The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination

Miles Jackson*

Abstract

Despite recent and increasing attention to the wrong of apartheid in international politics, some basic definitional questions remain uncertain. This article seeks to delineate the definition of apartheid in international law. Its focus is on the prohibition of apartheid binding states in custom and the obligation in Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination. In both cases, the article shows that the Apartheid Convention of 1973 supplies their definition. Thereafter, the article addresses three key elements that will be central to determining an allegation of apartheid: its wrongful acts, its distinctive purpose requirement, and the issue of what constitutes a 'racial group'. Finally, the article also draws attention to the wider importance of the prohibition of apartheid in the international legal system. International law marks with particular normative significance a set of practices entailing systematic and structural harms that need not involve violations of life or bodily integrity.

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I. INTRODUCTION

In April 2018, the State of Palestine submitted to the Committee on the Elimination of Racial Discrimination an inter-state communication against Israel under Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[1] Amongst other claims, the communication asserted that 'a system of apartheid has developed' in the Occupied Palestinian Territories (OPT),[2] which would entail a violation of Article 3 of ICERD. More recently, reports by Palestinian, [3] Israeli, [4] and international non-governmental organizations have invoked the same term in relation to Israel's practices in the OPT,[5] and Human Rights Watch's report on Myanmar's mass detentions of Rohingya explicitly

*Associate Professor of Law, University of Oxford. I am grateful to the editors and reviewers, and to Eleni Methymaki, Marko Milanović, Tsvetelina van Benthem, Massimo Lando, Dapo Akande, Sophie Ryan, and Antonios Tzanakopoulos for their comments and assistance. In part, this article builds on certain arguments I made in an opinion on the relationship between the prohibition of apartheid and the law of occupation commissioned and published by Diakonia International Humanitarian Law Centre in 2021. All errors are my own.

[1] ICERD, 'Communication submitted to the Committee on the Elimination of All Forms of Racial Discrimination by the State of Palestine pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination' (23 April 2018) ICERD-ISC-2018/3.

[2] ibid para 623.

[3] Al-Haq *et al.*, *Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports* (Report, 10 November 2019).

[4] Yesh Din, 'The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion' (June 2020).

[5] Human Rights Watch, 'A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution' (Report, 27 April 2021); Amnesty International, 'Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity' (Report, 1 February 2022). For a critical reflection, see N Sultany, 'The Question of Palestine as a Litmus Test: On Human Rights and Root Causes' (2021) 23 PYIL (forthcoming).

condemns a 'regime of apartheid' in Rakhine State.[6] In addition, Azerbaijan's application instituting proceedings against Armenia at the International Court of Justice, filed on 23 September 2021, alleges a violation of Article 3 of ICERD – the duty on state parties to 'prevent, prohibit and eradicate all practices' of racial segregation and apartheid in territories under their jurisdiction.[7] Three decades on from the formal end of apartheid in South Africa, the international wrong those practices generated is again at the forefront of legal and political argument.

Despite this increased attention, there remain a number of uncertainties as to the elements of the prohibition – including the basic question of its definition in international law. In part, this is a consequence of the fact that certain instruments referring to apartheid leave the term undefined or, where definitions are provided, those definitions differ *inter se*. Thus, as noted above, under Article 3 of ICERD state parties 'undertake to prevent, prohibit and eradicate all practices [of apartheid] in territories under their jurisdiction.'[8] The term, however, is not defined. Likewise, Article 85(4)(c) of Additional Protocol I (API) of 1977 to the Geneva Conventions, includes 'practices of "apartheid"' as a grave breach of the protocol but does not provide a definition.[9] By contrast, the Apartheid Convention of 1973, which imposes on state parties obligations of prevention and prosecution, does include a detailed definition in Article 2.[10] This definition, however, differs from that in the Rome Statute of the International Criminal Court, under which apartheid is an act constituting a crime against humanity.[11] In addition to these complications arising under treaty law, there remains the question of the scope of the prohibition of apartheid binding states in customary international law.

In this light, after some preliminary points in Section 2, the first aim of this article is to delineate the definition of apartheid in international law. This is done in Section 3. The focus is on two obligations binding *states*: the obligation of all states in custom and the obligation of state parties under Article 3 of ICERD.[12] The central claim in Section 3 is that for both of these rules, the Apartheid Convention of 1973 provides the definition of the wrong. As will be seen, this entails, in essence, the commission of human rights violations with the purpose of

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[6] Human Rights Watch, *"An Open Prison without End": Myanmar's Mass Detention of Rohingya in Rakhine State* (Report, 8 October 2020) 119–136.

[7] *Interpretation and Application of the International Covenant on the Elimination of All Forms of Racial Discrimination (Republic of Azerbaijan v. Republic of Armenia)* (Application Instituting Proceedings) 23 September 2021, para 97 <https://www.icj-cij.org/en/case/181/institution-proceedings>. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Application Instituting Proceedings) 16 September 2021, para 97 <https://www.icj-cij.org/en/case/180/institution-proceedings>.

[8] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (concluded 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

[10] International Convention on the Suppression and Punishment of the Crime of *Apartheid* (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (Apartheid Convention) art 2.

[11] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 7(1)(j), 7(2)(h). 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 (adopted 27 June 2014) (Malabo Protocol) art 28(C)(1)(j), 28(C)(2)(h).

[12] That is, the focus is not on *individual* criminal responsibility for apartheid as prescribed in the Rome Statute.

establishing and maintaining racial domination and systematic oppression. In addition, I argue that the negotiation and adoption of the Rome Statute, a criminal law instrument with a different definition of apartheid, did not affect the scope of states' pre-existing obligations under custom or Article 3 of ICERD.

Thereafter, in Section 4, I address three key elements of the definition set out in Section 3, each of which will be central to determining an allegation of apartheid. First, I briefly explore the wrongful acts of apartheid – and in particular, the broad reference, in Article 2(c) of the Apartheid Convention, to '[a]ny 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.'[13] Second, there is the question of what exactly is entailed in the idea of a *purpose* of establishing and maintaining racial domination. As with genocide, this distinctive mental element is likely to be a primary issue in any dispute about apartheid. In this respect, I also discuss what might ground an inference of such a purpose. And third, I address the question of what is meant by the term 'racial group' in the definition of apartheid. After all, it is a particular kind of racial discrimination, distinctively, that is the subject of regulation.

Finally, Section 5 addresses certain wider implications of the growing attention to the wrong of apartheid. First, it suggests that even though practices that constitute the wrong of apartheid will in any event be wrongful under other rules of international law, its proper delineation and application matter for three reasons. These concern law's expressive function, the potential political effects of the term, and, legally, the consequences that flow from the prohibition on apartheid's status as a peremptory norm. Second, in addition to bringing the question of racial discrimination to the fore, appreciation of the wrong of apartheid is also important in understanding what kinds of violence and harm international law marks out as having particular significance. More specifically, here is a set of practices both criminalized, for individuals, and subject to the aggravated responsibility regime, for states, that does not necessarily involve violations of life or bodily integrity. Rather, the wrong captures systemic and structural forms of discrimination that destroy equality and freedom.

II. THE STATE PROHIBITION ON APARTHEID – EXISTENCE AND SCOPE

Two preliminary issues arise. These concern the existence of the prohibition in ICERD and customary international law and the issue of territorial scope. These are taken in turn.

A. Apartheid in ICERD and Custom

The international legal regulation of apartheid emerged in the 1950s and 1960s with growing recognition by states of the abhorrence of South Africa's practices of institutionalised racial discrimination.[14] In relation to treaty law, as Thornberry notes, this recognition was important in creating political impetus for the drafting of ICERD in the mid-1960s.[15] As noted above, in addition to an explicit reference to apartheid in the Preamble, Article 3 of ICERD provides:

[13] Apartheid Convention, art 2(c).

[14] For an overview, see J Gebhard, 'Apartheid' (MPEPIL, 2018).

[15] P Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016) 236.

> 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.

As treaty law, Article 3 of ICERD obviously binds only state parties – a number that stands today at 182.[16]

Contemporaneously to the drafting of ICERD, and channelled through the United Nations, states increasingly articulated their opposition to apartheid. Thus emblematically,[17] UN General Assembly Resolution 2396 of 1968, adopted by 85 votes to 2 with 14 abstentions, repeated its 'condemnation of the policies of *apartheid* practiced by the Government of South Africa as a crime against humanity.'[18] In the Security Council, Resolution 282 of 1970 reiterated the Council's '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.'[19] As time passed, states' views on the question approached unanimity – UNSC Resolution 473 of 1980, for instance, unanimously reaffirmed the criminality of apartheid and called for its end.[20]

As in other cases, it is not easy to pinpoint exactly when the customary prohibition crystallized.[21] This question of pinpointing the moment of crystallisation, however, is more of historical interest than contemporary relevance,[22] for it is beyond serious doubt that by the late 1970s the customary rule had formed – there is no doubt that there arose a general acceptance among states that apartheid is a prohibited political system. This series of resolutions in the General Assembly and Security Council was of a declarative and normative character in relation to the wrongfulness of apartheid,[23] and garnered increased support as time passed.[24] Moreover, it is impossible to find a single state which today defends, as a matter of law, the

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[16] United Nations Treaty Collection, 'International Convention on the Elimination of All Forms of Racial Discrimination' (status as at 28 May 2022).

[17] For a full list, see Gebhard (n 14).

[18] UNGA Res 2396 (XXXIII) (2 December 1968) UN Doc A/Res/2396, para 1. The UN General Assembly first described *apartheid* as 'a crime against humanity' in 1966: see UNGA Res 2202 (XXI) (16 December 1966) UN Doc A/Res/2202(XXI), para 1 (The General Assembly '[*c*]*ondemns* the policies of apartheid practised by the Government of South Africa as a crime against humanity'). Previously, the UNGA's Declaration on the Elimination of All Forms of Racial Discrimination of 1963 called for an 'end … without delay' to policies of racial segregation and apartheid - UNGA Res 1904 (XVIII) (20 November 1963) UN Doc A/Res/18/1904.

[19] UNSC Res 282 (23 July 1970) UN Doc S/Res/282. Resolution 282 was adopted by 12 votes to 0, with three abstentions. See also UNSC Res 417 (31 October 1977) UN Doc S/Res/417, para 3(f), adopted unanimously, demanding 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.'

[20] UNSC Res 473 (13 June 1980) UN Doc S/Res/473.

[21] See further J Crawford and T Viles, 'International Law on a Given Day' in J Crawford (ed), *International Law as an Open System: Selected Essays* (Cameron May 2002) 69–94.

[22] Cf *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 142.

[23] ibid paras 152-153.

[24] In addition, the first part of Article 3 of ICERD – 'States Parties *particularly condemn* racial segregation and apartheid…' – may be understood as giving the provision a 'fundamentally norm-creating character', thus contributing to the formation of a customary rule: see *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3, para 72.

permissibility of institutionalised practices of racial discrimination of this kind. As the ILC's Special Rapporteur on Peremptory Norms of General International Law put it, the response of the international community amounted to the 'complete and total rejection of the policy of apartheid and the discriminatory practices attendant to it.'[25]

B. The Territorial Scope of the Wrong

States have accepted that the wrong of apartheid may be committed within or outside of a state's own borders. As to the customary rule, this emerges from the international community's condemnation of South Africa's practices in South West Africa, both before[26] and after[27] the termination of the League of Nations mandate.[28] UN Security Council Resolution 282, for instance, reiterates '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.' In short, there is no reason to think the customary rule is limited to the state's own territory.[29]

As to ICERD, in contrast to the general absence of a territorial limitation in the treaty,[30] Article 3 requires state parties (only) to 'prevent, prohibit and eradicate [apartheid] *in territories under their jurisdiction*.' Interpreting this clause, Thornberry notes that the 'practice under Article 3 merges into the broader CERD archive of applying the Convention extraterritorially' – that is, it extends, in particular, to 'cases of occupation or control of territory' abroad.[31] Although Article 3 entails a model of extraterritorial application that remains bound to territorial control, as opposed to more expansive models of personal control[32] or cause-and-effect[33], this is not likely to matter in practice. Paradigmatically, a situation in which a state is able to impose an

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[25] ILC, 'Fourth Report on Peremptory Norms of General International Law (Jus Cogens) by D Tladi, Special Rapporteur' (31 January 2019) UN Doc A/CN.4.727, para 98. The ILC's draft conclusions, adopted by the Drafting Committee on 2nd reading on 11 May 2022, includes in its annex of norms that the ILC has previously referred to as having peremptory status: 'The prohibition of racial discrimination and apartheid.'

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

[27] UNSC Res 282 (23 July 1970) UN Doc S/Res/282.

[28] UNGA Res 2145 (XXI) (27 October 1966) UN Doc A/Res 2145; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 106.

[29] See further M Longobardo, 'Preliminary but Necessary: The Question of the Applicability of the Notion of Apartheid to Occupied Territory' (*Just Security*, 2 December 2021) <https://www.justsecurity.org/79381/preliminary-but-necessary-the-question-of-the-applicability-of-the-notion-of-apartheid-to-occupied-territory/>.

[30] See *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* (Provisional Measures Order) [2008] ICJ Rep 353, para 109.

[31] Thornberry (n 15) 259. For a recent application, see CERD Committee, 'Decision adopted by the Committee under article 14 of the Convention, concerning communication No. 59/2016', *Anne Nuorgam et al v. Finland,* CERD/C/95/D/59/2016, paras 7-8.

[32] See e.g. ECtHR, *Al-Skeini and Others v United Kingdom,* App No. 55721/07 (7 July 2011).

[33] See e.g. UNHRC, 'General Comment 36, Article 6 (Right to Life)' (30 October 2018) UN Doc CCPR/C/GC/36, para 63.

institutionalized regime of racial discrimination will be one in which it controls the relevant territory.[34]

III. THE DEFINITION OF APARTHEID IN INTERNATIONAL LAW

A. Introduction

Leaving those preliminary questions, this section turns to the question of definition. As noted above, the term 'apartheid' is not defined in ICERD, nor in any of the contemporaneous United Nations resolutions employing the term.[35] The application of the rule on interpretation in Article 31(1) of the VCLT to Article 3 of ICERD is also of little use beyond confirming, through the term itself, a connection to South Africa and that it is distinctive, in some way, from racial discrimination generally.[36] Likewise, in relation to the customary rule the practice itself does not provide a precise definition. Of course, the target of the international community's condemnation were the racially discriminatory policies of the South African state that intensified after the National Party's election in 1948.[37] In the words of the United Nations Special Committee on the Policies of Apartheid, this 'mass of discriminatory and repressive legislation'[38] instantiated a regime of racial oppression in the country.[39] The question, though, is whether it is possible to provide a more detailed definition. To answer this question, it is necessary to consider whether the definitions set out in international treaties concluded after ICERD that *do* define apartheid – principally, the Apartheid Convention and the Rome Statute – are relevant to delineating the state prohibition in custom and ICERD.

B. The Relevance of the Apartheid Convention

The Apartheid Convention, negotiated and drafted in the Third Committee of the United Nations between 1971 and 1973, was an important part of the General Assembly's action against apartheid in South Africa. In Dugard's terms, this was 'the ultimate step in the condemnation of apartheid as it not only declared that apartheid was unlawful because it violated the Charter of the United Nations, but in addition it declared apartheid to be

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[34] For consideration of the interaction between the prohibition of apartheid and the law of occupation, see M Jackson, 'Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law' (March 2021) < https://www.diakonia.se/ihl/news/expert-opinion-occupation-palestine-apartheid/>.

[35] The ICJ also did not define the term in its 1971 *South West Africa* Advisory Opinion, in which it found apartheid as applied by South Africa in Namibia violated the UN Charter: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 131.

[36] In addition, in the Third Committee of the United Nations, where Article 3 was adopted unanimously, there is no discussion of any value on the meaning of the term: see (18 October 1965) UN Doc A/C.3/SR.1308.

[37] This is clearly evident in not only the UN resolutions, but also the drafting history of the 1963 Declaration, ICERD, and the Apartheid Convention: see, e.g., UNGA, Official Records of the Eighteenth Session, 1261st Meeting (20 November 1963). For an assessment of racial policies prior to the Union of South Africa in 1910, see B Magubane, *The Making of a Racial State: British Imperialism and the Union of South Africa 1875-1910* (Africa World Press, 1996).

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

[39] Report of the Special Committee (1963) paras 441–459.

criminal.'[40] In Article 2, the Convention sets out a definition – the first enshrined in a treaty – of apartheid in the following terms:

> 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:
>
> 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; [41]
>
> 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;
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> 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;
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> 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.[42]

Here, then, is a definition of apartheid. The question, though, is whether this definition informs states' obligations under custom and Article 3 of ICERD.

In this respect, there are some reasons for caution. First, conceptually, it cannot be assumed that the definition of a term in a later convention necessarily determines the scope of existing or crystallising obligations framed by the same term under earlier treaties or in custom. Second, and relatedly, it is possible for states to establish *criminal* responsibility for individuals only in relation to a narrower range of conduct than that proscribed under a (concurrent) rule binding

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[40] J Dugard, 'Introductory Note: Convention on the Suppression and Punishment of the Crime of Apartheid' (UNALIL, 2008) <https://legal.un.org/avl/ha/cspca/cspca.html>.

[41] Cf Convention on the Prevention and Punishment of the Crime of Genocide (entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 2(c).

[42] Apartheid Convention, art 2(a)–(f).

the state,[43] or, indeed, try to make clear that the two norms should be kept separate.[44] Third, as to the breadth of state participation, the Apartheid Convention was not immediately or later universally ratified. Today, it has 110 state parties.[45]

Though these are reasons for proceeding cautiously, the more convincing view is that the definition in the Apartheid Convention does give content to both the customary prohibition on apartheid and to the rule in Article 3 of ICERD. These will be taken in turn, for they implicate different issues.

To start with the customary rule, the drafting and adoption of the Apartheid Convention was part and parcel of the same process, centred in the General Assembly, that led to its crystallization. Indeed, this is evident in the Preamble to the Apartheid Convention itself, which refers explicitly to resolutions of both the General Assembly and Security Council condemning apartheid. [46] There is no evidence indicating that states had in mind two concepts in this process – that is, one definition in relation to the crystallizing customary prohibition binding states and another, different definition for the attempt at criminalization in the Apartheid Convention. Indeed, to the contrary, there are indications in the preparatory works that States had in mind a concept of apartheid that was one and the same as that contemplated in previous instruments and international discussions.[47]

Moreover, as to the extent of state support 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 against, with 21 abstentions.[48] That is, there was broad agreement among states on the meaning of the term, and no concerted support amongst those abstaining to propose a

[43] Cf AP I, art 51; Rome Statute, art 8(2)(b)(iv).

[44] 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 (31 May – 11 June 2010) RC/Res.6; see further ILA, 'Final Report on Aggression and the Use of Force' (2018). For a wider discussion, see R O'Keefe, *International Criminal Law* (OUP 2015) 47–83.

[45] United Nations Treaty Collection, 'International Convention on the Suppression and Punishment of the Crime of Apartheid' (status as at 28 May 2022). On the non-ratification by Western states, see P Eden, 'The Role of the Rome Statute in the Criminalization of Apartheid' (2014) 12 JICJ 171, 179; Gebhard, (n 14), para 26.

[46] See also Apartheid Convention, arts 6, 7.

[47] See e.g. UNGA Third Committee, Summary Records of the 2004th Meeting (23 October 1973) UN Doc A/C.3/SR.2004, para 7 (where the representative of Romania, Mr Chirila, stated that '[i]n the light of the references to *apartheid* in the United Nations instruments and resolutions mentioned in the preamble to the draft Convention, it could be said that *apartheid* was already regarded in international law as constituting a crime against humanity. The purpose of the draft Convention was to reflect that development in international law and embody it in a legal instrument. In that context, article II determined in a comprehensive and precise way the acts which constituted the crime of *apartheid*'). See also UNGA Third Committee, Summary Records of the 2005th meeting (24 October 1973) UN Doc A/C.3/SR.2005, para 25 (representative of Mongolia describing the Convention as a 'logical follow up to the instruments and resolutions adopted by the United Nations during the previous 20 years'); UNGA Third Committee, Summary Records of the 2006th meeting (25 October 1973) UN Doc A/C.3/SR.2006, para 12 (representative of the Ukrainian Soviet Socialist Republic noting that '*[a]partheid* had always been regarded as a crime against humanity' and that '[t]he purpose of the draft Convention was to define that crime precisely and provide for its punishment'), para 24 (representative of the Byelorussian Soviet Socialist Republic noting that '[u]nder the draft Convention, *apartheid* was viewed as a crime which violated existing norms of international law and the fundamental principles and purposes of the United Nations' and that 'article II… for the first time in international law gave a definition of the policy and practice of *apartheid*').

[48] (19 November 1973) UN Doc A/9233/Add.1. The Convention itself was adopted by 91 votes to four, with 26 abstentions – see Dugard (n 40). In 1973, there were 135 members of the United Nations.

different definition.[49] This is, in the terms of the ILC, a 'sufficiently widespread and representative' practice on the question of definition.[50] On this basis, the definition negotiated by states in the drafting of the Apartheid Convention should be understood to simultaneously inform the customary obligation.

The next question is whether the same applies in relation to Article 3 of ICERD. Here, the analysis is more complicated, for we are dealing with the effects of later conduct of states on a pre-existing treaty obligation – that in Article 3 of ICERD. To recall, Article 3 of ICERD, which entered into force on 4 January 1969, imposes a duty on state parties to 'prevent, prohibit and eradicate' all practices of apartheid in territories under their jurisdiction, but leaves the term undefined. Is the definition in the Apartheid Convention relevant to this provision?

In short, the answer is yes. In the process of negotiating and drafting the Apartheid Convention, states likewise made it clear that they had in mind the pre-existing treaty obligation in ICERD. Thus, the Preambles in each of the first draft submitted by Guinea and the Soviet Union to the Third Committee on 5 November 1971,[51] the revised draft submitted by Guinea, Nigeria, and the USSR on 24 October 1972,[52] and the final text adopted in 1973 refer explicitly to states' obligation under ICERD.[53] In relation to the latter, the 4th recital in the Preamble provides: 'Observing that, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination, States particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.'[54] In other words, the best way to understand the Apartheid Convention is as an attempt to criminalize – with a co-extensive definition – a particular practice already prohibited in treaty law under ICERD.[55]

In formal terms, for those states that were parties to ICERD at the time of this negotiation, their participation in the drafting and adoption of the Apartheid Convention may be understood as subsequent practice relevant to the interpretation of the treaty rule, as provided for in Articles

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[49] Those States that subsequently made statements explaining their decision to abstain mainly cited concerns of the desirability and feasibility of establishing universal jurisdiction in their domestic laws for *apartheid* 'so broadly defined': see, e.g., UNGA Third Committee, Summary Records of the 2008th meeting (26 October 1973) UN Doc A/C.3/SR.2008, paras 10–11 (Spain), 14 (Canada), 23 (Japan), 30 (Italy), 37 (New Zealand), and 44 (Costa Rica), although cf para 19 (United Kingdom).

[50] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) II(2) YILC Conclusion 8.

[51] UNGA Third Committee, 'Guinea and Union of Soviet Socialist Republics: draft of a Convention on the suppression and punishment of the crime of apartheid' (28 October 1971) UN Doc A/C.3/L.1871.

[52] UNGA Third Committee, 'Guinea, Nigeria and the Union of Soviet Socialist Republics: revised draft Convention on the suppression and punishment of the crime of apartheid' (24 October 1972) UN Doc A/C.3/L.1942/Rev.1.

[53] UNGA Third Committee, 'Draft Convention on the Suppression and Punishment of the Crime of Apartheid' (19 November 1973) UN Doc A/9233/Add.1, preambular para 4. This recital was adopted without opposition.

[54] ICERD, preambular para 4.

[55] Statements by States in the Third Committee can also be read as confirming this interpretation. See, e.g., UNGA Third Committee, Summary Records of the 2004th meeting (23 October 1973) UN Doc A/C.3/SR.2004, paras 7 (Romania), 25 (Mongolia), 26 (Algeria); UNGA Third Committee, Summary Records of the 2006th meeting (25 October 1973) UN Doc A/C.3/SR.2006, paras 12 (Ukrainian Soviet Socialist Republic), 20 (USSR), 24 (Byelorussian Soviet Socialist Republic), cf para 19 (United Kingdom rejecting 'the basic assumption of the draft Convention, namely, that *apartheid* was a crime against humanity').

31(3)(b) and 32 of the VCLT.[56] In this respect, the ILC's recent work on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties provides the following definitions:

> A subsequent practice as an authentic means of interpretation under article 31, paragraph 3(b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.[57]
>
> A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.[58]

As the ILC explains, such practice may take a range of forms, and includes statements or conduct on the international plane that indicate how the treaty is to be interpreted.[59]

In the present instance, it may be that states' conduct in the Third Committee and General Assembly does not quite meet the threshold of establishing 'the agreement of *all* the parties' to ICERD at the time,[60] as required by Article 31(3)(b) of the VCLT.[61] In this regard, the Brazilian delegate, for instance, expressed 'serious misgivings' about the definition in the draft Convention,[62] and there remains the fact that the United Kingdom, also a party to ICERD at the time, voted against the adoption of the Convention in the General Assembly.[63] Even so, it is clear that for a large majority of states, the definition negotiated and adopted in Article 2 of the Apartheid Convention represented their understanding of the meaning of the term, relevant to the interpretation of Article 3 of ICERD as subsequent practice under Article 32 VCLT.[64] In this respect, as before, the definition itself was adopted by 88 votes to three, with 21 abstentions, where many of the states voting in favour were also parties to ICERD.[65] As to the voting in the General Assembly itself, the Convention was adopted by 91 votes to four, with 26 abstentions. Moreover, there was no contemporaneous attempt by another group of states

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[56] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) arts 31(3)(b), 32.

[57] ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (2018) II(2) YILC (Draft Conclusions) Conclusion 4(2).

[58] ibid Conclusion 4(3).

[59] ibid Commentary to Conclusion 4, para 35.

[60] ibid Commentary to Conclusion 4, para 16.

[61] VCLT art 31(3)(b). To be clear, it is not that *practice* of all the parties is required, but rather that agreement of those parties is required. See, in relation to silence constituting acceptance, Conclusion 10.

[62] UNGA Third Committee, Summary Records of the 2008th meeting (26 October 1973) UN Doc A/C.3/SR.2008, 165 para 17.

[63] Dugard (n 40). The United Kingdom ratified ICERD on 7 March 1969. See also UNGA Third Committee, Summary Records of the 2006th meeting (26 October 1973) UN Doc A/C.3/SR.2007, para 51 (United States); UNGA Third Committee, Summary Records of the 2008th meeting (26 October 1973) UN Doc A/C.3/SR.2008, paras 10–11 (Spain), 19 (United Kingdom), 37 (New Zealand).

[64] VCLT, art 32. For a reflection on the distinction between Article 31(3)(b) and Article 32 VCLT (and, more widely, between sources of law and interpretation), see J D'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and Interpretation' (2016) 27 EJIL 1027.

[65] The Report of the Third Committee does not record the identity of the three states voting against the definition.

to establish an alternative definition. Although this practice is not unanimous, its overwhelming weight and specificity, establishes its relevance to the interpretation of Article 3 of ICERD.[66]

This argument helps to determine the meaning of Article 3 of ICERD at the time of the drafting of the Apartheid Convention. Since then, and leaving aside the issue of the Rome Statute addressed in the next sub-section, there is no evidence of contrary practice that changes this conclusion. As Thornberry notes, since South Africa's transition to democracy, 'clearer specification of the meaning of apartheid has hardly been forthcoming in CERD practice.'[67] In its Concluding Observations on Israel's Periodic Reports, for instance, the Committee has referred to Article 3 of the Convention without distinguishing its elements of racial segregation and apartheid,[68] and without any exposition of apartheid's meaning.[69] Israel's most recent submission, itself, contains no discussion of the meaning of the term,[70] and in respect of the periodic reports of other states, it is difficult to glean anything of particular value other than that certain states report their domestic criminalization of apartheid, drawing on the definition in the Apartheid Convention, as evidence of their compliance with Article 3.[71] In relation to individual communications under Article 14 of ICERD, the single complaint that has alleged a breach of Article 3 was found, in relation to that aspect of the claim, to be inadmissible.[72] Finally, there is the ongoing interstate communication between Palestine and Israel, filed in 2018.[73] Here, Palestine takes the view set out above – it holds that the Apartheid Convention 'provides the best definition for the purposes of interpreting Art. 3 CERD.'[74]

C. The Impact of the Rome Statute?

There remains, however, one final question about the meaning of apartheid in custom and Article 3 of ICERD: the potential relevance of the negotiation and adoption of the Rome Statute in 1998. Article 7(1)(j) of the Statute includes 'the crime of apartheid' as an act constituting a crime against humanity. Article 7(2)(h) then defines the 'crime of apartheid' as:

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[66] See ILC, Draft Conclusions (n 57) Conclusion 9(3).

[67] Thornberry (n 15) 260.

[68] ibid 257.

[69] See e.g. CERD, 'Consideration of reports submitted by States parties under article 9 of the Convention' (9 March 2012) UN Doc CERD/C/ISR/CO/14-16, para 24; CERD, 'Concluding observations on the combined seventeenth to nineteenth reports of Israel' (27 January 2020) UN Doc CERD/C/ISR/CO/17-19, para 23.

[70] CERD, 'Concluding observations on the combined seventeenth to nineteenth reports of Israel' (27 January 2020) UN Doc CERD/C/ISR/17-19, para 54.

[71] See e.g. CERD, 'Reports submitted by States Parties under Article 9 of the Convention, Bulgaria' (5 August 1996) UN Doc CERD/C/299/Add.7, paras 25–28; CERD, 'Reports submitted by States Parties under Article 9 of the Convention, Cuba' (30 January 2010) UN Doc CERD/C/CUB/14-18, paras 106–110. States also regularly refer in their periodic reports to the fact of being a party to the Apartheid Convention as evidence of their compliance with Article 3: see, e.g., CERD, 'Consideration of reports submitted by States Parties under Article 9 of the Convention, Argentina' (23 January 1997) UN Doc CERD/C/299/Add.11, para 36; CERD, 'Reports submitted by States Parties under Article 9 of the Convention' (6 November 2012) UN Doc CERD/C/BFA/12-19, para 43.

[72] CERD, Communication No. 46/2009, *Mahali Dawas and Yousef Shava* (2 April 2012) para 6.2.

[73] ICERD Communication by the State of Palestine (n 1).

[74] ibid para 586. See also para 593 (referring to 'Art. 2 of the Apartheid Convention as a primary interpretative tool for the content of the international legal definition of apartheid').

> [I]nhumane acts of a character similar to those referred to in paragraph 1,[75] 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.[76]

For present purposes, the context requirement – the existence of an institutionalised regime – creates an important difference from the definition in the Apartheid Convention.[77] It is true that the Apartheid Convention refers to 'systematic oppression', and it is also true that an institutionalized regime is almost certainly how a state would give effect to such oppression. But, formally, under the definition in the Apartheid Convention, it is in the mental element that the systematic aspect of the wrong is located – in the state agents' goals.[78] A state whose purpose is to establish a regime of systemic oppression on racial grounds breaches the prohibition of apartheid as set out in the Apartheid Convention *as soon as* it imposes the first of the measures that constitute the enumerated acts of the wrong.[79] On that definition, the existence of an institutionalised regime is not a pre-requisite.

The question, then, is whether states' negotiation, drafting, and adoption of the Rome Statute affected their pre-existing obligations under custom or ICERD – whether the requirement of the context of institutionalised oppression now applies to those rules too. The answer is no. In this respect, the key point is that there is no evidence to suggest that states in Rome understood themselves to be negotiating a definition for the purposes of the Rome Statute *and* that would be relevant to their pre-existing obligations under custom or under Article 3 of ICERD.[80] In other words, this is simply not practice relevant to the customary prohibition or 'conduct [of parties to ICERD] in the application of the treaty,'[81] as would be necessary to render it relevant to interpreting Article 3. This distinguishes the present situation from that set out above concerning the negotiating of the Apartheid Convention. That is prior to additional, formal, questions of interpretation that would concern the weight of any such subsequent practice in determining the meaning of the pre-existing rule,[82] or the generality of that practice for changing the customary rule.

In the absence of such evidence, the delineation of the crime of apartheid for the purposes of the Rome Statute does not affect the scope of existing state obligations. That is, the state wrong

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[75] These are (a) murder, (b) extermination, (c) enslavement, (d) deportation or forcible transfer, (e) imprisonment, (f), torture, (g) forms of sexual violence, (h) persecution, (i) enforced disappearance, … and (k) '[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[76] Rome Statute, art 7(2)(h).

[77] For discussion of other differences, see L Van den Herik and R Braga da Silva, 'Article 7 – Crimes against Humanity - Apartheid' in K Ambos (ed), *Rome Statute of the International Criminal Court* (4th ed., Hart/Beck/Nomos 2022).

[78] That is, if the relevant purpose exists, responsibility arises with the imposition of the *first* set of repressive measures.

[79] Jackson (n 34) para 25.

[80] For a detailed account, see Eden (n 45). Eden notes in summary that '[t]he sub-group of delegates that worked on the consensus language did not consider themselves bound by the definition in the Apartheid Convention': ibid 97.

[81] ILC, Draft Conclusions (n 57) Draft Conclusion 4.

[82] See generally ILC, Draft Conclusions (n 57).

and the international crime under the Rome Statute are not identical. Although this does make any introduce a degree of complexity into the analysis, it is neither conceptually nor practically problematic.[83]

IV. THREE KEY ISSUES

With this definition in mind, Section 4 turns to three key elements of the prohibition of apartheid. First, there is the question of the enumerated acts, as set out in Article 2 of the Apartheid Convention. Second, there is the fault element and, in particular, the question of what is meant by the term 'purpose' in the definition – in the sense that the state's *purpose* must be to establish and maintain domination and systematic oppression. Third, and finally, there is the question of what is meant by a 'racial' group – the intended domination must be by one racial group of persons over any other racial group of persons. One issue, here, concerns the meaning of the term 'race'; a second concerns its relationship with nationality or citizenship.

A. The Wrongful Acts of Apartheid

As set out above, apartheid under both Article 3 of ICERD and custom comprises, in the first place, sets of what the Apartheid Convention calls 'inhuman acts.' These acts are broadly defined and cover quite different forms of conduct. For the most part, these enumerated acts concern violations of fundamental rights under international law – a link reinforced by the Preamble's reference to the Universal Declaration of Human Rights. The content of these rights – and thus the enumerated acts – may be determined by reference to the International Covenant on Civil and Political Rights[84] and the International Covenant on Economic, Social and Cultural Rights,[85] as well as broadly ratified issue-specific instruments. In these conventions and instruments, the rights have undergone detailed development.

Thus, to draw out some examples: under Article 2(a) of the Convention, apartheid might be constituted by the 'denial to a member or members of a racial group or groups of the right to life and liberty of person.' In its sub-categories, the Convention refers to 'murder', 'infliction of serious bodily or mental harm', and 'arbitrary arrest and illegal imprisonment.'[86] In determining the meaning of arbitrary arrest and illegal imprisonment, for instance, reference may be made to the close exposition of standards in the Human Rights Committee's General Comment 35.[87] In Article 2(e) the Convention singles out the specific practice of: 'exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour.'[88] In this respect, standards developed by the Human Rights Committee in relation to Article 8 of the ICCPR[89] and by the supervisory mechanism of the International

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[83] O'Keefe (n 44) 79–81. See relatedly Additional Protocol I, art 51 and Rome Statute, art 8(2)(b)(iv) – the respective rules on proportionality in attack.

[84] (opened for signature 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[85] (opened for signature 19 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[86] Apartheid Convention, art 2(a).

[87] UNHRC, 'General Comment 35, Article 9 (Liberty and Security of Person)' (16 December 2014) UN Doc CCPR/C/GC/35.

[88] Apartheid Convention, art 2(e).

[89] See S Joseph and M Castan, *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed., OUP 2013) 329–334.

Labour Organisation in relation to the widely-ratified Forced Labour Conventions[90] may be taken to inform the enumerated act in Article 2(e).

The two examples in the preceding paragraph entail quite specific forms of wrongdoing on the part of the responsible state. By contrast, a different approach is found in Article 2(c), which is worth quoting in full:

> 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.[91]

The final section of this article returns to the wider implications of this provision in thinking about the kinds of harms that international law marks as particularly grave. For present purposes, the key issue is the evident breadth of the enumerated acts that might constitute apartheid: *any* measures calculated to prevent the group's participation in political, social, economic and cultural life – participation here being defined in relation to a non-exhaustive list of civil, political, social, and economic rights. Insofar as they are unlawful under international human rights law, the under-provisioning of schools, restrictions on movement, and bans on political speech or organising may constitute enumerated acts of apartheid.[92] In many situations, state conduct of this kind will also entail a violation of the right to self-determination.[93]

There is one final point to emphasize in relation to the enumerated acts of apartheid. For a state to commit the wrong of apartheid it is not required that a context of systematic and institutionalized domination has come into being. As long as the state's purpose is establishing such a system of oppression, as soon as any single enumerated act is undertaken the wrong is committed.[94] That is, the scale and gravity of the wrong is located predominantly in the *mental* element – in the state's goals.[95] As noted above, this distinguishes the state wrong from that arising under the Rome Statute, which requires a 'context of an institutionalized regime of systematic oppression and domination'.[96]

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[90] Convention concerning Forced or Compulsory Labour (adopted 28 June 1930, entered into force 1 May 1932); Convention (No. 105) concerning the abolition of forced labour (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291.

[91] Apartheid Convention, art 2(c).

[92] It is worth noting the mental element in Article 2(c) itself – 'calculated to prevent a racial group…', which overlaps with the purpose requirement in the chapeau.

[93] On the relationship between apartheid and self-determination, see Sultany (n 5).

[94] In the South African case, for example, the Prohibition of Mixed Marriages Act (1949) and the Group Areas Act (1950).

[95] As discussed in the next sub-section, absent direct evidence of such a goal it is likely that the wrongful purpose will need to be inferred from, inter alia, the systematicity of the underlying acts.

[96] Rome Statute, art 8(2)(h). See J Kern, 'Uncomfortable truths: how HRW errs in its definition of "Israeli apartheid", what is missing, and what are the implications?' (EJIL:Talk!, 7 July 2021) < https://www.ejiltalk.org/uncomfortable-truths-how-hrw-errs-in-its-definition-of-israeli-apartheid-what-is-missing-and-what-are-the-implications/>

B. The Purpose Requirement

Key to any allegation of apartheid is the requirement of a wrongful purpose: 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.'[97] This is apartheid's specific intent – a requirement that may also be characterised as one of ulterior intent.[98] Here, there are three questions. First, what is the meaning of domination and systematic oppression; second, what exactly is entailed by the requirement of 'purpose'; and third; how might such a purpose be shown?

On the first question, as to the meaning of 'domination', scholarship identifies it with the idea of control[99] – it 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.[100] Formulations differ, though that of Appeals Chamber of the ICTY in *Kunarac* may be adopted: '[T]he phrase "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence."'[101] Oppression may be understood as prolonged or continual cruelty.[102] These elements are conjunctive – the state's purpose must be domination *and* systematic oppression. In short, they speak to the scale, organized nature, and gravity of what the state is aiming to do.

The second question, then, is what exactly is entailed in the requirement of 'purpose' – apartheid's specific fault element. As a starting point, it makes sense to look to case law on genocide, which also implicates the singling out and targeting of a particular group, and where the distinctive fault element of the crime and (concurrent) state wrong – its specific intent – has received extensive attention. In *Krstić*, the Trial Chamber of the ICTY characterised genocide as encompassing 'only acts committed with the *goal* of destroying all or part of a group.'[103] Analogously, the Appeals Chamber of the ICTY in *Jelisić* held that the 'specific intent requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, *seeks to achieve* the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.'[104] Summarizing this case law, Ambos notes that '"intent to destroy"

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[97] Apartheid Convention, art 2.

[98] See also K Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (2nd ed., OUP 2020) 396.

[99] C Lingaas, 'The Crime against Humanity of Apartheid in a Post-Apartheid World' (2015) Oslo Law Review 86, 99; L Van den Herik and R Braga da Silva, 'Article 7 – Crimes against Humanity - Apartheid' in K Ambos, *Rome Statute of the International Criminal Court* (4th ed., OUP 2021) mn 268.

[100] For discussion, see K Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (OUP 2014) 59–61.

[101] ICTY, Appeals Chamber, *Prosecutor v Kunarac et al*, IT-96-23&IT-96-23/1-A (12 June 2002), para 94 citing ICTY, Trial Chamber, *Prosecutor v Kunarac et al*, IT-96-23&IT-96-23/1 (22 February 2001), para 429. See further G Werle and F Jeßberger (4th ed., OUP 2014) 340.

[102] Lingaas, 'Apartheid' (n 99) 99; Van den Herik and Braga da Silva (n 99) mn 268.

[103] ICTY, Trial Chamber, *Prosecutor v Krstić*, IT-98-33-T (2 August 2001) para 571. See also ICTY, Appeals Chamber, *Prosecutor v Krstić,* IT-98-33-A (19 April 2004) para 37; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Bosnian Genocide*), paras 186–189.

[104] ICTY, Appeals Chamber, *Prosecutor v Jelisić*, IT-95-10-A (5 July 2001) para 46 (emphasis added).

means a special or specific intent which, in essence, expresses the volitional element in its most intensive form and is purpose-based.' [105]

In this light, turning to apartheid and its purpose requirement, the state's *goal* must be racial domination and systematic oppression. On one hand, there is a narrowness to this requirement. Excluded, on this definition, are foreseen consequences – even where certain – that are not entailed in what the state seeks to achieve. That is, there may be regimes of inequality that arise as a consequence of state conduct that, even where anticipated, do not meet the legal definition of apartheid.[106] On the other hand, this requirement is not as narrow as it seems.[107] This is so for three reasons. First, different agents of the state might act for different reasons, and a state is responsible for apartheid where *any* of the individuals whose acts are attributable to it acted with the requisite purpose.[108] Moreover, there is no need for the wrongful purpose to be located in the political leadership of the state.[109] Second, a particular individual whose conduct is attributable to the state might act for more than one purpose. As long as the end of establishing or maintaining racial domination is one of the relevant ends playing a role – as long as it is one of the things they seek to achieve – that is sufficient. And third, perhaps most importantly, what a state (through its agents) seeks to achieve includes what is chosen by those agents as a means to bring about another, further end.[110]

This final possibility is particularly important in thinking about the wrong of apartheid. As noted above, there may be situations in which racial domination *is* the end in itself. But it is also possible that the state will be acting for a purpose understood by international law to be legitimate – national security or the maintenance of public order. Of course, any measures that do not relate to such a purpose cannot be justified by it, and the imposition of such measures on the group will be a good indication that what the state is seeking to achieve is racial domination. However, even where the measures *do* relate to the end of security, it will *still* be apartheid if the state is choosing a regime of racial domination in order to ensure its security or order.[111] This is apartheid as a means to an end. Although this might be a choice from the beginning of the interaction, more likely is that the material relations harden over time into a regime of domination, which the state then chooses to maintain in order to secure other ends. That choice entails a breach of the prohibition of apartheid.

Third, and finally, there is the issue of how the wrongful purpose of apartheid may be shown. Again, here, the analogy to genocide is helpful. As set out in the *Bosnian Genocide* case before the International Court of Justice, one possibility is to show the existence of an explicit plan –

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[105] Ambos, 'The Crimes' (n 100) 24.

[106] The relevant conduct will likely breach other rules of international law.

[107] See similarly H Gropengießer, 'The Criminal Law of Genocide: A German Perspective' (2005) 5 ICLR 329, 339 and further Ambos, 'Foundations' (n 98) 364–365.

[108] See similarly M Milanović, 'State Responsibility for Genocide' (2006) 16 EJIL 553, 568 and generally, *Bosnian Genocide* (n 103) paras 377–415. That is, the presence of a lawful purpose does not exclude the parallel existence of an unlawful purpose.

[109] Milanović, 'State Responsibility' (n 108) 568.

[110] J Finnis, 'Intention and Side Effects' in *Intention and Identity: Collected Essays Volume II* (OUP 2011) 173, 176. See further S Kim, *A Collective Theory of Genocidal Intent* (Asser Press 2015) 97–99.

[111] Human Sciences Research Council of South Africa, 'Occupation, Colonialism, Apartheid?' (2009) 166. See in relation to the specific intent of genocide and intermediate goals, Gropengießer (n 107) 339; Ambos, 'Foundations' (n 98) 365.

a plan to systematically oppress the targeted group on racial grounds.[112] More likely, perhaps, is an inference of that purpose. In *Jelisić*, the ICTY Appeals Chamber confirmed that absent explicit evidence, the specific intent for genocide may 'be inferred from a number of facts and circumstances',[113] which there included '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.'[114] For the wrong of apartheid, these factors ought to apply analogously.

In addition, evidence of a context of dehumanization and stigmatization of the targeted group will make an inference of the requisite purpose more likely.[115] In its Report to the Human Rights Council, the Independent Fact-Finding Mission on Myanmar emphasized the relevance to an inference of genocide's specific intent of both a broader context of dehumanization and othering of the targeted group and specific utterances of leaders and direct perpetrators.[116] In the case of apartheid, evidence of this kind points towards an intention to establish racial domination. Combined with evidence of the scale and systematicity of the wrongful acts, apartheid's wrongful purpose is likely to be found.

C. Racial Groups

The third issue in relation to the prohibition of apartheid concerns the meaning of a 'racial group' – the state's purpose in undertaking the inhuman acts of apartheid must be to establish and maintain 'domination by one racial group of persons over any other racial group of persons…' There may be cases where this aspect of the wrong will be easy to comprehend. In others, it will be more complex. In this respect, there are two questions. The first relates to the term 'racial group' itself.[117] The second concerns the relationship between racial discrimination for the purposes of apartheid and discrimination on the basis of citizenship or nationality.

On the first question, matters are rendered more straightforward by ICERD's approach to the definition of racial discrimination. Article 1(1) of the Convention provides:

> In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[118]

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[112] *Bosnian Genocide* (n 102) para 373. See similarly, Milanović (n 108) 568–569.

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

[114] ibid.

[115] See analogously, HRC, 'Report of the Detailed Findings of the Independent Fact-Finding Mission on Myanmar', A/HRC/39/CRP.2 (17 September 2018) paras 1419–1426.

[116] ibid paras 1419–1424.

[117] See, in particular, J Verhoeven, 'Crime de genocide : originalité et ambiguïté' (1991) 24 RBDI 5, 21–22; DM Amann, 'Group Mentality, Expressivism, and Genocide' (2002) 2 ICLR 93; C Lingaas, 'The Elephant in the Room: The Uneasy Task of Defining "Racial" in International Criminal Law' (2015) 15 ICLR 485; C Lingaas, 'Imagined Identities: Defining the Racial Group in the Crime of Genocide' (2016) 10 Genocide Studies and Prevention: An International Journal 79.

[118] ICERD, art 1(1).

There is no reason to think that this definition, which is certainly broad, does not apply to the idea of 'racial' groups underpinning the prohibition on apartheid in Article 3 of ICERD.[119] That is, the state's purpose may be to establish domination by one group over another group defined by race, colour, descent, national origin, or ethnic origin. The same may be said for the customary rule. In this respect, as noted above the Apartheid Convention, which provides the definition for the customary rule, makes explicit reference to ICERD in the preamble.[120] More generally, it would be strange to think that a set of practices in relation to a particular group may constitute *racial* discrimination in terms of the general approach in ICERD but not, where the wrongful purpose exists, the domination of a *racial* group for the purposes of the prohibition of apartheid.

Beyond this point, certain others may be drawn out. First, in any particular context, these terms may overlap. Second, the inclusion of national or ethnic origin within the definition takes the pressure off, in part, complexity around the meaning of 'race', specifically. In relation to practice under ICERD, Thornberry puts this well: ''National or ethnic origin' often function as a yoked pair of workhorses, employed whenever issues of colour ('visible minorities') are not the most prominent markers of discrimination.'[121] Third, though its significance is diminished by the preceding points, there may remain the problem of defining 'race' itself. In this respect, international criminal tribunals have shifted away providing 'objective' elements that define a group,[122] instead focusing on the subjective perceptions of the perpetrators and/or victims.[123] This approach is more convincing – to look to the perceptions as well as practices of the actors, which over time instantiate the reality of race and domination in the particular context.[124]

There persists, however, one other question – the relationship between racial discrimination and nationality: could a system of apartheid be imposed by one national group on another national group? This question is most likely to arise in the context of military occupation, where there exists the factual predicate for the imposition of system of domination entailed by apartheid. In framing this question, some care is needed: it arises only where the measures target *all* nationals of the second state. In the context of occupation, more likely in practice is that the occupant distinguishes among nationals of the occupied state on the basis of either race *per se* or ethnic origin. In relation to ethnic origin, the relevant term may track the name of the state itself, but this should not mislead us into thinking it is a nationality distinction. Thus, for example, Azerbaijan's claim before the ICJ alleges discriminatory treatment by Armenia of

[119] See similarly in relation to 'racial' segregation in Article 3 of ICERD, Thornberry (n 15) 249.

[120] Cf Lingaas, The Uneasy Task (n 117) 489–491 in relation to relationship between international human rights law and international *criminal* law specifically. The present article is not concerned with international criminal responsibility.

[121] Thornberry (n 15) 125.

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

[123] See e.g. ICTY, Trial Chamber, *Prosecutor v Brdanin*, IC-99-36-T (1 September 2004) para 683–684. For a detailed assessment of different approaches, see Lingaas, The Uneasy Task (n 117).

[124] See relatedly 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005) para 499, and further G Verdirame, 'The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals' (2000) 49 ICLQ 578, 592; Lingaas, Imagined Identities (n 117) 129. See also Lingaas, 'Apartheid' (n 100) 101–102 and more widely M Desmond and M Emirbayer, 'What is Racial Domination' (2009) 6 Du Bois Review 335.

Azerbaijanis *as an ethnic group* within Azerbaijan.[125] As set out in the submission, that group is one of many ethnicities in the country – 'Armenians, Russians, Ukrainians, Lezgis, Talyshs, Avars, Kurds, Jews and Tatars.'[126] Only if the impugned measures were imposed on *all* citizens would the difficult question of nationality and race arise.

In relation to this question, exceptional as it is, the law is unsettled. On one hand, the practice of the CERD Committee, in General Recommendation XXX and in the proceedings between Qatar and the United Arab Emirates, reads Article 1 of ICERD to encompass some forms of discrimination on the basis of citizenship or nationality.[127] Any such measures require a legitimate aim and a relationship of proportionality in achieving that aim[128] – that is, determination of whether the measures constitute racial discrimination is pushed to a substantive evaluation of the justifiability of the measures themselves.[129] On the other hand, in parallel proceedings between those two states, the ICJ held that the term 'national origin' in Article 1(1) of ICERD does not encompass nationality.[130] On this account, measures that distinguish between people on the basis of citizenship do not constitute racial discrimination for the purposes of the Convention.[131] They would thus also not fulfil the relational element for the wrong of apartheid.

From an evaluative perspective, the better approach is to recognize that distinctions on the basis of nationality may, in certain circumstances, coincide with an operative racial classification in a particular context – that is, nationality may track a conception of race in a certain place and time.[132] Regimes of domination imposed in such cases may entail both discrimination on the basis of nationality and discrimination on the basis of race – and, thus apartheid.

V. WIDER IMPLICATIONS

[125] Application, *Azerbaijan v. Armenia* (n 7) para 3.

[126] ibid para 5. See also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (Preliminary Objections) (Judgment) [2019] ICJ Rep 558, para 95, noting that the parties accept that 'Crimean Tatars and *ethnic Ukrainians* in Crimea constitute ethnic groups under ICERD' (emphasis added).

[127] CERD Committee, General Recommendation XXX on Discrimination against Non-Citizens (2004) UN Doc CERD/C/64/Misc.11/rev.3, para. 4; CERD Committee, 'Admissibility of the Inter-State Communication Submitted by Qatar against the United Arab Emirates' (27 August 2019) CERD/C/99/4.

[128] General Recommendation XXX (n 126) para 4; CERD Committee, Decision on Admissibility (n 127) para 60. See ET Achiume, 'Governing Xenophobia' (2018) 51 Vanderbilt Journal of Transnational Law 333, 356–358.

[129] General Recommendation XXX (n 127) para 4; CERD Committee, Decision on Admissibility (n 127) para 60. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v. United Arab Emirates* (Preliminary Objections) 4 February 2021, Dissenting Opinion of Judge Robinson, paras 6–18.

[130] *Qatar v. U.A.E* (n 129) para 105.

[131] For criticism, see C Costello and M Foster, 'Race Discrimination Effaced at the International Court of Justice' (2021) 115 AJIL Unbound 339, 341–343; D Desierto, A Study in Contrasting Jurisdictional Methodologies: The International Court of Justice's February 2021 Judgments in Iran v. USA and Qatar v. UAE' (EJIL:Talk!, 15 February 2021) <https://www.ejiltalk.org/a-study-in-contrasting-jurisdictional-methodologies-the-international-court-of-justices-february-2021-judgments-in-iran-v-usa-and-qatar-v-uae/>

[132] ibid 342. See further *Qatar v U.A.E.* (n 129) Declaration of Judge Yusuf, para 14 and more widely Desmond and Emirbayer (n 124).

Moving away from these specific aspects of the prohibition on apartheid, a further question is why, or how much, these issues matter? A sceptical view might note that the compound structure of the wrong – in essence, human rights violations committed with particular purpose – means that any practices that constitute apartheid will necessarily be wrongful in any event under other rules of international law. The enumerated acts – defined as they are in relation to international human rights law – will breach the rights to liberty, education, movement, or expression, as the case may be. Moreover, any conduct of this kind undertaken with the purpose of systematic oppression will violate the prohibition of non-discrimination under international law. What, in reality, does the prohibition of apartheid add?

Leaving aside the question of individual criminal responsibility for apartheid under international law, the proper delineation and appreciation of the state wrong is important for at least three reasons. First, in relation to law's expressive function, labelling and condemning *this* particular political system is important. The distinctive evil of apartheid – the systematic domination of a group of people on racial grounds – is captured and communicated, and for those subject to such a regime, recognised.[133] Second, and connected to the first, that these practices constitute apartheid and not (just) discrimination or human rights abuses may be significant politically. It may be significant in driving a particular situation onto the political agenda, or provoking political actors' engagement with it. For advocacy organisations, it provides a point of focus – using the term's expressive power as a basis for mobilisation.[134] Finally, there are additional legal consequences that follow from a breach of the prohibition of apartheid. Apartheid is widely understood to fall within the small set of peremptory norms of international law.[135] At set out in Article 40 of the Articles of State Responsibility, where the breach is 'serious' – as it surely will be in all cases of apartheid – the consequences set out in Article 41 will apply.[136] This entails for all states the three duties of cooperation in bringing to an end the serious breach, non-recognition of the situation as lawful, and non-assistance in the maintenance of the situation.[137]

This is to say that the prohibition of apartheid matters even though the relevant acts will also breach other rules of international law. In addition, the recognition and application of the wrong of apartheid is important for another reason. This reason concerns the kinds of harm and violence regulated by international law and which international law marks out as particularly grave – whether through penalisation under international criminal law or through the aggravated regime of state responsibility for peremptory norms. In recent years, this question has provoked a rich stream of scholarship across different fields.[138] For instance, Cusato's

[133] See further Amann (n 117) 117–131.

[134] See generally B Sander, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning' (2019) 32 *LJIL* 851, 866-871; and specifically N Erakat and J Reynolds, 'We Charge Apartheid? Palestine and the International Criminal Court' (20 April 2021) TWAILR.

[135] ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (12 December 2001) UN Doc A/Res/56/83 (ARSIWA), Commentary to Article 40, para 4; ILC, 4th Report (2019), para 94; ILC, 'Peremptory norms of general international law (*jus cogens*): Texts of the draft conclusions and Annex adopted by the Drafting Committee on second reading' (11 May 2022), UN Doc A/CN.4/L.967, Annex (e).

[136] ARSIWA, arts 40, 41.

[137] ibid. See also C Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible States' (2002) 13 EJIL 1161; M Jackson, *Complicity in International Law* (OUP 2015) 172-174.

[138] For an account of international law's *role* in the creation of injustice, see J Linarelli, M Salomon, and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018).

monograph identifies obstacles to the recognition of what she calls slow or 'less visible forms of violence' by international law.[139] Schmid argues that the 'mechanisms of international criminal law often marginalise or ignore those crimes that overlap with' violations of economic, social, and cultural rights.[140] And more widely, Miller, writing in 2008, argued that 'the literature, institutions and international enterprise of transitional justice historically have failed to recognize the full importance of structural violence, inequality and economic (re)distribution to conflict…'[141]

How does this stream of scholarship relate to the prohibition of apartheid in international law? In the wrong of apartheid, international law has marked with particular normative significance a set of practices that need not entail any forms of individualised violence to life or bodily integrity. Indeed, we may put that more strongly – these forms of individualised violence are not at the heart of the wrong. Rather, as in Article 2(c) of the Apartheid Convention, the heart of the wrong concerns practices '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.'[142] Thus, in the South African case, the Group Areas Act of 1950,[143] the Natives (Abolition of Passes and Co-Ordination of Documents) Act of 1952,[144] the Bantu Education Act of 1953,[145] the Native Labour (Settlement of Disputes) Act of 1953,[146] and the Reservation of Separate Amenities Act of 1953,[147] together imposed a regime of repression of black South Africans' rights to movement, property, education, and equal access to public goods, as well as their labour rights.[148] This is not to deny that the sharp edge of the state backed up this regime, or that the state undertook numerous acts of murder, torture, and arbitrary imprisonment.[149] Rather, however, it is to emphasize the significance of a wrong at whose heart are forms of systematic harm, imposed on racial grounds, that do not involve life or bodily integrity in the narrow sense.[150]

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[139] E Cusato, *The Ecology of War and Peace: Marginalising Slow and Structural Violence in International Law* (CUP 2021).

[140] E Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (CUP 2015) 3. See also J Reynolds and S Xaiver, '"The Dark Corners of the World": TWAIL and International Criminal Justice' (2016) 14 JICJ 959; I Kalpouzos, 'International Criminal Law and the Violence against Migrants' (2020) 21 German Law Journal 571.

[141] Z Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 IJTJ 266, 267. See also C Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (CUP 2021) 96–126.

[142] See also Apartheid Convention, art 2(d).

[143] Act 41 of 1950.

[144] Act 67 of 1952.

[145] Act 47 of 1953.

[146] Act 48 of 1953.

[147] Act 49 of 1953.

[148] Pre-1948.

[149] For a partial overview, see *Truth and Reconciliation Commission of South Africa Report, Volume Six* (March 2003).

[150] For a critique of South Africa's Truth and Reconciliation Commission's individualised approach to victims and perpetrators, see M Mamdani, 'Amnesty or Impunity: A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)' (2002) 32 *Diacritics* 33. See further T Madlingozi, 'Good Victims, Bad Victims: Apartheid Beneficiaries, Victims and the Struggle for Social Justice' in W. Le Roux and

VI. CONCLUSION

In *Nicaragua*, the International Court of Justice suggested that sovereignty entailed for states the freedom to choose their 'political, economic, social and cultural system.'[151] This isn't quite true,[152] for all states are prohibited from adopting a system of apartheid. As to what such a system entails, this article has argued that the Apartheid Convention of 1973 provides the definition of the wrong binding all states in customary international law, as well as definition for the treaty rule in Article 3 of ICERD. This amounts to the commission of human rights violations for the purpose of establishing and maintaining racial domination and systematic oppression. Although some elements of the prohibition are complex and will likely be contested as the wrong assumes greater importance in international legal practice, the core is clear: the categorical and non-derogable proscription by international law of systems of racial domination.

K. Van Marle (eds), *Law, Memory and Apartheid: Ten Years after AZAPO v President of South Africa* (PULP 2007) 107-126.

[151] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14 para 205.

[152] A Tzanakopoulos, 'The Right to be Free from Economic Coercion' (2015) CJIL 616, 630–631.