NGO MONITOR

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Joshua Kern & Anne Herzberg

March 2022

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NGO Monitor's mission is to provide information and analysis, promote accountability, and support discussion on the reports and activities of NGOs claiming to advance human rights and humanitarian agendas.

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Organization in Special Consultative Status with the UN Economic and Social Council since 2013

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Executive Summary

In December 2021, we published a report titled *False Knowledge as Power: Deconstructing Definitions of Apartheid that Delegitimise the Jewish State,* which sought to rectify the lack of a coherent and legally substantiated definition of the crime of apartheid. Accusations of this crime against humanity have been historically levelled at the state of Israel and its officials by powerful NGOs such as Human Rights Watch (HRW), B'Tselem and, most recently, Amnesty International. The lack of an accepted definition of the crime of apartheid has been harnessed by central actors in the campaign to delegitimise Israel, who apply the term to characterise the political and legal nature of Israel's government, and in many cases to delegitimise the notion of Israel's identity as a Jewish state.

The legal analysis found the definitions of apartheid's elements commonly used by the NGOs to be unreasoned by reference to principles and instruments of international law; consequently, we found the legal basis upon which accusations of apartheid against Israel rest to be invalid.

In this report, we expand on this analysis by assessing whether apartheid, as previously defined, is applicable to Israel and territories under its military administration. Building upon our previous analysis, it aims to respond to the most politicised aspects of the NGOs' allegations by presenting a clear-eyed review of the validity of common claims which are said to support a case that apartheid is being committed in Israel, the West Bank, and Gaza.

First, we examine specific allegations made in the main NGO and UN reports alleging Israeli responsibility for apartheid – including publications by Human Rights Watch, Amnesty, B'Tselem, Al Haq, and former UN Rapporteur Richard Falk. We also review prominent academic publications and the 2018 Palestinian complaint to the Committee on the Elimination of Racial Discrimination. We then turn to the topics that appear most frequently in such publications, including the concept of a "Jewish State," the Law of Return, the Nation State Law, separate legal regimes in Area C of the West

Bank, freedom of movement, "right of return," settlements, and the concept of race and racial groups. We analyse claims made regarding these issues against the elements of the crime of apartheid in the Rome Statute per *False Knowledge as Power*. We conclude with a discussion about institutional discrimination and offer recommendations to the government of Israel.

Main Findings:

- Apartheid discourse is not merely criticism of or an attempt to improve Israeli policy. Rather, it is used by NGOs and UN officials to construct a narrative that presents Israel's very existence as a Jewish state as illegitimate.

- The NGO and UN reports present an ahistorical and decontextualized narrative to press the case of apartheid. The publications erase the international community's endorsement of the creation of a Jewish State, alongside Arab States; Arab military aggression and the ongoing Palestinian rejection of any final settlement to date; Palestinian political divisions and the root causes of fragmentation; and how the ongoing armed conflict has shaped policy in the region.

- NGO and UN publications overwhelmingly adopt a neo-orientalist approach towards Zionism and Judaism. Their claims rest on antisemitic caricatures and stereotypes, which trivialize how Jews have, for thousands of years, defined their peoplehood and their religion.

- Claims that Israel imposes a single, institutionalised apartheid regime "from the river to the sea," and has deliberately "fragmented" the Palestinians are false. The existing territorial and political division of the Palestinian population results not from Israeli policies of "domination," but rather from geopolitical factors impacting the history of the conflict, including Arab rejectionism, the 1947 UN Partition Plan, Jordanian and Egyptian control over the West Bank and Gaza respectively, the Oslo Accords (mutually agreed to between Israel and the PLO

and witnessed by representatives of the international community), and Palestinian political splits.

- Contrary to NGO and UN rapporteurs' claims, there is no fundamental incompatibility between Israel's identity as a Jewish state and the protection of equality for all its citizens.

- Israel's Law of Return does not provide for "Jewish preferential citizenship," nor does it make the citizenship of non-Jews in any way inferior. Its provisions are consistent with international norms.

- Any reasonable assessment of Israel's policies must be viewed through the lens of its security dilemma and the context of armed conflict within which they are implemented. NGO and UN reporting consistently fails to address these issues.

- An intention to secure the right of a people to reside in their ancient homeland, alongside Palestinian communities, cannot be said to entail an intention to establish and maintain a relationship of "domination and oppression."

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Introduction

"Sound the great shofar for our freedom, raise high the banner to gather our exiles, and gather us together from the four quarters of the earth. Blessed are You, Lord, who gathers the dispersed of His people Israel."

-The Tenth Blessing of the thrice-daily Amidah prayer: Ingathering of Exiles (approx. 150 BCE)

"The Zionist settler state remains an alien body in the region. Not only its vital and continuing association with European imperialism, and its introduction into Palestine of the practices of Western colonialism but also its chosen pattern of racial exclusiveness and self-segregation renders it an alien society in the Middle East."

-Fayez Sayegh, "Zionist Colonialism in Palestine" (1965)

In *False Knowledge as Power: Deconstructing Definitions of Apartheid that Delegitimise the Jewish State*, we offered a detailed legal analysis of apartheid's definition as a crime against humanity and examined how the charge of apartheid has been levelled historically against Israel and its officials. In that report, we suggested definitions of the elements of the crime of apartheid under the Rome Statute of the International Criminal Court (ICC).

Given the differing contexts in which apartheid is prohibited, and the absence of universal acceptance of its definition under either the 1973 Apartheid Convention or the Rome Statute, we concluded that the legal basis for the definition proposed in NGO publications alleging Israeli responsibility for apartheid is doubtful. In this companion report, we address the application of these legal elements specifically to the situation in Israel, the West Bank, and Gaza.

Before undertaking that analysis, however, we begin by unpacking specific allegations made in NGO and UN reporting that alleges Israeli responsibility for apartheid. This report is intended to serve as a response, albeit – inevitably – incomplete, to those

allegations. Its incompleteness is due the nature of the charge of apartheid against Israel and the way it has been framed by the NGOs and UN reporting. The allegation encompasses almost every aspect of the century-old conflict that has subsisted, and continues to subsist, between the Israeli Jewish and the Palestinian Arab population of what historically has been known as Palestine and/or the Land of Israel (*Eretz Israel*). Specifically, policies and practices enacted by Israel in its 73-year history are characterised by NGOs and activists as acts of racial discrimination and violations of international law, operating to the benefit of Israeli Jews at the expense of Palestinian Arabs, but absent their relevant context. To assess all the allegations comprehensively would require thousands of pages. We have therefore focused on the main charges.

Israel, through its officials' public statements, jurisprudence, and practice before international organisations, has offered responses or justifications for many of these allegations. It has not, however, engaged substantively (apart from disputing admissibility and jurisdiction) with the allegation of apartheid as framed by those acting on behalf of the Palestinian authorities in their complaint to the Committee for the Elimination of Racial Discrimination (CERD).

We demonstrate that NGO and UN reports present an ahistorical and decontextualized narrative to press a case that Israel and its officials are responsible for establishing and maintaining a system of apartheid. Specifically, these publications erase the fact that, from the outset, the international community has proposed partition (i.e. dividing the land into areas of Jewish and Arab control) as a solution to the problems caused by the vacuum of sovereignty arising from the dissolution of the Ottoman Empire after the First World War. A discourse of Israeli apartheid obscures Arab and Palestinian policies of rejection of proposals which do not cement Arab hegemony over the Land of Israel / Palestine. The reporting also downplays and decontextualises continuing armed conflict between Israel and Palestinian armed groups, and how this violence has and continues to shape policy. We argue that these publications adopt a neo-orientalist approach towards their characterisations of Zionism and Judaism. Their perspective rests on caricatures and stereotypes which

disregard how Jews have, for millennia, self-defined their peoplehood and their religion.

This report, therefore, begins the process of unpacking these allegations and fills in missing context. Part I provides a summary of the main NGO and UN reports advancing the apartheid charge. Part II analyses their claims, applying them to the elements of the crime of apartheid – as it is defined under the Rome Statute, and pursuant to the interpretation of that definition that we provided in *False Knowledge as Power*. The report concludes with a discussion of institutional discrimination and provides recommendations to the government of Israel.

Part I – Summary of NGO and Intergovernmental Reports Alleging Apartheid Against Israel

2009: Report of the Human Sciences Research Council of South Africa

The Human Sciences Research Council (HSRC) of South Africa, in May 2009, published a preliminary study, titled "Occupation, Colonialism, Apartheid?",[1] followed by a similarly-titled book in 2012. The study was produced in response to a 2007 report to the UN Human Rights Council (UNHRC) issued by UN Special Rapporteur John Dugard, calling for examination of the question: "What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the occupying power and third States?"[2]

The HSRC study laid the foundation for much of the subsequent allegations of apartheid in Israel, the West Bank and Gaza. The report was the product of numerous academics and legal professionals who have assumed prominent roles in the pro-

[1] HSRC, *Occupation, colonialism, apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law* (2009), (hereinafter "HSRC Report"), p.51.
[2] John Dugard, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/HRC/4/17, 29 January 2007; Joshua Kern and Anne Herzberg, *False Knowledge as Power: Deconstructing Definitions of Apartheid that Delegitimise the Jewish State* (2021) (hereinafter "Kern and Herzberg"), p. 14-15.

Palestinian legal discourse concerning the Israeli-Palestinian conflict, including Virginia Tilley (editor), Victor Kattan, Michael Kearney, John Reynolds, and Iain Scobbie. John Dugard and Michael Sfard, among others, provided contributions. The HSRC's analysis encompassed, *inter alia*, a review of sources of law (relating to both apartheid as well as the legal status of the territory and prolonged occupation),[3] Israeli policies "relative to the prohibition of colonialism,"[4] and a review of "Israeli practices relative to the prohibition of apartheid."[5] The HSRC's analysis was limited to an assessment of Israeli conduct in the West Bank and Gaza, and refrained from reaching a conclusion that Israel and its officials were responsible for apartheid in the State of Israel behind the Green Line.

The HSRC report defined apartheid as "an aggravated form of racial discrimination because it is a State-sanctioned regime of law and institutions that have 'the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."[6] It asserted that this "definition is employed in the Apartheid Convention,"[7] which in turn builds on the International Covenant for the Elimination of Racial Discrimination (ICERD).[8] The Rome Statute included apartheid as a crime within the ICC's jurisdiction and, although the HSRC's analysis was not examining individual criminal responsibility, "the provisions of these three treaties were employed to develop a working definition of apartheid for the purpose of considering Israel's State responsibility for practices that offend against the norm prohibiting apartheid."[9] The HSRC report concluded that a "dual system appears to reflect a policy by the State of Israel to sustain two parallel societies in the OPT, one Jewish-Israeli and the other Palestinian, and to accord these two groups very different rights and protections in the same territory."[10]

[3] HSRC Report, p.25-118.
[4] Ibid., p.119-151.
[5] Ibid., p.152-271.
[6] Ibid., p.14.
[7] Ibid.
[8] Ibid., p. 14. It should be noted, however, that while the ICERD prohibits apartheid, it does not offer any definition of it.
[9] Ibid., p.15.
[10] Ibid., p.119.

Richard Falk

Richard Falk succeeded John Dugard in 2008 as the UN's Special Rapporteur on human rights in the Palestinian territories and repeated the themes raised by the HSRC in his annual reports to the Council. In 2010, Falk described the HSRC study as "both reliable and convincing."[11] His report listed the "salient apartheid features" of Israeli occupation as:

> preferential citizenship, visitation and residence laws and practices that prevent Palestinians who reside in the West Bank or Gaza from reclaiming their property or from acquiring Israeli citizenship, as contrasted to a Jewish right of return that entitles Jews anywhere in the world with no prior tie to Israel to visit, reside and become Israeli citizens; differential laws in the West Bank and East Jerusalem favouring Jewish settlers who are subject to Israeli civilian law and constitutional protection, as opposed to Palestinian residents, who are governed by military administration; dual and discriminatory arrangements for movement in the West Bank and to and from Jerusalem; discriminatory policies on land ownership, tenure and use; extensive burdening of Palestinian movement, including checkpoints applying differential limitations on Palestinians and on Israeli settlers, and onerous permit and identification requirements imposed only on Palestinians; punitive house demolitions, expulsions and restrictions on entry and exit from all three parts of the Occupied Palestinian Territories.[12]

Following Israel's disengagement from Gaza in 2005, however, Falk concluded that the situation there "is not characterized by either colonial ambitions as to territory and permanence or an apartheid structure.[13]

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[11] John Dugard and John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory," *European Journal of International Law*, Volume 24, Issue 3, August 2013 (hereinafter "Dugard and Reynolds"), p.871 *citing* R. Falk, "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967', UN Doc A/65/331, 20 August 2010, para. 3.
[12] R. Falk, "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967', UN Doc A/65/331, 20 August 2010, para 5.
[13] Ibid., para. 6.

John Dugard and John Reynolds in the European Journal of International Law

In 2013, John Dugard, together with John Reynolds, published an examination of the legal elements of apartheid in the *European Journal of International Law*. They undertook what they described as a "doctrinal legal enquiry" of Israeli conduct "in the language of international law and in the context of contemporary norms of international law."[14] As to apartheid's definition, they argued that the "essence of the definition" is the "systematic, institutionalized, and oppressive character of the discrimination involved, and the purpose of domination that is entailed."[15] However, details on the legal definition of the elements of oppression and domination were absent. Instead, Dugard and Reynolds suggested an empirical approach to definitional questions by arguing that "regimes of racial domination are typically exemplified by illegitimate acts of repression that go beyond what can be justified by reference to national security."[16] They claimed that a regime founded on a "discriminatory ideology" inevitably "results in the domination of the 'superior' group over the 'inferior' group, and it becomes impossible to refute the conclusion that the purpose of such discrimination is domination."[17]

Applying this approach to the Israeli-Palestinian situation, they argued that Israel's "legal system … constructs a notion of Jewish 'nationality'" and "privileges Jewish nationals over non-Jewish groups under Israeli jurisdiction." They argued that Israeli law is "somewhat unique" in distinguishing between nationality (in Hebrew, *le'om*) and citizenship (*ezrahūt*),[18] and compared Israel's Law of Return of 1950 with in South Africa's Population Registration Act of 1950.[19] They argued that a "grand apartheid-

[14] Dugard and Reynolds, p. 883.
[15] Ibid., p.881
[16] Ibid., p.901.
[17] Ibid., p.904.
[18] Ibid., p.904; 905. See also Palestinian 2018 complaint to CERD, para. 607 ("Israeli law is somewhat unique in distinguishing between nationality and citizenship, with Israel constituted as the state of the Jewish nation.")
[19] Dugard and Reynolds, p.911. South Africa's Population Registration Act of 1950 required identification and registration at birth as one of four racial groups: White, Coloured, Bantu (Black African), and other. These classifications were then used to segregate the population in every aspect of life. See, e.g. *False Knowledge as Power*, p.5-6. Israel's Law of Return relates to immigration criteria for those of Jewish descent. It does not classify the population into separate racial groups, nor does it grant "Jewish nationals" preferential legal status in Israel. *See infra* p. 75.

like" structure was reflected in the "matrix of security laws and practices" operating in the West Bank.[20]

Noting that Jewish nationals' "exclusive interests" were served by parastatal institutions such as the Jewish Agency and the Jewish National Fund,[21] they argued that Jewish preferential citizenship was "inscribed in Israel's constitutional law" and submitted that the premise of Israel as a Jewish state amounted to more than mere symbolism. Echoing the HSRC, they alleged that discriminatory treatment extended to the requisition and administration of state land in the West Bank,[22] as well as the use of force.[23] However, it was the "foundation provided by the concept of Jewish nationality for an institutionalized system of discrimination and domination" – evidenced by a legal system in the West Bank where it is alleged that "Jewish settlers are subject to an entirely separate body of laws and courts from Palestinian residents,"[24] and where Israeli law is extended on a personal basis to include all Jews – that is said to underpin a "system of domination by one over the other."[25] However, they accepted that "Palestinians in Israel, unlike the black population of apartheid South Africa, are enfranchised citizens entitled to hold public office," and that such considerations "make characterizations of the discriminatory regime inside Israel as one of apartheid in and of itself more contentious."[26]

[20] Ibid. See also HSRC Report, p.20-21 (referring to the same three "pillars" of apartheid in South Africa).
[21] Ibid., p.905.
[22] Ibid., p.906.
[23] Ibid., p.907.
[24] Ibid., p.907, 908, 910.
[25] Ibid., p.908-909. The HSRC report similarly found that discriminatory treatment between Jewish and Palestinian identities "cannot be explained or excused on grounds of citizenship, both because it goes beyond what is permitted by ICERD and because certain provisions in Israeli civil and military law provide that Jews present in the OPT who are not citizens of Israel also enjoy privileges conferred on Jewish-Israeli citizens in the OTP by virtue of being Jews" (See HSRC Report, p. 23).
[26] Dugard and Reynolds (2013), p.872. Nevertheless, Dugard and Reynolds concluded that "there are certainly grounds for further inquiry into the question of apartheid as a single regime of domination over the Palestinian people as a whole, including the the Palestinian population inside Israel." They claim "this is relevant not least in the light of legislative developments in the Israeli Knesset under coalition governments led by Benjamin Netanyahu from 2009," but give no examples of what developments they are referring to (or if they even are aware of any).

2014 Richard Falk Report to the UN Human Rights Council

Falk's final report as Rapporteur to the UNHRC in 2014 includes a section on "[t]he question of apartheid and segregation."[27] His report opens with the statement that "the language used to consider Palestinian grievances … needs to reflect everyday realities, and not remain beholden to technical wording and euphemisms."[28] He reflects that "[i]t seems therefore appropriate to describe such unlawful impositions on the people resident in the West Bank by reference to 'annexation' and 'colonial ambitions' rather than 'occupation'. Whether these impositions constitute 'apartheid' is discussed in more detail." Falk notes that since no advisory opinion from the International Court of Justice was sought following Dugard's 2007 call for one, he would assume "part of the task of analysing whether allegations of apartheid in occupied Palestine are well founded."[29]

Falk offers no definition of the elements of "domination" or "oppression", and he acknowledges a lack of certainty surrounding the definition of the crime. Nevertheless, he states that "[w]ithout prejudice to any possible differences in the elements of apartheid as an international crime and an internationally wrongful act, apartheid will be treated as a single concept for the purpose of the present report, which will be framed around the inhuman acts," as enumerated in the 1973 Apartheid Convention alone. He also acknowledges that "[a]partheid involves the domination of one racial group over another, and some may argue that neither Israeli Jews nor Palestinians constitute racial groups per se."[30]

Falk proceeds to accuse Israel of use of excessive force and a "lack of accountability" for violations of laws. He argues that "prevention of terror" is simply a pretext to intimidate and oppress Palestinians.[31] He claims "the denial of rights to Palestinians is made possible by the existence of parallel legal systems operating in the same territory: one set of civil and criminal laws for Israeli settlers and another for

[27] A/HRC/25/67, 13 January 2014.
[28] Ibid., Para. 7.
[29] Ibid., Para. 51.
[30] Ibid., Paras. 53-55.
[31] Ibid., Para. 58.

Palestinian Arabs," and that polices relating to the West Bank "tend to be immune from judicial intervention" or protected by Israel's Supreme Court.[32] He relies on the findings of the Russell Tribunal on Palestine[33] to conclude that "Israel has through its laws and practices divided the Israeli Jewish and Palestinian populations and allocated them different physical spaces, with varying levels and quality of infrastructure, services and access to resources. The end result is wholesale territorial fragmentation and a series of separate reserves and enclaves, with the two groups largely segregated."[34]

Report of the UN Economic and Social Commission for Western Asia

In 2017, Falk co-authored on a report with Virginia Tilley that was published by the UN Economic and Social Commission for Western Asia (ESCWA).[35] The report relied on the findings of the 2009 HSRC report (of which Tilley was an editor and contributor),[36] and reiterated Falk's recommendations from 2014. However, the report went beyond the conclusions of these previous publications and labelled Israel as a whole as being an apartheid regime, rather than confining its analysis to policies applied in the West Bank and Gaza. It rejected arguments that had been made by what it described as "Israel and supporters": The claim that Israel's determination to "remain a Jewish State" was "consistent with practices of other States, such as France" was dismissed on the basis that it "derives from miscasting how national identities function in modern nation States."[37] The argument that "Israel does not owe Palestinian non-citizens equal treatment with Jews precisely because they are not citizens" went to "the heart of the Israeli-Palestinian conflict," namely (in the authors' view) "the exclusion of the Palestinians, as non-Jews, from citizenship in the State that governs their country."[38] Finally, the claim that "Israeli treatment of the Palestinians reflects no 'purpose' or 'intent' to dominate, but rather is a temporary state of affairs

[32] Ibid., para. 68.
[33] For NGO Monitor's backgrounder to the Russell Tribunal on Palestine, see NGO Monitor, "Russell Tribunal on Palestine", October 12, 2012, https://www.ngo-monitor.org/ngos/russell_tribunal_on_palestine/.
[34] Falk, para. 68.
[35] Economic and Social Commission for Western Asia, *Israeli Practices Towards the Palestinian People and the Question of Apartheid* (2017) (hereinafter "ECSWA Report").
[36] ESCWA Report, p.iv, 44. See also ECSWA Report, Annex I.
[37] ESCWA Report, p.6.
[38] ESCWA Report, p.50.

imposed on Israel by the realities of ongoing conflict and security requirements" was rejected on the basis that "security issues related to Israeli measures relevant to this study are usually cited only in relation to the occupied Palestinian territory, while the apartheid regime is applied to the Palestinian people as a whole."[39] The authors examined what they described as a "doctrine of Jewish statehood as expressed in law and the design of Israeli State institutions" in order to establish whether the "purpose" and "intention" (which lie at the core of the treaty definitions of apartheid) were met.

It follows that, rather than use apartheid discourse to critique Israeli conduct in the West Bank and the "dual system" arising from the Israeli military administration there, the report reverted to a narrative castigating Israel's existence as a Jewish State as apartheid.[40] The report concluded, based on what it described as "overwhelming evidence," that "Israel is guilty of the crime of apartheid."[41] The UN Secretary-General formally withdrew the report within days of publication.[42] Falk and Tilley repeated these claims in a 2019 draft follow-up report and called on civil society to promote them.[43]

CERD Concluding Observations

In March 2012, the Committee for the Elimination of Racial Discrimination (CERD or Committee) stated in its Concluding Observations on Israel that it was "extremely concerned" at the consequences of Israeli "policies and practices which amount to de facto segregation," such as "separate legal systems" grouped "in illegal settlements," on the one hand, and "Palestinian populations living in Palestinian towns and villages on the other hand."[44] The Committee was "particularly appalled at the hermetic

[39] Ibid.
[40] See also Falk, Necessary Shift pp 27-29.
[41] ESCWA Report, p.90.
[42] "UN chief orders report accusing Israel of 'apartheid' pulled from web," *Times of Israel*, 17 March 2017, https://www.timesofisrael.com/un-chief-requests-report-accusing-israel-of-apartheid-be-pulled-from-web/
[43] Richard Falk and Virginia Tilley, "Update to the ESCWA Report of 15 March 2017 'Legal Inquiry into Israel as an Apartheid," 2019 *available at* https://secureservercdn.net/160.153.137.218/r0e.5a5.myftpupload.com/wp-content/uploads/2020/04/ESCWA-UPDATE-Falk-Tilley-COMPLETE-DRAFT-1.pdf; see also Joshua Kern and Anne Herzberg, *False Knowledge as Power: Deconstructing Definitions of Apartheid that Delegitimise the Jewish State* (2021)(hereinafter "Kern and Herzberg"), p. 18.
[44] CERD, Concluding Observations. UN Doc CERD/C/ISR/14-16, 9 March 2012, para. 24. It should be noted that the CERD observations are without citations to source material. Many observations are contentious, yet the absence of

character of the separation" of the 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."[45] The separation was, in the Committee's view, "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."[46] Falling short of distinguishing between policies of segregation and apartheid specifically, the Committee drew Israel's attention to its General Recommendation 19 (1995) and urged Israel to "take immediate measures to prohibit and eradicate" any policies or practices that "severely and disproportionately affect the Palestinian population" and violate Article 3 of the 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.").[47]

Recalling its 2012 Concluding Observations, in 2019, the CERD again drew Israel's attention to its General Recommendation 19 (1995) and urged it to give full effect to Article 3 of the ICERD. This was in order "to eradicate all forms of segregation between Jewish and non-Jewish communities and any such policies or practices which severely and disproportionately affect the Palestinian population in Israel proper and in the Occupied Palestinian Territory."[48]

The Committee reiterated its concern that "Israeli society continues to be segregated as it maintains Jewish and non-Jewish sectors," including two systems of education and separate municipalities.[49] Within Israel, the Committee was particularly concerned

citations make it impossible to verify the Committee's conclusions or to identify specific conduct and/or policies on which observations are based.

[45] Ibid.

[46] Ibid.

[47] Ibid. Palestine's inter-State Complaint to the CERD asserts that this paragraph "effectively acknowledged" the institutionalisation of a "system of segregation and domination by one group over the other," and that it censures Israel "under the rubric of apartheid and segregation." Palestine further claims that the "CERD Committee has recognized that Israel's segregationist policies and practices in the OPT may be seen as apartheid (para. 582). Close scrutiny of the Concluding Observations is however warranted as the Committee did not make specific findings on apartheid, and left open the question of whether Israel's conduct was to be considered under the specific rubric of either segregation or apartheid under Article 3 of the ICERD.

[48] CERD, "Concluding Observations on the combined seventeenth to nineteenth reports to Israel," (hereinafter "2019 Concluding Observations"), CERD/C/ISR/CO/17-19, 12 December 2019, para. 23.

[49] No references were provided to support these claims.

about the full discretion of Admissions Committees to reject applicants for housing deemed "unsuitable to the social life of the community," and it viewed the situation under the rubric of Articles 3, 5 and 7 of the ICERD.[50] With respect to the West Bank, the Committee reiterated its concern "at the consequences of policies and practices which amount to segregation," such as the existence "of two entirely separate legal systems and sets of institutions for Jewish communities in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand."[51] The Committee remained "appalled at the hermetic character of the separation of the 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, lands and

[50] Ibid., para. 21.
Article 5 of the ICERD states: In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
(a) The right to equal treatment before the tribunals and all other organs administering justice;
(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights, in particular:
(i) The right to freedom of movement and residence within the border of the State;
(ii) The right to leave any country, including one's own, and to return to one's country;
(iii) The right to nationality;
(iv) The right to marriage and choice of spouse;
(v) The right to own property alone as well as in association with others;
(vi) The right to inherit;
(vii) The right to freedom of thought, conscience and religion;
(viii) The right to freedom of opinion and expression;
(ix) The right to freedom of peaceful assembly and association;
(e) Economic, social and cultural rights, in particular:
(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
(ii) The right to form and join trade unions;
(iii) The right to housing;
(iv) The right to public health, medical care, social security and social services;
(v) The right to education and training;
(vi) The right to equal participation in cultural activities;
(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.
Article 7 of the ICERD states:
States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.
[51] Ibid., para. 22.

water resources." It observed that the "separation is materialized by the implementation of a complex combination of movement restrictions consisting of the Wall, the settlements, roadblocks, military checkpoints, the obligation to use separate roads and a permit regime that impacts the Palestinian population negatively."[52] Under Articles 2, 3 and 5 of the Convention, the Committee urged Israel to "review its blockade policy" of Gaza.[53]

Pointing to Articles 2, 4, 5, and 6[54] (but not Article 3) of the ICERD, the Committee expressed its concern at "continuing confiscation and expropriation" of Palestinian

[52] Ibid.
[53] Ibid., para. 45.
Article 2 of the ICERD states:
1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.
2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.
[54] See notes 50, 53;
Article 4 of the ICERD states:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.
Article 6 of the ICERD states:

land and continuing restrictions on access of Palestinians to natural resources. It expressed particular concern at the "discriminatory effect" of planning and zoning laws and policies on Palestinians and Bedouin communities in the West Bank: the continued demolitions of building and structures; prolonged processes for applying for building permits in a context of preferential treatment for expansion of Israeli settlements, including through the use of "state land" for them; acts of Israeli settler violence against Palestinians and their property in the West Bank; and a lack of effective accountability for and protection from such acts by Israeli authorities.[55]

State of Palestine[56] CERD complaint

On 23 April 2018, the State of Palestine filed an inter-state complaint against Israel for breaches of its obligations under the ICERD.[57] In its complaint, State of Palestine alleges that Israel is responsible for violations of Articles 2, 3 and 5 of the Convention "throughout the occupied territory of the State of Palestine"[58] and, in particular, that "Israel's policies and practices in the occupied territory of the State of Palestine constitute apartheid" within the meaning Article 3 of the ICERD.[59] Palestine asserts that Israel, in fulfilling its obligations under the Convention, "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."[60] In December 2019, over Israeli objection,[61] and departing from previous

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

[55] Ibid., para. 22.

[56] In 2012, the UN General Assembly upgraded Palestinian representation at the UN to "non-member observer state" status before UN bodies even though, uncontroversially, Palestine does not meet objective criteria of statehood under international law. Since 2012, certain international organisations and UN specialized agencies have permitted the "State of Palestine" to accede to them. For this reason, without prejudice to any question as to the legality of these accessions or of the objective legal status of Palestine under customary international law, that this report utilises the designation "State of Palestine" when referring to Palestinian advocacy before those bodies.

[57] Interstate Complaint under Articles 11-13 of the International Convention for the Elimination of All Forms of Racial Discrimination: State of Palestine vs. Israel, 2018, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_ISC_9325_E.pdf (hereinafter: Palestinian CERD Complaint).

[58] Ibid., para. 660.

[59] Ibid.

[60] Ibid.

[61] CERD/C/100/5, 12 December 2019, https://www.ohchr.org/Documents/HRBodies/CERD/CERD-C-100-5.pdf

practice (as noted by the UN's Office of Legal Affairs),[62] the CERD Committee found it had jurisdiction to hear the complaint.[63] In May 2021, again over Israeli objection,[64] the Committee found that the Palestinian complaint was admissible.[65] On 17 February 2022, the UN announced that the Committee appointed five of its members to serve as a Conciliation Committee to hear the complaint.[66]

The Palestinian complaint extends to the "occupied territory of the State of Palestine," or "OPT," which are defined as Gaza, the West Bank, and East Jerusalem.[67] To support its allegation that institutionalised and systematic discrimination and domination subsists in this territory, Palestine alleges that the "primary impetus of the commission of the practices of the Israeli civil and military authorities in the OPT is to insulate and privilege Jewish settlements and settler infrastructure, and to ensure that Palestinians intrude as little as possible on the lives of the dominant settler group."[68] A two-tiered system of status among Israeli citizens was argued to privilege Jewish nationals, who in turn invoke national rights in (Palestinian) territory.[69] Thus, it is argued, "the concept of Jewish nationality" provides the foundation for an "institutionalized system of discrimination and domination" which is "evidenced most visibly by this dual legal system in place in the West Bank, where Jewish settlers are subject to an entirely separate body of laws and courts from Palestinian residents."[70]

[62] See Note for the file, Treaty Bodies Secretariat, 23 August 2019: Transmission of the content of OLA Memorandum at the request of the Committee on the Elimination of Racial Discrimination available at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_ISC_9360_E.pdf.
[63] Ibid.
[64] "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, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/CERD_C_103_R-6_9416_E.pdf
[65] Ibid.
[66] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28129&LangID=E
[67] Palestinian CERD Complaint, paras. 8, 660.
[68] Ibid., para. 606. See also para. 621 (noting the result of "the institutionalisation of two separate legal systems for two separate racial groups in a manner that underpins a system of segregation and domination by one group over the other").
[69] Ibid., para. 610.
[70] Ibid., para. 613.

NGO reporting in 2021 and 2022

Between January 2021 and February 2022, several organisations and authors – most notably Human Rights Watch – alleged that Israeli officials are responsible for the crime against humanity of apartheid.

B'Tselem

B'Tselem published a position paper in January and a report in March 2021 alleging that "the Israeli regime" is "an apartheid regime."[71] Core to B'Tselem's argument is that Israel "strives to promote and perpetuate Jewish supremacy in the entire area between the Jordan River and the Mediterranean Sea."[72] According to B'Tselem, the Israeli "regime's policy of Judaizing space" is "implemented throughout the entire area," and is "based on a mindset that land is a resource meant to primarily benefit the Jewish population."[73] In the report, "This Is Ours – And This, Too", B'Tselem focuses on two "central aspects" of the "settlement enterprise." Firstly, an alleged financial aspect "includes a slew of benefits and incentives offered by the state" to encourage citizens to move to settlements, take up farming there, and set up industrial zones." Secondly, the report addresses the alleged "spatial impact of two settlement blocs that bisect the West Bank." The first lies south of Bethlehem, from Beitar Illit to Efrat and Gush Etzion, then on to Tekoa, Nokdim, and nearby outposts. The second is in the centre of the West Bank, stretching from Ariel to Rehelim and Ma'ale Levona, and then to Eli and Shilo, and outposts built east of them. B'Tselem alleges that both "settlement blocs have robbed the Palestinians of land reserves, roadways, farmland and commerce areas that served their communities for generations."[74]

B'Tselem finds that construction and infrastructure work "has recently been carried out in the West Bank on a scale not seen in decades." They claim that this "large-scale development is designed to facilitate another significant spike in the number of settlers

[71] B'Tselem, "A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid," January 2021; B'Tselem and Kerem Navot, "This is Ours – And this, too," March 2021.
[72] Ibid., p.7.
[73] Ibid.
[74] Ibid.,p.62.

living in the West Bank, which settlement leaders predict will reach one million in the near future,"[75] reflecting "the regime's long-term plans."[76] According to B'Tselem, "the two blocs bisect Palestinian space and block any possibility of its development." The report finds that Israel's "policies regarding the settlements are a clear expression of the Israeli apartheid regime."[77]

Al Haq

In the article, "The Legal Architecture of Apartheid," Susan Power (Head of Legal Research and Advocacy at Al Haq) argues that "Israel's legal architecture codifies a privileged status for its Jewish citizens, and discriminates against all its non-Jewish persons, and particularly its Palestinian citizens." Thus, she argues that Israel's "foundational laws provided the legal basis for Jewish domination over the Palestinian people as a whole, through entrenching their fragmentation." Describing the withdrawn 2017 ECSWA report as "authoritative," Power asserts that the Al Haq "brief serves to outline the key laws that established this regime and enabled discriminatory policies and practices to be applied to the Palestinian people as whole," and "maintains that the legal blueprint for Israel's apartheid was established in 1948 and continues to the present day."

Power identifies "discriminatory" laws on nationality and immigration (the Law of Return [1950], the Nationality Law [1952], the Basic Law: the Nation State of the Jewish People [2018], and Citizenship and Entry into Israel Law [Temporary Provision] [2003]), land use (the Land Acquisition Law [1953] and the Legal Procedures and Implementation Law [1970]), "physical fragmentation" (through construction of the "Annexation Wall" and the blockade of Gaza), and "laws to prevent Palestinian resistance" (such as where Israel "routinely opened fire" on Palestinians who "protested peacefully" their "rights of return" and self-determination) as establishing a framework that entails "peremptory recognitions of racial superiority, with the

[75] Ibid., p.7.
[76] Ibid.
[77] Ibid., p.62.

intention of maintaining Jewish dominance over the indigenous Palestinian population."[78]

Noura Erakat and John Reynolds

On 20 April 2021, Noura Erakat and John Reynolds published an essay examining Palestinian legal strategies and tactics in light of the allegations that Israel is responsible for apartheid. Focusing on the ICC's investigation, they argue that Israeli apartheid "encompasses the settlement project and economic exploitation of Palestinian land and labour in the West Bank, the blanket denial of Palestinian refugee return, and the Israeli state's exclusionary constitutionalism." They claimed that "all are potentially within the remit of the ICC."

Nevertheless, in Erakat and Reynolds' view, "warning signs" are present, as there is "no reference to apartheid or any other crimes against humanity" in the (former) ICC Prosecutor's summaries of her preliminary examination findings. They conclude that if "the ICC cannot bring itself to investigate and prosecute apartheid crimes in the most widely-analysed instance of apartheid since South Africa – after it has been presented with documentation and asked to do so by those subjected to the apartheid regime – that will say a lot about the politics of international criminal law."[79]

Diakonia

Diakonia, a Swedish aid agency, commissioned Professor Miles Jackson for an opinion on the interplay between the legal regimes applicable to belligerent occupation and the inter-State prohibition of apartheid under international law.[80] Focusing on legal as opposed to factual elements, Jackson affirms that customary international law

[78] S. Power, "The Legal Architecture of Apartheid," Al Haq, 2 April 2021.
[79] N. Erakat and J. Reynolds, "We Charge Apartheid? Palestine and the International Criminal Court," *TWAILR*, 20 April 2021.
[80] Miles Jackson, "Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law," Diakonia, 2021 (hereinafter "Jackson").

prohibits the practice of apartheid by States,[81] but notes that the Apartheid Convention was concerned primarily with the criminalisation of apartheid and did not immediately or later reach universal ratification.[82] Nevertheless, he proposes that in "formal terms, it makes sense to use the Apartheid Convention to interpret Article 7(1)(j) of the Rome Statute."[83] Turning to the elements of apartheid, Jackson cites Lingaas to note – with respect to the element of "domination" – that "the literature points to the idea of control,"[84] and accordingly he argues that "domination may be understood as a particularly powerful form of control."[85] As to the element of "oppression," Jackson suggests the incorporation of a gravity component to the definition and argues that oppression may be understood as "prolonged or continual cruelty."[86]

The core of Jackson's argument is that an institutionalised regime constituting apartheid might be established and maintained notwithstanding concurrent application of the law of belligerent occupation to the situation. Noting the example of German conduct in Poland in World War II, Jackson concludes that "depending on the specific context, a state's differing treatment of a community of its nationals in occupied territory vis-à-vis a racial group constituting, or within, the category of protected persons may, in fact, entail a relationship of domination which the prohibition of apartheid seeks to prevent."[87] Similarly, there is no suggestion of a territorial limitation to "practices of apartheid" contained in Additional Protocol I and in the definition of the crime in the Rome Statute, nor when considering the case of South-West Africa as an empirical example.[88] Rather, the interaction between the law of apartheid and "rules in the law of occupation must be assessed on case-by-case basis in relation to specific elements of the prohibition,"[89] and the mere fact that

[81] Jackson, p.2 (noting Article 3 CERD; Article 85(4)(c) API). See also p.3 ("The ratifications of ICERD, with its 182 state parties, and API, with its 174 state parties, confirm the broad consensus among states as to the prohibition of apartheid in international law.")
[82] Jackson, p.5.
[83] Jackson, p.9.
[84] The literature addressing this issue primarily cites to the dictionary to define "domination" as a form of control. See, e.g., Jackson, Lingaas, Ambos. Contra Kern and Herzberg, pp. 33-34.
[85] Ibid., p.7.
[86] Jackson, p. 7.
[87] Ibid., p.27.
[88] Ibid., p.14, 15.
[89] Ibid., p.15.

international humanitarian law is triggered does not exclude the applicability of other binding rules of international law,[90] including the prohibition and criminalisation of apartheid.[91] Nevertheless, he affirms that political rights under international human rights law are subject both to limitation and derogation by the State,[92] subject to compliance with principles of certainty, proportionality, non-discrimination, and necessity.[93]

Jackson also observes that within occupied territory, there may be "two groups – one comprising protected persons and one comprising non-protected persons," for instance nationals of the occupant,[94] and he correctly notes that "international law itself demands the application of different legal regimes" to these separate groups:[95] "a requirement that two groups are subject to different laws does not necessarily entail a regime of domination."[96] He argues, however, "in relation to the protection of rights international law only permits a difference in treatment between nationals and non-nationals under a state's jurisdiction in certain, narrowly defined circumstances."[97]

Human Rights Watch

In "*A Threshold Crossed*", published in April 2021, Human Rights Watch claims that laws, policies, and statements by leading Israeli officials "make plain that the objective of maintaining Jewish Israeli control over demographics, political power, and land has long guided government policy."[98] In pursuit of this goal, HRW argues, Israeli authorities have "dispossessed, confined, forcibly separated, and subjugated Palestinians by virtue of their identity to varying degrees of intensity." In the West Bank and Gaza Strip, Human Rights Watch charges that "these deprivations are so

[90] Jackson, p.16.
[91] Ibid.
[92] Ibid., p.20.
[93] Ibid., p.21-22.
[94] Ibid., p.26.
[95] Ibid., p.27.
[96] Ibid.
[97] Ibid.
[98] Human Rights Watch (HRW), "A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution," (27 April 2021), p.2.

severe that they amount to the crimes against humanity of apartheid and persecution."[99]

HRW claim that the "crime of apartheid under the Apartheid Convention and Rome Statute consists of three primary elements: an intent to maintain a system of domination by one racial group over another; systematic oppression by one racial group over another; and one or more inhumane acts, as defined, carried out on a widespread or systematic basis pursuant to those policies."[100] At the core of HRW's analysis is a definition of apartheid that equates the element of "domination" (inherent to the treaty definitions of the crime under both the Apartheid Convention of 1973 and the Rome Statute) with the concept of "control."[101] (In *False Knowledge as Power*, we demonstrate why HRW's proposed interpretation is not in keeping with a proper interpretation of these instruments.)[102]

In HRW's view, the element of domination and the crime's *mens rea* are proved through Israeli officials' statements that are said to reflect an "intent to maintain … [Israeli Jewish] control" over Israel, the West Bank and Gaza Strip in perpetuity.[103] The "fragmentation of the Palestinian population," which Human Rights Watch claims is in part engineered through Israeli restrictions on movement and residency, is argued to further Israel's goal of domination.[104]

Turning to "systematic oppression," HRW acknowledges that the term is "without a clear definition in law" but "appears to refer to the methods used to carry out an intent to maintain domination."[105] In the West Bank, HRW claims that "Israeli authorities treat Palestinians separately and unequally as compared to Jewish Israeli settlers," subject "Palestinians to draconian military law," and enforce segregation.[106] In East

[99] Ibid., p.2, 79.
[100] Ibid., p.5-6.
[101] HRW assert that although the element of "domination" lacks a "clear definition," it "appears in context to refer to an intent by one group to maintain heightened control over another, which can involve control over key levers of political power, land, and resources." *Threshold,* p.39.
[102] Kern and Herzberg, p.33-34.
[103] "Threshold," p.3.
[104] Ibid., p.8.
[105] Ibid., p.40.
[106] Ibid., p.7.

Jerusalem, HRW allege that "Israel provides the vast majority of the hundreds of thousands of Palestinians living there with a legal status that weakens their residency rights by conditioning them on the individual's connections to the city, among other factors."[107]

In the Gaza Strip, HRW claim that "Israel imposes a generalized closure, sharply restricting the movement of people and goods."[108] They argue that a travel ban imposed from Gaza "is not based on an individualized security assessment," which, in their view, "fails any reasonable test of balancing security concerns against the right to freedom of movement for over two million people."[109] HRW alleges that the Citizenship and Entry into Israel Law (Temporary Order), which bars automatic residency or citizenship status for Palestinians from the West Bank and Gaza who marry Israeli citizens or residents, is justified by Israel on demographic grounds[110] or on the basis of a security "pretext."[111] The group also claims that the "denial of building permits in Area C, East Jerusalem, and the Negev in Israel, residency revocations for Jerusalemites, or expropriation of privately owned land and discriminatory allocation of state lands" has "no legitimate security justification."[112] In HRW's view, the context to these measures is a "decades-long pattern of using excessive and vastly disproportionate force to quell protests and disturbances"[113] and, as a whole, this "level of discrimination amounts to systematic oppression."[114]

HRW alleges that, pursuant to these policies, "Israeli authorities have carried out a range of inhumane acts in the OPT."[115] The conduct alleged here overlaps with that which is argued to constitute "systematic oppression", and includes allegations of land confiscation, forcible transfer, denial of residency rights, and suspension of civil rights such as freedom of assembly.[116]

[107] Ibid.
[108] Ibid.
[109] Ibid., p.14, 18.
[110] Ibid., p.17.
[111] Ibid., p.19.
[112] Ibid.
[113] Ibid., p. 16.
[114] Ibid., p.7.
[115] Ibid., p.8.
[116] Ibid., p.9.

Finding Israeli Jews and Arab Palestinians to constitute "racial groups" for the purposes of the crime of apartheid, HRW draws on the ICERD's definition of racial discrimination.[117] On this basis, HRW finds that Jewish Israelis and Palestinians "are regarded as separate identity groups that fall within the broad understanding of 'racial group' under international human rights law."[118] There is no substantial attempt to distinguish between the elements of the definition of "racial discrimination" under international human rights law and the definition of a "racial group" under international criminal law in this context.[119]

HRW frames the *mens rea* required to establish liability for apartheid as an "intent to maintain domination." Again, relying on a definition of "domination" that equates to "control," HRW alleges that that a policy to "engineer and maintain a Jewish majority in Israel and maximize Jewish Israeli control over land in Israel and the OPT" amounts "to an intent to maintain domination by one group over another."[120]

In developing its argument concerning Israeli intent, HRW refers to Israeli plans for settlement in the West Bank produced in 1967 (the Allon Plan), 1977 (the Sharon Plan), and 1980 (the Drobles Plan), which they assert "guided the government's settlement policy in the West Bank at the time." HRW argue that the Drobles Plan called on Israel to settle the land between Arab population centers and their surroundings in order to make it "hard for Palestinians to create territorial contiguity and political unity" and to "remove any trace of doubt about [Israeli] intention to control Judea and Samaria forever."[121]

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[117] Ibid., p. 36.
[118] Ibid., p. 37.
[119] Carola Lingaas, "Jewish Israeli and Palestinians as distinct 'racial groups' within the meaning of the crime of apartheid?" *EJIL Talk!*, 6 July 2021, https://www.ejiltalk.org/jewish-israeli-and-palestinians-asdistinct-racial-groups-within-the-meaning-of-the-crime-of-apartheid; Jackson; Kern and Herzberg.
[120] "Threshold," p.49. Intent to maintain control in perpetuity is core the HRW's allegation concerning mens rea ("While officials have sometimes maintained that measures taken in the occupied West Bank are temporary, the government's actions and policies over more than a half-century make clear the intent to maintain their control over the West Bank in perpetuity." (p.72)).
[121] Ibid., p.12, 68. Human Rights Watch draw an express parallel between the parts of the "West Bank that should be prioritised for settlement development under the 1980 Drobles Plan, which guided the Israeli government's settlement policy at the time, and the division of the territory under the Oslo Accords of the 1990s between the areas where Israel maintains full control (Area C) and where Palestinian authorities manage some affairs (Areas A and B)."

HRW finds this intent to have continued through to 2019, and relies on a statement by former Israeli Prime Minister Benjamin Netanyahu in July that year asserting "Israeli military and security forces will continue to rule the entire territory, up to the Jordan [River]"[122] in support of its claim that a range of officials have made "clear their intent to maintain overriding control over the West Bank in perpetuity, regardless of what arrangements are in place to govern Palestinians."[123] HRW argues that Israel's Basic Laws, which have constitutional status, "re-enforce that the state is Jewish, rather than belonging to all its citizens" and that The Basic Law: Israel—The Nation-State of the Jewish People ("Nation-State Law") of 2018 "in effect affirms the supremacy of the 'Jewish' over the 'democratic' character of the state."[124]

According to HRW, Israeli "actions and policies further dispel the notion that Israeli authorities consider the occupation temporary, including the continuing of land confiscation, the building of the separation barrier in a way that accommodated anticipated growth of settlements, the seamless integration of the settlements' sewage system, communication networks, electrical grids, water infrastructure and a matrix of roads with Israel proper, as well as a growing body of laws applicable to West Bank Israeli settlers but not Palestinians. The possibility that a future Israeli leader might forge a deal with Palestinians that dismantles the discriminatory system and ends systematic repression does not negate the intent of current officials to maintain the current system, nor the current reality of apartheid and persecution."[125]

West of the Green Line, HRW alleges that Arab Israelis (collectively described by the NGO as "Palestinians in Israel" and regardless of how the sectors of this diverse population self-identify) suffer from institutional discrimination "including widespread restrictions on accessing land confiscated from them, home demolitions, and effective prohibitions on family reunification."[126]

[122] Ibid., p.19
[123] Ibid.
[124] Ibid., p.45.
[125] Ibid., p.19. See also p.64 (on Jerusalem).
[126] Ibid., p.8.

Amnesty International

In advance of three reports forthcoming in 2022 from UN bodies (the March 2022 Report of Special Rapporteur Michael Lynk to the UN Human Rights Council; the June 2022 Report of the UNHRC United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel; and the expected report from the CERD Conciliation Committee), on 1 February 2022, Amnesty International published "Israel's apartheid against Palestinians: Cruel system of domination and crime against humanity."

Amnesty's 280-page report largely echoes those of the HSRC and HRW. It does, however, express (while HRW and HSRC only did so implicitly) a thesis that the establishment and maintenance of Israel as a Jewish state institutionalised apartheid: "Since its establishment in 1948, Israel has pursued an explicit policy of establishing and maintaining a Jewish demographic hegemony and maximizing its control over land to benefit Jewish Israelis while minimizing the number of Palestinians and restricting their rights and obstructing their ability to challenge this dispossession."[127]

Amnesty charges, again echoing HRW, that Israel maintains an "overall system of oppression and domination" operating "with varying levels of intensity and repression based on Palestinians' status in the separate enclaves where Palestinians live today, and violates their rights in different ways, ultimately seek[ing] to establish and maintain Jewish hegemony wherever Israel exercises effective control."[128]

The group contends that it "documented and analysed Israel's institutionalized and systematic discrimination against Palestinians within the framework of the definition of apartheid under international law" by looking at the "laws, policies and practices which have, over time, come to constitute the main tools for establishing and

[127] Amnesty International, "Israel's apartheid against Palestinians: Cruel system of domination and crime against humanity", 1 February 2022, p. 14.
[128] Ibid., p. 12.

maintaining this system, and which discriminate against and segregate Palestinians in Israel and the OPT today, as well as controlling Palestinian refugees' right to return."[129]

According to Amnesty, the "key components" Israel's "system of oppression and domination" are: "territorial fragmentation; segregation and control through the denial of equal nationality and status, restrictions on movement, discriminatory family reunification laws, the use of military rule and restrictions on the right to political participation and popular resistance; dispossession of land and property; and the suppression of Palestinians' human development and denial of their economic and social rights." Amnesty further alleges that "almost all of Israel's civilian administration and military authorities, as well as governmental and quasigovernmental institutions, are involved in the enforcement of the system of apartheid against Palestinians across Israel and the OPT and against Palestinian refugees and their descendants outside the territory." They conclude that Israel has committed the "crime against humanity of apartheid under both the Apartheid Convention and the Rome Statute."[130]

Part II – Application of the Elements of the Crime Against Humanity of Apartheid Under the Rome Statute

In *False Knowledge as Power*, we suggested definitions of each element of the crime against humanity of apartheid as it appears in Article 7(1)(j) of the Rome Statute. Part II of this report examines each of these elements as they relate to specific claims alleged in the publications described in Part I. Many of these claims overlap and cut across several of the elements, but to avoid repetition, we analyse them in relation to the specific element with which they are most associated.

Under the Rome Statute, to constitute a crime against humanity, a person's criminal acts must have a nexus with a widespread or systematic attack directed against a

[129] Ibid.
[130] Ibid., p. 13.

civilian population, pursuant to a State or organisational policy.[131] The (underlying) crime against humanity is defined as "inhumane acts of a character similar to those referred to in [Article 7(1) of the Statute], 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."[132]

Widespread or Systematic Attack Directed Against a Civilian Population

To establish liability for crimes against humanity, a prosecutor must prove the existence of a "widespread or systematic attack directed against a civilian population" to the criminal standard. Given that an "attack" is defined under the Rome Statute as perpetration of "a series of acts of violence or of the kinds of mistreatment enumerated as underlying crimes against humanity,"[133] the chapeau requirements require further elements of proof in addition to proof of the elements of the (underlying) crime of apartheid. An institutionalised regime of systematic oppression and domination by one racial group over another is not the same as "a series of acts of violence or of the kinds of mistreatment enumerated as crimes against humanity. For instance, crimes against humanity's chapeau elements introduce a *gravity* element;[134] a "series of acts" of "the *kinds* of mistreatment enumerated as crimes against humanity" are needed to establish an "attack" (emphasis added), which requires elements of proof that the acts are of the same "kind" as other enumerated crimes against humanity.

Although HRW acknowledges that "crimes against humanity consist of specific criminal acts committed as part of a widespread or systematic attack, or acts committed pursuant to a state or organizational policy, directed against a civilian population,"[135] none of the NGO reporting on apartheid undertakes a specific factual

[131] See Kern and Herzberg, p.28-32.
[132] See Article 7(2)(h) of the Rome Statute. See also Kern and Herzberg, p.32-52.
[133] Ibid
[134] Ibid
[135] Threshold, p.5, 29.

assessment of whether a widespread or systematic attack directed against the Palestinian civilian population is occurring.

As we shall see below in the context of the elements of the underlying crime, certain allegations that are framed as "blatant" violations of international humanitarian law cannot be said to constitute part of a series of acts of violence or kinds of mistreatment otherwise enumerated as crimes against humanity. The implications of these distinctions in the Israel-Palestine context are material. Taking NGOs' allegations at their highest, "inhuman acts" alleged to be committed by Israeli officials include alleged denial of rights to free movement, rights of residency and nationality, and the right to free expression.[136] If these allegations cannot be relied upon to establish proof of an "attack" – on the basis that they are not of the same kind as other enumerated crimes against humanity – there would be insufficient evidence to establish the existence of an "attack" as a chapeau element of crimes against humanity and, as a result, apartheid as a crime against humanity under the Rome Statute, before one considers the elements of the underlying crime.

Recent allegations that Israeli "attacks" on Palestinian civil society and human rights defenders are reflective of commission of apartheid provide a timely case in point.[137] Taking these allegations at their highest, such "attacks" are not of the "same kind" as enumerated acts of murder, extermination, enslavement, deportation, forcible transfer, imprisonment, torture, or rape. Even if proved to be widespread or systematic violations, such conduct would not meet the gravity threshold required to establish an "attack" as a chapeau element of crimes against humanity.

[136] See, e.g. Threshold, p.9.
[137] See e.g., Al Haq: "This side event will discuss both the intended and resulting consequences of this designation, including…the maintenance of Israel's regime of domination and oppression over the Palestinian people, through the continued persecution of organisations and individuals, in particular because they oppose apartheid." https://www.alhaq.org/cached_uploads/download/2021/12/01/concept-note-palestine-al-haq-asp-side-event-1638373074.pdf.

Institutionalised Regime

B'Tselem argues that Israel imposes a "regime of Jewish supremacy from the Jordan River to the Mediterranean Sea."[138] HRW claims that a "single authority, the Israeli government, rules primarily over the area between the Jordan River and Mediterranean Sea," and frames the scope of their report as encompassing the area "between the Mediterranean Sea and Jordan River."[139] Both NGOs' case is that the "institutionalised regime" which forms the subject of their allegations is a single, Israeli regime that operates throughout Israel, the West Bank, and Gaza.[140]

However, the prescription, adjudication, and enforcement of law in Israel (*de facto* and *de jure* by Israel), in the West Bank (*de jure* and *de facto* by Israel and the Palestinian Authority), and in Gaza (*de facto* by Hamas) belong to different legal (institutionalised) regimes. The Oslo Accords (mutually agreed between Israel and the PLO) established (*de jure*) institutionalised regimes in Areas A, B and C of the West Bank and Gaza, which continue (*de facto*) in the West Bank but have been replaced since the 2005 Israeli disengagement (*de facto*) in Gaza by government controlled by the Palestinian Authority until 2007, and since then by Hamas.[141] Hamas has repeatedly (in 2006, 2008-09, 2012, 2014, 2018, and 2021) demonstrated its capacity to launch large-scale and widespread attacks directed against Israeli civilian population centres and remains in overall control of Gaza.[142]

The importance of the Oslo Accords cannot be overstated. Yet they are either disregarded by those alleging apartheid or are characterised as evidencing an Israeli

[138] "A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This is Apartheid," B'Tselem, January 12, 2021, https://www.btselem.org/publications/fulltext/202101_this_is_apartheid (accessed January 19, 2021).
[139] See e.g. Threshold, p.2.
[140] See also Erakat, *EJIL Talk!*: "In doing so, Israel is manifesting to the world what Palestinians have long known: it wants the land without the people and seeks to remain the sole source of authority from the Jordan River to the Mediterranean Sea." In Erakat's conspiratorial view, fragmentation has "obfuscated Israel's exclusive jurisdiction over all lands and peoples between the Mediterranean Sea and the Jordan River evidencing its oversight of a singular legal regime tantamount to apartheid."
[141] Following disengagement, borders were monitored by an EU peacekeeping force (EUBAM) but it was disbanded almost immediately. See https://www.timesofisrael.com/hamas-bars-eu-observers-from-returning-to-border-crossing-with-egypt/.
[142] See HCJ 9132/07 Jaber Al-Bassouni Ahmed v. Prime Minister and Minister of Defence, para. 22.

intent to dominate Palestinians.[143] In reality, these agreements belie many apartheid claims. The agreements were negotiated in 1993-1995, were mutually agreed between the PLO and Israel, and were witnessed by the representatives of the international community. They established a framework to establish Palestinian self-governance, created the Palestinian Authority (PA), divided control over the West Bank between the PA and the Israeli military government into three-regions, and laid the groundwork for a comprehensive peace settlement that would lead to the creation of an independent Palestinian state.[144] Under Oslo, the PA acquired jurisdiction and responsibility over the Palestinian population of the West Bank and Gaza for "all matters falling within its territorial, functional and personal jurisdiction as described in the agreement," including for education, culture, agriculture, tourism, health, taxation, labor, and religious affairs. In addition, Palestinian courts and judicial authorities were delegated jurisdiction over civil matters and over criminal offences committed in areas under its territorial jurisdiction.[145]

Nevertheless, a consistent theme underlying the apartheid discourse is that Israel (and Israel alone) has imposed fragmentation on the Palestinian people to establish and maintain its regime. According to this discourse, Israel has fragmented Palestinians in Gaza, the West Bank, in the diaspora, and in Israel proper. The HSRC claims that Israel's "grand apartheid," as in South Africa, is bolstered by several "pillars" which include the implementation of fragmentation for the "purposes of segregation and domination."[146] Erakat claims fragmentation is used by Israel to "obscure[] the structure of Zionist settler colonization and Jewish supremacy," and to "obfuscate" its "exclusive jurisdiction over all lands and peoples between the Mediterranean Sea and

[143] For instance, according to HRW, the "decades-long 'peace process' has neither significantly improved the human rights situation on the ground nor altered the reality of overall Israeli control across Israel and the OPT. Instead, the peace process is regularly cited to oppose efforts for rights-based international action or accountability, 12 and as cover for Israel's entrenched discriminatory rule over Palestinians in the OPT" (p. 26). Amnesty alleges that "the Oslo Accords have added another layer of administrative and legal complexity to the governance of Palestinians in the OPT, fragmenting and segregating them even further to Israel's benefit" (p. 75).
[144] Israel Ministry of Foreign Affairs, "Israel and Palestinian Negotiations," https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-palestinian%20negotiations.aspx
[145] Israel Ministry of Foreign Affairs, "Main Points of Gaza Jericho Agreements," https://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Main%20Points%20of%20Gaza-Jericho%20Agremeent.aspx. Israel retained jurisdiction to prosecute most security offences.
[146] HSRC pp. 20, 21, 275.

the Jordan River."[147] HRW alleges that the "fragmentation of the Palestinian population" is "in part deliberately engineered through Israeli restrictions on movement and residency" in furtherance of its "goal of domination."[148] Amnesty repeats these themes in the section of its report titled "territorial fragmentation and legal segregation," arguing that "[i]n the course of establishing Israel as a Jewish state in 1948, its leaders were responsible for the mass expulsion of hundreds of thousands of Palestinians and the destruction of hundreds of Palestinian villages in what amounted to ethnic cleansing. They chose to coerce Palestinians into enclaves within the State of Israel and, following their military occupation in 1967, the West Bank and Gaza Strip."

Yet Palestinian fragmentation was not inherent to the establishment of the State of Israel as the Jewish state. Palestinian territorial and political division is more the result of Arab policies of rejection directed towards the Jewish State prior to and after the establishment of Israel. Upon dissolution of the Ottoman Empire, the international community proposed partition of Palestine between its Arab and Jewish populations to resolve the dilemma arising from the absence of an existing sovereign and competing claims over the territory. Between 1922 and 1948, neighboring Arab states and the local Palestinian leadership (Arab Higher Committee) refused proposals from the British and the international community to create an Arab State in mandatory Palestine.[149] In each proposal, the Jewish community's leadership intended to grant the future Jewish State's Arab minority full political rights.[150] In May 1948, following Israel's declaration of independence, Jordanian, Egyptian, Syrian, Iraqi, Lebanese, and Saudi forces attacked the fledgling Jewish state and took control of Gaza (Egypt) and the West Bank (Jordan), creating a refugee crisis, and dividing the Palestinian population. Following the 1948 war, Arab states refused UN proposals to resolve the refugee issue. The continued rejection by Arab states, and later by the PLO, of wide-

[147] Erakat, *EJIL Talk!*.
[148] Threshold, p.8. See also p.77 ("The fragmentation of Palestinian populations in part deliberately created through the separation policy between the West Bank and Gaza, the restrictions on movement between East Jerusalem and the rest of the OPT, and the range of restrictions on residency rights, serves as another tool of ensuring domination.")
[149] See, e.g., Steven E. Zipperstein, *Zionism, Palestinian Nationalism and the Law 1939-48* (Routledge 2022). These proposals allocated a small amount of land for the establishment of a Jewish state or autonomous zone, alongside an Arab state or zone. Some plans rejected the creation of a Jewish state altogether. In every plan proposing a Jewish state or zone, a significant proportion of the population was to be Arab, while in the Arab state/zone there would be minimal, if any, Jewish population. See, e.g. pp. 239, 271, 274, 279, 287.
[150] Ibid., pp. 173-74, 196.

ranging peace agreement proposals with Israel, including in 1967, 2000, 2008, and 2014, has maintained Palestinian fragmentation. These historical facts are erased in the NGO retelling.

Palestinian fragmentation is not, therefore, the product of "Jewish supremacy". The territorial and political division of the Palestinian population results from the history of the Arab-Israeli conflict, including Arab rejection of the 1947 UN Partition Plan, Jordanian and Egyptian control over the West Bank and Gaza respectively, Israeli sovereignty over Israel "proper", the Oslo agreements, and Palestinian political splits. Together, these factors have contributed to a current reality that renders the concept of a single regime "from the river to the sea" inapposite in providing guidance as to the nature of government for Arab Palestinians in the West Bank and in Gaza, and for Arab Israelis in Israel.

A consideration of law enforcement in the West Bank and Gaza exemplifies the unreality of an Israeli regime from "the river to the sea". On 20 October 2014, the Palestinian Authority amended Penal Law No. 16 (article 114) on the "punishment on transferring territory to a foreign country or enemy state or any of its citizens or nationals" so as to introduce "life imprisonment with hard labour" as a new, extended sentence.[151] There are reports of convictions by Palestinian courts for "attempting to sever parts of Palestinian land and annex it to a foreign state,"[152] with life sentences and hard labour imposed as punishment for sales of land to Israelis. B'Tselem has

[151] Penal Law No. 16 article 114 states, "1. Any Palestinian who attempts, through actions, speeches, writings or otherwise, to carve out part of the Palestinian territory with the aim of annexing it to a foreign country, or to bestow it with rights or a special privilege over these territories, or attempting to sell or lease any part of the Palestinian lands to an enemy state or any of its citizens or nationals, shall be punished by temporary hard labor for at least five years. 2. The perpetrator shall be punished by life imprisonment with hard labor if his action described above led to a result." The original Jordanian Penal Law, which the Palestinian law is based on, stated the punishment of attempting the transgression – "imprisonment with hard labor for no less than five years."

[152] According to Quds Network Agency, in January 2021, the Bethlehem court convicted a Palestinian man of "attempting to sever parts of Palestinian land and annex it to a foreign state." The court sentenced the man to 15 years of imprisonment with hard labor. According to Asdaa Press, in September 2020, the Nablus court convicted three men of "attempting to sever parts of Palestinian land and annex it to a foreign state according to the 2014 amendment to the Penal Law." The court sentenced them to "five years of hard labor." According to Ramallah News, on April 30, 2019, the high criminal court in Nablus convicted two men of "attempting to sever parts of Palestinian land and annex it to a foreign state" and "sentenced them to 15 years of hard labor." According to DW, on December 31, 2018, American-Palestinian Issam Akel "was sentenced to life in prison by a Palestinian court after he violated the ban on selling land to Israelis." Akel was accused by the judiciary media office of "attempting to sever parts of Palestinian land and annex it to a foreign state." "In light of the conviction, the court handed down a life sentence with hard labor."

reported on the imposition of death sentences in Gaza imposed by military courts, "pursuant to the PLO Revolutionary Code, and not the Palestinian constitution."[153] Israel, ultimately, is not responsible for these regimes as it exercises no overall or effective control over them.[154] To hold Israel responsible for all policy and practices "between the river and the sea" denies agency to the Palestinian authorities in Gaza and Areas A and B, the attendant obligations for which the administrations there are responsible, and the autonomy which they possess.

Domination

NGOs argue that the element of domination can be equated with the concept of control. HRW frame objectives to maintain Israeli control "over demographics, political power, and land" as reflecting an intent to dominate Palestinians for the purposes of establishing liability for apartheid. According to HRW, Jewish privilege is said to underpin Israeli control over Palestinians,[155] and Israeli law is claimed to be

[153] B'Tselem, "Death Penalty in the Palestinian Authority and Under Hamas Control," 16 October 2013, https://www.btselem.org/inter_palestinian_violations/death_penalty_in_the_pa

[154]Article 133 of PLO's Revolutionary Penal Law of 1979 stipulates that any Palestinian who conspires with a foreign state or contacts it to incite aggression against the state or to provide the means for such aggression is punished with hard labor. The article specifies that the act is punishable by execution (death penalty) if it has repercussions. "Any Palestinian who conspires with the enemy or contacts it to collaborate with it by any means to achieve the victory over the state is punished by execution," it adds. Read more: https://www.al-monitor.com/originals/2021/05/hamas-try-collaborators-military-courts-claiming-legality#ixzz75iliubCW] "Al-Monitor tried to get a comment from the media department of Izz ad-Din al-Qassam Brigades, Hamas' military wing, on the trials before the military field court in Gaza, but to no avail. It also contacted several human rights organizations that refused to comment on the issue given its sensitivity, especially at a time when Gaza was under Israeli bombardment." Read more: https://www.al-monitor.com/originals/2021/05/hamas-try-collaborators-military-courts-claiming-legality#ixzz75ilziF3H The Supreme Military Court usually bases its decisions and rulings on the provisions of the Revolutionary Penal Code of 1979 by the Palestinian Liberation Organization (PLO). The undersigned organizations hereby reaffirm their position that the PLO Revolutionary Code of 1979, by which Palestinian courts issue death sentences, is both unconstitutional (since it is not part of the PNA legislative system) and has not been presented to the Palestinian Legislative Council. Moreover, many of its provisions are inconsistent with relevant international standards because it does not apply standards of a fair trial that emphasize that trials of civil cases be carried out before their natural judge https://ichr.ps/en/1/13/305/In-Violation-of-Proper-Legal-Procedures-the-Deposed-Government-in-the-Gaza-Strip-Executes-Death-Sentences-of-Convicted-Persons.htm.

[155] "Israeli authorities methodically privilege Jewish Israelis and discriminate against Palestinians. Laws, policies, and statements by leading Israeli officials make plain that the objective of maintaining Jewish Israeli control over demographics, political power, and land has long guided government policy. In pursuit of this goal, authorities have dispossessed, confined, forcibly separated, and subjugated Palestinians by virtue of their identity to varying degrees of intensity. In certain areas, as described in this report, these deprivations are so severe that they amount to the crimes against humanity of apartheid and persecution." (HRW Executive Summary, p.2). The HSRC found that discriminatory treatment between Jewish and Palestinian identities in the West Bank "cannot be explained or excused on grounds of citizenship, both because it goes beyond what is permitted by ICERD and because certain provisions in Israeli civil and military law provide that Jews present in the OPT who are not citizens of Israel also enjoy privileges conferred on Jewish-Israeli citizens in the OTP by virtue of being Jews."[HSRC Report, p.272, 277].

"somewhat unique" in distinguishing between nationality and citizenship.[156] The fact of Israeli settlements in the West Bank[157] is taken together with a legislative framework that is said to reflect Jews' privileged position over Palestinians,[158] territorial "fragmentation and racial segregation," and a "matrix of security laws and practices" operating in the West Bank[159] to reflect a system of institutionalised Jewish Israeli domination. HRW contends that Israeli officials' intent is to "retain the West Bank," and that the policies and practices described in the *Threshold* are executed in furtherance of this alleged purpose (of control/domination).[160]

Dugard and Reynolds claim that it is inevitable that a regime founded on a "discriminatory ideology" inevitably "results in the domination of the 'superior' group over the 'inferior' group, and it becomes impossible to refute the conclusion that the purpose of such discrimination is domination."[161] They allege that non-Jews who hold Israeli citizenship therefore "remain subordinated by virtue of the fact that they are not Jewish nationals."[162] Dugard and Reynolds argue that Jewish "preferential citizenship" is "inscribed in Israel's constitutional law" and the "premise of Israel as a Jewish state amounts to more than mere symbolism."[163] HRW criticises Israel's "demographic goals" and observes that demographic-driven policymaking and the desire to maintain a Jewish majority has concerned Prime Ministers including Olmert, Sharon, and Peres.[164]

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[156] Dugard and Reynolds, p.904. A point which has sought to be relied upon since by authors arguing that an apartheid system exists in Israel. See Noura Erakat, "Beyond Discrimination: Apartheid Is a Colonial Project and Zionism Is a Form of Racism," EJIL: Talk!, July 5, 2021, https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-projectand-zionism-is-a-form-of-racism/; HRW, "Threshold."
[157] See the discussion infra at p. 86-89 for consideration of the legality and fact of settlements to the question of whether it can be properly argued that Israel intends to dominate Palestinians.
[158] HRW state that "Israel's Basic Laws, which have constitutional status in the absence of a full constitution, re-enforce that the state is Jewish, rather than belonging to all its citizens... The Basic Law: Israel—The Nation-State of the Jewish People ('Nation-State Law') passed in 2018, in effect affirms the supremacy of the 'Jewish' over the 'democratic' character of the state." (p.45). Dugard and Reynolds conclude that the "demarcation of distinct racial groups under the 1950 Population Registration Act in South Africa finds its equivalent in the Israeli -Palestinian context in the preferential legal status granted to those defined as Jewish nationals under the 1950 Law of Return.": Dugard and Reynolds, p.911. See discussion n. 19, *supra*.
[159] Dugard and Reynolds, p.911. See also p.901. See also HSRC Report, p.20-21 (referring to the three "pillars" of apartheid in South Africa).
[160] Human Rights Watch state that "[m]any of the practices outlined in this report can be traced to the Israeli government's desire to maintain Jewish control while retaining the West Bank, including East Jerusalem, which adds 3.1 million Palestinians to the land it controls, in addition to the 1.6 million who reside in Israel." Threshold, p.46.
[161] Dugard and Reynolds, p.904.
[162] Ibid., p.905.
[163] Ibid.
[164] Threshold, p. 48.

In *False Knowledge as Power*, we demonstrated that the concept of "domination" must be understood through South African practices of racial supremacy (*baasskaap*) and segregation.[165] Proof of "control" is not sufficient to prove the element of domination. Racial supremacy informs the definition of domination as an element of apartheid.[166] The following section therefore examines Israel's constitutional nature as a Jewish and democratic State, the Law of Return of 1950, and its Nation-State Law of 2018 to examine whether Israel's legislative and constitutional framework establishes a regime of "domination" – interpreted through the prism of racial supremacy – for the purposes of establishing whether Israel and its officials might be held responsible for establishing and maintaining a system of domination for the purposes of proving liability for apartheid.

"Zionism is Racism" or Israel as a Jewish and Democratic State?

Certain NGOs' and UN rapporteurs' narratives are based on the premise that Zionism is a fundamentally racist ideology, and the existence of a Jewish State is its racialised manifestation. Erakat writes, bluntly, that Zionism is inherently "a form of racism and racial discrimination."[167] She charges that the "dominant tradition among Palestinian intellectual and organizations" has, since its inception, "understood Zionism as a settler-colonial project predicated on Palestinian elimination, and thus as a racist structure."[168] It follows, Erakat claims, that Zionism is the "political and intellectual analog of apartheid."[169]

This narrative is ahistorical. For more than 100 years, the international community sought to resolve the legacy of Jewish dispossession, statelessness, and persecution through the reconstitution of the Jewish nation in its historical homeland, and the establishment of a Jewish state in at least part of that homeland. The implementation of this goal began with the Balfour Declaration in 1917 and continued with the creation of the Mandate for Palestine and its adoption by the League of Nations in

[165] Kern and Herzberg, p. 33.
[166] Kern and Herzberg, p. 33.
[167] Erakat, "Beyond Discrimination."
[168] Ibid.
[169] Ibid.

1922. International commissions empaneled during this time, including the Peel Commission, the Anglo-American Commission, UN Special Committee on Palestine (UNSCOP), and the 1947 UN partition plan all called for the exercise of Jewish self-determination in Palestine.[170]

At no point were these proposals, policies, or plans predicated on "Palestinian eliminationism."[171] On the contrary, it was Arab States and the local Arab leadership that arguably endorsed Jewish "elimination" from Palestine. Jews living in the region had long been subject to domination and persecution under Ottoman Turk and Islamic law.[172] Despite there never having been a sovereign Arab state in the territory, the Arab States and the local Arab leadership rejected the establishment of a Jewish state, alongside an Arab state, or even area of Jewish autonomy on any part of the land.[173] The same actors also refused all Jewish immigration to the area. In the wake of the Holocaust, Arab leadership in Palestine sought to block refuge for Jews in the mandated territory. Steven Zipperstein records, in *Zionism, Palestinian Nationalism and the Law,* that Arab States and local leadership rejected a 1939 proposal for an Arab State because they did not want to accept any Jewish immigration on the cusp of World War II.[174] At all times, even in the UN's partition proposal, the proposed area designated for Jewish sovereignty included a large Arab population with full civil and political rights, while the proposed Arab state would include a minimal Jewish population.[175] In 1948, 1967, 1973, Arab States and Palestinian Fedayeen repeatedly attacked Israel with the intent to eliminate the Jewish State. Erakat's claims, therefore, are not only a gross distortion of the history of the region and the conflict, but arguably rise to the level of calumny.

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[170] See, e.g., United Nations Special Committee on Palestine, "Report to the General Assembly," 1947 (hereinafter "UNSCOP Report"); Elad Ben-Dror, "The Arab Struggle against Partition: The International Arena of Summer 1947, 43 Middle Eastern Studies 259 (2007); Steven E. Zipperstein, *Law and the Arab–Israeli Conflict: The Trials of Palestine* (Routledge 2020) and *Zionism, Palestinian Nationalism and the Law*.

[171] See also B. Morris, *The Birth of the Palestinian Refugee Problem Revisited* (Cambridge 2004). Morris's research as to how and why 700,000 Palestinians left their homes and became refugees during the Arab-Israeli war of 1948 undermined previous interpretations as to whether Palestinian refugees left voluntarily, or were expelled as part of a systematic plan. Morris concludes that the war of 1948 "and not design, Jewish or Arab gave birth to the Palestinian refugee problem" (p.588). He adds that "there was no pre-war Zionist plan to expel 'the Arabs' from Palestine…" (Ibid.). The absence of a policy to expel the Palestinians is evident by the fact that a large minority – 150,000 Arabs – remained in Israel (p.159).

[172] Zipperstein, *The Trials of Palestine*.

[173] Zipperstein, *Zionism, Palestinian Nationalism*.

[174] Ibid., p. 87.

[175] Ibid., pp. 217-221.

Another fallacy promoted by Dugard and Reynolds, HRW, Amnesty, and others, relates to the implications of distinctions between nationality and citizenship under Israeli law. While Israel's founding is rooted to the history of Jewish people and the Arab-Israeli conflict, the concept of recognition for national or ethnic groups within a state's national constitutional framework is not an aberration. As noted by Yakobson and Rubenstein, to disparage the concept of the "Jewish state" by claiming that it contradicts the principle of equality denies the principle of two states for two peoples: "While one of the two peoples … defines itself, and therefore is, Arab and Palestinian, the other defines itself, and therefore is, Jewish and Israeli. No Jewish state means no state for one of those two peoples."[176]

Minorities exist in many democratic nation-states, but in almost all cases, while minority rights are taken into account, the culture and identity of the majority determines the State's character.[177] Israel, the Jewish State, has a Jewish character that is expressed in the Hebrew language, emblems and symbols of the country (such as the Menorah and the Star of David), the official day of rest (Shabbat (Saturday)), and public holidays (such as Rosh Hashana and Yom Kippur).[178] Christian symbols such as the cross appears on the national flags of the Australia, Denmark, Finland, Greece, Hungary, New Zealand, Sweden, Switzerland, and the UK.[179] The flags of many Muslim countries (e.g. Algeria, Libya, Malaysia, Maldives, Pakistan, Tunisia) contain Islamic symbols such as the color green and the crescent moon. The Saudi

[176] Alexander Yakobson, Amnon Rubinstein, *Israel and the Family of Nations: The Jewish Nation-State and Human Rights* (Routledge 2009) (hereinafter "Yakobson and Rubinstein"), p. 14. In addition, the denial of Jewish self-determination and portrayal of the exercise of that self-determination as "racist" can also be deemed as antisemitic pursuant to the International Holocaust Remembrance Association working definition of antisemitism. The European Commission's 2021 Handbook for the practical use of the IHRA working definition of antisemitism states, "Denying the Jewish people the right to self-determination and a national homeland is antisemitic because it denies the religious and historic ties of Jews to the land of Israel. It evades the fact that the State of Israel was founded in 1948 based on Resolution 181 (II) of the United Nations General Assembly." https://op.europa.eu/en/publication-detail/-/publication/d3006107-519b-11eb-b59f-01aa75ed71a1/language-en

[177] Yakobson and Rubinstein at p.3

[178] Yakobson and Rubinstein, p.3.

[179] The preamble to the Irish Constitution reads: "In the name of the Most Holy Trinity… We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation… Do hereby adopt, enact, and give to ourselves this Constitution." (see Yakobson, p.81).

Flag also includes the Shahada, or Islamic declaration of faith.[180] The existence of such symbols does not reflect Islamic "domination" or racial supremacy.[181]

All the Arab states in the Middle East are "Arab" by virtue of their membership in the League of Arab States.[182] Syria is the "Syrian Arab Republic"; Algeria is an "Arab country"; Morocco is part of the "greater Arab Maghreb." The Palestinian Declaration of Independence states: "The State of Palestine is an Arab state, an integral and indivisible part of the Arab nation, at one with that nation in heritage and civilization."[183] Islam is the state religion,[184] and Arab states have an official Muslim character. Western democracies are also legally designated as having an "official", "established", or "state" Church. India retains characteristics and symbols of Hinduism. Tibetan identity is connected to Buddhism.[185]

The term "Jewish and democratic state" was adopted in Israel's "Basic Law: Human Dignity and Liberty" of 1992. It defines Israel's character and represents an attempt to find balance between the national and the civic aspect of the State.[186] The historical connection of the Jewish people to the Land of Israel (Eretz Israel/Palestine) is a cornerstone of Jewish identity.[187] In the 1922 League of Nations Mandate for Palestine, the international community recognised the historical connection of the Jewish people to Palestine, and "to the grounds for reconstituting their national home in that country",[188] and UN General Assembly Resolution 181 recommended the partition of Mandatory Palestine into an Arab state and a Jewish State.[189] As mentioned above,

[180] "What Does the Writing on the Saudi Flag Mean," Inside Saudi blog, https://insidesaudi.com/what-the-saudi-flag-means-with-photos/.
[181] Yakobson and Rubinstein, p.3.
[182] See Charter of the Arab League, https://www.refworld.org/docid/3ae6b3ab18.html
[183] See Yakobson and Rubinstein, p.45.
[184] The Syrian constitution adds that Shari'a is a principal source of legislation.
[185] Yakobson and Rubinstein, p.86
[186] Yakobson and Rubinstein, p.49, 114. As put by the former President of the Israeli Supreme Court, Aharon Barak, the "content of the phrase 'Jewish state' will be determined by the level of abstraction which shall be given it. In my opinion, one should give this phrase meaning on a high level of abstraction, which will unite all members of society and find the common among them. The level of abstraction should be so high, until it becomes identical to the democratic nature of the state. The state is Jewish not in a halachic-religious sense, but in the sense that Jews have the right to immigrate to it, and their national experience is the experience of the state (this is expressed, inter alia, in the language and the holidays)." Aharon Barak, "The Constitutional Revolution: Protected Human Rights," Mishpat Umimshal 1:9 (1992–1993) [Hebrew] *cited* in A. Bell on Nation State Law, n.44.
[187] Declaration of Independence, https://m.knesset.gov.il/en/about/pages/declaration.aspx.
[188] League of Nations, The Palestine Mandate, Preamble.
[189] See UN General Assembly Resolution 181, Article 3.

multiple commissions meeting between 1922-1947 studied and recommended partition as the most equitable resolution to the conflict.

The concept of a Jewish and democratic State enshrines the principle of equality in the Israel's constitutional order,[190] and over time, Israeli has acted to remedy systemic inequalities. While we recognise that this work is not complete, the reality of reform and improved conditions is not reflected in Dugard and Reynolds' depiction of Israeli governance.

For example, in the 1990s, the Israeli government terminated discrimination in family allowances that connected them to service in the Israeli Defence Forces. In 1992, Israel enacted the Basic Law: Human dignity and Liberty and the Basic Law: Freedom of Occupation.[191] Former President of Israel's Supreme Court, Aharon Barak, described this as a "constitutional revolution" as it conferred authority onto the Supreme Court to review Knesset legislation by reference to human rights principles. The Court interpreted the term "human dignity" broadly such that it included rights not explicitly mentioned in the legislation, including the right to equality.[192] The right to equality is therefore considered to be a constitutional principle in Israel, and alleged violations can be litigated before the Supreme Court.[193]

In the case of *Ka'adan v Israel Lands Authority*, the Israeli Supreme Court held that when the State could not discriminate amongst citizens when allocating public land, nor could it discriminate between citizens through transfers of land to third-party organisations.[194] In doing so, it overturned a land policy through which land was "in

[190] Israel's Declaration of Independence states that Israel would be a state "open to the immigration of Jews from all countries of the dispersion" but would also "uphold the full social and political equality of all its citizens, without distinction of race, creed or sex." See Yakobson and Rubinstein, p.13. The Declaration calls upon the "Arab inhabitants of the State of Israel to adhere to the ways of peace and play their part in the development of the State, with full and equal citizenship and due representation in its bodies and institutions" (Yakobson and Rubinstein, p.13).
[191] Yakobson and Rubinstein, p.114 ("A law from the 1970s gave the families of those who had served in the military far larger allowances than those given to families which did not have anyone who had been in the armed services. If the State exempts a national minority from doing military service (without offering it alternative national service), it is unfair to make a welfare benefit dependent on meeting unrealistic military obligations").
[192] HCJ 6924/98, Association for Civil Rights in Israel v. State of Israel. *See also* HC 1113/99, *Adalah et al v Minister of Religious Affairs et al.*, PD 54 (2) 164 at 170, 172. See also Yakobson and Rubinstein, p.115, 117.
[193] Yakobson and Rubinstein, p.114.
[194] Yakobson and Rubinstein, p.115.

practice" only allocated to Jewish communities, and that such a policy treated Arabs "separately and unequally."[195] The Court added that there was no justification for a policy designed to prevent Arab citizens from purchasing property on State land. The Judgment examined whether there was a clash between Israel's status as a democracy, based on equality and civil rights, and its nature as a Jewish state:

> The answer is that there is no such clash. We do not accept that the values of the State of Israel as a Jewish state can justify… discrimination by the state between the citizens of the state on the basis of religion or national origin… The values of the State of Israel as a Jewish and democratic state, *inter alia*, are based on the Jewish people's right to exist independently as a sovereign state… Indeed, the Jewish people's return to its homeland derives from the State of Israel's values as both a Jewish and a democratic state… Those values which characterise the State of Israel give rise to the country's primary official language, and national days and official holidays must reflect the national rebirth of the Jewish people; a further conclusion is that the Jewish heritage shall constitute a key element in Israel's religious and cultural heritage, as well as additional conclusions that there is no need for us to stress. But the values of the State of Israel in no way imply that the state should discriminate between its citizens. True, 'the Jewish people established the Jewish state, this is the beginning and from there we set out on our path' (Justice M Hehshin in *Isaacson*, p.548). But once the state has been established, it must treat its citizens equally… Every member of the minorities who live in Israel enjoys complete equality of rights. True, a special key to enter the house is given to the members of the Jewish people (see *Law of Return*-1950). But once somebody is in the house as a citizen under the law, he enjoys equal rights, just like all the other members of the household… Hence there is no contradiction whatsoever between the

[195] HC 6698/95, *Adel Kaadan and Imane Kaadan v the Israel Lands Authority.* See also Israel State Party Report 2011 for 2012 Review, paras 66-68.

> values of the State of Israel as a Jewish and democratic state, and complete equality between all of its citizens.[196]

As these cases demonstrate, and in contrast to the apartheid discourse, there is no fundamental incompatibility between Israel's identification as a Jewish state and the protection of equality for all its citizens.

Law of Return

Another central focus of attack by those advancing the claim of apartheid and the specific allegation of Jewish "domination" is Israel's Law of Return.

Dugard and Reynolds claim that Israel's Law of Return of 1950 provides for "Jewish preferential citizenship". HRW argues not only that the law remains, and has been, integral to Israeli demographic goals,[197] but also creates "a discriminatory 'reality'," as the law denies "Palestinian refugees and their descendants" the ability to enter and live in areas where they or their families once lived and have maintained links to.[198] Although HRW accepts that international human rights law gives "broad latitude to governments in setting their immigration policies," and there is "nothing in international law to bar Israel from promoting Jewish immigration," they claim that latitude "does not give a state the prerogative to discriminate against people who already live in that country, including with respect to rights concerning family reunification, and against people who have a right to return to the country."[199]

Amnesty observes that at "the same time as establishing Israel as a Jewish state, the 1948 Declaration [of Independence] appealed to Jewish people around the world to immigrate to Israel. In 1950, Israel granted every Jew the right to immigrate to Israel under the Law of Return, followed by the right to automatic Israeli citizenship under the Nationality Law of 1952. The Israeli authorities saw this partly as a necessary

[196] Yakobson and Rubinstein, p.116.
[197] Threshold, p.53.
[198] Ibid., p. 48.
[199] Ibid., p.18.

measure to prevent another attempt to exterminate Jews in the wake of the Holocaust and to provide shelter to Jews who faced persecution elsewhere in the world. Meanwhile, hundreds of thousands of Palestinian refugees displaced during the 1947-49 conflict remained barred from returning to their homes *based on demographic considerations*" (emphasis added).[200]

Questions concerning the Palestinian claim to a "right of return" are considered below.[201] However, the argument that the Law of Return provides evidence of Israeli "domination" over Palestinians is contingent on there being a Palestinian legal right that is unlawfully denied on a discriminatory basis, without reasonable justification. The allegation is therefore controversial, but it is not disclosed to be such by HRW nor any of the authors alleging Israeli responsibility for the crime of apartheid which rely on the Law of Return as proof of its elements.

As noted by the Israeli Supreme Court in *Ka'adan*, Israel's Law of Return does not discriminate between different categories of citizens within the State of Israel; it provides "a special key to enter the house" of Israel, but "once somebody is in the house as a citizen under the law, he enjoys equal rights, just like all the other members of the household."[202] The law is intended to offer Jews around the world safe haven. It does not provide for "Jewish preferential citizenship," nor does it make the citizenship of non-Jews inferior. It is directed towards the Jewish diaspora.

HRW accepts that a State has wide latitude as regards its policies on immigration and naturalisation,[203] and this principle is specifically enshrined in Article 1(3) of the ICERD which states that "[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality." There is nothing in Israel's Law of Return of 1950 conflicts with these principles.

[200] Amnesty p. 14.
[201] For analysis of the right of return (in connection with the element of inhumane acts), see infra p. 81.
[202] See Yakobson and Rubinstein.
[203] Threshold, p.18.

The Law of Return's purpose is therefore to rectify historic, and to safeguard against future, wrongs committed against the Jewish people, who for centuries lived as a minority throughout the world and as such were persecuted, deported, destroyed, and unable to achieve national independence. These considerations of corrective justice "create a justified exception to the principle of equality."[204] In Europe, Yakobson and Rubinstein note that is accepted that in relation to immigration and naturalisation, a nation-State is permitted to maintain official ties with "kin" outside its borders and treat them preferentially.[205] For example, Germany in the 1950s expanded the right to automatic citizenship to all ethnic Germans from the Soviet Union or Eastern Europe.[206] In 1996, Finland amended its "foreigners' Law" to confer residency status on ethnic Finns who came to Finland from the Soviet Union.[207] There is a distinction between ethnicity, national identity, and citizenship in the Constitutions of Poland, Ireland, and Armenia.[208] China maintains institutionalised connections with its diaspora, as does South Korea.

As these examples of practice demonstrate, in addition to international recognition and support for two States in the Land of Israel / Palestine, neither the Law of Return, nor the interest of the State of Israel in preserving its Jewish ethnic and national identity, can be construed as "unique," irrational, or racist. On the contrary, these goals are consistent with international norms, including the principle of equality.

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[204] Yaffa Zilbershats and Nimra Goren-Amitai, "Return of Palestinian Refugees to the State of Israel," 2011, p.68.
[205] This norm is expressed in an October 2001 decision of the Venice Commission which dealt with the question of the connection between ethno-national groups in Europe and their "kin-states". Yakobson and Rubinstein, p.126-127. The report cites the 1969 agreements between Italy and Austria which secured the rights of the German-speaking minority in Tyrol. Yakobson and Rubinstein, p.127. The 1955 Bonn and Copenhagen agreement between Germany and Denmark protects the cultural and language rights of Danes living in northern Germany and Germans living in southern Denmark. Yakobson and Rubinstein, p.127.
[206] Yakobson and Rubinstein, p.127.
[207] Yakobson and Rubinstein, p.127.
[208] Article 52 of the Polish Constitution states: "Anyone whose Polish origins has been confirmed in accordance with statute may settle permanently in Poland." Article 6 of the Constitution states that the Republic "shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage" (Yakobson and Rubinstein, p.130). Section 16 of the Irish Nationality and Citizenship Act empowers the Minister for Justice to grant an exemption from the ordinary prerequisites for naturalization "where the applicant is of Irish descent or Irish associations." Yakobson and Rubinstein, p.130. Section 14 of the Armenian Constitution determines that a "person of Armenian descent will obtain citizenship through a shortened procedure." Similarly, section 25 of the Bulgarian Law of Citizenship provides that a "person of Bulgarian origin will receive citizenship through a facilitated procedure" Yakobson and Rubinstein, p.228, n.7. The connection between the Armenian diaspora and Armenia is the same kind of ethno-cultural tie (often with a religious element) that connects Diaspora Jews with the State of Israel." Yakobson and Rubinstein, p.131.

Nation-State Law

HRW claims that Israel's Basic Law: Israel—The Nation-State of the Jewish People, passed in 2018, serves the Israeli government's aim to ensure that "Jewish Israelis maintain domination across Israel and the OPT."[209] The Basic Law, says HRW, effectively affirms the "supremacy" of the 'Jewish' over the 'democratic' character of the State.[210] In its 2019 Concluding Observations, the CERD Committee also deprecated the elevation of Israeli settlements to "a national value" under the Law.[211] The basis for its criticism was that "Israeli settlements in the Occupied Palestinian Territory" are "illegal under international law," and "also an obstacle to the enjoyment of human rights by the whole population."[212]

Amnesty claims that the "essence of the system of oppression and domination over Palestinians was clearly crystallized in the 2018 nation state law, which enshrined the principle that the "State of Israel is the nation State of the Jewish people" and that the right of self-determination is exclusive "to the Jewish people".[213]

On 19 July 2018, the Knesset passed the Nation State Law in a 62-55 vote as one of Israel's Basic Laws.[214] It is relatively short, and enshrines Israel as the nation state of the Jewish people. It proscribes Jerusalem, "complete and undivided" as Israel's capital, Hebrew as the official state language, the Hebrew calendar as the official calendar (alongside the Gregorian calendar), and preserving Jewish immigration and the "development of Jewish settlement as a national value". While the law emphasised the Jewish character of the State, it noted the special status of Arabic and states that "nothing in this article shall affect the status given to the Arabic language before this law came into force". It preserves the right of "non-Jews to observe the days of rest on their days of Sabbath and holidays." Finally, it states that "details regarding the State

[209] Threshold, p. 45.
[210] Ibid.
[211] Concluding Observations, para. 13.
[212] Concluding Observations, para. 13. See pp. 86-88, infra for consideration of the legality of Israeli settlements in the West Bank.
[213] Amnesty, p. 15.
[214] Nation State Law, https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawNationState.pdf

symbols shall be determined by law" and that it can be modified "by a Basic Law, passed by a majority of the members of the Knesset."[215]

In his analysis of the Law, Professor Abraham Bell writes that the "Law does not purport to downgrade democracy or equality, place any group of people beyond the pale of constitutional equality, establish supremacy of any ethnicity, demote anyone to second-class citizenship, or in any way balance, rebalance or unbalance the state's Jewish and democratic character. The Nation-State Law does not downgrade any prior declaration concerning democracy or civic equality in Israel; it simply adds its own declarations on a different subject."[216]

With respect to the status of the Arabic language following passage of the law, Bell argues that the legislation "explicitly preserves the prior legal status of Arabic, stating that '[n]othing in this [law] shall affect the status given to the Arabic language before this law came into force' and that "the Arabic language has a special status in the state."[217] Concurring with this view, Professor Mohammed S Wattad has written that the legislation "perpetuates the legal status of Arabic as prescribed in the laws and case law that already existed, and that the validity of laws clause, coupled with the special status granted to Arabic in a basic law, suggests that the door is still open for the Court to further endorse the legal status of Arabic in Israel."[218]

The law was nevertheless criticised by many Israelis as being unnecessary and antagonistic to minority groups in Israel, and it met almost immediate legal challenge in the Israeli courts. [219]

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[215] Ibid.
[216] Abraham Bell, "The Counter-Revolutionary Nation-State Law." Israel Studies, vol. 25, no. 3, Indiana University Press, 2020, p.248-249.
[217] Bell, p. 13, citing Nation-State Law, para. 4.
[218] Mohammed S. Wattad, "The Nation State Law And The Arabic Language In Israel: Downgrading, Replicating Or Upgrading?." Israel Law Review 54.2 (2021): 263-285.
[219] For a summary of the debate in Israel see, Israel Democracy Institute, " Nation State Law Explainer, " 18 July 2018, https://en.idi.org.il/articles/24241; Cf. E. Kontorovich, " A Comparative Constitutional Perspective on Israel's Nation State Law," 25 *Israel Studies* 137 (2020).

On 22 December 2020, Israel's Supreme Court convened a special session on 15 petitions against the Law, rejecting them in a 10 to 1 decision on 8 July 2021. The dissenting opinion was issued by Justice Kara (the only justice on the court at the time of Arab ethnicity). The petitions challenged the constitutionality, and therefore legality of the Law in general, and not any specific application of it.

In his dissenting opinion, Justice Kara found that the provisions of sections 1(c), 4, and 7 of the law deny the democratic identity of the State of Israel and rattle the foundation of its constitutional structure; therefore, the law should be null and void.[220] For Justice Kara, the law disregards the accepted "balancing formula" of the state's dual identity as "Jewish and democratic". In Justice Kara's opinion, the purpose (stated explicitly in the law) of the provision concerning Jewish settlement (section 7) is to create an operative constitutional norm that would (*de facto*) negate the legal situation following the *Ka'adan* decision and the Admissions Committees Law: "that is, to deny the principle of equality in the allocation of state lands and in housing, without prohibiting discrimination based on national affiliation." He further opined that "there is no interpretive method that cures the Law of its unconstitutionality."

The Majority, however, "ruled that the Law should be interpreted consistent with the other Basic Laws and with the principles and values of the [Israeli] legal system." The Court emphasised that the Basic Law "is a chapter of Israel's emerging constitution designed to enshrine the state's identity as a Jewish state, without detracting from the state's democratic identity anchored in other Basic Laws and constitutional principles in the system." The Judgment noted that the "principle of equality is a fundamental principle" in Israeli law and "equal rights are granted to all citizens of the state, including minority groups, which form an integral part of the state's fabric." Although the majority considered that it would have been "better" if the principle of equality had

[220] Nation State Law, Section 1(c) states: "The exercise of the right to national self-determination in the State of Israel is unique to the Jewish People." Section 4(a) states: "Hebrew is the State language." Section 4(b) states: "The Arabic language has a special status in the State; arrangements regarding the use of Arabic in state institutions or vis-à-vis them will be set by law." Section 4(c) states: "Nothing in this article shall affect the status given to the Arabic language before this law came into force." Section 7 states: "The State views the development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and strengthening" https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawNationState.pdf.

been explicitly included in the Basic Law, the Justices clarified that the fact that the principle is not included in the law "does not detract from the principle [of equality]'s status and importance as a foundational principle in our legal system." The summary states that "the value of Jewish settlement enshrined in Section 7 [of the Nation-State Law] can be realized alongside the value of equality" and "is not intended to legalize the discrimination and exclusion of non-Jews from state lands, as even clarified by the State respondents in their arguments."[221]

We have noted that the Majority emphasised that the Law needs to be viewed in context of Israel's constitutional framework, and it remains an open question as to how the Basic Law will be tested in specific cases. Israel's High Court of Justice has previously "dismissed claims of a contradiction" between the notion of a Jewish State and the democratic principle,[222] and Kretzmer and Ronen have noted that "particularistic elements involved in the Zionist ideology of a 'Jewish state' or 'state of the Jewish people' are [already] entrenched in the Court's jurisprudence,"[223] supporting the view that this Basic Law is symbolic, declarative, and essentially "counter-revolutionary."[224] Israeli constitutional law protects the principle of equality, and Israel's Supreme Court has used the constitutional equality provision it created to strike down several pieces of legislation.[225] As noted, in 1992 Israel enacted two basic laws relating to human rights – the Basic Law: Human Dignity and the Basic Law: Freedom of Occupation – and the Israeli Supreme Court has held that these basic laws have formal constitutional status and that primary legislation must be compatible with them.[226] On this view, by upholding the Nation-State Law, the Supreme Court simply

[221] Summary of Israeli Supreme Court Decision on the Jewish Nation-State Basic Law, HCJ 5555/18 Hassoun v. The Knesset, 8 July 2021, Adalah English translation, https://www.adalah.org/uploads/uploads/Translation_of_Summary_of_JNSL_Judgment.pdf
[222] David Kretzmer and Yaël Ronen, *The occupation of justice: the supreme court of Israel and the occupied territories.* Oxford University Press, 2021 (hereinafter "Kretzmer and Ronen), p.21 *citing* EA 1/88 *Neumann v Chairman of Central Elections Committee* (18 October 1988).
[223] Ibid.
[224] Bell.
[225] Bell, p.248 *citing* E.g., HCJ, 1877/14, The Movement for Quality Government in Israel v. The Knesset (2017); 4124/00 *Yekutieli v. Minister of Religious Affairs* (2010). The right to equality is recognized as a "basic value" of the Israeli legal system. As such, the Court made sure that its interpretation of ordinary laws will be in accordance with the principle of equality. *H.C.J. 2599/00 Yated - Non-Profit Organization for Parents of Children with Down Syndrome v. The Ministry of Education [2002] P.D. 56(5), 834.* See Israel 2008 Common Core, para 137. See also Bell, p.250.
[226] Kretzmer & Ronen, p.99.

acknowledged that the Knesset has "retaken the ability to amend the country's constitution."[227]

Conclusion on Systematic Domination

According to Dugard and Reynolds, safeguarding Jewish "nationality" provides the "foundation" for an institutionalised system of discrimination and domination. Yet recognition of Jewish nationality has been integral to how the international community has addressed issues arising from the Israeli-Palestinian conflict since 1922. Dugard and Reynolds, HRW, and Amnesty therefore provide an essentialised interpretation of Israel's legal framework, focusing on elements that are intended to safeguard the interests of the Jewish character of the State, whilst neglecting to mention the counterbalancing effect of law that protects the principles of equality, human rights, and human dignity. These authors appear to distinguish between rights that might permissibly be established on national grounds (those which amount to "mere symbolism") and those which are argued to be impermissible (for example, rules promoting Jewish immigration) without undertaking a rigorous legal or comparative analysis of them.[228] The implications of their arguments are that Israel's identity as a Jewish State is unsupportable, yet the foreseeable subordination of Israeli Jews and Arab hegemony which risks following the Jewish State's demise is not mentioned, and remains unexplored.

Systematic Oppression

To prove "systematic oppression", the facts underlying allegations need to be established to the criminal standard. This process would entail, *inter alia*, factual assessments of (a) whether an allegedly unlawfully discriminatory act is performed pursuant to a State policy, and (b) whether the impact of that policy, as alleged, is in fact unlawfully discriminatory by reference to standards of proportionality and

[227] Bell, p.250.
[228] Dugard and Reynolds, p.905-906. See also p.907.

reasonableness.[229] In this regard, it is notable that many of the examples of "systematic oppression" alleged by HRW and Amnesty have been subject to litigation and judicial review in Israeli courts. It should be noted that Israel has broad rules of standing, allowing both individual petitioners and organisations with no direct connection to a case to challenge State policy. Many challenges take place while military operations are underway.[230] Palestinians also frequently obtain remedies either through invalidation of a policy or law, and/or a remedy in a specific case of wrongdoing. We would recommend, therefore, that readers of this paper turn to those decisions for more detailed discussions on specific policies and cases.

Allegations

The essence of HRW's allegation with respect to the element of "systematic oppression" is that "Israeli authorities structurally discriminate against Palestinians throughout the areas where Israel exercises control."[231] In East Jerusalem, HRW alleges that "Israel effectively maintains one set of rules for Jewish Israeli settlers and another for Palestinians in virtually all aspects of life."[232] In the West Bank, HRW alleges that "Israel subjects Palestinians to draconian military law, while governing Israeli settlers under Israeli law civil law."[233] In Gaza, HRW alleges that "Israel imposes a generalized closure, severely restricting the movement of people and goods into and out of the territory."[234]

HRW argues that the denial of building permits to Palestinians in Area C and East Jerusalem and to Bedouin in the Negev, residency revocations for Jerusalemites or expropriation of privately owned land, and discriminatory allocation of state lands have no legitimate security justification. They claim that other measures, including the Citizenship and Entry into Israel Law (Temporary Provision) (2003), use security as a

[229] As we detail in *False Knowledge as Power*, a reasonableness standard is an accepted approach in international law and used by both international and domestic courts. Kern and Herzberg. pp. 34-7.
[230] See Richard A. Posner, "Enlightened Despot," *The New Republic*, 23 April 2007; Robert H. Bork, "Barak's Rule," *Azure*, Winter 2007, p. 125; Anne Herzberg, "An Activist's Disappointing Evasions," *Jewish Political Studies Review* 22 (Fall 2010): 3-4.
[231] Threshold, p.79.
[232] Ibid., p.7, 79.
[233] Ibid.
[234] Ibid.

"pretext to advance demographic objectives."[235] Although HRW accepts that Israel does "face legitimate security challenges," it argues that "restrictions that do not seek to balance human rights such as freedom of movement against legitimate security concerns by, for example, conducting individualized security assessments rather than barring the entire population of Gaza from leaving with only rare exceptions, go far beyond what international law permits."[236] According to HRW, this "level of discrimination amounts to systematic oppression."[237]

Dugard and Reynolds argue that discriminatory treatment extends to the requisition and administration of state land in the West Bank,[238] as well as the use of force.[239] The "foundation provided by the concept of Jewish nationality for an institutionalized system of discrimination and domination" is evidenced by a dual legal system of law in the West Bank, where "Jewish settlers are subject to an entirely separate body of laws and courts from Palestinian residents"[240] and where Israeli law is extended on a personal basis to include all Jews.[241] This argument echoes the HSRC report, which argues that "this dual system appears to reflect a policy by the State of Israel to sustain two parallel societies in the OPT, one Jewish-Israeli and the other Palestinian, and to accord these two groups very different rights and protections in the same territory."[242]

The HSRC report finds that discriminatory treatment between Jewish and Palestinian identities "cannot be explained or excused on grounds of citizenship, both because it goes beyond what is permitted by ICERD and because certain provisions in Israeli civil and military law provide that Jews present in the OPT who are not citizens of Israel

[235] Ibid., p. 19.
[236] Ibid., p.18.
[237] Ibid., p.7.
[238] Dugard and Reynolds, p.906.
[239] Dugard and Reynolds, p.907.
[240] Dugard and Reynolds, p.907, 908, 910.
[241] Dugard and Reynolds, p.908.
[242] HSRC Report, p.119. See also Kretzmer and Ronen, p.224 (stating that "special arrangements" for Israeli settlements in the West Bank "contribute to the institutionalisation of a legal distinction between the two populations in the West Bank – Israeli and Palestinian."); Threshold, p.81 (arguing that "Israeli authorities treat the more than 441,000 Israeli settlers and 2.7 million Palestinians who reside in the West Bank, excluding East Jerusalem, under distinct bodies of law" when arguing that a regime of systematic oppression exists for the purposes of establishing criminal liability for apartheid.")

also enjoy privileges conferred on Jewish-Israeli citizens in the OTP by virtue of being Jews."[243]

Standard of Reasonableness

Any assessment of policies which are alleged to be unlawfully discriminatory should be analysed according to a standard of reasonableness. As we discussed in *False Knowledge as Power*, "assessments of reasonableness may operate as a basis to assess whether a discriminatory action or decision by a public body might be characterised as oppressive."[244]

The Security Context

It bears recalling the nature of Israel's security dilemma in the third decade of the twenty-first century. From the north, south, east, and west, Israel is confronted by adversaries (namely Hamas, Hezbollah, and the Islamic Republic of Iran) that are acting in concert with what is, arguably, a genocidal intent to destroy it and its population. This specific intent is reflected in official statements, policies, and actions of these organisations.

Iranian government officials have – repeatedly and publicly – stated an intention to destroy Israel. In May 2021, Ali Shirazi, Iranian Supreme Leader Ayatollah Ali Khamenei's representative in the Quds Force, was quoted as promising young Iranians that one day they would "witness a world without Israel," whilst he threatened to "destroy the forged regime in less than 24 hours."[245] Iran's Supreme Leader and its Islamic Revolutionary Guards Corps (IRGC) have both reiterated these promises to destroy Israel.[246]

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[243] HSRC Report, p. 22.
[244] Kern and Herzberg, p.35.
[245] According to an *Iran International* news article, published on May 7, 2021.
[246] According to MEMRI, on October 10, 2020, the IGRC posted on its Telegram channel the text, "...Yesterday was the fifth anniversary of the promise that 'Israel will be destroyed within 25 years,' made by another deputy of the Hidden Imam, [Ali Khamenei]. So now only 19 years, 11 months and 30 days are left until the destruction of Israel and Zionism..." According to MEMRI, a statement issued September 12, 2020 by IRGC stated, "The domino[-effect] of normalization between the Zionist regime and the leaders of certain Arab states...will not [just] end in disgrace for

On 30 May 2021, Al-Jazeera broadcast Hamas ceremonies honouring members who had been killed in May 2021's conflict with Israel. Senior Hamas Official Fathi Hammad was quoted as saying that the "Jews are a treacherous people. There can be no peace with the Jews. There can be no peace with the Zionists. The only thing we have for the Zionists is the sword. The only thing we have for the Zionists is the Ayyash 250 rocket. The only thing we have for the Zionists is the sword."[247] Mr Hammad is not alone. On 10 April 2021, Hamas official Mahmoud Al-Zahar was quoted as stating that Jews were responsible for the Holocaust.[248] On 9 July 2020, Rajaa Al-Halabi, Head of Hamas's Women's Movement, claimed that the "Jews" had "slayed the prophets," "acted treacherously and violated [sanctities]," and "came from all corners of the world," but have "no place here." She concluded that "this is what Allah wanted for them… Allah brought them here in droves, so that Palestine becomes their graveyard, Allah willing."[249] On 6 May 2020, Hamas MP Yunis Al-Astal stated (in a parliamentary session) that it "is well known that the Jews are the most corrupt of Allah's creatures. They sow corruption throughout the land, and they do not act righteously." In his view, the "solution" is that Jews "should be treated according to

these [leaders]…but will promote and strengthen the overall resolve of the Islamic nation to expose the hidden abilities of the anti-Zionist resistance and bury the Israeli cancer [that has spread] in the Muslim world. According to MEMRI, on June 15, 2018, Khamenei said in a speech to Iranian regime officials and ambassadors from Islamic countries in Iran: "The problem of the Zionist regime is that it is illegitimate, and that it is a regime based on a lie. It will certainly be destroyed by the success of God and the effort of the Muslim peoples…by eradicating the Zionist regime, the Islamic ummah will attain its unity and its honor." According to the Times of Israel, on June 3, 2018, Khamenei tweeted, "#Israel is a malignant cancerous tumor in the West Asian region that has to be removed and eradicated: it is possible and it will happen."

[247] This echoed, according to MEMRI, a statement made by Fathi Hammad on 7 May 2021, in which he stated, "People of Jerusalem, we want you to cut off the heads of the Jews with knives. With your hand, cut their artery from here. A knife costs five shekels. Buy a knife, sharpen it, put it there, and just cut off [their heads]…'You shall find the strongest in enmity towards the believers to be the Jews and the polytheists.' The Jews have spread corruption and acted with arrogance, and their moment of reckoning has come. The moment of destruction at your hands has arrived." According to MEMRI, on July 15, 2019 Al-Aqsa TV aired a statement by Fathi Hammad's in which he said, "…Oh, you seven million Palestinians abroad, enough warming up! There are Jews everywhere! We must attack every Jew on planet Earth – we must slaughter and kill them, with Allah's help…I say to those in the West Bank: How long will you sit in silence? You can buy knives for five shekels! How much is the neck of a Jew worth to us – isn't it worth five shekels, or even less?…We will die while exploding and cutting the necks and legs of the Jews! We will lacerate them and tear them to pieces, Allah willing."

[248] According to MEMRI, Al-Etejah TV channel, "The [Arab] regimes that subscribe to the Neo-Arab-Zionism…How come they do not ask why the Holocaust happened? Was it because those who burned [the Jews] were criminals, or was it because the Jews in those countries took over the economy and politics and exploited the resources of these peoples for their own benefit?…Every single country in Europe deported the Jews, because they spread corruption in those countries, controlled their money, exploited their economies for their own benefit, and collaborated with the enemy in times of war…the Holocaust was not an extraordinary case, because every single country in Europe deported the Jews and killed Jews…"

[249] According to MEMRI.

Allah's decree about them...: 'Kill them wherever you may find them, and drive them away from wherever they drove you away.'"[250]

Israeli policies in the West Bank and Gaza Strip must be viewed in this context. As Richard Goldstone noted with respect to the security fence constructed by Israel at the time that it was erected, the "barrier was built to stop unrelenting terrorist attacks; while it has inflicted great hardship in places, the Israeli Supreme Court has ordered the state in many cases to reroute it to minimize unreasonable hardship. Road restrictions get more intrusive after violent attacks and are ameliorated when the threat is reduced."[251]

The NGO and UN reporting charging Israel and its officials with apartheid suffers from a complete failure to address Israel's policies in the context of an armed conflict characterised by the use of terror tactics, indiscriminate attacks on civilians, and an arguable genocidal intent.[252] We have seen that belligerent occupation creates a much narrower framework of rights and duties between the occupier and the population in the occupied territories than between a State, its citizens and residents.[253] Similarly, Israel's treatment of the population of Gaza "can only be examined through the prism of the laws of armed conflict."[254] By accusing Israel of failing to grant political rights to the Palestinian population in the West Bank and Gaza, NGOs and UN rapporteurs impose supposed legal obligations on Israel that exceed the requirements of law.[255]

Separate Legal Systems in Area C of the West Bank

The complex legal reality in the West Bank stems from unique historical circumstances, including the territory's prior status as an Ottoman territory, the absence of any historical Palestinian sovereign over it, the impact of the Balfour

[250] According to MEMRI,
[251] Richard Goldstone, "Israel and the Unrelenting Apartheid Slander," *The New York Times*, 31 October 2011, https://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html
[252] Yaffa Zilbershats, Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds, *European Journal of International Law* (2013), Vol. 24 No.3, 915-928.
[253] Ibid., p.917. See also supra p. 24.
[254] Ibid.
[255] Ibid., p.920.

Declaration, the establishment of the Palestine Mandate, the rejection by the Arab States of the UN partition plan, ethnic cleansing of the area's Jewish population at the time of the 1948 war, subsequent Jordanian occupation, the rejection of multiple settlement offers made by Israel, and ongoing military conflict involving certain Arab States, Iran, the Palestinians, and Israel. Its legal status is further complicated by implications of Israel's 1994 Peace Treaty with Jordan and the agreement of the Oslo Accords between Israel and the PLO. Any discussion relating to the applicable law that ignores these factors, and instead assigns sole responsibility for the current reality to Israel, is not properly grounded in historical fact.

Jackson reminds us that "international law itself demands the application of different legal regimes to (groups of) individuals under a state's jurisdiction."[256] Moreover, in certain circumstances international law recognises the permissibility of a state treating nationals and non-nationals differently.[257] A requirement that two groups are subject to different laws does not necessarily entail a regime of domination.[258] Israel's application of the law of belligerent occupation to protected persons in the West Bank, and its application of national law to Israeli nationals – i.e. discriminations based on citizenship – must be assessed by reference to their objective reasonableness.[259] Rules relating to planning and land development, freedom of movement, and access to roads in the West Bank must be assessed by reference to reasonableness and proportionality standards in order to weigh the allegation that, together, they contribute to a regime of systematic oppression.

Yoram Dinstein lays out a test as to whether an act taken by the Occupying Power is promoting a legitimate versus a suspect concern for the welfare of the civilian population.[260] He argues that one should look to see if the "Occupying Power shows similar concern for the welfare of its own population." In other words, does a parallel

[256] Jackson, p. 27. See also Kern and Herzberg, p. 42.
[257] Ibid.
[258] Ibid.
[259] See Kern and Herzberg, p. 42.
[260] Y. Dinstein, "Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation And Peacebuilding," Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series, Fall 2004, at 9, available at https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf.

law exist in the Occupying power's territory? If "the answer is negative, the ostensible concern for the welfare of the civilian population deserves being disbelieved."[261]

Distinctions Based on Citizenship

The definition of racial discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is narrowed by limitations contained in subparagraphs (2) and (3) of Article 1 which, like subparagraph (1), apply to the Convention as a whole.[262] The principle that human rights apply to all, irrespective of citizenship, was emphasised by the Human Rights Committee when it noted that aliens "receive the benefit of the general requirement of non-discrimination in respect of the rights… in the Covenant."[263] The CERD Committee adds:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional the achievement of this aim.[264]

While the HSRC report correctly notes that, as a matter of international human rights law, the "rule in Article 1(2) must be construed, in the words of CERD 'so as to avoid

[261] Ibid.
[262] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary,* Oxford University Press (Oxford, New York: Oxford University Press, 2016), p.140. Article 1 of the ICERD states: "1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens. 3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."
[263] Human Rights Committee General Comment (GC) 15, *The Position of Aliens under the Covenant*, paras. 1 -2.
[264] Committee on the Elimination of Racial Discrimination, *General Comment No.30: Discrimination Against Non-Citizens*, 1 October 2004, para. 5 *cited in* HSRC Report, n.777.

undermining the basic prohibition of discrimination,'"[265] it also claims that for Israel to rely on Article 1(2) of the ICERD to justify distinctions, exclusions, restrictions or preferences "would be in breach of Israel's duty to apply ICERD in good faith" and "would amount to an abuse of right."[266] The CERD Committee has also expressed concern at Israel's assertion that "it can legitimately distinguish between Israelis and Palestinians in the Occupied Palestinian Territories on the basis of citizenship."[267] Yet, it appears that CERD disregards implications of the law of belligerent occupation as *lex specialis*, specifically as it pertains to and allows for the differentiation between nationals of the occupying power and the protected population.[268] Yet the HSRC report admits that the "legitimacy of an occupant differentiating between its citizens and non-citizens to the benefit of the former within occupied territory accordingly must be determined by reference to the law of belligerent occupation."[269]

The HSRC report therefore argues that an occupant's duty to protect the civilian population in occupied territory (as, for example, prescribed by Article 4 of the Fourth Geneva Convention and in Article 43 of the Hague Regulations of 1907) "precludes the occupant's introducing measures between its citizens present in occupied territory who are not members of its forces or administration of occupation and civilians who are not its citizens (and therefore protected persons), to the benefit of the former."[270] It argues that this "consideration applies *a fortiori* to any measures favouring settlers" who are present in the area illegally,[271] and conclude – on this basis – that any "attempt to justify measures affecting settlers (*qua* Israeli citizens) on the basis of Article 1(2) of ICERD could only be an abuse of right (*abus de droit*)."[272]

[265] HSRC Report *citing* Committee on the Elimination of Racial Discrimination, *General Comment No.30: Discrimination Against Non-Citizens*, 1 October 2004, para. 2.
[266] HSRC Report, p.163.
[267] United Nations, Committee on the Elimination of Racial Discrimination, Concluding Observations, 13th Periodic Report of Israel, UN Doc. CERD/C/ISR/CO/13 (14 June 2007), para. 32.
[268] For example, the Geneva Conventions allow for the establishment of military courts for the protected population in situations of occupation. False Knowledge pp. 39-41. See also, Anne Herzberg, "Lex Generalis Derogat Legi Speciali: IHL in Human Rights Regulation of Military Courts Operating in Situations of Armed Conflict,"(2001) *Israel Law Review* 54 (1), pp 84-119.
[269] HSRC Report, p.164.
[270] Ibid., p.165.
[271] Ibid.
[272] Ibid., *citing* the Meron 1967 Opinion.

By contrast, the approach of the Israeli Supreme Court finds that *all* persons present in an area are entitled to the protection of their fundamental rights, and a balancing exercise must be undertaken. In the West Bank, the Court therefore takes into account the human rights of Israelis living in the West Bank, but it balances those rights with the rights of Palestinians as protected persons. In the *Gaza Coast Local Council* case, a special panel of eleven Justices of the Israeli Supreme Court expressly underscored the absence of protection afforded to Israeli settlers pursuant to the Fourth Geneva Convention.[273] However, while "settlers are … not to be treated on a basis of equivalence with the local inhabitants," the Court held that "it is impossible to ignore their presence in the occupied territory."[274] Accordingly, the Israeli Supreme Court has held that their needs have to be taken into account in a number of different ways. For example, in the *Jerusalem District Electricity Co.* case, the Court (per Justice Landau) held that the settlers of Kiryat Arba must be deemed part of the population, and they are entitled to get a regular supply of electric power.[275]

In the *Rachel's Tomb* case, Israel's Supreme Court likewise held that freedom of religion must be respected not only where protected persons are concerned, but also with respect to nationals of the Occupying Power.[276] Above all, "settlers are entitled to the security of their lives."[277] It follows that the "application of human rights law naturally works to 'equalize the playing field' between protected and non- protected persons under the Geneva Convention.[278]

Pointing to discrepancies between the language of the Hague Regulations and the Fourth Geneva Convention, Dinstein observes that the "Hague Regulations employ the blanket term 'inhabitants' of an occupied territory, all of whom enjoy the protection specified in the text."[279] The "presence of settlers in an occupied territory must not

[273] HCJ 1661/ 05 etc., supra note 159, at 517.
[274] Yoram Dinstein, *The International Law of Belligerent Occupation, Second Edition* (Cambridge 2019) (hereinafter "Dinstein"), para. 394.
[275] Ibid., para. 394 [n. 785]
[276] Ibid., para.395
[277] Ibid. This approach was affirmed by the Supreme Court in multiple cases, particularly Tzalum of 1987 (per Justice Barak), 786 Kawasmi of 2005 (per Justice Beinisch), 787 and Beit Sira of 2009.
[278] Ibid., para.395 [n.788].
[279] Kretzmer and Ronen, p.219 *citing* Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge, 2009), p. 60.

unduly override the rights of protected persons."[280] In the *Yanun* case (2006), Israel's Supreme Court (per Justice Beinisch) disallowed the denial of Palestinian farmers' access to their agricultural lands (following declarations of 'closed areas' by the military government) which infringed on their freedom of movement and right to property, on the pretext that the measures were designed to protect them from harassment by settlers.[281] The Judgment clarified that the declaration of a "closed area" may be permissible if required in order to safeguard the lives of settlers against terrorist attacks (notwithstanding that they do not come within the category of protected persons).[282] However, when what is anticipated is harassment of protected persons by settlers, the Supreme Court held that the military government's duty is to direct its powers against the prospective troublemakers, not against the victims.[283]

Implications of the Application of Extraterritorial Legislation to Nationals

True it is that "Israeli settlers have been subjected to a whole spectrum of extraterritorial legislation, passed by the Knesset, with 'personal' – rather than territorial – application"[284]; however, as residents of occupied territory settlers are not exempt from the jurisdiction of the military government. In the *Shaer* case, the Supreme Court (per Justice Matza) concluded that settlers may be interned by the military government, just like other inhabitants of the occupied territories.[285] In some areas, the military government has been permitted to discriminate against settlers: thus, supplementary land taxes – not levied on Palestinians – were imposed on them.[286] The Supreme Court also endorsed a decision by the military government to demolish a monument to an extremist who had died killing Palestinian civilians in the shared holy site of the Machpela Cave;[287] it permitted the military government to remove squatters who had settled in the West Bank in defiance of Government

[280] Dinstein, para. 396
[281] Dinstein, para. 396 *citing* HCJ 9593/ 04, *Yanun et al. v IDF Commander of Judea and Samaria et al.,* 61 (1) PD 844, 869-71
[282] Ibid.
[283] Ibid.
[284] Ibid., para 398.
[285] Ibid [n.799].
[286] Ibid. [n. 800].
[287] Ibid. [n. 801].

policy;[288] and it permitted the closure, by the military government, of an abandoned hotel used by settlers protesting their forced evacuation from the Gaza Strip.[289]

Acknowledging that a State may undertake extraterritorial constitutional law obligations towards its nationals, Kretzmer and Ronen posit that the question in this context is "how such obligations are to be reconciled with the state's obligations under international law towards non-nationals." They argue that "insofar as the application of domestic law is based on effective control over the territory in which the nationals are present, the obligation to act without discrimination entails the application of the law to everyone in the territory, subject of course to the state's international obligations; for example its obligations towards protected persons under the law of occupation."[290] They acknowledge, however, that the "question may be more complicated" where "the application of domestic law is personal without a territorial element, namely solely on the basis of nationality.[291]

Settlement Regularisation Law

In 2020, in the *Settlement Regularisation Law* case, Israel's Supreme Court struck down legislation that would have allowed for *ex post facto* legalisation of illegal settler construction on private Palestinian land. The Court found that the Law violated West Bank Palestinians' right to property and the right to equality, and it did not meet the demands of the Basic Law: Human Dignity and Liberty.[292] Chief Justice Hayut "included several references to the special protection that the international law of belligerent occupation provides to the Palestinian residents of the West Bank as protected persons."[293] The Court examined whether the Law had been enacted for a proper purpose, and if so whether its restrictions on property rights met the constitutional proportionality test adopted in the past.[294] "In Chief Justice Hayut's view, one purpose of the Law was entrenching settlement in the West Bank through

[288] Ibid. [n. 802].
[289] Ibid. [n. 803].
[290] Kretzmer and Ronen, p.109.
[291] Ibid (n.48).
[292] HCJ 1308/17 *Silwad Municipality v Knesset* (9 June 2020), paras. 32, 48-57, 110. (*Settlement Regularisation*).
[293] Kretzmer and Ronen, p.112 *citing Settlement Regularisation*, para. 32.
[294] Ibid., p. 113.

retroactive regularisation of illegal construction on land that is not government property. She held that this was not a proper purpose since it required a sweeping validation of manifestly illegal conduct on private land, which constituted a severe violation of the rule of law."[295]

Kretzmer and Ronen note that in the *Settlement Regularisation* case, "the Court did not take a position on the applicability of different *bodies* of law to Israelis and Palestinians." On the contrary, it acknowledged that there are special legal arrangements on the ground that assimilate the law applicable to Israelis in the West Bank to the law applicable in Israel, and facilitate the enforcement of Israel's rule and law over its nationals.[296]

Freedom of Movement – West Bank

HRW alleges that restrictions imposed by Israel on Palestinian freedom of movement in the West Bank are assessed without any proper balancing of security concerns. They allege that "demographic considerations…factor centrally" in Israel's "separation policy" between Gaza and the West Bank.[297] Israel's travel ban from Gaza, says Human Rights Watch, "is not based on an individualized security assessment and fails any reasonable test of balancing security concerns against the right to freedom of movement for over two million people."[298]

However, States enjoy jurisdiction over their borders and the exclusive right to control entry. Such control is "seen as a quintessential exercise of sovereignty."[299] Moreover, "even as states voluntarily enter into international agreements [on issues relating to entry of refugees and migration], they retain the right to renege on these commitments if observance would threaten national security."[300] Palestinians have no legal right of

[295] Ibid.
[296] Ibid., p.115 *citing Settlement Regularisation*, para. 54
[297] "Threshold," p.15.
[298] Ibid., p.14.
[299] Susan Martin and Elizabeth Ferris, "Border Security, Migration Governance and Sovereignty," International Organization for Migration, 2017, available at https://publications.iom.int/system/files/pdf/border_security_1.pdf at 2.
[300] Ibid. at 3

entry into Israel or to transit through the territory without the permission of Israeli authorities, and there is no requirement under international law that such assessments be made on an individualized basis.

Israel does allow for entry of hundreds of thousands of Palestinians into Israel, and to transit through the territory on a daily basis.[301] It restricts this movement based on the evolving security situation. Zilbershats notes that serious "restrictions on leaving and entering the territories started as attacks against Israeli citizens in the territories and in Israel became more frequent." She argues that Israeli restrictions are in accordance with both international humanitarian law and human rights law, which permit "the restriction of freedom of movement for security reasons."[302] Since "there is an ongoing armed conflict between Israel and the Hamas-led government of Gaza, Israel is under no obligation to allow the free passage of the population of a hostile entity through Israeli territory."[303] Moreover, a "state's obligation to allow entry into the territory is confined to its own citizens and permanent residents."[304] Still, Israel's Supreme Court also acts as a safeguard against potentially arbitrary restrictions on Palestinians' free movement. Following the construction of a security barrier between the State of Israel and the West Bank, which was a response to widespread and deliberate attacks (including suicide bombings, mass shootings, and shelling) that killed and injured thousands of Israeli civilians, the Court has heard hundreds of petitions and in many

[301] Aaron Boxerman, "Israel authorizes 3,000 additional entry permits for Gaza workers," Times of Israel, 20 October 2021, https://www.timesofisrael.com/israel-authorizes-3000-additional-entry-permits-for-gaza-workers/; Tovah Lazaroff, "13% hike in work permits for Palestinians prior to PM-Biden parley," Jerusalem Post, 28 July 2021, https://www.jpost.com/breaking-news/1500-additional-palestinians-to-be-given-work-permits-inside-of-israel-675112; OCHAOPT, "Health Cluster Bulletin December 2021, https://healthclusteropt.org/admin/file_manager/uploads/files/shares/Documents/61f91f00d1951.pdf p. 9; COGAT, October 2021 Movements in Judea and Samaria and Gaza, https://www.gov.il/en/Departments/faq/movements; COGAT, Crossings in Judea and Samaria May 2020, https://www.gov.il/en/Departments/General/crossings_judea_and_samaria?gclid=CjwKCAiAgvKQBhBbEiwAaPQw3lrgE6rxYkx1LH1UCdJ_MegzFKakh9QYlofltkFXGqEslcCdEbxCXxoC4RMQAvD_BwE.

[302] Zilbershats, EJIL, p.920 *citing* International Covenant on Civil and Political Rights (ICCPR), Arts 4(1) and 12(3), 999 UNTS 171; American Convention on Human Rights 1969, Arts 22(3) and 27; European Convention on Human Rights, Art. 15(1), ETS No. 005; 4th Protocol to the European Convention on Human Rights, Art 2(3), ETS No. 046; M. Sassoli and A.A. Bouvier, *How Does Law Protect in War – Cases, Documents and Teaching Material on Contemporary Practice in International Law* (1999), at 154-155. See also *Id.*, n.52: "The right to enter a state is one of the two rights in international law that is conferred solely upon citizens and permanent residents (Article 13(2) of the Universal Declaration on Human Rights...; Article 12(4) of the ICCPR... There is no obligation under international law to facilitate the entry of foreigners into a state, this is *a fortiori* the case with regard to the entry of people from enemy states or other entities."

[303] Ibid., p.926.

[304] Ibid., p.921

cases, and ordered the barrier's route to be changed to facilitate Palestinian freedom of movement.[305] As the security situation improved, barriers such as roadblocks and checkpoints were drastically reduced.[306]

Freedom of Movement – Gaza

HRW argues that in the "Gaza Strip, Israel imposes a generalized closure, sharply restricting the movement of people and goods—policies that Gaza's other neighbor, Egypt, often does little to alleviate."[307] For HRW, this reflects an overall position where "Israeli authorities treat Palestinians separately and unequally,"[308] and the "severe repression of Palestinians in Gaza stands in marked contrast to the treatment of Israeli settlers in the West Bank and East Jerusalem."[309] However, given the existence of ongoing armed conflict between Israel and Hamas in Gaza and frequent Palestinian attacks on the border crossings,[310] Israel is under no obligation to allow the free passage of the population of a hostile entity through Israeli territory.[311] Nevertheless, Israel permits thousands of Palestinians to cross into Israel from Gaza for work and medical needs, while thousands of tons of goods are allowed into Gaza on a weekly basis.[312] Even the HSRC report concluded that the situation in Gaza "is not

[305] Ibid., *citing BeitSourik Village Council v The Government of Israel*, PD 58(5) 807 (2004); *Zaharan Yunis Mihammed Mara'abe v The Prime Minister of Israel*, PD 60(2) 477 (2005); HCJ 8414/05, *Ahmed Issa Abdallah Yassin, Bil'in Village Council Chairman v The Government of Israel* (2007); HCJ 9593/04, *Morar v IDF Commander in Judaea and Samaria*, PD 61(1) 844 (2006).
[306] See, e.g., Dima Abumaria, "In bid to ease Palestinian mobility, Israel upgrades West Bank checkpoint," Jerusalem Post, 22 February 2019, https://www.jpost.com/arab-israeli-conflict/in-bid-to-ease-palestinian-mobility-israel-upgrades-west-bank-checkpoint-581440; Chaim Levinson, "IDF to Remove Major West Bank Checkpoint to Enable Palestinian Movement," Haaretz, 11 February 2011; https://www.haaretz.com/1.5120757; Yoram Schweitzer, "The Rise and Fall of Suicide Bombings in the Second Intifada," INSS, October 2010, https://www.inss.org.il/wp-content/uploads/sites/2/systemfiles/(FILE)1289896644.pdf; Washington Institute, "Israel's Security Fence: Effective in Reducing Suicide Attacks from the Northern West Bank," 7 July 2004, https://www.washingtoninstitute.org/policy-analysis/israels-security-fence-effective-reducing-suicide-attacks-northern-west-bank.
[307] "Threshold," p.7.
[308] Ibid.
[309] Ibid., p.130.
[310] Judah Ari Gross, "Soldier hurt by mortar fire while assisting in transfer of aid at Gaza crossing," Times of Israel, 18 May 2021, https://www.timesofisrael.com/soldier-hurt-by-mortar-fire-while-assisting-in-transfer-of-aid-at-gaza-crossing/; Israeli Mission to the UN in Geneva, "Rocket attack forces closure of Israel-Gaza border crossing," 10 August 2014, https://embassies.gov.il/UnGeneva/NewsAndEvents/Pages/Rocket-attack-forces-closure-of-Israel-Gaza-border-crossing-10-Aug-2014.aspx; Israel Ministry of Foreign Affairs, "Main terrorist attacks carried out at Gaza Strip crossings," https://www.mfa.gov.il/mfa/foreignpolicy/terrorism/pages/main%20terrorist%20attacks%20carried%20out%20at%20gaza%20strip%20crossings%2016-jan-2005.aspx.
[311] Zilbershats, EJIL, p.926.
[312] Boxerman, n. 298; OCHAOPT, n. 298; OCHAOPT Crossings Database, https://www.ochaopt.org/data/crossings.

characterized by either colonial ambitions as to territory and permanence or an apartheid structure."[313]

Roads

HRW alleges that "Israeli authorities retain primary control over resources and infrastructure" in the West Bank, and "systematically privilege Jewish Israeli settlers over Palestinians in the provision of roads, water, electricity, health care, and other services."[314] They further allege that West Bank roads "bypass Palestinian populated areas and connect settlements to the Israeli road network, to other settlements, and to major metropolitan areas inside Israel,"[315] and refer to Road 443, whose construction was built "in part on expropriated Palestinian land, to offer an alternative route for Israelis to commute between Jerusalem and Tel Aviv."[316] When landowners challenged the confiscation, HRW observes that "the Supreme Court dismissed their petition, accepting the government's position that it built the road, which also historically connected Ramallah to villages to its west, partly to serve the local Palestinian population."[317]

Under the law of belligerent occupation, an Occupying Power is required to "restore and maintain public order, and provide for the needs of the population."[318] Dinstein explains that pursuant to Article 43 of the Hague Regulations, the Occupying Power must "restore and ensure, as far as possible, public order and life in the occupied territory" and "respect the laws in force in the occupied territory unless an '*empêchement absolu*' exists."[319] Consistent with these rules, the Oslo Accords laid out the framework over which roads Israeli and Palestinian security forces have security responsibility.[320]

[313] HSRC Report, para. 6.
[314] Threshold, p.91.
[315] Ibid., p.94.
[316] Ibid.
[317] Ibid.
[318] Geoffrey S. Corn, et al., The Law of Armed Conflict: An Operational Approach, Walters Kluwer (2012) at 371. See also Article 43 of the 1907 Hague Convention.
[319] Dinstein, *supra* at 120.
[320] The Israeli-Palestinian Interim Agreement Annex I, 28 September 1995, https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement%20-%20annex%20i.aspx.

HRW's briefing of the *Beit Sira* (443 Road) case is arguably incomplete and partial. It fails to refer to the requirements of IHL, Oslo, and the balancing exercise performed by the Israeli Supreme Court.[321] For instance, HRW's analysis does not show that the Court held that a total ban on Palestinian vehicles from the use of the road exceeded the military commander's authority, and that even if the commander had the authority to exclude Palestinian vehicles, his decision to place an absolute ban on the use of the road by such vehicles failed to meet the demands of proportionality.[322] The Court (per Justice U. Vogelman) stressed the need to ensure the safety of the settlers and other commuters using the thoroughfare, suggesting that rigorous security screenings of local vehicles joining it would be proper.[323]

HRW notes that in a concurring opinion, Justice Beinisch "mentions apartheid, but asserts the comparison to Israeli policies is 'inappropriate,' without offering a detailed explanation."[324] This disregards that her reference to apartheid was a specific response to its pleading by one of the NGO petitioners. HRW also offers an incomplete and partial summary of Justice Beinisch's opinion, which is set out more completely below:

> Even if we take into account the fact that absolute segregation of the population groups travelling on the roads is an extreme and undesirable outcome, we must be careful to refrain from definitions that ascribe a connotation of segregation, based on the improper foundations of racist and ethnic discrimination, to the security means enacted for the purpose of protecting travellers on the roads. The comparison drawn by the petitioners between the use of separate roads for security reasons and the apartheid policy and accompanying actions formerly implemented in South Africa, is not a worthy one. The policy of apartheid constituted an especially grave crime and runs counter to the basic principles of Israeli law… It was a policy

[321] See, e.g. Dinstein, para. 397
[322] See Kretzmer and Ronen, p.153 *citing* HCJ 2150/07 *Abu Safiya v Minister of Defence* (29 December 2009).
[323] Dinstein, n.796.
[324] "Threshold," p.94 *citing Ali Hussein Mahmoud Abu Safiya, Beit Sira Village Council Head et al., vs. Minister of Defense et al.*, HCJ 2150/07, Judgement, March 5, 2008.

> of racist segregation and discrimination on the basis of race and ethnic origin … Not every distinction between persons, under all circumstances, necessarily constitutes improper discrimination, and not every improper discrimination is apartheid.[325]

In a subsequent case (brought by Shurat Hadin, an NGO), the partial permission given by the military commander for travel of Palestinian vehicles on Road 443 was challenged, and it was argued that the revised arrangements adopted by the military commander endangered the security of Israeli drivers. The Court held that the military commander had shown that he had taken adequate measures to protect travellers on the road, and that since his decision was reasonable there were no grounds for the Court to intervene.[326]

Land Policy in Area C

We recall that under the rubric of Articles 2, 4, 5, and 6 (but not Article 3 (segregation and apartheid)) of the ICERD, in its 2019 Concluding Observations, the Committee on the Elimination of Racial Discrimination expressed its concern at "continuing confiscation and expropriation" of Palestinian land and continuing restrictions on access of Palestinians to natural resources. The Committee expressed particular concern at the "discriminatory effect" of planning and zoning laws and policies, including building permitting, on Palestinians and Bedouin communities in the West Bank, demolition of building and structures, acts of Israeli violence against Palestinians and their property in the West Bank, and an alleged lack of effective accountability for and protection from such acts.[327]

With respect to planning and zoning regulation in Area C of the West Bank, Kretzmer and Ronen note that "the [Israeli] authorities treat the development of Israeli and Palestinian communities differently: they employ a different mechanism, different

[325] HCJ 2150/07, *Ali Hussein Mahmoud Abu Safiyeh, Beit Sira Village Council Head v Minister of Defence* (2008), para. 6. See also p.53, para.6: "we must not put the cart before the horse: the terrorist attacks came first, and the closure of the road came later."
[326] Kretzmer and Ronen *citing* HCJ 3607/10 *Shurat Hadin v Minister of Defence* (27 June 2010), para 12.
[327] 2019 Concluding Observations, para. 42.

planning practices, and different enforcement priorities."[328] In Area C, they say there are "separate planning systems for Israelis and Palestinians."[329]

When the military order (Order 418) establishing the system was challenged before the Israeli Supreme Court, Justice Rubinstein noted that it adapted Jordanian law "to the reality in the area and the related complexity."[330] The Court stated that upholding the petition "could have implications for the sensitive relationship between Israel and the Palestinian Authority, and this cannot be done in a single stroke disregarding the general framework."[331] In response to allegations of discriminatory planning policies in Area C put to the Israeli delegation in the March 2022 periodic review by the Human Rights Committee of Israel's compliance with the ICCPR, a representative of the military administration noted that in 2021, five master plans for Palestinian communities and more than 1,100 housing units were approved.[332] It is open to question whether this provides a complete answer to these specific allegations as well as to allegations of institutional discrimination in land allocation policy.

Currently, pending at the Israeli Supreme Court, there is a landmark case challenging planning on state land[333] in Area C between Bethlehem and the settlement of Efrat, and deemed by the Israeli NGO Peace Now as **"**first time the issue of land allocation in the Occupied Territories is being brought to trial."[334] In this case, Palestinian petitioners and NGOs argue that the land is being allocated in a discriminatory fashion and is blocking the ability of the Bethlehem municipality to expand. This is notable not only for planning allocation of lands falling under Israel's jurisdiction in Area C, but also

[328] Kretzmer and Ronen, p.273.
[329] Kretzmer and Ronen, p.277. They note that in 1971, the military commander of the West Bank promulgated Order 418 which amended the Jordanian planning law by transferring the powers of district committees, including over planning, to the Supreme Planning Council (SPC). In 1981, the Civil Administration was established, and the planning apparatus was incorporated within it. Through amendments, Order 418 empowered the military commander "to appoint, for a particular planning area, a special planning committee…"
[330] HCJ 5667/11 *Deirat Rifa'iya Village Council v Minister of Defence* (9 June 2015), para 18.
[331] HCJ 5667/11 *Deirat Rifa'iya Village Council v Minister of Defence* (9 June 2015), para 21.
[332] 3841st meeting of the Human Rights Committee, 134th Session, Consideration of the Periodic Report of Israel, 2 March 2022, https://media.un.org/en/asset/k1v/k1vz640m3b.
[333] In proceedings at the Supreme Court in 2014 and 2016, petitioners claimed the land was privately owned, challenging the designation as State land.
[334] Peace Now, "The Supreme Court issued a Decree Nisi in a precedent-setting petition against the allocation of lands to settlements," 10 February 2022, https://peacenow.org.il/en/the-supreme-court-issued-an-order-nisi-in-a-precedent-setting-petition-against-the-allocation-of-lands-to-settlements

how Israel's planning policies can impact development in Area A that is solely under Palestinian jurisdiction. On 30 January 2022, the Court, in a significant decision, ordered the State and the military commander to explain its policy in this case and present it within 90 days of the order.[335] This litigation may serve to demonstrate the efficacy of the review function of the Israeli Supreme Court over questions relating to land allocation policy in Area C.

Conclusion on Systematic Oppression

The foregoing discussion shows how HRW and others levying the apartheid charge disregard the requirements of applicable law (under international humanitarian law, the Oslo Accords, international human rights law, the standard of reasonableness, and the significance of the Israeli Supreme Court's jurisprudence). Israel's application of the humanitarian provisions of the law of belligerent occupation may be viewed as reasonable. Measures that discriminate between individuals through application of provisions of international humanitarian law should also not be considered oppressive *per se*. There is a distinction between the Israeli-Palestinian case and the South African in that whereas in South Africa there was nothing that reasonably could be said to have impinged upon the ability of all South Africans to enjoy their fundamental rights equally absent the policy of apartheid, in the Israeli-Palestinian case it is the context of the conflict between Israel and the Palestinians, and separate citizenships reflecting Palestinian and Israeli separate nationalities, that give rise to differential treatment. Such treatment's qualification as "oppressive" must necessarily take this context into account.

Turning again to Israeli Supreme Court, as President Beinisch put it in the *Beit Sira* case, an apartheid regime "is a grievous crime which contravenes the fundamental tenets of the Israeli legal system, international human rights laws and the provisions of international criminal law." An apartheid regime "is a regime of racial separation and discrimination on the basis of race and national origin, which is based on a number of

[335] *Kamaal et al., v. Ministry of Defence et al.*, 3303/20, https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/20/030/033/m16&fileName=20033030.M16&type=4

discriminatory practices designed to engender supremacy of the members of one race and to oppress members of other races." There is such a "great distance between the security measures taken by the state of Israel in defending against terrorism and the unacceptable practices of the Apartheid regime" that any comparison between the two is unwarranted: "Not every distinction between people under any circumstances necessarily constitutes a wrongful discrimination, and not every wrongful discrimination constitutes Apartheid."[336]

The Government of Israel echoed these sentiments in submissions to the CERD Committee (in 2019) on the West Bank and Gaza. Noting that Israel "continued to face security challenges, having suffered a number of devastating attacks in recent years committed by perpetrators from those areas," the Israeli government had "sought to find the proper balance between its commitment to the rule of law and its obligation to defend its citizens against terrorism, while ensuring that it upheld human rights and the principles of international law." Moreover, it "was seeking a peaceful solution to the situation through bilateral negotiations."[337]

By One Racial Group over Another

HRW assert that "Jewish Israelis and Palestinians are regarded as separate identity groups that fall within the broad understanding of 'racial group' under international human rights law."[338] The HSRC report similarly asserts that "'Jewish' and 'Palestinian' identities are socially constructed as groups distinguished by ancestry or descent as well as nationality, ethnicity, and religion. On this basis, the study concludes that Israeli Jews and Palestinian Arabs can be considered 'racial groups' for the purposes of the definition of apartheid under international law."[339] This approach is grounded on the ICERD's definition of "racial discrimination" (contained in its Article 1), but (as we

[336] HCJ 2150/07, *Abu Safiya, Beit Sira Village Council Head et. al v. Minister of Defense et. al.* (2009), concurring opinion of President Beinisch, para. 6. https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C07%5C500%5C021%5Cm19&fileName=07021500_m19.txt&type=4
[337] CERD/C/SR.2788, 4 December 2019, para. 7. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FSR.2788&Lang=en
[338] Threshold, p.37.
[339] HSRC Report p.17.

observed in *False Knowledge as Power*)[340] diverges from the approach adopted by the *ad hoc* international criminal tribunals when considering classification of national, ethnical, racial, or religious groups for the purpose of establishing liability for genocide.[341] Lingaas has argued convincingly that this approach remains problematic for the application of international criminal law in general and the crime against humanity of apartheid in particular.[342] She argues that rather "than relying on the objectivity of criminal law, courts need to see through the eyes of the perpetrator."[343]

Dugard's and Reynolds' premise that "the interpretation of racial groups as developed in international law appears sufficiently broad to understand Jewish Israelis and Palestinian Arabs as distinct groups" is therefore questionable as a matter of international criminal law.[344] Irrespective of whether it is correct that Palestinians and Israeli Jews are "constructed as groups distinguished by ancestry or descent as well as ethnicity, nationality, and religion,"[345] or that although "Jewish identity may be based in some context on religion," Jews "can also be understood as a group based on descent and/or ethnic or national origin,"[346] and therefore may be subjected to "racial discrimination" as defined under the ICERD, it does not automatically follow that, for Israelis, Israeli Jews and Arab Palestinians are constituted as racial groups.

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[340] Kern and Herzberg, p. 47.
[341] See Lingaas.
[342] Ibid.
[343] Carola Lingaas, *The Concept of Race in International Criminal Law* (Routledge 2020), p.3-4. See also p.7 ("the protected groups of genocide, including the racial group, are subjectively defined by means of the perpetrator's *mens rea*.")
[344] See e.g. Carola Lingaas, "Jewish Israeli and Palestinians as distinct 'racial groups' within the meaning of the crime of apartheid?" EJIL Talk! 6 July 2021.
[345] Threshold, p.889.
[346] Dugard and Reynolds, p.889. Contra, e.g., the speech made by the representative of Mauritania to the General Assembly on 19 October 1962, A/C.3/SR.1165, para. 22. In a statement to the General Assembly in October 1962, Mr Kochman (for Mauritania) stated the following to the Third Committee of the General Assembly in a "seminal" speech that was accorded a "positive reception" (Thornberry, p.25). Thornberry notes that "[c]ommencing with the claim that all discrimination 'sprang from a desire to dominate, [Mr Kochman] elaborated on four 'myths': of pure blood; of colour: "The Jewish myth was still fresh in the memories of many people. Anti-Semitism as a social attitude was very ancient and had by latter-day racists been connected with the pseudo-scientific, idea of a Jewish race. No such race existed, but a distinction must on the other hand be drawn between Semitism and Zionism. A political and ideological position of antizionism, based on the assumption that Zionist expansionism violated human rights, was not incompatible with a policy of tolerance towards the Jewish people and religion." Irrespective of the nature or the merits or the nature of the claim, an approach which seeks to explain either Zionist or Jewish) identity in *political* terms, as opposed to ethnic or national terms, is materially inadequate. However, the foregoing discussion shows that Jewish identity incorporates religious, ethnic and national elements, which (pursuant to the principles codified in the CERD) may now only extend to the concept of race but which, if they are so extended, in turn require recognition of Jews as a national and ethnic, as opposed to simply religious, group, as well as of the problematic nature of Mr Kochman's statement when considered in light of the principles protected by the CERD.

This is not to say that it has not been argued that the relationship between Israeli Jews and Arab Palestinians has been "racialised." Erakat, paradigmatically, frames a "racial theory of Zionist settler colonization" that relies on PLO and Arab League official Fayez Sayegh's "Zionist Colonialism in Palestine," an article published in 1965.[347] Sayegh refers to Israel as an "alien body" in in the Middle East and alleges that the "supposed" common ancestry of Jews masks a fake and constructed nationhood, whilst claiming that "not even in South Africa or Rhodesia has European race-supremacism expressed itself in so passionate a zeal," whilst highlighting Zionism's "congenial, essential" racism and "aspiration to racial self-segregation." Erakat, on the blog of the European Journal of International Law in 2021, quotes Sayegh to conclude that the "Zionist belief that Jews constitute a race and a singular people, irrespective of religious piety or identification, produces "three corollaries: racial self-segregation, racial exclusiveness, and racial supremacy."[348]

This view of Jewish national identity is revealing. It demonstrates, for Sayegh and Erakat, that Jewish national identity is defined by Zionist "otherness" (its "alien" nature, its "fake" nationhood, its "aspiration to racial self-segregation"). Jewish history, religion, and culture is denigrated to construct the Zionist other. For Sayegh, neither "religion nor language comprises the alleged 'national bond' of Jews… [The] Hebrew language was resuscitated only after the birth of Zionism." It is Zionism, he writes, that "strives to bring all Jews together into a single Jewish state, to which even moderate Zionists attribute a 'special mission.'"[349]

Yet Hebrew was the language of religious Jewish texts and commentaries throughout history, and was the basis for the dialects of the Jewish diaspora, including Yiddish, Ladino, and Judeo-Arabic during centuries of exile. The concept of the in-gathering of exiles to the Land of Israel is a core principle of Judaism and a central focus of the Jewish liturgy; it is included in many daily prayers including the Amidah that is recited

[347] Kern and Herzberg, p. 2, 8-9.
[348] Erakat, "Beyond Discrimination," citing Fayez Sayegh (2012) Zionist Colonialism in Palestine (1965), *Settler Colonial Studies* (2012), 2:1, 206-225.
[349] Sayegh, p. 214

three times a day.[350] Affirming Sayegh, Erakat's contribution is notable as it reflects how Jewish national identity continues to be appropriated, essentialised, and defined as an (intolerable) other that must be "dismantled," in this case through the discourse of apartheid.

It is here that Sayegh and Erakat's conception of Jewish national identity converges with that of Dugard and Reynolds who, for their part, cite to an article by Sari Nusseibeh (titled "Why Israel can't be a "Jewish State") to support their proposition that "[while] being Jewish clearly connotes a religious identity, this provides only a partial account."[351] Dugard and Reynolds rely on Nusseibeh when arguing that there "is significant but by no means complete overlap between 'Jewish' in the sense of those who practise the religion of Judaism, and 'Jewish' in the sense of the ancient Israelites and their descendants." Nusseibeh, for his part, argues against the concept of a Jewish state based upon his (neo-orientalist) interpretation of Talmudic law.[352] Again, Jewish national identity is appropriated, essentialised, and othered through a new orientalism that is expressed through the discourse of apartheid.[353]

This approach echoes the position taken by certain States during debates concerning adoption of the ICERD, where, for instance, the Saudi Arabian representative queried the meaning of "anti-Semitism, bearing in mind that 95 percent of persons of Semitic origin were Arabs, and that if this was intended as referring to Jews, then this was more appropriately styled as religious, not racial intolerance." He argued that "[o]nly

[350] National Jewish Outreach Program, "The Blessings of the Amidah: Ingathering of the Exiles," https://njop.org/blessings-of-amidah-ingathering-of/
[351] Dugard and Reynolds, p.889 *citing* Nusseibeh, 'Why Israel can't be a "Jewish State,"' Al-Jazeera, 30 Sept. 2011.
[352] Dugard and Reynolds, n.122 *citing* Nusseibeh, "Why Israel can't be a 'Jewish State.'" Dugard and Reynolds' reliance on Nuseeibeh, and the essentialisation of Jewish identity which it entails, recalls Edward Said, who wrote the of Western essentialising of the Orient: "The Orient and Islam have a kind of extrareal, phenomenologically reduced status that puts them out of reach of everyone except the Western expert. From the beginning of Western speculation about the Orient, the one thing the orient could not do was to represent itself. Evidence of the Orient was credible only after it had passed through and been made firm by the refining fire of the Orientalist's work." For Dugard and Reynolds, however, Nusseibeh performs the role of the Orientalist, making credible Dugard and Reynolds's "extrareal" interpretation of Judaism.
— Edward W. Said, Orientalism
[353] For Nusseibeh, "recognition of Israel as a 'Jewish state' implies that Israel is, or should be, either a theocracy (if we take the word 'Jewish' to apply to the religion of Judaism) or an apartheid state (if we take the word 'Jewish' to apply to the ethnicity of Jews), or both." Nusseibeh, 'Why Israel can't be a "Jewish State"', Al-Jazeera, 30 Sept. 2011.

confusion could result from mixing ethnology and religion."[354] In response, Israel's representative pointed out that "[t]he Jewish people knew exactly what anti-Semitism was, for it had too long been its victim, whether for racial, religious or other reasons; to those who had suffered from racial discrimination, qualifiers were not important."[355]

In addition, during the ICERD drafting process, the USSR weaponised attempts by Western countries to address antisemitism, and specifically the increase in attacks on Jews behind the Iron Curtain. The Soviets conditioned a threat to include Zionism as a form of racism (alongside Nazism and apartheid), and did so in its proposed drafts of the ICERD, if the United States insisted on including antisemitism as a form of discrimination under the Treaty.[356]

On the other hand, it seems more difficult to argue that, viewed from an "Israeli" point of view, Israeli Jews and Arab Palestinians constitute "racial groups." Zilbershats, for instance, notes that '[t]o put it simply, the separation is not along racial lines but between Israeli citizens and Palestinians."[357] Subjectively, in Israel, the question is arguably one of nationality and not race. From an Israeli point of view, Arab Israelis

[354] Thornberry, p.75 *citing* A/C.3/SR.1300, paras, 7-8. See also the concurring remarks of the representative of Hungary equating antisemitism with religious intolerance. A/C.3/SR.1301, para. 22. See also the position expressed by the Syrian delegate in the plenary of the UN General Assembly in on 22 September 1947, in response to the UNSCOP report and its recommendation in favour of partition: "The Committee assumed that the Jews are a race and a nation entitled to cherish national aspirations. The Jews are not a nation. Every Jew belongs to a certain nationality. None of them in the world is now stateless or without nationality. In their entirety, they embrace all the nationalities of the world. Nor are the Jews a race. The Children of Israel today are a very small fraction of the Jewry of the world, for the Jews are composed of all races of mankind, from the Negroes to the blond, fair-skinned Scandinavians. Judaism is merely a religion and nothing else. The followers of a certain religious creed cannot be entitled to national aspirations" (cited in Yakobson and Rubinstein, p.25) Nevertheless, the Syrian delegates plain antipathy towards Jews was plainly ethno-national: "There were so many nations that contributed greatly to the civilization of the world and which were stronger and more powerful than the Jewish dynasty. Yet we find none of them in existence now. They were not exterminated; they were assimilated by their invaders and became adapted to the environments in which they found themselves. Of the peoples of antiquity, only the Jews maintain their isolation and seclusion, to the dissatisfaction and anger of their compatriots and neighbours, who never failed to molest and persecute them, on each occasion giving the world a problem of refugees; a problem of displaced persons." Yakobson and Rubinstein note that "there is a gross contradiction between the anti-Jewish hostility, its character, and the way that it is expressed on the one hand, and the claim that Jews are merely a religious community and nothing more" (p.26). See also Article 18 of the 1964 Palestine National Charter.
[355] Thornberry, p.75 *citing* A/C.3/SR.1301, para. 38.
[356] James Loeffler, "Three days in December: Jewish human rights between the United Nations and the middle east in 1948," Journal of Global History (2021) 1–19, doi:10.1017/S1740022821000322, p. 10. Loeffler, Rooted Cosmopolitans (Yale 2018); Ofra Friesel, "Race versus Religion in the Making of the International Convention Against Racial Discrimination, 1965," Law and History Review, Vol. 32, No. 2 (May 2014), pp. 351-383.
[357] Zilbershats, p.26.

are not viewed "racially" as Palestinians any more than Bedouin, Druze or Circassian communities are so viewed. Palestinians, from an Israeli point of view, are a national and not a racial group. This flows from Israel's recognition of the Palestinian people as such during the Oslo negotiations.[358]

Inhumane Acts

HRW alleges that "Israeli authorities have carried out a range of abuses against Palestinians" and many "amount to inhumane acts".[359] It is specifically alleged that the "sweeping movement restrictions" in Gaza and the West Bank, "land confiscation" in the West Bank and East Jerusalem, "denial of residency rights" in Gaza, the West Bank and East Jerusalem, and "suspension of civil rights" in Gaza and the West Bank amount to inhumane acts.[360] Dugard and Reynolds argue that inhuman acts are committed by Israel in the West Bank and Gaza Strip through a number of State policies. They allege that Israeli policies violate the right to life,[361] as well as deny the right to liberty through arbitrary arrest and detention.[362] They further argue that a criminal justice system of separate Israeli civil laws and courts that applies "far more generous standards of evidence and procedure" to Israeli Jews "than the military law and courts to which Palestinians are subject" may also be considered under the rubric of inhumane acts.[363] They claim that policies "pursued by successive Israeli governments over the course of the occupation and particularly since the late 1970s, culminating in the construction of the wall since 2002, have divided the occupied territory into a series of non-contiguous enclaves or 'reserves' into which Palestinians are effectively confined," constituting inhumane acts, and as reflected by Article 2(d) of

[358] The Preamble to the Interim Agreement states that the agreement is made between "The Government of the State of Israel and the Palestine Liberation Organization" as "the representative of the Palestinian people." It further recognises "that the aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, i.e. the elected Council (hereinafter "the Council" or "the Palestinian Council"), and the elected Ra'ees of the Executive Authority, for the Palestinian people in the West Bank and the Gaza Strip," and recognises that "elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements and will provide a democratic basis for the establishment of Palestinian institutions."
[359] Threshold, p.171.
[360] Ibid.
[361] Dugard and Reynolds, p.892.
[362] Ibid.
[363] Ibid., p.895. The rules of procedure and evidence in Israeli military and civilian courts are virtually identical. See, e.g., https://www.ngo-monitor.org/reports/military-court-watch-inventing-legal-standards-attack-idf/.

the Apartheid Convention that prohibits measures designed to divide the population along racial lines.[364]

There is a substantial overlap between conduct alleged to constitute "systematic oppression," "domination," and allegations of "inhumane acts." Restrictions on Palestinian free movement and the legal framework governing civil rights and fair trial rights have been considered above, as has the distinction between *in personam* application of Israeli law to Israeli nationals living in the West Bank, and the alleged "fragmentation" of the Palestinian population.

In addition, however, HRW contends that by refusing to permit "more than 700,000 Palestinians who fled or were expelled in 1948 and their descendants to return to Israel" (numbering many millions), further inhumane acts are being committed.[365] Human Rights Watch therefore recommends that the Israeli authorities "[r]ecognize and honor the right of Palestinians who fled or were expelled from their homes in 1948 and their descendants to enter Israel and reside in the areas where they or their families once lived."[366]

Palestinian "Right of Return"

A core feature of the apartheid alleged is that it maintains the "fragmentation" of the Palestinian people, in part through denying refugees from the 1948 and 1967 wars, and millions of their descendants, to "return" to Israel.[367] Amnesty claims that "laws, policies and practices which have, over time, come to constitute the main tools for establishing and maintaining this [apartheid] system, and which discriminate against and segregate Palestinians in Israel and the OPT today" include control over "Palestinian refugees' right to return."[368]

[364] Ibid., p.898.
[365] Threshold, p.170-171.
[366] Ibid., p.206.
[367] UNRWA claims there are more than five million descendants of Palestinian refugees. https://www.unrwa.org/palestine-refugees
[368] Amnesty, p. 61.

The factual analysis presented by the apartheid narrative proponents is ahistorical and the legal claims are not well-grounded. Approximately 700,000 Palestinians were displaced as a result of the 1948 war, while several hundred thousand Jews expelled from Arab countries during and in the immediate years following the war were absorbed by Israel.[369] Achieving a settlement for both Arab and Jewish refugees was a subject of significant concern for the international community, resulting in the establishment of a UN Conciliation Commission.[370] The US, France, and Turkey served as members.

The Commission was established pursuant to UN General Assembly Resolution 194. This resolution is cited by proponents of the apartheid claim as the source of a customary international law rule obliging a Palestinian "right of return". Yet a textual review of Resolution 194 shows that it does not mandate wholesale return to Israel of Palestinians displaced in the 1948 War, nor of their descendants. Instead, it "permits", if "practicable," involved countries to allow both Jewish and Arab refugees who wish to "live at peace with their neighbours" to return to their homes. In lieu of returning, the resolution suggests that compensation be paid for lost or damaged property "by the Governments or authorities responsible." Resolution 194 notes that compensation should be based on principles of "international law or in equity," which weighs against any unfettered "right of return." As noted by Professor Eyal Benvinisiti, reliance on Resolution 194 to confer such a right is "baseless".[371]

A multi-state settlement was a core principle to resolve the refugee problem. Another principle was that the issue would be solved through repatriation and resettlement,

[369] Israel Ministry of Foreign Affairs, "Jewish refugees expelled from Arab lands and from Iran," 30 November 2017, https://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Jewish-refugees-expelled-from-Arab-lands-and-from-Iran-29-November-2016.aspx. In the decades that followed, close to a million Jews were forced from Arab countries. Carole Basri, "The Jewish Refugees from Arab Countries: An Examination of Legal Rights - A Case Study of the Human Rights Violations of Iraqi Jews," 26 Fordham J. of International Law 656 (2002).
[370] UNGA Resolution 194, text available at https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/creation%20of%20a%20conciliation%20commission-%20general%20ass.aspx; The Conciliation Commission was unsuccessful in obtaining a settlement on the refugee issue, but nevertheless, continues to annually report to the General Assembly. See listing of reports by the Commission at https://www.un.org/unispal/document-source/united-nations-conciliation-commission-for-palestine-unccp/.
[371] Eyal Benvenisti, "International Law and the Right of Return," *Palestine Israel Journal*, p. 44 (2009), available at https://www.corteidh.or.cr/tablas/R22718.pdf.

not return to Israel alone.[372] At no time did the international community view Israel as solely responsible for the problem, nor did it expect Israel to bear the sole burden of repatriating refugees and their descendants.[373] In fact, and contrary to the NGOs' narrative, Israel agreed to accept the return of up to 200,000 refugees, but neighbouring Arab states refused to resettle any "for political as well as economic reasons."[374]

Reliance on international human rights law, in particular Article 12(4) of the ICCPR, as a basis for a Palestinian "right of return" to Israel is similarly unfounded. Article 12(4) of the Covenant prohibits the imposition of arbitrary restrictions on the right of a person to enter his own country. Zilbershats and Goren Amitai argue that Palestinian refugees do not satisfy Article 12(4), as the State of Israel is not the "own country" of Palestinian nationals and, even if regarded as such, restrictions on Palestinians entry into Israel are not arbitrary as "such a development might endanger the existence of the state and the exercise of the Jewish people's right to self-determination within it."[375] This reflects that the immigration policy of a state is not based on historical right but on sovereignty,[376] as well as historical precedent.[377]

This interpretation is further supported by a 1 April 2003 report published by United Nations Secretary General Kofi Annan, as he then was, following a mission to Cyprus.

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[372] US Department of State, "Memorandum by the Coordinator on Palestine Refugee Matters (McGhee) to the Secretary of State," 22 April 1949, available at https://history.state.gov/historicaldocuments/frus1949v06/d608.
[373] Ibid.
[374] Ibid. See also Morris.
[375] Zilbershats and Goren Amitai, p.11-12. See also, p.66-67: "Return to the territory of the State of Israel of many of those who regard themselves as Palestinian refugees might severely prejudice the right of the Jewish people in Israel to national and cultural self-determination, public order in the state, the welfare of its citizens, irrespective of nationality or religion, and even the character of the state, its democratic spirit and its level of development. Accordingly, denying the right of the Palestinian refugees to decide whether or not they will exercise their 'right of return' is essential to the existence of the State of Israel and the welfare of its citizens and residents. Taking such an essential step for the peace and identity of a state cannot be regarded as an arbitrary deprivation of a right... [To] continue to survive nationally and culturally, the State of Israel is entitled to prevent the entry of a population group which is potentially huge, possesses a national and cultural hue that is manifestly different from the majority of the population and pursues an agenda which seeks to change the character of the state. The entry into the state of such a population would pose a real danger to the existence of the State of Israel and its self-determination as a Jewish state, even to the extent of its destruction as such. This is *a fortiori* the case in the face of a conflict which has deteriorated into violence between the two parties."" Zilbershats and Goren Amitai further note that this "reasoning is also relevant in relation to restricting the entry into Israel of a Palestinian who has married a citizen of the country and wishes to settle in the country within the framework of family unification" (p.12).
[376] Zilbershats and Goren Amitai, p.64.
[377] *See* Zilbershats and Goren Amitai, p.91 *citing* UNSC, S/2003/398, Report of the Secretary General on his mission of good office in Cyprus. The Security Council welcomed the Secretary General's plan in S/RES/1475 (2003).

Annan "noted in the report that a distinction had to be drawn between the problem of the refugees in Cyprus and the problem in Bosnia and Herzegovina and stated that it would be inappropriate to apply the solution of sweeping reparation, adopted in the Dayton Agreement, to Cyprus. Annan explained the difference in identifying the appropriate solution by emphasizing that it had to do with the lapse of time – i.e. the fact that the events in Cyprus had taken place 30-40 years previously and that during the interim period the displaced persons had rebuilt their home and become integrated into society and the economy. Accordingly, he asserted, it was impossible to restore the previous situation. Repatriation was only possible where it was proposed in response to a recently generated refugee problem." [378]

Importantly, the PLO and Israel have agreed that the resolution of Palestinian refugee settlement is reserved in the Oslo Accords as a final status issue to be negotiated between the parties.[379] HRW's approach effectively invites a fact finder to conclude that Israel's failure to pre-empt those final status negotiations through unilateral resolution of the Palestinian refugee question represents the commission of an inhumane act.

Intent to Establish and Maintain an Institutionalised Regime of Domination and Oppression

Whereas certain authors are blunt in equating the "purpose of maintaining Israel as a Jewish State" with a "core purpose of racial domination,"[380] others frame a (continuing) Israeli intent to maintain control over the State of Israel, the West Bank, and Gaza as reflective of an intent to establish and maintain domination for the purposes of establishing the *mens rea* element of the crime of apartheid.[381]

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[378] *Ibid.*
[379] Oslo "Declaration of Principles," Article V(3). https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx; https://www.washingtoninstitute.org/policy-analysis/assessing-oslo-stalemate-problems-and-solutions
[380] Erakat EJIL; 2017 ESCWA Report, p.2.
[381] See Threshold, p.49. Section III is titled "Intent to Maintain Domination" and HRW state that that "Israeli government policy… to engineer and maintain a Jewish majority in Israel and maximize Jewish Israeli control over land in Israel and the OPT… amounts to an intent to maintain domination by one group over another."

For Dugard and Reynolds, Israeli settlers' "mere presence" in the West Bank "violates Article 49(6) of the Fourth Geneva Convention."[382] Alleging that Israel fails to "facilitate the lives of Palestinians", in particular by "constructing or maintaining hospitals, schools and universities for the benefit of the protected population,"[383] they conclude that the "only inference that can be drawn from the institutionalized and systematic regime of inhuman acts and discrimination (unashamedly premised on an ideology of entitlement) towards the Palestinian people is that Israel intends to secure the domination of Jewish Israelis over Palestinians."[384]

HRW frames the functions of the Jewish National Fund (JNF), the Jewish Agency, and the World Zionist Organization (WZO) as reflecting an intent to dominate (i.e., for HRW, control) Palestinians.[385] Israeli urban and spatial development is said to be reflective of this intent,[386] as are alleged limitations on Palestinians' rights to citizenship and residency in East Jerusalem.[387] Above all, the intent to dominate is argued to be reflected by the predominance of demographic concerns as providing an impetus for Israeli policy.[388] HRW argues that Israel's intention to control the West Bank, the disproportionate nature of security measures it takes in order to effectuate such control, and their purported illegality under international law together reflect an intention to dominate the Palestinian population irrespective of security motives.[389]

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[382] Dugard and Reynolds, p.904. The authors cite to UN SC Res. 446 of 22 March 1979 and *Legal Consequences of the Construction of a Wall* [2004] ICJ Rep 136, para. 120. This echoes the HSRC, which argues that "the very existence of the settlers impedes public order and civil life and constitutes a breach of the laws of occupation." HSRC Report, p.90.
[383] Dugard and Reynolds, p.911.
[384] Dugard and Reynolds, p.911.
[385] Threshold, p.54-56. See also Dugard and Reynolds, p.900 *citing* World Zionist Organization, 'Master Plan for the Development of Settlement in Judea and Samaria 1979-1983' (October 1978), available as an annex to UN Doc A/34/605-S/13582, 22 October 1979; p.901 *citing* World Zionist Organization, *Settlement in Judea and Samaria – Strategy, Policy and Plans* (September 1980), available as an annex to UN Doc A/36/341-S/14566, 19 June 1981.
[386] "Threshold," p.57. According to Dugard and Reynolds, the "primary impetus of the commission of the practices of the Israeli civil and military authorities in the occupied Palestinian territory is to insulate and privilege Jewish settlements and settler infrastructure, and to ensure that Palestinians intrude as little as possible on the lives of settlers." Dugard and Reynolds, p.904.
[387] "Threshold," p.63.
[388] The Jerusalem "bolt" is framed as "aimed at bolstering Israeli Jewish control over the city." Threshold, p.64, 65. The same demographic considerations are argued to apply in the West Bank. Threshold, p.66.
[389] "Threshold," p.67: "Allon certainly appeared motivated by a desire to safeguard the security of Israel and its citizens, as have subsequent officials. Some regard the settlement enterprise as vital for security. Whatever the motive, it is unacceptable to pursue this aim through a strategy of seeking to dominate Palestinians, maintaining a discriminatory system, and engaging in tactics that either have an insufficient security justification or otherwise violate international law. An intent to ensure security neither negates an intent to dominate, nor grants a *carte blanche* to undertake policies that go beyond what international law permits. While security grounds can justify a range of restrictive measures under international humanitarian and human rights law, a strategy that seeks to promote security by ensuring the

One implication of this analysis, as alluded to by Milanović,[390] is that there appear to be two, separate cases alleging Jewish Israeli "intention to dominate" Arab Palestinians. The first (made by Amnesty, Erakat, Dugard and Reynolds and the ECSWA) frames Zionism itself as an "ideology of entitlement," reflecting an intention to maintain Jewish supremacy. The second (made by Sfard and Human Rights Watch) frames Israeli intent to control the West Bank as reflecting the intention to dominate.[391] For the reasons provided in *False Knowledge as Power*, defining "domination" as "control" for these purposes expands the scope of the element's definition; instead, it, the element more properly understood through the prism of racial supremacy.[392] The analysis which follows therefore focuses on the latter allegation.

Israeli Intent in the West Bank and Gaza Strip

Dugard and Reynolds' framing relies on the proposition that Jewish Israeli settlers' "mere presence" in the West Bank constitutes a violation of international law, and in particular Article 49(6) of the Fourth Geneva Convention.[393] Israel's position, with respect to the legal status of West Bank territory, is that sovereignty over the area is in abeyance.[394] While such a situation subsists, Israel applies humanitarian provisions (i.e. those provisions which protect the interests of the local population, as opposed to the reversionary sovereign) in the territory.[395] Thus, Israel's Supreme Court has held

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demographic advantage of one group of people through discrimination or oppression has no basis under international law."

[390] Marko Milanovic, "Symposium Introduction: Apartheid in Israel/Palestine?" EJIL, https://www.ejiltalk.org/symposium-introduction-apartheid-in-israel-palestine/

[391] See definition of "domination" supra at p.10. See also p. 13, where Human Rights Watch refer to Israel's intention as expressed in 1980s Drobles Plan which, according to HRW, "guided the government's settlement policy in the West Bank at the time and built on prior plans, called for authorities to 'settle the land between the [Arab] minority population centers and their surroundings,' whilst noting that doing so would make it 'hard for Palestinians to create territorial contiguity and political unity' and 'remove any trace of doubt about our intention to control Judea and Samaria forever.'" See also p.72: "While officials have sometimes maintained that measures taken in the occupied West Bank are temporary, the government's actions and policies over more than a half-century make clear the intent to maintain their control over the West Bank in perpetuity."

[392] See supra p. 17.

[393] See also Dugard and Reynolds, p.904; see infra p. 91.

[394] Memorandum by the Office of the Attorney General of the State of Israel, 20 December 2019, para. 22. See also Allan Gerson, Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank, Harvard International Law Journal 14(1), 1-49, p. 27 *citing* Lord Mc Nair in the *International Status of Southwest Africa Case* [1950] ICJ at 50.

[395] See.g. Zilbershats, EJIL, p.919 citing e.g. HCJ 606/78, Ayyub v Minister of Defence, PD 33(2) 113 (1978), at 131; Jam'iat Iscan v Commander of the IDF Forces in the Area of Judea and Samaria, PD 37(4) 785 (1983), at para. 12; HCJ 351/80, The Jerusalem District Electric Company v The Minister of Energy and Infrastructure, PD 35(2) 673 (1981), at 690; HCJ 1661/05, The Gaza Coast Regional Council v The Knesset, PD 59(2) 481, at para. 3; HCJ 7957/04, Zaharan Yunis Muhammed Mara'abe v The Prime Minister of Israel, PD 60(2) 477 (2005), at para. 22

that the West Bank has "special status" and as such it is not a territory of a "hostile state."[396] Accordingly, the Court applies customary norms of international humanitarian law *de facto* to settlements cases.[397] *De jure* legal classification of the situation as one of "belligerent occupation" is "inappropriate."[398] As belligerent-occupancy presupposes the existence of an ousted legitimate sovereign possessing reversionary rights to the occupied area, Israel argues that it cannot be termed as such as a matter of law.[399] It is submitted that Israel's understanding of the legal status pursuant to which it holds the West Bank is relevant to understanding the State's intentions with respect to the area.

To illustrate this intention, it bears recalling that in September 1967, Theodor Meron, then Legal Advisor in the Israeli Ministry of Foreign Affairs, wrote an opinion addressed to the Political Secretary to Israel's Prime Minister in which he concluded that "civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention."[400] Meron further noted that the prohibition on transfer by an occupying power of parts of its own civilian population into the territory it occupies (contained in Article 49(6) of the Fourth Geneva Convention) "is categorical and not conditional upon the motives for the transfer or its objectives."[401] However, in Meron's opinion, in 1967, whereas the Golan Heights lay "outside the area of the mandated Land of Israel" and "are unequivocally 'occupied territory'" (and therefore "subject to the prohibition on settlement"), the position in the West Bank was arguably

[396] Ayyub, p.13. See also The Levy Commission Report on the Legal Status of Building in Judea and Samaria, 21 June 2012 (hereinafter 'Levy Commission'), pp.5-14.
[397] See The Law of Belligerent Occupation in the Supreme Court of Israel, 210: "In the first petitions challenging acts of the military authorities in the OT, the petitioners based their arguments on the norms of belligerent occupation, as expressed in the Hague Regulations and the Fourth Geneva Convention. When the Court required them to reply to these petitions, the authorities were forced to take a position on whether these norms were indeed applicable. They initially attempted to hedge their bets by arguing that, even though it was not clear whether the territories were indeed occupied, in practice the military authorities complied with the norms of belligerent occupation and were therefore prepared for their actions to be assessed under these norms. After a short time this caveat fell away and, alongside the rules of administrative law that apply to actions of all branches of the Israeli executive, the framework of belligerent occupation became the standard legal regime for assessing actions of the authorities in the OT." citing HCJ 337/71, Christian Society for the Holy Places v Minister of Defence; HCJ 256/72, Electricity Company for Jerusalem District v Minister of Defence et al.; Hilu v Government of Israel; Ayyub.
[398] Gerson, p.9, 39. See also Statement of YS Shapiro on 27 June 1967 – see footnote 25 of Gerson.
[399] Gerson, p.9. See also Roberts – but note Roberts' conclusions with respect to Israel.
[400] See T. Meron, *Standing up for Justice: The Challenges of Trying Atrocity Crimes* (Oxford 2021), p.10-13. A full translation is available at http://www.hamoked.com.
[401] *Id.*

more equivocal. At the time, Meron acknowledged that Israel's opinion (which he shared through use of the pronoun "we") was as follows:

> In terms of settlement on the [West] Bank, we are trying not to admit that here too it is a matter of 'occupied territory.' We argue that this area of the Mandate on the Land of Israel was divided in 1949 only according to Armistice Lines, which, under the Armistice agreements themselves, had merely military, not political, significance and were not determinative until the final settlement. We go on to say that the agreements themselves were achieved as a temporary measure according to Security Council action based on Article 40 of the United Nations Charter. We also argue that Jordan itself unilaterally annexed the West Bank to the Kingdom of Jordan in 1950 and that the Armistice Lines no longer exist because the agreements expired due to the war and Arab aggression.

Meron went on to consider specific locations in the West Bank. With "regard to Gush Etzion, settlement there could to a certain extent be helped by claiming that this is a return to the settlers' homes." In the Jordan Valley, however the legal situation was "more complicated because we cannot claim to be dealing with people returning to their homes." At the same time, Meron advised caution as "the international community has not accepted our argument that the [West] Bank is not 'normal' occupied territory and that certain countries (such as Britain…) have expressly stated that our status in the [West] Bank is that of an occupying state." Meron added that "even certain actions by Israel" were inconsistent with the claim that the West Bank was not occupied.[402] Israeli official intent, as reflected by Meron's 1967 memorandum, was clear. Israel had a good faith claim to permit Israeli settlement in the West Bank as the territory was not "normal" occupied territory. This claim was fortified in areas from where Jews had been forcibly transferred during the conflict of 1948.

[402] There is, however, an apparently irreconcilable tension between these passages of Meron's 1967 Opinion and his 2017 article. *See* T. Meron, "The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War," American Journal of International Law, Vol. 111(2), April 2017, pp. 357 – 375.

In a similar way, a legal opinion made publicly available by the Israeli Ministry of Foreign Affairs in 2015 echoed these early intentions: "At issue is the right of Jews to reside in their ancient homeland, alongside Palestinian Arab communities, in an expression of the connection of both peoples to this land."[403] With respect to the applicability of the Fourth Geneva Convention, the 2015 opinion stated that Article 49(6) of the Fourth Geneva Convention does not "prohibit the movement of individuals to land which was not under the legitimate sovereignty of any state and which is not subject to private ownership."[404] Israel recognised that "Palestinians also entertain claims to this area," and it was "for this reason that the two sides have expressly agreed to resolve all outstanding issues, including the future of the settlements, in direct bilateral negotiations to which Israel remains committed."[405]

Meron's 1967 opinion, together with Israel's Ministry of Foreign Affairs' opinion of 2015, demonstrate that Israel's official intent with respect to settlement of the West Bank relates, at least in part,[406] to the right of Jews to reside in their homeland, alongside Palestinian communities. This contrasts with the mischief which the prohibition contained in Article 49(6) of the Fourth Geneva, as described by Pictet, "is intended to prevent," namely "a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories,"[407] arguably analogous to an intention to establish and maintain an regime of domination. Jackson is therefore correct in finding that "depending on the specific context, a state's differing treatment of a community of its nationals in occupied territory *vis-à-vis* a racial group constituting, or within, the category of protected persons may, in fact, entail a relationship of domination which the prohibition of apartheid seeks to prevent."[408] However, Israel's intention to secure the right of a people to reside in their ancient homeland, alongside Palestinian communities,

[403] Ministry of Foreign Affairs, 'Israeli Settlements and International Law", (30 November 2015)
[404] Ibid.
[405] Ibid.
[406] See infra p. 90.
[407] Jean Pictet, *Commentary on the Geneva Conventions of August 12 1949* (1958), p. 283.
[408] Jackson, p.26.

together with an intent to protect Israeli population centres,[409] cannot be said to entail an intention to establish and maintain such a relationship of domination and oppression, even if *arguendo* the legal basis upon which that intention is grounded is mistaken, as argued by Meron in 2017.[410]

The Oslo Accords as an Instrument of Israeli Control or Palestinian Autonomy and a Path to Independence and Statehood?

HRW draws a problematic parallel between parts of the West Bank prioritised for settlement development by Matiyahu Drobles in 1980[411] and "the division of the territory under the Oslo Accords of the 1990s between the areas where Israel maintains full control (Area C) and where Palestinian authorities manage some affairs (Areas A and B)."[412] The problematic implications of HRW's position are reflected by this comparison. In its assessment of Matiyahu Drobles' plan, HRW omits that the plan notes that the "civilian presence of Jewish settlements is vital for the security of the state," in the context of a security outlook that, in 1980, reflected a "large eastern rejectionist front which includes Syria, Iraq, Iran and Saudi Arabia…"[413]

[409] See infra pp. 90-93. See also A. Sharon, Warrior (1985), p.368
[410] T. Meron, "The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War," American Journal of International Law, Vol. 111(2), April 2017, pp. 357 – 375. See also Y. Ronen, Taking the Settlements to the ICC? Substantive Issues, January 2017, AJIL Unbound 111:57-61: "For almost fifty years Israel has been consistently obliterating the distinction between itself and the settlements (or the West Bank more generally). In maps and legally, the boundaries of sovereign Israeli territory have been intentionally obfuscated. The construction of the Separation Barrier has only exacerbated public misconceptions. It is therefore not surprising that with respect to certain parts of the West Bank (such as the Jordan Valley, not to mention Jerusalem), many Israelis are not aware that these are occupied land. In addition, for almost fifty years the government has been propagating the view that the territory of the West
Bank is not occupied because it had not been taken from a sovereign. This view has been endorsed by lawyers at the highest level. Thus, a person might know that transfer of civilian population to occupied territory is prohibited, but be factually mistaken about the West Bank being "occupied" because of a legal mistake as to the definition of "occupation."
[411] In 1978, Israeli settlement planning in the West Bank was directed by the Rural Settlement Division of the World Zionist Organization, headed by Matiyahu Drobles, a member of the Herut party (one of the original components of the Likud Party). The first settlement plan, drawn up by the WZO in 1978, envisaged a chain of settlement 'blocs' along the densely populated highlands of the West Bank. It is correct that the plan stated that the objectives of the settlements were to "reduce to the minimum the possibility for the development of another Arab state in these territories" and to make it difficult for the local Palestinian population "to form a territorial and political continuity." Matiyahu Drobles, *Settlement in Judea and Samaria: Strategy, Policy and Planning* (WZO Settlement Division 1980) 3. See also Kretzmer and Ronen, p.180.
[412] "Threshold," p.69.
[413] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 28 September 1995 (hereinafter "Interim Agreement").

By contrast, and as previously mentioned, by the mid-1990s Israel and the PLO had signed a series of historic agreements under the "Oslo Peace Process", jointly establishing the Palestinian Authority (PA) and gradually transferring authority over parts of the West Bank and the Gaza Strip to it. The interim arrangement, agreed in 1995 (the "Interim Agreement") divided control over the West Bank between the PA and the Israeli military government into three-regions. It states that the peace process and "new relationship" that it established were "irreversible."[414] The process's goal was to achieve a "Permanent Status Agreement" between Israel and the PLO. The Oslo Accords' principles were witnessed by representatives of the international community and reaffirmed by the Parties in the 1998 Wye River Memorandum,[415] the 1999 Sharm El Sheikh Memorandum,[416] as well *inter alia* in the 2003 Road Map,[417] which in turn was reaffirmed in Security Council Resolution 2334. To date, the parties have failed to reach such an agreement, resulting in the West Bank being transfixed in the Interim Agreement.[418]

By eliding the purpose of the Oslo Accords with the Matiyahu Drobles' plan of 1980, HRW draws a straight line running from 1967's Allon Plan[419], to Ariel Sharon's proposals of 1977,[420] to the Drobles Plan of 1980, on to the Oslo Accords, and beyond. This framing obscures the consensual nature of the Oslo agreements and the new era that they established, as reflected by the PLO's agreement to pursue the course of negotiations with Israel. This agreement was made freely, pursuant to, and in exercise of the Palestinian people's right to self-determination.[421] The Interim Agreement would not have been witnessed by the President of the United States, and representatives of *inter alia* Russia, Egypt, Jordan, Norway and the EU had it not been.[422] The Oslo

[414] Interim Agreement, Preamble, para. 4.
[415] Israel-Palestinian Liberation Organization, Wye River Memorandum, 1998, 37 ILM 1251 (1998).
[416] Sharm-el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, 1999, 38 ILM 1465 (1999).
[417] Letter Dated 7 May 2003 from the Secretary-General addressed to the Security Council, Annex: A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli- Palestinian Conflict, U.N. Doc. S/2003/529, 30 April 2003.
[418] Interim Agreement.
[419] See, e.g. "Threshold," p.67.
[420] See e.g. "Threshold," p.67.
[421] Peter Malanczuk, "Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law." *EJIL.* 7 (1996) p.493-494.
[422] The Interim Agreement was signed by Yitzhak Rabin (Israel), Shimon Peres (Israel), and Yasser Arafat (PLO). It was witnessed by President William J. Clinton (USA), Secretary Warren Christopher (USA), Andrei V. Kozyrev (Russian Federation), Amre Moussa (Egypt) Hussein Ibn Talal (Jordan), Bjorn Tore Godal (Norway), and Felipe Gonzalez (EU).

process did not intend to establish and maintain a regime of domination in the West Bank, contrary to the claims of HRW, Amnesty, and others, but rather a regime of Palestinian autonomy and a path to Palestinian statehood. HRW's elision of the purpose sought to be achieved by Matiyahu Drobles' plan and the Oslo Accords reflects an ahistorical methodology which strips away context to reveal a linear, continuous, Israeli intention to dominate, whilst depriving Palestinian and Arab actors of their agency.

Conclusion on Mens Rea

Noting differences between the *mens rea* elements contained in the Apartheid Convention and Rome Statute definitions of apartheid, the HSRC report asserts that it "could be argued that Israeli practices are not intended to maintain a relation of Jewish domination over Palestinians in the OPT comparable, for instance, to white dominion over blacks in South Africa, but are only temporary measures to keep order imposed on Israel by circumstances of conflict, until a peace agreement removes the need for domination."[423] Dugard and Reynolds reply that, as "was the case in apartheid South Africa – where 'executive detention' was employed on a lesser scale – measures pursued by the state in denial of the rights to life and liberty of person of a particular group are implemented primarily to eliminate dissent or resistance to Israeli rule."[424] They assert that "the aim of suppressing political opposition to Israel's rule is manifest", and cite travels bans, the closure of "charitable, educational and cultural organizations affiliated to Hamas and other banned political parties, as well as the imposition of indefinite travel bans on human rights defenders," and allegations of excessive force.[425]

HRW further claims that Israeli actions and policies dispel the notion that occupation is intended to be temporary. They allege that officials' actions and policies, including the continuing of land confiscation, the building of the security barrier in a way that

[423] HSRC Report, p.166.
[424] Dugard and Reynolds, p.895. One must question Dugard's and Reynolds' judgment if they consider Hamas, an internationally designated terrorist organization, motivated by a jihadist and genocidal ideology, responsible for the murder and maiming of thousands, to be an "oppressed" and legitimate political opposition.
[425] Dugard and Reynolds, p.902.

accommodates anticipated growth of settlements, the seamless integration of the settlements' sewage system, communication networks, electrical grids, water infrastructure and a matrix of roads with Israel proper, as well as a growing body of laws applicable to West Bank Israeli settlers, but not Palestinians, serve to prove this. The possibility that a future Israeli leader might forge a deal with Palestinians that dismantles this discriminatory system and ends systematic repression, HRW says, does not negate the intent of current officials to maintain the current system, nor the current reality of apartheid and persecution.[426]

Yet we have seen that the system of laws applicable to Israelis and Palestinians in Area C results from Israel's application of provisions of the law of belligerent occupation to protected persons in the area,[427] while domestic law is applied extraterritorially to Israeli citizens present there on a personal basis. This arrangement does not establish a basis to allege the imposition of an arbitrary system.[428] The temporary nature of the situation has been stressed by both the Israeli government and the Israeli Supreme Court, which also emphasises that the future of the settlements and their residents will be determined by consensually agreed upon political processes and agreements between the parties.[429]

After talks at Camp David convened by President Bill Clinton failed to reach agreement in July 2000, violence erupted in the West Bank and led to what came to be known as the second *intifada*. A few months into the fighting, Palestinian groups launched a series of terrorist attacks aimed at Israeli civilians both in Israel and the territories, injuring and killing thousands. As a response, in March 2002 the IDF mounted a military campaign in the West Bank, and a security barrier was constructed to prevent potential terrorists from entering Israel.[430] For Israel's part,

[426] "Threshold," p.19.
[427] The lex specialis outlook on the law of belligerent occupation has also been endorsed by the Israel Supreme Court, notably in the Ajuri case 560 (sitting in a special panel of nine Justices) and in the Targeted Killings case 561 (both per President Barak)." Dinstein, para 268 (p.98).
[428] As to the sustainability of Israel's position that sovereignty over the area is in abeyance.
[429] Zilbershats, p.922 *citing Ayyub*, paras. 12, 23, 27; *Jerusalem District Electric Company*, para. 13; *Gaza Regional Council*, para. 8; *Zaharan Yunis Muhammed Mara'abe*, paras. 15, 22; *Shlomo Valiro v The State of Israel* (2011), paras. 47-49, 52-58. [See Kretzmer and Ronen on Blum for position of the Government]
[430] Kretzmer and Ronen, p.11-12.

these efforts reflected an intention to establish and maintain peace and security and to provide ad hoc but urgent responses to the dire humanitarian situation arising from widespread and indiscriminate attacks against its civilian population. This is far from reflecting an intention to establish and maintain a regime of systematic oppression and domination.

Part III – Conclusion

For more than one hundred years, and formalized in the UN Partition Plan of 1947, the international community proposed and decided in favour of setting up Israel as a "Jewish state"; in other words, a homeland and haven for the Jewish people. Everything that naturally derives from that definition, including 1950's Law of Return, meets human rights norms accepted by the free world today, not just those of 1947.[431] A Jewish state "means no more and no less than that Israel was established as an expression of the Jewish people's right to a homeland and to an independent state – the right of national self-determination."[432]

With respect to the West Bank, as Richard Goldstone has written, the situation is more complex. But the foregoing discussion shows that here too there is no intent to establish or maintain "an institutionalised regime of systematic oppression and domination by one racial group over another," but rather to permit Jews and Palestinians to reside in their ancient homeland together, "in an expression of the connection of both peoples to this land."[433] South Africa's enforced racial separation was intended permanently to benefit the white minority, to the detriment of other "races." By contrast, Israel has accepted and made multiple offers to settle the conflict, including the establishment of a Palestinian state and through withdrawal of Jewish communities from the Gaza Strip and parts of the West Bank. Until there is a resolution to the conflict, or at least as long as Israel's citizens remain under threat of attacks from the West Bank and Gaza Strip, Israel will see roadblocks and similar measures as necessary for self-defence, even as Palestinians argue they remain oppressed and under the yoke of military occupation.[434]

Our analysis has demonstrated that there is no reasonable basis to support the charges of apartheid against Israel and its officials. Every country across the globe

[431] Yakobson and Rubinstein, p.2.
[432] Yakobson and Rubinstein, p.2.
[433] Ministry of Foreign Affairs, 'Israeli Settlements and International Law", (30 November 2015)
[434] Goldstone, "Israel and the Apartheid Slander," *New York Times*, 31 October 2011.

struggles to protect the principle of equality and rooting out racial and other forms of discrimination. Israel is no exception.

We also recommend that the Israeli government undertakes its own further study on allegations of institutional discrimination affecting all ethnic and national groups living under its jurisdiction, including the Palestinian population. The Israeli government may wish to evaluate, and strengthen where necessary, oversight and complaint mechanisms that specifically address allegations of institutional discrimination, including racial discrimination, perhaps under the auspices of the State Comptroller. This might be addressed through the establishment of an Israeli National Human Rights Institution. The Israeli government could improve, and where lacking, establish formal procedures for the collection of data on issues relating to discrimination, including discrimination affecting the Israeli Arab and Palestinian population, and in Area C of the West Bank. These data should be made publicly available. While it is true that Israel has undertaken such measures historically, too often, information on issues relating to discrimination are not readily available to civil society, government officials, and international institutions. The implementation of these measures is not only important to track areas inequalities that require remedy, and to facilitate the creation and implementation of those improvements, but also to blunt attacks made by those NGOs and UN rapporteurs who might instrumentalise the legal and factual vacuum in order to metastasize a real issue (namely, potential unlawful discrimination in areas under the jurisdiction of the State of Israel) into an attack on the legitimacy of Israel's existence as a Jewish State (through the adoption of the discourse of apartheid).

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