

Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law

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Executive Summary

This opinion addresses the interplay between the legal regime applicable to belligerent occupation and the prohibition of apartheid under international law. It is concerned with the prohibition of apartheid binding states under international law, rather than the issue of individual criminal responsibility. In addition, it is concerned with the delineation of the prohibition and its interaction with the law of occupation at the abstract level, rather than in relation to any specific situation of occupation.

Customary international law prohibits the practice of apartheid by states. In giving content to the customary rule, the opinion draws on the definition of apartheid set out in the Apartheid Convention, adopted by the General Assembly of the United Nations in 1973. On this basis, the prohibition of apartheid binding states comprises two elements: (a) the commission of certain acts of a particular character as set out in the Apartheid Convention; and (b) a purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them. The opinion clarifies the meaning of these two elements.

The opinion then addresses the interaction between the legal regime applicable to belligerent occupation and the prohibition of apartheid. In the first place, the prohibition of apartheid applies extraterritorially and in situations of occupation. As to how the enumerated acts in the prohibition of apartheid interact with the law of occupation, the opinion distinguishes relationships of parallel protection, complementary protection, conflict avoidance through interpretation, and conflict. Thereafter, while noting that crucial to establishing the wrong of apartheid remains the wrongful purpose, it considers certain practical possibilities that might arise in situations of occupation – it considers what material relationships of domination and oppression may form the basis of an inference of the required purpose. Such a material relationship may arise in relation to the state's treatment of (i) two racial groups within occupied territory, each of whom falls within the group of protected persons under the law of occupation; (ii) two racial groups within occupied territory, one of whom falls within the group of protected persons and one of whom does not fall within the group of protected persons; or (iii) a racial group within occupied territory and a racial group within the occupying state's own territory.

Finally, the opinion considers the legal consequences that follow when a state violates the prohibition of apartheid in occupied territory. For the occupant, its breach entails its responsibility under international law. Given the status of the prohibition on apartheid as an obligation owed *erga omnes*, all states are entitled to invoke the occupant's responsibility under international law. In addition, states other than the occupant are prohibited from knowingly providing assistance to the occupant in maintaining its policies and practices of apartheid. Finally, additional legal consequences follow from the fact that the prohibition on apartheid is a peremptory norm of international law. All states are required to cooperate to bring to an end the occupant's imposition of an apartheid regime, and to neither recognize the situation as lawful nor render aid or assistance in maintaining it.

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A. Introduction

1. I have been asked to provide an expert opinion by Diakonia International Humanitarian Law Centre, Jerusalem, on the interplay between the legal regime applicable to belligerent occupation and the prohibition of apartheid under international law. As requested, the opinion addresses this question at the general level, rather than in relation to any existing situations of occupation. In addition, the opinion focuses on the prohibition of apartheid binding states in international law, rather than the issue of individual criminal responsibility.
2. The opinion is structured as follows. Part B addresses the status, definition, and scope of the prohibition of apartheid in international law. Part C considers the interaction, in principle, of the prohibition of apartheid and the law of occupation. Thereafter, Part D analyses the interplay of specific elements of the prohibition with the law of occupation, dividing the interplay into relationships of parallel protection, complementary protection, conflict avoidance through interpretation, and conflict. Part E then discusses the purpose element in the prohibition of apartheid and considers how it may be inferred in certain practical scenarios. Part F assesses the legal consequences that follow when an occupant imposes an apartheid regime in occupied territory, before Part G concludes.

B. The International Wrongful Act of Apartheid

3. Part B addresses three issues. These concern the existence and peremptory status of the prohibition of apartheid in international law, the elements of the prohibition, and, finally, certain specific questions of scope and application. These will be taken in turn.

The Existence and Status of the Prohibition of Apartheid in International Law

4. Customary international law prohibits the practice of apartheid by states. The customary prohibition emerged out of the international community's condemnation of South Africa's policies and practices in the 1960s and 1970s.¹ At the United Nations, resolutions passed by both the General Assembly and Security Council specifically denounced apartheid.² Thus, emblematically, Resolution 2396 of 1968 reiterated the Assembly's 'condemnation of the policies of apartheid practised by the Government of South Africa as a crime against humanity' and explicitly linked the practice to a denial of the right to self-determination.³ At the Security Council, Resolution 417 of 1977, adopted unanimously, demanded that the 'racist régime of South Africa ... abolish the policy of bantustanization, abandon the policy of apartheid and ensure majority rule based on justice and equality.'⁴ These resolutions

¹ See generally Bultz, 'Redefining Apartheid in International Criminal Law' (2013) 24 *CLF* 205; Dugard and Reynolds, 'Apartheid, International Law, and the Occupied Palestinian Territory' (2013) 24 *EJIL* 867; Zilbershats, 'Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds' (2013) 24 *EJIL* 915–916; Eden, 'The Role of the Rome Statute in the Criminalization of Apartheid' (2014) 12 *JICJ* 171; Gebhard, 'Apartheid' (2018) *MPEPIL*.

² For a helpful account, see Gebhard, 'Apartheid' (2018) *MPEPIL* [14]–[24].

³ UNGA Res 2396 (XXXIII), A/Res/2396, 2 December 1968, [1]. See further Gebhard (2018) [16] for a list.

⁴ UNSC Res 418, S/Res/418, 4 November 1977, [3](f). See further Dugard and Reynolds (2013) 879–880 on the role of the Security Council in this context.

collectively amount to the ‘complete and total rejection of the policy of apartheid and the discriminatory practices attendant to it.’⁵

5. In conventional sources, apartheid is also addressed in the Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁶ ICERD, adopted by the General Assembly in UNGA Resolution 2106 of 1965, provides in Article 3: ‘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.’ In international humanitarian law, Article 85(4)(c) of Additional Protocol I (API) to the Geneva Conventions includes ‘practices of “apartheid”’ as a grave breach of the protocol.⁷ The ratifications of ICERD, with its 182 state parties, and API, with its 174 state parties, confirm the broad consensus among states as to the prohibition of apartheid in international law.
6. Beyond the basic status of the prohibition in customary international law, it is also the case that apartheid is generally seen to fall within the small set of peremptory norms of general international law – norms from which no derogation is permitted.⁸ In its Commentary on the Articles on State Responsibility, the International Law Commission (ILC) included racial discrimination and apartheid in the set of peremptory norms attracting ‘widespread agreement’.⁹ Likewise, the 4th Report of the ILC Special Rapporteur on Peremptory Norms included apartheid as one of the norms that the ILC has recognised as being peremptory – proposing that there is ‘ample State practice recognizing the prohibition of apartheid and racial discrimination as a peremptory norm of general international law.’¹⁰ The implications of this status are considered, in particular, in the final section of this opinion.

The Elements of the Prohibition of Apartheid in International Law

7. If the existence of the customary prohibition is clearly established, the next question concerns its content. As with other customary rules, answering this question is complicated by the fact that the international community’s practice in unequivocally rejecting apartheid did not precisely define the wrong itself. In a general sense, of course, at issue were the policies of the South African state that intensified with the election of the National Party in 1948. More particularly, the work of the United Nations Special Committee on the Policies of Apartheid focused on the ‘mass of discriminatory and repressive legislation’¹¹

⁵ ILC, Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur, A/CN.4.727, 31 January 2019, [98].

⁶ 660 UNTS 195 (entered into force 4 January 1969).

⁷ 1125 UNTS 3 (entered into force 7 December 1979).

⁸ See ILC, ‘Peremptory Norms of General International Law (*Jus Cogens*) - Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading’ (2019), Draft Conclusion 2. See Gebhard (2018) [25].

⁹ ILC, ‘Responsibility of States for Internationally Wrongful Acts’ annexed to UNGA Res 56/83, 12 December 2001, A/Res/56/83 (ARSIWA), Commentary to Article 40 [4].

¹⁰ ILC, 4th Report (2019) [94].

¹¹ Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa, UN Doc A/5497, 16 September 1963, [436]. The Special Committee was established by UNGA Res 1761 (XVII), A/Res/1761, 6 November 1962.

that created a system of racist oppression in South Africa.¹² As a starting point, the idea of racial discrimination of a particular scale and gravity provides a working definition.

8. Is it possible to be more precise? To answer that question, it is necessary to consider the definitions of the crime of apartheid set out in two important international instruments,¹³ and to assess how the definitions relate to each other and to the state prohibition. These are the Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly in Resolution 3068 of 1973,¹⁴ and the Rome Statute of the International Criminal Court, which entered into force in 2002.¹⁵ Both are instruments concerned primarily with individual criminal responsibility, a matter returned to below.¹⁶

9. To start with the Apartheid Convention, the first part of the definition provides:

For the purpose of the present Convention, the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following 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.¹⁷

10. Thereafter, the Apartheid Convention sets out the specific inhuman acts envisaged:

- a. *denial to a member or members of a racial group or groups of the right to life and liberty of person:*
 - i. *by murder of members of a racial group or groups;*
 - ii. *by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;*
 - iii. *by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;*
- b. *deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;¹⁸*
- c. *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, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;*

¹² Report of the Special Committee (1963), [441]–[459].

¹³ See also Art 1, International Convention against Apartheid in Sports, 1500 UNTS 161 (entered into force 3 April 1988).

¹⁴ 1015 UNTS 243 (entered into force 18 July 1976).

¹⁵ 2187 UNTS 3 (entered into force 1 July 2002). The definition in the Rome Statute is reproduced in the Malabo Protocol establishing the jurisdiction of the African Court of Justice and Human Rights – see Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), adopted 27 June 2014, Art 28(C)(1)(j) and Art 28(C)(2)(h).

¹⁶ See [13].

¹⁷ Art 2, Apartheid Convention.

¹⁸ Cf Art 2(c), Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (entered into force 12 January 1951).

- d. *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;*
- e. *exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;*
- f. *persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.*¹⁹

11. As to the Rome Statute, Article 7(1)(j) lists ‘the crime of apartheid’ as an act constituting a crime against humanity, ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.²⁰ The crime is then defined as follows:

*The crime of ‘apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.*²¹

12. Here, the reference to ‘inhumane acts of a character similar to those referred to in paragraph 1’ draws a link to the list of other acts that may constitute a crime against humanity in the Rome Statute. These acts, in short, are murder, extermination, enslavement, deportation or forcible transfer, serious acts of sexual violence, persecution, enforced disappearance, and ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’²²

13. It is fair to say that the use of non-identical definitions in the Apartheid Convention and Rome Statute complicates matters. Proceeding chronologically, an initial question is whether it makes sense to look to the Apartheid Convention at all in giving content to the customary rule binding states? In this respect, caution may be suggested by the fact that the Apartheid Convention is concerned primarily with the criminalization of apartheid and, as is often noted, did not immediately or later reach universal ratification.²³ In particular, Western states did not ratify the Convention.²⁴ On reflection, however, it is clear that it does make sense to look to the Apartheid Convention to give content to the customary prohibition binding states. In general, a multilateral treaty process in which states express views on the meaning of a term may provide insight into their understanding of the scope of their existing obligations. This is particularly evident in relation to apartheid, where the Preamble to the Apartheid Convention refers both to states’ treaty obligation concerning apartheid in Article 3 of ICERD and to the General Assembly and Security Council’s condemnation of apartheid as practiced by the South African state.²⁵ Moreover, as to the

¹⁹ Arts 2(a)-(f), Apartheid Convention.

²⁰ Art 7(1)(j), Rome Statute.

²¹ Art7(2)(h), Rome Statute.

²² Art 7(1), Rome Statute.

²³ As of today, there are 109 parties to the Convention.

²⁴ See Eden (2014) 180; Gebhard (2018) [26].

²⁵ See also Articles 6 and 7 of the Convention. In addition, the timing is relevant: the Apartheid Convention was drafted around the time of the formation of the customary rule and eight years after the adoption of ICERD, which left the term undefined.

level of support expressed in that process, during the drafting of the Convention the definition of apartheid in (proposed) Article 2 was adopted in the Third Committee by 88 votes to three, with 21 abstentions.²⁶ In the General Assembly itself, the Convention was adopted by 91 votes to four, with 26 abstentions.²⁷ That is to say, there was relatively widespread agreement on the meaning of the term. To be clear, this is not a claim that the suppression obligations in the Apartheid Convention themselves are customary, or to suggest that the apartheid was a *crime* binding individuals in custom at that time.²⁸ Rather, it is that the definition set out in the Apartheid Convention should be taken to inform the content of the state prohibition on apartheid as it existed at that time.

14. On this basis, the wrong would be constituted by two elements:

- a. The commission of certain acts of a particular character as enumerated in Articles 2(a)-(f) of the Apartheid Convention;
- b. A purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.

15. As to the first element – the enumerated acts – immediately evident is that it captures quite distinctive kinds of conduct. In certain cases, murder, for instance, a particular consequence is contemplated. In other cases, the act entails simply the passing of legislative measures – for example, a legislative measure that prohibits mixed marriages. Other than a shared connection to the proposed instantiation of a system of racial domination, the enumerated acts range broadly in terms of the underlying interests protected, their individual or structural nature, and their specific elements. Beyond that point, it bears emphasis that for the most part the enumerated acts are defined in terms of the denial of basic rights and freedoms. For interpretive purposes, these may be taken to refer to rights and freedoms as they are protected in international human rights law, in particular as protected in the International Covenant on Civil and Political Rights²⁹ and the International Covenant on Economic, Social and Cultural Rights.³⁰

16. As to the second element, it is clear that the definition in the Apartheid Convention entails a distinctive mental element. Before drawing that out, there is a preceding point here: the question of intention in relation to the enumerated acts themselves – those listed in Article 2(a)-(f). In the first place, faced with a set of acts similarly enumerated in the Genocide Convention, the International Court of Justice (ICJ), drawing on the ILC’s Commentary on the Draft Code of Crimes against the Peace and Security of Mankind, found that they are all, ‘by their very nature conscious, intentional or volitional acts.’³¹ It is fair to assume the same applies to the specific acts in the prohibition on apartheid. In addition, on the face of the text, certain of the enumerated acts explicitly contemplate mental elements – for instance, the ‘deliberate imposition on a racial group or groups of living conditions *calculated* to cause its or their physical destruction in whole or in part’ or the imposition of

²⁶ UN Doc A/9233/Add.1, 19 November 1973.

²⁷ See Dugard, ‘Introductory Note: Convention on the Suppression and Punishment of the Crime of Apartheid’ UNALIL (2008). In 1973, there were 135 members of the United Nations.

²⁸ For a cautious view, see Eden (2014).

²⁹ 999 UNTS 171 (entered into force 23 March 1976).

³⁰ 993 UNTS 3 (entered into force 3 January 1976).

³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 [186].

‘any measures, including legislative measures, *designed* to divide the population along racial lines...’³² The specific provision here overlaps with the purpose requirement in the chapeau of Article 2 of the Apartheid Convention.

17. Thus to turn to that distinctive mental element: the acts must be 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.’ This is a form of specific intent.³³ Addressing the related question of the specific intent required for the crime of genocide, in *Krstić* the Trial Chamber of the International Criminal Tribunal for former Yugoslavia adopted ‘a characterisation of genocide which encompass only acts committed with the *goal* of destroying all or part of a group.’³⁴ Analogously, the enumerated acts must be undertaken with the goal of establishing and maintaining racial domination and systematic oppression.
18. The next question, then, is the meaning of domination and systematic oppression – noting again that this is a requirement in the mental element of the prohibition. As to domination, the literature points to the idea of control³⁵ – domination may be understood as a particularly powerful form of control. As to systematic oppression, the term systematic may be read in the light of the case law on the requirement of a ‘systematic’ attack in the contextual element of crimes against humanity.³⁶ Formulations differ, though that of Appeals Chamber of the ICTY in *Kunarac* may be taken as emblematic: ‘[T]he phrase “systematic” refers to “the organised nature of the acts of violence and the improbability of their random occurrence.”’³⁷ Oppression may be understood as prolonged or continual cruelty.³⁸ In short, these requirements speak to the scale and gravity of the agent’s intention.
19. In addition, the purpose must be domination ‘by one racial group of persons over any other racial group of persons’. In relation to the issue of a racial group, scholarship tends to emphasize the fraught task of defining the term, particularly given evolving political, cultural, biological, and social-scientific understandings of race.³⁹ As a starting point, the definition of ‘racial’ in this context may be informed by Article 1(1) of ICERD, which defines racial discrimination as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.’⁴⁰ Despite the potentially circular

³² Arts 2(b), 2(d) Apartheid Convention.

³³ Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (2013) 297.

³⁴ ICTY, Trial Chamber, *Prosecutor v Krstić*, IT-98-33-T, 2 August 2001, [571]. See also ICTY, Appeals Chamber, *Prosecutor v Krstić*, IT-98-33-A, 19 April 2004, [37]; *Bosnian Genocide*, [186]–[189].

³⁵ Lingaas, ‘Apartheid’, (2015) 99; Van den Herik and Braga da Silva, ‘Article 7 – Crimes against Humanity - Apartheid’ in Ambos, *Rome Statute of the International Criminal Court* (4th ed. 2021) mn 268.

³⁶ For discussion, see Ambos (2014) 59–61.

³⁷ ICTY, Appeals Chamber, *Prosecutor v Kunarac et al*, IT-96-23&IT-96-23/1-A, 12 June 2002, [94] citing ICTY, Trial Chamber, *Prosecutor v Kunarac et al*, IT-96-23&IT-96-23/1, 22 February 2001, [429]. See further Werle and Jessberger (2014) 340.

³⁸ Lingaas, ‘Apartheid’, (2015) 99; Van den Herik and Braga da Silva (2021) mn 268.

³⁹ See, in particular, Verhoeven, ‘Crime de génocide: originalité et ambiguïté’ (1991) 24 *RBDI* 5, 21–22; Lingaas, ‘The Elephant in the Room: The Uneasy Task of Defining “Racial” in International Criminal Law’ (2015) 15 *ICLR* 485; Lingaas, ‘Imagined Identities: Defining the Racial Group in the Crime of Genocide’ (2016) 10 *Genocide Studies and Prevention: An International Journal* 79.

⁴⁰ Art 1(1) ICERD; Werle and Jessberger (2014) 385. Cf Lingaas, ‘The Uneasy Task’, (2015) 515.

reference to racism in terms of race as well as the introduction of other terms which throw up similarly complex problems, immediately clear is the breadth of the definition. Beyond that point, international criminal tribunals have tended to move away from seeking objective elements that define a group as racial,⁴¹ favouring instead a subjective approach grounded in the perceptions of the perpetrator and/or victims, sometimes in combination with unspecified objective elements.⁴² In brief, the better approach is to focus on the subjective perceptions of the relevant actors, perceptions which over time instantiate the reality of race in the particular context.⁴³ On this account, as Lingaas puts it, ‘if a group is perceived and treated as a distinct racial group, it would qualify as a racial group in the meaning of the crime of apartheid.’⁴⁴

20. There are four further points to note here, each of which relates to the distinctive mental element:

- a. First, under the definition in the Apartheid Convention, the emphasis is on the mental element of the crime. Certain inhuman acts must have been committed, but there is no additional requirement that these inhuman acts have (already) come to constitute a systematic regime of racial domination.⁴⁵ Instead, the systematic aspect of the crime is located in the mental element – in the goals of the relevant agents. On this basis, a state may be said to have committed the wrong of apartheid at an early stage in a series of acts that may together create a regime of oppression.⁴⁶
- b. Second, this requirement of specific intent does not entail an inquiry into the particular *motive* driving the actions of the individual state agents. Consistent with the general approach in international law, intention, including specific intent, and motive ought to be distinguished.⁴⁷ Moreover, the Apartheid Convention itself, in Article 3, specifically provides for responsibility ‘irrespective of the motive involved.’⁴⁸
- c. Third, there remains a question of what is encompassed within the meaning of purpose – in the sense that the agent’s purpose must be to establish and maintain racial domination and systematic oppression. That purpose may be the single end that the relevant agents are seeking to bring about, it may be one of a number of ends playing a role in the reasoning of those agents, or, it may be the means chosen by those agents to bring about a further end.⁴⁹ This last category may be significant

⁴¹ See e.g. ICTR, Trial Chamber, *Prosecutor v Akeyesu*, ICTR-96-4-T, 2 September 1998, [514].

⁴² See e.g. ICTY, Trial Chamber, *Prosecutor v Brdanin*, IC-99-36-T, 1 September 2004, [683]–[684]. For a detailed assessment of different approaches, see Lingaas, *The Uneasy Task*, (2015).

⁴³ See relatedly ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General’, 25 January 2005, [499] and further Verdirame, ‘The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals’ (2000) 49 *ICLQ* 578, 592; Lingaas (2016) 129.

⁴⁴ Lingaas, ‘Apartheid’, (2015) 101–102.

⁴⁵ See [24]–[25] below.

⁴⁶ In the South African case, then, see the Prohibition of Mixed Marriages Act (1949) and the Group Areas Act (1950).

⁴⁷ See e.g. *Bosnian Genocide* [189]; ICTY, Appeals Chamber, *Prosecutor v Jelisić*, IT-95-10-A, 5 July 2001, [49].

⁴⁸ Art 3 Apartheid Convention.

⁴⁹ Finnis, ‘Intention and Side Effects’ in *Intention and Identity: Collected Essays Volume II* (2011) 173, 176. See also Horder, *Ashworth’s Principles of Criminal Law* (9th ed. 2019) 191.

– it encompasses situations in which maintaining a regime of racial domination is chosen as a means – or intermediate goal – to achieve a wider end.⁵⁰

- d. Fourth, there is the question of how the required specific intent may be shown.⁵¹ In relation to the specific intent of genocide in the *Bosnian Genocide* case, the ICJ held that '[g]reat care must be taken in finding in the facts a sufficiently clear manifestation of that intent.'⁵² One way would be the demonstration of an articulated plan itself – in the case of apartheid, a plan of racial domination.⁵³ Beyond that, it is well-established, as the Appeals Chamber of the ICTY put it in *Jelisić*, that specific intent 'may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances.'⁵⁴ In that case, the Appeals Chamber referred to 'the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.'⁵⁵

21. To reiterate, the analysis thus far defines the customary prohibition of apartheid binding states by reference to the definition set out in the Apartheid Convention. The next question is whether the Rome Statute's definition is different. To reiterate, under the Rome Statute:

*The crime of 'apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.*⁵⁶

22. This definition may be split into three key elements:

- a. The commission of inhumane acts of a character similar to those referred to in the preceding paragraph of Article 7;
- b. A context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups;
- c. An intention on the part of the individual of maintaining the regime of systematic oppression and domination by one racial group over any other racial group or groups.

23. Taking these in turn, the first issue is the relationship between the constituent acts of apartheid under the Rome Statute and the definition in the Apartheid Convention. It has been suggested in this respect that the Rome Statute's definition is narrower.⁵⁷ This argument is plausible in the light of the inherent gravity of the acts listed in the preceding

⁵⁰ See in relation to the specific intent of genocide and intermediate goals, Gropengießer, 'The Criminal Law of Genocide: A German Perspective' (2005) ICLR 329, 339; Ambos (2013) 268. See further Werle and Jessberger (2014) 313: 'The destruction of the group in whole or in part must be the perpetrator's (*preliminary*) goal' (emphasis added).

⁵¹ See O'Keefe, *International Criminal Law* (2015) 152-153.

⁵² *Bosnian Genocide* [189] and further [373].

⁵³ *Bosnian Genocide* [373]. See similarly, Milanović, State Responsibility for Genocide (2006) 17 *EJIL* 553, 568-569.

⁵⁴ ICTY, Appeals Chamber, *Prosecutor v Jelisić*, IT-95-10-A, 5 July 2001 [47].

⁵⁵ *Ibid.*

⁵⁶ Art 7(2)(h) Rome Statute.

⁵⁷ See Hall, 'Article 7 – Crimes against Humanity' in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1st ed. 1999) mn 116; Bultz (2013) 223. See further, Van den Herik and Braga da Silva (2021) mn 267.

paragraph of the Rome Statute and the breadth of the enumerated acts in Article 2(c), in particular, of the Apartheid Convention.⁵⁸ However, too much should not be made of the difference. In formal terms, it makes sense to use the Apartheid Convention to interpret Article 7(1)(j) of the Rome Statute.⁵⁹ Moreover, one of the inhumane acts referred to in the preceding paragraph is persecution, defined as the ‘intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.’⁶⁰ That is, one of the other inhumane acts in the Statute is defined, in its nature, in similar terms to those denoted as inhuman in the Apartheid Convention.⁶¹ Finally, in relation to gravity it is a mistake to think that acts of an equivalent gravity must either be violent, in a narrow sense, or involve direct harm to bodily integrity.⁶² Measures calculated to restrict a racial group from employment in particular professions, from marrying as they wish, or from obtaining education may be as devastating to underlying human interests as other inhumane acts listed in the Statute.⁶³

24. The second issue is the requirement of a ‘context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.’ As a starting point, much of what is set out above in terms of the meaning of these terms applies here. In the additional term – an ‘institutionalized regime’ – the definition bears its heritage in the practices of the apartheid state in South Africa. Paradigmatically, this element is constituted by the establishment by a state of the oppressive regime through legislative, administrative, and/or judicial measures.⁶⁴ This is the core sense in which the practices may be institutionalized. In addition, an institutionalized regime may be established by a state through *de facto* practices – whether in the military, police, or bureaucracy.⁶⁵
25. Does this element in particular – the requirement of a context of an institutionalized regime – mean that the definition is different from that under the Apartheid Convention? In short, the answer is yes. It is true that the Apartheid Convention refers to systematic oppression, and it is also very likely the case that an institutionalized regime would be the way to establish such oppression. But, as set out above, under the Apartheid Convention the systematic aspect of the crime is found in the *mental* element – in the goals of the relevant agents. Under that definition, it is not required that systematic oppression and domination has (already) come about. As long as the agent’s purpose is to establish and maintain such a system, as soon as the first set of relevant measures is imposed there is

⁵⁸ The Elements of Crimes defines ‘character’ as referring to ‘the nature and gravity’ of the act.

⁵⁹ Werle and Jessberger, *Principles of International Criminal Law* (2014) 384.

⁶⁰ Article 7(2)(g) Rome Statute. See also Article 7(1)(k) Rome Statute.

⁶¹ See also Van den Herik and Braga da Silva (2021) mn 267.

⁶² See, in relation to the possibly ‘non-violent’ nature of apartheid, ICTY, Trial Chamber, *Prosecutor v Rutaganda*, ICTR-96-3-T, 6 December 1999, [70].

⁶³ See similarly Van den Herik and Braga da Silva (2021) mn 267. See also Werle and Jessberger, *Principles of International Criminal Law* (2014) 384 on the use of the Apartheid Convention to interpret the Rome Statute.

⁶⁴ Werle and Jessberger (2014) 384.

⁶⁵ Bultz (2013) 224; Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (2014) 114; Lingaas, ‘The Crime against Humanity of Apartheid in a Post-Apartheid World’ (2015) 2 *Oslo Law Review* 86, 97.

responsibility. Under the Rome Statute, by contrast, the relevant context must have come into being – it must exist at the time of the commission of the specific inhumane act(s).⁶⁶

26. The third, and final, element under the definition in the Rome Statute is that the individual intends to maintain the institutionalized regime of systematic oppression and domination. This is a form of specific intent, and an element additional to the general intent requirement in Article 30 of the Statute.⁶⁷ Evident, here, is the absence of a reference to ‘establishing’ such a regime, as in the Apartheid Convention’s requirement that the acts be ‘committed for the purpose of establishing...’ domination. This may be explained by reference to the context element discussed in the preceding paragraphs: under the Rome Statute, the regime of oppression must have been constituted. Beyond this point, the analysis set out above in relation to the definition in the Apartheid Convention applies here.⁶⁸
27. In sum, the key difference between the two definitions is the requirement that the context has come about under the Rome Statute – that there exists an institutionalized regime of the relevant kind. In practice, this difference may not amount to a great deal, given that the kinds of acts sufficient to ground an inference of the required purpose will often mean that the relevant context under the Rome Statute has been established.⁶⁹ Nonetheless, the question remains whether the customary prohibition binding states, informed by the definition in the Apartheid Convention, has narrowed on the basis of the drafting of the Rome Statute? On one hand, states’ attempts to define the content of a norm of criminal responsibility may also be taken to shape a pre-existing or crystallizing concurrent obligation binding states.⁷⁰ On the other hand, this need not be the case. States may wish to establish criminal responsibility only in relation to a narrower range of conduct than that proscribed under a rule binding the state,⁷¹ or, indeed, try to make clear that the two norms should be kept separate.⁷²
28. For the purposes of this opinion, the customary rule will be defined in relation to the definition set out in the Apartheid Convention. In the absence of evidence to the contrary, it cannot be assumed that states’ delineation of the crime for the purposes of the Rome Statute affected the pre-existing state obligation in custom. On this basis, a state is responsible for the wrong of apartheid where it is responsible for inhuman acts as set out in Articles 2(a)-(f) of the Apartheid Convention, where those acts are committed with the

⁶⁶ To be clear, under the Rome Statute the individual perpetrator need not themselves be responsible *for* bringing about the relevant context.

⁶⁷ Werle and Jessberger (2020) 436.

⁶⁸ See above [20].

⁶⁹ A similar point applies in relation to potential differences in the acts themselves – as discussed at [23] above.

⁷⁰ See above [13] and also the approach of the ICJ in *Bosnian Genocide*, [155]–[179] and, more widely, the ILC in Article 3 of its Draft Articles on Prevention and Punishment of Crimes Against Humanity (2019). In this respect, the number of states participating in such a multilateral process will also be important.

⁷¹ Cf Article 51 API and 8(2)(b)(iv) Rome Statute.

⁷² See, for instance, in relation to the crime of aggression, Understanding No. 4, ‘Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression’, Annex III to Resolution RC/Res.6: ‘It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.’ See further ILA, Final Report on Aggression and the Use of Force (2018).

purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.

29. In the majority of cases there will be no difficult attribution inquiry – in the ordinary case we are dealing with paradigmatic instances of conduct of state organs.⁷³ Given the scale of the required goal, a state’s responsibility will likely be grounded in the conduct and intentions of leaders of the government in power.⁷⁴ In principle, though, responsibility may be grounded by the enumerated acts of low or mid-level state agents, so long as those agents possess the requisite intent.⁷⁵
30. In addition, a state may be responsible in certain situations where the individuals undertaking the relevant acts with the purpose of establishing domination and systematic oppression are not *de jure* state agents. Of particular interest, here, may be the acts of a non-state authority.⁷⁶ Imagine, here, a secessionist movement or rebel group that has established authority over a particular territory.⁷⁷
31. In this case, if the relationship between the state and non-state authority is one of ‘complete dependence’, that authority will be equated to an organ of the state.⁷⁸ This is an exceptional situation, and would be met, in Talmon’s terms, if the authority ‘cannot conduct its activities without the multi-faceted support of the outside power and if the cessation of aid results, or would result, in the end of these activities.’⁷⁹ Even short of such a situation of complete dependence, the state may be responsible if it exercises ‘effective control’ over the specific conduct of the non-state authority constituting the wrong.⁸⁰ Although there is no equation of the non-state authority to an organ of state, and consequently no corresponding responsibility in relation to *ultra vires* acts, the threshold of control required for attribution remains high.⁸¹ The focus in this situation of control over specific conduct sits uneasily with the structural nature of the wrong of apartheid. Nonetheless, it may be relevant in a situation where the state exercises control over the non-state authority’s policies and practices in dealing with a racial group specifically, rather than the authority’s conduct ‘in all fields’.⁸² Where there is control ‘in all fields’ of activity, responsibility is likely to arise on the basis that the non-state authority is a *de facto* organ, as discussed in the

⁷³ See Art 4 ARSIWA.

⁷⁴ Werle and Jessberger (2014) 385.

⁷⁵ See analogously Milanović (2006) 568-569.

⁷⁶ Under the definition in the Rome Statute, there is the question of whether an ‘institutionalized regime’ only refers to state actors – see, for discussion Hall, ‘Article 7 – Crimes against Humanity’ in Triffterer (ed), *Rome Statute of the International Criminal Court*, (2nd ed. 2008) 264; Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court* (2009) 242; Bultz (2013); Lingaas, *Apartheid*, (2015) 97–98. The better view is that a non-state authority is capable of institutionalizing such a regime. This is consistent with the ordinary understanding of the term, and also captures within the definition of the wrong a situation which equally entails its essential feature: the official entrenchment of certain oppressive practices by an authority exercising public power.

⁷⁷ See generally Talmon, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’ (2009) 58 *ICLQ* 493.

⁷⁸ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Merits, Judgment*. I.C.J. *Reports* 1986, p. 14, [110]; *Bosnian Genocide*, [392].

⁷⁹ Talmon (2009) 499–500. See further Art 7 ARSIWA.

⁸⁰ *Bosnian Genocide* [400]; Art 8 ARSIWA.

⁸¹ Talmon (2009) 503 and further *Bosnian Genocide*, [402] on the requirement to demonstrate control over the specific acts constituting the wrong.

⁸² *Nicaragua* [109].

preceding sub-paragraph.⁸³ Finally, there is likely the possibility of the responsibility of a state if its agents undertake any of the forms of participation in apartheid set out in Article 3 of the Apartheid Convention.⁸⁴

Specific Questions of Scope and Application

32. There are two additional points of scope and application – the South African question and the issue of the extraterritorial commission of apartheid.
33. The first – the South African question – may be dispensed with quickly. Scholarly accounts naturally emphasize the historical roots of the prohibition on apartheid in the policies and practices of the South African state, which sometimes leads to the question of whether the prohibition is limited in some way – either to commission in or by South Africa.⁸⁵ The answer is clearly that there is no such limitation. The wrong is defined by a set of specified policies and practices committed with the requisite intent, rather than by who the wrongdoer is or the location of the regime.
34. The second point concerns the issue of the extraterritorial commission of the wrong of apartheid. The question, here, is whether the wrong of apartheid is spatially limited to the sovereign territory of the wrongdoing state, or whether, in principle, the wrong extends to situations in which state organs are acting outside of the state’s territory. At this point, the analysis proceeds without reference to the potential interaction of the prohibition of apartheid with the law of belligerent occupation, a matter addressed in the next part of this opinion.
35. In principle, there is no reason to think that the prohibition of apartheid is territorially limited in such a way. Of course, as a matter of practice, given the structural nature of the wrong the most likely location will be on the territory of the state. But it need not be so as a matter of law.
 - a. As to definition, Article 2 of the Apartheid Convention refers explicitly to ‘similar policies and practices of racial segregation and discrimination as practised in southern Africa...’⁸⁶ In partial contemplation, here, were the practices of South Africa in Namibia. This is evident too, more explicitly, in UNGA Resolution 2074 of 1965, where the General Assembly condemned ‘the policies of *apartheid* and racial discrimination practised by the Government of South Africa in South West Africa, which constitute a crime against humanity.’⁸⁷ At the time, South Africa administered the territory under the mandate system set up by the League of

⁸³ See further Talmon (2009) 500.

⁸⁴ Art 3(a), (b), Apartheid Convention. See, analogously, *Bosnian Genocide* [418]–[420]. A second route to a similar conclusion is to argue that the customary rule prohibiting interstate assistance that facilitates a wrongful act applies analogously to situations where a state facilitates the wrongdoing of a non-state actor – see Jackson, *Complicity in International Law* (2015) 214–215.

⁸⁵ See Stahn, *A Critical Introduction to International Criminal Law* (2019) n. 402; Lingaas, ‘Apartheid’, (2015) 102. For a longer discussion in the context of the *crime* of apartheid, see Eden, Rome Statute, (2014).

⁸⁶ Art 2 Apartheid Convention.

⁸⁷ UNGA Res 2074 (XX), A/Res/2074, 17 December 1965, [4]. See also UNGA Res 2145 (XXI), A/Res 2145, 27 October 1966.

Nations.⁸⁸ After the termination of the mandate by the General Assembly in 1966,⁸⁹ the Security Council, in UNSC Resolution 282 of 1970, explicitly reiterated ‘its condemnation of the evil and abhorrent policies of *apartheid* and the measures being taken by the Government of South Africa to enforce and extend those policies beyond its borders,⁹⁰ policies which were found by the ICJ to entail a ‘flagrant violation of the purposes and principles’ of the United Nations Charter.⁹¹ Moreover, there is no suggestion in API of a territorial limitation in relation to ‘practices of apartheid’ or in the definition of the crime in the Rome Statute.⁹²

- b. A similar conclusion follows if the customary prohibition is interpreted in the light of the specific textual provision on applicability in Article 3 of ICERD. To reiterate, Article 3 provides: ‘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*.’⁹³ Commenting on its meaning, Thornberry notes that the ‘practice under Article 3 merges into the broader CERD archive of applying the Convention extraterritorially, particularly in cases of occupation or control of territory.’⁹⁴ This is evident in General Recommendation 19 of the Committee on the Elimination of Racial Discrimination: ‘The Committee believes that the obligation to eradicate all practices of this nature includes the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments in the State or imposed by forces outside the State.’⁹⁵ More widely, the weight of authority in international human rights law points firmly in this direction – in the decisions of the ICJ,⁹⁶ in General Comments 31 and 36 of the Human Rights Committee,⁹⁷ in General Comment 3 on the African Charter on Human and Peoples’ Rights,⁹⁸ as well as in extensive recent case law of regional

⁸⁸ See generally Dugard, *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (1973); Heyns and Killander, ‘South West Africa/Namibia (Advisory Opinions and Judgments)’ (2007) MPEPIL.

⁸⁹ UNGA Res 2145 (XXI), A/Res 2145, 27 October 1966; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 16, [106].

⁹⁰ UNSC Res 282, S/Res/282, 23 July 1970.

⁹¹ *Namibia Advisory Opinion*, [128]–[131].

⁹² Art 85(4)(c) Additional Protocol I; Arts 7(1)(j), 7(2)(h) Rome Statute.

⁹³ Art 3 ICERD.

⁹⁴ Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016) 259.

⁹⁵ Committee on the Elimination of Racial Discrimination, ‘General Recommendation XIX: The Prevention, Prohibition and Eradication of Racial Segregation and Apartheid’, A/50/18 at 140, (1995), [2].

⁹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, I. C. J. Reports 2004, p. 136, [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment*, I.C.J. Reports 2005, p. 168, [216]–[218].

⁹⁷ HRC, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, CCPR/C/21/Rev.1/Add. 1326, (2004), [10]; HRC, ‘General Comment 36, Article 6 (Right to Life)’, CCPR/C/GC/35, (2019) [63].

⁹⁸ African Commission on Human and Peoples’ Rights, ‘General Comment 3 on the African Charter on Human and Peoples’ Rights – The Right to Life (Article 4)’ (2015) [14].

human rights institutions.⁹⁹ Indeed, the institutionalized context of control envisaged in the prohibition of apartheid would entail the meeting of all prevailing tests for extraterritorial application.¹⁰⁰

C. The Prohibition of Apartheid and Belligerent Occupation – In Principle

36. The previous section set out the definition of the prohibition of apartheid binding states in international law and discussed certain questions of scope and application. In short, the wrong is defined by the commission of inhuman acts as set out in Article 2(a)-(f) of the Apartheid Convention, where those acts are committed with the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them. The next question, as set out in the terms of reference for this opinion, is whether the prohibition of apartheid applies in situations of occupation at all.
37. Of course, one way that the prohibition of apartheid might be inapplicable in situations of occupation was that discussed in the previous section – the idea that the prohibition applies only within the territory of the state. As noted above, there is no reason to think that to be true. This section, though, deals with the related question of whether the prohibition of apartheid applies extraterritorially where the situation is one of belligerent occupation. First, it discusses the untenable idea that there is a sort of categorical exclusivity as to the applicable law in situations of occupation – the idea that international humanitarian law is exhaustive in this context. Second, drawing on case law and doctrine on the relationship between international human rights law and international humanitarian law, it concludes that the prohibition of apartheid continues to apply in times of occupation, and that its interaction with rules in the law of occupation must be assessed on case-by-case basis in relation to specific elements of the prohibition.

Mutual Exclusivity of Regimes

38. There is an older idea, one rooted in a categorical distinction between peace and war, that limits the applicable law in situations of the latter to international humanitarian law.¹⁰¹ War, in this sense, includes situations of belligerent occupation. This position is incorrect. As to the interaction of international human rights law instruments with international humanitarian law, the ICJ, in the *Nuclear Weapons Advisory Opinion*, in the *Wall Advisory Opinion*, and in *Armed Activities*, confirmed the ongoing applicability of the former in times of war.¹⁰² Similarly, the Human Rights Committee's recent General Comment 36 on the Right to Life proposes that '[l]ike the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are

⁹⁹ See e.g. ECtHR, *Al-Skeini and Others v United Kingdom*, App No. 55721/07, 7 July 2011; IACoMHR, *Coard and Others v The United States*, Report No. 109/99, Case No 10.951, 29 September 1999; IACtHR, 'Advisory Opinion on Human Rights and the Environment', 7 February 2018.

¹⁰⁰ On these tests, see generally Milanović, *Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy* (2011); Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (2020).

¹⁰¹ Ben-Naftali and Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 *Israel Law Review* 17, 27–33; Milanović, 'The Lost Origins of *Lex Specialis*' in Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (2016) 78, 103–104.

¹⁰² *Nuclear Weapons Advisory Opinion* [25]; *Wall Advisory Opinion* [106]; *Armed Activities* [216].

applicable, including to the conduct of hostilities.¹⁰³ The same position is taken by the African Commission on Human and Peoples' Rights in respect of Article 4 of the African Charter,¹⁰⁴ and in case law of the European Court of Human Rights and Inter-American Court of Human Rights in relation to their own instruments.¹⁰⁵

39. These holdings concern the applicability of obligations set out in human rights instruments specifically, but may simply be seen as the application of a wider principle. That principle is that the mere fact that international humanitarian law is triggered does not exclude the applicability of other binding rules of international law. Thus, for instance, in the *Nuclear Weapons Advisory Opinion*, the ICJ confirmed that general customary prohibition on genocide continues to bind states in times of armed conflict.¹⁰⁶ The same applies, without doubt, to the customary prohibition of apartheid binding states in international law.¹⁰⁷ As Dinstein puts it: 'Irrefutably, the inhabitants of occupied territories are in principle entitled to benefit from the customary *corpus* of human rights that coexists with the law of belligerent occupation.'¹⁰⁸

Concurrent Application and the Meaning of Lex Specialis

40. That the prohibition of apartheid continues to apply, in principle, in situations of belligerent occupation says nothing about the specific ways it might interact with the law of occupation. In this respect, given that the prohibition of apartheid is defined, in part, in terms of the limitation of the *rights* of the group, an important issue is the implications of the commonly invoked idea of international humanitarian law as *lex specialis*.¹⁰⁹ In the *Nuclear Weapons Advisory Opinion*, the ICJ referred to the law applicable in armed conflict designed to regulate the conduct of hostilities as 'the applicable *lex specialis*' in interpreting what is meant by an arbitrary deprivation of life.¹¹⁰ Relatedly, in the *Wall Advisory Opinion*, the ICJ appeared to contemplate more widely some idea of international humanitarian law as *lex specialis*.¹¹¹ These references sometimes ground a claim that in any area of substantive overlap between international humanitarian law and international human rights law, the former simply prevails by way of some sort of *in toto* displacement.¹¹² Such a claim would

¹⁰³ HRC, General Comment 36, [64]. See also, more generally, HRC, 'General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add. 1326, (2004).

¹⁰⁴ ACHPR, 'General Comment 3, [13].

¹⁰⁵ See e.g. ECtHR, *Loizidou v Turkey*, App. No. 15318/89, 23 March 1995; ECtHR, *Al-Skeini v United Kingdom*; ECtHR, *Hassan v United Kingdom*, App. No. 29750/09, 16 September 2014; IACHR, *Abella v Argentina*, Report No. 55/97, Case No. 11.137, 18 November 1997.

¹⁰⁶ *Nuclear Weapons Advisory Opinion* [26]. See also Lubell, 'Human Rights Obligations and Military Occupation' (2012) 94 *IRRC* 317, 318–319.

¹⁰⁷ See also Art 85(4)(c) Additional Protocol I designating the practices of apartheid as a grave breach of the Protocol and further [73]–[75] below.

¹⁰⁸ Dinstein, *The International Law of Belligerent Occupation* (2nd ed. 2019) 81.

¹⁰⁹ For an overview, see Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (2009) 401–438 and Milanović, 'The Lost Origins', (2016) 78.

¹¹⁰ *Nuclear Weapons Advisory Opinion* [25].

¹¹¹ *Wall Advisory Opinion* [106].

¹¹² For criticism of the Court's use of the term *lex specialis* in the *Wall Advisory Opinion*, see Bianchi, 'Dismantling the Wall: The ICJ's Advisory Opinion and its Likely Impact on International Law' (2004) 47 *German Yearbook of International Law* 343.

have important implications for the application of the prohibition of apartheid in times of occupation.

41. This is not the prevailing view. For one, in its subsequent judgment in *Armed Activities*, the ICJ, in considering the interaction between international human rights law and international humanitarian law, no longer referred to the ‘applicable *lex specialis*.’¹¹³ Too much should not be made of that omission in and of itself, treating it as though it means that a distinction between general rules and specific rules no longer plays or ought to play a role in legal reasoning.¹¹⁴ The better way to think of the issue is as follows. In broad terms, specific rules may entail in a certain case nothing more than the particular elaboration of general standards of conduct.¹¹⁵ Here, as the International Law Commission put it, ‘[t]he specific and the general point, as it were, in the same direction.’¹¹⁶ In other situations, where a specific rule – whether an obligation or a specific permission¹¹⁷ – appears to conflict with generally applicable law, *lex specialis* as a principle of legal reasoning may suggest an interpretation of the general rule that avoids the putative conflict.¹¹⁸
42. Implicit here is the central issue: while it is possible to describe the relationship between the prohibition of apartheid and the law of occupation in broad terms,¹¹⁹ the question of their interplay turns on the interpretation of the specific terms at issue.¹²⁰ Given the centrality of rights in the enumerated acts of apartheid, a key question will be how their interpretation is affected, if at all, by certain rules within the law of occupation. As will be shown in the next section, there is no single relationship that captures their practical interplay. Indeed, the relationship entails aspects of parallel protection, complementary protection, conflict avoidance through interpretation, and conflict.

¹¹³ Milanović, ‘A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law’ (2010) 14 *JCSL* 459, 464. See *Armed Activities* [216].

¹¹⁴ See generally Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*’ (2005) 74 *Nordic Journal of International Law* 27; Krieger, ‘A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study’ (2006) 11 *JCSL* 265.

¹¹⁵ Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, A/CN.4/L.682, 13 April 2006, [56].

¹¹⁶ *Ibid.*, [56].

¹¹⁷ Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) 17 *EJIL* 395. See also Clapham, ‘Human Rights in Armed Conflict: Metaphors, Maxims, and the Move to Interoperability’ (2018) 12 *HR&ILD* 9, 18 referring to situations where ‘international humanitarian law actually grants *specific permission* to do something.’

¹¹⁸ Milanović, ‘A Norm Conflict Perspective’ (2010) 476. See also Frowein, ‘The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation,’ (1998) 28 *Israel Yearbook on Human Rights* 1, 9-10; Krieger (2006).

¹¹⁹ See Droege, ‘Elective Affinities: Human Rights and Humanitarian Law’ (2008) 90 *IRRC* 501, 523 and Clapham, ‘The Complex Relationship Between the Geneva Conventions and International Human Rights Law’ in Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 701, 705 setting out the range of different ways that scholars have described the relationship between international human rights law and international humanitarian law.

¹²⁰ Milanović, ‘A Norm Conflict Perspective’ (2010) 464; Clapham, ‘The Complex Relationship’ (2015) 734–735.

D. The Enumerated Acts in the Prohibition of Apartheid and Belligerent Occupation – Interplay in Practice

Introduction

43. Before turning to the practical interplay between the prohibition of apartheid and the law of occupation more generally, one distinctive situation may be addressed. This is the case of the occupation of a state in which the *existing* laws and practices breach the prohibition of apartheid. For simplicity, imagine the occupation of South Africa by a foreign state in the early 1970s. In the law of occupation, central to the occupant's duties is that set out in Hague Regulation 43 to respect, 'unless absolutely prevented, the law in force in the country', as read together with the power in Article 64 of Geneva Convention IV.¹²¹ In the relevant part, the power in Article 64 allows the occupant to 'subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory...'¹²² By extension, in certain circumstances the occupant may 'implement other binding norms of international law', including international human rights law.¹²³
44. How, then, do these provisions relate to the ongoing laws and practices of apartheid in the occupied territory? The occupant certainly has the power to disapply the legislation establishing a regime of apartheid and to end the related administrative practices.¹²⁴ Indeed, it is not simply a power, but a duty.¹²⁵ This duty is best thought of as independent – a duty akin to positive duties generated by rights in the ordinary structure of international human rights law.¹²⁶ However, a failure to undertake reform, together with the continued execution of acts pursuant to the existing apartheid policies may, subject to the requirement that the relevant purpose can be inferred, come to amount to a breach of the prohibition of apartheid by the occupant itself.
45. Turning, then, to the practical interplay between apartheid and occupation: for the most part, this interplay will be illustrated by reference to the relationship between the enumerated acts in the prohibition of apartheid and the law of occupation. In taking this approach, there is a risk of an atomized analysis – one that unduly separates an assessment of the specific acts from the state's wider purpose. However, from a practical perspective it makes sense to proceed in this way, as in many cases these enumerated acts will form a central part of the context from which the putative specific intent may be inferred. On this basis, this interplay may be seen to entail four relationships – relationships of parallel

¹²¹ Art 43 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (entered into force 26 January 1910); Art 64 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (entered into force 21 October 1950). On the relationship between the two provisions, see Arai-Takahashi, 'Pre-occupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation' (2012) 94 *IRRC* 51.

¹²² Art 64 GCIV.

¹²³ See e.g. Arai-Takahashi (2009) 135–136; Dinstein (2019) 123–124. There is, of course, the risk of abusive reform putatively justified by the demands of international human rights law.

¹²⁴ See Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 4: Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958) 335 on the permissibility of abrogating 'any discriminatory measures incompatible with humane requirements.'

¹²⁵ See further *Armed Activities*, [178]. For discussion, see Arai-Takahashi (2009) 132–136.

¹²⁶ See generally HRC, General Comment 31 and further Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 *HRLR* 81.

protection, complementary protection, conflict avoidance through interpretation, and conflict.

Parallel Protection

46. The first relationship is one of parallel protection – one evident on a structural level and in terms of the enumerated acts in the definition of apartheid. On a structural level, as set out in Article 43 of the Hague Regulations, a core duty of the occupant is to ‘take all the measures in his power to restore, and ensure, as far as possible, public order and safety.’¹²⁷ Often understood as a form of trusteeship,¹²⁸ the occupant is vested with extensive duties to act for the benefit of the population under its control. This general duty is consonant with the prohibition of apartheid’s concern to prevent the imposition of a regime of oppression. Likewise, the principle of conservation, at least in the short term, is to the same effect.¹²⁹ As noted above, the occupant is required, subject to certain exceptions, to respect the laws in force in the occupied territory. Taking as a given that those laws did not themselves instantiate a regime of apartheid, their continued application, in general terms, would entail compliance with both the prohibition of apartheid and the law of occupation.
47. In relation to specific acts, the prohibition of apartheid and law of occupation contain certain overlapping proscriptions.¹³⁰ Thus, for instance, Article 2(a)(i) of the Apartheid Convention refers specifically to ‘murder of members of a racial group’ as an enumerated act. Murder is specifically prohibited in the law of occupation.¹³¹ Likewise, torture is set out as an enumerated act in the Apartheid Convention, and is specifically prohibited in the law of occupation.¹³² In addition, depending on the specific terms at issue, international human rights law may inform the meaning of proscriptions and duties in both the prohibition of apartheid and the law of occupation.¹³³

Complementary Protection

48. The previous section addressed aspects of parallel protection between the law of occupation and the prohibition of apartheid; the present section concerns complementary protection provided by the enumerated acts in prohibition of apartheid. It is often noted that the conventional law of occupation has little to say about certain political rights. In this respect, Hampson gives the example of the right to demonstrate and freedom of

¹²⁷ Art 43, Hague Regulations.

¹²⁸ Benvenisti, ‘Occupation and Territorial Administration’ in Liivoja and MacCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (2016) 435, 436; Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (2017) 29. Cf Dinstein (2019) 39–40. For discussion, see Arai-Takahashi, ‘Unearthing the Problematic Terrain of Prolonged Occupation’ (2019) 52 *Israel Law Review* 125.

¹²⁹ Art 43 Hague Regulations; Art 64 GCIV.

¹³⁰ The overlap is not simply a matter of proscriptions – both the prohibition on apartheid – in Article 2(c) – and the law of occupation – in Articles 24 and 50 of GCIV – seek to protect the right to education of children. On the application of social rights extraterritorially, see *Wall Advisory Opinion* [112] and more generally, see Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (2014) and Horowitz, ‘The Right to Education in Occupied Territories: Making Room for Human Rights in Occupation Law’ (2004) 7 *YIHL* 233.

¹³¹ Arts 27, 32 GCIV.

¹³² Art 2(a)(ii) Apartheid Convention; Arts 27, 32, GCIV.

¹³³ Krieger (2006) 275–276.

expression.¹³⁴ The absence of specific protection is evident in the general way in which certain military manuals address the issue. Thus, if we look to the United States' Law of War Manual, it simply notes that legal provisions 'relating to political process, such as laws regarding the rights of suffrage and of assembly'¹³⁵ may be suspended, and that 'for the purposes of security, an Occupying Power may establish censorship or regulation of any or all forms of media (e.g., press, radio, television) and entertainment (e.g., theater, movies), of correspondence, and of other means of communication.'¹³⁶ Likewise, in scholarship it is commonly noted that in practice political rights suffer in situations of occupation.¹³⁷ As Dinstein puts it in relation to security legislation, 'other recurrent permissible measures include...censorship curbing freedom of expression; control of means of communication...; restraints of freedom of association; and curtailment of freedom of assembly and demonstrations.'¹³⁸

49. By contrast, the prohibition of apartheid refers specifically to certain political rights. As an illustration of 'measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country', Article 2(c) of the Apartheid Convention enumerates a set of rights that includes 'the right to freedom of opinion and expression' and the 'right to freedom of peaceful assembly and association'.¹³⁹ As noted previously, these rights apply extraterritorially and in situations of occupation, and are to be interpreted, in the first instance, in accordance with their meaning in international human rights law, where they have received rich and detailed development.¹⁴⁰ Moreover, as to the question of interaction, the law of occupation cannot be seen to specifically elaborate the meaning of political rights in that context or to grant a specific permission in relation to those rights which might be accommodated through interpretation.¹⁴¹
50. As a provisional conclusion, then, in this respect the enumerated acts in the prohibition of apartheid seem to provide complementary protection to the law of occupation. The conclusion is provisional because it overlooks the possibility of rights limitation and derogation. In general, political rights of this kind under international human rights law are subject both to limitation and derogation by the state.

¹³⁴ Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 *IRRC* 549, 560. See also Milanović, 'The Lost Origins' (2016) 106; Dinstein (2019) 286–287.

¹³⁵ United States Department of Defense, 'Law of War Manual' (June 2015, updated December 2016) para 11.9.2.2.

¹³⁶ *Ibid*, para 11.7.2.

¹³⁷ See e.g. Greenwood, 'The Administration of Occupied Territory in International Law' in Playfair (ed), *International Law and the Administration of Occupied Territories* (1992) 241, 247–249; Dinstein (2019) 123. See also Arai-Takahashi (2009) 122 citing von Glahn (1957) and Greenspan (1959), both of whom note that 'naturally' the occupant will suspend laws granting political privileges.

¹³⁸ Dinstein (2019) 123.

¹³⁹ Art 2(c) Apartheid Convention. On the right to form and join a trade union, protected in the Apartheid Convention and in Art 22 ICCPR, see Quigley, 'The Right to Form Trade Unions under Military Occupation' in Playfair (ed), (1992) 295.

¹⁴⁰ See HRC, 'General Comment 34: Article 19: Freedoms of Opinion and Expression', CCPR/C/GC/34, (2011); HRC, 'General Comment 37: Article 21: Right of Peaceful Assembly', CCPR/C/GC/37 (2020). On the 'great weight' to be ascribed to the views of the HRC, see *Abmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J. Reports 2010, p. 639, [66].

¹⁴¹ For a similar approach, see Clapham, 'Metaphors' (2018) 18.

- a. As to limitation, to take freedom of expression as emblematic, as set out in Article 19(3) ICCPR the right may be subject to certain restrictions that are ‘provided by law and are necessary (a) [f]or respect of the rights or reputations of others or (b) [f]or the protection of national security or of public order (ordre public), or of public health or morals.’¹⁴²
 - b. As to derogation, as set out in Article 4 ICCPR, in a ‘time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’ state parties are empowered to take measures derogating from certain of their obligations under the Covenant, including in relation to freedom of expression.¹⁴³
51. In this light, it may be asked whether the fact that the relevant *factual* situation is one of occupation would allow the state to justifiably restrict the rights set out in international human rights law and, thus, the rights protected by the prohibition of apartheid. On this basis, at least for limitable and derogable rights what might be happening is a sort of implicit *in toto* displacement of these rights – displacement on the basis of the reasons of security in situations of occupation.
52. This idea, however, ignores the stringent requirements for both limitation and derogation under international human rights law.
- a. For limitation, in the first place, restrictions must be prescribed by law, which entails more than bare legality: discretion must be constrained and restrictions formulated with sufficient precision as to allow individuals to regulate their own conduct.¹⁴⁴ Moreover, there is a general requirement of non-discrimination, and a requirement that the restriction complies with the principle of proportionality. This entails that the restrictive measures, in design and in application, ‘be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected.’¹⁴⁵ Implicit here is the individualized and specific nature of permissible restrictions. Finally, as the Human Rights Committee put it in General Comment 31, ‘[i]n no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.’¹⁴⁶
 - b. For derogation, the requirements are similarly demanding. As to the threshold condition of a ‘time of public emergency which threatens the life of the nation’, the Human Rights Committee has confirmed that a state of armed conflict does not itself meet the condition – it is not possible for a state to derogate simply because the legal thresholds of international or non-international armed conflict

¹⁴² Art 19(3) ICCPR. See also Art 21 ICCPR.

¹⁴³ Art 4 ICCPR. In relation to limitations and derogation under the ICESCR, see Müller, ‘Limitations to and Derogations from Economic, Social and Cultural Rights’ (2009) 9 *HRLR* 557. See also Art 27 ACHR including the right to participate in government as a non-derogable right.

¹⁴⁴ HRC, General Comment 34, [25].

¹⁴⁵ *Ibid*, [34]; HRC, General Comment 27, [14].

¹⁴⁶ HRC, General Comment 31, [6].

are met.¹⁴⁷ Even then, if the threshold for derogation is met, the measures must still be *strictly* required by the exigences of the situation, be non-discriminatory, and must not be inconsistent with the state's other international obligations. Strict necessity here entails a relationship of proportionality.¹⁴⁸ Moreover, in the words of the Human Rights Committee: 'Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.'¹⁴⁹

53. In either case, at the core of the inquiry is a targeted, context-specific evaluation of the rights-restricting measure. While it is true that their limitable and derogable nature means that an occupant may be entitled to impose certain restrictions on the basis of its security needs, that is a far-cry from a generalized claim that in situations of occupation it is permissible to curb freedom of expression, freedom of association, and freedom of assembly.¹⁵⁰ Moreover, the temporal aspect is again important here. As an occupation prolongs and settles into something like normalcy, so the scope of permissible limitation is likely to narrow. The same goes for the measures that may be lawfully imposed through derogation, not to mention the threshold condition of a public emergency threatening the life of the nation.¹⁵¹

Conflict Avoidance through Interpretation

54. The previous subsection concerned the interplay between the prohibition of apartheid and the law of occupation where the former protects rights that are not specifically protected and regulated in the latter. The present subsection addresses the possibility that specific rules in the law of occupation might inform the meaning of the enumerated acts of the prohibition of apartheid so as to avoid what would otherwise be a conflict between the two.¹⁵² An example in this respect is the right to liberty – a right protected in the prohibition of apartheid. As set out in Article 2(a)(iii) of the Apartheid Convention, one of the constitutive acts of the wrong is the 'denial to a member or members of a racial group or groups of the right to ... liberty of person...by arbitrary arrest and illegal imprisonment of the members of a racial group or groups.'¹⁵³ As noted previously, the first place to look in thinking about the meaning of the right to liberty – and 'arbitrary arrest' and 'illegal imprisonment' – is international human rights law – specifically the ICCPR. As set out in General Comment 35, Article 9 ICCPR provides generous protection for the right.¹⁵⁴

55. However, the law of occupation itself regulates the right in a specific way, granting a specific permission to the occupant in relation to liberty.¹⁵⁵ Moreover, it is generally

¹⁴⁷ HRC, General Comment 29, [3]: 'The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.'

¹⁴⁸ *Ibid*, [4].

¹⁴⁹ *Ibid*, [2].

¹⁵⁰ Cf Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation? Emperor's New Clothes' (2007) 18 *EJIL* 1.

¹⁵¹ Koutroulis, 'The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?' (2012) 94 *ICRR* 165, 200–205.

¹⁵² For wider discussion, see Milanović, 'A Norm Conflict Perspective' (2010).

¹⁵³ Art 2(a)(iii), Apartheid Convention.

¹⁵⁴ HRC, 'General Comment 35: Article 9: Liberty and Security of Person' (2014).

¹⁵⁵ Art 78 GCIV.

understood that the specific provision in the law of occupation in relation to restrictions on liberty does inform the interpretation of the right protected by the ICCPR. Such a claim is consonant with the approach of the ICJ in the *Nuclear Weapons* and *Wall Advisory Opinions* to interpreting the term ‘arbitrarily’ in Article 6 ICCPR,¹⁵⁶ and is evident in the Human Rights Committee’s General Comment 35: ‘Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary.’¹⁵⁷ To put the issue in such bare terms should not be taken to discount the possible evolution of certain procedural guarantees provided by international humanitarian law itself or, relatedly, the infusion into it of additional protections drawn from human rights law.¹⁵⁸ But, at least in principle, forms of administrative detention that would otherwise be impermissible under human rights law are rendered permissible by the potentially conflicting and more permissive rule in the law of occupation.

56. The question, then, is what this means for the right to liberty as protected in the prohibition of apartheid? As a starting point, it is fair to assume that the permissive rules on the deprivation of liberty in the law of occupation also inform the ambit of the right to liberty protected by the prohibition of apartheid. Even though the prohibition of apartheid is a peremptory norm, its scope must still be determined first. On this basis, for instance, ‘illegal imprisonment’ in the definition of apartheid is to be interpreted in the light of the rules in the law of occupation.¹⁵⁹ However, a caveat is needed. If it can nonetheless be shown that the detention practices are undertaken for the *purpose* of maintaining domination and systemic oppression of the racial group, they will be ‘arbitrary’ for the purposes of human rights law and the prohibition of apartheid. In this respect, the analysis set out previously in relation to an inference of purpose applies here too.

Conflict

57. In addition to relationships of parallel protection, complementary protection, and conflict avoidance through interpretation, there may also be certain genuine conflicts between the enumerated acts of the prohibition of apartheid and the law of occupation.¹⁶⁰ An example may be the provisions on forced labour.¹⁶¹ On one hand, Article 2(e) of the Apartheid Convention refers to the ‘exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour’.¹⁶² As noted above, it makes sense to interpret this provision in the light of the ICCPR, which prohibits forced labour save in exceptional circumstances, of which the most relevant is ‘service exacted in cases of emergency or calamity threatening the life or well-being of the community’.¹⁶³ On the other hand, Article 52 of the Hague Regulations, read together with Article 51 of GCIV,

¹⁵⁶ *Nuclear Weapons Advisory Opinion*, [25]; *Wall Advisory Opinion*, [106].

¹⁵⁷ HRC, General Comment 35, [64]. See Campanelli, ‘The Law of Military Occupation Put to the Test of Human Rights Law’ (2008) 90 *IRRC* 653, 666–667.

¹⁵⁸ See *Hassan v UK* (2014) [106] and for discussion Milanović, ‘The Lost Origins’ (2016) 107–108.

¹⁵⁹ In addition, other norms of the international legal system may also be relevant. In relation to the *jus ad bellum*, see the claim of the Human Rights Committee in [70] of General Comment 36 (2018); in relation to the right to self-determination, see Pellet, ‘The Destruction of Troy will not Take Place’ in Playfair (ed), (1992) 169.

¹⁶⁰ See more widely Milanović, ‘A Norm Conflict Perspective’ (2010) 465–466.

¹⁶¹ See Koutroulis (2012) 198–199.

¹⁶² Art 2(e) Apartheid Convention.

¹⁶³ Art 8(3) ICCPR.

specifically authorizes forced labour insofar as it serves the ‘needs of the army of occupation.’¹⁶⁴ Although international humanitarian law places some constraints on the practice, those constraints still allow forced labour in situations that would breach human rights law.¹⁶⁵

58. As to avoiding the conflict, in the first place there is the possibility of derogation, though this will be impermissible where it is otherwise evident that the state’s purpose is to impose a regime of racial domination.¹⁶⁶ Leaving that point aside, where the stringent thresholds for derogation are not met – particularly in a prolonged occupation where the measures are not ‘of an exceptional and temporary nature’¹⁶⁷ – the conflict between the provisions on forced labour in the law of occupation and the right in human rights law specifically may be irresolvable by interpretation.¹⁶⁸ It is not easy to see how the permissive rule in the law of occupation could be read into the right as protected in human rights law without undue interpretive strain.¹⁶⁹
59. How, then, should this situation be assessed? One option, which does reconcile the relevant rules, is to read into the condition ‘the needs of the army of occupation’ in Article 51 of GCIV a substantive constraint defined by the overall purposes of the occupant.¹⁷⁰ The upshot, here, would be that forced labour imposed pursuant to an overall purpose of racial domination is impermissible under the law of occupation itself, even if it does, in a narrow sense, serve the needs of the occupying army. A second option would be to look to the peremptory nature of the prohibition of apartheid in order to resolve the conflict. The fact that a conflict between the rules in the law of occupation and forced labour in international human rights law is irresolvable does not mean that the same applies as between forced labour as protected in the prohibition of apartheid and the law of occupation. As noted above, the prohibition of apartheid is a peremptory norm of international law. One consequence of this status is its priority over conflicting rules of international law. This is to say that if the forced labour practices of the state are undertaken with the purpose of establishing and maintaining domination and systematic oppression over a racial group, then the conflicting permissible rule in the law of occupation is displaced.

E. The Purpose Requirement in the Prohibition of Apartheid and the Law of Occupation – Interplay in Practice

60. The preceding section of this opinion addressed the practical interplay between the specific enumerated acts of the prohibition of apartheid and the law of occupation. These acts must be undertaken by the state 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.

¹⁶⁴ Art 52 Hague Regulations; Art 51 GCIV. See also ICTY, Trial Chamber, *Prosecutor v Simić*, IT-95-9-T, 17 October 2003, [88].

¹⁶⁵ Giacca, ‘Economic, Social, and Cultural Rights in Occupied Territories’ in Clapham et al (eds) (2015) 1499.

¹⁶⁶ Art 8(3) ICCPR is derogable.

¹⁶⁷ HRC, General Comment 29, [2].

¹⁶⁸ Cf Giacca 1499.

¹⁶⁹ See though *Hassan v UK* (2014) in relation to Article 5(1) ECHR.

¹⁷⁰ See further the prohibition of apartheid in Article 85(4) of API – discussed at [73]–[75] below.

61. At the outset, it is worth reiterating certain points as to the definition developed above. Domination was defined as a particularly powerful form of control, while oppression was defined as prolonged or continual cruelty. Moreover, the state's intention must be to establish systematic oppression – rights violations of an organized nature.¹⁷¹ Evident here is the requisite scale and gravity of the state's intentions. Moreover, in the idea of *prolonged* cruelty, there is a temporal aspect. Given the focus is on the mental element, it is true that the relevant agents may possess such an intention at the outset – that is, as the first of the enumerated acts are being undertaken. In practice, however, to the extent that an inference of the requisite purpose is based on the context, as the occupation extends so it may become easier to infer the purpose.
62. In addition, there is the relational element of the wrong of apartheid: the state's purpose must be domination *by one racial group over another*. Again, here, the inquiry is focused on the intentions of the relevant agents: the relational element must exist in the intentions of the state's agents. With that in mind, it may nonetheless be useful to consider certain practical possibilities in situations of occupation – to consider which material relationships of domination and oppression may form the basis of an inference of the required purpose.
63. *First*, the occupant might distinguish among different racial groups falling *within* the category of protected persons under international humanitarian law. Article 4 of GCIV provides a definition in the following terms: 'Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.'¹⁷² Given the definition of racial groups set out above, it is likely that the factual predicate for an apartheid regime of this kind will exist in many situations of occupation. As to the law of occupation, its provisions are of complementary effect to the prohibition on apartheid. Article 27 of GCIV provides: 'Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.'¹⁷³
64. *Second*, it may be the case that there exists a community within the occupied territory which does not comprise protected persons under international humanitarian law. As a preceding point, there is a question of how the community of non-protected persons came to live in the occupied territory. Two situations may be distinguished as far as international humanitarian law is concerned. First, there is the possibility that the occupant has itself created the relevant situation in violation of that body of law. Article 49(6) of GCIV provides: 'The Occupying Power shall not deport or transfer parts of its own civilian

¹⁷¹ See above [18].

¹⁷² Art 4 GCIV. See also ICTY, Appeals Chamber, *Prosecutor v Tadić*, IT-94-1A, 15 July 1999, [164]–[169] and, in particular, [168]: '[Article 4 GCIV] therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.' See also ICTY, Appeals Chamber, *Prosecutor v Delalić et al*, IT-96-21-A, 20 February 2001, [52]–[106].

¹⁷³ Art 27 GCIV.

population into the territory it occupies.¹⁷⁴ Second, however, it cannot be assumed that the presence of non-protected persons in the occupied territory is necessarily consequent on a breach on the duty of transfer by the occupant. There may have been, for instance, a community of nationals of the occupant living in the territory prior to the establishment of a situation of occupation. Alternatively, there is the possibility of genuinely voluntary and independent settlement on the part of nationals of the occupant.¹⁷⁵

65. In either case, as a matter of factual reality there will thus be within the territory two groups – one comprising protected persons and one comprising non-protected persons. In thinking about the prohibition of apartheid, an initial question is whether the two groups may be considered ‘racial groups’ for the purposes of its definition. As set out previously, what matters, predominantly, is the subjective perceptions of the relevant communities and actors and whether those perceptions ground what is understood in the context as a distinction on the basis of race.¹⁷⁶ A second question concerns the issue of nationality and how it relates to the classification of the two groups as racial groups. In the situation under discussion, it may be asked whether the two groups – protected persons and non-protected persons living in the occupied territories – might in some cases be classified on the basis of nationality rather than race. Thus, writing in the context of the territories occupied by Israel, Zilbershats argues that ‘[t]o put it simply, the separation is not along racial lines but between Israeli citizens and Palestinians. It is a fact that the same law applies in the territories to an Israeli Arab of any religion and to an Israeli Jew.’¹⁷⁷ It might be suggested that the same point applies more generally.
66. It is certainly the case that there is a complicated relationship between nationality and race, including in ICERD.¹⁷⁸ But the mere fact that a distinction is based on nationality does not mean that differences in treatment cannot also entail a regime of oppression and domination by one racial group over another. In the present context, this point is evident in the rationale underlying states’ inclusion of Article 49(6) – the prohibition on transfers – in GCIV. As is widely noted, Article 49(6) was included as a response, in particular, to German practices of transferring their own nationals into occupied territory during the Second World War.¹⁷⁹ As Pictet puts it, the provision:

*is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.*¹⁸⁰

¹⁷⁴ Art 49(6) GCIV. See also Art 85(4)(a) API; and further Art 8(2)(b)(viii) Rome Statute: ‘The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.’

¹⁷⁵ On the scope of the duty not to transfer, see Arai-Takahashi (2009) 346–350.

¹⁷⁶ Lingaas, ‘Apartheid’ (2015) 101-102. See above [19].

¹⁷⁷ Zilbershats (2013) 921.

¹⁷⁸ See Art 1(2) ICERD and CERD, ‘General Recommendation XXX on Discrimination against Non-Citizens’ (2002). See further CERD, ‘Jurisdiction of the Inter-State communication submitted by Qatar against the United Arab Emirates’ CERD/C/99/3, 27 August 2019; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment of 4 February 2021.

¹⁷⁹ *Wall Advisory Opinion*, [120].

¹⁸⁰ Pictet Commentary (1958) 283.

67. In this light, there is no difficulty in understanding the institutionalized regimes that favoured Germans in those territories as regimes of racial domination. The same applies more widely: depending on the specific context, a state's differing treatment of a community of its nationals in occupied territory vis-à-vis a racial group constituting, or within, the category of protected persons may, in fact, entail a relationship of domination which the prohibition of apartheid seeks to prevent.
68. *Third*, there is the question of whether a system of apartheid can exist irrespective of the existence of a community of civilians who are non-protected persons living in the occupied territory. That is, can the requisite purpose be established on the basis of a relationship of domination between the state's own nationals – or group of its nationals – on its territory and a group in the occupied territory? As an initial response, it is hard to see why not. To give a historical example, the categorization of South Africa's policies in Namibia as a form of apartheid did not turn on the presence of white Namibians within the territory. Even without such a community and even if there had not been evidence of a *plan* to establish and maintain racial domination, the systematic rights violations of black Namibians by the South African government would have straightforwardly grounded an inference of the relevant purpose.
69. Why, then, might this scenario – the absence of a community of non-protected persons in the occupied territory – seem harder to envisage as constituting a situation of apartheid? There may be two reasons. First, it is clear that the law of occupation itself demands a difference in treatment as between these groups. This is the conservation principle.¹⁸¹ Indeed, the occupant is prohibited from extending its own laws to the occupied territory. This is to say that international law itself demands the application of different legal regimes to (groups of) individuals under a state's jurisdiction. Second, in certain circumstances international law, more generally, recognizes the permissibility of a state treating nationals and non-nationals differently.
70. On reflection, neither of these reasons excludes the application of the prohibition of apartheid in this situation. As to the first, it is certainly true that embedded in the law of occupation is the requirement of leaving existing laws in force and, implicitly, that the occupant will subject its own population to a different set of laws. But a requirement that two groups are subject to different laws does not necessarily entail a regime of domination. As discussed in detail above, the wrong of apartheid is constituted by the commission by the occupant of specific acts that infringe *rights* of the relevant group protected under international law, where those acts are committed with the purpose of racial domination. That there may be different legal regimes in place does not affect the requirement of certain standards of treatment under international human rights law.
71. As to the second, in relation to the protection of rights international law only permits a difference in treatment between nationals and non-nationals under a state's jurisdiction in certain, narrowly defined circumstances. As a general rule, as set out by the Human Rights Committee in General Comment 15, 'the rights set forth in the [ICCPR] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.'¹⁸² This is to say that the enjoyment of these rights must be 'available to all individuals, regardless of nationality or statelessness ...who may find themselves in the territory or *subject to the*

¹⁸¹ Art 43 Hague Regulations; Art 64 GCIV.

¹⁸² HRC, 'General Comment No. 15: The Position of Aliens under the Covenant', HRI/GEN/1/Rev.9 (1986), [1]. See e.g. Art 25 ICCPR in respect of certain rights of citizens.

*jurisdiction of the State Party.*¹⁸³ Thus, for instance, while non-nationals may be prevented from entering the territory of the state, they enjoy the right to life, protection against torture, the right to liberty, the right to leave, freedom of thought, assembly, and association, and so on.¹⁸⁴ Moreover, that a distinction between two groups is formally based on nationality does not mean that it may not, in a particular context, also entail differential treatment of two racial groups. The analysis set out in the preceding scenario is applicable here.

72. More widely, the key issue is this. Situations of occupation entail the subjection of a group of persons to the jurisdiction of a foreign state in relation to their enjoyment of a wide range of rights guaranteed by international law. Depending on the factual situation, that group may be perceived as a distinct racial group.¹⁸⁵ Where the occupant imposes measures or undertakes acts that violate the rights of the group as protected under international law, enumerated acts in the prohibition of apartheid will be committed. If the occupant's purpose in imposing the measures or undertaking the acts is to establish and maintain domination of one racial group – whether within the occupied territory or not – over the group subject to occupation, the wrong of apartheid will be committed.

73. Finally, it is worth drawing attention to Article 85(4) of Additional Protocol I. Article 85(4)(c) provides:

In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

...

(c) practices of 'apartheid' and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

74. This is to say that international humanitarian law itself prohibits apartheid. As a starting point, it makes sense to interpret 'practices of apartheid' in Article 85(4) in terms of the general prohibition in international law, as set out previously.¹⁸⁶ There is, however, one question of interpretation here.

- a. A narrow interpretation of Article 85(4)(c) of API would only encompass inhuman acts where the purpose is to establish a regime of racial domination *as between two groups of protected persons*. That is, it may be linked to general rule on non-discrimination in the application of international humanitarian law.¹⁸⁷ Bothe gives the example of the 'segregation on the basis of race in a prisoner of war camp.'¹⁸⁸

¹⁸³ HRC, General Comment 31, [10].

¹⁸⁴ HRC, General Comment 15, [7].

¹⁸⁵ Lingaas, 'Apartheid', (2015) 101–102.

¹⁸⁶ See similarly Sandoz et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), [3511]. The Commentary does note – [3512] – that API only refers to *practices* of apartheid rather than *policies* and practices. It is unlikely that much turns on this difference in practice.

¹⁸⁷ On the general rule, see Rule 88, ICRC, *Study on Customary International Humanitarian Law* (2005); Art 27 GCIV.

¹⁸⁸ Bothe, *New Rules for Victims of Armed Conflict: Commentary on Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd ed. 2013) 589.

- b. A wider interpretation would be that Article 85(4)(c) of API prohibits practices of apartheid imposed on a group of protected persons whether or not the other group also comprises protected persons. On this interpretation, as long as international humanitarian law is applicable,¹⁸⁹ practices that meet the definition of apartheid discussed above would violate international humanitarian law too.
75. The wider interpretation is the better one. Article 85(4)(c) of API picks out a particular kind of inhuman and degrading practice to which protected persons are not to be subject – that is, the violations of rights committed by the occupant with the purpose of establishing and maintaining racial domination and systematic oppression. There is no reason to think that the drafters intended to confine its application to a small subset of cases where an occupant is distinguishing among groups of protected persons.

F. Legal Consequences

76. The final question concerns the legal consequences that follow when a state violates the prohibition of apartheid in occupied territory. The legal consequences for the occupant itself and for other states will be taken in turn, with a focus on consequences under general international law rather than under any specific treaties.¹⁹⁰
77. As to the occupant, the breach of its international obligation entails its legal responsibility under international law.¹⁹¹ Responsibility, in this sense, entails the generation of new legal relations between the occupant and other states.¹⁹² Central to those new legal relations are the duties of cessation and reparation.
- a. The duty of cessation requires that the state bring to an end the continuing violation of international law. Cessation, then, ought to bring the state back into compliance with the primary obligation, the force of which is unaffected by the state's breach.¹⁹³ As to a situation of occupation, this will entail the repeal of legislation and/or abolition of the relevant practices.
 - b. The duty of reparation – or, the duty to make ‘full reparation for the injury caused by the internationally wrongful act’¹⁹⁴ – arises automatically on the commission of the wrongful act. As set out in *Factory at Chorzów*, full reparation is to be understood as entailing an obligation to, as far as possible, ‘wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.’¹⁹⁵ Injury, in this sense, includes ‘any damage, whether material or moral, caused by the internationally wrongful act.’¹⁹⁶

¹⁸⁹ See Art 2 GCIV; Art 1 API.

¹⁹⁰ States that are party to the Apartheid Convention may be under additional obligations – see, in particular, Art 4 Apartheid Convention.

¹⁹¹ Art 1 ARSIWA. For analysis of possible other obligations on the occupant itself, see Tams, ‘Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible States?’ (2002) 13 *EJIL* 1161.

¹⁹² Commentary to Art 1 ARSIWA, [4].

¹⁹³ Art 29 ARSIWA.

¹⁹⁴ Art 31(1), ARSIWA.

¹⁹⁵ *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29, 47.*

¹⁹⁶ Art 31(2), ARSIWA.

As to a situation of the imposition of an apartheid regime, reparation will likely entail extensive obligations of restitution and compensation.¹⁹⁷

78. This, then, leads to the question of which states may invoke the responsibility of the occupant in relation to the imposition of an apartheid regime. In this respect, it is important to distinguish the displaced sovereign state and third states.

- a. As to the displaced sovereign state, it is entitled, as a state injured by the breach, to invoke the responsibility of the occupant.¹⁹⁸ In the formal terms of the Articles on State Responsibility, it is specially affected in relation to the breach of an obligation owed to the international community as a whole.¹⁹⁹ On this basis, it is entitled to demand that the occupant complies with its duties of cessation and reparation, as well as take lawful countermeasures.²⁰⁰
- b. As to other states, of particular importance is the status of the prohibition of apartheid as an obligation owed *erga omnes* – an obligation which, ‘[i]n view of the importance of the rights involved’, all states have a legal interest in upholding.²⁰¹ On this basis, *all* states are entitled to claim cessation from the occupant, and are also entitled to claim performance of the obligation of reparation ‘in the interest of the injured State or of the beneficiaries of the obligation breached.’²⁰²

79. States other than the occupant also bear obligations under general international law in relation to the occupant’s imposition of an apartheid regime. First, Article 16 of the Articles on State Responsibility, which reflects a rule of customary international law,²⁰³ provides:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) *That State does so with knowledge of the circumstances of the internationally wrongful act;*
and
- (b) *The act would be internationally wrongful if committed by that State.*²⁰⁴

80. In the present instance, it goes without saying that sub-paragraph (b) is met – the prohibition of apartheid binds all states. Leaving that condition aside, the rule in Article 16 is breached where a state, knowing that the recipient state will impose, or is imposing,²⁰⁵

¹⁹⁷ See Art 34, ARSIWA.

¹⁹⁸ Art 42, ARSIWA.

¹⁹⁹ Art 42(b)(i), ARSIWA.

²⁰⁰ Art 42(3), ARSIWA.

²⁰¹ *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3, [33]. See also *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, [29] and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, p. 95, [180] on the *erga omnes* character of the right of peoples to self-determination, which may itself be relevant.

²⁰² Art 48(2)(b). There is also the possibility of the non-injured state taking countermeasures – see Dawidowicz, *Third-Party Countermeasures in International Law* (2017).

²⁰³ *Bosnian Genocide*, [420].

²⁰⁴ Art 16, ARSIWA.

²⁰⁵ A breach of the prohibition of apartheid is a continuing wrong – see Art 14(2), ARSIWA.

an apartheid regime, provides assistance to the occupant that contributes significantly to its imposition or maintenance.²⁰⁶ Three points may be developed here.

- a. First, as to the kind of assistance prohibited, the rule in Article 16 is broad: it covers all forms of material assistance.²⁰⁷ In essence, the rule is concerned with the provision, by the assisting state, ‘of means to enable or facilitate the commission’ of the principal wrong.²⁰⁸ It may be financial aid, logistical support, the provision of weapons or other equipment, or, indeed, the sharing of intelligence.²⁰⁹
- b. Second, the assistance must make a significant contribution to the principal wrong.²¹⁰ The rule in Article 16 does not entail a form of generalized responsibility for trading or cooperating with the wrongdoing state; it captures only assistance that contributes to the specific wrong – in this case the imposition and maintenance of the apartheid regime. In this respect, any determinations will necessarily be case-specific,²¹¹ and fine-grained.²¹²
- c. Third, the assisting state must *know* that the occupant is imposing policies and practices of apartheid. Although the Commentary to Article 16 suggests that the assistance must be provided ‘with a view to facilitating the commission of the wrongful act’,²¹³ the better view is that the textual standard – that of knowledge – is sufficient for responsibility.²¹⁴ As a starting point, knowledge may be taken to mean something like awareness with practical certainty of the relevant circumstances.²¹⁵ Responsibility would also arise in situations of what is often termed wilful blindness. As Lowe puts it, it is ‘unlikely that a tribunal would permit a State to avoid responsibility by deliberately holding back from inquiring into clear indications’ that it would be facilitating a wrongful act.²¹⁶

81. Alongside the rule reflected in Article 16, additional legal consequences may follow from the fact that the prohibition on apartheid is a peremptory norm. Articles 40 and 41 of the Articles on State Responsibility envisage particular consequences that flow from serious breaches of such a norm. Serious, in this sense, is defined in Article 40 as ‘a gross or systematic failure by the responsible State to fulfil the obligation’.²¹⁷ Given the definition

²⁰⁶ Commentary to Art 16 ARSIWA, [5].

²⁰⁷ Crawford, *State Responsibility: The General Part* (2013) 402.

²⁰⁸ See *Bosnian Genocide*, [419].

²⁰⁹ Lowe, ‘Responsibility for the Conduct of Other States’ (2002) 101 *Kokusaibo Gaiko Zasshi* 1, 5–6; Crawford (2013) 402.

²¹⁰ See also Commentary to Art 16 ARSIWA, [5] setting out need for a ‘clear link’.

²¹¹ Aust (2011) 216.

²¹² For assessment, see Aust (2011) 210–230; Moynihan, ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, Chatham House Research Paper (2016) 8–10.

²¹³ Commentary to Art 16 ARSIWA, [5].

²¹⁴ See Gaja, ‘Interpreting Articles Adopted by the International Law Commission’ (2015) 85 *BYIL* 10, 19–20 and further Jackson (2015) 159–162; Lanovoy (2016) 331.

²¹⁵ Jackson (2015) 161.

²¹⁶ Lowe (2002) 10.

²¹⁷ Art 40(2), ARSIWA.

of apartheid – the imposition of certain rights violations with the purpose of racial domination and systematic oppression – it is hard to imagine a situation where the imposition of an apartheid regime would not trigger the particular consequences set out in the serious breaches regime.²¹⁸

82. Those consequences are set out in Article 41 of the Articles on State Responsibility:

- (i) *States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.*
- (ii) *No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.*

83. On this basis, there are three duties on states other than the occupant in relation to the latter's imposition of an apartheid regime – cooperation, non-recognition, and non-assistance.²¹⁹ These may be taken in turn.

- a. As to the duty to cooperate to bring to an end the serious breach, the exact scope of the obligation is not easy to determine.²²⁰ In the main, the likely forum for cooperation is the United Nations – in particular, the General Assembly and Security Council.²²¹ In general terms, what is required is, within the bounds of international law, the 'joint and coordinated effort by all States' to bring to an end the occupant's imposition of an apartheid regime.²²²
- b. As to the duty of non-recognition, it is clear that the duty precludes express recognition of the situation as well as acts that would imply such recognition.²²³ Where an occupant has imposed a regime of apartheid in occupied territory, this would include entering treaty relations with the occupant in relation to the occupied territory, invoking or applying existing treaties in relation to the territory, and sending diplomatic or consular agents.²²⁴ The duty of non-recognition also prohibits states from 'entering into economic and other forms of relationship or dealings with' the occupant on behalf of or concerning the occupied territory 'which may entrench its authority' over it.²²⁵

²¹⁸ See similarly Commentary to Art 16 ARSIWA, [8].

²¹⁹ See also *Namibia Advisory Opinion*, [119]–[127]; *Wall Advisory Opinion*, [159].

²²⁰ Aust (2011) 352.

²²¹ See *Wall Advisory Opinion*, [160].

²²² Commentary to Art 41 ARSIWA, [3].

²²³ *Namibia Advisory Opinion*, [133]; Commentary to Art 41 ARSIWA, [5]. This duty – the duty of non-recognition – also applies to the occupant, notably with respect to acts of recognition aimed at consolidating the situation – see Commentary to Art 41 ARSIWA, [9].

²²⁴ *Namibia Advisory Opinion*, [122]–[123]. For further analysis, see Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?' in Tomuschat and Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (2005) 99.

²²⁵ *Namibia Advisory Opinion*, [124]. See further [125] in respect of certain matters the non-recognition of which would be only to the detriment of the population subject to the apartheid regime.

- c. As to the duty not to render aid or assistance in maintaining the apartheid regime, a central question is what it adds to the general rule on aid or assistance discussed above. For certain peremptory norms, a difference will lie in the fact that the duty in Article 41(2) concerns assistance rendered ‘after the fact’ of the wrongful act.²²⁶ This difference seems less relevant to the imposition of a regime of apartheid, which is itself a continuing breach. Leaving that aside, there are two differences. First, there is a relaxed subjective element.²²⁷ Article 41(2) requires neither intent nor actual knowledge on the part of the assisting state – the logic being that ‘it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.’²²⁸ Second, even though Article 41(2) presupposes a nexus between the aid and the maintenance of the breach, there is no requirement that it be ‘significant’ as with Article 16.²²⁹ The duty in Article 41(2) captures less salient contributions to the occupant’s maintenance of the regime.

G. Conclusion

84. This opinion has addressed the status, definition, and scope of the prohibition of apartheid in international law, as well as its interaction, in principle and practice, with the law of occupation. This interaction entails relationships of parallel protection, complementary protection, conflict avoidance through interpretation, and conflict. It also considered certain practical possibilities in situations of occupation, and set out the legal consequences that follow when an occupant imposes a regime of apartheid in occupied territory.
85. To conclude in practical terms: what does the prohibition of apartheid bring to situations of occupation in addition to international human rights law? First, the prohibition of apartheid comes with additional stigmatic effects on state conduct even where that conduct otherwise breaches international law. Those stigmatic effects may prompt engagement by political and legal actors in the international community beyond that ordinarily triggered by violations of international human rights law or the law of occupation. Second, in a situation of conflict between a permissive rule in the law of occupation and the prohibition of apartheid, the latter prevails. This is a straightforward consequence of the peremptory status of the prohibition of apartheid. And third, the prohibition of apartheid generates additional consequences in relation to state conduct that also breaches international human rights law or, as the case may be, the law of occupation. In addition to consequences relating to the responsibility of individuals, a matter not addressed in this opinion, *all* states are obligated to cooperate to bring to an end the occupant’s imposition of an apartheid regime, and to neither recognize the situation as lawful nor render aid or assistance in maintaining it.

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Oxford, March 2021

²²⁶ Commentary to Art 41 ARSIWA, [11].

²²⁷ Aust (2011) 341–342.

²²⁸ Commentary to Art 41 ARSIWA, [11]. See also Lanovoy (2016) 115 referring to a ‘presumption of knowledge.’

²²⁹ Lanovoy (2016) 116–117.