PALESTINE V ISRAEL AND THE COLLECTIVE OBLIGATION TO CONDEMN APARTHEID UNDER ARTICLE 3 OF *ICERD*

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Under art 3 of the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'), 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. The provision is central to Palestine's inter-state communication against Israel under arts 11–13 of ICERD, in which it is argued that Israel's policies and practices in the occupied Palestinian territories constitute apartheid. Importantly, Palestine invokes two obligations inherent in art 3 — the individual obligation of Israel to prevent, prohibit and eradicate all practices of this nature, and the collective obligation of all states parties to ICERD to condemn such practices by not recognising as lawful the illegal situation, or rendering aid or assistance in its maintenance. This article examines the origin, meaning and implications of the collective obligation to condemn apartheid under art 3 of ICERD. It traces its emergence in the text of art 3 through the drafting history of the provision. It outlines its implementation by the Committee on the Elimination of Racial Discrimination ('CERD') in relation to apartheid South Africa from 1970–94, a period in which South Africa remained outside the treaty and the obligation of all states parties to condemn apartheid was the focus of the Committee's work. Finally, it considers its potential implications in Palestine v Israel, underlining that a finding of apartheid would render the obligation opposable in relation to the other 180 states parties to ICERD under all of its mechanisms. It could be monitored in state reports, individual communications or inter-state communications before CERD, or litigated in inter-state proceedings before the International Court of Justice.

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I INTRODUCTION

The *International Convention on the Elimination of All Forms of Racial Discrimination* ('*ICERD*'), adopted on 21 December 1965, is the first multilateral treaty to condemn apartheid.[1] Its art 3 reads: 'States Parties particularly condemn

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1 As highlighted by the State of Palestine in 'Interstate Complaint under Articles 11–13 of the International Convention for the Elimination of All Forms of Racial Discrimination: State of Palestine v Israel', (23 April 2018) 295 [584] <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FISC%2F9325&Lang=en>, archived at <https://perma.cc/Q6R2-UWWA> ('*Palestine's Complaint to CERD*'). See also *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*').

racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction'. A claim of apartheid in violation of art 3 of *ICERD* is currently before the Committee on the Elimination of Racial Discrimination ('CERD') in the context of the occupied Palestinian territories ('OPT'). In *Palestine v Israel*, an inter-state communication submitted in April 2018 under art 11(1) of *ICERD*, Palestine requests findings to the effect that 'Israel's policies and practices in the occupied territory of the State of Palestine constitute apartheid within the meaning of Art. 3 CERD'.[2] The claim awaits determination by the ad hoc Conciliation Commission, appointed in December 2021 in accordance with art 12(1)(b) of *ICERD*, tasked with issuing findings of fact and recommendations for the 'amicable solution' of the dispute.[3] It occurs against a backdrop of a number of recent reports assessing the situation in the OPT as apartheid by Yesh Din,[4] B'Tselem,[5] Human Rights Watch,[6] Amnesty International[7] and the United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories occupied since 1967.[8]

Palestine holds in its communication that a finding of apartheid would give rise to two obligations. Israel 'must dismantle the existing Israeli settlements as a necessary pre-condition for the termination of the system of racial discrimination and apartheid in the occupied territory of the State of Palestine'.[9] Third states 'must not recognize as lawful this illegal situation, nor render aid or assistance in any form in maintaining that situation'.[10] This article focuses on the third states element of Palestine's claim, which refers to the parties to the Convention other than Palestine and Israel and emphasises that these have obligations as contracting

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2 *Palestine's Complaint to CERD* (n 1) 342 [660(B)].

3 For a more detailed discussion of the CERD inter-state communications mechanism and decisions to date, see generally Jan Eiken and David Keane, 'Towards an Amicable Solution: The Inter-State Communications Procedure under ICERD' (2022) 21(2) *The Law and Practice of International Courts and Tribunals* 302; Dai Tamada, 'Inter-State Communication under ICERD: From Ad Hoc Conciliation to Collective Enforcement?' (2021) 12(3) *Journal of International Dispute Settlement* 405.

4 'The Occupation of the West Bank and the Crime of Apartheid: Legal Opinion', *Yesh Din* (Web Page, 9 July 2020) <https://www.yesh-din.org/en/the-occupation-of-the-west-bank-and-the-crime-of-apartheid-legal-opinion/>, archived at <https://perma.cc/ZA8K-CQH3>.

5 'Apartheid', *B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories* (Web Page, 12 January 2021) <https://www.btselem.org/apartheid>, archived at <https://perma.cc/5NLZ-XAWY>.

6 'A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution', *Human Rights Watch* (Web Page, 27 April 2021) <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>, archived at <https://perma.cc/B2PQ-ZBD3>.

7 Amnesty International, *Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity* (Report No MDE 15/5141/2022, 1 February 2022) <https://www.amnesty.org/en/documents/mde15/5141/2022/en/>, archived at <https://perma.cc/74F3-UDB5>. Amnesty International's report includes 'Israel itself' in its assessment of apartheid.

8 Michael Lynk, Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UN GAOR, 49th sess, Agenda Item 7, UN Doc A/HRC/49/87 (12 August 2022). Lynk writes 'Is this situation now apartheid? … the Special Rapporteur has concluded that the political system of entrenched rule in the Occupied Palestinian Territory … satisfies the prevailing evidentiary standard for the existence of apartheid': at 17 [52].

9 *Palestine's Complaint to CERD* (n 1) 342 [660(D)].

10 Ibid 342 [660(E)].

parties to *ICERD*.[11] There are currently 182 states parties to *ICERD*, and so this aspect relates to the obligations of the other 180 states parties to the treaty. As CERD noted in its decision on jurisdiction in *Palestine v Israel*, the claims brought forward in the communication 'pertain to the interests of all the States parties to the Convention'.[12]

In general international law, the International Law Commission has stated that the prohibition of apartheid is a peremptory norm (*jus cogens*)[13] that gives rise to a third state's obligation not to recognise as lawful a situation created by a serious breach, or render aid or assistance in its maintenance.[14] Third states' obligations have also been articulated by the International Court of Justice ('ICJ') in its advisory opinions on *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (1971)[15] and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('*Wall Advisory Opinion*') (2004).[16] However, 15 years after the *Wall Advisory Opinion*, the Palestinian NGO Al Haq would largely affirm the failure of third states to act in accordance with that opinion.[17] Judge Kooijmans remarked in a separate opinion in the *Wall Advisory Opinion* that it was 'an obligation without real substance',[18] and although his views were aimed only at the 'non-recognition' aspect, it appears true of the implementation of the obligation overall. As Susan Akram and Michael Lynk surmise, the 'obligations were not explained, and the consequences to States unclear'.[19] By contrast, under *ICERD*, a collective obligation to condemn apartheid falls on all states parties as a treaty obligation under art 3. A finding of apartheid would render it opposable in relation to all states parties to the treaty.

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11 Ibid 341 [659]. The complaint notes that

> given the *erga omnes* character of the obligations underlying CERD, as well as the character of CERD as part of the *ordre public international*, the *ad hoc* Commission to be set up under these proceedings, ought also to call upon *third States*, contracting parties of CERD, to be aware of, and to fulfil, their own obligations arising under CERD.

12 Committee on the Elimination of Racial Discrimination, *Inter-State Communication Submitted by the State of Palestine against Israel: Decision on Jurisdiction*, UN Doc CERD/C/100/5 (12 December 2019) 10 [53].

13 International Law Commission, *Report of the International Law Commission*, UN GAOR, 77th sess, Agenda Item 77, Supp No 10, UN Doc A/77/10 (1 January 2022) 18.

14 Ibid 70 as seen through Conclusion 19(2); this conclusion is derived from *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002) annex art 41(2), which are the articles on responsibility of states for internationally wrongful acts.

15 *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, 54 [119]. The Court found that there was an obligation on all states 'to recognize the illegality and invalidity of South Africa's continued presence'.

16 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion*) [2004] ICJ Rep 136, 200 [159] ('*Wall Advisory Opinion'*). The Court found that 'all States are under an obligation not to recognize the illegal situation … [nor] render aid or assistance in maintaining the situation'.

17 '15 Years since the ICJ Wall Opinion: Israel's Impunity Prevails Due to Third States' Failure to Act', *Al-Haq: Defending Human Rights* (Web Page, 9 July 2019) <https://www.alhaq.org/advocacy/14616.html>, archived at <https://perma.cc/B9J9-LYJ5>.

18 *Wall Advisory Opinion* (n 16) 232 [44] (Judge Kooijmans).

19 Susan Akram and Michael Lynk, 'The Wall and the Law: A Tale of Two Judgements' (2006) 24(1) *Netherlands Quarterly of Human Rights* 61, 82.

The substance of the obligation could then be tested under all of *ICERD*'s mechanisms, including before the Court itself.

The article proceeds in three parts. Part II sets out the drafting history of art 3, tracing its shift from a provision addressed only to individual states that practiced apartheid, ie South Africa and the southern African region, to a provision addressed to all states parties to condemn apartheid. The analysis establishes that a collective obligation on all states parties is integral to the text of art 3. Part III focuses on CERD practice on art 3 from 1970–94, a period during which apartheid South Africa remained outside the treaty and CERD implemented only the collective obligation. Here, the legal character and content of the obligation emerged, as the Committee examined states parties on their diplomatic, economic and other relations with apartheid South Africa. Part IV considers the apartheid claim that is before the Commission in *Palestine v Israel*. A finding of a collective obligation would trigger its potential enforcement in relation to all other 180 states parties to *ICERD* under all of its mechanisms. The obligation not to recognise the illegal situation, or render aid or assistance in its maintenance, could be raised in state reports, individual communications or inter-state communications before CERD, or litigated in inter-state proceedings before the ICJ. As a result, *Palestine v Israel* has potential significant legal consequences for all states parties to the treaty.

II THE EMERGENCE OF A COLLECTIVE OBLIGATION IN THE DRAFTING OF ARTICLE 3

ICERD's apartheid provision was pioneering and it is perhaps unsurprising that it was resisted at various points in its elaboration. The Convention began as a UN response to a global outbreak of anti-Semitic incidents in the winter of 1959–60.[20] Resolutions were issued by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities ('Sub-Commission'), the Commission on Human Rights ('Commission') and the Third Committee of the General Assembly ('Third Committee'), condemning these 'manifestations of anti-Semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature'.[21] At the time, the Sub-Commission and Commission were smaller expert bodies with almost no representation from African states.[22] Although they had indicated the need to widen the response to

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[20] On these incidents, see generally Howard J Ehrlich, 'The Swastika Epidemic of 1959–1960: Anti-Semitism and Community Characteristics' (1962) 9(3) *Social Problems* 264.

[21] Voitto Saario, Rapporteur, *Report of the Twelfth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, UN ESCOR, 12th sess, UN Docs E/CN.4/800 and E/CN.4/Sub.2/206 (8 February 1960) 69 [194].

[22] In 1960–61, just one member of the 14-member Sub-Commission (Mr Mohamed Ahmed Abu Rannat (Sudan)), and no members of the 18-member Commission, were from Africa. For a list of the Sub-Commission and Commission members in 1960–61, see ibid 6 [3]; Commission on Human Rights, *Report of the Seventeenth Session*, UN ESCOR, 32nd sess, Supp No 8, UN Doc E/CN.4.817 (17 March 1961) 1–2 [3].

these 'manifestations' to include other forms of racism,[23] neither body had expressly raised apartheid under the rubric of 'other forms of racial prejudice'. In October 1962, in the Third Committee, the focus of the discussion shifted decisively.

African membership of the General Assembly had been growing, and by 1962, it was the most represented continent. The General Assembly had adopted *Resolution 44(I)* on the 'Treatment of Indians in South Africa' in 1946, and further resolutions on apartheid throughout the 1950s–60s.[24] It was soon to adopt *Resolution 1761 (XVII)* on 'The Policies of Apartheid of the Government of the Republic of South Africa', which called for the breaking off of diplomatic relations with South Africa and a boycott of South African goods.[25] It was in this context that nine African states, in response to the item on manifestations, proposed the preparation of an international convention on the elimination of racial discrimination.[26] For these and other delegates, apartheid was a clear priority for the proposed instrument.[27] General Assembly *Resolution 1780 (XVII)* was adopted calling for the preparation of a draft declaration and convention, tasking the Sub-Commission and Commission with preparing the drafts.[28] The principal drafters in the Sub-Commission and Commission were from the United Kingdom, the United States and the Soviet Union ('USSR'), which, as Timothy Lovelace Jr observes, 'reinforced long-standing hierarchies in global race relations, as it dismissed the black South and much of the so-called "Third World"'.[29] The dominance of the global North meant the inclusion of an apartheid provision in the draft of both instruments would be contested.

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23 For example, in the Sub-Commission, it was pointed out that '[r]egimes of colonialism and slavery had also contributed to the spread of racism': Voitto Saario, Rapporteur, *Report of the Thirteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, UN ESCOR, 13th sess, UN Docs E/CN.4/815 and E/CN.4/Sub.2/211 (9 February 1961) 56 [160].

24 *Treatment of Indians in the Union of South Africa*, GA Res 44(I), 1st sess, 52nd plen mtg, UN Doc A/RES/44(I) (8 December 1946).

25 *The Policies of Apartheid of the Government of the Republic of South Africa*, GA Res 1761, UN GAOR, 17th sess, Agenda Item 86, UN Doc A/RES/1761(XVII) (6 November 1962) paras 4(a), (d).

26 Central African Republic, Chad, Dahomey, Guinea, Ivory Coast, Mali, Mauritania, Niger and Upper Volta: *Manifestations of Racial Prejudice and National and Religious Intolerance: Preparation of an International Convention on the Elimination of Racial Discrimination*, UN GAOR, 3rd Comm, 17th sess, Agenda Item 48, UN Doc A/C.3/L.1006 (25 October 1962).

27 For example, Mrs Leflerova (Czechoslovakia) described how '[r]acialism … was particularly acute in Africa, in the form of apartheid in South Africa': UN GAOR, 3rd Comm, 17th sess, 1165th mtg, Agenda Item 48, UN Doc A/C.3/SR.1165 (29 October 1962) 159 [47]; Mr Diaz Casanueva (Chile) observed that racial discrimination and prejudice took various forms, but apartheid was 'the most repugnant of all': UN GAOR, 3rd Comm, 17th sess, 1167th mtg, Agenda Item 48, UN Doc A/C.3/SR.1167 (30 October 1962) 168 [27]; Mrs Rousseau (Mali) considered that '[t]he extreme form of discriminatory policy was apartheid, which was as much a crime against humanity as the crimes of the Nazis had been': UN GAOR, 3rd Comm, 17th sess, 1169th mtg, Agenda Item 48, UN Doc A/C.3/SR.1169 (31 October 1962) 178 [23].

28 *Preparation of a Draft Declaration and a Draft Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 1780(XVII), 3rd Comm, 17th sess, 1187th plen mtg, UN Doc A/RES/1780(XVII) (7 December 1962) paras 1(a), (b).

29 H Timothy Lovelace Jr, 'Making the World in Atlanta's Image: The Student Nonviolent Coordinating Committee, Morris Abram, and the Legislative History of the United Nations Race Convention' (2014) 32(2) *Law and History Review* 385, 425. The author also highlights the total exclusion of women in the 'all-male Sub-Commission': at 426.

In January–February 1963, the Sub-Commission decided to focus first on the draft declaration.[30] It had before it three texts, a joint working paper, and draft declarations submitted by Mr Abram (USA) and Mr Ketrzynski (Poland).[31] Only the Ketrzynski draft had a proposed apartheid provision, in its art 2: 'Government policies of apartheid and racial discrimination shall immediately be brought to an end'.[32] The Sub-Commission decided to use the joint working paper as the basis for its draft, which contained a preambular reference to apartheid, but no apartheid provision.[33] However, the Cold War dynamics of the time ensured the apartheid provision was not lost. In March 1963, the Commission began its consideration of the Sub-Commission draft,[34] where a further draft declaration was submitted jointly by Denmark and the USA.[35] The USSR then maintained that if the Commission were to consider also the Denmark–USA text, the USSR and Poland would submit a text of their own, which included the apartheid provision from Ketrzynski's draft.[36] A working group was set up, and its draft was a compromise that contained an apartheid provision in line with the Poland-USSR draft.[37] Thus, its art 5 in the draft declaration read: 'An end shall be put without delay to governmental policies of racial segregation and especially policies of apartheid as well as all forms of racial discrimination and separation resulting from such policies'.[38]

The inclusion of an apartheid provision in the draft declaration was not unanimously supported in the Commission. Mr Beaufort (Netherlands) commented: 'With regard to the use of the word apartheid … he wondered whether it was proper to make a reference to the specific policy of a specific country in an instrument of a general, or even universal, character'.[39] Mr Diaz Casanueva (Chile) saw a practical obstacle to the proposed provision:

> [T]he Polish-Soviet draft was misleading. Who was to bring an end to government policies of apartheid? Clearly only the South African Government could do that,

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30 Voitto Saario, Rapporteur, *Report of the Fifteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, UN ESCOR, 15th sess, UN Docs E/CN.4/846 and E/CN.4/Sub.2/229 (14 February 1963) 67–8 [187].

31 Ibid 61 [182]. The joint working paper was submitted by Mr Capotorti (Italy), Mr Juvigny (France), Mr Santa Cruz (Chile) and Mr Ketrzynski (Poland).

32 Ibid 65 [186].

33 Ibid 61 [183].

34 *Draft Declaration on the Elimination of All Forms of Racial Discrimination: Note by the Secretary-General*, UN GAOR, 18th sess, UN Doc A/5459 (29 July 1963) 2 [4].

35 Commission on Human Rights, *Summary Record of the Seven Hundred and Fortieth Meeting*, UN ESCOR 19th sess, 740th mtg, Agenda Item 12, UN Doc E/CN.4/SR.740 (2 March 1964) 4–5. These UN documents were later issued as documents E/CN.4/L.635 and Corr 1 and 2.

36 Commission on Human Rights, *Summary Record of the Seven Hundred and Forty-First Meeting*, UN ESCOR, 19th sess, 741st mtg, Agenda Item 12, UN Doc E/CN.4/SR.741 (4 March 1964) 10.

37 Commission on Human Rights, *Report of the Nineteenth Session*, UN ESCOR, 19th sess, Supp No 8, UN Docs E/3743 and E/CN.4/857 (1963) 62–5 ('*Report of the Nineteenth Session*').

38 Ibid 64 [104].

39 Commission on Human Rights, *Summary Record of the Seven Hundred and Forty-Second Meeting*, UN ESCOR, 19th sess, UN Doc E/CN.4/SR.742 (3 March 1964) 3–4.

> and, despite many General Assembly resolutions calling on it to abandon that policy, it had not done so.[40]

Ultimately, draft art 5 was adopted by 18 votes to none, with only one abstention, the Netherlands.[41] Beaufort affirmed that his abstention was an objection to the inclusion of the reference to apartheid.[42]

The Third Committee began its consideration of the Commission draft in September 1963.[43] Here, delegates consistently raised apartheid and South Africa in a context of wide support for the proposed declaration.[44] A voice of opposition came from South Africa itself, where Mr Dirkse Van Schalkwyk decried the 'bitter political note' introduced into the discussion and rejected the allegations regarding South Africa as unfounded.[45] Echoing the comments of Beaufort in the Commission, he regretted that the declaration 'had been drafted with one or two specific situations in mind, rather than with a desire to make it universally applicable'.[46] South Africa would not participate any further in the drafting process. Portugal also abstained from voting in favour of draft art 5, although it would support the declaration as a whole.[47] These were marginal views. The UN *Declaration on the Elimination of All Forms of Racial Discrimination* ('*Declaration*') was adopted by the General Assembly on 20 November 1963 by

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40 Commission on Human Rights, *Summary Record of the Seven Hundred and Forty-Third Meeting*, UN ESCOR, 19th sess, UN Doc E/CN.4/SR.743 (4 March 1964) 9.

41 *Report of the Nineteenth Session*, UN Docs E/3743 and E/CN.4/857 (n 37) 67 [114].

42 Commission on Human Rights, *Summary Record of the Seven Hundred and Sixty-First Meeting*, UN ESCOR, 19th sess, 761st mtg, Agenda Item 12, UN Doc E/CN.4/SR.761 (3 March 1964) 5. Beaufort was also clear that the abstention 'should in no way be interpreted as meaning that his Government approved of the policy of apartheid; the contrary was true'.

43 *Draft Declaration on the Elimination of All Forms of Racial Discrimination*, UN GAOR, 3rd Comm, 18th sess, 1213th mtg, Agenda Item 43, UN Doc A/C.3/SR.1213 (26 September 1963).

44 For example, Miss Wachuku (Nigeria) referenced 'the need to end racial discrimination, especially apartheid': at ibid 8 [23]; Mr Ung Mung (Cambodia) said 'it would be shameful for mankind to remain unmoved by the consequences of the policy of apartheid pursued in particular in South Africa': *Draft Declaration on the Elimination of All Forms of Racial Discrimination*, UN GAOR, 3rd Comm, 18th sess, 1214th mtg, Agenda Item 43, UN Doc A/C.3/SR.1214 (27 September 1963) 12 [22]. Mrs Pesic Golubovic (Yugoslavia) deplored how racial discrimination had been 'elevated to the level of official policy in South Africa': at 12 [12].

45 *Draft Declaration on the Elimination of All Forms of Racial Discrimination (Continued)*, UN GAOR, 3rd Comm, 18th sess, 1218th mtg, Agenda Item 43, UN Doc A/C.3/SR.1218 (2 October 1963) 37 [20]. Mr Van Schalkwyk denied that South Africa's policies were based on a 'concept of superiority of one race over others, or on the suppression or oppression of any race'.

46 Ibid 37 [22].

47 *Draft Declaration on the Elimination of All Forms of Racial Discrimination (Continued): Adoption of the Draft Declaration as a Whole*, UN GAOR, 3rd Comm, 18th sess, 1245th mtg, Agenda Item 43, UN Doc A/C.3/SR.1245 (28 October 1963) 174 [6] ('*Draft Declaration 1963*'). Portugal explained that it considered art 5 to be at variance with art 2(7) of the *Charter of the United Nations*, which prohibits intervention in the domestic affairs of states.

89 votes to none, with 17 abstentions.[48] The abstentions, all from Western States, related to the provision on racist propaganda rather than apartheid.[49]

With the adoption of the *Declaration*, the General Assembly called for the Sub-Commission and Commission to prepare a draft convention.[50] The return to the smaller expert bodies saw the apartheid provision again be the subject of questioning. When the Sub-Commission began its work in January 1964, it had three drafts before it, from Mr Abram (USA), Mr Calvocoressi (UK), and Messrs Ivanov and Ketrzynski (USSR and Poland).[51] Abram's draft provided an apartheid provision in its art III, closely modelled on art 5 of the *Declaration*.[52] But Calvocoressi's draft,[53] and Ivanov and Ketrzynski's draft,[54] contained no apartheid provision, despite its inclusion in the *Declaration* and clear support in the General Assembly. Calvocoressi explained his omission:

> Article 5 of the Declaration raised a question which would be likely to lead to debate. He had not included in his text any reference to apartheid or any other contemporary form of discrimination, although such phenomena were obviously in everyone's mind, because it was to be hoped that the convention would stand for all time, whereas transient current practices might be expected to disappear.[55]

The stance was supported by Mr Cuevas Cancino (Mexico), who referred to Abram's draft art III as having 'no meaning in a convention because [it] concerned one country or one particular policy'.[56] He was at a loss as to how art III might be relevant outside South Africa, including in his own country: '[h]e could not see how the law courts and parliament of a country such as Mexico could approve that clause, since apartheid did not exist in Mexico'.[57] At this point, draft art III had

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48 *Draft Declaration 1963*, UN Doc A/C.3/SR.1245 (n 47) 173 [2]; *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res 1904(XVIII), UN Doc A/RES/1904(XVIII) (20 November 1963).

49 See, eg, comments of Mr Shields (Ireland): 'He therefore regretted that article 9 of the draft Declaration had been amended in such a way as to interfere with the freedoms of expression and association and thus make it impossible for him to support the draft Declaration as a whole': *Draft Declaration 1963*, UN Doc A/C.3/SR.1245 (n 47) 173 [4].

50 *Preparation of a Draft International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 1906(XVIII), UN Doc A/RES/1906(XVIII) (20 November 1963) para 1.

51 Francesco Capotorti, Rapporteur, *Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, UN ESCOR, UN Docs E/CN.4/873 and E/CN.4/Sub.2/241 (11 February 1964) 14 [24] ('*Report of the Sixteenth Session*').

52 Abram, *Suggested Draft for United Nations Convention on the Elimination of All Forms of Racial Discrimination*, UN ESCOR, 16th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/L.308 (13 January 1964) 2.

53 Calvocoressi, *Draft Convention on the Elimination of All Forms of Racial Discrimination*, UN ESCOR, 16th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/L.309 (13 January 1964).

54 Ivanov and Ketrzynski, *Draft International Convention on the Elimination of All Forms of Racial Discrimination*, UN ESCOR, 16th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/L.314 (15 January 1964).

55 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Summary Record of the Four Hundred and Seventh Meeting*, UN ESCOR, 16th sess, 407th mtg, UN Doc E/CN.4/Sub.2/SR.407 (5 February 1964) 4.

56 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Summary Record of the Four Hundred and Twelfth Meeting*, UN ESCOR, 16th sess, 412th mtg, UN Doc E/CN.4/Sub.2/SR.412 (5 February 1964) 5.

57 Ibid.

yet to take on a collective character and would apply only to a contracting state practising apartheid.

Mr Capotorti (Italy) and others responded that it would be desirable to retain the wording of the *Declaration* adopted by the General Assembly and condemn the policy of apartheid in the text of the draft convention.[58] Following a brief debate, the Sub-Commission decided to take as a basis the draft put forward by Abram.[59]

Abram's draft art III read: 'Each State Party shall put an end without delay to governmental and other public policies of racial segregation and especially policies of apartheid, as well as all forms of racial discrimination and separation resulting from such policies'.[60] After considering Abram's draft, a new text was prepared by the working group, which read: 'States Parties particularly condemn apartheid and undertake to prevent and eradicate all practices of this nature'.[61] This draft condemned apartheid only, dropping the other two terms, racial segregation and separation. It did not contain the 'especially' formula in relation to apartheid, redundant given the absence of segregation and separation from the revised phrasing. In the course of the discussion on the working group draft, Ivanov proposed the insertion of the words 'racial segregation and' before 'apartheid' to reflect art 5 of the *Declaration* more accurately, which was adopted.[62] Ivanov was also likely motivated by the association of racial segregation with the US.[63] Thus, racial segregation was reinstated, but separation was not. The reinstatement grouped racial segregation and apartheid together, without distinguishing the two via the 'especially' formula. It gave rise to the composite phrase seen in art 3, 'racial segregation and apartheid', whose equivocal

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58 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Summary Record of the Four Hundred and Eighth Meeting*, UN ESCOR, 16th sess, 408th mtg, UN Doc E/CN.4/Sub.2/SR.408 (5 February 1964) 4.

59 *Report of the Sixteenth Session*, UN Docs E/CN.4/873 and E/CN.4/Sub.2/241 (n 51) 14–15 [25].

60 Ibid 28 [69].

61 Ibid 28 [70].

62 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Summary Record of the Four Hundred and Twenty-Fifth Meeting*, UN ECSOR, 16th sess, 425th mtg, UN Doc E/CN.4/Sub.2/SR.425 (11 February 1964) 3 ('*Summary Record of 425th Mtg*').

63 The working group amendment had replaced the 'governmental … policies' of art 5 with 'practices' in draft art III, which meant the provision, following Ivanov's amendment, condemned practices of racial segregation without any need for a link to government policy. Racial segregation in the US was a concern raised throughout the drafting process, in particular by the USSR. The US response was to accept its experience of racial segregation, but argue that this was now opposed by government and therefore distinguishable from apartheid and related practices as government policy. See, eg, comments of Mr Ostrovsky (USSR) on the segregationist riots at the University of Mississippi, and response by Mrs Tree (USA) that the President of the United States 'had made it quite clear that the nation was unreservedly opposed to racial segregation': *Manifestations of Racial Prejudice and National and Religious Intolerance (Continued)*, UN GAOR, 3rd Comm, 17th sess, 1170th mtg, Agenda Item 48, UN Doc A/C.3/SR.1170 (1 November 1962) 187–8 [31]–[33]; see also comments of Mr Stevenson (USA) accepting past segregation in the armed forces, housing and education, but '[u]nlike those Governments which, as the draft Declaration said, imposed racial discrimination by means of legislative, administrative and other measures, his own Government used such measures to destroy racial discrimination': *Draft Declaration on the Elimination of All Forms of Racial Discrimination (Continued)*, UN GAOR, 3rd Comm, 18th sess, 1217th mtg, Agenda Item 43, UN Doc A/C.3/SR.1217 (1 October 1963) 30 [6].

meaning would become of later significance in the context of CERD's concluding observations to Israel.

The change from the opening phrase in Abram's text, 'Each State Party shall put an end', to the opening phrase in the working group text, 'States Parties particularly condemn', would shift the dynamic of the provision in terms of its obligations. It meant the opening phrase was no longer directed *only* to those states parties with policies or practices of racial segregation and apartheid, but to *all* states parties via the call to condemn such policies or practices. It addressed the question raised by Diaz Casanueva in the Commission — 'Who was to bring an end to government policies of apartheid?' — the answer being all states parties through the act of condemnation, as well as individual states parties that practised such policies. Abram then suggested adding the phrase 'in territories subject to their jurisdiction'.[64] Calvocoressi agreed, pointing out that 'Abram's amendment would help to make it clear that States were not being obligated to act in any areas which were not subject to their jurisdiction'.[65] This addition distinguished the two elements of art III, which now read in whole: 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate, in territories subject to their jurisdiction, all practices of this nature'.[66] The jurisdictional limit applied to the individual obligation to prevent, prohibit and eradicate, and could be distinguished from the collective obligation to condemn, which did not apply only to territories subject to a state party's jurisdiction. This text of art III would be unanimously adopted in the Commission and Third Committee, subject to minor amendments.[67]

In an early commentary on the treaty, Egon Schwelb wrote somewhat dismissively of art 3 of *ICERD*: '[i]n law, Article 3 hardly adds anything to either the general (Art. 2) or the more specific (Art. 5) provisions and prohibitions of the Convention'.[68] The point fails to capture the significance of the express condemnation of apartheid in the treaty, affirmed repeatedly by delegates in the General Assembly. However, it is worth considering what art 3 adds *in law*.

First, the terms 'racial segregation' and 'apartheid' appear only in the Preamble and art 3, and while there is no definition in the treaty text, they clearly have a meaning distinct from other terms in the Convention, and from each other. Second, art 3 is distinguishable in terms of its specific invocation of a collective obligation.

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64 *Summary Record 425th Mtg*, UN Doc E/CN.4/Sub.2/SR.425 (n 62) 3.

65 Ibid.

66 *Report of the Sixteenth Session*, UN Docs E/CN.4/873 and E/CN.4/Sub.2/241 (n 51) 47.

67 *Draft International Convention on the Elimination of All Forms of Racial Discrimination (Continued)*, UN GAOR, 20th sess, 1308th mtg, Agenda Item 58, UN Doc A/C.3/SR.1308 (18 October 1965) 102 [48]. The phrasing 'undertake to prevent, prohibit and eradicate, in territories subject to their jurisdiction, all practices of this nature' was replaced by 'undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction': at 102 [39]. The changed wording was considered 'a little more elegant' (Mr MacDonald (Canada)): at 102 [42]. A further, ultimately unsuccessful, proposal in the Commission and Third Committee to include a condemnation of anti-Semitism in the text of art 3, and then as a separate provision in the Convention, has been extensively discussed elsewhere: see Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Brill Nijhoff, 2014) vol 3, 44–7; Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016) 243–6.

68 Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15(4) *International and Comparative Law Quarterly* 996, 1021.

South Africa had made it clear in debates on the 1963 *Declaration* that it was not likely to ratify the instrument. In that light, what art 3 adds in law is a collective obligation to condemn apartheid wherever it occurs, including in non-states parties. CERD practice would illustrate this differentiated character of the obligations of art 3, focussing first on the obligation of all states parties to condemn apartheid from 1970–94, and then on the obligation of each state party to prevent, prohibit and eradicate racial segregation in its own jurisdiction from 1995 onwards. This first period would see the Committee elaborate on the legal character and content of the collective obligation of art 3, as South Africa remained outside the treaty.

III THE IMPLEMENTATION OF THE COLLECTIVE OBLIGATION IN RELATION TO SOUTH AFRICA

From 1970–94, CERD engaged art 3 primarily as an 'apartheid provision' with regard to South Africa and the southern African region. South Africa was not a party to the Convention in this period,[69] and so the art 3 obligation fell on all states parties to condemn apartheid in their external relations. The first session of CERD was held in January 1970, and it immediately sent a communication to all states parties in relation to the content of state reports under art 9, requesting:

> 1. Information on the legislative, judicial, administrative or other measures that have been adopted and that give effect to the following provisions of the Convention:
>
> (a) Condemnation of racial segregation and apartheid, in accordance with article 3.[70]

Thus, apartheid was the very first concern of the Committee, which linked the call to states parties to 'condemn' in art 3 to the reporting requirement of art 9. The communication referred only to condemnation and did not refer at all to the 'prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction' limb of art 3, since practices of apartheid were not under the jurisdiction of a state party to the treaty.

Article 3 is not limited geographically and CERD did not confine its requirement of condemnation to South Africa. In 1971, CERD noted that the 'Government of South Africa is actively extending to Namibia the policies of apartheid'.[71] It expressed concern also that 'the authorities of the illegal regime in Southern Rhodesia are deliberately pursuing an oppressive policy based on a form

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69 South Africa ratified *ICERD* on 10 December 1998: United Nations, 'International Convention on the Elimination of All Forms of Racial Discrimination', *United Nations Treaty Collection: Status of Treaties* (Web Page, 16 April 2023) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en>, archived at <https://perma.cc/7XZ7-NGR2> ('*ICERD Status*').

70 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 25th sess, Supp No 27, UN Doc A/8027 (1970) annex III ('*Text of Communication Sent to States Parties under Article 9 of the Convention, Adopted at the First Session of the Committee on 28 January 1970*') 32.

71 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 26th sess, Supp No 18, UN Doc A/8418 (1971) 36.

of apartheid and on racial discrimination against the non-white majority of the population'.[72] It recommended to the General Assembly:

> [An] appeal to the major trading partners of South Africa (i) to abstain from any action that might constitute an encouragement to the continued violations of the principles and objectives of the Convention by South Africa and the illegal régime in Southern Rhodesia, and (ii) to use their influence with a view to ensuring the eradication of policies of apartheid and racial discrimination in Namibia and Southern Rhodesia.[73]

On 6 December 1971, the General Assembly issued *Resolution 2784 (XXVI)* which took note with appreciation of CERD's report and issued an appeal to the major trading partners of South Africa in line with CERD's request.[74]

In 1972, CERD issued General Recommendation ('GR') 3 in which it 'considered some reports from States Parties containing information about measures taken to implement resolutions of United Nations organs concerning relations with the racist régimes in southern Africa'.[75] Citing art 3 of *ICERD*, GR 3 reads:

> The Committee welcomes the inclusion in the reports submitted under article 9, paragraph 1, of the Convention, by any State Party which chooses to do so, of information regarding the status of its diplomatic, economic and other relations with the racist régimes in southern Africa.[76]

GR 3 was proposed in the course of the examination of the initial state report of Canada.[77] Canada's report had contained in its opening paragraph an extract from a statement made by its Secretary of State for External Affairs before the UN General Assembly, that 'Canada fully complies with the arms embargo against South Africa', and that this compliance was but one manifestation of the 'emphatic opposition of the Canadian Government and people to the practice of apartheid'.[78] During the discussion of the report, CERD member Mr Sayegh recalled that 'other States Parties in addition to Canada had volunteered information on their implementation of resolutions adopted by organs of the United Nations concerning relations with the racist régimes in southern Africa'.[79] As a result, he submitted the draft of GR 3 for consideration by the Committee.[80] In the Committee discussion of the draft, Mr Haastrup, supported by Messrs Dayal and Ingles, suggested that the words 'by any State Party which chooses to do so' should be deleted.[81] Messrs Ancel, Partsch and Soler indicated that they would find difficulty

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72 Ibid.

73 Ibid 38.

74 *Elimination of All Forms of Racial Discrimination*, GA Res 2784(XXVI), UN DOC A/RES/2784(XXVI) (6 December 1971) pt III para 3.

75 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 27th sess, Supp No 18, UN Doc A/8718 (1972) 39 ('*Report of CERD 1972*').

76 Ibid 23–4 [92]. The recommendation also cites GA Resolution 2784 and its call to 'all the trading partners of South Africa to abstain from any action that constitutes an encouragement to the continued violation of the principles and objectives of the [ICERD] by South Africa and the illegal régime in Southern Rhodesia'.

77 Ibid 14–15 [53].

78 Ibid 23–4 [92].

79 Ibid.

80 Ibid.

81 Ibid 24 [93].

in supporting the draft if those words were deleted.[82] The Committee unanimously adopted the draft general recommendation without the amendment.[83] Hence, GR 3 was a call to states parties to submit information, but the Committee had yet to view this in terms of a treaty obligation.

This would change in 1975, when the Committee issued *Decision 2(XI)* on 'Relations with racist regimes' which recognised such a collective obligation.[84] *Decision 2(XI)* recalled GR 3, and continued: 'it is essential to consider ways and means of ensuring the international and regional isolation of racist régimes'.[85] It declared that:

> [A]ll policies, practices or relations which have the effect of supporting, sustaining or encouraging racist régimes are irreconcilable with the commitment to the cause of the elimination of racial discrimination which is inherent in the ratification of … [ICERD].[86]

It further declared such relations as 'inconsistent with the specific commitment of States parties to condemn racial segregation and apartheid in accordance with article 3 of the Convention'.[87] While GR 3 requested the inclusion of information on diplomatic, economic and other relations with the racist regimes in southern Africa, *Decision 2(XI)* clarified that all such policies, practices or relations that have the effect of supporting, sustaining or encouraging racist regimes are *irreconcilable* with the treaty, and *inconsistent* with the commitment to condemn in art 3. This articulated a collective obligation of all states parties under art 3 of *ICERD* that was capable of being violated.

Throughout the 1970s and 80s, the Committee engaged in detailed dialogue with states parties on their diplomatic, economic and other relations with the racist regimes in southern Africa. Some contestation to the existence of such a collective obligation can be found — for example, in its dialogue with the Committee in 1979, France stated that 'the relations of States parties with South Africa were not within the scope of the Convention'.[88] However, the vast majority of states parties accepted the obligation and reported to the Committee on their relations. For example, the representative of Nigeria 'assured the Committee that his Government "did not have and never would have diplomatic, economic or other relations" with the racist régimes in southern Africa'.[89] The Philippines:

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82 Ibid. Note that the Committee's 1970 communication used similar language: 'the Committee feels that information … might be presented on the following lines': *Text of Communication Sent to States Parties under Article 9 of the Convention, Adopted at the First Session of the Committee on 28 January 1970*, UN Doc A/8027 (n 70) 32.

83 *Report of CERD 1972*, UN Doc A/8718 (n 75) 24 [94].

84 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 30th sess, Supp No 18, UN Doc A/10018 (1975) 68 ('*Report of CERD 1975*').

85 Ibid. The Decision was issued in the context of the UN Programme for the Decade for Action to Combat Racism and Racial Discrimination.

86 Ibid.

87 Ibid. It ends with the view that 'a régime which makes racial segregation and racial discrimination the corner-stone of its national policy falls outside the pale of the community of nations'.

88 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 34th sess, Supp No 18, UN Doc A/34/18 (1979) 73 [343] ('*Report of CERD 1979*').

89 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 28th sess, Supp No 18, UN Doc A/9018 (1973) 43 [176] ('*Report of CERD 1973*').

> maintained no diplomatic relations with South Africa or Southern Rhodesia, and … it had provided for sanctions aimed at making South Africa abandon its racist policy of apartheid and its illegal régime in Namibia as well as sanctions aimed against the illegal régime of Southern Rhodesia.[90]

The representative of Niger informed the Committee that 'his country had no relations with the South African régime; that his Government had long ago prohibited all trade with South Africa and denied South African aircraft overflight and landing rights'.[91]

Decision 2(XI) did not consider relations per se as irreconcilable with the obligation to condemn apartheid under art 3, but only those that had the effect of supporting, sustaining or encouraging the racist regimes. In that light, a number of states parties condemned apartheid but argued that they would maintain diplomatic relations with South Africa. The Netherlands 'rejected apartheid both in principle and practice', but 'did not believe … in a policy of isolating South Africa'.[92] The following year, it re-emphasised that 'it did not entirely agree that the isolation of South Africa could solve the apartheid problem and felt that dialogue with South Africa could yield positive results'.[93] Greece, 'which had had diplomatic relations with South Africa long before apartheid had become an established policy of the South African régime', had maintained those relations but had joined in all UN action against apartheid.[94] Finland informed the Committee that 'her Government did maintain diplomatic relations with South Africa but that it condemned the practice of apartheid'.[95]

The Committee queried this approach in relation to Canada, which offered a statement that continued relations with South Africa 'afford the [Canadian] Government the opportunity to exert some influence on the South African Government'.[96] Some CERD members wished to know 'what had been done in that regard and what results had been obtained'.[97] It was observed that 'continued relations with a racist régime contradicted the spirit of the Convention, and would hardly assist the elimination of apartheid'.[98] This reference to the 'spirit' rather than the text of the Convention distinguished a 'desirable' policy of not having any relations at all with apartheid South Africa, from the obligatory character of the obligation not to support, sustain or encourage the apartheid regime. Clearly, relations which sought to end apartheid through diplomatic channels could not be considered to violate art 3, although the Committee appeared sceptical as to whether this approach was in good faith and effective. A similar formula was seen in relation to Australia, where the Committee found that the maintenance of diplomatic relations with South Africa 'was a stimulus to continue the policy of

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90 Ibid 53 [225].
91 *Report of CERD 1975*, UN Doc A/10018(n 84) 30 [102].
92 *Report of CERD 1973*, UN Doc A/9018 (n 89) 76 [312].
93 *Report of CERD 1975*, UN Doc A/10018 (n 84) 35 [120].
94 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 31st sess, Supp No 18, UN Doc A/31/18 (1976) 18 [42] ('*Report of CERD 1976*').
95 Ibid 18–19 [46].
96 Ibid 52 [185].
97 Ibid.
98 Ibid.

apartheid and therefore hardly compatible with the spirit of article 3 of the Convention'.[99]

The Committee accepted also that certain obligations could not be realised for practical reasons. In general, trade and other economic relations formed a crucial part of the obligations of art 3, seen in GR 3 with its call to the 'trading partners' of South Africa. For example, the Committee noted with satisfaction in relation to Trinidad and Tobago that it 'did not limit itself to condemning apartheid but also adopted economic measures against the racist régime of South Africa'.[100] However, it relaxed its requirements for South Africa's neighbour, Mauritius, observing that 'while Mauritius condemned apartheid, it had to maintain trade relations with South Africa for economic reasons'.[101] It hoped that in the future, Mauritius could become less dependent on South Africa and eventually break its economic ties with that country in order to comply with the Committee's recommendations relating to art 3.[102] In a similar vein, CERD accepted that the question of relations with South Africa under art 3 'could not be raised in the case of Lesotho, because it was a country locked in by the racist régime so that its entire population was under the siege of racial discrimination and apartheid'.[103] This may be viewed as undermining the obligatory character of art 3. However, it also emphasised that the substance of the collective obligation is not fixed, is context-specific and can evolve over time.

When a new and democratic government was installed in South Africa in 1994, Mr Garvalov, Chairman of CERD, wrote to Secretary-General Boutros Boutros-Ghali: 'The ending of apartheid does not mean that the Convention's goals have been attained'.[104] The Committee would soon apply this dictum to art 3. In 1995, CERD adopted GR 19 on art 3, which read: 'The reference to apartheid may have been directed exclusively to South Africa, but the article as adopted prohibits all forms of racial segregation in all countries'.[105] GR 19 served to activate art 3 as primarily a 'racial segregation provision' and following its adoption, CERD has issued concluding observations on racial segregation to a wide range of states parties under art 3.[106] The obligation is on each state party to prevent, prohibit and eradicate racial segregation in its own jurisdiction; this has not involved any collective obligation to condemn practices of racial segregation in other

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99 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 37th sess, Supp No 18, UN Doc A/37/18 (1982) 37 [126] ('*Report of CERD 1982*').

100 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 35th sess, Supp No 18, UN Doc A/35/18 (1980) 37 [132].

101 *Report of CERD 1982*, UN Doc A/37/18 (n 99) 46 [171].

102 Ibid.

103 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 38th sess, Supp No 18, UN Doc A/38/18 (1983) 52–3 [204]. Members of the Committee commended Lesotho 'for its opposition to apartheid in the face of unprovoked attacks by the racist régime, attacks which proved that apartheid was not only a pernicious system in itself but a threat to international security'.

104 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 49th sess, Supp No 18, UN Doc A/49/18 (19 September 1994) 7.

105 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 50th sess, Supp No 18, UN Doc A/50/18 (19 January 1996) annex VII ('*General Recommendation XIX (47) on Article 3, Adopted at the 1125th Meeting, on 17 August 1995*') [1].

106 Thornberry, (n 67) 247–53. These include Antigua and Barbuda, Barbados, Bosnia and Herzegovina, Czech Republic, Estonia, Ethiopia, Germany, India, Ireland, Italy, Japan, Nepal, Nigeria, Qatar, Russian Federation, Slovakia, Switzerland and the US.

jurisdictions. Palestine's claim in *Palestine v Israel* would be the first to invoke *both* the individual obligation of art 3 in relation to Israel, and the collective obligation in relation to all other states parties to the treaty.

CERD practice from 1970–94 affirms that the collective obligation is actionable under *ICERD*'s monitoring mechanisms, and opposable in relation to all states parties to *ICERD*. The obligation was tested only in the state reporting procedure. There, it was shown to be capable of diverse application and development over time. Arguably, the obligation is not amenable to a single uniform application and while there is a core element common to the examination of all states parties, state-specific contexts also emerged. The communication in *Palestine v Israel* calls for the beginning of such a process through the finding of a collective obligation on all states parties under art 3 not to recognise the illegal situation, or render aid or assistance in its maintenance. Its substance would then emerge in state-specific contexts through *ICERD*'s monitoring mechanisms.

IV THE IMPLICATIONS OF THE COLLECTIVE OBLIGATION IN *PALESTINE V ISRAEL*

The first concern in relation to art 3 and Israel was raised by CERD in the 1980s, with regard to the collective obligation to condemn apartheid in South Africa. In this period, Israel came under scrutiny by the Committee for cooperation with apartheid South Africa. In response to Israel's initial report in 1981, CERD expressed 'hope … that efforts would be made by the Government of Israel to abandon its close relations with South Africa, since such efforts were essential if the situation in that country was to be changed'.[107] It found that Israel was 'known to be an ally of South Africa and was co-operating with it in many fields, including the nuclear field'.[108] In 1987, CERD concluded that 'Israel was South Africa's closest ally'.[109] The Committee continued to express concern on Israel's relations with South Africa into the 1990s, 'particularly on military matters'.[110] Israel responded that the contacts it maintained with South Africa 'had been for the sake of keeping up cultural ties with organizations combating racial discrimination'.[111] Hence, Israel recognised the art 3 obligation to condemn apartheid, but argued that its relations with South Africa were not in breach.

With the end of apartheid in South Africa and the shift in the focus of art 3 to the individual obligation on each state party to prevent, prohibit and eradicate all practices of this nature in territories under its jurisdiction, Israel's own practices in the OPT came under review under this provision. In its state reports, Israel has generally written the same statement in relation to art 3:

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107 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 36th sess, Supp No 18, UN Doc A/36/18 (1981) 33 [93].

108 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 40th sess, Supp No 18, UN Doc A/40/18 (19 September 1985) 48–9 [204]; it later determined that 'collaboration appeared to be on the increase, and in the nuclear field, it had reached the level of full partnership, notwithstanding Israeli denials': *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 42nd sess, Supp No 18, UN Doc A/42/18 (1987) 120 [591] ('*Report of CERD 1987*'); on military and other relations between Israel and apartheid South Africa, see generally Jane Hunter, 'Israel and the Bantustans' (1986) 15(3) *Journal of Palestine Studies* 53.

109 *Report of CERD 1987*, UN Doc A/42/18 (n 108) 120 [591].

110 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 46th sess, Supp No 18, UN Doc A/46/18 (25 September 1991) 88 [370].

111 Ibid 90 [383].

> Apartheid has always been regarded as abhorrent by the Israeli Government and society and continues to be so regarded. Apartheid has never been practised in Israel. There exist in Israel no restrictions of any kind as to place of residence nor is there any segregation of any kind.[112]

In 2012, Patrick Thornberry describes an oral briefing to the Committee by non-governmental organisations ('NGOs') and civil society groups in which 'the case for a clear characterization by CERD of the situation in the Occupied Territories as one of apartheid was made'.[113] In response, Ms Ben-Ami (Israel) stressed that such efforts 'to condemn and demonize Israel bore no relation to the historical truth of South Africa's past or the current situation in the Middle East, constituted a slander against Israel and belittled the suffering of the people of South Africa'.[114] CERD member Mr Lindgren Alves underlined that he had 'taken note of the [Israeli] delegation's response … The Committee itself had not stated that the situation in Israel constituted apartheid'.[115] Likewise, CERD member Mr Kemal emphasised that 'he had not accused Israel of apartheid but had referred to allegations', noting that 'the case concerning the West Bank seemed to be quite strong'.[116] CERD's 2012 concluding observations to Israel read:

> The Committee is extremely concerned at the consequences of policies and practices which amount to de facto segregation, such as the implementation by the State party in the Occupied Palestinian Territory of two entirely separate legal systems and sets of institutions for Jewish communities grouped in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand. The Committee is particularly appalled at the hermetic character of the separation of two groups, who live on the same territory but do not enjoy either equal use of roads and infrastructure or equal access to basic services and water resources. Such separation is concretized by the implementation of a complex combination of movement restrictions consisting of the Wall, roadblocks, the obligation to use separate roads and a permit regime that only impacts the Palestinian population (Article 3 of the Convention).[117]

This passage, with its language of segregation, separation and concretisation, was of clear significance. The Committee then expressly held that violations of art

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112 See, eg, Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties under Article 9 of the Convention: Ninth Periodic Reports of States Parties Due in 1996*, UN Doc CERD/C/294/Add.1 (17 October 1997) 20 [101]; Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties under Article 9 of the Convention: Thirteenth Periodic Reports of States Parties Due in 2004*, UN Doc CERD/C/471/Add.2 (1 September 2005) 26 [136]; Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties under Article 9 of the Convention: Fourteenth to Sixteenth Periodic Reports of States Parties Due in 2010*, UN Doc CERD/C/ISR/14–16 (17 January 2011) 32 [165]; Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Seventeenth to Nineteenth Periodic Reports of States Parties Due in 2016*, UN Doc CERD/C/ISR/17–19 (14 March 2017) 8 [54].

113 See Thornberry (n 67) 258 n 189.

114 Committee on the Elimination of Racial Discrimination, *Summary Record of the 2132nd Meeting*, 80th sess, 2132nd mtg, UN Doc CERD/C/SR.2132 (22 February 2012) 2 [7].

115 Ibid 8 [42].

116 Ibid 8 [47].

117 Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination*, 80th sess, UN Doc CERD/C/ISR/CO/14–16 (9 March 2012) 6 [24] ('*Consideration of Reports to CERD 2012*').

3 were occurring.[118] However, as supported by the comments of the CERD members above, this did not amount to a finding of apartheid, which was referred to only within the composite phrase 'racial segregation and apartheid'.[119] Thornberry also affirms that these concluding observations contained 'an unusually high number of references to Article 3 … without individuating the elements of the article'.[120]

The next reporting cycle would be influenced by developments before the International Criminal Court ('ICC'). The 1998 *Rome Statute of the International Criminal Court* ('*Rome Statute*') lists apartheid as a crime against humanity in its art 7(1)(j).[121] In January 2015, Palestine acceded to the *Rome Statute*, and in May 2018, it referred the *Situation in the State of Palestine* to the Prosecutor.[122] When in 2019, Israel submitted its state report to CERD, the 2018 referral to the ICC strongly influenced the shadow submissions. A joint report from Palestinian NGOs focussed only on apartheid: 'Our organisations substantiate that Israel has created and maintained an apartheid regime over the Palestinian people as a whole, in violation of its obligations under international law, including Article 3 of ICERD'.[123] The report then discussed the elements of the crime of apartheid in line with the *Rome Statute*.[124]

However, in the subsequent exchange between the Committee and Israel, just one CERD member, Ms McDougall, raised the question of apartheid.[125] CERD's concluding observations in 2020 reiterated its approach in 2012, deploying the

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118 Ibid 1. At 6:

> The Committee draws the State party's attention to its General Recommendation 19 (1995) concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid, and urges the State party to take immediate measures to prohibit and eradicate any such policies or practices which severely and disproportionately affect the Palestinian population in the Occupied Palestinian Territory and which violate the provisions of article 3 of the Convention.

119 Ibid 6.

120 Thornberry (n 67) 257.

121 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 7(l)(j) ('*Rome Statute*'). A definition of '[t]he crime of apartheid' is provided in art 7(2)(h) of the *Rome Statute*: 'inhumane acts … 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'.

122 *Situation in the State of Palestine (Decision Assigning the Situation in the State of Palestine to Pre-Trial Chamber I)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/18, 24 May 2018) annex I, 5 [9] – [10]. Seven categories of crimes are identified by Palestine as being core to its referral, including '[c]rimes involving the establishment of a system of apartheid': at 6–7 [12].

123 Al Haq — Law in the Service of Man et al, *Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports: 100th Session* (Report, 10 November 2019) 1 [3].

124 Ibid 55–6 [153].

125 Committee on the Elimination of Racial Discrimination, *Consideration of Reports, Comments and Information Submitted by States Parties under Article 9 of the Convention (Continued)*, 100th sess, 2788th mtg, UN Doc CERD/C/SR.2788 (10 December 2019) 7 [42] ('*Consideration of Reports by CERD 2019*'). Ms Gay McDougall stated that

> [t]he State party's claims that 'apartheid has always been regarded as abhorrent by the Government of Israel and society' … [and that] 'there exists in Israel … [no] segregation of any kind' … contrasted with its actions in erasing the fundamental rights of large parts of the population.

composite phrase 'racial segregation and apartheid' in the context of Article 3.[126] Again, it did not amount to an individuated finding of apartheid, but did emphasise issues of segregation and separation. McDougall's intervention further highlighted that 'the State party had once again failed to report on the rights of all Palestinians subject to its jurisdiction and effective control'.[127] This referred to Israel's consistent failure to report to the Committee on the OPT, since it does not consider the Territories to be within its jurisdiction for the purposes of the Convention. As a result, it provides no information on the OPT in its state reports. CERD, in response, has repeatedly expressed its deep concern

> at the position of the State party to the effect that the Convention does not apply to all the territories under the State party's effective control, which not only include Israel proper but also the West Bank, including East Jerusalem, the Gaza Strip and the occupied Syrian Golan.[128]

By the time CERD issued these concluding observations, Palestine had already reached for the inter-state communications mechanism, submitting its communication under art 11(1) of *ICERD* in April 2018.[129] In *Palestine v Israel*, Palestine would refer to the 'inadequacy' of relying on the reporting procedure and the consequent need for it to invoke the inter-state procedure.[130] It argued that Israel 'has never fulfilled its reporting obligations with regard to the Occupied Palestinian Territory'.[131] It has 'continuously denied the applicability of the Convention in the occupied territory and has proven unwilling to engage in meaningful dialogue'.[132] Palestine's inter-state communication may also be seen as a challenge to the Committee itself, to reach an individuated determination on apartheid which it has not done in the reporting mechanism to date.[133]

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126 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel*, UN Doc CERD/C/ISR/CO/17–19 (27 January 2020) 5 [23] ('*Concluding Observations by CERD 2020*'):

> [T]he Committee draws the State party's attention to its general recommendation 19 (1995) on article 3 of the Convention, concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid, and urges the State party to give full effect to article 3 of the Convention to eradicate all forms of segregation between Jewish and non-Jewish communities and any such policies or practices that severely and disproportionately affect the Palestinian population in Israel proper and in the Occupied Palestinian Territory.

127 *Consideration of Reports by CERD 2019*, UN Doc CERD/C/SR.2788 (n 125) 7 [42].

128 *Concluding Observations by CERD 2020*, UN Doc CERD/C/ISR/CO/17–19 (n 126) 2 [9]; *Consideration of Reports to CERD 2012*, UN Doc CERD/C/ISR/CO/14–16 (n 117) 2 [10]; Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention*, 17th sess, UN Doc CERD/C/ISR/CO/13 (14 June 2007) 1 [3].

129 *Palestine's Complaint to CERD* (n 1).

130 Committee on the Elimination of Racial Discrimination, *Inter-State Communication Submitted by the State of Palestine Against Israel: Preliminary Procedural Issues and Referral to the Committee*, UN Doc CERD/C/100/3 (15 June 2021) 8 [47] .

131 Ibid.

132 Committee on the Elimination of Racial Discrimination, *Inter-State Communication Submitted by the State of Palestine Against Israel: Supplementary Submissions*, UN Doc CERD/C/100/4 (16 June 2021) 3 [10] .

133 *Palestine's Complaint to CERD* (n 1). Palestine's communication accepts the ambiguity of CERD determinations on apartheid in the OPT to date, considering '[t]he CERD Committee has recognized that Israel's segregationist policies and practices in the OPT *may* be seen as apartheid': at 294 [582] (emphasis added).

In December 2019 and April 2021, CERD issued its decisions under art 11 on jurisdiction,[134] and admissibility,[135] holding that it had jurisdiction and declaring the communication admissible. In December 2021, CERD appointed an ad hoc Conciliation Commission tasked with issuing findings of fact and recommendations for the 'amicable solution' of the dispute.[136] If the Commission is to make a determination on apartheid in *Palestine v Israel*, it is apparent it may need to adopt an understanding of the term. A definition is provided in the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid* ('*Apartheid Convention*'),[137] and in the *Rome Statute*.[138] Palestine's communication argues that the *Apartheid Convention* provides the best definition for the purposes of interpreting art 3 of *ICERD*.[139] *ICERD* and the *Apartheid Convention* are linked, with the *Apartheid Convention* recalling art 3 of *ICERD* in its fourth preambular paragraph.[140] Miles Jackson discusses how in the process of drafting the *Apartheid Convention*, states made it clear that they had in mind the pre-existing treaty obligation in *ICERD*.[141] He concludes that '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'.[142]

The link between the treaties was raised in 1976, when CERD member Mr Blishchenko suggested that the Committee could make a concrete contribution to the struggle against apartheid by appealing to all states parties to ratify the *Apartheid Convention*.[143] Up until this point, the Committee had 'taken note' if a

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134 *State of Palestine v Israel*, UN Doc CERD/C/100/5 (n12) 11–12 [61].

135 Committee on the Elimination of Racial Discrimination, *Inter-State Communication Submitted by the State of Palestine Against Israel: Decision on Admissibility*, UN Doc CERD/C/103/4 (17 June 2021) 15 [65].

136 *ICERD* (n 1) arts 12(1)(a)–(b), 13(1).

137 *International Convention on the Suppression and Punishment of the Crime of Apartheid* opened for signature 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976) art II.

> [T]he 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:

at art II(a)-(f).

138 *Rome Statute* (n 121) art 7(2)(h).

139 *Palestine's Complaint to CERD* (n 1) 297 [586]: 'Although this definition [in the *Rome Statute*] is substantially the same as that of the Apartheid Convention, the latter convention has a more comprehensive definition of apartheid and for this reason provides the best definition for the purposes of interpreting Art. 3 CERD'.

140 The Convention reads: '*Observing* that, in accordance with [*ICERD*], States particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction': *Apartheid Convention* (n 137) Preamble para 4 (emphasis added).

141 Miles Jackson, 'The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination' (2022) 71(4) *International and Comparative Law Quarterly* 831, 840.

142 Ibid 841.

143 *Report of CERD 1976*, UN Doc A/31/18 (n 94) 80 [270].

state party to *ICERD* had signed or ratified the *Apartheid Convention*,[144] but had not advocated ratification. The suggestion, however, was not fully supported. CERD members Mr Pahr and Mr Partsch 'doubted that the Committee was competent to take that action'.[145] Mrs Warzazi thought it would be 'more appropriate to ask the General Assembly to reiterate its own appeal to Member States to do so'.[146] Pahr suggested,

> as a compromise, that the Committee recommend that all States Parties, in implementing the provisions of article 3 of the Convention, should take special care to respect all United Nations resolutions concerning relations with the apartheid régime of South Africa — which would include General Assembly resolutions appealing to all States to ratify the Convention on apartheid.[147]

The following year, '[i]n connexion with article 3 of the Convention, a member of the Committee inquired whether Panama had acceded to the [*Apartheid Convention*]'.[148] Likewise, Denmark was asked whether it had considered that 'the provisions of article 3 of the Convention were met by accession to the [*Apartheid Convention*]'.[149] Similar inquiries were made of Belgium, the Holy See, Morocco, Pakistan, and Uruguay.[150]

The *Apartheid Convention* (like the *Rome Statute*) remains an instrument of international criminal law rather than an instrument of international human rights law, and the early concerns of certain CERD members as to its relevance to its mandate are not without substance. Hence, the Commission may wish to consider whether *ICERD* as a human rights instrument has a sui generis understanding of apartheid. Such an understanding would have to distinguish apartheid from its art 3 sister term, racial segregation. In that regard, Thornberry views racial segregation as 'a concentrated form of discrimination through exclusion', with apartheid representing 'a further concentration', displaying additional characteristics of domination integrated into a determinate public policy.[151] Jackson likewise emphasises that apartheid involves the commission of human rights violations for the purpose of establishing and maintaining racial domination and systematic oppression.[152] Any understanding of apartheid under art 3 of *ICERD* should recognise the collective obligation on all states parties that flows from a situation of apartheid.

The Commission would then be required to test the claim before it. Palestine's inter-state communication urges 'an objective, clear and legal description of the principal elements and characteristics of apartheid against which to measure and judge the question whether Israel applies apartheid in the OPT'.[153] In April 2022,

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144 For example, in relation to Czechoslovakia and Mongolia: see *Report of CERD 1975*, UN Doc A/10018 (n 84) 35 [121], 38 [133].

145 *Report of CERD 1976*, UN Doc A/31/18 (n 94) 80 [270].

146 Ibid.

147 Ibid.

148 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 32nd sess, Supp No 18, UN Doc A/32/18 (1977) 49 [191].

149 Ibid 57 [232].

150 Ibid 31 [101], 36 [125], 40 [146], 54 [216]; *Report of CERD 1979*, UN Doc A/34/18 (n 88) 53 [225].

151 Thornberry (n 67) 260.

152 Jackson (n 141) 855.

153 *Palestine's Complaint to CERD* (n 1) 303 [593].

the Commission in *Palestine v Israel* adopted its Rules of Procedure under art 12(3) of *ICERD* which state that the Commission shall consider the matter 'on the basis of information made available to it by the Committee as well as other relevant information supplied by the States Parties or obtained from any other relevant sources'.[154] This appears to open a window to potential third party source materials,[155] although the determination should be based primarily on the claims advanced in the context of the inter-state communication.

A number of outcomes are possible in relation to the claim of apartheid under art 3 in *Palestine v Israel*, including: conciliation resulting in a confidential settlement; a finding that no violations of art 3 are occurring; a finding that violations of art 3 are occurring, and these relate to racial segregation; a finding that violations of art 3 are occurring, and these relate to 'racial segregation and apartheid' without individuating the terms; a finding that a situation of apartheid has arisen in the OPT in violation of art 3; or the Commission may decide that it does not have enough facts to determine the issue. Any recommendations made by the Commission are not legally binding, since under art 13(2) of *ICERD*, the parties to the dispute are to inform CERD 'whether or not they accept the recommendations contained in the report of the Commission'. A proposal by El Salvador at the drafting stage to add that '[i]f they do not accept the recommendations, the Committee shall reconsider the problem until a satisfactory solution is reached', was rejected.[156] However, as Schwelb highlights:

> The parties are not under an obligation to accept the recommendations contained in it, at least not qua recommendations. They may, of course, be under an obligation to do what the Commission recommends on the ground of their being parties to the Convention, which is binding on them.[157]

While the Commission recommendations could be rejected at the individual level, it seems unlikely that they could be rejected at the collective level. A collective obligation would not *necessarily* flow from a Commission finding of racial segregation, or the composite 'racial segregation and apartheid', although it *could* do so as a violation of the peremptory norm of racial discrimination. As noted, CERD practice from 1995 has seen many findings of racial segregation under art 3 without ever articulating a collective obligation to condemn this, including in relation to the OPT. This does not mean that such an obligation does not exist, and there is evidence to suggest that the Committee is becoming increasingly aware of the obligations on all states parties that can flow from the

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154 Ad Hoc Conciliation Commission, *Rules of Procedure of the ad hoc Conciliation Commission on the Interstate Communication Submitted by the State of Palestine Against Israel Under Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 25 April 2022) r 2(3).

155 Jan Eiken and David Keane, 'New Rules of Procedure of the Ad Hoc Conciliation Commission in Palestine v Israel' *EJIL: Talk!* (Blog Post, 23 May 2022) <https://www.ejiltalk.org/new-rules-of-procedure-of-the-ad-hoc-conciliation-commission-in-palestine-v-israel/>, archived at <https://perma.cc/82C7-UYF3>.

156 Schwelb (n 68) 1041 quoting *Draft International Convention on the Elimination of All Forms of Racial Discrimination: El Salvador* , 3rd Comm, UN Doc A/C.3/L.1306 (25 November 1965).

157 Schwelb (n 68) 1041.

prohibition of racial discrimination.[158] A collective obligation on all states parties to *ICERD* would *necessarily* flow from a finding of apartheid, as affirmed in the drafting history and text of art 3 and in CERD practice from 1970–94. It would comprise an obligation not to recognise the illegal situation, or render aid or assistance in its maintenance. Such an obligation would be enforceable in relation to all states parties to *ICERD* under all of the treaty's mechanisms. The implications of this are worth emphasising.

First, the obligation could be enforced via the art 9 state reporting mechanism, in line with the CERD precedent in relation to South Africa. The systematic questioning of states parties from 1970 on their relations with South Africa and the southern African region occurred at a time when NGOs and civil society groups did not participate at all, or to the same extent, in the state reporting mechanism. It would seem impractical today for CERD to enquire of each state party, *proprio motu*, on whether it was recognising the illegal situation, or rendering aid or assistance in its maintenance, as it did in relation to South Africa. Instead, the Committee could consider any evidence on this submitted by NGOs and civil society groups in the state reporting process and question any state party to the Convention should such information be submitted. The substance of the obligation would thereby emerge and evolve in state-specific contexts.

Second, Palestine could pursue a claim of a breach of the collective obligation of art 3 not to recognise the illegal situation, or render aid or assistance in its maintenance, via the arts 11–13 mechanism. For example, the 2019 declaration from the US that it does not consider Israeli settlements in the OPT a violation of international law,[159] could be considered to form an act of recognition in breach of such an obligation. Article 11(1) requires only that 'a State Party considers that another State Party is not giving effect to the provisions of the Convention', clearly actionable in the context of a perceived breach of the obligation of art 3 to condemn apartheid in relation to any state party to *ICERD*.

Third, CERD could also receive individual communications under the art 14 mechanism, from an individual alleging a state violation of the obligation of all states parties not to recognise the illegal situation, or render aid or assistance in its maintenance. The individual communications mechanism is optional, with 59 states parties to *ICERD* opting in to date.[160] Thus, many European Union states have opted in under Article 14. Human Rights Watch and others have called on

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158 See CERD's recent Decision 1(108) of 23 November 2022, in relation to serious violations in the Xinjiang Uyghur Autonomous Region of China, which '[r]eminds all States of their responsibility to cooperate to bring an end through lawful means any serious breach of human rights obligations, in particular serious violations of the peremptory norm of the prohibition of racial discrimination': Committee on the Elimination of Racial Discrimination, *Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedure: Decision 1(108)*, 108th sess, 2940th mtg (23 November 2022). <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FEWU%2FCHN%2F9624&Lang=en>, archived at <https://perma.cc/BVA7-SWBA>.

159 See also Gilead Sher and Daniel Cohen, *The Trump Administration's Statement on Israeli Settlements: Legal Status and Political Reality* (Issue Brief, 23 January 2020); Giovanni Russonello, 'Where Biden Is (and Isn't) Turning Back Trump's Israel Policies', *New York Times* (online, 17 May 2021) <https://www.nytimes.com/2021/05/17/us/politics/trump-israel-policy.html>, archived at <https://perma.cc/D9P3-AMA5>.

160 *ICERD Status* (n 69).

the European Commission to prohibit EU trade with settlements in the OPT.[161] In the continued absence of Commission legislation, states parties from the EU that trade with the settlements could be considered in breach of the obligation not to render aid or assistance in maintaining the illegal situation. This could be the subject of a communication by an individual or group under art 14.

Fourth, Palestine could pursue a claim for a breach of the collective obligation to condemn apartheid under art 3 of *ICERD* before the ICJ. *ICERD*'s compromissory clause, art 22, grants jurisdiction to the Court in a dispute between two or more states parties with respect to the interpretation or application of the Convention. Article 22 is the most reserved provision under *ICERD* with 25 reservations in total, including Israel.[162] Hence, it is only the interpretation or application of the collective obligation not to recognise the illegal situation, or render aid or assistance in its maintenance, that could be referred by Palestine to the Court. For example, should a state party to *ICERD* contest the existence of such an obligation under art 3, as France did in relation to South Africa in 1979,[163] then this could be referred to the Court as a dispute with respect to the interpretation of the Convention. Similarly, trade with settlements in the OPT by states parties to ICERD could be referred to the Court as a dispute with respect to the application of the Convention.

V CONCLUSION

There are a number of potential outcomes in *Palestine v Israel*, as discussed. A confidential settlement may be reached; the Commission may find no breaches of the Convention or may not have enough facts to determine the issue. Should the Commission find a breach of art 3, this will give rise to an individual obligation on Israel to prevent, prohibit and eradicate all practices of this nature in territories under its jurisdiction. A finding of racial segregation, or 'racial segregation and apartheid', could give rise to a collective obligation on all states parties as a violation of the peremptory norm of the prohibition of racial discrimination. An individuated finding of apartheid would give rise to a collective obligation to condemn apartheid, potentially actionable in relation to all states parties under all of *ICERD*'s mechanisms. UN General Assembly *Resolution 76(82)*

> [c]alls upon all States, consistent with their obligations under international law and the relevant resolutions, not to recognize, and not to render aid or assistance in maintaining, the situation created by measures that are illegal under international law.[164]

A significant implication of a determination of apartheid by the Commission in *Palestine v Israel* would be to frame an established obligation in general

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161 'Europe: Ban Trade with Illegal Settlements', *Human Rights Watch* (Web Page, 21 February 2022) <https://www.hrw.org/news/2022/02/21/europe-ban-trade-illegal-settlements>, archived at <https://perma.cc/9TZY-2FB7>.

162 *ICERD Status* (n 69). These countries include Afghanistan, Bahrain, China, Cuba, Egypt, Equatorial Guinea, India, Indonesia, Iraq, Israel, Kuwait, Lebanon, Libya, Madagascar, Morocco, Mozambique, Nepal, Saudi Arabia (Kingdom of), Singapore, Syrian Arab Republic, Thailand, Turkey, US, Viet Nam, Yemen.

163 *Report of CERD 1979*, UN Doc A/34/18 (n 88) 73 [343].

164 *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and the Occupied Syrian Golan*, GA Res 76/82, UN Doc A/RES/76/82 (15 December 2021) [17].

international law as a treaty obligation under *ICERD*. The triggering of the collective obligation of art 3 could have potential far-reaching consequences for all states parties to the treaty. The Commission must carefully weigh the claim that is before it.