Apartheid as an Instance of Breach of the Principle of Prohibition of Discrimination Regarding the Palestinian Issue

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Abstract

Discrimination is known as an internationally wrongful act. The prohibition of discrimination as a jus cogen in international law is a necessity to protect human rights and fundamental freedoms and guarantee people's dignity, and even in some cases, to maintain international peace and security. Therefore, the principle of prohibition of discrimination plays a prominent role in the international human rights system. The Geneva Conventions of 1949 and their Additional Protocols of 1977 contain provisions that clearly prohibit "adverse effect discrimination" against persons affected by armed conflicts and occupation, and require equal behavior between certain categories of persons, such as the wounded and the sick, and this is the first step to consider apartheid a war crime. Secondly, the human pain caused by the political ideology of apartheid in South Africa lasting 1948 to 1994, which raised international condemnation and a variety of diplomatic and legal responses, led to the adoption of the 1973 UN Apartheid Convention in 1973 in which apartheid was considered as a crime against humanity, while in the Article 85 Paragraph (4) (c) of the Additional Protocol I (AP I), it was a war crime. These international reactions did not stop even after the end of the apartheid era, so in 1998, apartheid was included as an instance of crimes against humanity in the Statute of the International Criminal Court (ICC). Furthermore, paragraph 1 of Article 86 AP I, which obliges parties to repress grave breaches of the Protocol, ensures that apartheid has been included as a war crime in the domestic criminal laws of many countries, and the demise of apartheid in South Africa has not changed this. In fact, it is the increasing (but contested) use of the term apartheid in Israeli laws and actions in the Occupied Palestinian Territories (OPT) that led to individual criminal prosecution in this context. In other words, although the inclusion of the Apartheid Convention on Israel's actions faces challenges, there are no such restrictions regarding the provisions of AP I.

Key words: Apartheid, Crimes against humanity, Discrimination, Palestine, War crimes
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1. Introduction

The crime of apartheid is important in international human rights law and international criminal law. Apartheid, as an aggravating case of racial discrimination, is a clear breach of the principle of racial discrimination in Article 1(3) of the United Nations Charter and Article 2 of the UDHR. Apartheid has been an important catalyst in the international community in uniting UN member states during the Cold War against the apartheid regime of the South African government. The development of the crime of apartheid has contributed to the development of international criminal law and the Rome Statute, although it is often neglected. The criminalization of apartheid and its inclusion in the Rome Statute, which ensures individual criminal responsibility, is more than a legacy for victims of systematic oppression and racial discrimination. This inclusion deserves the prudence of the international community in effectively dealing with current and future cases of apartheid. It is the responsibility of the ICC Prosecutor to release apartheid's proximity to the South African context by applying Article 7(1)(j) of the Rome Statute in other situations. A recent reference to the crime against humanity of apartheid by Special Rapporteur Richard Falk reveals the continuing relevance of this crime to the current situation. If the ICC Prosecutor decides to investigate the situation in Palestine, the application of the provisions related to apartheid crime is very evident. Therefore, there is legitimate hope that the prosecutor will use Article 7(1) (j) of the Rome Statute on the crime of apartheid as a string in the prosecutorial bow[1].

While there is some academic support for the existence of a common customary apartheid crime under the 1973 Apartheid Convention, there are two key problems with this claim: First, Article 2 of the Apartheid Convention limits the geographical scope of the Apartheid Convention to "policies and racial segregation methods and discrimination carried out in South Africa," and the second, there is doubt about demonstration of the common status of the apartheid crime and as well as the Apartheid Convention lacks a universal belief. The present paper tries to answer these challenges with an analytical-descriptive method. Hence, apartheid will be examined as a war crime in the first part, and apartheid committed by Israel against Palestine will be discussed in the next part.

2. Apartheid as a war crime

In 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted the First Protocol to the Geneva Conventions of 1949 (Protocol I), criminalizing the “practices of apartheid and other inhuman

[1]Carola Lingaas‹Article in Oslo Law Review · November 2015‹ The Crime against Humanity of Apartheid in a Post-Apartheid World.

practices or degrading practices based onracial discrimination and involving outrages upon personal dignity " as grave breaches when theyare done intentionally and in opposition to conventions or protocols[2]. 174 countries joined or ratified this protocol and it was signed by three countries[3]while Israel has refused to sign or ratify this protocol to date. It is worth mentioning that the Geneva Conventions of 1949 and their Additional Protocols of 1977 contain provisions that clearly prohibit "adverse effect discrimination" against persons affected by armed conflicts and occupation, and require equal behavior between certain categories of persons, such as the wounded and sick, and this is the first step to consider apartheid a war crime[4].

After this first step, the human pain caused by the political ideology of apartheid in South Africa lasting 1948 to 1994, which raised international condemnation and a variety of diplomatic and legal responses, led to the adoption of the 1973 UN Apartheid Convention in 1973 in which apartheid was considered as a crime against humanity, while in Article 85 Paragraph (4) (c) of the first Additional Protocol, it was a war crime. These international reactions did not stop even after the end of the apartheid era, so in 1998, apartheid was included as an instance of war crime in the Statute of the International Criminal Court (ICC)[5]. furthermore, paragraph 1 of Article 86 AP I, which obliges parties to repress grave breaches of the Protocol, ensures that apartheid has been included as a war crime in the domestic criminal laws of many countries, and the demise of apartheid in South Africa has not changed this. In fact, it is the increasing (but contested) use of the term apartheid in Israeli laws and actions in the Occupied Palestinian Territories (OPT) that led to individual criminal prosecution in this context.

2.1. Inclusion of apartheid in thelist of grave breachesAP I

The debate on the inclusion of "apartheid practices" in the list of grave breaches AP I reflects longstanding tensions between the diplomatic and legal agendas of First World countries and Third World and Eastern Bloc countries. These tensions compromised some aspects of the drafting of AP I, and the inclusion of "apartheid practices" in the list of grave breaches of AP I has been criticized. The conflict between the deep-rooted ideological beliefs of the negotiating parties has led to what Professor Yoram Dinstein has referred to as the "great Schism" that

[2]Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter “Additional Protocol I”), Article 85(4)(c).
[3]Joshua Kern & Anne Herzber December 2021 ‹False Knowledge as Power: Deconstructing Definitions of Apartheid that Delegitimize the Jewish State
[4]Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 135, Article 12; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85, Article 12; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, Article 16; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Articles 13 and 27; Additional Protocol I; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, Articles 2, 4 and 7.
[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).

separates the contracting parties of the Additional Protocol I from some key players in the international arena. However, the pressure to include apartheid in the list of grave beaches began with the initial draft (Article 74) of the International Committee of the Red Cross (ICRC), which merely developed the application of the provisions of the 1949 Geneva Conventions on the Repression of Beaches to Persons and Objects supported by Additional Protocol I. At the first session of the Diplomatic Conference in March 1974, the Democratic Republic of Vietnam proposed a number of amendments to the ICRC draft, including a proposal for adding "the continued existence of colonial regimes, the practice of apartheid and all forms of racial discrimination" to the list of international crimes defined in international law since the judgment of the Nuremberg Military Tribunal[6]. The supporters of this amendment included the Soviet Union, Belarus, Ukraine and Syria. Supporters of the amendment stated that they are concernedwith these issues: First, the need forReaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts;Second, the need for inclusion of developments after 1949, and finally, the need to prevent human suffering from dangerous crimes against humanity.

2.2. Criticism of the inclusion of practices of apartheid the list of grave breaches AP I during the drafting process

The list of grave breaches of AP I (which eventually became Article 85 of Additional Protocol I) was adopted by consensus, but several delegations questioned some of the provisions (apartheid practices) due to vagueness of the draft. Austria and Finland questioned whether "practices of apartheid" could be easily transposed into national criminal laws. Australia's representative complained that the inclusion of political ideologies, however hateful, into the system of grave breaches was not to reaffirm and develop humanitarian law, but to distort it[7]. He also stated that if a separate vote had been taken, his delegation would not have been able to support the inclusion of "practices of apartheid" in the list of grave breaches. The representative of France also expressed his delegation's doubts about its inclusion and stated that he would have abstained if a vote had been taken. By contrast, the representatives of Yugoslavia and Poland also expressed satisfaction at the inclusion of apartheid and inhuman and degrading practices based on racial discrimination in the list of grave violations.

2.3.Commentary and criticism on Article 85 (4) (c) of AP I

Article 85 (4) (c) of AP I states that: "practices of apartheid and other inhuman and degrading practices that involve outrages upon personal dignity based on racial discrimination are grave breaches if committed intentionally and illegally."

[6]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
[7]Official Records, Vol IX, CDDH/I/SR.64, p. 307: summary record of the 64th meeting, 7 June

The commentary notes that paragraph (4) is related to "off the battlefield" grave breaches, and that the crime of apartheid remains exclusively within the scope of crimes against humanity. In 1976, while the negotiations were still ongoing, Professor Gerald Draper criticized the creation of a war crime aimed at a state and complete racial content, noting that Article 27 of the Fourth Geneva Convention[8]already required respect for protected persons "without any distinction based on race, religion or political opinions". In Draper's viewpoint, the deletion of the words "practices of apartheid and other" does not alter the essential nature of the grave breach which eventually became Article 85(4)(c) of AP I. The representative of Uganda noted that "all United Nations bodies, and especially the Security Council, had always drawn a clear distinction between racial discrimination and apartheid"[9]. This point had been accepted to some extent by the representative of Uganda during the drafting process, who stated that apartheid, although had not arisen in the armed conflict, had brought a combat situation and that recognition of apartheid as a grave breach could serve as a preventive measure likely to decrease the risk of war.

2.4. The ICC Statute and the crime of apartheid

The crime of apartheid was not included in the list of crimes against humanity in the draft statute of the International Criminal Court prepared by the Preparatory Committee on the Establishment of the International Criminal Court, although the main concept was undoubtedly included in the concept of persecution in political, racial, national, ethnic, cultural or religious contexts in subsection (h) of Article Y (definition of crimes against humanity)[10]. However, apartheid was initially included in the possible options for the definition of war crime as an example of an outrage at personal dignity[11]. While the majority of governments consider AP I as a part of customary international law, some who have subsequently joined AP I did not accept this claim when the ICC Statute was being drafted[12].

In the discussion of the draft, Article 5 (Crimes within the jurisdiction of the Court), it was discussed whether apartheid can be included as a crime against humanity in a time of peace and war[13]. The representative of Mexico pointed out that apartheid should have been included in the list of crimes within the jurisdiction of the Court. Finally, the result was that the crime of apartheid should be added to the list of crimes against humanity within the jurisdiction of the Court. When the inclusion of apartheid into the list of crimes against humanity came up,

[8]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).
[9]Official Records, Vol IX, CDDH/I/SR.60, p. 266: summary record of the 60th meeting, 3 June 1976, para 82.
[10]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.
[11]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.
[12]See Von Hebel and Robinson 1999, pp. 103–107 for an account of the heated preliminary discussions.
[13]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.

Bangladesh and Nigeria colligated with primarily sub-Saharan African countries to ensure its inclusion in the final draft[14]. Despite South Africa's undeniable acceptance due to its painful national experience, the process of negotiating a consensus definition of the crime of apartheid was relatively long. At another level, some states (especially the United States) were concerned that racist opinions and policies of private individuals or non-governmental organizations should not fall within the scope of the apartheid crime due to concerns about freedom of expression. Accordingly, the crime of apartheid as defined in Article 7(2) (h) of the Statute of the International Criminal Court requires that inhumane acts be committed "in the context of an institutionalized regime of systematic oppression and domination by one racial group over other racial groups.

The inclusion of apartheid as a crime against humanity in Article 7(1) of the ICC Statute is significant for two reasons. First, it is the first time that apartheid has been criminalized in a manner that is consistent with criminal legality and certainty. Second, while Article 7(1) (j) almost certainly represents a progressive development, "it can be argued that the ICC Statute has contributed to the recent formation of a customary rule on the matter"[15]. By contrast, the failure to proceed with the proposal to include apartheid in the list of war crimes in the ICC Statute could weaken the argument that the practice of apartheid is acustomary international war crime unless Article 10 of the ICC Statute can be invoked[16].

3. Committing apartheid crime against Palestine by Israel

For years, Israel has used the occupying government as a temporary suspension of sovereignty and citizenship rights as facts faced with accusations of committing the crime of apartheid in the West Bank. Intentional and obvious expropriation policy, Zionist settlement building, and creeping annexation, both on the field and the legal arena, destroys its intent to strengthen its control and continue to suspend Palestinian sovereignty and rights and thereby ruins its facts. In our view, several key policies and practices employed by Israeli authorities in the West Bank lead to "persecution" practice under the Rome Statute and/or "denial of rights" under the Apartheid Convention. The Rome Statute defines the crime of persecution (Article 7(2) (g)) as follows:*"Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."*

[14]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.

[15]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.

[1616]- See further infra Sect. 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".

The crime of persecution has also been included in the statutes of previous international tribunals, such as the Nuremberg Military Tribunal which operated after World War II, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). The denial of rights crime is based on group without the need for a specific motive (such as racism or ideology). For the existence of a "persecution" element, it is sufficient that the denial of rights occurs as a result of the victim's membership in a group rather than as an individual. There is a lot of overlap between the inhumane acts of persecution and several of the inhumane practices listed in the Apartheid Convention, including:

- Paragraph c of Article 2: "Any legislative measures and other 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"

- Paragraph d of Article 2: "Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof"

- Paragraph and Article 2: "Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid."

The definition of "persecution" under the Rome Statute includes two conditions that are not explicitly mentioned in the Apartheid Convention. These conditions include; first, the denial of rights must be "severe". Clearly, every instance of denial of rights or discrimination is not persecution. These must be accompanied by a degree of severity that raises it to the level required for a crime[17]. Denial must have a profound effect on the victims' lives. It should not only deprive them of comfort, but also deprive their ability to maintain their social, cultural and economic identity and individual and collective development. The ICTY has ruled that severity should not be assessed with respect to an isolated act of discrimination, but rather it should be evaluated from a broader perspective of the context and cumulative effect of discriminatory practices and policies. The second condition is that the denial must be done " contrary to international law". This provision has been interpreted as involving breach of fundamental rights, recognized as the "International Bill of Human Rights", which includes the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). In other words, the denial must be about rights that are recognized in international law and must be done in a way that contradicts the provisions of this law. Legal context means without no protection, deviation or exception that allows crime.

Within a systematical control framework, this legal aspect of the occupying regime becomes the inhumane act of "denial of members of a racial group or groups from fundamental human rights" or "persecution." This dual legal system constitutes a systematic and institutionalized

[17]William A. Schabas, The international Criminal Court - A Commentary on the Rome Statute (Oxford University Press, p.198.

policy of discrimination that denies Palestinians fundamental rights, in the sense that it creates a legal system in which rights are granted or denied based on group dependency. This dual legal system certainly serves to prevent "participation in political, social, economic and cultural life" because it extends the opportunity for participation to one group while withholding it from another group. Finally, the dual legal system contributes to creating "conditions preventing the full development" of members of the group that is under discrimination. In other words, this policy is "intentional and severe deprivation of fundamental rights contrary to international law due to group or collective identity."

The legal planning system in the West Bank as well as the policy of planning and allocating public lands in practice are to prevent Palestinians from participation in the political, social, economic and cultural life of the country or to create conditions that prevent their "full development" while at the same time encouraging massive development only in the Israeli part. This violation of fundamental rights, which is recognized in international law on a collective basis, also constitutes persecution under the Rome Statute. The policy of separation is a classic case of "...measures, including legal measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups". It is an inhumane act in Article 2(d) of the Apartheid Convention. Separation is also a widespread violation of the right to freedom of movement on a collective basis and, as such, it is persecution under the Rome Statute. The declaration policy and retroactive approval of construction on privately owned Palestinian land is "the expropriation of landed property belonging to a group or racial groups or their members". Some lands were expropriated in the ordinary sense of the word - the expropriation of proprietary rights from their owners - while others were collectively expropriated, in the sense that members of the groups were deprived of their collective rights to benefit from this land. Not only that case, but also Israel has systematically allocated expropriated land to other members of the dominant Israeli group of West Bank residents to complete the dispossession[18]. This is a very widespread policy and procedure that is undertaken in the definition of inhuman act of persecution according to the Rome Statute; it is also defined as an inhumane act against the West Bank. Denial of rights and separation along group lines is under the apartheid convention. The latter specifically refers to land expropriation and dispossession of one group by another group.

In the West Bank, Israeli authorities created an oppressive system designed to suppress Palestinian political activity to resist the occupation and advance independence. Palestinian leaders at every level have been arrested, imprisoned, chased away and even killed by Israel as part of Israel's policy of assassination. While some of Israel's actions were designed to protect Israelis from violent and sometimes murderous attacks, a significant portion of them were designed to suppress opposition, which is effectively the inhuman practice of "persecution of organizations and individuals by depriving them of their fundamental rights and freedoms, because they are

[18]Adv. Michael Sfard ‹The Israeli Occupation of the West Bank and the Crime of Apartheid.

against apartheid". Forced transfer and threats of mass forcible transfers from the West Bank to the Gaza Strip, as well as forcible transfer and threats of mass forcible transfers of entire communities from their lands in the West Bank over the years, are part of demographic engineering. According to Article 7(1) (d) of the Rome Statute, this is an inhuman act of forcible transfer. It is also an instance of denial of rights under the apartheid convention. This is true for the denial of civil rights for the entire Palestinian people and the dual legal system. This is true for the denial of development and the policy of separation. The land expropriation and dispossession policy is only against the Palestinians, like the long-standing policy of persecution of regime opponents and critics. Finally, the act of forcible population transfer is not limited to only one part of society, but against many of them.

All the above-mentioned cases lead to the conclusion that the inhumane acts described in this document meet the requirements of a widespread or systematic attack against a civilian (non-armed) population and that this element of the crime of apartheid is evident. It is difficult to comment, but the conclusion of such an opinion is that the crime against humanity of apartheid is being committed in the West Bank. The perpetrators of this crime are Israelis and the victims are Palestinians. This crime is committed as Israel's occupation is not an "ordinary" occupying regime (or a regime of domination and oppression), but it is a regime with a large-scale colonization project that has created a society of citizens of the occupying power in the occupied area. This crime is committed since the occupying power has also made an effort to increase its dominance over the occupied residents and ensure their inferior status, in addition to colonizing the occupied territory. The crime of apartheid is committed in the West Bank because, within the framework of a regime of domination and oppression of one national group by another, the Israeli authorities implement practices and policies that are considered as inhumane acts defined in international law as follows: denial of rights from a national group, denial of resources from one group and their transferring to another group, physical and legal separation between two groups and the institutionalization of a different legal system for each of them. This is a complete list of inhuman acts.

The claims by successive Israeli governments that the situation is temporary and they have no desire or intention to maintain dominance and oppression over the Palestinians in the region or to preserve their inferior position fall apart against clear evidence of using separate policies and practices. Israel's requests in the occupied territories are designed to maintain and strengthen the domination and oppression of the Palestinians and the superiority of the Israelis migrated to this area. That is not all. As explained in this comment, the Israeli government is conducting a process of "gradual annexation" of the West Bank. From an administrative point of view, annexation means the revocation of military rule in the annexed area and the territorial expansion of the Israeli authorities deep into the West Bank. The continuation of creeping legal annexation, let alone the formal annexation of a specific part of the West Bank through legislation that imposes Israeli law and administration there, is an amalgamation of the regimes. This could mean strengthening the argument which has already been heard that the crime of

apartheid was not committed only in the West Bank. That the Israeli regime is an apartheid regime as a whole is sad and shameful. Even if not all Israelis are guilty of this crime, all are responsible for it[19].

3.1. Israel and the apartheid paradigm

In 2007, Professor John Dugard, as the United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, concluded that elements of the Israeli occupation constitute forms of colonialism and apartheid that are contrary to international laws[20]. He also noted that "the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid appears to be violated by many practices, particularly those that deny freedom of movement for Palestinians." Features of "colonialism and apartheid" were exhibited in the West Bank and East Jerusalem. "Apartheid is formally considered as a crime against humanity"[21].

When discussing the concept of apartheid in relation to Israel's policies towards the Palestinians, it is important to distinguish between the general (civil) obligation owed the Israeli government not to engage in systematic racial discrimination and the potential criminal liability for Israeli citizens as an obligation. The result of any Israeli policy towards the Palestinians can fairly be described as apartheid. With respect to the former, Israel—not least because it is a party to the ICERD—is obligated to “condemn racial segregation and apartheid and undertake to prevent, prohibit, and eradicate it in territories under [its] jurisdiction". In May 2012, the Committee on the Elimination of Racial Discrimination (CERD) called on Israel to prohibit and eradicate all policies of racial segregation and apartheid that severely and disproportionately affect the Palestinian population in the Occupied Palestinian Territories and violate the provisions of Article 3[22].

Israel is not a party to either the Apartheid Convention, AP I, or the Statute of the International Criminal Court, and thus has no obligation to include the crimes of apartheid in its domestic laws. Criminal liability for Israeli citizens for the implementation of policies condemned by CERD in 2012 - in the absence of successful Palestinian ratification of the ICC Statute or AP I - depends firstly onthe current customary status of various international efforts to criminalize apartheid[23]. Since apartheid is either a customary international crime against humanity and/or a war crime under customary international humanitarian law, it does notseem that Israel can be considered as a persistent objector to the international criminalization of apartheid, specifically as a crime against humanity. Israel voted in favor of the adoption of the draft 1968 Convention on

[19]Adv. Michael Sfard ‹The Israeli Occupation of the West Bank and the Crime of Apartheid
[20]Dugard 2007, p. 3.
[21]Falk 2010, p. 2.
[22]Report of the Committee on the Elimination of Racial Discrimination, Eightieth session (13 February–9 March 2012), UN Doc. A/67/18, p. 20.
[23]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 Of fice of the Prosecutor (OTP) on 3 April 2012 on the grounds that only a “State” could make such a declaration.

the Non-Applicability of Statutes of Limitations to War Crimes and Crimes against Humanity (1968 Convention), which refers to apartheid as a crime against humanity[24].

3.2. Customary status of Article 85 (4) (c) of AP I

There are two key factors in the claim of apartheid as a war crime in the Israeli-Palestinian conflict. Firstly, unlike the Apartheid Convention, there is no express geographical limit to the operation of Article 85 (4) (c) of AP I and secondly, 174 countries are currentlyparty to AP I. In the context of treaty interpretation, the principle of contemporaneity states that the terms of a treaty must be interpreted according to the meaning which they have or which has been attributed to them and in the light of presentlinguistic usage, at the time when treaty was originally concluded[25]. If, at the time that AP I was originally concluded, the current linguistic use of the term apartheid was limited to South Africa, Article 85(4) (c) of AP I could only be applied to the Israeli-Palestinian conflict by analogy. However, in 1961, the "architect of apartheid", South African Prime Minister Verwoerd, criticized Israel's hypocrisy in voting in favor of a UN Security Council resolution criticizing South Africa's apartheid policies as reprehensible and repugnant to humanity because Israel, like South Africa, was an apartheid state[26]. The UNGA resolution of 1975 (revoked in 1991) which declared Zionism to be a form of racism and racial discrimination, the Organization of African Unity resolution considered the racist regimes in occupied Palestine and Rhodesia (now Zimbabwe), and South Africa had common imperialist origin and the same racist structure[27].

Thus, even if the current linguistic use of the term 'apartheid' is restricted to South Africa in 1977, a dynamic (evolutionary) interpretation may still be proper, and the principle of contemporaneity is increasingly respected only in the breaches. It is an accepted principle that provisions of criminal law should not be broadly interpreted to the detriment of the accused. The inclusion of "practices of apartheid" in the list of grave breaches ofAP I was controversial, and ambivalence towards the grave breaches of the regime in AP I was obvious during the drafting of the ICC Statute. For example, the representative of New Zealand argued that; "The definition of war crimes must not be departed from the existing and accepted standards of international humanitarian law reflected in the Geneva Conventions and additional protocols." The customary status of definitions for war crimes is also expressed in AP I (especially from Israel)[28]and the absence of practices of apartheid in the list of war crimes in the ICC Statute indicates continued dissatisfaction. Views hostile to the current status of conventional definitions of war crimes were also expressed in AP I (particularly from Israel), and the absence of practices of apartheid from the list of war crimes in the ICC Statute indicates continued unease. In the case of Article

[24] Israel also voted in favor 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.
[25]Fitzmaurice 1957, p. 212. See also Kotzur 2012.
[26]UNGA Res. 1598 (XV) (13 April 1961).
[27]The Rand Daily Mail, “Premier Lashes Israel” (23 November 1961), as quoted in Clarno 2009, p. 66.
[28]Fifth Meeting of the Committee of the Whole, supra n 46, p. 167, para 79.

85(4)(c) of AP I drafting, it was found that there is no necessary connection between practices of apartheid and armed conflict[29].

4. Conclusion

As a fact, it should be accepted that although people have common characteristics, they also have independent traits (either internal or acquired) at the same time which may legitimately be considered in the distribution of goods, services and benefits. It is often claimed that equality requires that those who are equal be treated in an equal manner, while those who are different should be treated differently. Of course, the basic question is "under what circumstances can we say that people are equal or different, and what are the legal justifications for different behavior". On the other hand, it is very important to know that any distinction cannot be interpreted as discrimination in the sense of human rights abuse. As long as the distinction is based on logical and objective reasons, it can be justified. Another issue is how to define "logical criteria" and can these criteria be the same in all different societies? These ambiguities can explain why the principle of equal treatment is one of the most controversial principles of human rights.

Although the negation of discrimination and its elimination is one of the most important examples of human rights, the findings of this research show that the principle of equality and non-discrimination does not mean that all discrimination between people is illegal according to international laws. Distinctions are subject to the following conditions: first, they have a legitimate purpose, such as affirmative actions to address real inequalities, and they are reasonable with regard to their legitimate purpose. The relevant international conventions have explicitly condemned and prohibited discrimination, but unfortunately, despite the existence of international human rights documents and legislative documents, the denial of discrimination has not been practically recognized and has not been taken into account in the enforcement phase. Generally, individuals and groups act ethnically and unilaterally and they do not hesitate to make any effort to deprive each other of their rights. This action itself causes more religious, racial, ethnic and tribal conflicts and human crimes. The main controversies and conflicts are made to get privileges and exclude each other. Discrimination sometimes appears in the form of religion, race, ethnicity, language and such things. In the international criminal law system, some discriminatory behaviors that reach a certain threshold and intensity have been criminalized. This problem is due to the fact that those discriminatory behaviors are so abominable and outrages to the conscience of human society. They provoke human feelings that the perpetrator should be prosecuted and punished. The inclusion of the concept of "crime against humanity" is one of the important manifestations of the punishment of perpetrators violating fundamental human rights. For example, the crime of "persecution" is one of the most important examples of crimes against

[29]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.

humanity, which is criminalized in Article 7 (2) (h) of the Statute of the International Criminal Court. The mentioned crime is the continuous persecution of any specific group or group for political, racial, national, ethnic, cultural, religious, sexual or other reasons, in connection with practices mentioned in this paragraph or any crime under the jurisdiction of the court which is recognized as illegal all over the world according to international law. The crime of apartheid as the subject of this article is a form of persecution. In our view, several key policies and practices employed by Israeli authorities in the West Bank lead to "persecution" practice under the Rome Statute and/or "denial of rights" under the Apartheid Convention. The definition of the crime of persecution in the Rome Statute includes two conditions that are not explicitly mentioned in the Apartheid Convention. These conditions include; first, the denial of rights must be "severe". Second, the denial must be done "in contrary to international laws". This provision has been interpreted as involving breach of fundamental rights, recognized as the "International Bill of Human Rights", which includes the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). In other words, the denial must be about rights that are recognized in international law and must be done in a way that contradicts the provisions of this law. Although there is some academic support regarding Israel's behavior as apartheid and the inclusion of the convention on their behavior, this assertion is facing two challenges. The first is that Article II of the Apartheid Convention limits the geographical scope of the Apartheid Convention to "the policies and practices of racial segregation and discrimination done in South Africa" and the second problem is related to the customary status of apartheid crime as well as the Apartheid Convention is the lack of a universal opinion. Regarding the first problem, it should be stated that the Draft Code of Offences against the Peace and Security of Mankind by the International Law Commission (ILC) confirms the view that the apartheid convention was limited in its geographical scope to South Africa. Regarding the second problem, it should be stated that not only was the Apartheid Convention rejected by the majority of Western countries, but also the majority of countries that actually ratified the Apartheid Convention clearly failed to include this crime in their domestic laws before the drafting of the Statute of the International Criminal Court. With this description, even if the apartheid convention can be considered as the basis of a general customary crime of apartheid, the scope of this crime cannot be wider than the customary crime on which it is based. Therefore, any customary international crime against humanity would be limited to the geographical limits of southern Africa and would consequently not be applicable to the Israeli-Palestinian conflict. In addition, due to the explicit limitations in the geographical scope of the apartheid convention, this convention cannot be applied to the Israeli-Palestinian conflict. But this is not all; there are two key factors in the claim of apartheid as a war crime in the Israeli-Palestinian conflict. Firstly, unlike the Apartheid Convention, there is no express geographical limit to the operation of Article 85 (4) (c) of AP I and secondly, 174 countries are currently party

to AP I. In the case of Article 85(4) (c) of AP I drafting, it was found that there is no necessary connection between practices of apartheid and armed conflict.

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