

# Picking Battles: Race, Decolonization, and *Apartheid*

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## Introduction

If race had been an analytical category in international law,<sup>1</sup> when did that category lose its relevance? What role, if any, did decolonisation have in the 'de-racialisation' of international law – to echo Theodor Meron's claim of the 'humanization' of international law in the post-war era?<sup>2</sup>

These are weighty questions. This chapter, however, is more limited in scope. It focuses on the *effect* that decolonization had on the question of race in international law. After all, decolonization sought to achieve concrete political aims. These may well have involved reversing the consequences of the operation of racial inequality and exclusion underwriting international law in the 19<sup>th</sup> Century.<sup>3</sup> But if making race irrelevant had been among the goals of agents and movements of decolonisation, it was at most a tactical, not a strategic, goal.

What follows are preliminary reflections and observations on the effects of decolonisation on the race category in international law. These are drawn, in particular, from the vantage point of the battle against *apartheid* that culminated, in 1973, in the adoption of the UN *Apartheid* Convention.<sup>4</sup> Rather than engaging with the construction of norms or offering a systematic account of the *travaux préparatoires* of the *Apartheid* Convention, this chapter delves into a number of episodes forming its broader historical, political, and legislative context. These give rise to exploratory claims on the effects of decolonisation on the race category. They are meant to instigate a debate rather than conclude it.

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1 E. Roman, 'A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?', (2000) 33 *U.C. Davis L. Rev.* 1519.

2 T. Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 239.

3 E.g. M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002).

4 *International Convention on the Suppression and Punishment of the Crime of Apartheid* (30 November 1973) 1015 *UNTS* 243 (entered into force July 18, 1976).

In the *Apartheid* Convention, much-neglected by the international law (and diplomatic) history literature, decolonisation produced the most focused, perhaps even radical, reading of race and international law. Earlier legal texts framing decolonization, such as the 1960 UNGA Resolution 1514 or the 1970 Friendly Relations Declaration, had referenced race only fleetingly.<sup>5</sup> The 1966 Covenants did enunciate the right to self-determination in their common Article 1, and prohibited distinction or discrimination on grounds of race.<sup>6</sup> Yet they neither linked the two, nor framed self-determination in terms of overcoming the race category. Even the 1965 Convention on the Elimination of All Forms of Racial Discrimination, though its preamble recalled UN condemnation of ‘colonialism and all practices of segregation and discrimination associated therewith’,<sup>7</sup> offered no reading of self-determination as the undoing of the legal category of race. CERD, besides, was not quite the product of decolonization; it originated, as I discuss below, in East-West divisions and Mideast recriminations; North-South divisions were factored into its text only at a late stage.

By contrast, the *Apartheid* Convention dealt with ‘inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them’; it also declared *apartheid* itself a crime against humanity and dubbed resulting ‘inhumane acts’ as crimes violating the principles of international law. It offered, in other words, a reading of racial domination and oppression, not merely as discrete displays of racism but as an organised form of governance. For this and other reasons, the battle against *apartheid* furnishes useful vantage points from which to gauge and assesses whatever footprints decolonisation had left on postcolonial international law.

## 1. The Causes of Race

One insight about the effect of decolonization on the issue of race in international law is that that de-racializing international law was not quite a linear progression of a single trajectory. It took place at multiple sites, and sprung out of several agenda. It was driven by different political forces driving in different, sometimes opposing, directions and acting on a variety of motives. And it was fraught with unintended consequences.

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<sup>5</sup> UNGA Res.1514 (XV) (14 December 1960), *Declaration On The Granting Of Independence To Colonial Countries And Peoples*; UNGA Res.2625 (XXV) (24 October 1970), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.

<sup>6</sup> *International Covenant on Civil and Political Rights* (16 December 1966) (entered into force 23 March 1976), 999 *UNTS* 171 Arts.2, 4, 24, 26; Art.20 provided for the prohibition of ‘advocacy of ... racial .. hatred’ reaching the threshold of ‘incitement’. *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) 993 *UNTS* 3 (entered into force 3 January 3, 1976), Arts.2, 13.

<sup>7</sup> *International Convention on the Elimination of All Forms of Racial Discrimination* (21 December 1965) 660 *UNTS* 195 (entered into force 4 January 1969); Art.15 did involve the Committee on Elimination of Racial Discrimination in petitions from territories governed by Res.1514.

Decolonization, specifically, was neither the only nor quite the first launching pad for the *legislative* battle on race. Thus, protagonists in the UN debate that followed India's 1946 complaint against the Union of South Africa's discriminatory treatment of persons of Indian origins at times framed their contentions in terms of racial discrimination.<sup>8</sup> But this started (alongside the Union's recalcitrance over South-West Africa) as a single-issue campaign that sought to put pressure on South Africa and carve a world role for India rather than set or elaborate a general standard. This was true also in 1952, when India realized it could not demand equality for a small, somewhat newly-disenfranchised Indian minority but remain silent on the systemic disenfranchisement of the majority in South Africa.<sup>9</sup> The result was the inclusion of 'The question of race conflict in South Africa resulting from the policies of apartheid ...' on the GA agenda.<sup>10</sup> And while the Union was repeatedly singled out in successive GA sessions,<sup>11</sup> such debates saw no attempt to revise old or generate novel norms. Besides, India's original grievance itself was couched in terms confirming that race was as relevant as ever: after commenting that under South African legislation, Jesus Christ would have been considered a prohibited immigrant, Vijaya Lakshmi Pandit proceeded to say that 'if the country belonged to anyone, it was the "barbaric indigenous population"' from which it was taken.<sup>12</sup> Her own memoir note how in the midst of the 'Asian victory' celebrations, she approached Smuts on the Assembly floor to ask for the patriarch's pardon and regain his goodwill.<sup>13</sup> Race was largely still framing the debate even when its concrete manifestations came under challenge.

Legislative efforts originated elsewhere. Jewish lawyers and organizations were contemplating international legislation on anti-Semitism already during the Holocaust.<sup>14</sup> Such initiatives, seemingly, were lost in the plurality of post-war legislative (and political) projects touching on Jewish questions. On Christmas Eve 1959, however, anti-Jewish slogans were painted on a rededicated synagogue in Cologne; slogans and swastikas soon spread across West Germany; in the next two weeks, more than 500 episodes were recorded in 34 countries.<sup>15</sup> The alarm

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8 Evoking 'a striking resemblance to the Nazi principle and practice of race superiority and concentration of power in the superior race': quoted in L. Lloyd, 'A Family Quarrel: The Development of the Dispute over Indians in South Africa' (1991) 34 *The Historical Journal* 703, 722–3.

9 R. Giladi, 'Israel, Apartheid, and the United Nations, 1949–1952' (forthcoming).

10 Letter to Secretary-General, 12 September 1952, A/2183.

11 E.S. Reddy, *Apartheid: the United Nations and the International Community – A Collection of Speeches and Papers* (1986); Ö.A. Özgür, *Apartheid: The United Nations & Peaceful Change in South Africa* (1982).

12 L. Lloyd, "'A Most Auspicious Beginning': The 1946 United Nations General Assembly and the Question of the Treatment of Indians in South Africa', (1990) 16 *Review of International Studies* 131, at 141.

13 M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009), 179; V.L. Pandit, *The Scope of Happiness: A Personal Memoir* (1979), at 211.

14 M. Vishniak, *An International Convention Against Antisemitism* (1946); O.I. Janowsky, *International Aspects of German Racial Policies* (1937).

15 J. Loeffler, *How Zionism Became Racism: International Law, Anti-Semitism, and Jewish Lawyering at the United Nations, 1945–1975* (unpublished manuscript; I thank James Loeffler for

caused by the ‘Swastika Epidemic’<sup>16</sup> soon appeared on the UN agenda. In early 1960, the UN’s Sub-Commission on the Prevention of Discrimination and the Protection of Minorities condemned the incidents.<sup>17</sup> Jewish NGOs with UN consultative status were heavily involved. The question of ‘Manifestations of anti-Semitism and other forms of racial prejudice and religious intolerance of a similar nature’ was discussed by the Commission on Human Rights, then the Assembly. NGOs were invited to submit materials. At the end of 1960, at the invitation of ECOSOC, the Assembly adopted a resolution on ‘Manifestations of Racial and National Hatred’.<sup>18</sup> Notwithstanding early consensus in the sub-Commission, Cold War issues touched the final text;<sup>19</sup> and the Israeli-Arab conflict now caused the deletion of any reference to anti-Semitism; colonialism, or *apartheid*, were not mentioned.

Soon after, early proposals on an international convention on racial discrimination foresaw a ‘far narrower scope’ for such an instrument than CERD would eventually encompass.<sup>20</sup> Although the deliberations at the Sub-Commission occasionally referenced colonialism, its consensus first was a focus on ‘racial, national and religious hatred’—that is, discrimination within states, not among nations.<sup>21</sup> The issue was still largely European. It was at the UNGA Third Committee, in 1962, during the consideration of such proposals, that a change of direction was recorded. Although the path for drafting a declaration, then a convention, on racial discrimination by the Assembly was now largely determined, this came at a cost. Arab and Eastern bloc opposition bifurcated the cause through a distinction between ‘racial discrimination’ and ‘religious intolerance’.<sup>22</sup> Of the two tracks, the former was to gain priority. So it did: in late 1963, the Assembly adopted a ‘Declaration on the Elimination of All Forms of Racial Discrimination’;<sup>23</sup> two years later, the Assembly adopted CERD.<sup>24</sup> The Convention contained a brief condemnation of ‘segregation and apartheid’ and an undertaking ‘to prevent, prohibit and eradicate all practices of this nature in territories’ of state parties (Art.3); but colonialism itself remained a minor concern, notwithstanding the marginalization of anti-Semitism.<sup>25</sup> The

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permission to quote this paper): (‘the total for 1960 rose to 2500 incidents in 41 countries’); M. Brecher, *The Foreign Policy System of Israel: Setting, Images, Process* (1972), at 237-8, 550.

16 N. Robinson, ‘The Swastika Epidemic’, June 1960, World Jewish Congress, C13018, American Jewish Archives [AJA].

17 E/CN.4/800, para.163.

18 UNGA Res.1510(XV) (12 December 1960). For background, N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (1980), at 1.

19 *Ibid.*, at 22 (early draft work by representatives of the US, USSR, UK and Poland).

20 E. Schwelb, ‘The International Convention on the Elimination of All Forms of Racial Discrimination,’ (1966) 15 *ICLQ* 996, at 998.

21 E/CN.4/815 (9 February 1961) para.176.

22 Schwelb, *supra* note 20, at 998-9. See UNGA Res.1799, 1780 (XVII), 7 December 1962; neither referenced colonialism. How to classify anti-Semitism was debated, the crux being whether Judaism was a religion or Jews a race or a nation.

23 UNGA Res.1904 (XVIII), 20 November 1963.

24 UNGA Res.2106 (XX), 21 December 1965.

25 Owing to Arab opposition (‘could be interpreted as support’ for Israel) and Soviet sensitivity to criticism of treatment of its Jewry: Lerner, *supra* note 18, 73; R. Cohen, ‘International Convention

involvement of African and Asian countries in the legislative process was undoubtedly on the rise, and colonialism was deployed as a rhetorical weapon during the drafting process; yet if CERD attested to the persistence of a race problem, this was at best only marginally the problem of the racial structuring of authority in international relations. As marginal were the solutions it prescribed for that problem. ‘Religious intolerance’ – for some, the appropriate framework to deal with anti-Semitism – remain to this day the subject of UN declarations with no treaty emerging to combat it.

## **2. The Banner of *Apartheid***

One may consider, next, the relationship between *apartheid* and decolonization; specifically, the role of *apartheid* in UN legislative initiatives on race in the context of decolonisation. Specific *apartheid* practices in the Union of South Africa, then ‘the policies of *apartheid*’ themselves, were debated at the UN at India’s initiative since 1946 and 1952, respectively.<sup>26</sup> As decolonisation came to occupy the agenda of the world organisation, *apartheid* came to take centre stage in the battle to produce new norms on racial discrimination. CERD, to the disappointment of its Jewish promoters, failed to include the draft article on anti-Semitism;<sup>27</sup> that ‘apartheid is the only form of racial discrimination to which a specific article is devoted in addition to mentioning it in the Preamble’ did not assuage their disaffection with the fruit of their labour.<sup>28</sup> One dismissed the ‘not convincing explanation’ that, unlike Nazism or anti-Semitism, ‘*apartheid* is *today* the only instance of racial discrimination as an official policy’; ‘what decided the final text’, he repeatedly observed, ‘were political considerations’.<sup>29</sup> ‘In law,’ another commented, ‘Article 3 (on apartheid) hardly adds anything to either the general ... or the more specific ... provisions and prohibitions of the Convention.’<sup>30</sup>

The decision not to reference any specific form of ‘ism’, *after* the article on *apartheid* was secured, was ‘led by the Afro-Asians’.<sup>31</sup> This was part of a trend. One World Jewish Congress officer lamented in early 1966 that ‘for a large number of Member States, particularly the African-Asian states of the United Nations, [anti-Semitism] is of peripheral importance’. He also recorded that, ‘accelerated no doubt by the ... admission of the newly-independent African states, especially since 1960, there is a powerful tendency to narrow all references

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...’, 10 January 1966, World Jewish Congress, B91/4, AJA, at 5; I thank Jim Loeffler for drawing my attention to this source.

<sup>26</sup> Text accompanying *supra* note 9; Lloyd, *supra* note 8; Lloyd, *supra* note 12; Mazower, *supra* note 13.

<sup>27</sup> Cohen, *supra* note 25.

<sup>28</sup> Lerner, *supra* note 18, at 11, 68 *et seq.* The preamble recorded alarm caused by ‘... manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation’; Art.3 reported: ‘States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction’.

<sup>29</sup> Lerner, *supra* note 18, at 22-3, 42-43, 72-3.

<sup>30</sup> Schwelb, *supra* note 20, at 1021.

<sup>31</sup> Cohen, *supra* note 25, at 6.

to racial discrimination down to color relations or, more specifically, *apartheid*.<sup>32</sup> Jewish advocacy was losing not only individual battles, but also the impetus and initiative.

By contrast, *apartheid* in Southern (not merely South) Africa became during the 1960s a unifying force. As Saul Dubow notes,

the iniquity of apartheid was one moral and political issue that countries, large and small, aligned and non-aligned, could mostly agree on—albeit not always from the purest of motives. Whereas pre-war segregation was not so different from practices elsewhere in British colonial Africa and Asia, statutory racial discrimination was becoming indefensible in a world where decolonization and rights were gaining ground.<sup>33</sup>

In the years that followed the Sharpeville Massacre (21 March 1960), *apartheid* became a cause that Asian, African, Eastern Bloc and, increasingly, certain socialist Western European countries – as well as some liberal and labour constituencies in the West – could rally around.<sup>34</sup> Unity could be forged by such events as Nelson Mandela’s ‘I Am Prepared to Die’ speech from the dock during the Rivonia trial (20 Apr. 1964),<sup>35</sup> or fostered by the presence of ANC leadership in exile. Different factors combined to ensure the *apartheid* regime would largely enjoy Western political cover and economic advantages (especially by the US and the UK) well into the 1970s and 1980s.<sup>36</sup> Yet these very same factors – including strategic and economic import and its portrayal as the last bastion of the white man in Africa *and* a bulwark against spreading communism – often rendered South Africa’s *apartheid* such an effective symbol of racial discrimination, whether in domestic arenas, at the UN, or at the Peace Palace. To address race, the agents of decolonisation treated *apartheid* as an essential representation of the racial underpinnings of colonialism in legislative, institutional,<sup>37</sup> and judicial arenas. The Court was asked first to comment on the Union’s position in South West Africa,<sup>38</sup> then rule on applications by Liberia and Ethiopia that alleged violations of the mandate instrument and the Covenant, including that

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32 M. Melamet to World Governing Council, WJC, 11-31 Jan. 1966, B91/4, AJA, at 4.

33 S. Dubow, *Apartheid, 1948-1994* (2014), at 47.

34 R.M. Irwin, *Gordian Knot: Apartheid and the Unmaking of the Liberal World Order* (2012), at 5 (‘lodestar’); R. Skinner, *The Foundations of Anti-Apartheid Liberal Humanitarians and Transnational Activists in Britain and the United States, c.1919-64* (2010).

35 Dubow, *supra* note 33, at 96-7; Owen Collins, ed. *Speeches that Changed the World* (1999), 404.

36 Dubow, *supra* note 33, at 190 (‘Up until 1976, countries sympathetic to South Africa, the United States and Britain most notably, had been able to use diplomatic pressure in order to avert international diplomatic and economic sanctions. South Africa remained a loyal ally of the West and its firm anti-communism received considerable international support, backed by conservative media commentary. But western support of—or association with—South Africa was becoming more costly’).

37 *E.g.* the UN Special Committee on *apartheid*, established by UNGA Res.1761 (6 November 1962); in 1971, the UN Centre Against Apartheid was established.

38 See, in this volume I. Ventzke, \_\_\_\_\_.

The Union, by law and in practice, distinguishes as to race, color, national and tribal origin in establishing the rights and duties of the peoples of South West Africa. This official practice is referred to as apartheid.<sup>39</sup>

In general, and in particular with regard to banning racial discrimination, *Apartheid* became a banner.

### **3. The Aberration of *Apartheid***

Raising the banner of *apartheid* did not serve well the cause of de-racializing international law. Whatever its effect on other causes espoused by various advocates of CERD, or on CERD's own perception and reception, making *apartheid* the banner of the battle against (colonial) racism may not have been all propitious for the cause of the battle against *apartheid* itself. Following the crushing of ANC domestic resistance in the 1960s, the ANC hoped to receive material assistance from liberated African countries. While, post-Bandung, the cause of the anti-*apartheid* struggle offered to consolidate African nationalism domestically and cement its block politics,<sup>40</sup> it also allowed newly independent states to offer the ANC no more than robust rhetoric denouncing the racism of the *apartheid* regime.<sup>41</sup> African nationalism, at any rate, was often suspicious of both the ANC inclusive racial composition and its communist membership/affiliations; it was more attuned to the ANC's competitor, the Pan-African Congress. Here, international organisations provided both podium and opportunity to talk against the evil of settler colonialism and *apartheid in lieu* of furnishing those resisting these forms of oppression with the means to succeed.

Another effect of making *apartheid* the banner of the struggle against racism (colonial or otherwise) may have been to deflect attention away from the structural racial underpinning of international law. In and outside the UN, treating *apartheid* as a banner implied that the struggle against *apartheid* would serve as a panacea. Rallying against the scandal of race in South Africa portrayed *apartheid* as an aberration rather than what it really had been: among many other things,<sup>42</sup> the entrenchment (and only later the reification) of segregation laws and practices that long preceded the 1948 electoral victory by the National Party. These were often rooted in British colonial policies and comparable to other colonial regimes in Africa and elsewhere.<sup>43</sup> Enshrining the right to self-determination signified that peoples, not races, were now the political unit of reference in international law without, however, considering (let alone undoing)

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<sup>39</sup> ICJ, *Pleadings, Oral Arguments, Documents* (1966) vol.i, at 6.

<sup>40</sup> S.L.B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (2016).

<sup>41</sup> For background, Dubow, *supra* note 33, at 132.

<sup>42</sup> I do not discount here the role of ideology or theology, economic or other structural explanations of *apartheid*; the conclusion to Dubow, *supra* note 33, provides a very useful survey.

<sup>43</sup> Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-determination in International Law* (1996), at 160, observes: 'That South Africa always looked outward to Australia, New Zealand, and the United States for ideas concerning apartness was confirmed during the court proceedings' of the South West Africa case.

the lingering products of the operation of old units of reference. This levelled the playing field, but on the formal level alone.

Treating *apartheid* as an exception rather than an extreme iteration of the (old) rule likely made such outcomes even more resilient to reverse or reform. As an aberration, *apartheid* vindicated colonialism, or in the very least obviated the need to reflect on racialised structural formations of international law and obfuscated how these conditioned post-colonial independence. At a time when decolonisation politics inevitably emphasised 'sovereign' more than 'racial' equality as a new organising principle of international relations, marking *apartheid* as an aberration pronounced that race had become irrelevant without, however, either reflecting on the need to undo its systemic relevance or in fact addressing the myriad ways in which race had underwritten legal norms and institutions, categories and distinctions, or the structures and decision making processes of international bodies. It was as if, as Siba N'Zatioula Grovogui put it, 'the only requirement for decolonization is the elimination of the legal instruments that provided for direct foreign rule'.<sup>44</sup> This left newly-independent states to individually negotiate their entrance into the international community based on formations that placed them at a disadvantage<sup>45</sup> or, collectively, through 'looking back in anger',<sup>46</sup> make prospective law predestined to matter little in practice.<sup>47</sup>

#### **4. Apartheid as Scapegoat**

*Apartheid*, 'was a symbol, a lightning-rod, even a scapegoat that took away the sins of the world'.<sup>48</sup> In the historical framework of decolonization, this has taken place through treating *apartheid* as an outmoded exception rather than an outlier of the rule. This has reached its apex in 1973, when *apartheid* was made into a crime against humanity.<sup>49</sup> Making *apartheid* a crime under international law confirmed that it was, in fact, but an aberration. This also confirmed,

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<sup>44</sup> Grovogui, *Sovereigns*, at 1.

<sup>45</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 111; M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007).

<sup>46</sup> Klabbers, *International Law* (2013), at 83 attributing the phrase to Bruno Simma.

<sup>47</sup> The controversial internationalization of armed conflict by national liberation movements in Art.1(4) of the 1977 Additional Protocol I comes to mind. Though it did refer to 'peoples ... fighting against colonial domination and alien occupation ... in the exercise of their right of self-determination', subsequent interpretation and understanding placed emphasis on peoples fighting 'against racist régimes'. This has rendered the provision not only un-invoked since 1977 but, rather, un-invokable: *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), 1125 *UNTS* 3 (entered into force 7 December 1978).

<sup>48</sup> Dubow, *supra* note 33, at 277-8, referencing 'an image borrowed from a poem by van Wyk Louw [by] veteran Afrikaans journalist Piet Cillie'. See J.V. Crewe and N.P. Van Wyk Louw, 'Two Poems By N. P. Van Wyk Louw', 35 *Theoria: A Journal of Social and Political Theory* (1970) 59.

<sup>49</sup> Preceded by GA Res.2202(XXI) (16 December 1966), and *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (26 November 1968) 754 *UNTS* 73 (entered into force 11 November 1970), Art.1. See R. Slye, 'Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission', (1999) 20 *Mich. J. Int'l L.* 267.



effectively if implicitly, that less sweeping or blatant forms of colonial rule drawing on similar racial ideologies or implementing similar racial policies were not. The Convention, in short, vindicated colonialism; criminalizing the aberration offered to wash away the sins of colonialism.

This point was not lost on Hercules Booyesen, a Professor in the Department of Constitutional and International Law at Pretoria's University of South Africa, in a journal article he published upon the Convention's entry into force. Other than considering the Convention a Soviet plot that 'runs counter to the basic principles of the Charter of the United Nations', he also dubbed it 'a masterpiece of hypocrisy'.<sup>50</sup> This targeted the record of the Convention's supporters but also the fact that South Africa was being singled out among the Convention's opponents. If the crime comprised of '[a]ny measures ... designed to divide the population along racial lines by the creation of separate reserves', as Art.2(d) provided, that must surely mean that 'America, Canada and perhaps even Australia are also committing the "crime of *apartheid*" as a result of the existence of Indian and other reserves in these countries'.<sup>51</sup> Booyesen warned: 'It is not only South Africa which has been branded as a criminal in this convention, but other western states as well.'<sup>52</sup> While slightly more than half of UN members are today's parties to the *Apartheid* Convention, membership extends to none of the former colonial powers. Of the P5, only Russia and China have ratified or acceded it.<sup>53</sup>

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<sup>50</sup> H. Booyesen, 'Convention on the Crime of *Apartheid*', (1976) 2 *South African Yearbook of International Law* 56 (Convention brought about by states 'either dominated by or are under the influence of the USSR'). The draft was sponsored by Guinea and the USSR: UN Doc.A/C.3/L.1871 (28 October 1971).

<sup>51</sup> *Ibid.*, at 61.

<sup>52</sup> *Ibid.*, at 95.

<sup>53</sup> Multilateral treaties deposited with the Secretary-General, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-7&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&clang=en), accessed on 12 September 2016.

If the expressive value of the *Apartheid* Convention should therefore be called into question, so can its practical utility. First, marking *apartheid* as an aberration and focusing on its racial underpinning in fact facilitated the construction of *Apartheid* in narrow terms. Thus, when the ICJ was given in 1971, finally, a chance to extricate itself from the ‘disaster of 1966’ (by the Security Council, not the Assembly), it announced in the South-West Africa Advisory Opinion that

To establish ... and to enforce, distinctions, exclusions, restrictions and limitations *exclusively based on grounds of race*, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.<sup>54</sup>

This left unaffected ‘distinctions, exclusions, restrictions and limitations’ not ‘exclusively based on grounds of race’, whether or not they amounted to a denial of fundamental human rights. While *apartheid* may have been the conduit for denouncing colonialism at large, singling it out affected precisely the opposite outcomes.

Second, no single person has ever been charged, let alone convicted, for committing the crime of *apartheid*.<sup>55</sup> Ambiguity was built into the Convention’s definitions and scope of application; on the one hand, *apartheid* was portrayed as bounded by a historical specificity of a country-specific practices and policies; on the other it was, simultaneously, phrased as universal and universally applicable. This, undoubtedly, had contributed to the Convention’s limited utility. It is instructive, however, that the Convention’s uselessness was revealed most poignantly precisely at the moment the *apartheid* regime in South Africa came to its end. The delicate balances represented by the Truth and Reconciliation Commission precluded resort to the criminal justice model on which the Convention was predicated.<sup>56</sup> The TRC affirmed in an annex to its report ‘its judgement that apartheid, as a system of enforced racial discrimination and separation, was a crime against humanity’; it also noted that ‘the recognition of apartheid as a crime against humanity remains a fundamental starting point for reconciliation in South Africa.’<sup>57</sup> But the report itself considered that the ‘vexed issue of apartheid as a crime against humanity impinges perhaps more directly on moral than on legal culpability.’<sup>58</sup> The TRC also took care to distance itself

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<sup>54</sup> Emphasis added: ‘Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276’ (1970), Advisory Opinion, 21 June 1971, (1971) *ICJ Reports* 4, §131.

<sup>55</sup> C. Langaas, ‘The Crime against Humanity of Apartheid in a Post-Apartheid World’, (2015) 2 *Oslo Law Review* 86.

<sup>56</sup> The TRC did discuss crimes against humanity both with regard to ‘apartheid as a system’ and to ‘specific acts’: Truth and Reconciliation Commission of South Africa, *Report* (1998) vol.i, Ch.4; and vol.v, §101.

<sup>57</sup> *Ibid.*, Appendix, ‘Apartheid as a Crime against Humanity’.

<sup>58</sup> *Ibid.*, §103, (adding: ‘A simple focus on the criminal culpability of isolated individuals responsible for apartheid can ignore the broader responsibilities presently under discussion. It is not enough merely to identify a few high-profile ‘criminals’ as those responsible for the atrocities

from the operational implications of such conceptualization: ‘sharing of the international community’s basic moral and legal position on apartheid should not be understood as a call for international criminal prosecution of those who formulated and implemented apartheid policies. Indeed, such a course would militate against the very principles on which this Commission was established.’<sup>59</sup> The minority position submitted by Commissioner Malan was more explicit in casting doubt ‘whether an investigation of apartheid under international law would have any present or future legal or political value.’<sup>60</sup> This, apparently, is the reason why South Africa, the template and impetus for the treaty definition of *apartheid* (as particular yardstick demonstrating the universality of the norm<sup>61</sup>) has to date neither signed or ratified the *Apartheid Convention*.<sup>62</sup>

The *Apartheid Convention* signified more the end of a conversation on race in the era of decolonization than its beginning. To the best of my knowledge, no legal or diplomatic history of the *Apartheid Convention* has ever been written.<sup>63</sup> Rather than panacea, *apartheid* proved a dead end. It remains a largely a forgotten and quite under-studied instrument by lawyers, diplomatic historians or historians of *apartheid*.<sup>64</sup> What little familiarity it commands owes much to its inclusion in the Rome Statute of the International Criminal Court.<sup>65</sup> The international criminal law literature following that inclusion tends, nonetheless, to treat the crime of *apartheid* briefly and focus, naturally, more on technical aspects of the criminality of *apartheid* rather than what it signifies for the role of race in international law. Scholars of international criminal law debate the customary status of the crime, whether it survived the transition to democracy in South Africa, or try to use it to denounce contemporary policies in other parts of the globe.<sup>66</sup> Yet such debates obfuscate the effects of criminalization of *apartheid*: it posits *apartheid* as a scandal, dramatizes a spectacle of its denunciation, generates reforms – which all, in the end, serve to regularize,

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of the past – and thus give insufficient attention to a deeper analysis of the underlying nature, cause and extent of apartheid’).

<sup>59</sup> *Ibid.*, vol.5, §64. Malan’s submission revealed the discord on this question within the Commission.

<sup>60</sup> TRC, *Report*, vol.1, Ch.4, Appendix, ‘Apartheid as a Crime against Humanity’.

<sup>61</sup> *Apartheid Convention*, Art.2 (‘similar policies and practices of racial segregation and discrimination as practised in southern Africa’).

<sup>62</sup> J. Reynolds, ‘Third World Approaches to International Law and the Ghosts of Apartheid’, in D. Keane, Y. McDermott eds., *The Challenge of Human Rights: Past, Present and Future* (2012) 194, at 210. South Africa did ratify the Rome Statute on 27 November 2000.

<sup>63</sup> *E.g.*, only cursory mentions of *apartheid* in the otherwise thorough P.G. Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (1988), at 228;

<sup>64</sup> Reynolds, *supra* note 62, at 209 (‘a largely forgotten and neglected concept in international law’); Lingaas, *supra* note 55, at 87 (‘legal scholarship has largely turned a blind eye onto this crime’); J. Dugard and J. Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory* (2013) 24 *EJIL* 867 (concept of *apartheid* ‘never given enormous attention by international lawyers’).

<sup>65</sup> Rome Statute of the International Criminal Court (17 July 1998) (entered into force 1 July 2002), Art.7(1)(j) .

<sup>66</sup> *E.g.* Lingaas, *supra* note 55; Reynolds, *supra* note 62; Dugard and Reynolds, *supra* note 64.

entrench, even legitimize the system that produced the scandal in the first place.<sup>67</sup>

## 5. Law of Unintended Consequences

There were other unintended consequences of engaging with the race category. The anti-Semitism initiative of Jewish NGOs at the UN had led to codification of general non-discrimination norms; but the contingencies of the Cold War, the Mideast conflict, and the sea change in the composition of the international community all combined to divert and pervert such agenda items. This began, in the course of negotiations of the CERD draft, as a device for the USSR to mute criticism of Soviet treatment of Jews behind the Iron Curtain:

the Soviet Union introduced a sub-amendment to the United States-Brazilian amendment declaring that ‘States Parties condemn anti-Semitism, Zionism, Nazism, neo-Nazism and other forms of the policy and ideology of colonialism’. The Soviet delegate declared that Zionism was as ‘dangerous’ a form of racial discrimination as Nazism, fascism and anti-Semitism.<sup>68</sup>

In 1975, two years after the adoption of the *Apartheid* Convention, that device would devolve into a condemnation of Zionism – the political movement of Jewish nationalism, and Israel’s foundational ideology – as ‘a form of racism’.<sup>69</sup> That Assembly Resolution was titled ‘Elimination of all forms of racial discrimination’. One paragraph recalled a 1973 resolution where the Assembly ‘condemned, *inter alia*, the unholy alliance between South African racism and zionism’.<sup>70</sup> It also recited an OAU resolution noting the ‘common imperialist origin’ and ‘racist structure’ of *apartheid* and Zionism. My first political engagement consisted of being dragged by my mother, not quite a model of political activism, to a protest rally denouncing the UN. At seven, I could not know that the 1975 Resolution, ‘revoked’ by the Assembly in 1991,<sup>71</sup> had its roots in the 1960 Jewish UN initiative against anti-Semitism.

Another fallout of the same process concerned agents. A month after CERD was adopted, the USSR representative to the 18<sup>th</sup> Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities decried NGOs with UN consultative status – some routinely critical of the Soviet Union for how its treated its Jews – as unrepresentative, and tools of Western states in the Cold War.<sup>72</sup> Driven by the USSR and the Arab bloc, such charges had seen the

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<sup>67</sup> I owe a debt here to N.B. Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (2006).

<sup>68</sup> Cohen, *supra* note 25, at 5; O. Freisel, ‘Equating Zionism with Racism: The 1965 Precedent’, (2013) 97 *American Jewish History* 283.

<sup>69</sup> UNGA Res.3379 (10 November 1975).

<sup>70</sup> UNGA 3151 G (XXVIII) (14 December 1973). On Israel’s relations with South Africa, see S. Polakow-Suranski, *The Unspoken Alliance: Israel’s Secret Relationship with Apartheid South Africa* (2010).

<sup>71</sup> UNGA Res.46/86 (16 December 1991).

<sup>72</sup> M. Melamet to World Governing Council, WJC, 11-31 January 1966, B91/4, AJA.

presence and influence of consultative-status Jewish advocacy at UN severely diminished.<sup>73</sup>

## 6. *Apartheid* and Genocide

The appendix to the TRC report dealing with *apartheid* as a crime against humanity recorded the ‘almost total unanimity within the international community that apartheid as a form of systematic racial discrimination constituted a crime against humanity’. At the same time, it took care to dispel the ‘confusion in public debates in South Africa’ and ‘state that a finding of a crime against humanity does not necessarily or automatically involve a finding of genocide’,<sup>74</sup> implying that the ‘intent to destroy, in whole or in part, an ethnic or racial group’ in Article 1 of the Genocide Convention<sup>75</sup> was lacking.

This draws into attention a curious choice made by the drafters of the *Apartheid Convention*. In rough terms, they have elected to follow the overall structure and the general technique of the 1948 Genocide Convention rather than developing a criminal law model out of the terms and forms of racial discrimination elaborated by CERD or developing a unique framework for elaborating the criminality of *apartheid* and putting it into operation. The reasons for following a familiar structural criminal law template, or signifying the intellectual and moral proximity of genocide and *apartheid*, appear obvious. The rivalry of the 1960s between the different causes of combating racial discrimination – specifically, anti-Semitism and *apartheid* – may well also explain this choice. Still, with this choice the drafters, inadvertently and indirectly, lent some authority to the proposition that race was still a relevant category.

The Genocide Convention gave effect to Raphael Lemkin’s project to extend the protection of international law not to individuals as such but rather to the separate existence and identity of the group<sup>76</sup> – including the racial group.<sup>77</sup> At a time when the protection of minority rights became almost entirely discredited,<sup>78</sup> and the rights of the individual were coming into vogue, this swan song of the interwar minority system stamped the most extreme abuses of racial (and other) groups with criminality. Whatever made, for Lemkin, the group worthy of protection, it was the group that had merited such protection. And the

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<sup>73</sup> Loeffler, *supra* note 15.

<sup>74</sup> TRC, *Report*, vol.1, Ch.4, Appendix.

<sup>75</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* (9 December 1948),

<sup>78</sup> UNTS 277 (entered into force 12 January 1951).

<sup>76</sup> His 1933 proposal were directed at ‘attacks carried out against an individual as a member of collectivity’: R. Lemkin, ‘Acts Constituting A General Danger Considered as Offenses Against the Law of Nations’ (1933), <http://www.preventgenocide.org/lemkin/madrid1933-english.htm>. See also M.L. Siegelberg, ‘Unofficial Men, Efficient Civil Servants: Raphael Lemkin in the History of International Law’, (2013) 15 *Journal of Genocide Research* 297, at 309; D. Moses, ‘Raphael Lemkin, Culture, and the Concept of Genocide,’ in D. Bloxham & D. Moses, eds, *The Oxford Handbook on Genocide Studies* (2010), 19, at 23–24.

<sup>77</sup> R. Lemkin, *Axis Rule in Occupied Europe* (1944); R. Lemkin, ‘Genocide as a Crime under International Law’, (1947) 41 *AJIL* 145.

<sup>78</sup> M. Mazower, ‘The Strange Triumph of Human Rights, 1933–1950’, (2004) 47 *The Historical Journal* 379, at 387.

group was, among other criteria, racially defined. The idea of minority rights, wrote US Judge Joseph Proskauer, President of the American Jewish Committee and one of the promoters of the Universal Declaration in March 1944, was an ‘exaggeration of the race concept...’.<sup>79</sup> So was, then, the crime of genocide. The Genocide Convention, perhaps paradoxically, re-asserted the relevance of race.

Did the *Apartheid* Convention, other than by following the Genocide Convention’s design, unwittingly confirmed the continued relevance of the race category? To some extent, the answer seems positive. Criminalizing ‘policies and practices of racial segregation and discrimination’, perhaps entails the rejection of the analytical relevance of race. And yet defining *apartheid* as comprising of ‘inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them’ and requiring that such acts be directed against ‘member or members of a racial group or groups’ does require decision makers to subscribe, in order to impose liability, to the value-system of perpetrators of *apartheid* by assuming it has objective meaning that the decision maker can share, if only in order to denounce it. That, perhaps, is another reason why the TRC confirmed the criminality of *apartheid* but refused to engage it.

## **7. In the Aftermath of Battle**

Are these episodes representative? Though they may be, they are admittedly too few. Yet they are certainly instructive. They suggest that race, whatever its rhetorical deployment in the battle for international law waged in the decolonization era, had been neither a strategic goal nor a major battlefield. They demonstrate how, notwithstanding early opportunities for coalitions, contingencies made the cause of decolonization – increasingly considering *apartheid* the embodiment of colonial racism – eventually come to compete with, divert, obstruct, or supplant other causes in the battle to overcome the race category in international law. These episodes also highlight the costs and unintended consequences of making *apartheid* a banner in the battle for international law. One involved portraying *apartheid* as an aberration; this, while seeking to denounce colonialism, in effect validated it and its lasting consequences. The more strenuously one decried *apartheid*, the more were the sins of colonialism washed away. Another was the paradox, in transitioning South Africa, of the crime of *apartheid*: while validating the work of the TRC, at the same time it threatened to undermine its very foundations.

When it came to race race, decolonization has left lasting footprints on the normative landscape of international law. Only some of these were mentioned here. Still, these footprints are sketchy, disjointed, borrowed, or sporadic, often the product of accident and convenience, not design. They do not address racialized structuring of international authority, but rather concern national governance and treatment. And these footprints tend to obfuscate rather than reveal: they cover the imprints of older and other causes of combatting racism;

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<sup>79</sup> Quoted in J. Loeffler, ‘The Particularist Pursuit of American Universalism: The American Jewish Committee’s 1944 “Declaration on Human Rights,”’ (2014) 49 *Journal of Contemporary History* 1, at 7.

they mark the cause of formal sovereign equality but conceal how it abandoned substantive racial equality; and they draw attention away from the myriads ways in which race remains imprinted in the genetic material of many international norms, institutions, and institutions, obscuring the lingering consequences of an explicitly racialized international law predating decolonization but, alas, not quite de-racialized by it.

Helsinki, September 2016