The practices of apartheid as a war crime: a critical analysis

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Chapter 5
The Practices of Apartheid as a War Crime: A Critical Analysis

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Abstract
The human suffering caused by the political ideology of apartheid in South Africa during the Apartheid era (1948-1994) prompted worldwide condemnation and a variety of diplomatic and legal responses. Amongst these responses was the attempt to have apartheid recognised both as a crime against humanity in the 1973 Apartheid Convention as well as a war crime in Article 85(4)(c) of Additional Protocol I. This article examines the origins, nature and current status of the practices of apartheid as a war crime and its possible application to the Israeli-Palestinian conflict.

Keywords
Apartheid, war crimes, crimes against humanity, international criminal law, Additional Protocol I (AP I), the Statute of the International Criminal Court (the ICC Statute), the ICRC Customary International Humanitarian Law Project, the Israeli-Palestinian conflict, the principle of legality (*nullum crimen, nulla poena sine lege*)

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5.1 Introduction

The term "apartheid" is derived from the Afrikaans word for apartness or separation. It is most commonly used to denote the policy of racial classification and segregation practised in South Africa between 1948 and 1994.[1] The denial of basic human and political rights that the South African policy of apartheid entailed prompted worldwide condemnation as well as a variety of diplomatic and legal responses. Amongst these responses were the drafting of an international convention declaring that "apartheid is a crime against humanity" in 1973[2] and the inclusion of the "practices of *apartheid*" in the list of grave breaches contained in Article 85 of Additional Protocol I (AP I) in 1977.[3]

The focus of this chapter is a critical examination of the origins, nature and current status of the practices of apartheid as a war crime. The current status of apartheid as a crime against humanity will also be considered but more briefly and largely only in so far as it is relevant to the question of its possible application to the Israeli-Palestinian conflict.[4] Although the ending of apartheid in South Africa in 1994 might be thought to have consigned both the concept and the attempts to criminalise it to history, apartheid was included as a crime against humanity in the 1998 Statute of the International Criminal Court (ICC Statute).[5] Further, the obligation, contained in Article 86(1) of AP I, requiring parties to repress grave breaches of the Protocol has ensured that the war crime of the "practices of *apartheid*" has been incorporated into the domestic criminal law of many countries[6] and the demise of apartheid in South Africa has not changed this. Finally, the increasing (but contested) application of the term apartheid to Israeli law and practice in the Occupied Palestinian Territories (OPT) raises the possibility of individual criminal prosecutions in this context.

[1] See generally Guelke 2005; Dubow 2014.
[2] Article I of the International Convention on the Suppression and Punishment of the Crime of Apartheid, opened for signature 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976) (Apartheid Convention).
[3] Article 85(4)(c) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978) (hereinafter: API).
[4] For detailed consideration of the origins and current status of apartheid as a crime against humanity see, e.g., Clark 2008; Dugard 2012; Bultz 2013; Eden 2014.
[5] Article 7(1)(j) of the Statute of the International Criminal Court, opened for signature 17 July 1998, 2178 UNTS 3 (entered into force 1 July 2002) (hereinafter: ICC Statute).
[6] The "practices of *apartheid*" have been a war crime in the United Kingdom since 20 July 1998, the date of the coming into force of the UK Geneva Conventions (Amendment) Act 1995, section 1(3) amending the UK Geneva Conventions Act 1957.

Section 5.2 examines the inclusion of the "practices of *apartheid*" in the list of grave breaches of AP I. It details the criticism levelled against the inclusion of the "practices of *apartheid*" in the list of grave breaches of AP I. Section 5.3 addresses the process of inclusion of apartheid in the ICC Statute with particular emphasis on the failure to include the practices of apartheid in the list of war crimes. Section 5.4 criticises the inclusion of "[t]he practice of apartheid" in the list of customary international humanitarian law crimes by the International Committee of the Red Cross (ICRC) on the basis that the evidence relied upon relates almost exclusively to state practice declaring apartheid to be a crime against humanity. Section 5.5 asserts that the possible liability of individual Israeli citizens for carrying out policies that fall within the agreed definition of apartheid will depend on the customary status of the various international attempts to criminalise apartheid. The importance of distinguishing between the civil obligations of states and the potential criminal liability of individuals is also stressed. Section 5.6 assesses the customary status of the crime of apartheid as both a crime against humanity and as a war crime paying special attention to the principle of legality (*nullum crimen, nulla poena sine lege*). Section 5.7 concludes by stating that, even if the customary status of the crime of apartheid remains in doubt, the customary status of persecution on racial grounds and the other inhumane acts required to enforce any policy of systematic racial discrimination (whether characterised as apartheid or not) does not.

5.2 The Inclusion of the "Practices of A*partheid*" in the List of Grave Breaches of AP I

5.2.1 Introduction

The debate over the inclusion of the "practices of *apartheid*" in the list of grave breaches of AP I is indicative of the longstanding tensions between the diplomatic and legal agendas of First World countries and Third World and Eastern Bloc states. These tensions compromised some aspects of the drafting of AP I and the inclusion of the "practices of *apartheid*" in the list of grave breaches has been singled out for criticism in this regard. Equally problematic is that the clash between the deep-rooted ideological convictions of the negotiating parties has resulted in what Professor Yoram Dinstein has referred to as a "'Great Schism' separating the Contracting Parties of Additional Protocol I from some key players in the international arena led by the US".[7] This section examines the process by which the "practices of *apartheid*" were included in the list of grave breaches in AP I and the criticism levelled against this inclusion of the "practices of *apartheid*".

5.2.2 The pressure to include the "practices of apartheid" in the list of grave breaches

The initial ICRC draft (Article 74) merely extended the application of the provisions of the 1949 Geneva Conventions relating to the repression of breaches to the persons and objects falling within the protection of AP I. As early as the First Session of the Diplomatic Conference in March 1974, the Democratic Republic of Vietnam proposed a number of draft amendments to the ICRC's draft AP I including a proposal to add "[t]he continued existence of colonial regimes, the practice of apartheid and all forms of racial discrimination" to the list of international crimes

[7] Dinstein 2010, p 295.

defined in international law since the Judgment of the Nuremberg International Military Tribunal.[8]

On 23 April 1976, during the debate on the discussion of the repression of breaches of the proposed AP I, the representative of the Byelorussian Soviet Socialist Republic made reference to the Apartheid Convention as an example of a crime against humanity that had been developed since the adoption of the Geneva Conventions of 1949.[9] The representatives of the Union of Soviet Socialist Republics[10] and the Ukrainian Soviet Socialist Republic[11] made similar observations. The representative of the Syrian Arab Republic also deplored the failure to include apartheid among the list of grave breaches in draft AP I.[12] On 29 April 1976, after the conclusion of the debate on the relevant article, Mongolia, Uganda and the United Republic of Tanzania introduced an amendment to the draft list of grave breaches that had been submitted by Australia to include:

> Outrages upon personal dignity especially inhuman acts such as the practices of apartheid and other humiliating and degrading treatment.[13]

The amendment's sponsors stated that they were particularly concerned (i) with the need to reaffirm and develop international humanitarian law applicable in armed conflicts, (ii) with the need to take into account developments in the years since 1949, and (iii) with the need to prevent human suffering.[14] "The sponsors' aim was to make it clear that the practices of apartheid were serious war crimes as well as dangerous crimes against humanity".[15]

5.2.3 Criticism of the inclusion of the "practices of apartheid" in the list of grave breaches during the drafting process

The list of grave breaches (that ultimately became Article 85 of AP I) was adopted by consensus but several delegations questioned the feasibility of some of the provisions due to the vagueness of the drafting. The inclusion of the "practices of *apartheid*" was singled out for criticism in this regard. Both the Austrian[16] and the Finnish[17] representatives doubted whether the "practices of *apartheid*" could be easily transposed into national criminal laws.

The Australian representative complained that some of the proposed grave breaches "did not embody the degree of specificity essential if abuse and injustice

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[8] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) (hereinafter: Official Records), Vol IV, CDDH/41, p 182.
[9] Official Records, Vol IX, CDDH/I/SR.43, p 17: summary record of the 43rd meeting, 23 April 1976, para 12.
[10] Ibid, p 23, para 34.
[11] Official Records, Vol IX, CDDH/I/SR.44, p 34: summary record of the 44th meeting, 26 April 1976, para 37.
[12] Ibid, p 38, para 58.
[13] Official Records, Vol III, CDDH/I/313 and Add.1, p 321.
[14] Official Records, Vol IX, CDDH/I/SR.47, p 68: summary record of the 47th meeting, 29 April 1976, para 5.
[15] Ibid, p 69, para 10.
[16] Official Records, Vol IX, CDDH/I/SR.64, p 307: summary record of the 64th meeting, 7 June 1976, para 9.
[17] Ibid, p 316, para 64.

were to be avoided".[18] He confirmed his delegation's condemnation of apartheid but stated:

> the introduction of political ideologies, hateful as they might be, into the system of grave breaches was not to reaffirm and develop humanitarian law but to distort it.

He also stated that his delegation would not have been able to support the inclusion of the "practices of *apartheid*" into the list of grave breaches if a separate vote had been taken.[19] The French representative also expressed his delegation's doubts about the wisdom of including the "practices of *apartheid*" in the list of grave breaches and stated that, although not opposed to consensus as a whole, if a vote had been taken on this point, France would have abstained.[20]

By contrast, the representative of Yugoslavia strongly supported regarding discriminatory practices against protected persons, such as apartheid, as grave breaches.[21] The Polish representative also expressed satisfaction at the inclusion of apartheid and inhuman and degrading practices based on racial discrimination in the list of grave breaches.[22] The Argentinean representative considered the list of grave breaches less than perfect but stated that, given the diversity of legal concepts and political opinions, it appeared to be acceptable.[23]

5.2.4 Article 85(4)(c) of AP I – commentary and criticism

Article 85(4)(c) of AP I states that the "[p]ractices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" are grave breaches of AP I when committed wilfully and in violation of AP I. The commentary notes that sub-paragraph (4) is concerned with "off the battlefield" grave breaches and that, outside the scope of application of AP I, the crime of apartheid remains exclusively within the domain of crimes against humanity.[24]

In 1976, while the negotiations were still ongoing, Professor Gerald Draper[25] criticised the creation of a war crime aimed at one State and entirely racial in content, noting that Article 27 of the Fourth Geneva Convention[26] already required respect for protected persons "without any adverse distinction based, in particular, on race, religion or political opinion". In Draper's view, the deletion of the words "practices of *apartheid* and other" would not have altered the substantive nature of the grave breach that ultimately became Article 85(4)(c) of AP I. During the drafting process, the Ugandan representative pointed out "that all United Nations bodies, and the Security Council in particular, had always drawn a clear-cut distinction between racial discrimination and apartheid".[27] Draper also noted that "[t]he practices of *apartheid*,

[18] Ibid, p 310, para 28.
[19] Ibid, p 310, para 29.
[20] Ibid, p 317, para 68.
[21] Ibid, p 313, para 49.
[22] Ibid, p 317, para 69.
[23] Ibid, p 314, para 53.
[24] Sandoz 1987, p 1002, para 3512.
[25] Draper 1976, p 42.
[26] Geneva Convention Relative to the Protection of Civilian Persons in Times of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GCIV).
[27] Official Records, Vol IX, CDDH/I/SR.60, p 266: summary record of the 60th meeting, 3 June 1976, para 82.

however morally defective, are not acts in any way linked with armed conflict. Placing them in the Protocol will not make them so".[28] This point had been partially conceded by the Ugandan representative during the drafting process who stated that apartheid, although not arising in a situation of armed conflict, had brought about a combat situation and that recognising apartheid as a grave breach would serve as a preventative measure likely to decrease the risk of war.[29] Draper's counter-argument was that such reasoning constituted an example of "that confusion between *jus ad bellum* and *jus in bello*, now based on racial considerations which nearly wrecked the Conference at its first session in 1974".[30]

5.2.5 Conclusion

There are currently 174 parties to AP I but the drafting of Article 85 remains controversial and although the Netherlands has stated that it regards the offences contained in Article 85 as equivalent to the war crimes specified in the 1949 Geneva Conventions,[31] this assertion of the customary status of the grave breaches regime in AP I is the exception rather than the rule.[32] The fact that the crime of apartheid was not included in the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (or the International Criminal Tribunal for Rwanda (ICTR)) despite a request for it to be included from the ICRC[33] is indicative of the controversy over the customary status of this war crime.

5.3 The ICC Statute and the Crime of Apartheid

5.3.1 Introduction

The crime of apartheid was not included in the list of crimes against humanity in the Draft Statute of the ICC produced by the Preparatory Committee on the Establishment of an International Criminal Court although the core concept undoubtedly falls within the concept of persecution on 'political, racial, national, ethnic, cultural or religious' grounds that was included in subparagraph (h) of proposed article Y (defining crimes against humanity).[34] During the preliminary discussions, some delegations expressed a preference for including apartheid and other forms of racial discrimination as defined in the relevant conventions.[35]

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[28] Draper 1976, p 43.

[29] Official Records, *supra* n 14, para 16.

[30] Draper 1976, p 43.

[31] Declaration contained in the instrument of acceptance to the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (25 January 1974, 2245 UNTS 307) by the Kingdom of the Netherlands, 25 November 1981, available at: www.conventions.coe.int. Accessed 12 May 2014.

[32] See, e.g., Dinstein 2010, p 266, n 1730 ("Some of the grave breaches listed in the Protocol (pre-eminently, practices of apartheid under Article 85(4)(c) are patently not war crimes per se".).

[33] Some Preliminary Remarks by the ICRC on the Setting-Up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia (UNSC Res. 808 (1993), adopted on 22 February 1993), DDM/JUR/422b (25 March 1993). Reproduced in Morris and Scharf 1995, pp 391-398. See also Hall 2008, p 228, n 332.

[34] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (14 April 1998), p 26.

[35] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol I (Proceedings of the Preparatory Committee during March-April and August 1996), UNGA Official Records, Fifty-first Session, Supplement No 22, UN Doc. A/51/22 (13 September 1996), p 26, para 108.

Apartheid was, however, initially included in the possible options for the proposed definition of war crimes as an example of an outrage upon personal dignity.[36] The records of the preliminary discussions reveal a clear disagreement on the customary status of AP I.[37] While a clear majority of states considered AP I to be part of customary international law in the light of the number of ratifications of AP I, other key states (including some who have subsequently become parties to AP I) did not accept this assertion at the time that the ICC Statute was being drafted. [38]

5.3.2 The inclusion of the crime of apartheid as a crime against humanity

The absence of apartheid from the list of crimes against humanity was noted during the discussion of the draft Article 5—Crimes within the jurisdiction of the Court—in the context of the debate about whether crimes against humanity could be committed in times of peace as well as war. The Mexican representative indicated that apartheid should have been included in the list of crimes within the jurisdiction of the Court[39] and the Irish representative noted that apartheid was the subject of a convention that did not require a link with times of armed conflict.[40] The Chairman, summing up the discussion, observed that it had been suggested that the crime of apartheid should be added to the list of crimes against humanity within the jurisdiction of the Court.[41] Support for the inclusion of apartheid into the list of crimes against humanity was also forthcoming from Bangladesh and Niger.[42] Once the question of the inclusion of apartheid in the list of crimes against humanity had been raised, the South African delegation intervened to lead a coalition of primarily sub-Saharan African countries[43] in ensuring its inclusion into the final draft. Notwithstanding South Africa's unassailable moral authority due to its own painful national experience, the process of negotiating a consensus definition of the crime of apartheid was relatively protracted.[44]

The sub-group of delegates that worked on the consensus language did not consider themselves bound by the definition in the Apartheid Convention. At one level, the existence of the overarching threshold elements for a crime against humanity contained in the *chapeau* rendered much of the Apartheid Convention's definition of the *actus reus* of the crime redundant. At another level, some states

[36] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, *supra* n 34, reproduced in UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998), Official Records, Vol III: Reports and other documents, p 18.

[37] See, e.g., Report of the Ad-Hoc Committee on the Establishment of an International Criminal Court, UNGA Official Records, Fiftieth Session, Supplement No 22, UN Doc. A/50/22 (6 September 1995), pp 15-16, para 73; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol I, *supra* n 35, p 21, para 81.

[38] See Von Hebel and Robinson 1999, pp 103-107 for an account of the heated preliminary discussions.

[39] Third Meeting of the Committee of the Whole, UN Doc. A/CONF.183/C.1/SR3 (17 June 1998), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998), Official Records, Vol II: summary records of the plenary meetings and of the meetings of the Committee of the Whole, p 152, para 125.

[40] Ibid, p 153, para 167.

[41] Ibid, p 154, para 178.

[42] Fourth Meeting of the Committee of the Whole, UN Doc. A/CONF.183/C.1/SR4 (17 June 1998), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998), Official Records, Vol II: summary records of the plenary meetings and of the meetings of the Committee of the Whole, p 156, paras 18-19.

[43] Bangladesh, India, Lesotho, Malawi, Mexico, Namibia, Swaziland, Trinidad and Tobago and Tanzania.

[44] McCormack 2004, pp 198-199.

(particularly the United States) were anxious that the racist opinions and policies of private individuals or non-state bodies should not fall within the scope of the crime of apartheid due to concerns about freedom of expression. In deference to this, the crime of apartheid as defined in article 7(2)(h) of the ICC Statute requires the inhumane acts to be "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". As Professor Robert Cryer notes, "it is difficult to envisage any crime covered under this definition that would not be caught under the customary definition of 'persecution-type' crimes against humanity or 'other inhumane acts' in Article 7(1)(k)".[45]

5.3.3 Apartheid as a war crime and the ICC Statute

During the discussions on the provisions concerning war crimes in the draft ICC Statute, 21 states expressed support for the draft version (option 2 under (*p*)) that included a reference to the practices of apartheid.[46] Nine states expressly rejected the reference to "practices of apartheid and other inhuman and degrading practices involving outrages on personal dignity based on racial discrimination" in the list of war crimes[47]. Costa Rica's representative expressed a preference for "the broader formulation under option 1" (excluding the reference to the "practices of apartheid" in option 2) but, confusingly, also indicated that the specific elements of option 2 should possibly be considered separately.[48] The proposal to include apartheid within the list of war crimes made by a group of six African states[49] was not proceeded with and, consequently, there is no reference to the policies of apartheid in the list of war crimes in Article 8 of the ICC Statute.

In the absence of full *travaux préparatoires* for the ICC Statute (particularly the absence of the records of the separate working groups that drafted the definitions of war crimes and crimes against humanity), the reasons for failure to include apartheid within the list of war crimes in the ICC Statute will remain a matter of conjecture. Anecdotal evidence suggests two reasons for the absence. First, the hostility by some states to anything that might strengthen the argument that AP I constituted customary law should not be underestimated. Second, the inclusion of apartheid as a crime against humanity ensured that the agenda of those states that had always supported the criminalisation of apartheid was appropriately acknowledged.

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[45] Cryer 2005, p 259. See also Bultz 2013, pp 225-228 arguing that Article 7(1)(j) of the ICC Statute — the crime of apartheid — is subsumed by Article 7(1)(h) of the ICC Statute — persecution.

[46] Fourth Meeting of the Committee of the Whole, *supra* n 42, p 158, para 44 (Syria); p 158, para 48 (Lebanon); p 160, para 63 (Libya); p 160, para 65 (China); p 160, para 66 (United Arab Emirates); p 160, para 67 (Greece); p 161, para 69 (Vietnam); p 161, para 70 (Bahrain); p 161, para 73 (Denmark). Fifth Meeting of the Committee of the Whole, UN Doc. A/CONF.183/C.1/SR5 (18 June 1998), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998), Official Records, Vol II: summary records of the plenary meetings and of the meetings of the Committee of the Whole, p 162, para 9 (Kuwait); p 163, para 18 (Republic of Korea); p 163, para 23 (Tunisia); p 163, para 26 (Thailand); p 164, para 33 (Egypt); p 165, para 46 (Brazil); p 165, para 48 (Algeria); p 165, para 56 (Japan); p 166, para 62 (Morocco); p 166, para 69 (Cuba); p 166, para 70 (Turkey); p 166, para 72 (Iran); p 168, para 97 (South Africa).

[47] Belgium, Chile, Italy, Macedonia, the Russian Federation, Senegal, Sweden, Switzerland and the United Kingdom. See further Schabas 2010, p 183, n 373.

[48] Fourth Meeting of the Committee of the Whole, *supra* n 42, p 160, para 61.

[49] UN Doc. A./CONF.183/C.1/L.13 (22 June 1998), reproduced in UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) Official Records, Vol III: Reports and other documents, p 239.

Commentators who draw attention to the discrepancies between the war crimes listed in AP I and the war crimes contained in Article 8 of the ICC Statute tend to focus on the failure to include the wilful and unjustifiable delay in the repatriation of prisoners of war and civilian internees as the key omission in the ICC Statute.[50] Sandoz submits that the inclusion of the crime of apartheid as a crime against humanity in the ICC Statute changes the language, but not the content, of the equivalent violation of AP I.[51] Sandoz further submits that the "[p]ractices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" (Article 85(4)(c) of AP I) are probably covered by the general terminology used in Article 8(2), Part B (xxi) "Committing outrages upon personal dignity, in particular humiliating and degrading treatment".[52]

5.3.4 Conclusion

The inclusion of apartheid as a crime against humanity in Article 7(1)(j) of the ICC Statute is significant for two reasons. First, it represents the first time that apartheid has been criminalised in a manner that is consistent with penal legality and certainty.[53] Second, while Article 7(1)(j) almost certainly represents progressive development, "it could be argued that the ICC Statute has, however, contributed to recent formation of a customary rule on the matter".[54] By contrast, the failure to proceed with the proposal to include apartheid in the list of war crimes in the ICC Statute could be seen as weakening the argument that the practices of apartheid constitute a customary international war crime unless Article 10 of the ICC Statute can be invoked.[55] Article 10 of the ICC Statute states:

> Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

As Schabas observes, Article 10 has been "largely ignored by the very bodies to which it is directed, namely specialised tribunals engaged in the interpretation of international law".[56] The current customary status of the crime of apartheid both as a war crime and as a crime against humanity is considered below in Sect. 5.6.

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[50] See, e.g., Graditzky 1999, p 204; Dörmann 2003, p 345; Sandoz 2008, p 310.
[51] Sandoz 2008, p 311.
[52] Ibid. See also Dörmann 2002, p 315.
[53] But see also Bultz 2013 who argues that Article 7(1)(j) of the ICC Statute is ambiguous and inoperable.
[54] Cassese 2013, p 107. See further *infra* section 5.5.4. But see also Eden 2014, pp 189-191 for a more cautious assessment of the customary status of Article 7(1)(j) of the ICC Statute.
[55] See further *infra* section 5.5.3. See also Henckaerts 2009, p 692. Noting that all war crimes in the ICC Statute are part of customary international law but that "this does not mean that the Statute exhaustively codified all war crimes under customary international law. In other words, there may still be war crimes under customary international law outside the Statute of the ICC".
[56] Schabas 2010, p 271. See also ICTY, *Prosecutor v Furundžija*, Judgment Trial Chamber (IT-95-17/1-T), 10 December 1998, para 227; ICTY, *Prosecutor v Galić*, Judgment Appeals Chamber (IT-98-29-A), 30 November 2006, separate and partially dissenting opinion of Judge Schomburg, para 20. For the views of the ICC in this regard see ICC, *Prosecutor v Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I (ICC-02/05-01/09), 4 March 2009, para 127.

5.4 The ICRC's Customary International Humanitarian Law Project

In 1996, the ICRC embarked on a major international study into current practice in international humanitarian law in order to identify the relevant customary law in the area. The ICRC's Study on International Customary Law (the ICRC Study), published in three volumes in 2005, has been welcomed as a valuable contribution to the development of customary international humanitarian law but concerns have been expressed about its methodology.[57] It is beyond the scope of this article to do justice to the vigorous debate over the methodological concerns beyond assessing the validity of the assertion that "[t]he practice of apartheid or other inhuman and degrading practices involving outrages on personal dignity based on racial discrimination" constitutes a war crime under customary international humanitarian law.[58]

The ICRC Study cites as authority the fact that "[t]his war crime is listed as a grave breach in Additional Protocol I".[59] The ICRC Study acknowledges the omission of the crime of apartheid from the list of war crimes in the ICC Statute but argues "such conduct would amount to a war crime as an outrage on personal dignity, as well as humiliating and degrading treatment".[60] The ICRC Study also states, in the application of international humanitarian law, apartheid is a crime under the legislation of numerous States. With a few notable exceptions,[61] all the examples of national legislation cited involve the incorporation of either AP I or the ICC Statute into domestic law and the rather limited exceptions are all parties to the Apartheid Convention who were formerly members of the Eastern (Soviet) Bloc.

The ICRC Study notes that no practice was found in national case law[62] or international judicial or quasi-judicial bodies[63] to support the existence of the customary war crime of the "practices of *apartheid*". The remaining practice cited relates to debates before the UN General Assembly (UNGA), various UNGA resolutions, UN Security Council resolutions and two resolutions adopted by the UN Commission on Human Rights in 1992 and 1993 declaring apartheid to be a crime against humanity.[64] The ICRC Study also notes that section 5(i)(j) of UN Transitional Administration in East Timor Regulation No. 2000/15 includes "the crime of apartheid" in the list of crimes against humanity over which the panels established by the Regulation have exclusive universal jurisdiction.[65]

Although, there is a case for arguing that apartheid as defined in Article 7(1)(j) of the ICC Statute is evolving into a customary crime against humanity, it is more difficult to argue that the practices of apartheid constitute a customary international war crime given failure to include a reference to the crime of apartheid within the list of war crimes contained in the ICC Statute and the controversy over the drafting of

[57] See, e.g., Cryer 2006; Dinstein 2006; McCormack 2006; Bellinger and Haynes 2007; Wilmshurst and Breau 2011. But see also Henckaerts 2007.
[58] Henckaerts and Doswald-Beck 2005a, p 588.
[59] Ibid.
[60] Ibid, p 589.
[61] Article 418 of the Bulgarian Penal Code as amended (1968); Article 263(a)(1) of the Czech Republic Criminal Code as amended (1961); Section 157 of the Hungarian Criminal Code as amended (1978); Article 263(a)(1) of the Slovakian Criminal Code as amended (1961), as quoted in Henckaerts and Doswald-Beck 2005b, pp 2055-2058.
[62] Ibid, p 2058, para 636.
[63] Ibid, p 2060, para 650.
[64] Ibid, pp 2058-2060, paras 637-647.
[65] See United Nations Transitional Administration in East Timor, UNTAET Reg. 2000/15 (6 June 2000), on the establishment of panels with exclusive jurisdiction over serious criminal offences.

the grave breaches regime in AP I. Given the clear distinction between the categories of war crimes and crimes against humanity,[66] it is disappointing that the ICRC Study's evidence for the existence of a war crime of the practices of apartheid under customary international humanitarian law is primarily related to state practice declaring apartheid to be a crime against humanity.

5.5 Israel and the Crime of Apartheid

5.5.1 Introduction

The term apartheid is used loosely in a number of non-legal contexts to emphasise the seriousness of various inequalities. Increasingly, the paradigm of apartheid has also been applied in relation to Israel.[67] Since 2005 an annual "Israeli Apartheid Week" has been held on university campuses (and in other civic spaces) to raise awareness about Israel's policies, although these events have occasionally drawn accusations of anti-Semitism. The application of the apartheid paradigm in relation to Israel's policies and practices towards Palestinians in the Occupied Territories has recently crossed the divide between rhetorical device and legal analysis.

5.5.2 Israel and the apartheid paradigm – the legal dimensions

In 2007 Professor John Dugard, in his capacity as UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, concluded that elements of the Israeli occupation constituted forms of colonialism and apartheid, which are contrary to international law.[68] Dugard also noted:

> the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid appears to be violated by many practices, particularly those denying freedom of movement to Palestinians.[69]

In 2010 Professor Richard Falk, Dugard's successor as UN Special Rapporteur, likewise concluded that Israeli policies in the West Bank and East Jerusalem exhibited "features of colonialism and apartheid, as well as transforming a de jure condition of occupation into a circumstance of de facto annexation".[70] Falk, with reference to Article 7 of the ICC Statute, also noted that "apartheid has come to be formally treated as a crime against humanity"[71] To support the factual basis for his assertions, Falk made reference to a 300-page report from the Human Sciences Research Council (HSRC) of South Africa released in May 2009 (written by an international team of scholars and practitioners of international law) concluding that Israel is practising both colonialism and apartheid in the Occupied Palestinian Territories (OPT).[72] In his final presentation to the Human Rights Council in January

[66] The need for a nexus between an armed conflict and the criminal act in question for a war crime and the contextual threshold for crimes against humanity, i.e. the commission of a listed prohibited act in the context of a widespread or systematic attack directed against a civilian population.
[67] See, e.g., Tutu 2002; Davis 2003; Carter 2006; Tilley 2009; White 2009; Diaz Polanco 2010; Tilley 2012; Dugard and Reynolds 2013a; Falk 2013; Lebrun 2013. But see also Goldstone 2011; Zilbershats 2013.
[68] Dugard 2007, p 3.
[69] Ibid, p 2.
[70] Falk 2010, p 2.
[71] Ibid, p 4.
[72] Tilley 2009. See also Tilley 2012; Dugard and Reynolds 2013a.

2014, Falk analysed in greater depth whether the continuing occupation of Palestine by Israel constituted apartheid.[73]

In their recent article in the *European Journal of International Law*, Dugard and Reynolds are careful to limit their analysis of the applicability of the international legal prohibition of apartheid in the context of Israeli law and practice in the Occupied Palestinian Territories to "the responsibility of the Israeli state under norms of public international law, as opposed the responsibility of its individual agents under international criminal law".[74] Dugard and Reynolds do acknowledge that individual criminal responsibility *could* arise if state responsibility for a breach of apartheid is *prima facie* established,[75] but their reliance on the definition of apartheid in the 1973 Apartheid Convention and the ICC Statute is premised on the absence of a definition of apartheid in the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

5.5.3 The importance of distinguishing between civil and criminal obligations

When discussing the concept of apartheid in relation to Israel's policies towards the Palestinians, it is important to distinguish between a general (civil) obligation owed by the *State* of Israel not to engage in systematic racial discrimination and potential criminal liability for *individual* Israeli citizens as a result of enforcing any Israeli policies towards the Palestinians that can fairly be characterised as apartheid. With regard to the former, Israel—not least because it is a party to ICERD[76]—is obliged to "condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under [its] jurisdiction".[77] In May 2012, the Committee on the Elimination of Racial Discrimination (CERD) urged Israel to prohibit and eradicate all policies of racial segregation and apartheid which severely and disproportionally affected the Palestinian population in the Occupied Palestinian Territories and which violated the provisions of Article 3 of ICERD.[78]

5.5.4 Conclusion

Israel is not a party to either the Apartheid Convention, AP I or the ICC Statute and consequently is not under an obligation to incorporate the conventional crimes of apartheid into its domestic law. Criminal liability for individual Israeli citizens for carrying out the policies condemned by the CERD in 2012—in the absence of a successful Palestinian ratification of the ICC Statute[79] or AP I[80]—will depend, in the

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[73] Falk 2014, pp 14-20, paras 51-76.

[74] Dugard and Reynolds 2013a, p 880. See also Tilley 2009, p 26; Tilley 2012, pp 3, 223.

[75] Dugard and Reynolds 2013a, p 880, n 81 (emphasis added).

[76] Israel ratified ICERD on 3 January 1979 (excluding Article 22 – ICJ jurisdiction over disputes).

[77] Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature on 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) (ICERD). See also Committee on the Elimination of Racial Discrimination, General Recommendation XIX, adopted on 17 August 1995, reprinted in UN Doc. A/50/18, p 140, para 1 ("The reference to apartheid may have been directed exclusively to South Africa, but the article as adopted prohibits all forms of racial segregation in all countries".).

[78] Report of the Committee on the Elimination of Racial Discrimination, Eightieth session (13 February-9 March 2012), UN Doc. A/67/18, p 20.

[79] The attempt to lodge a declaration pursuant to Article 12(3) of the ICC Statute on 22 January 2009 recognizing the jurisdiction of the ICC was rejected by the ICC's Office of the Prosecutor (OTP) on 3 April 2012 on the grounds that only a "State" could make such a declaration.

[80] The attempt by the Executive Committee of the Palestinian Liberation Organization, entrusted with the functions of the Government of Palestine, to ratify the four 1949 Geneva Conventions and the two Additional Protocols on 21 June 1989 failed due to the uncertainty within the international community

first instance, on the current customary status of the various international attempts to criminalise apartheid.

To the extent that apartheid constitutes either a customary international crime against humanity and/or a war crime under customary international humanitarian law, it does not appear that Israel can be regarded as a persistent objector to the international criminalisation of apartheid particularly as a crime against humanity. Israel voted in favour of the adoption of the draft 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (the 1968 Convention) that refers to apartheid as a crime against humanity[81] and Judge Eli Nathan, Head of the Israeli delegation at the drafting of the ICC Statute, in his statement explaining Israel's negative vote in relation to the adoption of the ICC Statute, made it clear that but for the inclusion of Article 8(2)(b)(viii)—the transfer of the population of an occupying power into the territory it occupies or deporting the existing population from the occupied territory—his delegation "would have been proudly able to vote in favour of adopting the Statute".[82] Although Nathan also indicated that Israel had other problems with the ICC Statute which they would address at the appropriate time, given Israel's positive vote for the adoption of the 1968 Convention, it seems inconceivable that this would include the crime of apartheid.[83]

5.6 Assessing the Customary Status of the Crime of Apartheid

5.6.1 Introduction

Given the generally non-binding nature of UNGA resolutions, there are three possible origins of a customary international crime of apartheid, namely, the 1973 Apartheid Convention, Article 85(4)(c) of AP I and Article 7(1)(j) of the ICC Statute.

5.6.2 The customary status of the 1973 Apartheid Convention

Whilst there is some academic support for the existence of a general customary crime of apartheid based on the 1973 Apartheid Convention,[84] there are two key problems with this assertion. First, Article II of the Apartheid Convention limits the geographical scope of the Apartheid Convention to "policies and practices of racial segregation and discrimination as practised in southern Africa". Supporters of the contention that the Apartheid Convention applies beyond the geographical limits of

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as to the existence or non-existence of a State of Palestine at that time. See Palestine and the Geneva Conventions, 30 International Review of the Red Cross (1990), pp 64-65, or La Palestine et les Conventions de Genève, 72 Review Internationale de la Croix-Rouge (1990), pp 69-70. For the current situation see *infra* n 131.

[81] Israel also voted in favour of the last part of paragraph 1 of the Preamble containing the reference to apartheid as a crime against humanity during the separate vote requested by the United States during the drafting process. See UN Doc. A/C.3/SR.1573 (15 October 1968), p 1, para 5. See also Lerner 1969, p 518.

[82] Nathan 1998. See also 9th Plenary Meeting, UN Doc. A/CONF.183/SR9 (17 July 1998), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998), Official Records, Vol II: summary records of the plenary meetings and of the meetings of the Committee of the Whole, p 123, paras 33-34.

[83] Israel signed the ICC Statute on 31 December 2000 stating that it was an active supporter of the concept of an International Criminal Court, and its realisation in the form of the ICC Statute but it rejected any attempt to interpret its provisions "in a politically motivated manner against Israel and its citizens".

[84] See, e.g., McCormack and Simpson 1994, p 42.

southern Africa,[85] tend to rely on statements made by the representatives of Australia, Cyprus and the United States during the drafting process.[86]

The original draft convention did not contain the phrase "as practised in southern Africa".[87] During the discussion of the draft convention on 22 October 1973, the United States' representative complained:

> Article I would be open to very broad interpretations going beyond both the intentions of its drafters and the geographical limits of southern Africa. The Convention could be applied to situations which currently were entirely unforeseeable.[88]

At the same meeting, the Cypriot representative too expressed concerns about the drafting of the convention "mainly from the legal point of view" and noted that "it must be remembered that it would become part of the body of international law and might last beyond the time when apartheid was being practised in South Africa".[89] The following day, the Australian representative also expressed concerns that "the concept of apartheid was being widened to such an extent that it could be applicable to areas other than South Africa".[90]

In response to these criticisms, the Moroccan representative agreed that Article II should be made clearer and she proposed that the phrase "as practised in southern Africa" should be added to draft Article II.[91] The Algerian representative supported the Moroccan proposal and stated that "[w]ith regard to the amendment to Article II proposed orally by the representative of Morocco, it would be highly desirable to specify the geographical area".[92] The Tunisian representative also spoke in favour of the Moroccan proposal clarifying and precisely defining the sphere of application of the Convention and she expressed the hope that the amendment would help to dispel certain misgivings expressed by some delegations.[93] The proposed Moroccan amendment was adopted by 89 votes to three with 19 abstentions.[94] It should also be noted that during the drafting of the Draft Code of Offences Against the Peace and Security of Mankind, the International Law Commission (ILC) also

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[85] See UN Economic and Social Council, Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid, Report of the Group of Three Established under the Convention, UN Doc. E.CN.4/1995/76 (25 January 1995), para 17 ("While recognizing that the International Convention on the Suppression and Punishment of the Crime of Apartheid applied to any country that might practise racial segregation under an institutionalized apartheid system, the Group noted that thus far there is no claim by any State party that apartheid, as defined by the Convention, exists anywhere else than in southern Africa".). See also Clark 2008, p 603 (Article II "is drafted so as to 'include' the cases of southern Africa, but not exclusive to them".).

[86] See, e.g., Du Plessis 2011, p 423; Reynolds 2012, p 211, n 66; Tilley 2012, p 124; Dugard and Reynolds 2013a, pp 884-885.

[87] See Draft Convention on the Suppression and Punishment of the Crime of Apartheid, UN Doc. A/9095 (28 August 1973), Annex.

[88] UN Doc. A/C.3/SR.2003 (22 October 1973), p 142, para 36.

[89] Ibid, pp 142-143, para 39.

[90] UN Doc. A/C.3/SR.2004 (23 October 1973), p 143, para 4.

[91] See UN Doc. A/C.3/SR.2005 (24 October 1973), p 150, para 12. The wording of the amendment was as follows: In the third line of article II, after the words "segregation and apartheid", add the words "as practised in southern Africa". UN Doc. A/C.3/L.2020 (24 October 1973) (original French).

[92] UN Doc. A/C.3/SR.2005 (24 October 1973), p 151, para 26. See also the remarks of the representatives of Ghana and Pakistan supporting the Moroccan amendment, UN Doc. A/C.3/SR.2006 (25 October 1973), p 152, para 2 (Ghana); p 153, para 15 (Pakistan).

[93] UN Doc. A/C.3/SR.2008 (26 October 1973), p 162, para 5.

[94] See ibid, p 162.

expressed the view that the Apartheid Convention was limited in its geographical scope to southern Africa.[95]

The second problem with asserting the customary status of a crime of apartheid based on the Apartheid Convention is the lack of a universal *opinio iuris*.[96] Not only was the Apartheid Convention rejected by the vast majority of Western states, an overwhelming majority of the states that actually ratified the Apartheid Convention conspicuously failed to incorporate the crime into their domestic law prior to the drafting of the ICC Statute.[97]

Even if the Apartheid Convention could be regarded as the basis of a general customary crime of apartheid, the ambit of this crime could not be wider than the conventional crime on which it was based and thus any such customary international crime against humanity would be restricted to the geographical limits of southern Africa and would consequently be inapplicable to the Israeli-Palestinian conflict. Further, given the express limitations on the geographical scope of the Apartheid Convention, it also cannot apply *qua* treaty to the Israeli-Palestinian conflict notwithstanding the fact that the United Nations Treaty Database records the accession of the State of Palestine to the Apartheid Convention on 2 April 2014.

5.6.3 The customary status of Article 85(4)(c) of AP I

There are two key factors in the assertion of the existence of a customary war crime of apartheid with potential application to the Israeli-Palestinian conflict. First, unlike the Apartheid Convention, there are no express geographical limits to the operation of Article 85(4)(c) of AP I and, second, the extensive ratification of AP I (174 states are currently party to AP I) raises at least a rebuttable presumption with regard to the customary status of its main provisions.

With regard to the first factor, whilst there are no express geographical limits vis-à-vis Article 85(4)(c) of AP I, an examination of the *travaux préparatoires* of AP I reveals that the racist regimes in southern Africa were the sole targets. In the context of treaty interpretation, the principle of contemporaneity provides:

> The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of the current linguistic usage, at the time when the treaty was originally concluded.[98]

If, at the time that AP I was originally concluded, the current linguistic usage of the term apartheid was limited to South Africa, then Article 85(4)(c) of AP I could only be applied to the Israeli-Palestinian conflict by analogy. However, as early as 1961, the "architect of apartheid", South African Prime Minister Hendrik Verwoerd, criticised what he saw as Israeli hypocrisy in voting in favour of a UNGA resolution deploring South Africa's policies based on racial discrimination as reprehensible and

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[95] Draft Code of Crimes Against the Peace and Security of Mankind, reprinted in [1991] Yearbook of the ILC, Vol II(2), 79-107, p 103, para 4.

[96] Cassese 2008, p 13; Hannum 1997, p 144; Tomuschat 1995, p 54.

[97] See Amnesty International 2011 and note the frequent statements that "*apartheid* is not defined/included in the Penal Code [of state X]..., so prosecutions would have to be for ordinary crimes" in relation to states that are parties to the Apartheid Convention. See also Carrillo and Nelson 2013, p 13 (noting that 10 out of 34 States (29%) surveyed in 2013 excluded apartheid from the list of prohibited acts in their CAH (crimes against humanity) legislation and that "seven of these 10 States have ratified or acceded to the Convention on Apartheid".).

[98] Fitzmaurice 1957, p 212. See also Kotzur 2012.

repugnant to human dignity[99] on the grounds that Israel, like South Africa, was an apartheid state.[100]

In the early 1970s, some Palestinian authors also compared Israeli proposals for limited Palestinian autonomy with the Bantustan strategy in South Africa.[101] In an infamous 1975 UNGA resolution (revoked in 1991) declaring Zionism to be a form of racism and racial discrimination, the UNGA took note of an Organisation of African Unity resolution which considered that the racist regimes in occupied Palestine and in Rhodesia (now Zimbabwe) and South Africa had a common imperialist origin and the same racist structure.[102]

In its 1975 resolution on the inter-temporal problem, *L'Institut de Droit International* noted:

> Lorsqu'une disposition conventionnelle se réfère à une notion juridique ou autre sans la définir, il convient de recourir aux méthodes habituelles d'interprétation pour déterminer si cette notion doit être comprise dans son acception au moment de l'établissement de la disposition ou dans son acception au moment de l'application.[103]

Thus, even if the current linguistic usage of the term "apartheid" was limited to southern Africa in 1977, a dynamic (evolutive) interpretation might still be appropriate, and the principle of contemporaneity is increasingly honoured only in the breach.[104] Although it is an accepted principle that criminal law provisions must not be extensively construed to the accused's detriment, in *S.W. v. United Kingdom,*[105] the European Court of Human Rights held that an evolutive interpretation of a common law principle (that a husband could not be found guilty of rape upon his wife) was not incompatible with the principle of legality contained in Article 7 of the European Convention on Human Rights.[106]

With regard to the second factor (the customary status of the grave breaches regime in AP I due to the number of ratifications), the inclusion of the "practices of *apartheid*" in the list of grave breaches of AP I was controversial[107] and the

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[99] UNGA Res. 1598 (XV) (13 April 1961).

[100] The Rand Daily Mail, "Premier Lashes Israel" (23 November 1961), as quoted in Clarno 2009, p 66.

[101] Clarno 2009, p 67.

[102] UNGA Res. 3379 (XXX) (10 November 1975). Revoked by UNGA Res. 64/86 (16 December 1991).

[103] Institut de Droit International 1975, p 538, para 4. The official translation of the authentic French text reads as follows: "Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept is to be interpreted as understood at the time when the provision was drawn up or at the time of its application".

[104] See, e.g., ICJ, *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Merits Judgment, (2009) ICJ Rep 213, pp 241-244, paras 62-71; *Arbitration regarding the Iron Rhine ("IJzeren Rijn") Railway (Belgium v the Netherlands)*, Award of the Arbitral Tribunal (24 May 2005), 27 Reports of International Arbitral Awards (2008), 35-125, pp 72-75, paras 79-84, noting "a general support among the leading writers today for evolutive interpretation of treaties" (para 81). See also Higgins 1996 (reprinted in Higgins 2009); Jennings and Watts 1996, pp 1281-1282, para 633.

[105] ECtHR, *S.W. v The United Kingdom*, Judgment (App. No. 20166/92), 22 November 1995.

[106] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (European Convention on Human Rights).

[107] See *supra* sections 5.2.3 – 5.2.4.

ambivalence towards the grave breaches regime in AP I was evident during the drafting of the ICC Statute. The New Zealand representative, for example, argued:

> the definition of war crimes must not fall short of existing, widely accepted standards of international humanitarian law as reflected in the Geneva Conventions and Additional Protocols, which, given the large number of State parties thereto, constituted customary international law.[108]

Views hostile to the customary status of the definitions of war crimes in AP I were also expressed (particularly from Israel)[109] and the absence of the practices of apartheid from the list of war crimes in the ICC Statute suggests continuing unease over the drafting of Article 85(4)(c) of AP I (notably the problem of category error; i.e., there is no necessary link between the practices of apartheid and armed conflicts).[110]

5.6.4 The customary status of the crime of apartheid as a crime against humanity in the ICC Statute

Darryl Robinson has argued that the delegations participating in the Rome Conference were keen to limit the definitions of crimes against humanity to existing customary law and that, with regard to enforced disappearances and the crime of apartheid, both could be regarded as examples of other inhuman acts that now deserved express recognition due to the special concern of the international community.[111] However, in the case of enforced disappearances, the ICC's Elements of Crimes makes it clear that it is to be regarded as a progressive development.[112] No such restriction is included in the elements of the crime against humanity of apartheid but, as Professor Kai Ambos acknowledges, the customary law character of the crime is controversial.[113]

With regard to the customary status of apartheid as a crime against humanity, two possible dates should be considered. First, if the definition of the crime in Article 7(1)(j) of the ICC Statute can be regarded as crystallisation of earlier state practice, then the date of adoption of the ICC Statute (17 July 1998) would be the critical date. However, and second, if the ICC Statute is to be regarded as a new beginning for the worldwide application of the crime of apartheid (progressive development), then only subsequent state practice will suffice. It might be possible to regard the date of the coming into force of the ICC Statute (1 July 2002) as the critical date, but various studies of the ambit of universal criminal jurisdiction made after the adoption and coming into force of the ICC Statute have failed to include the crime of apartheid in their list of customary crimes against humanity although the uncertainty surrounding the status of the crime of apartheid was noted.

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[108] Fourth Meeting of the Committee of the Whole, *supra* n 42, p 160, para 64. See also p 161, para 72 (Denmark); p 161, para 74 (Sweden). Fifth Meeting of the Committee of the Whole, *supra* n 46, p 162, para 9 (Kuwait); p 163, para 20 (Saudi Arabia); p 168, para 91 (Chile); p 168, para 94 (South Africa).

[109] Fifth Meeting of the Committee of the Whole, *supra* n 46, p 167, para 79.

[110] Contrary to some assertions (see, e.g., Levie 1993, p 470, n 4; Solis 2010, p 134, n 67), there is nothing in the so-called Matheson statement that can be read as an acceptance of the customary status of Article 85(4)(c) of API by the United States. See Matheson 1987, p 428. "Certain of the principles contained in [the final part of Protocol I] also merit acceptance as customary law", but Article 85(4)(c) of API is not specified as belonging to this category.

[111] Robinson 1999, p 55.

[112] See ICC 2011, p 11, n 24.

[113] Ambos 2014, p 113. See also Zahar 2009; Cassese et al. 2011, p 11; Gebhard 2012, p 467; Eden 2014.

The 2001 Princeton Principles on Universal Jurisdiction observed that "*Apartheid*, terrorism, and drug crimes were raised as candidates for inclusion"[114] and the 2002 preamble to the *Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective* similarly expresses concern at the fact that "certain offences which have particular resonance in Africa, such as the crime of *apartheid*, have so far not attracted prosecution under the principle of universal jurisdiction".[115] The 2005 *Institut de Droit International* report on universal criminal jurisdiction also failed to include apartheid in the list of crimes to which universal jurisdiction applied.[116] I have argued elsewhere that the use of the "copy out" technique (i.e., the incorporation of the ICC Statute's definition of crimes against humanity into domestic law) by states not party to the ICC Statute will end this uncertainty once and for all.[117]

5.6.5 The crime of apartheid and the problem of legality

Prior to the drafting of the ICC Statute, all the international instruments criminalising apartheid were created with a specific target in mind and, thus, it can be argued that the crimes that they contain could only be applied to the Israeli-Palestinian conflict by analogy. The prohibition against analogy is a generally accepted component of the *nullum crimen* principle,[118] and this may make the application of international instruments criminalising apartheid drafted before the end of the Apartheid era difficult to apply to the Israeli-Palestinian conflict in spite of the absence of any express geographical limitations in Article 85(4)(c) of AP I (unless the principle of dynamic (evolutive) interpretation can be applied to this grave breach).[119]

The interdiction of analogy as part of the principle of legality is particularly important here because the fact that Israel is a party to ICERD has surprising ramifications for the applicability of a customary law crime of apartheid to the Israeli-Palestinian conflict. In various German Border Guards cases, both the European Court of Human Rights[120] and the UN Human Rights Committee[121] have held that where an individual's conduct (albeit in furtherance of an official policy) breaches a binding obligation under international human rights law, a subsequent criminal conviction will not breach the principle of legality; i.e., the rules of international law on the protection of human rights ensured that the offences were sufficiently accessible and foreseeable.

Although, as noted above, few states provided for jurisdiction over the crime of apartheid prior to their ratification of AP I and the ICC Statute, the principle of non-retroactivity or *nullum crimen, nulla poena sine lege praevia* is not breached by the failure to incorporate an international crime into domestic law as the *Eichmann*

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[114] Macedo 2001, p 48.

[115] See Kwakwa 2002, pp 419-420. See also Bultz 2013, p 218. Asserting that the lack of judicial application of the Apartheid Convention weakens the customary status of the crime of apartheid.

[116] Tomuschat 2005, p 246. But see also Institut de Droit International 2005, pp 212 ("Disagreement was also expressed with regard to Mr Tomuschat's comments on apartheid".), 236 ("[Mr Koroma] expressed his irritation with the lengthy treatment of the crime of apartheid, because it was included in the Rome Statute and therefore such ruminations were unnecessary".).

[117] See Eden 2014, pp 189-191.

[118] See generally Kreß 2012, p 897, para 28. See also PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion (4 December 1935), 1953 PCIJ, Series A/B No. 65, p 51 ("In other words, criminal laws may not be applied by analogy".)

[119] See *supra* text accompanying footnotes 97-105.

[120] ECtHR, *Streletz, Kessler and Krenz v Germany*, Grand Chamber Judgment (App. Nos. 34044/96, 33532/97, 44801/98), 22 March 2001.

[121] Human Rights Committee, *Baumgarten v Germany*, Communication No. 960/2000, UN Doc. CCPR/C/960/2000 (31 July 2003), para 9.5.

case demonstrates.[122] Although Eichmann was convicted of both war crimes and crimes against humanity, recent state practice suggests that retrospective legislation is more easily applied to war crimes than crimes against humanity.[123]

5.6.6 Conclusion

If doubt remains over the customary status of the crime of apartheid as a crime against humanity, a much stronger case can be made for the customary status of the "practices of *apartheid*" as a war crime. Although Article 85(4)(c) of AP I was both a progressive development and specifically targeted at South Africa, a provision representing progressive development in one multilateral treaty may be regarded as a codification if repeated in a later multilateral treaty. Had apartheid been included in the list of war crimes in Article 8 of the ICC Statute, this would certainly have entailed the codification of the "practices of *apartheid*" as a war crime. However, its absence from the list of war crimes in the ICC Statute weakens but does not necessarily destroy the argument for the customary status of Article 85(4)(c) of AP I for several reasons. First, Article 7(1)(j) ICC Statute confirms the status of apartheid as an international crime albeit as a crime against humanity. Second, the fact that the ICC Statute recognises that crimes against humanity can be committed outside the context of an armed conflict entails that the war crime of the "practices of *apartheid*" is, in effect, a lesser-included offence rendering its inclusion in the ICC Statute as a war crime redundant.[124] Third, the inclusion of the crime of apartheid in the ICC Statute can be regarded as acceptance that the concept of apartheid has a worldwide application. Finally, Article 10 of the ICC Statute expressly stipulates that the failure to include a crime cannot be interpreted as limiting or prejudicing existing or developing rules of international law "for purposes other than this Statute".

In her reply to Dugard and Reynolds' recent article in the *European Journal of International Law*, Professor Yaffa Zilbershats accepted the premise that apartheid as practised in the former South Africa "remains today a crime against the law of nations applicable to states practising a similar regime",[125] but asserted that the fundamental error underlying the authors' analysis is that apartheid "both in wider usage and specifically in the South African experience, is characterized by the institutionalized racism of a government against citizens and residents under its sovereign regime".[126] While this might potentially be true of the underlying conceptualisation of crimes against humanity generally, it is certainly not true of the underlying conceptualisation of war crimes, and Article 85(4)(c) of AP I is fully applicable to occupied territories.[127] Further, as Dugard and Reynolds noted in their rejoinder to

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[122] District Court of Jerusalem, *Attorney-General of the Government of Israel v Eichmann*, Judgment (11 December 1961), 36 ILR 5-276. Although it should be noted that the Israeli Supreme Court held that "the principle *nullum crimen sine lege, nulla poena sine lege*, in so far as it negates penal legislation with retrospective effect, has not yet become a rule of customary international law", see Israeli Supreme Court, *Attorney-General of the Government of Israel v Eichmann*, Judgment (29 May 1962), 36 ILR 5-277-342, p 281, para 8.

[123] See, e.g., High Court of Australia, *Polyukhovich v Commonwealth of Australia* (1991), 172 CLR 501; Supreme Court of Canada, *R v Finta* [1994] 1 SCR 701 (both recognising that retrospective legislation can be applied to war crimes) and the UK War Crimes Act 1991. See also Gallant 2009, pp 370-371.

[124] Although war crimes can consist of a single isolated act, apartheid by its very nature will always require widespread and systematic commission against a civilian population.

[125] Zilbershats 2013, p 916.

[126] Ibid.

[127] See Gasser and Dörmann 2013, p 277.

Zilbershats,[128] her assertion fails to appreciate the imposition of apartheid policies in the Mandated Territory of South West Africa (now Namibia), which led to the first reference to apartheid as a crime against humanity by the UNGA in 1965.[129]

5.7 Conclusion

Although all the international instruments criminalising apartheid prior to the drafting of the ICC Statute were produced as part of the international campaign against South Africa, universally applicable norms of international law can emerge in response to a specific historical experience. The prohibition of genocide is an obvious case-in-point. However, in the relation to the prohibition of genocide, the international crime that resulted was not limited by reference to the specific historical experience that prompted its creation. By contrast, the criminalisation of apartheid prior to the drafting of the ICC Statute needed to be expressly linked to the specific political ideology that motivated its creation in order to avoid any claims of exceptionalism that might have been made in response to a less explicit criminalisation.

If the factual basis exists, the application of the apartheid paradigm to the Israeli-Palestinian conflict can serve an important rhetorical function but—in the absence of a successful Palestinian ratification of the ICC Statute[130]—the question of individual criminal responsibility will be beset by the problem of the principle of legality, specifically the prohibition of analogy, until the question of the customary status of the crime of apartheid is settled. The recent ratification of AP I by the Palestinian Authority[131] may not alter the applicability of the war crime of the "practices of *apartheid*" to the Israel-Palestine conflict unless an evolutive interpretation can be applied to Article 85(4)(c) of AP I. However, even if the customary status of the crime of apartheid (as well as the applicability of Article 85(4)(c) of AP I *qua* treaty) remains in doubt, there can be no doubt that the acts required to enforce any policy of systematic racial discrimination would fall squarely within the definition of clearly established customary law crimes against humanity such as persecution and other inhumane acts. Where applicable, such policies would also breach the obligation contained in Article 27 of the Fourth Geneva Convention to treat protected persons "without any adverse distinction based, in particular on race, religion or political opinion" and the war crime codified in Article 8(2)(b)(viii) of the ICC Statute—"[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory"—may be relevant too.[132]

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[128] Dugard and Reynolds 2013b.

[129] Question of South West Africa, UNGA Res. 2074 (XX) (17 December 1965).

[130] In its Report on Preliminary Examination Activities 2013, the ICC's Office of the Prosecutor (OTP) noted that UNGA Resolution 67/19 (29 November 2012) according Palestine non-member observer State status in the United Nations did not cure the invalidity of Palestine's 2009 declaration and, although the OTP considered that Palestine's status at the UNGA was of direct relevance to the ICC's jurisdiction, "at this stage, the Office has no legal basis to open a new preliminary examination".

[131] The Palestinian Authority declared itself to be a party to the four 1949 Geneva Conventions of 12 August 1949 and API (but not APII) on 2 April 2014. Switzerland formally registered this accession on 10 April 2014. See L'Agence France-Presse (AFP), "Confirmation que la Palestine est partie aux Conventions de Genève", available at: http://www.afp.com/fr/node/2278155. Accessed 30 April 2014.

[132] See, e.g., Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, UN Doc. A/HRE/22/63 (7 February 2013).

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