the active policy making point, and required States to

[164] *Ibidem,* Art.2; Art.3(1); Art.7(2)
[165] *Ibidem,* Art.5
[166] *Ibidem,* Art.3(2); *For Reservation of Separate Amenities Act (1953), see at* 26-27
[167] *Ibidem,* Art.8; Art.10
[168] Moreover ICERD is considered to be one of the six 'core' human rights treaties – Simma B. (Ed.) (2002) *The United Nations Charter: a Commentary,* 2nd Edition, Oxford University Press, Oxford, 933
[169] International Convention on the Elimination of All Forms of Racial Discrimination, Art.1(1) A/RES/2106(XX), (21 December 1965)

adopt national legislation prohibiting racial discrimination and the promotion of such, by the State authorities, persons, groups and organisations.[170] It referred not only to direct acts of discrimination but also indirect or *de facto* ones[171], for example laws which normatively do not contain discriminatory provisions but can be interpreted as such in consideration of particular social or cultural conditions. Art. 8 established the Committee on the Elimination of Racial Discrimination (CERD) which to this day is involved in monitoring the respect of ICERD. In its work the Committee focused on underlining the obligatory nature of implementation of anti-discriminatory measures and preparation of reports in accordance with art. 4[172] but it also addressed possible conflict of rights,[173]. It is also engaged into constant dialogue with States through the periodical States reports system.[174]

ICERD includes a bill of rights which encompass and extends the content of the UDHR by adding, among others, the right to inherit, the right of access to any place or service intended for use by the general public or the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.[175]

A system of dispute settlement in the matters of the Convention was provided in art. 11. In accordance with principles set out in the Declaration on the Granting of Independence to Colonial Countries and Peoples, for the first time in history a special

[170] *Ibidem*, Art.2; Art.4
[171]"(Indirect) Discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" – CERD Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, *Concluding observations of the Committee on the Elimination of Racial Discrimination*, para. 10, CERD/C/USA/CO/6 (Febuary 2008)
[172] U.N. Committee on Elimination of Racial Discrimination, General recommendation VII relating to the implementation of article 4, A/40/18, 32nd session (1985); General recommendation I concerning States parties' obligations (art. 4 of the Convention), A/87/18, 5th session (1972)
[173] For example in General Recommendation XV (para.4), the Committee addressed the compatibility of Art. 4(b) of the Convention with art. 19 UDHR, namely on whether the prohibition of promotion of racial discrimination and banning of groups and organisations involved in such is compatible with the freedom of opinion and expression. The Committee responded positively claiming that: "The citizen's exercise of this right (freedom of expression) carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance."
[174] Simma B. (Ed.) (2002) *The United Nations Charter: a Commentary*, 2nd Edition, Oxford University Press, Oxford, 936
[175]International Convention on the Elimination of All Forms of Racial Discrimination, A/RES/2106(XX) (21 December 1965), Art.5

right to submit petition was also granted to the inhabitants of Trust and Non-Self-Governing territories. Summaries of such petitions could later be included in the Committee's reports to the UN General Assembly.[176] In all the other cases, an individual petition may be considered only if a declaration accepting Committee's competence is delivered by a State Party. Again, the rule of prior domestic remedies exhaustion is in force (unless unreasonably prolonged).[177]

4.1.3 Prohibition of racial segregation and apartheid

In the Convention the question of apartheid in its strict sense is briefly treated at art. 3 which condemns practices of racial segregation and apartheid and requires State Parties to prevent, prohibit and eradicate such practices from the territories under their jurisdiction[178]. Such definition is rather vague and doesn't give any suggestion as to what is exactly intended as apartheid. Moreover, its efficiency was also contested as it was mainly addressed towards South Africa and would require it to ratify the convention to have any effect (although it was able to hit private actors)[179]. Nonetheless, it would be worth it to briefly reconstruct the reasoning behind the inclusion of art.3 in such a widely accepted Convention as ICERD.

In the first place the difference between apartheid in strict sense and segregation more in general should be noted. One of the tools that can be used to determine such difference is the UNESCO Declaration on Race and Racial Prejudice of 1978, which perceives the policy of apartheid as an "extreme form of racism"[180]and a "crime against humanity"[181] while "other policies and practices of racial segregation and discrimination constitute crimes against the conscience and dignity of mankind."[182] This would mean that apartheid represents a particularly violent form of a more residual concept of racial segregation.

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[176] International Convention on the Elimination of All Forms of Racial Discrimination, Art.15 A/RES/2106(XX) (21 December 1965)
[177] *Ibidem*, Art.14
[178] "Under their jurisdiction" may be inspired by the above mentioned situation in South West Africa – territory under South African jurisdiction, and applicable also to the case of Occupied Palestinian Territories
[179] Cassese A. L'azione delle Nazioni Unite contro l'Apartheid. Comunità Internazionale 25(3-4), (In Italian), 638
[180] UNESCO, Declaration on Race and Racial Prejudice (1978), Art.1(2)
[181] *Ibidem*, Art. 4(2)
[182] *Ibidem*, Art. 4(3)

During the *Travaux Préparatoires* for the Convention the US delegate in the drafting sub-commission proposed the adding of anti-Semitism to the content of art.3 while the USSR proposed the inclusion of Nazism. Whereas having a similar discriminatory background and historical value, such concepts couldn't be directly interpreted as forms of racial segregation analogous to apartheid. In fact, the former was but a general manifestation of racial discrimination rather than a segregation system.[183]

A better understanding of the concept of segregation intended under art. 3 but at the same time detached from South African scenario, emerged from consideration of State submitted reports on situations such as residential segregation and self-segregation of foreign workers in Germany not imposed by State. Question arose on whether segregation should be intended only in its narrow sense, as imposed by State authorities, or a broader one, involving different levels of segregation[184] To a certain extent the doubts on the interpretation have been resolved by the General Recommendation 19 of the CERD which stated that:

"[W]hile conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds. (para.3) The Committee therefore affirms that a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities. It invites States parties to monitor all trends which can give rise to racial segregation, to work for the eradication of any negative consequences that ensue, and to describe any such action in their periodic reports. (para.4)"[185]

Such a definition gives another grounds of distinction between the two concepts: while apartheid is a particularly obnoxious form of racial segregation that can be only imposed by State authorities, a segregation may also derive from other factors not

[183] Thornberry, P. (2016). *The International Convention on the elimination of all forms of racial discrimination : a commentary*. Oxford: Oxford University press, 244
[184] CERD/C/SR.850, para. 46
[185] UN Committee on the Elimination of Racial Discrimination, *General Recommendation XIX, The prevention, prohibition and eradication of racial segregation and apartheid* (Forty-seventh session, 1995), A/50/18, 140

necessarily connected with the State practices which is, however, required to act against such segregation (for example in the private sector).

General Recommendation 29 extended the racial discriminatory grounds of segregation to those descent-based targeting several caste systems[186] while General Recommendation 30 forbade segregation of non-citizens[187].

Thornberry comments on the difference between segregation and apartheid stating that:

"[S]egregation has essentially been regarded as a concentrated form of discrimination through the exclusion and the implicit or explicit ranking of populations, the psychology of which may not be far removed from 'ethnic cleansing' though it does not generally take such a drastic form. Apartheid represents a further concentration of the segregation phenomenon, possessing additional characteristics in terms of domination, imposition of hierarchy, assignment of racial identity by fiat, all holistically integrated into a determined public policy."

4.1.4 Special Protection Measures (Affirmative or Positive Actions)

It is interesting to note, that the Convention also possesses a special clause that provides that measures aiming to achieve "adequate advancement of certain racial or ethnic groups or individuals requiring such protection", shall not be regarded as discriminatory unless they lead to the maintenance of separate and unequal rights for different racial groups.[188] These provisions can be interpreted as addressing for example the indigenous populations issue, in terms of protection of their cultural and traditional immaterial heritage and identity. They may be also used in a wrongful way, though, and interpreted as a justification for unfair treatment. Such special measures usually take form of affirmative actions or other programmes. In the words of the Human Rights Committee "Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population […] as long as such action is needed to correct discrimination in fact, it is a

[186] UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent)* (1 November 2002)
[187] UN Committee on the Elimination of Racial Discrimination, General Recommendation 30, (64th session 23 February-12 March 2004), CERD/C/64/Misc.11/rev.3, para. 32
[188] *Ibidem*, Art.1(4), Art.2(2)

case of legitimate differentiation under the Covenant (on Civil and Political Rights)." [189] It may also be intended as reshaping the order within society by addressing "the structural and individual realities of discrimination while simultaneously recognizing the legal/political space for differences in multicultural societies"[190]. It might seem ironic how the process of legitimately executed differentiation can be necessary in order to eliminate discrimination. These measures shouldn't be however considered "positive discrimination" which in itself is a contradictory term.[191] In some cases, affirmative actions may be the best or the only solution to achieve the goals set forth in the Convention and as such they are mandatory[192]. In fact, the CERD expressed that the prohibition of enactment of such actions might be the very reason of persistence of discriminatory conditions.[193] The Convention also mentions that such measures must be retracted once their fulfil their purpose[194] in order to maintain the reached balance. The lack of a uniform approach of CERD on how exactly such measures should be implemented and in what form may lead to unclear situations. Notwithstanding, in its General Commentaries the Committee formulated some instructions which reinforce the mandatory nature of affirmative actions and specify their role as means to achieve equality in human rights.[195]

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[189] U.N. Office of the High Commissioner for Human Rights (OHCHR), Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, para. 10, 37th Sess. (10 November 1989) *in reference to* art. 26 of the International Covenant on Civil and Political Rights, A/RES/2200(XXI) (19 December 1966)

[190] Romany, C.; Chu, J. (2004). *Affirmative action in international human rights law: critical perspective of its normative assumptions*. Connecticut Law Review, 36(3), 833

[191] "The term 'positive discrimination' is a *contradictio in terminis*: either the distinction in question is justified and legitimate, because not arbitrary, and cannot be called "discrimination", or the distinction in question is unjustified or illegitimate, because arbitrary, and should not be labelled "positive" – U.N. Economic and Social Council (ECOSOC), Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: The concept and practice of affirmative action, Progress Report, para. 5, E/CN.4/Sub.2/2001/15 (26 June 2001).

[192] Especially when considering "shall" term in Art.2(2) of the ICERD

[193] "With concern that recent case law of the U.S. Supreme Court and the use of voter referenda to prohibit states from adopting race-based affirmative action measures have further limited the permissible use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms" – CERD Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, *Concluding observations of the Committee on the Elimination of Racial Discrimination*, para. 15, CERD/C/USA/CO/6 (February 2008)

[194] International Convention on the Elimination of All Forms of Racial Discrimination, Art.1(4) A/RES/2106(XX) (21 December 1965)

[195] de la Vega, C. (2010). *The special measures mandate of the international convention on the elimination of all forms of racial discrimination: Lessons from the United States and South Africa*. ILSA Journal of International and Comparative Law, 16(3), 637

As for the addressees of the special measures the lack of a precise provision regarding their identification led to application problems. In various cases the specification of the subjects of preferential treatment is over-extensive or simply too vague and not regarding only the actually disadvantaged groups[196], which creates a situation of unfair treatment[197] and over-privileging of the "victimhood".[198] As an example, special treatment in the USA may be recalled. Measures which initially were supposed to help and accommodate African Americans were, over the time, extended to all immigrants. Question arose whether the immigrants which arrived to the USA out of their free will, should be entitled to the same level of protection as descendants of slaves who were forced to leave their place of origin and did not easily adapt to their new environment.[199]

It might seem ironic how both affirmative actions and apartheid measures can have a "discriminatory" legislative act nature. The main difference lies in the intention of the legislator however. Whereas the latter aims at the creation of advantages for one racial group by imposing disadvantage on the other, the former one has quite the contrary goal. As such affirmative actions could have remedial function towards damages dealt by an apartheid system.

South Africa went through a peaceful revolution, but, as mentioned before[200], it still suffers from several issues. This is due to the fact that the transition had mainly nature of political compromise, and as such, it couldn't count on swift deep going reforms. Perhaps if, when the plan of complete apartheid failed and its structural reform was inevitable, the South African government decided to endorse affirmative actions for the excluded groups, the situation in today's RSA would be much more stable. This doesn't mean that the contemporary South African authorities decided to stand idle after the transition. In many situations affirmative actions became a remedy for social

[196] *Ibidem, at 643*
[197] " It can occur that affirmative action will benefit some people even though they themselves have not been disadvantaged by past or societal discrimination." – U.N. Economic and Social Council (ECOSOC), Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: The concept and practice of affirmative action, Progress Report, para. 10, E/CN.4/Sub.2/2001/15 (26 June 2001)
[198] Romany, C.; Chu, J. (2004). *Affirmative action in international human rights law: critical perspective of its normative assumptions*. Connecticut Law Review, 36(3), 856
[199] *Ibidem*
[200] *See at* 41-42

discrepancies – legacy of the Apartheid. The legitimacy of such actions comes directly from the Constitution which uses terms "fair discrimination."[201] One of the sectors with most disproportions was the employment and labour field. The access to job opportunities was limited due to physical, formal but also prejudice reasons. To solve this problem, the Employment Equity Act (Act 55 of 1998)[202] was adopted, requiring employers to prepare equity plans[203]. The provisions of the Act weren't meant to enforce diversity in workspace, a move which would be excessive, but to merely to attract and eliminate barriers for the groups finding themselves in precarious and disadvantaged position. Broad-based Black Economic Empowerment (Act 53 of 2003) pursued a more radical goal of economic empowerment, through ownership and management, of all black people.[204] What sounded like a dangerous idea excessively benefitting one group over another, was addressed by the Constitutional Court which stated that implemented measures should "ensure that the preferential treatment did not discriminate against the non-beneficiaries by requiring a plan that was clear, rational and coherent."[205] The Court went further by stating that the particular measure must target persons or categories of persons who have been disadvantaged by unfair discrimination, it must be designed to protect or advance those persons or categories of persons and it must promote equality.[206] In other words it was to be ensured that the subjects of the special treatment were actually discriminated.

In conclusion, the affirmative actions can prove to be an effective tool in reshaping and rebalancing the social order. At the same time they could be easily subject to manipulations and for this reason a proper formulation of their content and most of all,

[201] "Discrimination on one or more of the grounds listed in subsection (3)(Discrimination by the State) is unfair unless it is established that the discrimination is fair." – Constitution of the Republic of South Africa Act, No. 108, 10 December 1996, Sec. 9(5)
[202] This legislation would most likely correspond to affirmative action in labour sector in accordance with Art.2 and Art.5(2) of the Discrimination (Employment and Occupation) Convention, C111 (25 June 1958)
[203] A long termed equity plan was to be prepared through audits in cooperation with trade unions and employees, which by giving demographic statistics would enable the identification of main barriers and problems to confront. Burger R.; Jafta R. (2010).; *Affirmative action in South Africa: an empirical assessment of the impact on labour market outcomes*, CRISE Working Paper No. 76, 6
[204] *Ibidem at* 7
[205] de la Vega, C. (2010). *The special measures mandate of the international convention on the elimination of all forms of racial discrimination: Lessons from the United States and South Africa*. ILSA Journal of International and Comparative Law, 16(3), 664-665
In reference to City Council of Pretoria v Walker (1998) (2) SA 363 at para. 73 (S. Aft.)
[206] *Ibidem, at* 665
In reference to Minister of Finance and Others v Van Heerden 2004 (6) SA 121 at para. 37 (S. Afr.)

an efficient monitoring system (such as judiciary) are required for it to meet its goals in accordance with international standards.

4.2 International Convention on the Suppression and Punishment of the Crime of Apartheid

The biggest drawback of the ICERD was that it still was rather generic and didn't exactly specify discriminatory practices that a State could exercise. Art. 3 did condemn and prohibit apartheid, but as said before, it didn't go as far as giving any specific meaning to it. At this point Apartheid in South and South West Africa became an internationally recognized problem and the UN General Assembly called for action both by international community and by Security Council.[207] Concept of apartheid from a mere violation of Conventions slowly began to transform in that of international crime making it possible to identify and sanction responsible individuals and not entire States. Indeed, in the following resolution the GA officially condemned apartheid as a crime against humanity.[208][209] As the result of international interest in the issue the International Convention of the Suppression and Punishment of the Crime of Apartheid (ICSPCA was adopted in 1973 and entered in force in 1976. The preface recalls the above mentioned Charter, declarations and ICERD giving a sense of continuity in the development of international doctrine in the matter of racial discrimination. Instead of providing a bill of inviolable rights, the Apartheid Convention indicates a series of "inhuman acts" which are "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".[210] Among these acts there were those typically considered as crimes against humanity by international customary law[211] and those

[207] UN General Assembly, Resolution 1761 (XVII) the policies of *apartheid* of the Government of the Republic of South Africa, A/RES/1761(XVII) (6 November 1962)
[208] UN General Assembly, Resolution 2202 A (XXI) the policies of *apartheid* of the Government of the Republic of South Africa, A/RES/2202 (XXI) (16 December 1966), para.1
[209] In addition, it was also recognized as war crime for it was listed as a grave breach of Additional Protocol I to the Geneva Conventions of 1948, however this is minoritarian consideration.
[210] International Convention on the Suppression and Punishment of the Crime of Apartheid, A/RES/3068(XXVIII) (30 November 1973), Art. II
[211] For example in accordance with Art.II, para (a) of the Convention:
Denial to a member or members of a racial group or groups of the right to life and liberty of person: (i) By murder of members of a racial group or groups; (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups

which addressed typical measures of South African apartheid model including discriminatory legislation with regard to political, economic and social rights[212] as well as right to freedom of residence, right to mixed marriage, and right to land propriety.[213] The Convention requires State Parties to enact penal legislation[214] and punish individuals, members of organizations and institutions and representatives of the State, for directly or indirectly committing crime of apartheid.[215] Considering the international criminal nature of such acts, the jurisdiction should be considered universal, although the question of universal validity of crime of apartheid is still subject to discussion as will be said further[216]. Periodic reports on the implementation of the Convention are to be delivered by State Parties to the selected members of the Commission on Human Rights.[217] In order to prevent offenders from not being extradited when seeking asylum in foreign States, the Convention forbids perceiving the crime as political.[218]

From political perspective the ICSPCA represented yet another fatal blow to South Africa which at this point remained virtually isolated on the international scene. What's interesting is that South Africa didn't decide to sign the Convention, even after the end of Apartheid, as they preferred to deal with the matter internally through the Truth and Reconciliation Commission whereas other prosecutions for crimes committed during the apartheid era were brought before courts as "ordinary crimes".[219] This differed from international stance much more determined to underline the gravity of these acts. ECOSOC went as far as to compare Apartheid to genocide, however such statement was dismissed by the majority of international opinion.[220] Although not being its primary goal or intent, the Apartheid in South Africa as a matter of fact aimed also to maintain some sort of demographic balance as seen when discussing the abortion policy in chapter I[221], and provisions able to prevent births are considered among the cases of

[212] *Ibidem,* Art. II, para. (c)
[213] *Ibidem,* Art. II, para. (d)
[214] *Ibidem,* Art.. IV
[215] *Ibidem,* Art. III
[216] *See* para. 6
[217] International Convention on the Suppression and Punishment of the Crime of Apartheid, A/RES/3068(XXVIII) (30 November 1973), Art. VII; Art. IX
[218] *Ibidem,* Art. XI
[219] Barnard, A. (2009). Slegs suid afrikaners -south africans only a review and evaluation of the international crime of apartheid. New Zealand Journal of Public and International Law, 7(2), 331
[220] *Ibidem,* at 337
In reference to: ECOSOC Decision 1985/14 (1985)
[221] *See at* 24-25

international crime of genocide.[222] Other analogy can be made in relation to crime of persecution developed by International Criminal Tribunal for Former Yugoslavia and Draft Code of Crimes Against the Peace and Security of Mankind.[223] The ICSPCA addressed the South African scenario in the first place[224] and question arose whether, in lack of similar cases after 1994, the crime of apartheid was still a valid concept.

4.2.1 The Impact and importance of the ICSPCA

The implementation of ICSPCA is somewhat problematic as up to this day there are no reported prosecutions or convictions for the commitment of the international crime of apartheid and the proposed special court to deal with the matter never came to exist.[225] In fact, for a long time until the institution of the International Criminal Court (ICC), the creation of permanent international criminal body with universal (and not *ad hoc)* jurisdiction, considered necessary to enforce provisions of the Conventions[226] through so called "direct enforcement model" , proved to be a difficult task, which doesn't mean that no progress was made in the matter. The Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes, envisaged also by the ICSPCA,[227] in art. 22 provided definition and elements of an international crime which were later integrated in the Rome Statute of ICC. The jurisdiction of the Court could be extended beyond the contents of the ICSPCA if a proper agreement with a State party was provided.[228]

The crime, however, acquired a doctrinal value. In reality, it was already mentioned as a crime against humanity in the 1968 Convention on the Non-Applicability of

[222] International Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260A(III) (9 December 1948), Art. II (d)
[223] Barnard, A. (2009). Slegs suid afrikaners -south africans only a review and evaluation of the international crime of apartheid. New Zealand Journal of Public and International Law, 7(2), 342-343
[224] International Convention on the Suppression and Punishment of the Crime of Apartheid, A/RES/3068(XXVIII) (30 November 1973), Art. II
[225] Duguard J. (2008) *Introductory Note to the International Convention on the Suppression and Punishment of the Crime of Apartheid*, United Nations Audiovisual Library of International Law, 2
[226] ECOSOC, Commission on Human Rights, Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid, E/CN.4/1426 (19 January 1981), 14, para. 56
[227] International Convention on the Suppression and Punishment of the Crime of Apartheid, A/RES/3068(XXVIII) (30 November 1973), Art. V
[228] ECOSOC, Commission on Human Rights, Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid, III. Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes, E/CN.4/1426 (19 January 1981), 21, Art.4

Statutory Limitations to War Crimes and Crimes Against Humanity.[229] It was later included in the Draft Code of Crimes Against the Peace and Security of Mankind proposed by the International Law Commission and in Rome Statute of International Criminal Court. The former one, an ambitious yet never adopted project, contained a slightly modified[230] version of the crime of apartheid. In the final form of the Code from 1996 the term "apartheid" was substituted by "institutionalized discrimination"[231] in order to detach it from South African context and give it a more global reach. Another way of granting more space to the meaning of this crime, was reviewing its racial aspect. In fact, the ILC decided to include in the provision on institutionalized discrimination cases of racial but also religious and ethnic discrimination practiced by State organs, as the measures are similar even if the motives have different background. Such discrimination would be carried out through the violation of fundamental human rights and freedoms and creation of a situation of "serious disadvantage" for a part of the population. The ILC pushed towards putting the crime of genocide and apartheid on the same level of gravity.[232]

The term "apartheid" reappeared in the article dedicated to crimes against humanity [art.7(j)] of the Rome Statute of the ICC, which could mean that it gained a legal meaning *per se* and wasn't necessarily related to South Africa. The formula was similar to the previous ones, although again it presented slight differences[233]. It rejected the extended version of the crime endorsed by the ILC's Draft Code and a major meaning has been given to "institutionalised regime of systematic oppression" which became the main target of the provision. Whereas the ICSPCA focused on the situation of

[229] Eden, Paul. (2014). *The Role of the Rome Statute in the Criminalization of Apartheid*, Journal of International Criminal Justice. 12, 175

[230] For example, Art. 20 of the 1991 Draft Code, eliminated the reference to South Africa and three indicated cases under Art. II (a) of the Convention (see note 211) giving it a broader meaning. Also, it limited individual responsibility to leaders and organizers – Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991, Official Records of the General Assembly, Forty-sixth session, Supplement No. 10 (1991), A/46/10, 102-103

[231] UN, ILC, Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission, 1996, vol. II (Part Two) (1996), Art.18(*f*)

[232] Lingaas, Carola. (2015). The Crime against Humanity of Apartheid in a Post-Apartheid World. Oslo Law Review. 2, 91

[233] "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime - UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010) (17 July 1998), Art.7(2)(*h*)

institutionalised domination (a more *de facto* approach) of one race over another, in the Rome Statute this element was attributed to a specific governing administration (a more *de jure* approach)[234]. The status of the ICC widely recognized as the first permanent and UN independent international court dealing with criminal issues, gave an additional boost to the crime of apartheid in its journey to be recognized as part of international customary law.[235]

The criminalization of apartheid appeared as the most efficient way to give it a universal outreach, however today only 32 States have adopted national legislation addressing crime of apartheid and most of western States didn't even sign the ICSPCA.[236]Also, in a hypothetical case, it would be doubtful for a State practicing apartheid or similar systems to ratify a convention against them. The difficulty in identifying cases of violation of the Convention and interpretation of its extent, as well as lack of consideration by *ad hoc* International Courts[237], also prove that this international crime is still distant from acquiring full recognition. On the other hand, the inclusion of apartheid in the Rome Statute helped it to regain some of its legal value. In recent years, action has been taken in the analysis of cases suitable to be considered in this matter as will be seen in Chapter III.

The above mentioned conventions are among the paramount international treaties on human rights and international criminal law, nonetheless there are several other legal sources of soft law which, in their own way, could be used to better understand the problem of apartheid.[238]

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[234] Lingaas, Carola. (2015). The Crime against Humanity of Apartheid in a Post-Apartheid World. Oslo Law Review. 2, 97-98

[235] Eden, Paul. (2014). *The Role of the Rome Statute in the Criminalization of Apartheid*, Journal of International Criminal Justice. 12, 187
In reference to A. Cassese, International Criminal Law (2nd edn., Oxford University Press, 2008)

[236] Barnard, A. (2009). Slegs suid afrikaners -south africans only a review and evaluation of the international crime of apartheid. New Zealand Journal of Public and International Law, 7(2), 352

[237] Both International Criminal Tribunals for Former Yugoslavia and Rwanda, as well as Special Courts (Except for East Timor Panels) disregarded opinions calling for including apartheid in their competence sphere

[238] For example in 2001 , a World Conference against Racism under auspices of the UN was summoned in Durban, South Africa and a Declaration and Programme of Action were drafted. Among the discussed topics were the recognition of slavery as crime against humanity and condemnation of colonialism as reason for the existence of apartheid. The conference also paid its attention on perhaps the most controversial discrimination case in recent years occurring in Palestine.

5. Role of Regional Conventions and Courts

The ICERD, the ICSPCA and the Rome Statute gave the basic theoretical legal tools to deal with the problem of the apartheid, one which emerged in times when the legal framework of regional organisations was still in primal phase. With the "defeat" of apartheid in South Africa and a lack of equal successive cases, it seemed that the original notion of apartheid was disappearing and dilatating into a broader idea of racial segregation. In human rights field, the regional organisations dedicated themselves to develop the anti-discriminatory policies and develop the meaning of right to equality and right to development among others. Despite the fact that the apartheid as a whole system doesn't appear reproducible in its entirety in relation to any case today, there are some examples of State-led policies that present minor similarities to the segregationist system. The following paragraphs will briefly present different approaches towards the problem of discrimination and will deal with forms of discrimination that are the closest to what original apartheid was.

5.1 European Convention of Human Rights

There are no traces of real apartheid installed by political regime in Europe. Nonetheless, this doesn't mean that discrimination on different grounds (among which racial) by the State actors doesn't find its place within contemporary European context characterised by more and more unstable multi-cultural structure. The European Convention of Human Rights (ECHR) was one of the first drafts of the Council of Europe born in 1949.[239] In many points it resembles the UDHR and places a rather modest and not exhaustive[240] non-discriminatory clause at art.14. Art. 14 being rather generic was expanded by Prot. 12 to the Convention, which however has been ratified only by 20 out of 47 states.[241] The content of the protocol was controversial as art. 1 provided that the non-discriminatory clause was not limited only to the provisions of the

[239] Council of Europe is one of the oldest regional organizations founded after the II World War aiming "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress" as well as achieving "maintenance and further realisation of human rights and fundamental freedoms." - Council of Europe. (1949). Statute of the Council of Europe: London, 5th May, 1949. London: H.M.S.O., Art.1

[240] O'Connell, R. (2009). *Cinderella comes to the ball: Art 14 and the right to non-discrimination in the ECHR*. Legal Studies , 29(2), 211

[241] *Retrieved from* https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures

Convention, but to every "right set forth by law". Such wide formulation, may indeed be problematic when considering for example the affirmative actions. art.14 also contains a flexibility clause in form of wording "discrimination on any ground such as […] and other status", thanks to which the discriminatory grounds can be constantly expanded by the evolving doctrine.

Section II of the Convention foresees the establishment and composition of the European Court of Human Rights (ECtHR) which remains one of the most efficient and influent legal bodies in human right protection field. Among the great innovations was the possibility of direct application to the Court by individual, group of individuals and non-governmental organisations victims of the violations of the Convention,[242] after all domestic remedies have been exhausted. [243] Such application shall be subject to conditions of admissibility among which the need of significant disadvantage suffered by the victim. Prot. 16 to the Convention added a connection to national judiciary, by giving the possibility to the highest court or tribunal of applying for advisory opinions on the interpretation or application of the ECHR (and additional protocols).

There is no provision addressing the issue of apartheid or institutionalized racial discrimination, however, the States having the obligation to prevent the violation of the Convention, could still be accused of negligence in protection of discriminated groups or even of implementation of single acts providing discriminatory measures in indirect way. Again, in this matter question of validity of affirmative actions is raised.

5.1.1 Indirect Racial Discrimination and Affirmative Actions

In early years of its activity the Court adopted the model of formal rather than substantive equality[244], model which would therefore be limited to analysis of legislation and its content's compatibility with the Conventions in a direct way. This scheme might seem defective as: "the central question is not whether the law makes distinctions, but whether the *effect* of the law is to perpetuate disadvantage,

[242] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (4 November 1950), Art. 34
[243] *Ibidem*, Art. 35(1)
[244] Substantive equality concept was developed by the Permanent Court of International Justice in its Advisory Opinion in *German Settlers in Poland, 1923, Series B, No. 6, p. 24.*

discrimination, exclusion or oppression."[245] Möschel believes that: "where the direct discrimination and the principle of formal equality 'only' prohibits the different treatment of similar situations on the basis of a prohibited ground, indirect discrimination goes further by prohibiting the similar treatment of different situations when certain seemingly neutral provisions, measures or practices have a negative impact on certain groups."[246] Such an approach might appear as a legacy of distinction between principle of equality and principle of non-discrimination[247]. The ECtHR's position of formal equality model was even criticised by its own judges.[248] In its *modus operandi t*he Court for a long time consciously omitted the consideration of art.14 even as reinforcing regulation, by choosing the application of other provisions such as art. 3 (inhuman treatment) without consideration of additional elements such as race or ethnicity. As it is well known, art. 14 contains a complementary norm which violation is triggered only when connected to another provision of the Convention (not necessarily breeching that provision) and doesn't act on its own.[249] Through the process of extended interpretation, however, the Court managed to expand the area of protected rights beyond that expressly defined within Convention[250], regarding social security and right to work.[251] ECtHR's stance goes beyond comparator requirement (analogous position of

[245] O'Connell, R. (2009). *Cinderella comes to the ball: Art 14 and the right to non-discrimination in the ECHR*. Legal Studies , 29(2), 213

[246] Möschel, M. (2017), The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain. The Modern Law Review 80(1), 123

[247] *See* Pustorino P. (2019) *Lezioni di tutela internazionale dei diritti umani*, Bari: Cacucci, 137

[248] O'Connell recalls *Anguelova v Bulgaria* case and the dissenting opinion of judge Bonello which stated: "Frequently and regularly the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence. The root of this injurious escape from reality lies the evidentiary rule which the Court has inflicted on itself: The Court recalls that the standard of proof required under the Convention is 'proof beyond reasonable doubt'." The majority found that in the present case it had not been established "beyond reasonable doubt" that in the death of the 17-year-old Rom, Anguel Zabchekov that followed the devoted attentions of police officers, his ethnicity was "a determining factor" with those police officers who facilitated the young Rom's access to the fastest lane from Razgrad to eternity."

[249] McCruden C, Perchal S. (2009) *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Network of Legal Experts in the Field of Gender Equality, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, 22

[250] O'Connell, R. (2009). *Cinderella comes to the ball: Art 14 and the right to non-discrimination in the ECHR*. Legal Studies , 29(2), 216

[251] For example in a series of cases [Gaygusuz v Austria (1996); Stec v United Kingdom (2005); Luczak v Poland (2007)] the Court stated that the right to welfare payment (property right) is not only limited to payment based on contributions, as it ruled in the first case, but also general taxation.

individuals) typical for domestic anti-discriminatory law and gives higher value to the question of justification of single situations.[252] In the past, the Court was mainly focused on cases of direct discrimination but sometimes it gave attention to factual discrimination.[253]

5.1.2 The ECtHR case-law

Indirect racial discrimination presenting elements of institutionalised segregation in particular, was treated in *DH and Others v. the Czech Republic* (2007). The Czech Republic established a series of special schools, of arguably lower quality and level, for children with mental deficiencies, which in factual terms, gathered mostly pupils of Roma[254] origin, thus creating a situation of educational race segregation. No special justification was given. Therefore, in the opinion the applicants, the legislation establishing such schools would go against art.2 of prot.1 of the ECHR (right to education) combined with art.14 in consideration of particular victimized ethnic group. In citing the relevant sources, the Court mentioned Directive 2000/43/EC also known as European Union's Race Equality Directive, which at art.2 describes indirect discrimination as: "an apparently neutral provision,[255] criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[256]. The second part of this formula is again acknowledging "fair discrimination" criterion,

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[252] O'Connell, R. (2009). *Cinderella comes to the ball: Art 14 and the right to non-discrimination in the ECHR*. Legal Studies , 29(2), 217-218

[253] *Ibidem*, 220 *in reference to* Thlimmenos v Greece (2001) 31 EHRR 411; Zarb Adami v Malta (2007) 44 EHRR 49.

[254] The question of difficulty of accommodation and protection (especially in education and housing) of Roma people has also been the topic of CERD General Recommendation 27 which calls the States "to prevent and avoid as much as possible the segregation of Roma students, while keeping open the possibility for bilingual or mother-tongue tuition; to this end, to endeavour to raise the quality of education in all schools and the level of achievement in schools by the minority community, to recruit school personnel from among members of Roma communities and to promote intercultural education." – UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXVII on Discrimination Against Roma*, para. 18;
See also Thornberry, P. (2016). *The International Convention on the elimination of all forms of racial discrimination : a commentary*. Oxford: Oxford University press, 250-253

[255] In opinion of the Court, the intent of discrimination of such provisions is not required

[256] In an additional description the Court states: the difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. – *DH and Others v. the Czech Republic*, no.57325/00, ECHR 13 November 2007, 184

typical of affirmative or positive actions. In fact, remembering its past case law[257], the Court states that: "Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them."[258] In these cases the most obvious evidence appears to be statistical data, the Court confirms this remark, however it underlines that it shouldn't act as the only evidence and has to be supported by other proof. In fact, such data although scientifically providing demographic information, may fail to consider other elements such as historical development of the situation. As for the merit, the Czech government submitted that the placement of Roma children in the special schools was made upon professionally prepared psychological tests' results and parental consent (thus an acceptance of the difference in treatment). The Court held, however, that the tests could be biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. As for the parent's consent it considers the fact that the parents weren't fully informed of the consequences of their decision and as such the binding aspect of such decision should be considered void.[259]

The case produced controversies as in a way it fell into the trap of legal interpretative fog of affirmative actions. In fact, in his dissenting opinion, judge Šikuta appealed for consideration of particular history and mentality of Roma populations and held that: the "introduction of special schooling, though not a perfect solution, should be seen as positive action on the part of the State to help children with special educational needs to overcome their different level of preparedness to attend an ordinary school and to follow the ordinary curriculum." From this perspective, the extensive Roma population in special schools is but a simple factual effect of scientifically prepared tests[260], a fact which, in contrast to majority's opinion, is supposed to be favourable to the concerned

[257] *Willis v. the United Kingdom*, no. 36042/97, ECHR 2002-IV; *Okpisz v. Germany*, no. 59140/00, para. 33, 25 October 2005, para.48
[258] *DH and Others v. the Czech Republic*, no.57325/00, ECHR 13 November 2007, para. 175
[259] In the words of the Court: the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools.
[260] "The difference in treatment of the children attending either type of school (ordinary or special) was simply determined by the different level of intellectual capacity of the children concerned and by their different level of preparedness and readiness to successfully follow all the requirements imposed by the existing school system represented by the ordinary schools." – Dissenting Opinion of Judge Šikuta

group in relation to their integration within society, and thus the differentiation would be not only justifiable, but even necessary[261] and sought after. Quite ironically, even the Court itself appreciated previous Czech actions relating to the difficult task of integration of Roma people, however in this particular case it held that the State went beyond its margin of appreciation in the education sphere effectively interfering with the enjoyment of Convention rights. The Court went further on the merit explaining that the received in this way limited to below ordinary curriculum education would limit their future job opportunities and, as such, compromise their personal development.

The *DH* case is a clear example of a thin line that can exist between an affirmative action and a discriminatory norm. Surely the fact that differentiation isn't explicitly provided by the law, and it manifests itself only *ex post* in *de facto* terms (and as such can be interpreted as indirect discrimination), doesn't facilitate the identification of its positive or negative nature. At this point it seems that the only way of determining this nature would be focusing on the real effects that such norms produce or could produce upon the concerned individuals and their situation. On the other hand, there are also two aspects of the justifiability of an affirmative action that can determine its validity. The first one is the level of legitimacy of the pursued aim and the second is the proportionality test, that is how proportionate are the adopted measures in relation to the sought aim.[262][263] The Other required activity to be performed by the State is investigation. By analogy to obligation of investigation in relation to art.2 and 3

[261] As such, they could have mandatory nature recalling Art.2(2) of the ICERD.
In recalling such obligation, the Court stated: "a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article".

[262] These elements are provided by the expanded concept of "indirect racial discrimination" (as previously given by EC Directive 2000/43) formulated by European Commission against Racism and Intolerance (ECRI) in Art.1 of its General Policy Recommendation No.7:

"indirect racial discrimination" shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

[263] As to the validity of the aim these questions have to be answered: (a) is the objective sufficiently important to justify limiting a fundamental right; (b) are the measures designed to meet the objective rationally connected to it; and (c) are the means used to impair the right or freedom no more than is necessary to accomplish the objective? – McCruden C, Perchal S. (2009) *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Network of Legal Experts in the Field of Gender Equality, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, 22

(suspicious death and torture) of the ECHR, the State has also such obligation in relation to discriminatory acts delivered by non-State actors in relation to art.14.[264] In later years the Court has ruled in other similar cases regarding Roma segregation in schools in Greece, Croatia and Hungary, however it wasn't always able to determine whether the discrimination was plainly direct or indirect.[265]

The topic of indirect discrimination was further developed in *Biao v. Denmark.* The case regarded a naturalized Danish citizen from Togo whom married a woman from Ghana and applied for spousal reunification. Danish law, however, required attachment towards Denmark higher than towards any other country unless one of the spouses has been a Danish citizen for at least 28 years or was raised as child in Denmark.[266] Such conditions weren't met in the present case. The applicant brought the case to the ECtHR claiming that this law violated his right to family (art.8 ECHR) combined with art.14. In this particular case, the opinion of the Court shifted balanced between consideration of direct and indirect discrimination. The majority of judges pushed towards indirect discrimination, which manifested itself, as the plaintiff claimed, in the 28 years of citizenship condition, which clearly favoured Danish-born citizens, in particular Danish expatriates, over those who acquired it later in their lives, persons often of different ethnic origin.[267] The Danish government defended its position claiming that the condition was imposed to better control immigration and limit the cases of unsuccessful integration. On the second point, the Court argued that Biao was had a proper level of attachment to Denmark and that integration of the other spouse wouldn't present problems. The lack of justification, mainly resides in the fact that the government failed to prove that the persons born and raised in the country are substantially more attached to it than persons permanently residing in it for more than a decade (necessary time to acquire citizenship). In his opinion, judge Pinto de Albuquerque, taking example from the US strict scrutiny approach[268], and citing the minority opinion of Danish Supreme

[264] O'Connell, R. (2009). *Cinderella comes to the ball: Art 14 and the right to non-discrimination in the ECHR*. Legal Studies , 29(2), 227
[265] Möschel, M. (2017), The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain. The Modern Law Review 80(1), 124-125
[266] Law no. 1204 of 27 December 2003, sec.9(7)
[267] *Biao v. Denmark,* no.38590/10, ECHR 24 May 2016, para. 102 and 112
[268] *See below* note 271

Court[269], went further by claiming that the intent of the legislation was obvious enough to consider it a matter of direct discrimination.[270]

Finally, it is interesting to present a short comparison between ECHR's proportionality system and the US Equal Protection Clause (EPC) strict scrutiny system as retrieved from the Fourteenth Amendment to the US Constitution. Whereas the former is very much focused on the goal-price equation in which, as seen before, the State in its policy making process cannot go beyond a certain margin of appreciation in relation to rights protected by the Convention, the latter is based on the a strict inquiry of legislator's intention and whether this intention indeed corresponds to the pursued aim.[271] Baker states that:

"In the absence of strict scrutiny, measures very seldom violate the EPC […] (whereas) proportionality can lead to the rejection of a measure that is efficacious, narrowly tailored, and pursues a compelling state interest if it proves to exact too high a cost in individual, group, principle, or social terms. In other words, proportionality has the potential to say "no" to the state even when the state has nothing but really good reasons for what it wants to do."[272]

5.2 American Convention of Human Rights

Similarly to the European scenario, Americas didn't know a real country-wide institutionalised racial discrimination, except for the case of southern American States in the past. Notwithstanding, as Durban Declaration explained[273], slavery left its mark in

[269] "When assessing whether the difference in treatment implied by the 28-year rule can be considered objectively justified, it is not sufficient to compare persons not raised in Denmark who acquire Danish nationality later in life with the large group of persons who were born Danish nationals and were also raised in Denmark. If exemption from the attachment requirement was justified only in regard to the latter group of Danish nationals, the exemption should have been delimited differently. The crucial element must therefore be a comparison with persons who were born Danish nationals and have been Danish nationals for twenty-eight years, but who were not raised in Denmark and may perhaps not at any time have had their residence in Denmark." – Minority opinion of Danish Supreme Court.
[270] "Rather than favouring a group of nationals who had been Danish nationals for twenty-eight years, which included Danish expatriates, the Government were in reality targeting a group of nationals who had been naturalised and were of ethnic origins other than Danish. The 28-year rule had the intended consequence of creating a difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origin, because de facto the vast majority of persons born Danish citizens would be of Danish ethnic origin, whereas persons who acquired Danish citizenship later in life would generally be of foreign ethnic origin." – Dissenting Opinion of judge Pinto de Albuquerque
[271] "Strict scrutiny asks whether the measure pursues a compelling state interest in a way narrowly tailored to the objective. This focuses exclusively on the reasons for choosing the measure in question, not its impacts" – Baker, A. (2007). Controlling racial and religious profiling: Article 14 ECHR protection v. U.S. equal protection clause prosecution. Texas Wesleyan Law Review, 13(- 2), 288
[272] *Ibidem*, 289
[273] *See* note 238

the social structure of the two continents. By the first impression it would seem that the American Convention of Human Rights (ACHR) is the exact counter part of the ECHR. Both Conventions were enacted under auspices of regional organisations, and in case of ACHR it was the Organisation of American States (OAS) founded in 1948 with similar purposes to those of the CoE.[274] There are some fundamental differences to note although. The non-discrimination clause is present in the art.1 of the Convention, however it goes a step further by providing at art.24 right to equal protection before the law[275], without discrimination (although the Convention's text doesn't specify grounds in this matter). This clause, which is clearly more of constitutional nature, is similar to art.1 of prot. 12 to the ECHR, which as seen before[276], had limited success. The judiciary functions in the matters of ACHR are conferred to the Inter-American Commission on Human Rights and Inter-American Court of Human Rights (IACtHR).[277] In contrast to the ECHR an individual, victim of violation of his or her rights, can't directly bring his issue to the Court, but has to previously apply to the Commission[278] (after exhausting domestic remedies)[279] which has "filter" functions.[280] As for the inter-state complaints, contrary to American optionally case, in the European system the complaint procedure is mandatory, which means that a State Party is deemed *ipso facto* to have accepted the right of other States Parties to file charges against it.[281]

In Inter-American jurisprudence, progressive elaboration of rights is supported partly by the Court's own normative reasoning, partly by invocation of subsequent OAS

[274] Charter of the Organisation of American States (A41), (1948), Art.1(1)
[275] „this Article does not merely reiterate the provisions of Article 1(1) of the Convention concerning the obligation of States to respect and ensure, without discrimination, the rights recognized therein, but, in addition, establishes a right that also entails obligations for the State to respect and ensure the principle of equality and non-discrimination in the safeguard of other rights and in all domestic laws that it adopts." - Inter-American Court of Human Rights, *YATAMA v. Nicaragua,* (23 June 2005) (Preliminary Objections, Merits, Reparations and Costs), para 186
[276] *See at* 75
[277] Charter of the Organisation of American States (A41), (1948), Art. 33
[278] Until 1998, a similar system existed under ECHR, however Prot.11 to the Convention abolished the European Commission on Human Rights.
[279] Charter of the Organisation of American States (A41), (1948), Art. 44, 46
[280] The Commission decides on the admissibility and calls for "peaceful settlement" before proceeding
[281] Buergenthal, T. (1980). *The american and european conventions on human rights: Similarities and differences*, American University Law Review, 30(1), 159

human rights instruments, and by references to the global and especially European human rights regimes, like the ones developed by ECHR.[282]

5.2.1 Non-Discrimination and *Jus Cogens* in the IACtHR's legal framework

The IACtHR was the first Court to acknowledge the *jus cogens* nature of non-discrimination and was much more involved in the interpretation of ACHR through the use of international global and regional legal instruments. Among such instruments, there are, for example, the case-law of the ECHR and UN declarations. This process can be called the importation of legal interpretations. The Court considers that such phenomenon is actually justified by the ACHR itself, which at art.29(b) states that no provision of the Convention shall limit the enjoyment of any right recognized by virtue of internal laws of State Parties or conventions ratified by those States.[283]

From such stance, the IACtHR also tended to exercise the interpretative exportation through a better identification of *jus cogens* especially in the non-discrimination sphere. The highest priority in the matter was taken previously by prohibition of torture and inhumane treatment which today are undoubtedly considered inviolable in any conditions. On the fundamental nature of the principle of equality and non-discrimination as part of *jus cogens,* the Court expresses itself in its Advisory Opinion no.18 in case regarding *Juridical Condition and Rights of Undocumented Migrants.* In its view, the principle of equality and non-discrimination stands at the basis of human rights in general, as one could deduce from the presence of such principle in almost every international treaty regarding the protection of human rights. Such principle is inseparable from the concept of equality before law which "is linked to the essential dignity of an individual". [284] In a concurring opinion, judge Antônio Augusto Cançado Trindade explains that this principle oriented approach is based on *prima principia* which are pre-conditions to the very existence and legitimacy of law. In fact the judge

[282] Neuman G. (2008), *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, European Journal of International Law, Volume 19(1), 107
[283] *Ibidem*, 112
[284] "This Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable." – Interamerican Court of Human Rights, Advisory Opinion no.18, Juridical Condition and Rights of Undocumented Migrants, (17 March 2003), para. 101

maintains that "from the *prima principia* the norms and rules emanate, which in them find their meaning. The principles are thus present in the origins of Law itself. The principles show us the legitimate ends to seek: the common good (of all human beings, and not of an abstract collectivity), the realization of justice (at both national and international levels), the necessary primacy of law over force, the preservation of peace."[285]

It can be observed that whereas the ECtHR concentrated on determining the formal or substantive approach to the discrimination in its direct or indirect manifestation, the Inter-American Court condemns any discrimination in its primal general form. In other words, the exercise of State powers that includes discrimination at any level is considered as a violation of both national and international peremptory principles. This doesn't preclude a State to apply positive actions, which in Inter-American nomenclature derive from legitimate distinction, however, such measures are rather to be considered as *ultima ratio*.[286] Nonetheless it is important to underline that an overall generalization of the principle of non-discrimination doesn't mean that all types of discrimination, not regulated by autonomous sources as for example the racial discrimination, have the same rank at the regulatory level considering that some of them have a more developed internal or international legal framework.[287]

5.3 African Charter on Human and People's Rights and the right to development

Africa is probably the continent which suffered the most of all in the historical context of human rights breeches. Whether it was the case of South African apartheid, Rwandan genocide or numerous civil wars mixed with extreme levels of poverty, safeguarding human rights represented and still represents a major challenge for the continent's international community. The main issues regard mainly gender or illegitimate children discrimination[288] but not is not limited to them and permeates every level of society[289].

[285] Interamerican Court of Human Rights, Advisory Opinion no.18, Concurring Opinion of Judge A.A. Cançado Trindade , (17 March 2003), para. 42
[286] Comment of the Commission: "Any distinction that States make in the application of benefits or privileges must be carefully justified on the grounds of a legitimate interest of the State and of society, 'which cannot be satisfied by non-discriminatory means.'" – *Ibidem,* page 23
[287] Pustorino P. (2019) *Lezioni di tutelage internationale dei diritti umani,* Bari: Cacucci, 137
[288] Nnaemeka-Agu, P. P. (1993). Discrimination and the african charter on human and peoples' rights. Commonwealth Law Bulletin, 19(4), 1673
[289] African scenarios inspired the creators of universal acts like Convention on the Elimination of All Forms of Discrimination Against Women (1957) or the UN Declaration of the Rights of the Child (1959)

In Africa the main legal instrument for the HR protection is The African Charter on Human and People's Rights (ACHPR) which implementation is monitored and promoted by the African Commission and Court on Human and People's Rights both acting under the mandate of the African Union (formerly Organisation of African Unity). The non-discrimination clause resembles the same provision as in other conventions, however it also specifies additional grounds such as "fortune" going beyond the meaning of mere property, and "national and social origin"[290], which gives it a deeper social meaning[291]. As in the case of the ACHR the Convention also recognizes the right to equal protection before the law.[292] In consideration of particular continental context, Art.18(3) emphasises the need of elimination of discrimination against women and protection of women and children's rights. As for legitimate different treatment, the African Commission partially reproduced the interpretation of the IACHR stating that a measure to be considered legitimate and justifiable must satisfy three conditions: proportionality, reasonable and objective justification and same treatment of similar cases.[293]

5.3.1 Racial Segregation as violation of right to development

The troubled history and experiences of slavery, colonialism and apartheid in the African continent also gave life to new concepts like right to development, which in itself is a complex of different human rights and the right to self-determination and is particularly pertinent when considering developing countries of the continent. Its role cannot be ignored in the better understanding of discrimination. One of the innovations of the African Charter was the right to economic, social and cultural development present at art. 22[294] containing also the obligation for the State Parties to ensure the exercise of such right. The UN expanded its meaning with the Declaration on the Right to Development (1986) in which it included also the political development. There are

[290] Mujuzi, J. D. (2017). The African Commission on Human and Peoples' Rights and its promotion and protection of the right to freedom from discrimination. International Journal of Discrimination and the Law, 17(2), 92
[291] African Union, African Charter on Human and Peoples' Rights (27 June 1981), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art.2
[292] *Ibidem,* Art.3
[293] Dabalorivhuwa Patriotic Front v. the Republic of South Africa, (23 April 2013) Communication 335/2006, para 113
[294] "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind"

various interpretations as to definition of development, for example UDHR oriented (process of expanding fundamental freedoms) or in a political-systematic key[295]. Within the apartheid framework the concept of "separate (and unequal) development" was one of the main postulates of the South African legislator. It could be said that that the lack of provision of development tools for a particular group was one of the main discriminatory dimensions of the Apartheid. In fact, the Declaration itself urges States to eliminate violations of human rights (deriving from segregationist policies) affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism and other oppressive behaviours.[296] In addition it is worth mentioning that art. 5(c) of the ICERD envisages the right to political participation and art. II (c) of the ICSPCA explicitly inserts among the cases of the crime of apartheid, "measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups". To give an example of how apartheid laws affected the right to development one could take in consideration the Bantu Education Act (1953). From the development prospective, the discrimination isn't merely focused on physical segregation of black children or their access to education in general but on the limited possibilities of fulfilling their potential because of scarce level of educational instruments at their disposal.[297]

Whereas up to this point discrimination was rather focused on denial of rights, in the perspective of development discrimination presents itself in the unwillingness of a State to provide tools to assert such possibility for a group or an individual. In fact, the enjoyment of the right is strongly dependant on the actions performed by the State, and thus, again, could be based on affirmative actions.[298]

[295] Igbinedion S.A. (2019) *Finding value for the right to development in international law*, 19 African Human Rights Law Journal 398-399
In reference to A. Sen, *Development as freedom* (1999) and D. Seers, *The meaning of development* (
[296] UN, Declaration on the Right to Development, A/RES/41/128(XLI) (4 December 1984), art. 5
[297] Similar conclusions can be made in reference to the ECtHR statements on the *DH* case in which, as seen before, the minimal curriculum could compromise the labour possibilities, and thus personal development of Roma pupils. *See at* 78-80
[298]UN, Declaration on the Right to Development, A/RES/41/128(XLI) (4 December 1984), art. 6(3) and 10

6 International Law Commission and *Jus Cogens*

The question whether the apartheid as violation of international law or as crime against humanity can be considered part of *jus cogens* in terms of peremptory norms is still difficult to answer. If one would prefer to endorse the IACtHR's approach, through a simple analogy, it could be said that apartheid being a particular form of racial discrimination should be considered a violation of prohibition of discrimination and thus *jus cogens*. Nevertheless, IACtHR's approach can't define *jus cogens* on its own and the concept of institutionalised racial discrimination, still struggles to be fully internationally recognized especially by Western States (see ICSPCA signatories). Barnard argues that there are four main reasons of this struggle: small amount of countries that implemented prohibition of apartheid in their national legal systems, the substantially non-universal nature of the apartheid convention, the lack of provision on apartheid in special international criminal courts (except for East Timor panels) and no practical application of the norm regarding the crime of apartheid up to this day.[299] This last aspect was also partially due to the choice of the new South African State, not to convict any authors of the apartheid through a criminal body but to rather resolve the issue through the TRC.

Within the International Law Commission framework, In the fourth report on peremptory norms of general international law (jus cogens) the special rapporteur again tried to include the apartheid within the *jus cogens*. On the discrimination-apartheid relationship he recalls that the ICSPCA referred to "similar policies and practices of racial segregation and discrimination as practised in southern Africa" extending the application of the Convention. The ICJ in *Barcelona Traction* case stated that the prohibition of discrimination is valid *erga omnes*.[300] The two concepts are interconnected because as Pellet and Cherif Bassiouni explain while *jus cogens* concerns the content of the rule, the *erga omnes* tells us the addressees of the rule and is

[299] Barnard, A. (2009). Slegs suid afrikaners -south africans only a review and evaluation of the international crime of apartheid. New Zealand Journal of Public and International Law, 7(2), 351-354

[300] "The Court stated that obligations *erga omnes* derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" – Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, at p. 32, para. 34.

a consequence of the former. [301] The ICJ went further stating apartheid and racial policies of South Africa constituted "a denial of fundamental human rights [that] is a flagrant violation of the purposes and principles of the Charter"[302] indirectly acknowledging the *jus cogens* nature of apartheid crime.[303] In several resolutions of the General Assembly and the Security Council addressing the situation in South Africa and the struggle of the oppressed groups, similar conclusions were made. The ILC recalls in particular the wording of the 1965 Declaration on the Elimination of All forms of Racial Discrimination in which the General Assembly refers to "all States" rather than "member" or "affected" ones.

It has also been established that the struggle against the discriminatory or apartheid regime constitutes a legitimate reason for prevalence of self-determination[304] over territorial integrity, thus legitimate struggle for independence.[305]

Finally it also appears that some national courts considered the *jus cogens* nature of racial discrimination.[306] In 2011, the US Court of Appeals judged in *Sarei et al. v. Rio Tinto* case in which the plaintiffs of Papuan origin acting upon Alien Tort Claims Act[307] sued a Papuan mining company for damages brought to the population and the environment during the civil war. In the part regarding the alleged systematic racial discrimination imposed "under color of law", the Court stated that "There is a great deal of support for the proposition that systematic racial discrimination by a state violates a jus cogens norm and therefore is not barred from consideration by the act of state

[301] UN, International Law Commission, Fourth report on peremptory norms of general international law (jus cogens) (31 January 2019), A/CN.4/727, para. 93
[302] ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 57, para. 131.
[303] UN, International Law Commission, Fourth report on peremptory norms of general international law (jus cogens) (31 January 2019), A/CN.4/727, para. 93
[304] *See* para. 3.2.2
[305] For example, the General Assembly resolution on the definition of aggression was subject to the caveat that the definition did not prejudice "in any way" the right of "peoples under colonial and racist regimes or other forms of alien domination …[to] struggle" for their rights and "to seek and receive support".
[306] Swiss case A v. Department of Economic Affairs; United States Court of Appeals in Committee of US Citizens Living in Nicaragua;
[307] U.S. law that grants to U.S. federal courts original jurisdiction over any civil action brought by an alien (a foreign national) for a tort in violation of international law or a U.S. treaty. – Encyclopaedia Britannica entry, Retrieved from" https://www.britannica.com/topic/Alien-Tort-Claims-Act

doctrine."[308] However, ultimately the Court had to reject the claim posed under this argument, pointing out the biggest flaws of art. 3 of ICERD, namely that it is not self-executing, it does not establish a norm sufficiently specific, universal, and obligatory and lacks any definition of *systematic racial discrimination.*[309] Moreover, the Court held that the claim would be acceptable if it fully integrated elements of the crime of apartheid[310], a condition which again seems almost unreachable under the current legal interpretation.

7. The implementation of anti-discriminatory principles in national legislation of South Africa

The ways of implementation of norms regarding prohibition of apartheid and, in a more generic sense, of racial discrimination became one of the beacons of the post-apartheid Republic of South Africa. The two main legal sources that regard such prohibitions are the section nine of the South Africa's Constitution (Act 108 of 1996) and the Promotion of Equality and Prohibition of Unfair Treatment Act (Act 4 of 2000) (Henceforth referred as Equality Act).

The section enunciates a general equality guarantee (subsection 1), defines it by outlawing unfair discrimination on a number of grounds (subsections 3 and 4), expressly allows for affirmative action (subsection 2) and lays the burden of proof upon the discriminator (subsection 5, applying when the grounds listed in subsection 3 are present).[311] The question of affirmative actions in the South African context has been treated in paragraph 4.1.4. What is interesting is the approach of South African legislator towards the concept of racial equality. In rejects the concept of equality of results in favour of a more liberal equality of opportunity. Such choice was made in order to maintain a healthy market economy within the country[312] and prevent post-apartheid destabilization. In accordance with art.2 of the ICERD the State is required to act positively in order to guarantee such equality.

[308] *Sarei and Others v. Rio Tinto,* PLC, Judgment, United States Court of Appeals for the Ninth District, 25 October 2011, at 19378
[309] *Ibidem,* at 19378-19379
[310] *Ibidem,* 19380
[311] Constitution of the Republic of South Africa [South Africa], 10 December 1996, Sec. 9
[312] Vogt, G. S. (2001). Non-discrimination on the grounds of race in south africa with special reference to the promotion of equality and prevention of unfair discrimination act. Journal of African Law, 45(2), 198

The Equality Act prohibits general discrimination by individuals or by State at section 6 and racial discrimination in particular at section 7:

„Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including - (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence; (b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race; (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group; (d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group; (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons."

7.1 The "unfair" discrimination

In South African law, an aspect that plays a major role in the identification of discrimination is its "unfairness" as seen when treating the matter of affirmative actions. The judges in the examination of discrimination cases have to perform a two-step test. Once it is confirmed that there has been a discrimination it is necessary to define whether such discrimination was "unfair". Section 14 of the Equality Act excludes affirmative actions as cases of discrimination (1) and provides instructions on how to consider "unfairness" through the use of context (2a), objective justifiability and reasonability (2c) and other factors (2b).[313] By the presumption of "unfairness" of a discriminatory act, the burden of proof of the contrary lays upon the respondent.

On the matter of applicability there is a difficult legal interpretation conflict. The non-discrimination right in sec. 9 of the Constitution can be subject to limitations in accordance with sec. 36 which states that the provisions of the Bill of Rights (among which sec. 9) can be limited by "the law of general application to the extent that the

[313] (3) The factors referred to in subsection 2(b) include the following: (a) Whether the discrimination impairs or is likely to impair human dignity; (b) The impact or likely impact of the discrimination on the complainant; (c) The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage; (d) The nature and extent of the discrimination; (e) Whether the discrimination is systemic in nature; (f) Whether the discrimination has a legitimate purpose; (g) Whether and to what extent the discrimination achieves its purpose; (h) Whether there are less restrictive and less disadvantageous means to achieve the purpose; (i) Whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or (ii) accommodate diversity."

limitation is reasonable and justifiable." That means that the "unfairness" combined with justifiability clause present in the Equality Act could overly limit the enjoyment of non-discrimination constitutional right. Vogt argues that:

"There should be a strict distinction between the analysis of unfairness and the examination of a justification within a limitation of the right […] The reversal of the burden of proof provision […] is weakened considerably by such a broad understanding of "unfairness". The effect is that the defendant can discharge the presumption of unfairness not only by showing that the discrimination was "fair" in a narrow sense, but simply by testifying that there was a legitimate purpose and that there was no less-restrictive means to reach that purpose. In consequence the initial force of the guarantee of racial equality becomes practically worthless."[314]

To conclude, the system of distinction between the "fair" and "unfair" discrimination can be a dangerously inconsistent one if it is not founded on precise principles. Vogt stated that such system presented "danger of developing contradictory and confusing jurisprudence"[315] and is not too efficient as to strengthening the right to non-discrimination.

[314] Vogt, G. S. (2001). Non-discrimination on the grounds of race in south africa with special reference to the promotion of equality and prevention of unfair discrimination act. Journal of African Law, 45(2), 201-202

[315] *Ibidem*, 204

CHAPTER III: Racial Segregation outside South Africa: an overview of USA, Occupied Palestinian Territories and Sudan cases

1. Jim Crow's laws in the USA

In many aspects the situation in Southern States of the USA and the policies of "separate but equal" resembled the apartheid in South Africa. Nonetheless, the so called Jim Crow's laws (a symbolic name referring to a random Afro-American person) were issued on State and not federal level and considering the limited international interest in interfering with the internal policies of the USA, such laws never reached the same level of international notoriety as the Apartheid.

Historically, the racial discrimination in laws emerged especially after the end of the American Civil War (1861-1865) which saw the defeat of the pro-slavery Confederate States in the South. The federal government in Washington D.C. pushed for the adoption of the XIII amendment to the US Constitution which has abolished slavery in the country. Up to that point, the southern economy was mostly based on agriculture which was strongly dependant on the slave work, so the war and the adopted amendment led to a drastic economical decay. The factual status of the black citizens barely differed from that of a slave. The vagrancy laws prevented individuals from remaining without a job and whites tended to stream the black workforce back to plantations by blocking access to any other industries or trades.[316] From the legal perspective, it was the XIV amendment which introduced equality before law[317] that was the most significant.

The black resistance against the introduced laws, is particularly visible in the cases brought before state and federal courts. In *Plessy v. Ferguson* a Citizens Committee aimed to challenge the constitutional compliance (with XIV amend.) of the Louisiana's Separate Car Act (1890) by selecting Homer Plessy which would get purposely arrested for staying in the train's white car, in order to bring the case to the court.[318] As it was expected, both Louisiana's State and Supreme Court as well as the Supreme Court of

[316] Fremon D. (2015) The Jim Crow Laws and Racism in United States History, Enslow Pub Inc., 23-24
[317] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
[318] Fremon D. (2015) The Jim Crow Laws and Racism in United States History, Enslow Pub Inc., 31

the United States upheld the position of the State authorities and dismissed the plaintiff's objections. Officially, the reason for the separate cars was to prevent any racial tensions that could arise within them and thus was of security nature. Moreover, the US Supreme Court held that "separate" doesn't necessarily mean "unequal" and as such it wouldn't go against the XIV amendment.[319] The Court added that any attempts to eradicate social (or racial) prejudices by forcing integration through law has to be rejected and achieved through other means.[320] In a way it tends to emphasise the barriers which law cannot breach: "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[321] On the other hand, Justice Harlan argued that the very violation of equity rule was the sole arbitrary separation of citizens, on the basis of race.[322] It is clear that formal equality doesn't always correspond to the factual one, and in the present case the separate cars most likely differed in quality and accessibility. In some cases there wasn't even a respective facility for the black race, which meant they were exclusively white. The constitutional doctrine of "separate but equal" that derived from *Plessy v. Ferguson* legitimized the later southern statutes introducing other forms of segregation in other sectors. However, one shouldn't underestimate the constitutional value of the XIV amendment which was still able to hinder the introduction of any drastic discriminatory measures. This was facilitated by the inclusion of substantial equality clause in the interpretation of the amendment.[323]

[319] "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it" – U.S. Supreme Court, Plessy v. Ferguson, 163 U.S. 537 (1896), para. 551, *retrieved from:* https://supreme.justia.com/cases/federal/us/163/537/

[320] "The (plaintiff's) argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individual […] Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation" – *Ibidem*

[321] *Ibidem*, para. 552

[322] Groves H. E. (1951) *Separate But Equal-The Doctrine of Plessy v. Ferguson,* Phylon (1940-1956), Vol. 12, No. 1 (1st Qtr., 1951), Clark Atalanta University, 67

[323] "Any classification which preserves substantially equal school advantages is not prohibited by either the State or federal constitution, nor would it contravene the provisions of either." – *State Ex Rel. Garnes v. McCann*, 21 Ohio St. 198, 407 (Ohio 1871)

In contrast to this system, the South African "separate development" faced no such constitutional barriers and was much more absolute in its policies.[324] This difference can be traced in the educational expenditures for different races in both countries. For instance, in South Africa there were great disproportions in this matter between different groups. In the USA instead, the equality clause required the per capita expenditures not to be unreasonably disproportionate between the two groups.[325] Groves argued that despite some progressive touches, the case-law couldn't hope for the same level of effectiveness as legislation due to its *inter partes* and not *erga omnes* validity. This is especially problematic when considering that the problem of segregation regarded a whole part of the country and decisions regarding acts of singular cities or States weren't able to enforce reforms for all the others. The processes were also costly which discouraged victims from seeking justice.[326] In addition, considering the social and wealth differences between the two racial groups, a situation of perfectly maintained and racially separated sister facilities providing the same exact amount and quality of services was difficult to imagine. Developments were also made in *Henderson v. United States, et al.* which addressed compatibility of Southern Railway Company's regulations regarding separate seats in the dining car with the Interstate Commerce Act. The regulations provided that the two tables normally reserved for blacks could be reserved exclusively for the whites if all the other tables were occupied. The applicant successfully contested the compliance of these regulations with sec. 3 of the IC Act which forbade railway companies "any undue or unreasonable prejudice or disadvantage in any respect whatsoever" towards any person.[327] Again it wasn't the very segregation that was challenged but rather the way it was implemented. The regulations were changed and had foresaw a separate single table for an exclusive use by black people in accordance with railroads clients' proportionality test. Nevertheless, the Federal Supreme Court stroke them down again, claiming that the ticket entitled all

[324] However, it is noteworthy to remember that the South African judges in *Minister of Posts and Telegraphs v. Rasool* (1934) referred to the matter of "substantial inequality" when addressing the need of equal quality services. *See at* 25; similar conclusions were made in *Abdurahman v. R.* (1950)
[325] *Jones v. Board of Education of City of Muskogee*, 90 Okla. 233, (1923).
[326] Groves H. E. (1951) *Separate But Equal-The Doctrine of Plessy v. Ferguson,* Phylon (1940-1956), Vol. 12, No. 1 (1st Qtr., 1951), Clark Atalanta University, 69-70
[327] Green, L. L. (1950). The legality of Jim Crow regulations. International Law Quarterly, 3(4), 592

the clients to use the dining car equally, and a severely restricted access to it for some of them could be interpreted as "prohibited disadvantage".[328]

On the note of education, in *Missouri ex rel. Gaines v. Canada, Registrar of the University of Missouri* (1934), the Supreme Court again searched for a positively binding meaning of "separate but equal" by ruling that where a State establishes a law school exclusive for a particular race, a similar facility has to be provided to the other one. In 1950 it also went a step further and in *Sweatt v. Painter* it forced the "white" University of Texas to admit a black student, because, despite the fact that a similar facility for the other race existed, it was lacking the same level of quality in education.[329] In spite of this federal decision, in other cases like University of Tennessee's Law School, the black students continued to remain excluded from education in the concerned field.[330]

A true revolution happened in 1954 with the landmark US Supreme Court's decision in *Brown v. Board of Education* case which was the first step towards officially putting an end to the "separate but equal" doctrine endorsed by the justices so far. The case revolved around the segregation of black and white children in separate schools and the invalidity of "separate but equal" criterion in education sphere. The reasoning of the Court, however, wasn't based on any new legal instruments (international law on human rights was still at its birth), but rather on a methodological or ideological swift as to the interpretation of the XIV amendment that emerged within some judiciary circles. In the Court's opinion, provision of adequate education, especially in its compulsory form, became a sort of *sine qua non* in the enjoyment of future life.[331] This has to be read in a beyond curricular key: besides giving standard knowledge the school works as a guideline to interpersonal relations and peaceful life within the society. The Court stated that: "to separate them [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to

[328] *Ibidem,* 593
[329] *Ibidem, 594-595*
[330] Groves H. E. (1951) *Separate But Equal-The Doctrine of Plessy v. Ferguson,* Phylon (1940-1956), Vol. 12, No. 1 (1st Qtr., 1951), Clark Atalanta University, 70
[331] U.S. Supreme Court, *Brown v. Board of Education,* U.S. Reports: 347 U.S. 483

ever be undone."[332] The lack of a clear practical basis for a reinterpretation of the equality norm and brave yet arguable considerations made by the Court through the use of social science, caused the decision to suffer criticism.[333]

Nonetheless, although not being perfect, the decision paved the road to Civil Rights Act (1964)[334], called "the second emancipation" by Martin Luther King Jr.. The Act not only forbade race, color, religion, or national origin discrimination in public places, but also made provisions on the desegregation of public facilities[335] and public education[336] and equal employment opportunity.

Although the situation has been considerably ameliorated in the legal field, the struggle for racial equality in the South continues to this day, but no drastic change can be expected in the near future considering the deep-rooted social and almost cultural gaps between racial groups. Among the phenomena that still drain from the legacy of Jim Crow there remain to be the mass incarcerations of blacks, the extensive use of penal labour and the racial profiling in the war on drugs occurring in the past decades.[337]

In conclusion, despite a similar content of discriminatory norms that the two systems enacted, the differences between the Jim Crow's laws and the Apartheid can be traced on several levels. Historically and sociologically, the South African system initially aimed to completely separate racial groups for civilizational and cultural reasons, while in the Southern States the unhealthy economical and mental bonds that slavery established led to creation of system analogous to feudal serfdom with racial background. Legally speaking, the implementation of "separate development" doctrine was much easier to endorse in legislation due to a heavily centralised State and a high

[332] *Ibidem*
[333] „Virtually everyone who has examined the question now agrees that the Court erred. The proffered evidence was methodologically unsound. The damage of the dual school system, the systematic treatment of blacks as inferior beings, is a historical and not an empirical truth." – Yudof M. G. (1978) *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 L*aw* and Contemporary Problems, 70
[334] Civil Rights Act of 1964, 42 U.S.C.
[335] The Attorney General received power to issue a civil lawsuit (upon the victim's complaint) against discriminating parties, where the victim wasn't able to initiate and maintain appropriate legal proceeding autonomously (Title III of the Act).
[336] The Commissioner of Education has been given the task to perform surveys on the process of desegregation, as well as to coordinate and grant technical assistance and (Title IV of the Act)
[337] Zinkel B. (2019) *Apartheid and Jim Crow: Drawing Lessons from South Africa's Truth and Reconciliation*, J. Disp. Resol. 2019, 238-240

level of parliamentarism, whereas the federal bodies in the USA tended to confront geographically dispersed discriminatory legislation through the development of the Constitution and a sort of attempted yet ultimately abandoned compromise that "separate but equal" was supposed to be. Zinkel adds that differences can be also spotted in the way the countries dealt with the aftermath of the "fall" of the two systems. He underlines that the Truth and Reconciliation Commission established in the RSA in 1995 played a key role in the passage between the pre and post-apartheid eras and perhaps it was the lack of such a body in the USA that left the racial issues in the country ultimately unresolved.[338] Finally, as mentioned at the beginning South Africa suffered a much bigger international pressure as can be seen from the numerous UN resolutions, and embargos that derived from them. This situation didn't occur in the USA which, being an international major power, remained unaffected by any possible international criticism.

2. Apartheid in the Occupied Palestinian Territory (OPT)

The case of Palestine is perhaps among the most complicated and controversial in the international law (especially its criminal branch) in the contemporary world. Since the occupation of Palestine in 1967 the Israeli administration has been accused of several partial annexation of Palestinian territory in violation of international law, war crimes and crimes against humanity among which the forcible transfer of population, inhumane acts, persecutions and apartheid. Whereas in the American and South African scenarios the racial segregation was the effect of internal policies in peacetime, in Palestine the aspect of semi-permanent, sometimes openly violent, conflictual situation plays a major role. Moreover, the situation in Palestine had a much more international character with several subjects involved. For this reason it is necessary to briefly explain the origins of this conflict.

Since the fall of the ancient kingdom of Israel the lands of Palestine had been subject to influence of foreign empires and three different religions. The mass Jewish

[338] "South Africa made significant efforts to remedy the harm caused by apartheid soon after the end of apartheid. The United States did not make such efforts. Although the Civil Rights Act passed in 1964, the United States did nothing to remedy the past discrimination and harm caused by Jim Crow. No reparations were paid nor was there any form of reconciliation. This has caused Jim Crow sentiments to linger long past the official "end" of the era" – *Ibidem,* 241

emigrations and the influx of Muslim Arabic populations led to a creation of a new cultural background in the area. The situation tended to reverse again at the end of XIX century when Jews began to buy lands in Palestine from ruling Ottoman landlords in order to settle the already inhabited territory. After the First World War, the land found itself under British protection in accordance with League of Nations mandate[339]. The Jewish communities decided upon the development of a movement known as Zionism[340] and the "restoration" of a Jewish State. The increasing number of Jewish immigrants and purchased land, led to first signs of tensions with the local Arab community. The British proposed the establishment of a State that would represent the two groups (White Paper 1939), but it was rejected by both. The rising instability forced the British to call upon the newly formed UN which appointed the United Nations Special Committee on Palestine (UNSCOP) in 1947. The Resolution 181 provided a plan of partition of the land which was however strongly disproportionate and hadn't been accepted by the Palestinian party.[341] In 1948 the Jewish State of Israel was born and, in denial of the resolution, laid claims on the entirety of the ex-Palestinian mandate. This led to Arab-Israeli War in 1949 which ended with the victory of the later which affirmed its dominance over a vast majority of the contested territory in accordance with the armistice and caused thousands of Arab Palestinians to leave their former home. The abandoned villages were rebuilt as settlements for future Jewish immigrants. The second conflict that occurred in 1967 (Six Days War) saw the Israel's expansion over the Sinai Peninsula, Gaza Strip, West Bank, East Jerusalem and Golan Hights regions[342]. The UN Security Council's resolution 242/1967 called for withdrawal of Israeli armed forces from territories occupied in the conflict, but without specifying particular regions. Israel complied only as to the Sinai Peninsula, which has been

[339] Under the legally binding mandate the British administration was compelled to establish in Palestine a "national home for the Jewish people" (League of Nations, Mandate for Palestine, 24 July 1922).
[340] A movement that aims to preservation of Jewish cultural and religious identity. It is important to note however, that Zionism has been severally accused of being too aggressive in its philosophy and it has been placed on the same level as racism in African Charter on Human and Peoples' Rights (1981) and Arab Charter on Human Rights (2004).
[341] "It designated 56% of the land to the Jews and 43% to the Arabs. At the time, Jews constituted one third of the population and owned less than 10% of the land. Nevertheless, the assumption was that an increasing number of Jews would migrate to the territory. […] In the eye of the Palestinians and Arab leaders, the partition had no legal and moral credibility as it ignored the fundamental principles of self-determination and majority rule" – Adem, S. (2019). Palestine and the international criminal court, International criminal justice series, 21, The Hague, T.M.C. Asser Press, 21
[342] *See* Appendix 2

generally accepted. Since then several militia and guerrilla groups under the auspices of Palestine Liberation Organisation[343] began their underground armed struggle against Israel and further raised the international awareness of the issue. The more radical measures were adopted on the occupied territory the more aggressive resistance opposed them. In fact, terroristic and fundamentalist organisations like Hamas continued to gain popularity.[344]

In 1988 with the Resolution 43/77 the UN acknowledged the Declaration of Palestinian State, (1988) which in 2012 obtained the observer status within General Assembly. Palestine also joined the Rome Statute of the International Criminal Court (ICC), which is crucial in the contemporary struggle against apartheid,[345] and called for the examination of alleged crimes committed in the occupied Palestinian territory[346]. Palestine also adhered to ICERD in 2014 and submitted an interstate communication (acting under art.11) against Israel to the Committee which is yet to deliver its decision.[347]

Considering the strong military presence, the somehow violent resistance against it and resettlement plans conducted by Israeli government, the situation in the Occupied Palestinian Territories has been marked by many allegations of violations of international law. Whereas in the two previous cases the apartheid like systems were denounced for their factual and historical context, in the contemporary Palestinian scenario it is worth to analyse the allegations of apartheid through the use of international legal instruments (mainly ICERD and ICSPCA) and doctrine.

As for the first preliminary question it would necessary to attain whether the concept of "institutionalized racial discrimination" is valid in the present case. Contrary to the

[343] International organisation advocating the question of Palestinian right to self-determination, which has received observer status in the UNGA.
[344] The historical background in this part is based upon Adem S. (2019) *Palestine and the international criminal court*, International criminal justice series, Volume 21, Springer, Chapter 2
[345] Mutaz M. Qafisheh (2016) *Palestinian prisoners in Israel versus Namibian prisoners under apartheid: a potential role for the International Criminal Court*, The International Journal of Human Rights, 20:6, 806
[346] At the time of writing of this text, the most recent development on the matter dates back to 20th December 2019, when the ICC Prosecutor Fatou Bensouda declared that the preliminary examination has concluded positively, and announced the investigation can be launched once the Court confirms the extent of territory upon which it can be performed. For more information *see* https://www.icc-cpi.int//Pages/item.aspx?name=20191220-otp-statement-palestine
[347] *See* para. 2.2

previous scenarios, the race distinction here, doesn't appear clear right away. Perhaps the most correct answer to whether Palestinians and Jews can be perceived as two separate "races" for the purposes of the crime of apartheid and racial discrimination, can be retrieved from the ICERD[348] which among the discriminatory grounds places the "national or ethnic origin".[349] Scholars argue that in its contemporary meaning "race" has a more sociological rather than biological or purely historical and colour nature.[350] It is important to remember that even the Israeli law itself distinguishes between the two groups for institutional reasons,[351] which would prove that the simple yet versatile principle of racial or ethnic self-identification provided by the Committee on Elimination of Racial Discrimination[352] also appears to be valid.

Once it is possible to distinguish the two concerned groups it is necessary to determine whether there subsists the intent of "establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."[353] Contrary to South Africa, in Israel there is no explicit theory at the basis of the segregation. Instead, its logic is based upon the laws regarding Jewish nationality and the privileges that from such derive. More than in the other cases, such law is not founded in the consideration of "inferiority" of other races, but rather on the special status of Jews which welfare is absolutely prioritized over the other groups.[354] In

[348] International Convention on the Elimination of All Forms of Racial Discrimination, Art.1(1) A/RES/2106(XX), (21 December 1965)

[349] The ICT for Rwanda defined a national group as a "collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties", the ethnic group as one "whose members share a common language and culture". Moreover it stated that "the conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors." - Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, 2 Sept. 1998, paras 512–515

[350] "Jewish and Palestinian identities, while not typically seen as 'races' in the old (discredited) sense of biological or skin colour categories, are constructed as groups distinguished by ancestry or descent as well as ethnicity, nationality, and religion." – Dugard J, Reynolds J. (2013) *Apartheid, International Law, and the Occupied Palestinian Territory*, European Journal of International Law, Volume 24, Issue 3, 889

[351] *Ibidem, in reference to:* Russell Tribunal on Palestine, Findings of the South Africa Session (Nov. 2011), para. 5.19.

[352] UN, Committee on the Elimination of Racial Discrimination (22 Aug. 1990) *General Recommendation VIII, 'Identification with a particular racial or ethnic group'*, UN Doc. A/45/18

[353] International Convention on the Suppression and Punishment of the Crime of Apartheid, A/RES/3068(XXVIII) (30 November 1973), Art. II

[354] "[i]t is clear that such [inhuman] acts do not occur in a random and isolated manner but are part of a widespread and oppressive regime that is both institutionalized and systematic. This regime is founded on a discriminatory ideology that elevates Jews to a higher status and accords separate and unequal treatment to Palestinians. Inevitably, as shown by the experience of apartheid South Africa, such discrimination results in the domination of the 'superior' group over the 'inferior' group, and it becomes impossible to

this perspective the sole fact of possessing Jewish nationality puts a citizen in a significantly superior position towards those who are not entitled to it despite being subject to Israeli sovereignty. The idea of State of Israel was always focused on a State for the Jewish nation intended as a sort of enclave. A symbol of this approach is the Law of Return of 1950 provided special status of *oleh* (convertible to immediate citizenship in accordance with 1952 Nationality Law) to all those who were able to prove they are of Jewish bloodline and who decided to "return" to Israel.[355] The Arab Palestinian population in the occupied area couldn't count on a similar treatment, and instead it had to rely on the rule of permanent residence (since the establishment of the State of Israel until the coming in force of the 1952 Nationality Law)[356] which made the task more difficult considering the mass refugee escapes from the conflict zones. The distinction between the nationality and citizenship is also important: a person which is an Israeli citizen but doesn't have (per origin) Jewish nationality, is deprived of several rights.[357] What this meant is that the Jewish nationality in itself became a privilege, a fact which, in connection to several restrictions issued upon the non-Jewish population by the military administration in the occupied zones, was capable of establishing a domination of one national-racial group over another. The institutionalized and systematic nature of the discrimination also doesn't appear to be contestable: the discriminatory acts do not seem to occur in random or isolated manner, but are part of general government's policy towards the Palestinian population, which greatly exceeds normal security measures which would amount to "justified discrimination".

As for the violations of art. 2 of the Apartheid Convention, namely the implementation of measures that can be considered inhumane acts[358] committed in the

refute the conclusion that the purpose of such discrimination is domination." – Dugard J, Reynolds J. (2013) *Apartheid, International Law, and the Occupied Palestinian Territory*, European Journal of International Law, Volume 24, Issue 3, 904

[355] Law of Return 5710-1950 (last amended in 1970) passed by the Knesset 5th July, 1950 and published in Sefer Ha-Chukkim No. 51 of the 21st Tammuz, 5710 (5th July. 1950), p. 159

[356] Art. 3 (a)(3) of the Nationality Law (last amended in 1971) passed by the Knesset 1st April, 1952 and published in Sefer Ha-Chukkim No. 95 of the 13th Nisan, 5712 (8th April, 1952), p. 146

[357] "[w]hile Palestinians holding Israeli citizenship make up approximately 20 per cent of the state's population and are entitled to vote as citizens, they are hugely restricted in critical areas such as land use and access to natural resources and key services, excluded by planning laws and institutions, and systematically discriminated against at municipal and national levels in the sphere of economic, social, and cultural rights." – Dugard J, Reynolds J. (2013) *Apartheid, International Law, and the Occupied Palestinian Territory*, European Journal of International Law, Volume 24, Issue 3, 905

[358] Considered also in a more generic form in Art.7 (1)(j) and art.7 (2)(h) read in connection with art.7 (1)(h) of the Rome Statute of International Criminal Court

apartheid context, Israel has been accused of four out of six possible unlawful *actus reus* of which some will be presented below. In addition, considering the nature of the conflict, similar acts could be considered as a grave breech of Protocol I to the Geneva Conventions.[359] The main executing antagonists in this scenario are not the police enforcement, but military units engaging in allegedly preventive, repressive, pacification or anti-terroristic operations conducted in the Occupied Territories[360], neglecting collateral damage suffered by the non-belligerents.[361] The other side often respond with retaliation acts intensifying the spiral of violence. Such operations were often accompanied by unnecessary and abusive killings and executions and arbitrary arrests and "administrative detentions"[362] without or with superficial trials issued by military commandants and courts. Many of them could be considered as violations of art. 2 (a) regarding denial of right to life and right to freedom.[363] In accordance with Military Order No. 132, extensive trials can apply to the "stone throwers" children which can be sentenced to up to 20 years of imprisonment. According to UN Committee against torture and Special Rapporteur on the promotion and protection of human rights[364], the treatment of prisoners from occupied lands captured in large numbers[365] was also confirmed as particularly brutal[366] and considering that Israel has not incorporated the absolute prohibition of torture into domestic law has also partially

[359] Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts) , opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), Art. 85(4)(c).

[360] For Example Operation Cast Lead (2009) and Operation Portective Edge (2014) – *see* Adem, S. (2019). Palestine and the international criminal court, International criminal justice series, 21, The Hague, T.M.C. Asser Press, 35-38

[361] *Ibidem*, 160

[362] Introduced by Military Order No. 1229, Order Concerning Administrative Detention (Provisional Regulations), 17 Mar. 1988

[363] Moreover, the superficial trials and other violations of prisoners' rights, may be considered as breaches of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War and Geneva Convention III relative to the Treatment of Prisoners of War – Mutaz M. Qafisheh (2016) *Palestinian prisoners in Israel versus Namibian prisoners under apartheid: a potential role for the International Criminal Court*, The International Journal of Human Rights, 20:6, 806-807

[364] Adem, S. (2019). Palestine and the international criminal court, International criminal justice series, 21, The Hague, T.M.C. Asser Press, 162

[365] "Since 1967 over 650,000 Palestinians have been held in Israeli prisons. Hardly a family in Palestine has therefore been untouched by the Israeli prison system. Inevitably most prisoners emerge from prison embittered against the occupying Power." – UN, Human Rights Council (2007), *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard*, A/HRC/4/17, para. 45

[366] *See* Commission on Human Rights, Economic and Social Council (ECOSOC) (2002), *Question of the Human Right of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment*
Report of the Special Rapporteur, E/CN.4/2002/76/Add.1

legitimized such abuses by the Israeli Security Agency (despite some decisions of the Israel's Supreme Court which tried to partially contain the injustice problem).[367] Moreover, whereas the Israeli nationals normally get prosecuted before Israeli penal tribunals, the Palestinian cases are delegated to military tribunals (which often lead to unrightfully summarized processes).[368]

Further concerns regard art.2 (c) of the Apartheid Convention which refers to legislative or other provisions that prevent participation of certain racial groups in the political, social, economic and cultural life of the country and tend to limit the enjoyment of rights such as right to work, right to education and freedom of movement and residence among others. Almost every such right has been found to be violated. Palestinians are constantly denied freedom of movement and residence by the introduction of checkpoints, permit[369] and ID system, limited possibility of travel to and from the OPT and restrictions on residence and building in the East Jerusalem. This undoubtedly has also negative effect on the right to work, which is also affected by the restrictions on import and export imposed by Israel. The right to nationality is being denied by the difficulty of obtaining the Israeli (governing State) citizenship and on the one hand and by the non-recognition of Palestinian right to self-determination on the other. Right to freedom of expression is restricted by censorship and press accreditation limitations, while free exercise of education and freedom of peaceful assembly can be hindered by impeded by the strict military rule.[370] Dugard and Reynolds note that in contrast to South Africa where such provisions were given explicitly by the national legislation, in the OPT they are a fruit of more obscure "web of military orders and regulations"[371] and non-official rules (like separate roads system).

[367] Dugard J, Reynolds J. (2013) *Apartheid, International Law, and the Occupied Palestinian Territory*, European Journal of International Law, Volume 24, Issue 3, 892-895
[368] Mutaz M. Qafisheh (2016) *Palestinian prisoners in Israel versus Namibian prisoners under apartheid: a potential role for the International Criminal Court*, The International Journal of Human Rights, 20:6, 808
[369] Adem, S. (2019). Palestine and the international criminal court, International criminal justice series, 21, The Hague, T.M.C. Asser Press, 167
[370]Dugard J, Reynolds J. (2013) *Apartheid, International Law, and the Occupied Palestinian Territory*, European Journal of International Law, Volume 24, Issue 3, 895-897 *in reference to* V. Tilley (ed.) (2012), *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, 216-218
[371] *Ibidem*

Art 2 (d) refers to the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed race marriages and the expropriation of landed property of racial groups and their members. The reserve system in South Africa was part of the ordinary separation policy that with time was transformed in the Bantustans system whereas in the OPT it was conceived also as an effect to the strict, and sometimes completely closed, control of the population movement. Israel also aims to further integrate East Jerusalem by depriving Palestinian population in the city from basic urban services and excluding them from citizenship rights. Mass evictions, transfers of population and the instalment of Jewish settlements in the occupied land[372] (combined with expropriation and demolitions of basic facilities)[373] are among others elements characterizing territorial segregation. One of the symbols of Israeli plans of separation is the infamous "Wall" dividing the West Bank which has been considered contrary to international law in 2004.[374]

The arbitrary arrest of leaders of peaceful opposition and local representatives could be seen as infringement of art.2 (f) which prohibits persecution of organizations and persons because of their struggle against the apartheid.

Despite allegations of genocide and Israeli attacks and destruction of basic facilities and installations necessary to produce food and provide fresh water and sanitation necessary for survival, no violation of art.2 (b) of Apartheid Convention reproducing the content of art.2 (c) of the Genocide Convention[375] could be confirmed, due to the lack of "deliberate intent" of destruction of the Palestinian nation, a requirement that has been endorsed by the ICT for Yugoslavia and the ICC.[376]

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[372] The ERD Committee considered the settlement policy a violation of international law and "an obstacle to the enjoyment of human rights by the whole population, without distinction as to national or ethnic origin." - *Consideration of reports submitted by States parties under article 9 of the Convention*, (3 April 2012) CERD/C/ISR/CO/14-16, para. 4

[373] *Concluding observations on the combined seventeenth to nineteenth reports of Israel* (12 December 2019) CERD/C/ISR/CO/17-19, para. 42

[374] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [*2004] ICJ Rep 136

[375] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277

[376] Adem, S. (2019). Palestine and the international criminal court, International criminal justice series, 21, The Hague, T.M.C. Asser Press 163-164; *See* ICTY*, Prosecutor v. Popović, Beara & et al, Judgment,* 10 June 2010, IT-05-88-T, para 1311; ICC, Prosecutor v. Omar Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09 (Al Bashir 2009), para 194.

The before mentioned inhumane acts clearly appear as a violation of international law. However, one final and most debated question has to be answered before being able to categorize the Palestinian scenario as a case of crime of apartheid. There can be no doubts as to the "intent" of South African National Party regime to maintain a domination of white race over the black one, but such doubts arise when considering the Israeli policy towards Palestinians. Just like in case of the crime of genocide, the matter of "intent" is crucial in fully admitting the responsibility of crime of apartheid.[377] Experts tend to argue in this matter. Adem believes that the goal of Israeli policies is not exactly that of maintaining domination over the Palestinians, but rather that of "maintaining a Jewish majority demographic balance. The ultimate aim is preserving the 'Jewish character' of Israel in as much of the territory of ancient Palestine as possible", a process that could be defined as "demographic engineering."[378] For this reason in the view of the ICSPCA and the Rome Statute, the commitment of the crime of apartheid doesn't appear to take place. Dugard and Reynolds, however, detect a violation of ICERD and classify apartheid in Palestine as an internationally wrongful act rather than an international crime. "On the basis of the systemic and institutionalized nature of the racial domination that exists, there are indeed strong grounds to conclude that a system of apartheid has developed in the occupied Palestinian territory. Israeli practices in the occupied territory are not only reminiscent of – and, in some cases, worse than – apartheid as it existed in South Africa, but are in breach of the legal prohibition of apartheid." They also cite the words of International Law Commission: "As a 'composite wrongful act' of international law, apartheid involves 'a series of acts or omissions defined in aggregate as wrongful' and 'give[s] rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.'"[379]

There is no doubt, that under many aspects the treatment of Palestinian population in the OPT resemble that of South African apartheid. The classification of different treatment for different citizens through the Law of Return can be compared to the 1950

[377] In the case of crime of apartheid in terms of Rome Statute the requirement of intent is also reinforced by art. 30 of the Satute, namely the mental element of the crime.
[378] Adem, S. (2019). Palestine and the international criminal court, International criminal justice series, 21, The Hague, T.M.C. Asser Press, 171
[379] Dugard J, Reynolds J. (2013) *Apartheid, International Law, and the Occupied Palestinian Territory*, European Journal of International Law, Volume 24, Issue 3, 912

Population Registration Act. Territorial fragmentation obtained through the settlements policies, appropriation of lands and limitations on movement are comparable to reserves system and urban access barriers that were present in South Africa. Finally a strong State controlled security apparatus involving a wide amount of oppression instruments and citizens invigilation is another common element to both systems.[380]

There are also some contrary opinions to the position of Dugard and Reynolds. Apartheid was performed by a government exercising his power as a sovereign. Zilbershats claims that Israel does not exercise sovereign powers over the OPT, but rather operates in a situation of "belligerent occupation"[381]. Upon this argument the situation of people living in the occupied zones and their freedoms can be different than that of the ordinary citizens. Moreover, the author, claims that the question of security should also be taken under broader consideration and that certain human rights can be subject to limitations for security reasons.[382] Same reasons could be at the basis of military operations to counter particularly aggressive terroristic activity, one that was not so overly present in the South African scenario.

2.1 Palestinian right to self-determination

One could ask, if similarly to South African case[383], the armed struggle against Israeli administration could be seen as legitimate by the international community in terms of violation of the Palestinian right to self-determination which has been recently confirmed by the UN[384]. The partial recognition of *de jure* State of Palestine, could be

[380] *Ibidem*, 911
[381] "Recognizing the temporary aspect of occupation, as well as its military nature, belligerent occupation creates a much narrower framework of rights and duties between the occupier and the population in the occupied territories than between a state and its citizens and residents" – Zilbershats Y (2013), *Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds*, European Journal of International Law, Volume 24, Issue 3, 917
[382] *Ibidem*, 920
in reference to International Covenant on Civil and Political Rights (ICCPR), Arts 4(1) and 12(3), 999 UNTS 171; American Convention on Human Rights 1969, Arts 22(3) and 27, in I. Brownlie, Basic Documents on Human Rights (1992), at 524; European Convention on Human Rights, Art. 15(1), ETS No. 005; 4th Protocol to the European Convention on Human rights, Art. 2(3), ETS No. 046. See also M. Sassoli and A.A. Bouvier, How Does Law Protect in War – Cases, Documents and Teaching Material on Contemporary Practice in International Law (1999), at 154–155.
[383] *See* Chapter II, para. 3.2.2
[384] UN General Assembly, *The right of the Palestinian people to self-determination,* A/RES/73/158, (9 January 2019)

one of the elements which provides such legitimacy and at the same time transforms the conflict into an international rather than internal one.

It should be noted that even if in both cases a segregation took or takes place, the struggle in South Africa was explicitly targeted against apartheid system and its regime, in order to obtain equality and to reform the country. In the Palestine the main goal of Arab population is independence[385] and separation of the two States. If combined with the right to self-determination and the general overview of the practices carried out by both the Israeli military and civil administration, it appears that such struggle may be more properly defined in terms of *decolonization* rather than *anti-apartheid.*[386]

2.2 Palestinian Case in the ICERD context

In its task of reviewing the reports submitted by State Parties under art. 9 of the ICERD, The Committee on the Elimination of Racial Discrimination several times pointed out the segregationist character of some of the practices performed by the Israeli government. Such segregation is carried out for example in education system and access to municipalities, [387] however the access to public and political life has been slightly improved in recent years[388]. Moreover, the Committee condemned the lack of provision on prohibition of racial discrimination within the Israel's bill of rights and poor legislation as to criminalization and definition of racism[389] (which although has been classified as aggravating circumstance of murder in 2019) and addressed the problem of discriminatory laws[390]. In consideration of the *de facto* segregation (access to roads and

[385] The notion of independence and self-determination despite being different, are connected as shows the UN 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (A/RES/2131(XX)): Art.6 affirms that "all States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms."
[386] "[T]he fact that the struggle is seen and articulated in terms of decolonialization rather than of anti-apartheid means that there can be no anti-apartheid-type movement. The belief of most Palestinians is that the struggle is for independence, for separation, for two states, not for integration and equality in one state. The result is that the powers are centrifugal, not centripetal, and the rights debated are not individual civil and political rights but group rights (self-determination)." – Zreik, R. (2004). PALESTINE, APARTHEID, AND THE RIGHTS DISCOURSE. Journal of Palestine Studies, 34(1),
[387] *Consideration of reports submitted by States parties under article 9 of the Convention*, (3 April 2012) CERD/C/ISR/CO/14-16, para. 11
[388] *Concluding observations on the combined seventeenth to nineteenth reports of Israel* (12 December 2019) CERD/C/ISR/CO/17-19, para. 36
[389] *Consideration of reports submitted by States parties under article 9 of the Convention*, (3 April 2012) CERD/C/ISR/CO/14-16, para. 13-14
[390] *Ibidem*, para. 15; 18;

services) and two entirely separated legal systems, the Committee went further recalling[391] its General Recommendation 19[392], which requires States to eradicate racial segregation in all its forms. The adoption of Basic Law: Israel – the Nation State of the Jewish People (2018) has been criticized in the part where it stated that the right to exercise self-determination in Israel is "unique to the Jewish people"[393].

2.2.1 State of Palestine's Interstate Communication

In 2018 the State of Palestine acting upon arts. 11-13 of the ICERD has filled an interstate communication[394] against Israel and submitted it to the ERD Committee. Israel declared that it did not recognize Palestine as a State and that its accession to the Convention did not affect Israel's treaty relations under the Convention. Among the main allegations brought up by Palestine in its interstate communication there was the violation of art. 3.[395] Such communication was the only available tool to Palestine as Israel made a reservation as to art.22 (dispute settlement before the ICJ). Initially viewed as a reservation to the Convention, the Israeli's non-recognition of Palestine, ultimately was interpreted as only having effect in relations between the declaring state and the non-recognized entity[396]. Such an opinion was endorsed by 5 members of the Committee which excluded its jurisdiction in the absence of treaty relationships between the two States. However, the majority of the Committee's members opted for recognition of the *erga omnes partes* nature of human rights obligations (ICJ, Barcelona Traction) not based on classical reciprocity principle. The Committee held that substantive obligations refer also to the treatment of people under the State's jurisdiction even if not nationals. It also added that procedural provisions (arts. 11-13)

[391] *Ibidem* para. 24; 27; Concerns again recalled in CERD/C/ISR/CO/17-19 (paras. 21-22)
[392] *See at* 65
[393] *Concluding observations on the combined seventeenth to nineteenth reports of Israel* (12 December 2019) CERD/C/ISR/CO/17-19, para. 13
[394] The interstate communication ("complaint" in the drafting process) is one of the available dispute settlement instruments (besides negotiations and referral to the ICJ) regarding the violation of the Convention available to State Parties. The procedure aims to the establishment of an *ad hoc* Commission which seeks to prepare a report and recommendations providing amicable solutions to the conflict at stake. (arts. 11-13 ICERD)
[395] "It is clear that Israel's acts are part of a widespread and oppressive regime that is institutionalised and systematic; that accords separate and unequal treatment to Palestinians," – Holmes O. (2018) *Palestine files complaint against Israel under anti-racism treaty, In reference* to Palestine's interstate communication summary *Retrieved from:* https://www.theguardian.com/world/2018/apr/23/palestinians-file-complaint-against-israel-under-anti-racism-treaty
[396] Yearbook of the International Law Commission, 2011, Vol. II, pt. 3, p. 69, para. 5

do not require bilateral treaty relations as the Convention aims to allow State parties to trigger collective enforcement machinery, independently from existence of such relations.[397] Lastly, the Commission also underlined the unique compulsory[398] and common good nature of interstate communications instrument[399] which cannot be subject to reservations[400]. Such an approach leads to an ultimate objectification of the instrument of communication as it has a common good at its basis rather than a State's particular interest. The situation of Palestine's communication remains still in development.[401]

3. Sudan Case and apartheid's relationship with genocide

Except for the Palestinian case, there aren't any relevant situations in which a clear analogy to South African apartheid can be spotted in the contemporary world. However, this doesn't mean that allegations of creation of similar systems weren't observed in the recent years. The question is whether many scenarios concerning racial, religious, national, cultural or ethnical discrimination both directly realized systematically and institutionally by the State or simply promoted by it, can be extensively interpreted as crimes of apartheid (rather than simple discrimination) in order to make it more relevant. In other words, how far can the actual concept of apartheid relate to the content of ICERD. At the same time one could ask on what's the relationship between apartheid and other international crimes such as genocide or wrongful acts.

There are several ethnic and religious groups living in Sudan, but the major conflict persists between the Arab elites ruling the country and black population[402] (again, a

[397] CERD/C/100/5, para. 3.33
[398] "This does not render it unique in human rights law, with compulsory inter-state provisions also found in the ILO, the ECHR and the African Charter for example, with established inter-state caselaw emanating from the regional systems. But its compulsory character under ICERD is unique among the UN international human rights treaties." – Keane D. (30 April 2018) *ICERD and Palestine's Inter-State Complaint*, Retrieved from: https://www.ejiltalk.org/icerd-and-palestines-inter-state-complaint/#more-16151
[399] *Ibidem*, para.3.41
[400] International Convention on the Elimination of All Forms of Racial Discrimination, Art.20 (2) A/RES/2106(XX), (21 December 1965)
[401] Eiken J. (29 January 2020) *Breaking new ground? The CERD Committee's decision on jurisdiction in the inter-State communications procedure between Palestine and Israel*, Retrieved From: https://www.ejiltalk.org/breaking-new-ground-the-cerd-committees-decision-on-jurisdiction-in-the-inter-state-communications-procedure-between-palestine-and-israel/
[402] Van Rensburg P., *Is Sudan not an apartheid State?,* 3 *Retrieved from:* http://www.rightlivelihoodaward.org/fileadmin/Files/PDF/Literature_Recipients/van_Rensburg/van_Rensburg_-_Sudan.pdf

legacy of slavery, still not fully eradicated in Sudan)[403] living in the more remote regions among which Darfur. Some might argue that the dire situation in Sudan and the Darfur region which is currently one the greatest humanitarian crises in the world can be classified in these terms. Upon a referral by the UN Security Council, the ICC, so far, has confirmed that cases of war crimes, crimes against humanity and genocide have been committed of which the last one has been attributed to the former president Omar Al Bashir upon which to warrants of arrest have been submitted.[404] Nonetheless, the UN organs pointed out some other infringements of international law. There are substantial differences between men and women which lead to sex discrimination in addition to discrimination of religious minorities.[405] Even in the lack of legislation explicitly imposing racial barriers, one should ask whether the sole absence of anti-discriminatory law, in view of Arab dominated government and strongly marginalized black population, is in itself some sort of apartheid analogy. It could be said that Sudan maintains a *de facto* apartheid by not fighting the deeply rooted "tiered system of racism."[406]

The analysis of the situation in Sudan gives another interesting prospect: racial, ethnic or national discrimination can be considered as a broader phenomenon which propagation can lead to different outcomes among which genocide and the apartheid. It is plausible to admit that in case in which these two practices are committed, apartheid would remain in the shadow of genocide which is the ultimate act of discriminatory violence. The two remain somehow interconnected thanks to the inclusion of art. 2 (c)[407] of the Genocide Convention into art. 2 (b) into the Apartheid Convention. On the other hand the South African Truth and Reconciliation Commission underlined the necessity of distinguishing the two in terms of crimes against humanity.[408] They can

[403] For more information *see* Report of the International Eminent Persons Group (2002) *Slavery, Abduction and Forced Servitude in Sudan*, Bureau of African Affairs.
[404] *See* https://www.icc-cpi.int/Darfur
[405] ECOSOC, Committee on Economic, Social and Cultural Rights (27 October 2015), *Concluding observations on the second periodic report of the Sudan*, E/C.12/SDN/CO/2, para.19 and 29.
[406] *See* http://matthewbrunwasser.com/index.php/2011/03/racism-in-sudan/;
In South Africa's Apartheid system of racial division, the white power structure was easy to see. Sudan's Apartheid isn't so clear cut.
[407] "Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part."
[408] Truth and Reconciliation Commission of South Africa Report (1998), I, Ch. 4, Appendix, para. 4, at 94.

also be connected by a chronological order. In a hypothetical scenario, where genocide could be regarded as the last step, a system of apartheid could be seen as a passage before that (one could considerate the situation of Jews in the III German Reich).

It would require further detachment from the South African case and a more elastic interpretation of Art.7.1 (j) to add new classifications to apartheid concept in today's world. The racial character and the strong requirements as to the intent proved to drastically limit its application.

CONCLUSION

In today's international legal framework apartheid might appear as a dead concept. Countries act more cautiously as to assessing their goals in legislation, in order to evade any possible allegations. The concept of racial discrimination in general, saw a major evolution thanks to the work of international courts which developed its direct or substantive and indirect form, elevated the prohibition of discrimination to a peremptory norm of international law and affirmed the existence of "derogatory" measures in form of affirmative actions.

Apartheid, being for years identified with the sole case of South Africa, couldn't count on a similar development. This is most likely due to a much more complex structure of the concept of apartheid itself. The ICERD itself at art.3 considers apartheid as a more particular manifestation of racial discrimination through segregation. It was printed upon a particular scenario that took place in South Africa with a rather great amount of characteristic elements like reserves system, segregation in almost every sector of public life and a clear colour bar set forth by the law, elements which today are only more or less visible in the case of Palestine. This means that the classical meaning of apartheid might need to be more uniformed with that of racial segregation in general. The CERD commented on the utility of art.3 stating that:

> "The implementation of States parties' obligations under article 3 of the Convention has been hindered by the fact that many States parties interpret the scope of the article as directed exclusively to apartheid in South Africa and fail to examine whether forms of de facto racial segregation are occurring on their own territory. Segregation, as defined in article 3 of the Convention, still occurs in various forms in a number of States, in particular in housing and education, and its eradication should be considered a matter of priority by all States parties to the Convention."[409]

Racial discrimination can be limited to one particular sector like it was seen in the ECtHR's cases regarding separate education for Roma in Europe. Apartheid can't be simply limited to a particular matter, but is rather a whole system which violates human rights of one or more racial groups. I agree with that. However, it would be worth to consider a situation in which there is only a partial apartheid consisting in, for example,

[409] ECOSOC, Commission on human rights, *Views of the Committee on the Elimination of Racial Discrimination on the implementation of the Convention on the Elimination of All Forms of Racial Discrimination and its effectiveness*, E/CN.4/2004/WG.21/10 (17 September 2004), para.9

limitations in education and employment rights as to create a low class workforce out of a particular racial group in favour of another (creating a situation of domination) although without interfering with other rights. In other words, it is necessary to ascertain whether apartheid can only be absolute or not.

It would be also interesting to understand if a situation of perfect "separate but equal" doctrine, with equality of rights and merely *de facto* domination and control of one race over another, can be deemed apartheid. In such a case it would be a matter of introducing additional anti-discriminatory law in order to eliminate such domination.

Ultimately, considering its scarce applicability, the hard coded interpretation of apartheid may require a review. At the core of such system there is an "institutionalized regime" practicing "systematic oppression and domination". These two are the elements that essentially differentiate apartheid from any other manifestation of racial discrimination and as such are original and not subject to modifications. Moreover, these two attributes enable to automatically identify the perpetrator, namely a State organ, political organization or their governing member.

The "racial" character of the apartheid, however, might require a re-examination. Such an attempt was made by the ILC with the 1996 Draft Code of Crimes against the Peace and Security of Mankind which substituted "apartheid" with "institutionalized discrimination". In fact, art. 18 of the Draft Code concerning crimes against humanity placed at para. (f): "Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population". In the subsequent commentary, the Commission affirmed that the both the crime of persecution and that of institutionalized discrimination requires act to be committed in systematic manner or on a large scale, however only the latter one has to be "institutionalized". The Commission stated that:

"The prohibited act covered by subparagraph (j) consists of three elements: a discriminatory act committed against individuals because of their membership in a racial, ethnic or religious group, which requires a degree of active participation; the denial of their human rights and fundamental freedoms, which requires sufficiently serious discrimination; and a consequential serious disadvantage to members

of the group comprising a segment of the population. It is in fact the crime of apartheid under a more general denomination."[410]

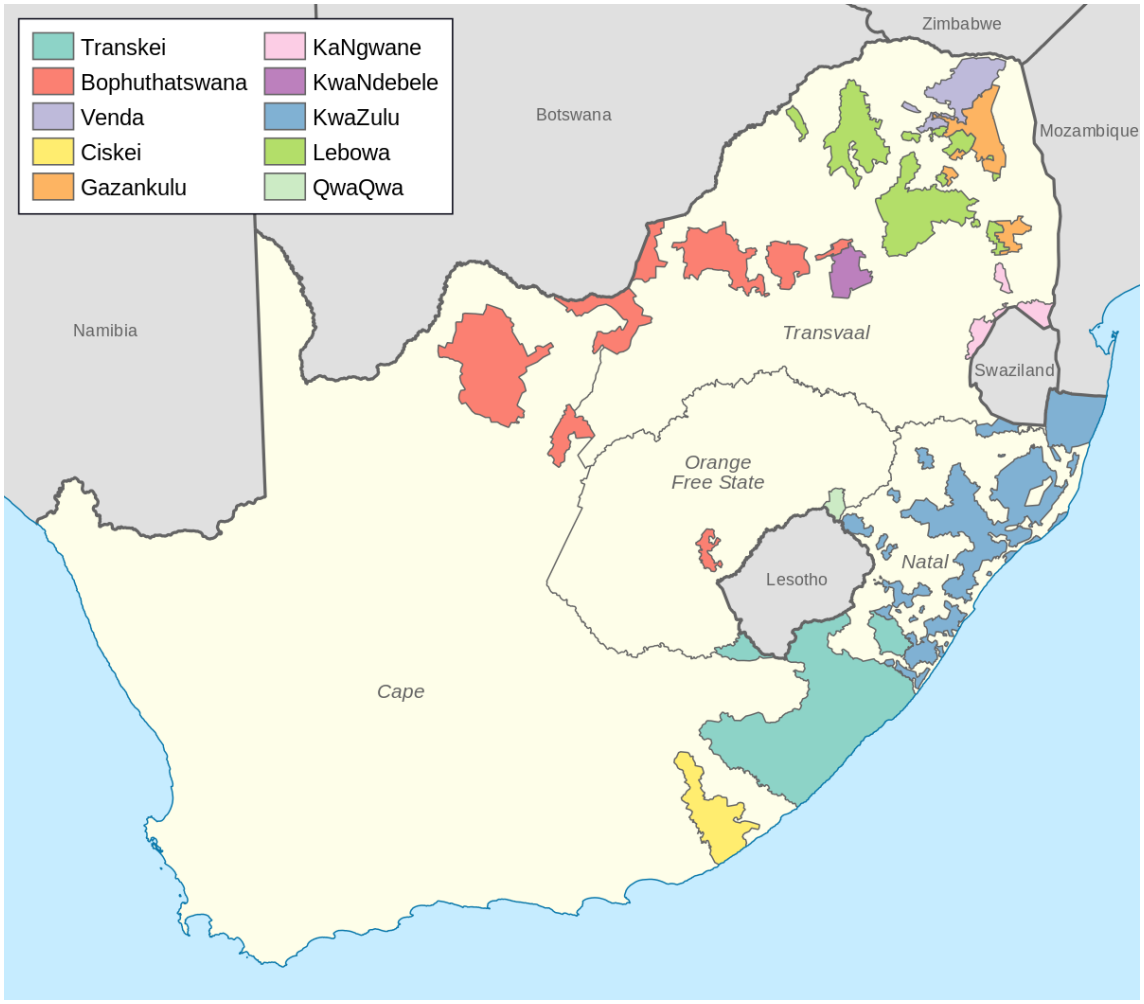
In my opinion this expansive approach would be the most adequate in the contemporary interpretation of apartheid, hence the title of this work. Further expansion of the discriminatory grounds, in terms of institutionalized discrimination may open new frontiers for the consideration of apartheid-like systems existing today, like, for example, the North Korean *Songbun* – a caste system comparable to a socio-political apartheid. Finally, as seen by the case of Palestine, also the matter of "intent" could be reviewed, whether by expanding it beyond the question of "racial domination" or by amplifying the meaning of "domination" itself.

Through this process, the legal concept of apartheid could gain a second life by partially siphoning cases that so far were considered as mere racial discrimination and by detaching even more from South Africa's past through consideration of institutionalized and systematic but more informal and obscure analogies occurring in the world.

[410] Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, Art. 18 commentary, 49, para.12

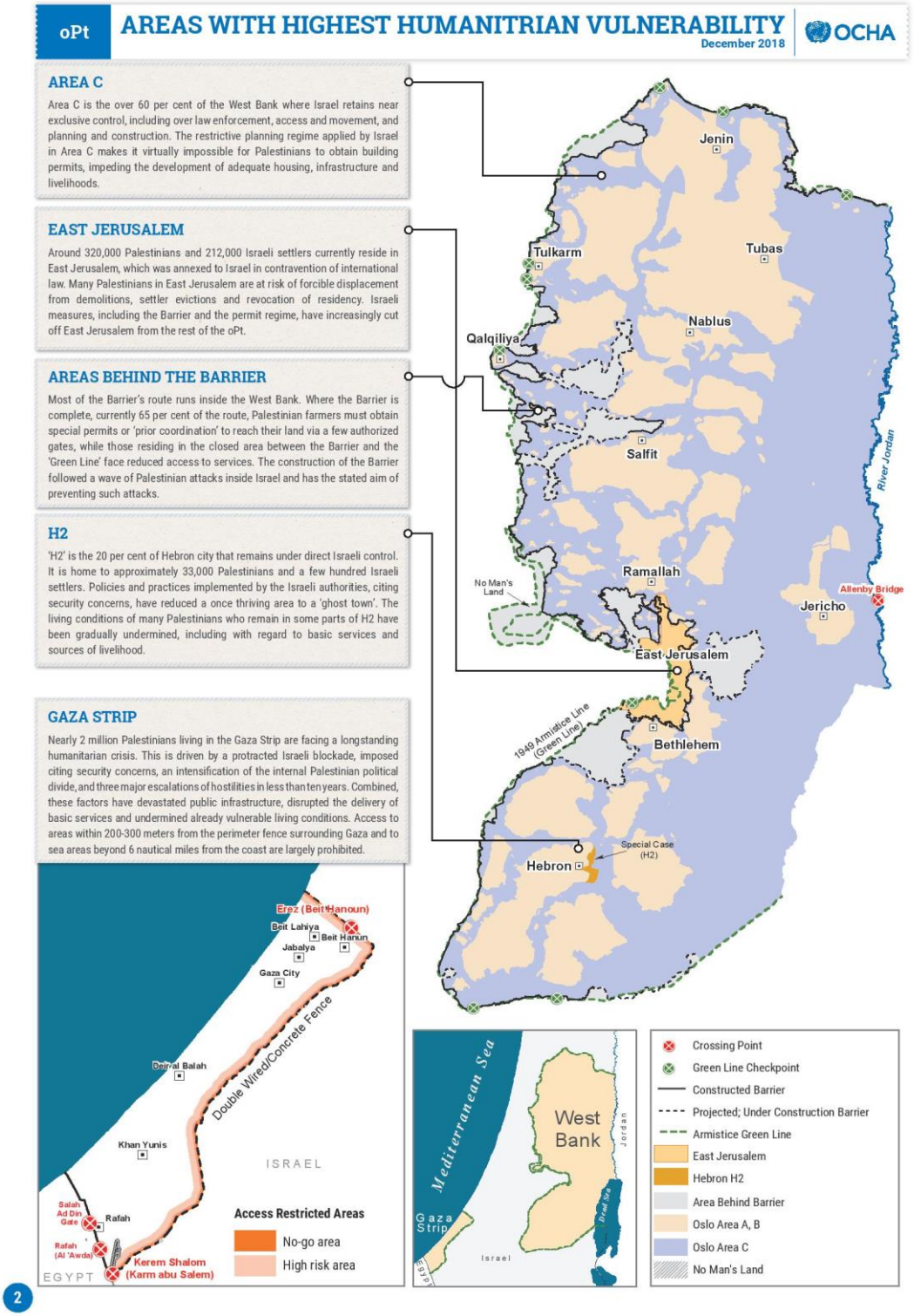
Appendix 1: Bantustans in South Africa at the end of Apartheid

Source: https://simple.wikipedia.org/wiki/Bantustan



Appendix 2: Areas with Highest Humanitarian Vulnerability in the OPT (December 2018)

Source: https://www.ochaopt.org/content/areas-highest-humanitarian-vulnerability-december-2018



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