The Applicability of Apartheid to Situations of Occupation: At the Crossroads Between International Humanitarian law, International Criminal Law, and International Human Rights Law

La aplicabilidad del Apartheid a las situaciones de ocupación: en las encrucijadas entre el derecho internacional humanitario, el derecho penal internacional y el derecho internacional de los derechos humanos

L'applicabilite de l'apartheid aux situations d'occupation: a las croisees du droit international humanitaire, du droit penal international et du droit international des droits de l'homme

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Abstract: The article deals with the applicability of apartheid in occupied territory. Rather than assessing whether in specific situation of an occupation an occupying power has established an apartheid regime, the article discusses whether there is anything in the law of occupation or in the international regulation of apartheid that makes them mutually exclusive. On the basis of international human rights law, international criminal law, and international humanitarian law considerations, it is argued that apartheid can be applied to occupied territory following the ordinary rules for the application of international human rights law and international criminal law in occupied territory. Accordingly, international law does not bar the application of apartheid in

occupied territory, but rather, the law of occupation and apartheid coincide to strengthen the protection of civilians in occupied territories.
Keywords: apartheid, international crimes, occupation, occupied territory, principle of self-determination of peoples, racial discrimination.

Resumen: El artículo trata de la aplicabilidad del apartheid en territorios ocupados. En vez de evaluar si en una situación específica de ocupación una potencia ocupante ha establecido un régimen de apartheid, el artículo discute si hay algo en la ley de ocupación o en la regulación internacional del apartheid que los haga mutuamente excluyentes. Sobre la base de las consideraciones del derecho internacional de los derechos humanos, el derecho penal internacional y el derecho internacional humanitario, se argumenta que el apartheid se puede aplicar al territorio ocupado siguiendo las reglas ordinarias para la aplicación del derecho internacional de los derechos humanos y del derecho penal internacional en el territorio ocupado. En consecuencia, el derecho internacional no prohíbe la aplicación del apartheid en los territorios ocupados, sino que el derecho de la ocupación y el apartheid concurren para fortalecer la protección de los civiles en los territorios ocupados.
Palabras clave: apartheid, crímenes internacionales, ocupación, territorio ocupado, principio de libre determinación de los pueblos, discriminación racial

Résumé: L'article traite de l'applicabilité de l'apartheid en territoire occupé. Plutôt que d'évaluer si, dans une situation spécifique d'occupation, une puissance occupante a établi un régime d'apartheid, l'article examine l'article examine si le droit de l'occupation ou la réglementation internationale de l'apartheid les rend mutuellement exclusifs. Sur la base du droit international des droits de l'homme, du droit pénal international et des considérations de droit international humanitaire, il est soutenu que l'apartheid peut être appliqué au territoire occupé en suivant les règles ordinaires d'application du droit international des droits de l'homme et du droit pénal international en territoire occupé. En conséquence, le droit international n'interdit pas l'application de l'apartheid dans les territoires occupés, mais plutôt le droit de l'occupation et l'apartheid concourent à renforcer la protection des civils dans les territoires occupés.
Mots-clés: apartheid, crimes internationaux, occupation, territoire occupé, Droit des peuples à disposer d'eux-mêmes, discrimination raciale.

I. Introduction

This article explores whether it is possible to apply the legal notion of apartheid in a situation of occupation. Notwithstanding the wealth of studies on both apartheid and occupation, whether occupation under international humanitarian law and apartheid are two mutually exclusive legal notions or whether they can apply simultaneously is a question rarely addressed by international legal scholarship.[1] Nevertheless, this is an important question in light of the significant debate that occurs today over whether the populations of certain occupied territories are under apartheid. For instance, an increasing number of NGOs have considered that in the Occupied Palestinian Territory, which has been under Israeli occupation since 1967, the Palestinian population is subject to apartheid.[2] These allegations have received widespread attention by scholars,[3] bringing to the fore an academic debate

[1] But see the detailed analysis provided by Jackson, Miles, "Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law, Diakonia: International Humanitarian Law Centre", 23 March 2021, https://www.diakonia.se/ihl/news/expert-opinion-occupation-palestine-apartheid/. See also Longobardo, Marco, "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/ (which anticipates, in an embryonic form, some of the points discussed here in detail).

[2] See, e.g., Human Rights Watch, "A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution", 27 April 2021, https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution; B'Tselem, "A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This Is Apartheid", 12 January 2021, https://www.btselem.org/publications/fulltext/202101_this_is_apartheid; Amnesty International, "Israel's Apartheid Against Palestinians: A Look into Decades of Oppression and Domination", 1 February 2022, https://www.amnesty.org/en/documents/mde15/5141/2022/en/

[3] See, e.g., the posts collected in Milanović, Marko, *Apartheid in Israel/Palestine?*, *EJIL:Talk!*, 5 July 2021, https://www.ejiltalk.org/symposium-introduction-apartheid-in-israel-palestine/; Sahd, Fabio Bacila, "Ocupaçâo ou apartheid? Uma ressignificação interpretativa necessária para o caso palestino/israelense", *Outros Tempos*, São Luís, vol. 19, 2022, pp. 92122; Reynolds, John, "Apartheid and International Law in Palestine", in Kiswanson, Nada & Power, Susan (eds.), *Prolonged Occupation and International Law*, Leiden, Brill, 2023, p. 104; Erakat, Noura *et al.*, "Race, Palestine, and International Law", *AJIL Unbound*, vol. 117, 2023, p. 77, https://doi:10.1017/aju.2023.9

Anuario Mexicano de Derecho Internacional, vol. XXIV, 2024, pp. 3-36
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that is at least a decade old.[4] Conclusions that the Occupied Palestinian Territory is under apartheid are today shared by mandate holders appointed by the Human Rights Council of the United Nations (UN) to deal with human rights violations in Palestine and elsewhere.[5] Yet, usually this highly contentious topic is addressed without paying any attention to whether, in principle, apartheid and occupation are compatible legal notions, or whether they are mutually exclusive. This article fills this gap in international scholarship by providing the first thorough analysis of this topic.

Some words of caution are here needed. This article does not mean to analyse the applicability of the notion of apartheid as if this may be, under any circumstance, a lawful phenomenon in international law. This impression might be generated by the fact that apartheid is juxtaposed to occupation, which may be a lawful situation under international humanitarian law.[6] However, the analysis of the applicability of the notion of apartheid —criminal as it is— in occupied territory is needed because, as explained below, some authors claim that the reality of occupation makes it impossible to apply the notion of apartheid to the measures adopted by an occupying power under the

[4] See, e.g., Tilley, Virginia, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, London, Pluto Press, 2012; Dugard, John & Reynolds, John, "Apartheid, International Law, and the Occupied Palestinian Territory", *European Journal of International Law*, Oxford, vol. 24, num. 3, 2013, pp. 867-913, https://doi.org/10.1093/ejil/cht045; Zilbershats, Yaffa, "Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds", *European Journal of International Law*, Oxford, vol. 24, num. 3, 2013, pp. 915-928, https://doi.org/10.1093/ejil/cht043; Lingaas, Carola, "The Crime against Humanity of Apartheid in a Post-Apartheid World", *Oslo Law Review*, Oslo, vol. 2, num. 2, 2015, pp. 86-115, http://dx.doi.org/10.5617/oslaw2566

[5] See, e.g., Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, John Dugard, 29 January 2007, A/HRC/4/17, paras. 49-50; Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, 13 January 2014, A /HRC/25/67, paras. 51-77; Report of the Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967, Michael Lynk, 21 March 2022, A/HRC/49/87; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on ecological crisis climate justice and racial justice, Ms. Ashwini K.P., 25 October 2022, A/77/2990, para. 29. See, also, Falk, Richard and Tilley, Virginia, "Israeli Practices towards the Palestinian People and the Question of Apartheid", Report for the Economic and Social Commission for Western Asia, E/ESCWA/ECRI/2017/1, Spring 2017.

[6] Dinstein, Yoram, *The International Law of Belligerent Occupation*, 2nd ed., Cambridge, Cambridge University Press, 2019, pp. 1-2.

law of occupation.[7] Accordingly, it is necessary to explore whether the notion of apartheid —which is always illegal— may apply in situations of occupations —which may be legal or illegal under international humanitarian law and under other rules of international law depending on the circumstances of each specific occupation.[8] To avoid confusion, the article refers to 'apartheid', 'ban on apartheid', 'notion of apartheid, or 'institution of apartheid' to describe the legal prohibition of apartheid under international law.

The analysis proceeds as follows: Section 2 defines the law of occupation as the main legal framework governing the activities of occupying powers over the occupied territory. Section 3 clarifies that the law of occupation does not exhaust the legal framework that is applicable to occupied territory, but rather, the law of occupation welcomes the application of other rules of international law. Section 4 discusses some common misconceptions about the applicability of apartheid in occupied territory. Since apartheid is both a human rights violation and an international crime, Section 5 argues that its applicability in an occupied territory is determined by the rules on the applications of international human rights law and international criminal law in situations of occupations. In light of the generic consensus on the possibility of applying these bodies of international law in occupied territory, the article concludes that apartheid and occupations are not mutually exclusive, but rather, that the crime of apartheid can occur in occupied territory. The solution of normative conflicts between the ban on apartheid and the law of occupation is examined in Section 6. The conclusion (Section 7) emphasises that the application of the ban on apartheid in occupied territory is the result of shifting the narrative

[7] See *infra*, section 4.

[8] Actually, there is a growing debate on the illegality of occupations. See, e.g., the request for an ICJ advisory opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* presented by the UN General Assembly, Res 77/247, 30 December 2022, A/77/400. For the scholarly debate, see Ben-Naftali, Orna, Gross, Aeyal M., and Michaeli, Keren J., "Illegal Occupation: Framing the Occupied Palestinian Territory", *Berkeley Journal of International Law*, Berkeley, vol. 23, num. 3, 2005, pp. 551-614, p. 551, https://doi.org/10.15779/Z38H948; Ronen, Yaël, "Illegal Occupation and Its Consequences", *Israel Law Review*, Tel-Aviv, vol. 41, num. 1-2, 2008, pp. 201-245, p. 201, *https://doi.org/10.1017/S0021223700000224*; Wilde, Ralph, "Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation", *The Palestine Yearbook of International Law*, Ramallah, vol. 22, num. 1, 2021, pp. 1-74, p. 41, https://doi.org/10.1163/22116141_022010_002. Hindi, Ata R., "Unlawful Occupations? Assessing the Legality of Occupations, including for Serious Breaches of Peremptory Norms", *TWAIL Review*, vol. 4, 2023, pp. 1-34.

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of apartheid from a territorially determined notion to a violation pertaining to the human rights of certain individuals, whose rights are unaffected by the status of the territory where said individuals are located.

II. A Summary Overview of the Law of Occupation as the Main Legal Framework Governing Occupied Territory

International humanitarian law (also known as the law of armed conflict or *jus in bello*) governs the main duties and faculties of occupying powers over occupied territory. Article 42 of the 1907 Hague Regulations (HR) provides that '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'[9] Other provisions of the 1907 Hague Regulations deal with the administration of occupied territories.[10] Moreover, other relevant rules are provided by the 1949 Fourth Geneva Convention (GCIV),[11] and by the 1977 First Additional Protocol (API).[12] Taken together, all of these rules form what it is usually referred to as 'the law of occupation', that is the ensemble of international humanitarian law rules designed to govern occupied territory.[13]

[9] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 205 C.T.S. p. 277.

[10] *Ibidem*, Articles 42-56.

[11] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949) 75 U.N.T.S. p. 287.

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 U.N.T.S. p. 3.

[13] See, generally, Capotorti, Francesco, *L'occupazione nel diritto di guerra*, Naples, Jovene, 1949; Migliazza, Alessandro, *L'occupazione bellica*, Milan, Giuffrè 1949; von Glahn, Gerhard, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, Minneapolis, University of Minnesota Press, 1957; Arai-Takahashi, Yutaka, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law*, Leiden, Martinus Nijhoff, 2009; Annoni, Alessandra, *L'occupazione 'ostile' nel diritto internazionale contemporaneo*, Turin, Giappichelli 2012; Ferraro, Tristan (ed.), *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, Geneva, International Committee of the Red Cross, 2012; Kolb, Robert and Vité, Sylvain, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels*, Brussels, Bruylant, 2009; Benvenisti, Eyal, *The International*

In very broad brushstrokes, the key point of the law occupation is that the occupying power is vested with governmental duties and faculties even if it does not enjoy sovereignty over the occupied territory. The main governing provision in this sense is embodied in Article 43 of the 1907 Hague Regulations, according to which '[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.'[14] This provision is so central to the law of occupation that it has been defined as a quasi-constitutional rule.[15]

The law of occupation tries to navigate internal contradictions and ontological conflicts. On the one hand, the occupying power is prevented from acquiring sovereignty over the occupied territory,[16] and the local population does not owe any duty of obedience to the occupying power.[17] On the other hand, though, the occupying power must administer the occupied territory,

Law of Occupation, 2nd edn., Oxford, Oxford University Press, 2012; Cuyckens, Hanne, *Revisiting the Law of Occupation*, Leiden, Brill, 2017; Gross, Aeyal M., *The Writing on the Wall: Rethinking the International Law of Occupation*, Cambrdige, Cambridge University Press, 2017; Longobardo, Marco, *The Use of Armed Force in Occupied Territory*, Cambridge, Cambridge University Press, 2018; Dinstein, Yoram, *The International Law..., cit.*; Lieblich, Eliav and Benvenisti, Eyal, *Occupation in International Law*, Oxford, Oxford University Press, 2022.

[14] The reference to 'civil life' is employed here because it is the only correct one considering that the sole authoritative text is the French version. See Schwenk, Edmund H. "Legislative Power of the Military Occupant under Article 43, Hague Regulations" *Yale Law Journal*, New Heaven, vol. 54, 1945, p. 393, note 1.

[15] Benvenisti, Eyal, *The International Law...*, *cit.*, p. 69.

[16] See, generally, Korman, Sharon, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford, Clarendon Press, 1996.

[17] See Holland, *Council for the Restoration of Legal Rights, D'Escury v. Levensverzekerings- Maatschappij Utrecht Ltd* (30 April 1940), *International Law Reports*, Cambridge, vol. 15, p. 572; United Kingdom, *Manual of the Law of Armed Conflict*, Cambridge, Cambridge University Press, 2004, section 11.15.1. See, also, Oppenheim, Lassa, "The Legal Relations between an Occupying Power and the Inhabitants", *Law Quarterly Review*, London, vol. 37, 1907, p. 368; Baxter, Richard R., "The Duty of Obedience to the Belligerent Occupant", *British Year Book of International Law*, Oxford, vol. 27, 1950, pp. 235-266; Lauterpacht, Hersh *Oppenheim's International Law. A Treatise, vol. II: Disputes, War and Neutrality*, 7th edn., London, Longmans, 1952, pp. 438-439; Greenwood, Christopher, "The Administration of Occupied Territory in International Law", in Playfair, Emma (ed.), *International Law and the Administration of Occupied Territories*, Oxford, Clarendon Press, 1992, p. 252; Longobardo, Marco, *The Use...*, *cit.*, pp. 137-141.

Anuario Mexicano de Derecho Internacional, vol. XXIV, 2024, pp. 3-36
ISSN 1870-4654
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providing for the public order and civil life of the local population.[18] Accordingly, an occupation is a situation where two hostile entities are forced to cohabit temporarily,[19] and the law of occupation tries to strike a balance between these conflicting interests: on the one hand, the occupying power must respect certain rights of the local population, for instance regarding individual freedoms and the protection of public and private property;[20] on the other hand, the occupying power is granted specific and extensive powers in relation to the maintenance of public order and civil life, including the possibility, under certain conditions, of altering the law in force in the occupied territory and the local administrative apparatus,[21] and to undertake measures to prevent hostile acts against the occupying forces.[22]

Although some authors stress that the administration of the occupied territory should focus on the welfare of the local population,[23] there is no obligation under the law of occupation that requires the occupying power to treat the local population according to the same standards that it would apply to its own population: rather, the legal framework and life conditions of the occupied territory before the occupation are the legal standards governing the obligations upon the occupying powers.[24] The ban on annexation and the temporary nature of the occupation maintain a legal distinction between the action of the occupying power towards its own population (which is grounded on the occupying power's own domestic legal system and on the concept of sovereignty) and the action of the occupying power towards the local population of the occupied territory (which is the product of the idea that the

[18] On this, see, generally, Greenwood, Christopher, *op. cit.*; Bothe, Michael, "The Administration of Occupied Territory", in Clapham, Andrew, Gaeta, Paola & Sassòli, Marco (eds.), *The 1949 Geneva Conventions: A Commentary*, Oxford, Oxford University Press, 2015, pp. 1468-1484.

[19] On this aspect, see generally Pellet, Alain, "La destruction de Troie n'aura pas lieu", *Palestine Yearbook of International Law*, Ramallah, vol. 4, 1987-1988, pp. 44-84.

[20] E.g., those protected by Articles. 44-56 of the HR, by Articles. 49-78 of the GCIV, and by Article 75 of the API.

[21] See Article 43 of the HR and Article 54 of the GCIV.

[22] See Article 43 of the HR and Articles 27(4), 49(2) and 78 of the GCIV.

[23] See Bothe, Michael, *op. cit.*, pp. 1466-1467.

[24] Longobardo, Marco, "The Duties of Occupying Powers in Relation to the Prevention and Control of Contagious Diseases through the Interplay between International Humanitarian Law and the Right to Health", *Vanderbilt Journal of Transnational Law*, Nashville, vol. 54, num. 3, 2022, pp. 757-804, https://scholarship.law.vanderbilt.edu/vjtl/vol55/iss3/4/

occupying power must alter the daily life and legal framework of the occupied territory as little as possible since it does not have sovereignty over the occupied territory). The principle of self-determination of peoples, which is applicable to situations of occupation,[25] reinforces this distinction and, along with the law of occupation, preserves the existence of the occupied territory and the legal framework applicable therein as distinct from that of the occupying force. The main difference between the legislation applicable to the local population and that applicable to the occupying power's own population can be found in the field of the security of the occupying force: the law of occupation allows the occupying power to restrict the rights and freedoms of the local population in order to preserve the security of the occupying army and public order in the occupied territory, and provides for certain procedural and substantive conditions to do so.[26]

It follows that the law of occupation allows for the application of different legal regimes between those devised for the local population and those provided for the population of the occupying power. Any negative impact of this consideration is tempered, under the law of occupation, by the absolute prohibition on the occupying power transferring its own population in the occupied territory, embodied in Article 49(6) of the Fourth Geneva Convention.[27] Accordingly, a different legal regime is applicable only to a very limited portion of the population of the occupying power, namely, the army of occupation and the civilians working for them.

[25] See *infra*, section 3.

[26] See, e.g., Article 64(2) of the GCIV.

[27] On this provision, see generally Salmon, Jean, "Les colonies de peuplement israéliennes en territoire palestinien occupé au regard de l'avis consultatif de la Cour internationale de Justice du 9 juillet 2004", in Fischer-Lescano, Andreas et al. (eds.), *Frieden in Freiheit, Peace in liberty, Paix en liberté – Festschrift fur Michal Bothe zum 70. Geburtstag*, Baden-Baden, Nomos, 2008, pp. 285-308; Tomuschat, Christian, "Prohibition of Settlements", in Clapham, Andrew, Gaeta, Paola & Sassòli, Marco, *op. cit.*, pp. 1551-1574; Meron, Theodor, "The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War", *American Journal of International Law*, Cambridge, vol. 111, 2017, pp. 372-374.

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III. The Law of Occupation as an Open Legal Framework

The fact that the law of occupation is the main legal framework that governs the activity of the occupying power in occupied territory does not mean that the law of occupation bars the application of other relevant branches of international law. Rather, the legal framework applicable to occupied territory is not exhausted by the law of occupation, but is complemented by several other rules of international law.[28]

This conclusion is well-established in international case law. For instance, the International Court of Justice (ICJ) stated in the 2004 *Wall* Opinion that while "some rights [pertaining to the administration of the occupied territory] may be exclusively matters of international humanitarian law", other issues are to be governed by other applicable bodies of law such as international human rights law.[29] This principle has been confirmed verbatim in subsequent decisions, such as in the 2005 *DRC v Uganda* case.[30] Moreover, in 2022, the ICJ granted DRC millions of USD in reparations for violations of both international humanitarian law and international human rights law in the district of Ituri, formerly occupied by Uganda.[31]

After these pronouncements, most commentators have focused their attention on the, application of international human rights to occupied territory and on its relationship with rules of international humanitarian law that are simultaneously applied there, in particular to avoid or solve normative conflicts.[32] However, beyond international human rights law, the wider issue of

[28] See generally Longobardo, Marco, *The Use…*, *cit.*, pp. 43-47.

[29] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I. C.J. Reports 2004*, p. 136, para. 106 (hereinafter: *Wall* Opinion).

[30] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 168, para. 216 (hereinafter: 2005 *DRC v. Uganda* Judgment).

[31] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf (hereinafter: 2022 *DRC v. Uganda* Judgment).

[32] See, generally, Benvenisti, Eyal, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories", *Israel Law Review*, Tel-Aviv, vol. 26, num. 1, 1992, pp. 24-35, *https://doi.org/10.1017/S0021223700010803*; Ben-Naftali, Orna & Shany, Yuval, "Living in Denial: The Application of Human Rights in the Occupied Territories", *Israel Law Review*, Tel-Aviv, vol. 37, num. 1, 2004, pp. 17-118, https://doi.org/10.1017/S0021223700012413; Arai-Takahashi, *op. cit.*, pp. 401-607; Noam Lubell, "Human Rights Obligations in Military Occupation", *International Review of the Red Cross*, Cambridge, vol. 94, 2012, pp. 317-337; Gutiérrez

the applicability of rules of international law (both embodied in treaties and customary law) to complement the law of occupation remains largely unexplored. So far, the ICJ has discussed only the applicability of two other rules of international law embodied in the UN Charter and in customary international law alike, namely, the ban on the use of armed force and the principle of self-determination of peoples, both of which, according to the Court, apply in occupied territory along with the law of occupation.[33] Rather arbitrarily, the ICJ has excluded the application of the principle of permanent sovereignty over natural resources in occupied territory,[34] attracting criticisms from scholars.[35] Furthermore, in January 2023, under the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats, Azerbaijan has launched some arbitral proceedings against Armenia,[36] which will likely lead an arbitral tribunal to rule on the applicability of this multilateral environmental treaty during the occupation of Nagorno-Karabakh.[37]

The generic applicability of other treaty and customary law rules in occupied territory as an additional source of obligations for the occupying power outside the rules codified by the law of occupation has received some attention by academia. Some relatively dated studies on international labour law

Castillo, Víctor Luis, "La aplicación extraterritorial del Derecho internacional de los derechos humanos en casos de ocupación beligerante", *Revista Electrónica de Estudios Internacionales*, Madrid, vol. 36, 2018, pp. 1-31; Longobardo, Marco, *The Use…*, *cit.*, pp. 62-82.

[33] *Wall* Opinion, paras. 87-88.

[34] See 2005 *DRC v. Uganda* Judgment, para. 244.

[35] See Longobardo, Marco, "The Palestinian Right to Exploit the Dead Sea Coastline for Tourism", *German Yearbook of International Law*, vol. 28, 2015, pp. 343-346; Longobardo, Marco, "State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources", *Netherlands International Law Review*, Leiden vol. 63, num. 3, 2016, pp. 251-274, p. 256, https://dx.doi.org/10.1007/s40802-016-0068-8; Lieblich, Eliav and Benvenisti, Eyal, *op. cit.*, pp. 194-195.

[36] Republic of Azerbaijan, Ministry of Foreign Affairs, Press Release on Arbitration Filed by Azerbaijan against Armenia for Widespread Environmental Destruction, January 2023, https://www.mfa.gov.az/en/news/no01523

[37] For more on this, see Abualrob, Waad, Longobardo, Marco & Mackenzie, Ruth, "Applying International Environmental Law Conventions in Occupied Territory: The *Azerbaijan v. Armenia* Case under the Bern Convention", *EJIL:Talk!*, 12 May 2023, https://www.ejiltalk.org/applying-international-environmental-law-conventions-in-occupied-territory-the-azerbaijan-v-armenia-case-under-the-bern-convention/

Anuario Mexicano de Derecho Internacional, vol. XXIV, 2024, pp. 3-36
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correctly pointed towards a broader approach to this question.[38] More recently, scholarly attention has stressed that, in certain fields such as the protection of the environment[39] and management of contagious diseases,[40] the law of occupation is integrated by external sources of international environmental law and international health law.

Overall, a clear trend favouring the application of external sources to complement the law of occupation is well-established in international case law and scholarship alike. Indeed, there is nothing in the law of occupation that prohibits the application of other rules of international law in occupied territory as long as their application does not result in a violation of the law of occupation itself. It is possible that some of these external rules are inapplicable outside the territory of a state or in times of armed conflict because of the rules regarding their scope of application rather than because of the law of occupation. But absent these two conditions, as explained by the work of the International Law Commission in the field of the effects of armed conflicts upon treaties,[41] external sources complement the law of occupation.

Taking seriously the idea that the law of occupation is an open system, the following section dispels some common misconceptions suggesting that apartheid is inapplicable to occupied territory.

IV. Common Misconceptions About Apartheid

This section explores some common misconceptions about apartheid that may lead to the conclusion that apartheid and occupation are two mutually exclusive notions. In particular, the role of some historical examples and the use of terminology belonging to the principle of self-determination of peo-

[38] See Meron, Theodor, "The Applicability of Multilateral Conventions to Occupied Territories", *American Journal of International Law*, Cambridge, vol. 72, num. 3, 1978, pp. 542-557, https://doi.org/10.2307/2200458

[39] See Longobardo, Marco, "Animals in Occupied Territory", in Peters, Anne, Kolb, Robert, and Hemptinne, Jérôme de (eds.), *Animals in the International Law of Armed Conflict*, Cambridge, Cambridge University Press, 2022, pp. 224-226.

[40] Longobardo, Marco, "The Duties…", *cit.*, pp. 764-766.

[41] See Draft articles on the effects of armed conflicts on treaties, with commentaries 2011, *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.

ples may have inadvertently originated the perception that apartheid and occupation cannot coexist.[42]

The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention or Convention) provides the definition of the crime of apartheid.[43] According to Article II, the definition of apartheid, "which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to [some] 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."

The most blatant case of apartheid was that established in South Africa against the non-white population between 1948 and 1991, closely followed by that established in Rhodesia up to 1980.[44] This example is so emblematic that the aforementioned definition of the 1973 Convention mentions 'southern Africa' as a paradigmatic case of apartheid, including in that notion both the apartheid in South Africa and that in Rhodesia.[45] In both countries, during the apartheid regimes, there were no situations of occupation. Indeed, occupations can be established only in the framework of an international armed conflict over the territory of a hostile state, whereas there was no such an occurrence in South Africa during apartheid. Rather, Article 1(4) of the API was devised to consider the struggle against apartheid as an international armed conflict specifically because, under international humanitarian law prior to

[42] See, e.g., Zilbershats, Yaffa, *op. cit.*, pp. 916-919; but see Eden, Paul A., "The Practices of Apartheid as a War Crime: A Critical Analysis", *Yearbook of International Humanitarian Law*, Leiden, vol. 16, 2013, pp. 89-117, https://doi.org/10.1007/978-94-6265-038-1_5

[43] 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 U.N.T.S. p. 243.

[44] See generally Study of apartheid and racial discrimination in Southern Africa: report of the Special Rapporteur Manouchehr Ganji, E/CN.H/979, 18 December 1968; Ténékidès, Georges, "L'action des Nations Unies contre la discrimination raciale", *Recueil des Cours*, Leiden, vol. 168, 1980, pp. 437-458; Klotz, Audie, *Norms in International Relations: The Struggle against Apartheid*, Ithaca, Cornell University Press, 1995.

[45] Some authors consider that this expression referred also to the colonial Portuguese regimes in Angola and Mozambique until 1975. See Dugard, John, "L'Apartheid", in Ascensio, Harvé, Decaux, Emmanuel and Pellet, Alain (eds.), *Droit International Penal*, 2nd ed., Paris, Pedone, 2012, p. 199.

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1977, struggles against apartheid in non-occupied territory would have been considered non-international armed conflicts.[46]

Accordingly, taking stock of the experiences in South Africa and Rhodesia, apartheid and occupation are often presented as legal institutions grounded on opposite premises. Following a distinction that is commonly employed in international law scholarship, apartheid is usually considered as a violation of the right to *internal* self-determination of a people, who are not permitted to participate in the political, social, and economic life of their state because of systematic racial discrimination.[47] More specifically, apartheid is considered a grave infringement of the principle of internal self-determination of peoples, which has some specific consequences under international law: notwithstanding the traditional neutrality of international law towards the internal organisation of a state, apartheid regimes are considered to be unlawful;[48] organised groups fighting against apartheid are subjects of international law in the form of movements of national liberation and are treated as such by the UN General Assembly;[49] armed fights against apartheid

[46] See Baxter, Richard R., "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law", *Harvard International Law Journal*, Cambridge, vol. 16, num. 1, 1975, pp. 1-26, pp. 14-15; Boister, Neil, "The *Ius in Bello* in South Africa: A Postscript?", *The Comparative and International Law Journal of Southern Africa*, Pretoria, vol. 24, num. 1, 1991, pp. 72-87, https://journals.co.za/doi/abs/10.10520/AJA00104051_569

[47] See, e.g., Rosas, Allan, "Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?", in Tomuschat, Christian (ed.), *Modern Law of Self-Determination*, Leiden, Brill, 1993, pp. 237-238; Cassese, Antonio, *The Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, Cambridge University Press, 1996, pp. 120-121; Dugard, John, "The Secession of States and their Recognition in the Wake of Kosovo", *Recueil des Cours*, Leiden, vo. 357, 2011, p. 86; Senaratne, Kalana, *Internal Self-Determination in International Law History, Theory, and Practice*, Cambridge, Cambridge University Press, 2021, p. 68. However, there are significant contrary views: see, e.g., Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. p. 217, para. 138.

[48] Salmon, Jean, "Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?", in Tomuschat, Christian, *op. cit.*, p. 260. See more recently, Longobardo, Marco, "Legal Perspectives on the Role of the Notion of «Denazification» in the Russian Invasion of Ukraine under *Jus contra Bellum* and *Jus in Bello*", *Revue Belge de Droit International*, Brussels, vol. 54, núm. 1-2, 2021, pp. 223-225.

[49] A/RES/3412(XXX), 28 November 1975. See, generally, Spalding Brubeck, Kirsten, "Recognition of the African National Congress and the Apartheid Government: A Proposal for the United States", *Hastings International and Comparative Law Review*, San Francisco, vol. 13, 1990, pp. 315-339.

deserve to be equated to international armed conflicts even if it they are, essentially, non-international armed conflicts with a goal sanctioned by the international community.[50]

On the other hand, a situation of occupation is a paradigmatic case of the infringement of the *external* right to self-determination of a people,[51] that is, the right of a people to decide freely the external aspects of sovereignty and their international relations (through establishing a new state, acquiring internal autonomy within a state, or by merging with another state). As recently pointed out by the African Court on Human and Peoples' Rights in relation to the ongoing Moroccan occupation of Western Sahara, 'the right to self-determination is essentially related to peoples' right to ownership over a particular territory and their political status over that territory' and 'it is inconceivable to materialise the free enjoyment of the right to self-determination in the absence of any territory that peoples could call their homeland.'[52] Accordingly, '[t]he Court stresses that [a] continued occupation [...] is incompatible with the right to self-determination of the people'.[53] Furthermore, contrary to what happens in contexts of apartheid, the armed fight

[50] Article 1(4) of the API. See, also, UNGA, A/RES/3103(XXVIII), 12 December 1973.

[51] See Supreme Court of Canada, *Reference re Secession of Quebec*, *cit.*, para 138; Cassese, Antonio, *op. cit.*, pp. 90-99; Gareau, Jean-François, "Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", *Leiden Journal of International Law*, Leiden, vol. 18, num. 3, October 2005, pp. 489-521, p. 510, https://doi.org/10.1017/S0922156505002840; Ahmed, Dirdeiry M., *Boundaries and Secession in Africa and International Law: Challenging Uti Possidetis*, Cambridge, Cambridge University Press, 2015, p. 222; Mafrica Biazi, Chiara Antonia Sofia, "O princípio de autodeterminação dos povos dentro e fora do contexto da descolonização", *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*, Belo Horizonte, vol. 67, 2015, p. 200; Wilde, Ralph, "Using the Master's Tools...", *cit.*

[52] *Bernard Anbataayela Mornah v. Benin et als.*, App. No. 028/2018, Judgment of 22 September 2022, para. 301.

[53] *Ibidem*, para 303. See also *Wall* Opinion, para. 122 (where certain measures undertaken by the occupying power, rather than the occupation in its entirety, are considered to be in breach of self-determination). For more on the relationship between self-determination of peoples and the law of occupation, see, generally, Cardona Llorens, Jorge, "Le principe du droit des peuples à disposer d'eux-mêmes et l'occupation étrangère", in *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon*, Brussels, Bruylant, 2007, pp. 855-873; Wrange, Pål, "Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara", *Israel Law Review*, Tel Aviv, vol. 52, num. 1, 2019, pp. 3-29, https://doi.org/10.1017/S0021223718000274; Saul, Matthew, "The Right to Self-Determina-

against the occupying power is inherently governed by the law of international armed conflict since a situation of occupation can only occur during an international armed conflict.[54]

The preponderant attention provided to apartheid in South Africa and Rhodesia and the analysis of apartheid from the standpoint of the principle of self-determination of peoples should not overcome the fact that apartheid is a violation of human rights law and an international crime for individuals. Accordingly, international humanitarian law and international criminal law are the lenses through which the applicability of apartheid to occupied territory must be assessed. The following section goes on to explain that the institutes of apartheid and occupation are not mutually exclusive.

V. The Applicability of Apartheid to Occupied Territory as a Violation of International Human Rights Law and as an International Crime

This section assesses whether apartheid is applicable to occupied territory as a violation of international human rights law and as an international crime. When dealing with the application of any treaty in occupied territory, two questions must be addressed: whether that treaty applies in armed conflict (because any occupation is a portion of an armed conflict) and whether that treaty applies extraterritorially (because occupied territory is, by definition, a portion of territory that does not belong to the occupying power). This is the relevant test for the application of the notion of apartheid, too.

The Apartheid Convention does not mention its applicability in armed conflict, nor does it limit its applicability to peacetime. Similarly, the Convention does not explain its territorial scope of application, leaving unanswered the question of whether it applies to extraterritorial actions of a state. However, the silence of the Convention on these issues is not decisive in concluding that the Convention does not apply in occupied territory. Rather, several considerations point towards the opposite conclusion.

tion and the Prolonged Occupation of Palestinian Territory", in Zyberi Gentian (ed.), *Protecting Community Interests through International Law*, Antwerp, Intersentia, 2021, pp. 217-246.

[54] See generally Longobardo, Marco, *The Use*, *cit.*, pp. 205-229.

The analysis is undertaken considering that the Apartheid Convention can be seen as both an international human rights law treaty and as a treaty on international criminal law. From this perspective, the Apartheid Convention is similar to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[55] (Genocide Convention) and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (Enforced Disappearance Convention),[56] both of which have this dual character.

1. *The Application of Apartheid in Armed Conflict*

Considering the Apartheid Convention as an international human rights law treaty, it is straightforward to determine that absent any derogation, the Convention is applicable to armed conflict. The Apartheid Convention does not exclude armed conflicts from its own scope of application. Rather, today, there is an overall consensus that the application of international human rights law is not displaced by the mere fact that an armed conflict occurs.[57] This is the conclusion reached by the ICJ in the aforementioned *Wall* Opinion in relation to the applicability in occupied territory of the 1966 International Covenant on Economic, Social and Cultural Rights,[58] which the Court considered to be applicable to a situation of armed conflict and occupation.[59] Similarly, on a different occasion, the ICJ took for granted that the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[60] was applicable in situations of armed conflict, notwithstanding

[55] 78 U.N.T.S. p. 277.

[56] 2716 U.N.T.S. p. 3.

[57] See generally Müller, Amrei, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law*, Leiden, Brill, 2013; Oberleitner, Gerd, *Human Rights in Armed Conflict*, Cambridge, Cambridge University Press, 2015; Murray, Daragh *et al.*, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford, Oxford University Press, 2016; Wallace, Stuart, *The Application of the European Convention on Human Rights to Military Operations*, Cambridge, Cambridge University Press, 2019.

[58] 993 U.N.T.S. p. 3.

[59] *Wall* Opinion, para. 112.

[60] 660 U.N.T.S. p. 195.

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the fact that its text does not provide any clear indication on its applicability in armed conflict.[61]

The fact that the CERD is presumed to be applicable in armed conflict is confirmed by a series of inter-state applications before the CERD Committee regarding its alleged violations in armed conflict,[62] as well as by the constant practice of the CERD Committee in relation to the actions by Israel in the Occupied Palestinian Territory.[63] International case law and practice on the applicability of the CERD to situations of armed conflict is particularly relevant in relation to apartheid because Article 3 of the CERD contains a specific prohibition on apartheid, according to which "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". It would be absurd to consider that the ban on apartheid mentioned in the CERD applies to armed conflicts while the ban on apartheid fully regulated by the Apartheid Convention does not.

Moreover, the conclusion that the ban on apartheid under the Apartheid Convention and the CERD is applicable during armed conflicts is in line with the opinion of the International Law Commission. In its work on the effects of armed conflicts on treaties, the Commission included "treaties for the international protection of human rights" in the list of treaties that are presumed to continue applying during times of armed conflict and occupation.[64]

The same conclusion can be reached if one considers the ban on apartheid from an international criminal law perspective. First, the 1977 API, which is an international humanitarian law instrument governing armed conflict,

[61] See, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order of 15 October 2008; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Order of 7 December 2021; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Order of 7 December 2021.

[62] CERD Committee, *Inter-State communication submitted by the State of Palestine against Israel*, CERD/C/100/5, 12 December 2019; *Decision on the admissibility of the inter-State communication submitted by the State of Palestine against Israel*, CERD/C/103/R.6, 20 May 2021. On the potential outcomes of these proceedings, see Keane, David, "Palestine v Israel and the Collective Obligation to Condemn Apartheid under Article 3 of ICERD", *Melbourne Journal of International Law*, Melbourne, vol. 23, 2023, p. 1.

[63] CERD Committee, *Concluding observations on the combined seventeenth to nineteenth reports of Israel*, CERD/C/ISR/CO/17-19, 27 January 2020.

[64] See Draft articles on the effects of armed conflicts on treaties, *cit.*, Annex, lit f.

considers "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" among those grave breaches of the law of armed conflict that belligerents must criminalize and prosecute as war crimes.[65] Accordingly, after 1977, international humanitarian law, the main legal framework governing situations of armed conflicts, addresses apartheid in the context of an international armed conflict, even if apartheid did not end up in the list of war crimes embodied in the Statute of the International Criminal Court. Notably, both domestic legislation and military manuals criminalise apartheid as a war crime in international armed conflicts.[66]

Furthermore, apartheid is a crime against humanity. The first treaty that considers apartheid a crime against humanity is the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which mentions apartheid in Article I.[67] Additionally, Article I(1) of the Apartheid Convention unequivocally states that '[t]he States Parties to the present Convention declare that apartheid is a crime against humanity', whereas Article I(2) adds that '[t]he States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.' Moreover, not only are states bound by obligations of domestic criminalisation[68] in relation to apartheid pursuant to the Apartheid Convention,[69] but also this crime is autonomously punished by Article 7(1)(j) of the Statute of the International Criminal Court as a crime

[65] See Article 85(4)(c) of the API.

[66] See Henckaerts, Jean-Marie and Doswald-Beck, Louise (eds.), *Customary International Humanitarian Law*, vol. II, Cambridge, International Committee of the Red Cross / Cambridge University Press, 2005, pp. 2054-2058.

[67] 754 U.N.T.S. p. 73.

[68] On this notion, see Longobardo, Marco, "The Italian Legislature and International and EU Obligations of Domestic Criminalisation", *International Criminal Law Review*, Leiden, vol. 21, num. 4, 2021, pp. 623-640, https://doi.org/10.1163/15718123-bja10051

[69] According to Article IV of the Apartheid Convention, 'The States Parties to the present Convention undertake: (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons'.

against humanity.[70] Under the Statute of the International Criminal Court, crimes against humanity can be committed both in peacetime and during armed conflict.[71] This is in line with the position recently expressed by the International Law Commission in its 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity, according to which crimes against humanity, including apartheid, should be punished during armed conflict.[72] This conclusion resonates the texts of the aforementioned Genocide Convention and the Convention of Enforced Disappearances, which criminalise the respective crimes during armed conflict,[73] as well as with the previous opinion of the International Law Commission, which affirmed that "treaties on international criminal justice" continue to apply in armed conflict due to their subject-matter.[74]

In light of the aforementioned survey of relevant state practice and case law, it is impossible to deny that the notion of apartheid under international criminal law and international human rights law is applicable during armed conflict. However, it is now necessary to assess whether it is applicable extraterritorially as well.

2. The Extraterritorial Application of the Ban on Apartheid

In relation to whether the Apartheid Convention and CERD apply extraterritorially to occupied territory, very few words are necessary. In the 2004 *Wall* Opinion, the ICJ considered that the ICESCR was binding on Israel in its extraterritorial actions even if that treaty does not include any provision on its scope of application.[75] As summarised and explored by vast scholarship, international case law has affirmed consistently that international human rights

[70] 2187 U.N.T.S. p. 3.

[71] See Cryer, Robert, Robinson, Darryl and Vasiliev, Sergey, *An Introduction to International Criminal Law and Procedure*, 4th ed., Cambridge, Cambridge University Press, 2019, p. 230.

[72] See Draft Article 3, International Law Commission, 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity, Yearbook of the International Law Commission, 2019, vol. II, Part Two.

[73] Respectively, Article I ("genocide, whether committed in time of peace or in time of war, is a crime under international law") and Article 1(1) ('No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance').

[74] 2011 Draft Articles on the effects of armed conflicts on treaties, *cit.*, annex, lit d.

[75] *Wall* Opinion, para. 112.

law conventions apply whenever a state exercises extraterritorial jurisdiction in the form of effective control over a portion of territory – such as in the case of an occupation.[76] Even the most unpersuasive decisions on the inapplicability of human rights conventions in armed conflict, such as the 2021 decision of the European Court of Human Rights in the controversial *Georgia v. Russia* (II) case, have maintained that international human rights law applies in occupied territory, excluding only its application to the active phase of hostilities outside the occupied territory.[77]

Playing the devil's advocate, one might argue that the extraterritorial application of conventions such as the Apartheid Convention or the Genocide Convention is different in relation to the specific obligation at stake: for instance, the obligation to prosecute alleged breaches of the Genocide Convention is subject to the ordinary international law rules governing the exercise of states' criminal jurisdiction over international crimes[78] coupled with the special rules under Article VI of the Genocide Convention,[79] whereas the territo-

[76] See, e.g., Milanović, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, Oxford University Press, 2011; Costa, Karen da, *The Extraterritorial Application of Selected Human Rights Treaties*, Leiden, Brill, 2012; Vezzani, Simone, "Considerazioni sulla giurisdizione extraterritoriale ai sensi dei trattati sui diritti umani", *Rivista di diritto internazionale*, Milan, vol. 101, num. 4, 2018, pp. 1086-1135.; Shany, Yuval, "The Extraterritorial Application of International Human Rights Law", *Recueil des Cours*, Leiden, vol. 409, 2020, pp. 21-152; Raible, Lea, *Human Rights Unbound: A Theory of Extraterritoriality*, Oxford, Oxford University Press, 2020.

[77] *Georgia v. Russia (II)*, App. No., 38263/09, Judgment of 21 January 2021, paras. 146-175. For criticisms, see, among others, Milanović, Marko, "*Georgia v. Russia No. 2*: The European Court's Resurrection of Bankovic in the Contexts of Chaos", *EJIL: Talk!*, 25 January 2021, *https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/*; Duffy, Helen, "*Georgia v. Russia*: Jurisdiction, Chaos and Conflict at the European Court of Human Rights", *Just Security*, 2 February 2021, *https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/*; Vezzani, Simone, "Recenti sviluppi in tema di applicazione extraterritoriale delle convenzioni internazionali sui diritti umani", *Rivista di diritto internazionale*, Milan, vol. 104, num. 3, 2021, pp. 647-688; Longobardo, Marco & Wallace, Stuart, "The 2021 ECtHR's Decision on *Georgia v Russia (II)* Case and the Application of Human Rights Law to Extraterritorial Hostilities", *Israel Law Review*, Tel Aviv, vol. 55, num. 2, 2022, pp. 145-177, https://doi.org/10.1017/S0021223721000261

[78] See, generally, Treves, Tullio, *La giurisdizione nel diritto penale internazionale*, Padua, CEDAM 1973, pp. 53-64; Cryer, Robert, Robinson, Darryl and Vasiliev, Sergey, *op. cit.*, pp. 49-68.

[79] *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, para 442.

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rial scope of the duty to prevent genocide is constrained by the "the capacity to influence effectively the action of persons likely to commit, or already committing, genocide".[80] However, since there is nothing in the Apartheid Convention —or in any similar convention— that limits the scope of application of the duty *not to commit* apartheid (or, mutatis mutandis, genocide), this duty applies pursuant to the aforementioned rules governing the extraterritorial application of human rights treaties. Indeed, the International Court of Justice has recognized that the ban on genocide under the Genocide Convention would apply extraterritorially.[81]

Furthermore, it must be emphasized that the rules on apartheid included in the CERD are explicitly applicable to any territory under State jurisdiction, rather than merely in its own territory alone. According to Article 3, States Parties "undertake to prevent, prohibit and eradicate all practices of this nature *in territories under their jurisdiction*".[82] According to the CERD Committee, Article 3 includes "such practices[…] imposed by forces outside the State,"[83] as well as those directly instituted within the territory of the State. As noted by Thornberry, Article 3 is the only jurisdictional clause in the CERD, and it explicitly applies to any territory under State jurisdiction in relation to apartheid, whereas no indication is included in relation to other prohibitions under that treaty.[84] By definition, an occupied territory is a territory under the extraterritorial jurisdiction of another state, the occupying power.

Finally, it is noteworthy that the ICJ has considered that the notion of apartheid was applicable to occupied territory in relation to Namibia in 1971.[85] At that time, Namibia was occupied by South Africa, which had no legal title over the area after the termination of the 1920 mandate in 1966.[86]

[80] *Ibidem*, para. 430.

[81] *Ibidem*, para. 183.

[82] Emphasis added.

[83] Committee on the Elimination of Racial Discrimination, General Recommendation 19, *The prevention, prohibition and eradication of racial segregation and apartheid*, U.N. Doc. A/50/18, para 2.

[84] Thornberry, Patrick, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford, Oxford University Press, 2016, p. 258.

[85] *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, para 129 (hereinafter: *South West Africa* Opinion).

[86] UNGA Res. 2145 (XXI), 27 October 1966. The ICJ considered that Namibia was under occupation in its *South West Africa* Opinion, para 118.

Although the ICJ was not applying the Apartheid Convention, which had not been yet adopted in 1971, but rather the customary international law definition of apartheid,[87] nevertheless, the Court's conclusion supports the idea that the ban on apartheid is applicable to occupied territory. From this perspective, the reference to 'policies and practices of racial segregation and discrimination as practised in southern Africa' in Article II of the Apartheid Convention should be read as a reference to apartheid in South Africa, Rhodesia, and *Namibia* as well.[88]

The conclusion that apartheid is applicable in occupied territory is reinforced by Azerbaijan in relation to alleged apartheid established by Armenia in territories occupied between 1994 and 2020 in the framework of the Nagorno-Karabakh conflict: in a pending application before the ICJ, Azerbaijan alleged that Armenia had violated Article 3 of the CERD, which includes apartheid, by 'engaging in a campaign of ethnic cleansing and other racial segregation against Azerbaijanis, including through: the unlawful expulsion of hundreds of thousands of Azerbaijanis from the formerly Occupied Territories' and 'the construction of illegal Armenian settlements in those Territories'.[89] Accordingly, Azerbaijan believes that apartheid applies extraterritorially in situations of armed conflict and that the institutions of apartheid and occupation are not mutually exclusive.

This section has thus demonstrated that there is nothing in international law preventing the application of apartheid in armed conflict and from applying it extraterritorially to a territory over which a state exercises temporarily extraterritorial jurisdiction. Consequently, the institutions of apartheid is

[87] On the latitude of the customary international law definition of apartheid, see generally Jackson, Miles, "The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination", *International and Comparative Law Quarterly*, London, vol. 71, 2022, pp. 831-855.

[88] Quigley, John, "Apartheid Outside Africa: The Case of Israel", *Indiana International & Comparative Law Review*, Indianapolis, vol. 1, 1991, p. 224; Dugard, "L'Apartheid", *cit.*, pp. 199-200.

[89] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application instituting proceedings, 23 September 2021, para. 98. Armenia reciprocated the allegations of apartheid in armed conflict – with no reference to occupied territory – in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Application instituting proceedings and request for the indication of provisional measures, 16 September 2021, para. 97.

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fully applicable in occupied territory under international human rights law, international criminal law, and international humanitarian law.

VI. Avoiding Normative Conflicts Between the Law of Occupation and Apartheid

The previous section has demonstrated that apartheid, both as an international human rights law violation and as an international crime, is applicable to occupied territory. The analysis requires a brief overview of the main issues pertaining to the application of the notion of apartheid in occupied territory.[90]

The crux of the issue is distinguishing between cases in which the law of occupation and apartheid do not overlap, and cases in which an overlapping does in fact exists.[91] If the two branches of international law do not overlap in relation to certain specific conduct, they will apply cumulatively without any normative conflict.[92] Thus, apartheid will fill gaps in the law of occupation by dealing with conduct that is not directly addressed by international humanitarian law.

However, it is possible that the rules on apartheid under international human rights law and international criminal law overlap with certain provisions of the law of occupation. In this case, two scenarios can be distinguished. On the one hand, it is possible that the law of occupation and the ban on apartheid reinforce each other. For instance, this is the case of the prohibition of settlements: settlements are illegal under Article 49(6) of the Fourth Geneva Convention and can be used to impose a system of racial discrimination and segregation that amounts to apartheid. On the other hand, the law of occupation and apartheid can present apparent normative conflicts, for instance, in relation to the possibility for the occupying power to maintain two different legal systems in the occupied territory, one pursuant to the duty to maintain the law in force in the occupied territory for the local population, the other pursuant the right of the occupying power to adopt measures to protect its own safety. If the two provisions reinforce each other, no issue should arise.

[90] For more on this, see Jackson, Miles, "Expert Opinion", *cit.*

[91] *Wall* Opinion, para. 106.

[92] Jackson, Miles, "Expert Opinion", *cit.*, paras 46-47.

If there is an apparent normative conflict, though, this should be avoided through interpretation,[93] following the established case law of international courts and tribunals on the relationship between international human rights law and international humanitarian law. The ICJ reached this conclusion in its 1996 *Nuclear Weapons* Opinion, which clarified that in cases of contextual application of international humanitarian law and international human rights law, the latter must be interpreted in light of the former, under the principle of *lex specialis*.[94] The Court's argument has been explored in detail because its reference to *lex specialis* in this context has generated a significant debate: in fact, the Court demanded the undertaking of a contextual interpretive operation, which is fully consonant with the obligation under Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties directing that the interpretation of treaty terms be undertaken in light of any other rules of international law applicable between the parties.[95] Accordingly, the reference to *lex specialis* is misleading since *lex specialis* is usually understood as a technique to solve normative conflicts once interpretation fails to avoid them, whereas this is not the way in which this notion is understood in the discourse on the relationship between international human rights law and international humanitarian law.[96] Although this is not the occasion to explore this topic in depth,[97] suffice it to say that the use of international humanitarian law to interpret international human rights law and vice versa is commonplace in the case-law of Inter-American and European human rights courts and mechanisms.[98]

[93] *Ibidem*, para. 54-56.

[94] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, para. 25.

[95] 155 U.N.T.S. p. 331.

[96] On the various uses of *lex specialis*, see Milanović, Marko, "A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law", *Journal of Conflict and Security Law*, Oxford, vol. 14, num. 3, 2009, pp. 459-483, https://doi.org/10.1093/jcsl/krp033 (who is less optimistic than this author on the possibility to avoid normative conflicts through interpretation in almost all the circumstances).

[97] This author has expressed his views on this topic in Longobardo, Marco, *The Use…*, *cit.*, pp. 71-80.

[98] See, e.g., Inter-American Court of Human Rights, *Cruz Sánchez y otros vs Perú*, 17 April 2015, paras. 272-273; European Court of Human Rights, *Hassan v. UK*, App. no. 29750/09, 16 September 2014, para. 100.

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Applying this conclusion to the topic at hand, it is possible to argue that in the specific context of occupied territory, the law of occupation guides the interpretation of the definition of apartheid. For instance, the notion of arbitrary arrest and illegal imprisonment in Article 2(a)(iii) of the Apartheid Convention should be interpreted in light of the rules of the law of occupation that permit the occupying power to restrict the personal freedom of the local population (e.g., Article 78 of the Fourth Geneva Convention). Similarly, the notion of "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" should be interpreted in light of the rules of the law of occupation pertaining to continuing functioning of public officials affiliated with the ousted sovereign (Article 54 of the Fourth Geneva Convention). From this perspective, by employing Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties to avoid normative conflict, it is very unlikely that any conflict between the law of occupation and apartheid will materialize.

If such an unavoidable normative conflict materialises, international law does not permit the prevalence of the law of occupation over the ban on apartheid. It is true that the ICJ affirmed in the *Wall* Opinion that, in cases of normative conflicts between international humanitarian law and international human rights law, the former prevails over the latter as *lex specialis*.[99] However, only one year later, in the 2005 *DRC v. Uganda* judgment, the ICJ omitted any reference to *lex specialis* as a reason to render international humanitarian law prevailing.[100] This may signify that the ICJ has retracted its prior statement on the possibility that applicable international human rights law could be displaced by international humanitarian law.[101] This conclusion is reinforced by the *jus cogens* nature of the ban on apartheid[102] which, as a such,

[99] *Wall* Opinion, para. 106.

[100] 2005 *DRC v. Uganda* Judgment, para. 216.

[101] See, e.g., Kolb, Robert, and Vité, Sylvain, *op. cit.*, p. 334; Milanović, Marko, 'A Norm Conflict', *cit.*, p. 464; Annoni, Alessandra, *op. cit.*, p. 126; Vitucci, Maria Chiara, *Sovranità e amministrazioni territoriali*, Naples, Editoriale Scientifica, 2012, p. 55; Longobardo, *The Use…*, *cit.*, pp. 76-77.

[102] International Law Commission, 2022 Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), A/77/10, para. 43, Draft Conclusion 23(e).

prevails over other rules of international law.[103] In any case, it is necessary to reiterate that the law of occupation and the ban on apartheid reinforce each other and that any normative conflict between the two that cannot be solved through interpretation is extremely unlikely.

VII. Conclusions

This article has demonstrated that apartheid and occupation are not mutually exclusive, but rather, they are international law institutions which can apply simultaneously. Whereas the law of occupation is intrinsically linked to territorial considerations and the preservation of territorial sovereignty, apartheid under international human rights law and international criminal law pertains to individuals, their rights, and their duties under international law, irrespective of any consideration pertaining to the status of the territory wherein they are physically located.

Situations of occupation are, sadly, fertile soil for violations of rights of individuals and groups, particularly since they are established in the context of an armed conflict. During occupations, the enemy occupying power is tasked with governing a territory and the population dwelling therein, in a hostile framework that could result in the adoption of discriminatory and segregatory systems. By definition, apartheid can be seen as a perversion of the good governance that should occur in a state with the welfare of the citizens in mind, since it excludes and targets a specific racial group. The fact that the latter can occur in the former environment is far from unlikely. International law does not impose any barrier to the application of apartheid, and the prosecution of its perpetrators, in occupied territory.

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[103] Article 53, Vienna Convention on the Law of Treaties.

ISSN 1870-4654
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