

# 1. The Legal Context

## Short History of the Prohibition of Apartheid

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The prohibition of apartheid in international human rights law draws primarily from two areas: (1) prohibitions of discrimination on the basis of race; and (2) rejection of the racist regime that governed in the Republic of South Africa between 1948 and 1992.<sup>6</sup>

The prohibition of racial discrimination traces to the earliest principles of the United Nations. While a full list would overburden this report, foundational statements include Article 55 of the United Nations Charter and article 2 of the Universal Declaration of Human Rights (1948). Later instruments, particularly the International Convention on the Elimination of All Forms of Racial Discrimination, spelled out the prohibition in greater detail. Thus Member States of the United Nations are obligated to abide by the prohibition of apartheid whether or not they are parties to the Apartheid Convention.

The juridical history of international rejection of apartheid in South Africa dates to the early years of the existence of the United Nations. General Assembly resolution 395(V) of 1950 was the first to make explicit reference to apartheid in southern Africa, which it defined as a form of racial discrimination.<sup>7</sup> Resolution 1761(XVII) of 1962 established what came to be called the Special Committee against Apartheid.<sup>8</sup> In the preamble to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, alarm is expressed about “manifestations of racial discrimination still in evidence in some areas of the world... such as *policies of apartheid, segregation or separation*” (emphasis added). In article 3, signatories to the Convention “particularly condemn *racial segregation and apartheid* and

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<sup>6</sup> The precise date given for the end of apartheid varies with the benchmark used: decriminalization of the African National Congress (ANC) in 1990; the launching or closure of the CODESA (Convention for a Democratic South Africa) talks in 1991 or 1993 respectively; the assassination of Chris Hani in 1993, which triggered the capitulation of the apartheid regime; the election of Nelson Mandela as President in 1994; or passage of the new Constitution in 1995. Taking the meaningful collapse of apartheid’s legitimacy as a rough signpost, the fall of apartheid is here dated to 1992.

<sup>7</sup> Resolution 395(V) addressed racial discrimination against people of Indian origin in South Africa (A/RES/395(V)). Concern for that population had been expressed earlier, beginning with resolution 44 (I) of 1946 (A/RES/44(I)).

<sup>8</sup> A/RES/1761(XVII).

undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction” (emphasis added).

The Apartheid Convention of 1973 classifies apartheid as a crime against humanity (in articles I and II) and provides the most detailed definition of it in international law.<sup>9</sup> It also clarifies international responsibility and obligations with regard to combating the crime of apartheid. In the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter Additional Protocol I to the 1949 Geneva Conventions), apartheid is defined as a war crime. The 1998 Rome Statute of the International Criminal Court (ICC), hereinafter the Rome Statute, lists apartheid as a crime against humanity (article 7 (1) (j)), bringing its investigation and possible prosecution under the jurisdiction of the ICC.

Although only 109 States are parties to the Apartheid Convention, most States (currently 177) are parties to the International Convention on the Elimination of All Forms of Racial Discrimination, under which they commit themselves to “prevent, prohibit and eradicate” apartheid (article 3). As of 31 January 2017, 124 States had ratified the Rome Statute. Hence, most States have a legal responsibility to oppose apartheid and take measures to end it wherever it may arise. That responsibility concerns not only human rights violations resulting from apartheid but the threat it poses to international peace and security. The Apartheid Convention further provides that States parties should act at the national level to suppress and prevent the crime of apartheid, through legislative action and prosecutions and legal proceedings in any competent national court.

**This report proceeds on the assumption that apartheid is a crime against humanity and that all Member States of the United Nations are legally responsible for acting to prevent, end and punish its practice.**

## Alternative definitions of apartheid

Arguments about whether a State practices apartheid rest on how apartheid is defined. Several definitions are currently used in polemical debate with regard to Israel, which is frequently labelled an “apartheid State” for its practice of discrete

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<sup>9</sup> When the Convention was drafted, apartheid had already been described as a crime against humanity by the General Assembly, as in resolution 2202 (XXI) of 1966 (A/RES/2202(XXI) A-B).

“acts of apartheid”, such as the “apartheid wall”.<sup>10</sup> Those who insist that Israel cannot be held culpable for apartheid argue that the country’s laws are fundamentally different from those of apartheid South Africa: for example, because Palestinian citizens of Israel have the right to vote.<sup>11</sup> These diverse arguments arguably fall outside a study grounded in the tenets of international law as set forth in the pertinent instruments, but a quick overview of them here is warranted. This brevity should not be taken to imply a dismissal of such definitions, which have their place beyond strict considerations of international law. Rather, the overview serves to explain why they are not employed in this report. Neat divisions cannot always be made between these definitions, and some clearly overlap, but they can be identified as types or tendencies.

1. Defining only regimes consistent with the apartheid regime in South Africa as being apartheid, so that, by definition, digressions from South African practices preclude any charge of apartheid.
2. Treating discrete practices considered to have qualities of apartheid, such as the so-called “apartheid wall” (“separation fence” or “separation barrier” in official Israeli discourse), as signifying that a State has established a comprehensive apartheid regime.
3. Defining apartheid as the outcome of anonymous structural global forces, such as global corporate influences or neoliberalism, as enforced by Bretton Woods institutions.
4. Defining apartheid as the aggregate body of private racist practices by the dominant society as a whole, whereby State involvement is a contingent tool for enforcing a draconian social system based on racial hierarchy, discrimination and segregation.
5. Treating apartheid as pertaining only to Palestinian citizens of Israel, or only to Palestinians in the occupied territory, or excluding Palestinian refugees and involuntary exiles living outside territory under Israeli control.<sup>12</sup>

These types of definition, and the reasons that make them unsuitable for this report, are elaborated upon below.

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<sup>10</sup> A literature review of such references exceeds the scope of this report.

<sup>11</sup> CERD/C/ISR/14-16.

<sup>12</sup> Palestinians expelled from the occupied Palestinian territory by Israel and not allowed to return.

## 1. The comparison with southern Africa

Arguments about whether Israel has established an apartheid regime often compare the policies and practices of Israel with the system of apartheid in southern Africa (South Africa and Namibia).<sup>13</sup> The very term “apartheid” may suggest that the system of racial discrimination as practised by the South African regime constitutes the model for a finding of apartheid elsewhere.<sup>14</sup> The comparison does sometimes provide illuminating insights: for instance, by clarifying why existing proposals for a two-State solution in Mandate Palestine are most likely to generate a Palestinian Bantustan.<sup>15</sup> Such insights are found by examining the South African distinction between so-called “petty apartheid” (the segregation of facilities, job access and so forth) and “grand apartheid”, which proposed solving racial tensions with the partition of South African territory and by establishing black South African “homelands” delineated by the regime. Be that as it may, the South African comparison will be mostly avoided in this report, because (1) such comparison contradicts the universal character of the prohibition of apartheid and (2) because apartheid systems that arise in different countries will necessarily differ in design. Nonetheless, because they tend to have much in common, this approach requires brief elaboration.

### (a) Reasons for the error of comparison

The first reason people turn to the South African case is that the collective memory of the South African struggle and the term “apartheid” itself encourage this error. On coming to power in 1948, the Afrikaner-dominated Nationalist Party translated its constituency’s long-standing beliefs about racial hierarchy into a body of racial laws designed to secure white supremacy and determine the life conditions and chances of everyone in the country on the basis of race. The Nationalists’ term for this comprehensive system was apartheid (Afrikaans for “apart-hood” or “separate development”).<sup>16</sup> The opposition to apartheid (coordinated by the African National Congress, the Pan-African Congress, the domestic United Democratic Front and

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<sup>13</sup> The term “southern” Africa reflects the practice of South Africa in extending apartheid to South West Africa (now Namibia), which South Africa had held under a League of Nations mandate and refused to relinquish after the Second World War.

<sup>14</sup> Afrikaans is the adapted Dutch of the indigenized Dutch-European “Afrikaner” settler society in southern Africa.

<sup>15</sup> For a study of how arrangements for the Palestinian Interim Self-Government Authority replicate the South African “homelands”, or Bantustans, see Virginia Tilley, “A Palestinian declaration of independence: implications for peace”, *Middle East Policy*, vol. 17, No. 1 (March 2010). Available from <http://mepc.org/journal/middle-east-policy-archives/palestinian-declaration-independence-implications-peace>.

<sup>16</sup> The National Party was the principal party in South Africa expressing the Afrikaner worldview and white-nationalist political goals. Hold-outs against United Nations denunciations of apartheid in South Africa included Israel, which maintained a close alliance with the regime throughout its duration, and the United States of America, which had close business ties with South Africa.

other southern African actors, as well as sympathetic international human rights networks) accordingly adopted the term in order to denounce it. The General Assembly did the same, using the term for a series of measures concerning South Africa. For many people, this long history of legal activism naturalized the association between apartheid and South Africa to the point of conflation.

That this conflation is a legal error can be seen in the history of usage through which the term gained universal application:

- 1962 – The General Assembly established the Special Committee on the Policies of Apartheid of the Government of South Africa, later renamed the Special Committee against Apartheid;
- 1965 – Under the International Convention on the Elimination of All Forms of Racial Discrimination, apartheid was classified as a form of racial discrimination (preamble and article 3) with no mention of South Africa;
- 1973 – The Apartheid Convention clarified that “inhuman acts” that constitute the crime of apartheid would “include” acts that are “similar to” those of apartheid South Africa;
- 1976 – The Secretariat of the United Nations set up the Centre against Apartheid;
- 1998 – Apartheid was listed in the Rome Statute as a crime against humanity, with no mention of South Africa.

That the term has come to have universal application is clarified by South African jurist John Dugard (a leading legal scholar of apartheid):

*That the Apartheid Convention is intended to apply to situations other than South Africa is confirmed by its endorsement in a wider context in instruments adopted before and after the fall of apartheid... It may be concluded that the Apartheid Convention is dead as far as the original cause for its creation – apartheid in South Africa – is concerned, but that **it lives on as a species of the crime against humanity**, under both customary international law and the Rome Statute of the International Criminal Court (emphasis added).<sup>17</sup>*

**This report assumes that the term “apartheid” has come to have universal application in international law and is accordingly not confined to the South African case.**

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<sup>17</sup> John Dugard, “Introductory note to the Convention on the Suppression and Punishment of the Crime of Apartheid”. Available from <http://legal.un.org/avl/ha/cspca/cspca.html>.

**(b) The paucity of precedents**

A second reason people turn to the South African comparison is that, because no other State has been accused of the crime of apartheid, South Africa stands as the only case providing a precedent. Given the importance of precedents in the interpretation of law, it is arguably natural for people to look at the “inhuman acts” of apartheid in southern Africa as the models or benchmarks for what apartheid “looks like”. For example, some claim that Israel clearly does not practise apartheid because Palestinian citizens of Israel have the right to vote in national elections, while black South Africans did not. That the design of apartheid regimes in other States must necessarily differ — due to the unique history of their societies and the collective experience shaping local racial thought, such as settler colonialism, slavery, ethnic cleansing, war or genocide — is neglected in such a simplified search for models.

Nevertheless, the case of southern Africa does serve to expose some legal arguments as specious. For example, it might be argued that the treatment by Israel of Palestinian populations outside its internationally recognized borders (that is, in the occupied Palestinian territory and abroad) falls beyond the scope of the question, making its policies on Palestinian refugees and Palestinians living under occupation irrelevant to a charge of apartheid. That this argument is unsupported is confirmed by reference to ICJ advisory opinions regarding the behaviour of South Africa in South West Africa (Namibia).<sup>18</sup> In 1972, the ICJ found South African rule over Namibia illegal partly on the grounds that it violated the rights of the Namibian people by imposing South African apartheid laws there.<sup>19</sup> South Africa was thus held to account for apartheid practices outside its own sovereign territory and in respect to non-citizens.

**This report assumes that the question of formal sovereignty is not germane to a finding of apartheid.**

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<sup>18</sup> In the 1960s, South Africa administered South West Africa (Namibia) as a fifth province and applied to it its doctrine of apartheid, complete with Bantustans. The policy attracted repeated criticism from the General Assembly.

<sup>19</sup> The ICJ was addressing the legality of South Africa’s continued rule of South West Africa in violation of a Security Council resolution calling for its withdrawal. See especially the last of four opinions issued between 1950 and 1971: *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128; *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67; *Admissibility of Hearings of Petitioners by the Committee on South-West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 (especially paras. 131 and 133).

## 2. Apartheid as discrete practices

Discrete acts by Israel are frequently labelled as examples of “apartheid”: for example, as noted earlier, in references to the “apartheid wall”. Such references are useful to those wishing to highlight how the forcible segregation of groups strongly suggests apartheid. Yet it would be erroneous to take such isolated practices as indicative that a State is constituted as an apartheid regime.<sup>20</sup> Rather, the Apartheid Convention provides a definition that stresses the combination of acts with their “purpose” or intent:

*For the purpose of the present Convention, the term “the crime of **apartheid**”, which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts **committed for the purpose of** (emphasis added) establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them (article II).*

The Convention then lists six categories of such “inhuman acts”. In article 7 (2) (h), the Rome Statute formulates the same concept differently, but again places emphasis on such acts as reflecting an “intention”:

*“The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1 [i.e., “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”], 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.*

Both instruments thus establish that discrete acts are crimes of apartheid only if they are part of an institutionalized regime and have the “intention” or “purpose” of racial domination and oppression. The same acts, if not observably part of such a regime or lacking such a clear purpose, may be denounced as reprehensible instances of racism but do not meet the definition of a crime of apartheid. For that reason, a check-list method alone — such as looking for the “inhuman acts” mentioned in the Apartheid Convention — would be a misreading of the

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<sup>20</sup> Former special rapporteurs John Dugard and Richard Falk highlighted the problem of determining when “features of apartheid” signify that an apartheid regime is operating, which would constitute a matter that might be referred to the ICJ. For both rapporteurs, the question arose with regard to the legality of the Israeli occupation. Mr. Dugard described “road apartheid” in the occupied Palestinian territory and noted that the Israeli occupation has “features” or “elements” of apartheid. However, whether Israel is constituted as an apartheid regime remained for Mr. Dugard a question still to be legally determined (A/62/275). Mr. Falk adopted a similar position (A/HRC/25/67, p. 21).

Convention's intention. In article II, it explicitly establishes that such acts are illustrative, not mandatory, and are crimes of apartheid only if they serve the overarching purpose of racial domination. Hence, such acts can be considered crimes of apartheid only after the existence of an "institutionalized regime of systematic oppression and domination" has been conclusively established.

The very existence of the Apartheid Convention indicates that apartheid is rightly distinguished from other forms of racial discrimination, already prohibited under instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination, by its character as a regime. The Rome Statute expressly refers to apartheid as a regime. In political science, a State regime is the set of institutions through which the State is governed, principally regarding its arrangements for exercising power. In the oft-cited formulation by political scientist Robert Fishman:

*A regime may be thought of as the formal and informal organization of the centre of political power, and of its relations with the broader society. A regime determines who has access to political power, and how those who are in power deal with those who are not... Regimes are more permanent forms of political organization than specific governments, but they are typically less permanent than the State.<sup>21</sup>*

On the basis of this definition, relevant evidence for an apartheid regime in Israel-Palestine must go beyond identifying discrete acts and determine whether the regime blocks access to "the centre of political power" on the basis of race. Moreover, the Apartheid Convention specifies that "organizations, institutions and individuals" may be culpable for the crime of apartheid (article I, para. 2). This, too, means that the State as a whole may be held accountable for committing that crime.

Finally, identifying apartheid as a regime clarifies one controversy: that ending such a regime would constitute destruction of the State itself. This interpretation is understandable if the State is understood as being the same as its regime. Thus, some suggest that the aim of eliminating apartheid in Israel is tantamount to aiming to "destroy Israel". However, a State does not cease to exist as a result of regime change. The elimination of the apartheid regime in South Africa in no way affected the country's statehood.

**To determine whether specific acts constitute evidence of apartheid, this report examines whether they contribute to the overarching purpose of sustaining an institutionalized regime of racial oppression and domination.**

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<sup>21</sup> Fishman, Robert M., "Rethinking State and regime: Southern Europe's transition to democracy", *World Politics*, vol. 42, No. 3 (April 1990).



### 3. Apartheid as generated by anonymous structural conditions

Some writers have begun to define apartheid as the racialized impact of anonymous socioeconomic forces, such as the capitalist mode of production. It may indeed be heuristically useful to use the term “economic apartheid” to describe situations where economic inequality feeds into racial formation and stratification, even in the absence of any deliberate State policy to achieve this result.<sup>22</sup> (Scholars of race relations will identify this as the illimitable race-class debate.) In this model, “apartheid” is used to flag discrimination that emerges spontaneously from a variety of economic conditions and incentives. Some argue that the entire global economy is generating a kind of “global apartheid”.<sup>23</sup>

The trouble with this hyper-structural approach is that it renders agency, particularly the role of a given State, unclear or implicitly eliminates it altogether. International law interprets apartheid as a crime for which individuals (or States) can be prosecuted, once their culpability is established by authoritative legal procedures. No such criminal culpability could pertain when treating apartheid as the product of the international structure itself, as this would not signify whether the State regime is configured deliberately for the purpose of racial domination and oppression — the distinguishing quality of apartheid according to the Apartheid Convention and Rome Statute.

**This report considers that the question of whether or not an apartheid system is in place should be analysed at the level of the State, and that the crime of apartheid is applicable only to that level.**

### 4. Apartheid as private social behaviour

The term apartheid is also used to describe racial discrimination where the main agent in imposing racial domination is the dominant racial group, whose members collectively generate the rules and norms that define race, enforce racial hierarchy and police racial boundaries. The primary enforcers of such systems are private, such as teachers, employers, real estate agents, loan officers and vigilante groups, but they also rely to varying degrees on administrative organs of the State, such as the police and a court system. It follows that maintaining these organs as compliant with the system becomes a core goal of private actors, because

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<sup>22</sup> For more on this, see Cass Sunstein, “Why markets don’t stop discrimination”, *Social Philosophy and Policy*, vol. 8, issue 2 (April 1991).

<sup>23</sup> Anthony H. Richmond, *Global Apartheid: Refugees, Racism, and the New World Order* (Toronto, Oxford University Press, 1994).

excluding dominated groups from meaningful voting rights that might alter that compliance is essential to maintaining the system.

Social racism doubtless plays a vital role in apartheid regimes, by providing popular support for designing and preserving the system, and by using informal methods (treating people with hostility and suspicion) to intimidate and silence subordinated groups.<sup>24</sup> Social racism is rarely entirely divorced from institutionalized racism. Law and practice are so interdependent that the difference between them may seem irrelevant to those oppressed by the holistic system they create.

Nonetheless, one significant difference distinguishes the two: the role of constitutional law. Where a State's constitutional law provides equal rights to the entire citizenry, it can provide an invaluable resource for people challenging discrimination at all levels of the society. However, if constitutional law defines the State as racial in character — as in Israel (as a Jewish State), and apartheid South Africa (as a white-Afrikaner State) — movements against racial discrimination not only lack this crucial legal resource but find themselves in the far more dangerous position of challenging the regime itself. Such a challenge will naturally be seen by regime authorities as an existential threat and be persecuted accordingly.<sup>25</sup>

In short, it is crucial for a finding of apartheid to establish whether the State's constitutional law (the Basic Law in Israel) renders discrimination illegal or renders resistance to discrimination illegal. The latter case fits the definition of apartheid in the Apartheid Convention, which lists as a crime against humanity "persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid" (article II (f)).

## 5. Apartheid and the question of race

The Apartheid Convention defines apartheid as "domination by one racial group of persons over any other racial group of persons...". The Rome Statute uses similar wording: "...systematic oppression and domination by one racial group over any other racial group or groups...". However, neither Jews nor Palestinians are

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<sup>24</sup> Surveys of Jewish Israeli attitudes towards "Arabs" and Palestinians are omitted here because they do not pertain to a study of the State's institutionalized regime. This omission in no way intends to suggest that popular views are not key guardians and enforcers of that regime.

<sup>25</sup> Although the Constitution of the United States of America states that "We hold these truths to be self-evident, that all men are created equal", race relations always complicated this principle in practice. Constitutional law favouring white supremacy included the key "separate but equal" provisions in *Plessy v. Ferguson*, 163 US 537 (1896). They were overturned only in 1954, in *Brown v. Board of Education of Topeka*, 347 US 483, which was later followed by the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

referred to as “races” today. Moreover, Jews are correctly argued to include many “races” in the sense of the old colour categories: black, white, Asian and so forth. Thus, one challenge to any accusation that Israel maintains an apartheid regime is that the Israeli-Palestinian conflict is not racial in nature. Hence, the argument goes, Jews cannot be racist toward Palestinians (or anyone else) because Jews themselves are not a race.

Such arguments reflect a mistaken and obsolete understanding of race. Through the first half of the twentieth century, the idea of race was seen as scientifically established and measurable. Since the Second World War, however, it has come to be recognized as a social construction that varies over time and may be contested within each local context. One illustration of such variability is the North American “one-drop rule”, which has long operated to label as “black” anyone with a perceptible element of African phenotypes or known black ancestry. Yet the same “black” person, travelling to Latin America, finds the one-drop rule working in reverse, such that s/he is not considered “black” if s/he has any portion of “white” blood, instead being called *mestizo* or *mulatto*. Thus racial identity changes with the setting.

Consequently, there can be no single, authoritative, global definition of any race. The only way to determine how racial identities are perceived and practiced locally is through historical studies of racial thought and by field observations in each local setting. The question is therefore not whether Jewish and Palestinian identities are innately racial in character wherever they occur, but whether those identities function as racial groups in the local environment of Israel-Palestine.

This point raises another question on how race is handled in United Nations instruments.<sup>26</sup> For the purposes of human rights law, a finding of racial discrimination is based less on how groups are labelled than how they are treated. For example, although Jews today are not normally referred to as a “race”, anti-Semitism is correctly seen as a form of racism. It would indeed be unethical and politically regressive sophistry to argue that Jews cannot be subject to racial discrimination simply because they are not normally referred to as a “race”. The International Convention on the Elimination of All Forms of Racial Discrimination captures that point by defining “racial discrimination” as embracing a range of identities:

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<sup>26</sup> The exception that proves the rule regarding definitions of race is the isolated effort by the International Criminal Tribunal for Rwanda: see *Prosecutor v. Jean-Paul Akayesu*, case No. ICTR-96-4-T, Judgement (TC), 2 September 1998, Akayesu Trial Judgment, paras. 511-515.

*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 (part I, article 1) (emphasis added).*

By invoking that Convention in its preamble, the Apartheid Convention suggests that its language regarding “racial group or groups” embraces the same range of identities.

Recognizing this contextual meaning of “race” is not haphazard. Since the mid-twentieth century, scholars of international law have joined social scientists in coming to understand racial identity as fundamentally a matter of perception, rather than objectively measurable qualities. Racial identities are usually signally somatic and so are *seen* as stable and permanent, acquired at birth and thus immutable. That races are actually *social constructions* is evidenced by how such constructions vary from society to society: that is, the significance of specific somatic criteria, such as skin colour or eye shape, to a racial typology. Where such perceptions of an essential identity persist, the difference disappears between language about groups understood as racial or “ethnic”, as descent groups, and that which sees them as sharing a particular national or ethnic origin. What matters in all those cases is that all members of a group — including infants and others who cannot possibly constitute a “racial threat” — are embraced by one policy. A pertinent example of this conflation of terms has been discrimination against Jews, for whom a mix of labels (race, religion and ethnicity) has been used by those pursuing anti-Semitic segregation, persecution or genocide. The question here is, therefore, whether relations between Jews and Palestinians in Mandate Palestine rest on ideas that each group has an immutable character, such that their relations fit the definition of “racial” discrimination.

A comprehensive review of how Jewish and Palestinian identities are understood locally in Israel-Palestine would overburden this report. Fortunately, one factor confirms the racial quality of both identities in this context: both are considered *descent* groups (one of the categories in the International Convention on the Elimination of All Forms of Racial Discrimination). Palestinian identity is explicitly based on origins or ancestral origins in the territory of Mandate Palestine. The 1964 Charter of the Palestinian Liberation Organization (PLO)<sup>27</sup> expresses this

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<sup>27</sup> See <https://web.archive.org/web/20101130144018/http://www.un.int/wcm/content/site/palestine/pid/12363>.

principle by affirming that Palestinian identity is passed down through the paternal line and is intergenerational:

*Article 5: The Palestinian personality is a permanent and genuine characteristic that does not disappear. It is transferred from fathers to sons.*

Palestinian national identity has always been nested within pan-Arabism, an ethno-national identity formulated first as a modern territorial nationalism by Sherif Hussein of Mecca. “Arab” was certainly the generic term for Arabic-speaking people in Palestine when the Zionist movement began to settle the area. General Assembly resolution 181(II) of 1947,<sup>28</sup> which recommended the partition of Mandate Palestine into an “Arab State” and a “Jewish State”, drew from that discourse. Updated and promoted especially by Egyptian President Gamal Abdul Nasser to craft an anticolonial Arab identity bloc across the Middle East and North Africa, Arab identity became a vital identity and political resource for the PLO, as reflected in its Charter:

*Article 1: Palestine is an Arab homeland bound by strong Arab national ties to the rest of the Arab countries and which together form the great Arab homeland.*

*... Article 3: The Palestinian Arab people has the legitimate right to its homeland and is an inseparable part of the Arab Nation. It shares the sufferings and aspirations of the Arab Nation and its struggle for freedom, sovereignty, progress and unity...*

In this conception, Palestinians are integral members of the Arab “Nation”, but it is the “Palestinian people” that holds the right to self-determination in Mandate Palestine, thus conveying the international legal meaning of “nation” to the Palestinian people.

In contrast, Jewish identity combines several contradictory elements.<sup>29</sup> “Jewish” is certainly a religious identity in the sense that Judaism is a religious faith to which anyone may convert if willing and able to follow the required procedures. On that basis, opponents of Israeli policy insist that Jewishness is not a national identity but simply a religious one, and so Jews *qua* Jews are not a “people” in the sense of international law and therefore lack the right to self-determination. Supporters of Israel use the same point to deny that Jewish statehood is racist, on the grounds

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<sup>28</sup> A/RES/181(II).

<sup>29</sup> Internal debates about “who is a Jew” are irrelevant to the State’s construction of Jewishness as a single people, and thus not pertinent to this report. On such debates, see, for example, Noah Efron, *Real Jews: Secular Versus Ultra-Orthodox: The Struggle For Jewish Identity In Israel* (New York, Basic Books, 2003).

that Zionism and Israel cannot be racist if Jews are not a race. However, those arguments are flawed, even disingenuous, as religious criteria alone are not adequate for defining what it is to be “Jewish”.

Like many other groups that today are now commonly called “ethnic” or “national”, until the mid-twentieth century Jews were often referred to as a “race”. Jewish-Zionist thinkers adopted the same approach, reflecting contemporary concepts of what races were, how races composed peoples and nations, and how on that basis they had the right to self-determination. For example, Zionist philosopher and strategist Max Nordau commonly used the term “race” for Jews in speaking of Jewish interests in Palestine.<sup>30</sup> For decades, the founder of Revisionist Zionism, Vladimir Jabotinsky, wrote passionately about the Jewish “race” and how the “spiritual mechanism” associated with it granted transcendental value to a Jewish State.<sup>31</sup> Today, this usage persists in the Memorandum of Association of the Jewish National Fund (JNF), which in article 2 (c) cites one of its objectives as being to “benefit, directly or indirectly, those of Jewish race or descent”. In none of those sources is religious faith even mentioned (because it is recognized to vary): the concern is entirely with descent. Halachah (often translated as “Jewish law”) and social norms in Jewish communities provide that Jewish identity is conveyed from mother to child, irrespective of the individual’s actual religious beliefs or practice. The State of Israel enshrined the central importance of descent in its Law of Return of 1950 (amended in 1970),<sup>32</sup> which states that:

*For the purposes of this Law, “Jew” means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.*

Descent is crucial to Jewish identity discourse in Israel because direct lineal descent from antiquity is the main reason given by political-Zionist philosophers for why Jews today hold the right to self-determination in the land of Palestine. In this view, all Jews retain a special relationship and rights to the land of Palestine, granted by covenant with God: some schools of Zionism hold that Israel is the successor State to the Jewish kingdoms of Saul, David and Solomon. That claim is

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<sup>30</sup> See, for example, Max Nordau, “Address to the First Zionist Congress”, 29 August 1897. Available from [www.mideastweb.org/nordau1897.htm](http://www.mideastweb.org/nordau1897.htm).

<sup>31</sup> See Vladimir Jabotinsky, A lecture on Jewish history (1933), cited in David Goldberg, *To the Promised Land: A History of Zionist Thought* (London, Penguin, 1996), p. 181.

<sup>32</sup> Passed by the Knesset on 5 July 1950 and amended on 10 March 1970.

expressed, inter alia, in the Declaration of Independence of Israel,<sup>33</sup> which affirms that Jews today trace their ancestry to an earlier national life in the geography of Palestine and therefore have an inalienable right to “return”, which is given precedence over positive law:

*The Land of Israel<sup>34</sup> was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books.*

*After being forcibly exiled from their land, the people kept faith with it throughout their Dispersion and never ceased to pray and hope for their return to it and for the restoration in it of their political freedom.*

*Impelled by this historic and traditional attachment, Jews strove in every successive generation to re-establish themselves in their ancient homeland. In recent decades they returned in their masses. [...]*

That claim to unbroken lineal descent from antiquity attributes collective rights to the “land of Israel” to an entire group on the basis of its (supposed) bloodlines. The incompatible claim that Jewishness is multiracial, by virtue of its character as a religion to which others have converted, is simply absent from this formula.

The emphasis on descent implicitly portrays all other descent groups — including Palestinians — as lacking any comparable right by virtue of their different descent. Thus the claim to Palestine as the exclusive homeland of the Jewish people rests on an expressly racial conception of both groups. This means that Jews and Palestinians are “racial groups” as defined by the International Convention on the Elimination of All Forms of Racial Discrimination and, accordingly, for the purposes of the Apartheid Convention.

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<sup>33</sup> Provisional Government of Israel, The Declaration of the Establishment of the State of Israel, Official Gazette, No. 1 (Tel Aviv, 14 May 1948). It is also commonly referred to as the Declaration of Independence. Available from [https://www.knesset.gov.il/docs/eng/megilat\\_eng.htm](https://www.knesset.gov.il/docs/eng/megilat_eng.htm).

<sup>34</sup> Eretz-Israel in Hebrew.

## 2. Testing for an Apartheid Regime in Israel-Palestine

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The design of an apartheid regime in any State will necessarily reflect the country's unique history and demography, which shape local perceptions of racial hierarchy and doctrines of racial supremacy. The first task here is, therefore, to consider how local conditions in Israel-Palestine constitute such an environment. The main feature, stemming from the history of wars and expulsions, is the geographic fragmentation of the Palestinian people into discrete populations that are then administered differently by the State regime. Those components include Palestinians living under direct Israeli rule in three categories (as citizens of the State of Israel, residents of occupied East Jerusalem, and under occupation in the West Bank and Gaza) and Palestinians living outside direct Israeli rule: refugees and involuntary exiles expelled from the territory of Mandate Palestine who are prohibited by Israel from returning. The next section clarifies how those four categories have emerged from the territory's history of warfare and incremental annexation.

### A. The political geography of apartheid

The geographic unit of "Mandate Palestine" was established by the League of Nations in 1922 with the stated intention of fostering the future independence of Palestine as a State, as specified in the League of Nations Charter.<sup>35</sup> Famously, the Palestine Mandate included contradictory provisions for a Jewish "national home" (not a State) and the special authority of the Jewish Agency in establishing that "home". Later British commissions and white papers specified that "national home" had not been intended to signify a Jewish State, but that position was not

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<sup>35</sup> The borders of Mandate Palestine were derived from the Sykes-Picot agreement, which divided Ottoman imperial territory after the First World War and placed it under British or French Mandates. Article 22 of the Covenant of the League of Nations provided for various classes of mandate territory. Palestine was considered one of the most advanced areas, whose "existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone". In that context, "independent nations" signified independent statehood, thus informing language in the Mandate for Palestine. The early history of Palestine's mandate borders, which combined Transjordan and Palestine, is not considered material to this report, but for that history, see especially Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (London, Pluto Press, 2009).



accepted by the Zionist leadership. Endemic violence that emerged from this contradictory formula, combined with imperial exhaustion after the Second World War, ultimately led Great Britain to withdraw from its role as Mandatory Power and submit the fate of Palestine to the United Nations. In 1947, the General Assembly passed resolution 181(II) by a modest majority of 36 Member States, recommending the territory's partition into a "Jewish State" and an "Arab State". The same resolution specified conditions and measures deemed essential to make partition viable, including borders that provided for racial majorities in each titular State, constitutional protections for minorities, economic union between the two States and a special international regime for the city of Jerusalem.<sup>36</sup>

In the 1948 war, however, the Zionist movement took over territory far beyond what had been assigned to the Jewish State under resolution 181(II) and, by so doing, rendered moot its labyrinthine provisions, including acquiescence by the internationally recognized representatives of the Palestinian people. In 1948, the Zionist leadership declared the independence of Israel in territory under its military control, although its final borders had yet to be established. In 1949, the General Assembly recommended admission of the State of Israel to membership even though its borders had still not been finalized. Palestinians remaining in Israel, who had not fled or been expelled in the 1948 war, became citizens of Israel, but Israel administered them under emergency laws and denied them civil rights, such as the franchise, until 1966.

From 1948 until 1967, the West Bank (including East Jerusalem) was governed by Jordan, while the Gaza Strip was administered by Egypt. As a result of the 1967 Arab-Israeli war, both territories came under Israeli military occupation and rule, yet were not formally annexed.<sup>37</sup> The geographic separation of the West Bank and Gaza Strip has suggested the existence of two discrete territories. However, the United Nations commonly refers to the West Bank and Gaza Strip in the singular as the "occupied Palestinian territory", treating both as geographic fragments of "Palestine" as established under the League of Nations Mandate.<sup>38</sup> Pursuant to article XI of the 1995 Israeli-Palestinian Interim Agreement on the West Bank and

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<sup>36</sup> Resolution 181(II) was the result of work by the United Nations Special Committee on Palestine (UNSCOP), with its two subcommittees providing options for a partitioned or unified State.

<sup>37</sup> Although effectively annexed, the occupied Syrian Golan is excluded from the scope of this report because that territory was not part of the Palestine Mandate and is considered legally to be Syrian territory. However, many of this report's findings could apply to Israeli policy in the Golan and may be consistent with apartheid, as Israel has used Jewish settlement to stake a claim to the land and the population of the four Druze villages there live in conditions of relative deprivation.

<sup>38</sup> Steps taken by the General Assembly to recognize a "State of Palestine" have prompted some to suggest that occupied Palestinian territory should now be referred to as "occupied Palestine". However, since recognition of such a State still lacks any final agreement about its borders, the authors here continue to use the term "occupied Palestinian territory" to refer to territory delineated by the 1949 Armistice Agreement and occupied by Israel in the 1967 war.

the Gaza Strip (also known as the Oslo II Accord or Oslo II), for the purposes of negotiation those areas were considered a “single territorial unit” (article XI). Hence, international jurists and the United Nations consider Palestinians in the West Bank and Gaza Strip to be under one legal category: that is, civilians under belligerent occupation, whose rights and protections are stipulated primarily in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War (1949).

East Jerusalem (that part of Jerusalem on the east side of the Armistice Line or “green line” of 1949) obtained a special status. Although seamlessly integrated with the West Bank between 1948 and 1967, East Jerusalem retained the aura of the diplomatic character, proposed by resolution 181(II), of a *corpus separatum*, reflecting its vital importance to all three Abrahamic faiths. After the 1967 war, however, Israel passed legislation making East Jerusalem part of the unified city of Jerusalem, radically expanding the city’s borders, and extending Israeli civil law throughout. After the second intifada (from September 2000), parts of East Jerusalem were re-segregated from Jewish areas physically by the separation wall and its security gates and Israeli checkpoints. This forced separation has allowed Israel to separate East Jerusalem from the West Bank in juridical terms and so has generated the category of Palestinian “residents” of East Jerusalem, whose rights stem largely from Israeli law on permanent residency.<sup>39</sup>

The territory’s history has further generated the separate case of Palestinian citizens of Israel: people who remained inside the internationally recognized borders of Israel after 1949 and their descendants. Granted Israeli citizenship although not full “national” equality as non-Jews in a Jewish-national State, this Palestinian population now makes up 20 per cent of the country’s citizenry.<sup>40</sup> How Israeli law and doctrine has defined this population as citizens but not “nationals” of the State is addressed below. Here it is incumbent only to recognize that Palestinian citizens of Israel comprise a distinct legal category. The situation of refugees and involuntary exiles comprises the final category, distinct from the others in that they are governed by the laws of the other States in which they reside.

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<sup>39</sup> The Knesset passed Basic Law: Jerusalem, Capital of Israel on 30 July 1980 (published in *Sefer Ha-Chukkim* No. 980 of 5 August 1980, p. 186).

<sup>40</sup> Jewish Virtual Library, Vital Statistics: Latest Population Statistics for Israel (January 2017). Available from [www.jewishvirtuallibrary.org/latest-population-statistics-for-israel](http://www.jewishvirtuallibrary.org/latest-population-statistics-for-israel).

By developing discrete bodies of law, termed “domains” in this report, for each territory and their Palestinian populations, Israel has both effected and veiled a comprehensive policy of apartheid directed at the whole Palestinian people.<sup>41</sup> Warfare, partition, de jure and de facto annexation and occupation in Palestine have, over the decades, generated the complex geography in which the Palestinian people have become fragmented into different juridical categories and are administered by different bodies of law. What matters for the purposes of a study of apartheid is how Israel has exploited this fragmentation to secure Jewish-national domination.

## B. Israel as a racial State

A test of apartheid cannot be confined, methodologically, to identifying discrete policies and practices, such as those listed under the Apartheid Convention. Such policies and practices must be found to serve the *purpose* or *intention* of imposing racial domination and oppression on a subordinated racial group. In somewhat circular reasoning, international law provides that discrete “inhuman acts” acquire the status of a crime against humanity only if they intentionally serve that purpose, but establishes that such a purpose requires the identification of related inhuman acts. The solution is to examine the context in which acts and motives are configured: that is, whether the State itself is designed to ensure “the domination of a racial group or groups over any other racial group or groups”. (For example, in South Africa, State institutions were designed to ensure incontestable domination by whites and, particularly, Dutch-Afrikaners.)

In this study, it is vital to establish the racial character of the regime that the system of domains is designed to protect. Otherwise, their internal diversity — the laws that comprise them — can convey the incorrect impression of discrete systems.

That Israel is politically constructed as the State of the Jewish people requires no extended explanation here, but will be discussed briefly.<sup>42</sup> Since the turn of the twentieth century, the history of the Zionist movement has been centred on creating and preserving a Jewish State in Palestine. That aim remains the cornerstone of

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<sup>41</sup> “Domain” is used in the report in the sense of logic or discourse analysis, in which concepts and actors are understood as part of one “universe” of references. Hence, the domains in Israeli policy consist of definitions of the populations themselves (domestic, foreign, citizens or otherwise, “Palestinians” oriented toward Palestinian self-determination or “Arabs” as an Israeli minority, and so forth), as well as the laws, practices, norms and other measures, formal and informal, by which Israeli definitions of those identities are imposed on Palestinian populations in each domain.

<sup>42</sup> For a more complete discussion, see Tilley (ed.), *Beyond Occupation*, chaps. 3 and 4.

Israeli State discourse. During the Mandate years, the Jewish Agency and Zionist leadership argued that the “Jewish national home” promised under the Mandate was to be a sovereign Jewish State. The Declaration of the Establishment of the State of Israel specifically referred to the new State as a “Jewish State in Eretz-Israel”. The Basic Law: Human Dignity and Liberty<sup>43</sup> and Basic Law: Freedom of Occupation<sup>44</sup> specify concerns with “the values of the State of Israel as a Jewish and democratic State”.<sup>45</sup> The 1952 World Zionist Organisation–Jewish Agency (Status) Law,<sup>46</sup> which establishes those organizations as “authorized agencies” of the State on a range of responsibilities, including land settlement, specifies that Israel is “the creation of the entire Jewish people, and its gates are open, in accordance with its laws, to every Jew wishing to immigrate to it”.

The mission of preserving Israel as a Jewish State has inspired or even compelled Israel to pursue several general racial policies.

## 1. Demographic engineering

The first general policy of Israel has been one of demographic engineering, in order to establish and maintain an overwhelming Jewish majority in Israel. As in any racial democracy, such a majority allows the trappings of democracy — democratic elections, a strong legislature — without threatening any loss of hegemony by the dominant racial group. In Israeli discourse, this mission is expressed in terms of the so-called “demographic threat”, an openly racist reference to Palestinian population growth or the return of Palestinian refugees. Related practices have included:

1. A global programme, organized by the World Zionist Organization and Jewish Agency, launched at the end of the nineteenth century and accelerating into the early 1930s, to bring Jewish immigrants to Palestine in numbers large enough to ensure the demographic majority needed for building a Jewish State with democratic characteristics;

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<sup>43</sup> Passed by the Knesset on 17 March 1992 (published in *Sefer Ha-Chukkim* No. 1391 of 25 March 1992). Available from [https://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm).

<sup>44</sup> The law amending the original 1992 legislation was passed by the Knesset on 9 March 1994 (published in *Sefer Ha-Chukkim* No. 1454 of 10 March 1994). Available from [https://www.knesset.gov.il/laws/special/eng/basic4\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic4_eng.htm).

<sup>45</sup> A controversial bill to declare this principle as a central tenet had been tabled in the Knesset but not yet passed at the time of writing. See Basic Law: Israel as the Nation-State of the Jewish People, Ministry of Justice. Available from [http://index.justice.gov.il/Statelidentity/InformationInEnglish/Documents/Basic%20Law%2010911%20\(1\).pdf](http://index.justice.gov.il/Statelidentity/InformationInEnglish/Documents/Basic%20Law%2010911%20(1).pdf). Accessed 5 February 2017.

<sup>46</sup> The Status Law was amended in 1975 to restructure this relationship: see World Zionist Organisation–Jewish Agency for Israel (Status) (Amendment) Law, 1975.

2. Ethnic cleansing (forcible displacement) in 1948 of an estimated 800,000 Palestinians from areas that became part of the internationally recognized territory of Israel;<sup>47</sup>
3. Subsequent measures undertaken by Israel to maintain an overwhelming Jewish majority within its internationally recognized territory, including by:
  - (a) Preventing Palestinian refugees from the wars of 1948 and 1967 from returning to homes in Israel or in the occupied Palestinian territory, which they had abandoned due to fighting, dispossession, forced expulsion and terror;<sup>48</sup>
  - (b) Composing the Law of Return and Citizenship Law (often wrongly translated as Nationality Law) to provide Israeli citizenship to Jews from any part of the world, while denying citizenship even to those Palestinians who have a documented history of residency in the country;
  - (c) A range of other policies designed to restrict the size of the Palestinian population, including harsh restrictions placed on immigration, the return of refugees, and rules prohibiting Palestinian spouses of Israeli citizens from gaining legal residency rights in Israel.
4. The affirmation in the Basic Law that Israel is a “Jewish and democratic State”, thus establishing Jewish-racial domination as a foundational doctrine.

Together, those measures have been highly effective in maintaining an overwhelming Jewish majority in Israel. In 1948, the ratio of Palestinians to Jews in Palestine was approximately 2:1 (some 1.3 million Arabs to 630,000 Jews).<sup>49</sup> Today, Palestinian citizens of Israel constitute only about 20 per cent of the population, rendering them a permanent minority.

## 2. Bans on challenges to racial domination

Israel reinforces its race-based immigration policy with measures designed to prevent Palestinian citizens of Israel from challenging the doctrine and laws that purport to establish Israel as a Jewish State. Article 7 (a) of the Basic Law: Knesset (1958), for instance, prohibits any political party in Israel from adopting a platform that challenges the State’s expressly Jewish character:

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<sup>47</sup> See Ilan Pappé, *The Ethnic Cleansing of Palestine* (London, Oxford One World Press, 2006).

<sup>48</sup> *Ibid.* The right of refugees to return is specified in the International Convention on the Elimination of All Forms of Racial Discrimination (article 5 (d) (ii)).

<sup>49</sup> Censuses categories under the British Mandate were ordered by “religion” rather than ethnicity. Statistics therefore grouped together Arab and non-Arab Christians. In 1947, Christians and Muslims numbered 143,000 and 1,181,000 respectively.

*A candidates list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset, if the objects or actions of the list or the actions of the person, expressly or by implication, include one of the following:*

*(1) **Negation of the existence of the State of Israel as a Jewish and democratic State** (emphasis added)...<sup>50</sup>*

Voting rights lose their significance in terms of equal rights when a racial group is legally banned from challenging laws that perpetuate inequality. An analogy would be a system in which slaves have the right to vote but not against slavery. Such rights might allow slaves to achieve some cosmetic reforms, such as improved living conditions and protection from vigilante violence, but their status and vulnerability as chattels would remain. Israeli law bans organized Palestinian opposition to Jewish domination, rendering it illegal and even seditious.

### 3. Israeli Jewish-national institutions

Israel has designed its domestic governance in such a way as to ensure that the State upholds and promotes Jewish nationalism. The term “Jewish people” in political Zionist thought is used to claim the right to self-determination. The quest of an ethnic or racial group for its own State amounts to a national project, and so Israeli institutions designed to preserve Israel as a Jewish State are referred to in this report as “Jewish-national” institutions.

In Israel, an interplay of laws consolidates Jewish-national supremacy. For example, regarding the central question of land use, Basic Law: Israel Lands<sup>51</sup> provides that real property held by the State of Israel, the Development Authority or the Keren Kayemet Le-Israel (JNF-Jewish National Fund) must serve “national” (that is, Jewish-national) interests and cannot be transferred to any other hands. It further establishes the Israeli Lands Authority (ILA) as administrator of such lands. The ILA (as successor of the Israeli Lands Administration) is charged with administering land in accordance with the JNF Covenant, which requires that land held by the JNF be held in perpetuity for the exclusive benefit of the Jewish people. The ILA also operates in accordance with the World Zionist Organization-Jewish Agency Status Law (1952), which sets forth the responsibility of those conjoined organizations for serving Jewish settlement and development. Thus, State land, which accounts for 93 per cent of land within the country’s

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<sup>50</sup> Basic Law: Knesset. Available from [https://www.knesset.gov.il/laws/special/eng/basic2\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic2_eng.htm).

<sup>51</sup> Passed by the Knesset on 19 July 1960 (published in *Sefer Ha-Chukkim* No. 312 of 29 July 1960).

internationally recognized borders, is managed through laws prohibiting its use by non-Jews.<sup>52</sup>

In a legal process that Israeli lawyer Michael Sfard has called “channelling”, Israel has extended the application of laws regarding land to the occupied Palestinian territory.<sup>53</sup> Large areas of the West Bank have been declared “State lands”, closed to use by Palestinians and administered in accordance with Israeli regime policies that, as described above, by law must serve the Jewish people.<sup>54</sup> In other words, much of the West Bank, including East Jerusalem, is under the authority of an Israeli State institution that is legally bound to administer that land for the exclusive benefit of the Jewish people. The same arrangement once governed Israeli Jewish settlements in the Gaza Strip, but since the Israeli “disengagement” of 2005 and the withdrawal of Jewish settlements, such laws apply only to small portions of the Strip, such as the unilaterally imposed security zone by the fence.

The Jewish Agency and World Zionist Organisation (hereafter JA-WZO) deserve special attention for their role in establishing the racial character of the Israeli regime. According to Israeli law, they remain the “authorised agencies” of the State regarding Jewish-national affairs in Israel and the occupied Palestinian territory.<sup>55</sup> Their authority is detailed in the Covenant signed on 26 July 1954 between the Government of Israel and the Zionist Executive, representing the JA-WZO.<sup>56</sup> The Covenant provides for a coordinating board, composed half of State officials and half of JA-WZO members, which is granted broad authority to serve the Jewish people, extending to development plans for the entire country. Powers accorded to the JA-WZO by its Covenant are:

*The organising of [Jewish] immigration abroad and the transfer of immigrants and their property to Israel; participation in the absorption of immigrants in Israel; youth immigration; agricultural settlement in Israel; the acquisition and amelioration of land in Israel by the institutions of the Zionist Organisation, the Keren Kayemeth Le-Israel [Jewish National Fund] and the Keren Hayesod [United Jewish Appeal]; participation in the establishment*

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<sup>52</sup> ILA website. Available from [www.mmi.gov.il/Envelope/indexeng.asp?page=/static/eng/f\\_general.html](http://www.mmi.gov.il/Envelope/indexeng.asp?page=/static/eng/f_general.html).

<sup>53</sup> For details on how this is done, see Tilley (ed.), *Beyond Occupation*.

<sup>54</sup> Provisions of humanitarian law prohibiting the occupant from altering the infrastructure, laws and economic institutions that existed in occupied territory prior to its coming under belligerent occupation include articles 43 and 55 of the 1907 Hague Regulations (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land) and article 64 of the Fourth Geneva Convention. See also Tilley (ed.), *Beyond Occupation*, chap. 2.

<sup>55</sup> The World Zionist Organisation–Jewish Agency (Status) Law of 1952 was amended in 1975. Available from <https://www.adalah.org/en/law/view/534>.

<sup>56</sup> See [www.israellobby.org/ja/12311970\\_JAFI\\_Reconstitution.pdf](http://www.israellobby.org/ja/12311970_JAFI_Reconstitution.pdf), appendix I.

*and the expansion of development enterprises in Israel; the encouragement of private capital investments in Israel; assistance to cultural enterprises and institutions of higher learning in Israel; the mobilisation of resources for financing these functions; the coordination of the activities in Israel of Jewish institutions and organisations acting within the sphere of these functions with the aid of public funds.*

A principle task of the JA-WZO is to work actively to build and maintain Israel as a Jewish State, particularly through immigration policy:

*... 5. The mission of gathering in the [Jewish] exiles, which is **the central task of the State of Israel** and the Zionist Movement in our days, requires constant efforts by the Jewish people in the Diaspora; **the State of Israel**, therefore, expects the cooperation of all Jews, as individuals and groups, in building up the State and assisting the immigration to it of the masses of the [Jewish] people, and regards the unity of all sections of Jewry as necessary for this purpose (emphasis added).<sup>57</sup>*

Such explicit language by the State's authorized agencies conclusively underlines the State's essentially racist character.

The World Zionist Organisation-Jewish Agency (Status) Law is linked to a second body of Israeli law and jurisprudence that distinguishes between citizenship (in Hebrew, *ezrahut*) and nationality (*le'um*). Other States have made this distinction: for example, in the former Soviet Union, Soviet citizens also held distinct "national" identities (Kazakh, Turkmen, Uzbek and so forth), but all nationalities had equal legal standing. In Israel, by contrast, only one nationality, Jewish, has legal standing and only Jewish nationality is associated with the legitimacy and mission of the State. According to the country's Supreme Court, Israel is indeed not the State of the "Israeli nation", which does not legally exist, but of the "Jewish nation".<sup>58</sup> National rights are reserved to Jewish nationality. For instance, the Law of Return serves the "in-gathering" mission cited above by allowing any Jew to immigrate to Israel and, through the Citizenship Law<sup>59</sup>, to gain immediate citizenship. No other group has a remotely comparable right and only Jews enjoy any collective rights under Israeli law.

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<sup>57</sup> World Zionist Organisation-Jewish Agency (Status) Law of 1952.

<sup>58</sup> *George Rafael Tamarin v. State of Israel* (20 January 1972), Decisions of the Supreme Court of Israel (Jerusalem: Supreme Court, 1972), vol. 25, pt. 1, 197 (in Hebrew). See also Roselle Tekiner, "On the inequality of Israeli citizens", *Without Prejudice*, vol. 1, No. 1 (1988), pp. 9-48.

<sup>59</sup> Passed by the Knesset on 1 April 1952 and amended in 1958, 1968 and 1971.



The operational platform of the JA-WZO, reformulated in 2004 as the Jerusalem Programme, further clarifies how the State of Israel will serve as a “Jewish State”. Its language is illuminating, especially in the light of the broad powers held by the JA-WZO, cited above:

*Zionism, the national liberation movement of the Jewish people, brought about the establishment of the State of Israel, and views a **Jewish, Zionist, democratic and secure State of Israel to be the expression of the common responsibility of the Jewish people for its continuity and future.** The foundations of Zionism are:*

- *The unity of the Jewish people, its bond to its historic homeland Eretz Yisrael, and the centrality of the State of Israel and Jerusalem, its capital, in the life of the nation.*
- *Aliyah to Israel from all countries and the effective integration of all [Jewish] immigrants into Israeli Society.*
- *Strengthening Israel as a Jewish, Zionist and democratic State and shaping it as an exemplary society with a unique moral and spiritual character, marked by mutual respect for the multi-faceted Jewish people, rooted in the vision of the prophets, striving for peace and contributing to the betterment of the world.*
- *Ensuring the future and the distinctiveness of the Jewish people by furthering Jewish, Hebrew and Zionist education, fostering spiritual and cultural values and teaching Hebrew as the national language.*
- *Nurturing mutual Jewish responsibility, defending the rights of Jews as individuals and as a nation, representing the national Zionist interests of the Jewish people, and struggling against all manifestations of anti-Semitism.*
- *Settling the country as an expression of practical Zionism (emphasis added, bullet points in the original).<sup>60</sup>*

This discussion, although incomplete, should suffice to demonstrate that Israel is designed to be a racial regime. To remain a “Jewish State,” uncontested Jewish-nationalist domination over the indigenous Palestinian people is essential — an advantage secured in the democracy of Israel by population size — and State laws, national institutions, development practices and security policies all focus on that mission. Different methods are applied to Palestinian populations depending on where they live, requiring variations in their administration. Within Israel that discriminatory feature is exhibited by the deceptive distinction between citizenship laws that treat all Israelis more or less equally, and nationality laws that are blatantly discriminatory in favour of Jews. The distinction allows Israel to continue

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<sup>60</sup> See [www.wzo.org.il/The-Jerusalem-Program](http://www.wzo.org.il/The-Jerusalem-Program). Accessed 19 February 2017.

its insistence on being “a democracy”, while discriminating in fundamental ways against its non-Jewish citizens.

Most important here is that Israel uses different methods of administration to control Palestinian populations depending on where they live, generating distinctive conditions. Fragmentation of the Palestinian people is indeed the core method through which Israel enforces apartheid.

### C. Apartheid through fragmentation

Different methods of administration are used to control Palestinian populations depending on where they live. The practical onus of that administrative complexity also benefits Israel, as the fragmentation of the Palestinian people is the core method through which Israel enforces apartheid.

It would be an error to assume that, although comprising one regime, apartheid is effected through a single monolithic body of laws, applied everywhere to everyone without variation. The South African case is relevant here: even within the comprehensive body of law that defined life chances for everyone in the country, apartheid included important variations: for instance, different laws for black South Africans living in townships and in the Bantustans and different privileges for Indians and Coloureds. Similarly, the apartheid regime of Israel operates by splintering the Palestinian people geographically and politically into different legal categories.

The international community has unwittingly collaborated with this manoeuvre by drawing a strict distinction between Palestinian citizens of Israel and Palestinians in the occupied Palestinian territory, and treating Palestinians outside the country as “the refugee problem”. The Israeli apartheid regime is built on this geographic fragmentation, which has come to be accepted as normative. The method of fragmentation serves also to obscure this regime’s very existence. That system, thus, lies at the heart of what is to be addressed in this report.

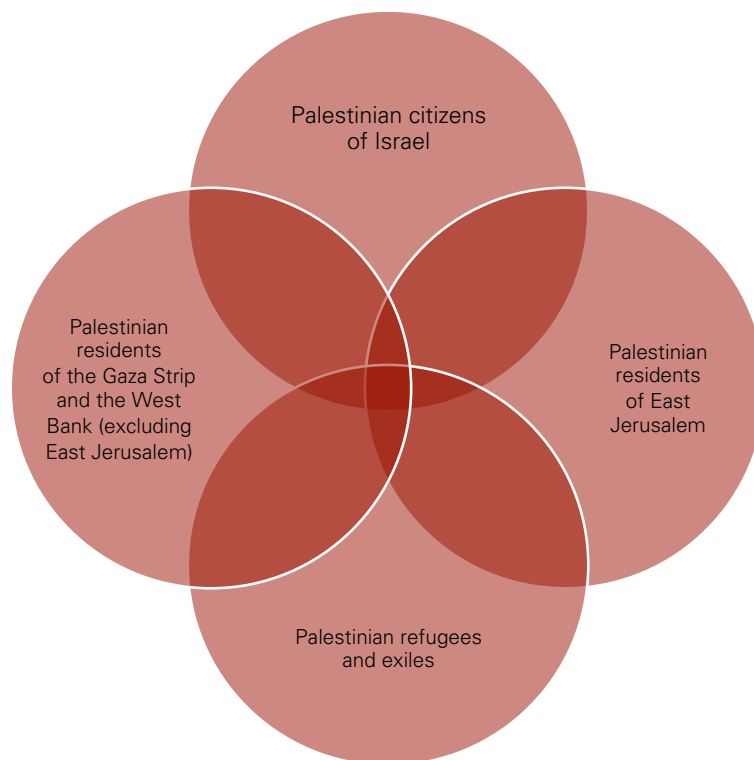
#### The four domains

This report finds that Israel maintains an apartheid regime by administering Palestinians under different bodies of law, identified here as constituting four legal domains:

- **Domain 1:** laws curtailing the capacity of Palestinian citizens of Israel to obtain equal rights within the State’s democracy.

- **Domain 2:** permanent residency laws designed to maintain a highly insecure legal status for Palestinian residents of occupied East Jerusalem.
- **Domain 3:** military law governing Palestinians in occupied Palestinian territory as a permanently alien population, which rejects any claim they may want to make on Israeli political representation for equal rights and conditions.
- **Domain 4:** policy preventing Palestinian refugees and involuntary exiles from returning to their homes in Mandate Palestine (all territory under the direct control of Israel).

These domains interplay so as to enfeeble Palestinian resistance to Israeli apartheid oppression in each of them, thereby reinforcing oppression of the Palestinian people as a whole. The following sections describe how the system works.<sup>61</sup>



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<sup>61</sup> Much of the following section represents an edited version of the discussion in Tilley (ed.), *Beyond Occupation*, chap. 4.

### Domain 1: Palestinian citizens of Israel

Approximately 1.7 million Palestinians are citizens of Israel and have homes within its internationally recognized borders. They represent those who were not expelled or did not flee in the 1948 or 1967 wars. As citizens, they purportedly enjoy equal rights along with all Israeli citizens. For the first 20 years of the country's existence, however, they were subjected to martial law and they continue to experience domination and oppression solely because they are not Jewish. Empirically, this policy of domination is manifest by the provision of inferior social services, restrictive zoning laws, and limited budget allocations benefitting their communities, in formal and informal restrictions on jobs and professional opportunities, and in the segregated landscapes of their places of residence: Jewish and Palestinian citizens overwhelmingly live separately in their own respective cities and towns (the few mixed areas, as in some neighbourhoods in Haifa, are exceptional).<sup>62</sup>

Those problems are not only the result of discrete policies. The dilemma for Palestinian Muslim, Christian and other non-Jewish citizens is to seek equal rights in a regime that openly privileges Jews.<sup>63</sup> Any actions to weaken or eliminate that regime are considered "national" (that is, Jewish-national) threats. Even constitutional law providing for equal treatment before the law, such as Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation (see above), allows for discrimination on those "national" grounds. Israeli constitutional law therefore, rather than providing tools for combatting oppression, makes resistance to oppression illegal.

The concern of the regime is that Palestinian citizens of Israel could eliminate its discriminatory design if they were able to revise the Basic Law and other key legislation (such as the Law of Return). Such changes require only a simple majority vote in the Knesset. However, as long as Palestinians represent only 20 per cent of the population, they will be unable to win the necessary proportion of Knesset seats. For example, even after forming an unprecedented unity list for elections to the Knesset in 2015, Palestinian parties held only 13 (10.6 per cent) of 120 seats. Because the Basic Law: Knesset disallows political parties from adopting a platform containing any challenge to the identity of Israel as a Jewish State,

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<sup>62</sup> See Ian Lustick, *Arabs in the Jewish State: Israel's Control of a National Minority* (Austin, University of Texas Press, 1980); Nadim Rouhana, *Palestinian Citizens in an Ethnic Jewish State: Identities in Conflict* (New Haven, Yale University Press, 1997) and Ben White, *Palestinians in Israel: Segregation, Discrimination and Democracy* (London, Pluto Press, 2011).

<sup>63</sup> Druze citizens of Israel have fallen into a different category under Israeli policy. They serve in the military and are accorded rights and treatment superior to those of Palestinian Muslims and Christians.

Palestinian parties can campaign only for minor reforms and better municipal budgets. They are legally prohibited from challenging the racial regime itself. Thus the right to vote is circumscribed by laws regarding party platforms.<sup>64</sup>

Any study of domain 1 will involve interpreting coded language. For example, the Admissions Committee Law of 2011 authorizes the creation of private Jewish councils in small rural Jewish towns to exclude applications for residency on the basis of the applicants' "social suitability". This is a proxy term for Jewish identity and provides a legal mechanism for such communities to reject Palestinian applicants.<sup>65</sup>

Israeli law must be evaluated in its application in order to determine whether a racist agenda lies beneath the apparently neutral legal language. A plethora of Israeli laws reserve public benefits to those who qualify as citizens under the Citizenship Law and the Law of Return — an oblique reference to Jews — thus creating a nested system of covert racism that is invisible to the casual observer.

Effectively interchangeable under international law, the terms "citizenship" (*ezrahut*) as "nationality" (*le'um*) have distinct meanings in Israel, where citizenship rights and national rights are not the same thing. Any citizen enjoys the former, but only Jews enjoy the latter, as only Jewish nationality is recognized under Israeli law. These and other laws comprise a regime of systematic racial discrimination that imposes second-class citizenship on Palestinian citizens of Israel.<sup>66</sup> The broad impact is confirmed even by Israeli data, which detail, for instance, inferior funding for Palestinian schools, businesses, agriculture and health care, as well as limits on access to jobs and freedom of residence.

Thus, domain 1 sustains the myth that one portion of the Palestinian people enjoys the full benefits of democracy, while at the same strengthening the apartheid

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<sup>64</sup> The Arab-Israeli party Balad has uniquely adopted an openly anti-Zionist platform and calls for Israel to become a State of all its citizens. The arrests, attacks, investigations and Supreme Court cases involving Balad illustrate the determination of the Israeli authorities not to let this stand spread.

<sup>65</sup> Human Rights Watch, "Israel: New Laws Marginalize Palestinian Arab Citizens", 30 March 2011: "The "admissions committee" law requires anyone seeking to move to any community in the Negev and Galilee regions with fewer than 400 families to obtain approval from committees consisting of town residents, a member of the Jewish Agency or World Zionist Organization, and several others. The law empowers these committees to reject candidates who, among other things, "are ill-suited to the community's way of life" or "might harm the community's fabric". Available from <https://www.hrw.org/news/2011/03/30/israel-new-laws-marginalize-palestinian-arab-citizens>.

<sup>66</sup> A particularly valuable source on this discrimination is the database of discriminatory laws maintained by Adalah: Centre for Legal Rights of the Arab Minority in Israel, which in 2016 listed more than 50 discriminatory laws of Israel, and reports on related legal challenges. Available from [www.adalah.org/en/law/index](http://www.adalah.org/en/law/index).

regime that serves to preserve Israel as a Jewish State. Israel uses the trappings of token universal democracy to lead many observers astray and deflect international opprobrium. The success of this approach depends on limiting Palestinian citizens to a politically ineffectual minority. However, it is impossible to fully appreciate this outcome without examining Israeli policies and practices in the other three domains. Indeed, the success of domain 1 depends on the workings of the other three.

## Domain 2: Palestinians in East Jerusalem

Israeli policies towards the some 300,000 Palestinians in East Jerusalem can be addressed more concisely.<sup>67</sup> The discrimination evident in domain 1 is reproduced: Palestinians in East Jerusalem experience discrimination in areas such as education, health care, employment, residency and building rights, experience expulsion from their homes and house demolitions consistent with a project of ethnic engineering of Greater Jerusalem, and suffer harsher treatment at the hands of the security forces.<sup>68</sup>

The central question here, however, is not whether Israel discriminates against Palestinians — amply confirmed by the data — but how the domain for Palestinians in East Jerusalem operates as an integral element of the apartheid regime. In brief, domain 2 situates Jerusalem Palestinians in a separate category designed to prevent them from adding to the demographic, political and electoral weight of Palestinians inside Israel. Specific policies regarding their communities and rights are designed to pressure them to emigrate and to quell, or at least minimize, resistance to that pressure. The “grand apartheid”<sup>69</sup> dimension of this domain can be appreciated by observing how the Israeli Jerusalem municipality has openly pursued a policy of “demographic balance” in East Jerusalem. For instance, the Jerusalem 2000 master plan seeks to achieve a 60/40 demographic balance in favour of Jewish residents.<sup>70</sup> As long ago as the 1980s, the municipality had drafted master plans to fragment Palestinian neighbourhoods

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<sup>67</sup> The figure of 300,000 was provided by the Association for Civil Rights in Israel in March 2015.

<sup>68</sup> For more details, see A/HRC/31/73; B’Tselem, “Statistics on Palestinians in custody of the Israeli security forces” (January 2017, available from [http://www.btselem.org/statistics/detainees\\_and\\_prisoners](http://www.btselem.org/statistics/detainees_and_prisoners)); Office for the Coordination of Humanitarian Affairs (OCHA), *Humanitarian Bulletin* (16 November 2015, available from [https://www.ochaopt.org/documents/ocha\\_opt\\_the\\_humanitarian\\_monitor\\_2014\\_12\\_11\\_english.pdf](https://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2014_12_11_english.pdf)); Alternative Information Center (AIC), “OCHA: One in two Palestinians to need humanitarian assistance in 2017” (26 January 2017, available from <http://alternativenews.org/index.php/headlines/329-ocha-one-in-two-palestinians-to-need-humanitarian-assistance-in-2017>).

<sup>69</sup> See Tilley, “A Palestinian declaration of independence”.

<sup>70</sup> A/HRC/22/63, para. 25.

with intervening Jewish ones, stifling the natural growth of the Palestinian population and pressuring Palestinians to leave.<sup>71</sup> Describing Jewish settlements in East Jerusalem as “neighbourhoods” is part of the wider tactic of disguising violations of international humanitarian law through the use of non-committal language.

Such policies have a significant impact because Jerusalem has such importance for the collective identity of Palestinians as a people. For them, the city is the administrative, cultural, business and political capital of Palestine, home to the Palestinian elite, and site of hallowed places of worship and remembrance. Although many Palestinians in East Jerusalem maintain networks of family and business connections with Palestinian citizens in Israel, the West Bank and (now to a lesser extent) the Gaza Strip, their primary interest is to go about their lives and pursue their interests in the city where they have homes, businesses, a vigorous urban society, strong cultural resonances, and, in some cases, ancestral roots going back millennia.

Israel pursues efforts to weaken the Palestinians politically and contain their demographic weight in several ways. One is to grant Palestinians in East Jerusalem the status of permanent residents: that is, as foreigners for whom residency in the land of their birth is a privilege rather than a right, subject to revocation. That status is then made conditional on what Israeli law terms their “centre of life”, evaluated by documented criteria such as home and business ownership, attendance at local schools and involvement in local organizations. If the centre of life of an individual or family appears to have shifted elsewhere, such as across the Green Line, their residency in Jerusalem may be revoked. A Palestinian resident of Jerusalem who has spent time abroad may also find that Israel has revoked his or her residency in Jerusalem.

Proving that Jerusalem is one’s “centre of life” is burdensome: it requires submitting numerous documents, “including such items as home ownership papers or a rent contract, various bills (water, electricity, municipal taxes), salary slips, proof of receiving medical care in the city, certification of children’s school registration”.<sup>72</sup> The difficulty in meeting the criteria is suggested

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<sup>71</sup> For further discussion of the Jerusalem master plans, see Francesco Chiodelli, “The Jerusalem Master Plan: planning into the conflict”, *Journal of Palestine Studies*, No. 51 (2012). Available from [www.palestine-studies.org/jq/fulltext/78505](http://www.palestine-studies.org/jq/fulltext/78505). For related maps, see Bimkom, *Trapped by Planning: Israeli Policy, Planning and Development in the Palestinian Neighborhoods of East Jerusalem* (Jerusalem, 2014). Available from <http://bimkom.org/eng/wp-content/uploads/TrappedbyPlanning.pdf>.

<sup>72</sup> B’tselem, “Revocation of residency in East Jerusalem”, 18 August 2013. Available from [www.btselem.org/jerusalem/revocation\\_of\\_residency](http://www.btselem.org/jerusalem/revocation_of_residency).

by the consequences of failure to do so: between 1996 (a year after the “centre of life” legislation was passed) and 2014, Jerusalem residency was revoked for more than 11,000 Palestinians.<sup>73</sup> To avoid that risk, a growing, albeit relatively low, number of Palestinians are seeking Israeli citizenship. Israel has granted only about half of those requests.<sup>74</sup>

Their fragile status as permanent residents leaves Palestinians in East Jerusalem with no legal standing to contest the laws of the State or to join Palestinian citizens of Israel in any legislative challenge to the discrimination imposed on them. Openly identifying with Palestinians in the occupied Palestinian territory politically carries with it the risk of Israel expelling them, for violating security provisions, to the West Bank and removing their right even to visit Jerusalem. Thus, the urban epicentre of Palestinian nationalism and political life is caught inside a legal bubble that neutralizes Palestinians’ capacity to oppose the apartheid regime.<sup>75</sup>

### Domain 3: Palestinians in occupied Palestinian territory

The roughly 4.6 million Palestinians who live in the occupied Palestinian territory (2.7 million in the West Bank and 1.9 million in the Gaza Strip) are governed not by Israeli civil law, but by military law, codified as orders issued by the commander of the territories and administered by the Israeli Defence Forces (IDF) and other designated arms of the occupying power.<sup>76</sup> Since the Israeli “disengagement” and withdrawal of settlers in 2005, the Gaza Strip has been internally governed by the Hamas Government (elected in 2006 to head the Palestinian Authority but later deposed). Still, Israeli military law continues to apply for Gaza regarding exclusive Israeli control over Palestinian movement and trade in and out of the territory, the unilaterally imposed “security zone” along the perimeter fence, and Palestinian

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<sup>73</sup> Data from B’tselem, Statistics on Revocation of Residency in East Jerusalem. Available from [www.btselem.org/jerusalem/revocation\\_statistics](http://www.btselem.org/jerusalem/revocation_statistics).

<sup>74</sup> Maayan Lubell, “Breaking taboo, East Jerusalem Palestinians seek Israeli citizenship in East Jerusalem”, *Haaretz*, 5 August 2015. Available from [www.haaretz.com/israel-news/1.669643](http://www.haaretz.com/israel-news/1.669643). According to the article, the number of Jerusalem Palestinians applying for Israeli citizenship has grown to between 800 and 1,000 annually, although in 2012 and 2013 only 189 out of 1,434 applications were approved.

<sup>75</sup> Nonetheless, Palestinians in Jerusalem have made formidable contributions to critiques of Israeli policies, the more impressive for their having done so under such conditions.

<sup>76</sup> Until the Oslo Accords of 1993 and 1995, governance of the occupied Palestinian territory was assigned to a “civil administration” operating within the IDF. In 1994, much of its authority was transferred to the Palestinian Authority (also known as the Palestinian National Authority), an interim self-government body.



access to fishing areas and sea routes. Gaza remains, therefore, under military occupation in the eyes of the United Nations.<sup>77</sup>

In 2009, a comprehensive report by the Human Rights Research Council of South Africa found that Israeli practices in the occupied Palestinian territory were overwhelmingly consistent with apartheid (see annex I). Israel has not accepted those findings, however, on several grounds. Those who claim that Israel does not govern Palestinians in an apartheid regime invariably cite conditions and rights for Palestinians in domain 1 (citizens of Israel). Leaving aside the issue of domain 2, they say that the situation of Palestinians in the occupied territory is irrelevant to the question. That approach can be persuasive at first glance. Palestinians in the occupied Palestinian territory are not citizens of Israel and, under the laws of war (cf. the Fourth Geneva Convention), are not supposed to be. The differential treatment by Israel of citizens and non-citizens in the occupied Palestinian territory could therefore seem admissible or, at least, irrelevant. In this common view, Israel would be practicing apartheid only if it annexed the territory, declared one State in all of Mandate Palestine and, thereafter, continued to deny equal rights to Palestinians. Influential voices such as former Israeli Prime Minister Ehud Olmert, former United States President Jimmy Carter, former United States Secretary of State John Kerry, and a host of Israeli, American and other critics and pundits have warned that Israel should withdraw from the West Bank precisely to avoid that scenario.

However, those warnings rest on flawed assumptions. First, Israel already administers the occupied Palestinian territory in ways consistent with apartheid, given that the territory has not one population but two: (a) Palestinian civilians, governed by military law; and (b) some 350,000 Jewish settlers, governed by Israeli civil law. The racial character of this situation is evidenced by the fact that all West Bank settlers are administered by Israeli civil law on the basis of being Jewish, whether they are Israeli citizens or not.<sup>78</sup> Thus, Israel administers the West Bank

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<sup>77</sup> The authors of this report concur with those scholars who have concluded that Gaza remains under military occupation. Although governed entirely by Palestinians, key elements of apartheid as defined by the Apartheid Convention remain. In particular, Israel has exclusive control of the borders of Gaza and, since 2007, has imposed a blockade, which translates into draconian restrictions on Palestinian movement that affect trade, work, education and access to health care (article II (c)), and repression of any resistance to those conditions (article II (f)). The Palestinian Authority has suffered from de facto separation, particularly since the 2006 legislative election victory of Hamas and the clashes that led to its taking effective control over the Gaza Strip in 2007. Between then and 2014, there were two de facto Palestinian Governments, one in Gaza and the other in Ramallah, controlled by Hamas and the Fatah movement respectively. In 2014, they formed a national unity Government, although Hamas retained effective control of the Gaza Strip.

<sup>78</sup> Limor Yehuda and others, *One Rule Two Legal Systems: Israel's Regime of Laws in the West Bank* (Association for Civil Rights in Israel (ACRI), October 2014), p. 108. Available from [www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf](http://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf).

through a dual legal system, based on race, which has led to expressions of concern by, among many others, former special rapporteurs Mr. Dugard and Mr. Falk.

Secondly, the character of this dual legal system, problematic in itself, is aggravated by how the State of Israel manages land and development on the basis of race. By denying Palestinians essential zoning, building and business permits, Israeli military rule has crippled the Palestinian economy and society, leaving Palestinian cities and towns (outside the Ramallah enclave) increasingly under-resourced and suffocating their growth and the welfare of their inhabitants. The Israeli blockade of Gaza has resulted in even worse living conditions for the entrapped Palestinian population there.

In contrast, Jewish settlements in the West Bank are flourishing. All State ministries provide support for their planning, funding, building and servicing; some, such as the Ministry of Construction and Housing and the Ministry of Agriculture and Rural Development, have been entirely committed to doing so. They also offer financial incentives for Jews to move to the settlements, including interest-free loans, school grants, special recreational facilities, new office blocks, agricultural subsidies, job training and employment guarantees. State complicity is further demonstrated by measures to integrate the economy, society and politics of Jewish settlements into those of Israel, generating seamless travel and electricity networks, a unified banking and finance system for Jews, Jewish business investment, and, in particular, a customs union.<sup>79</sup>

This vast State involvement belies any claim that the settlements are the work of maverick religious zealots, and challenges the plausibility of claims that Israel will leave the West Bank as soon as a negotiated settlement is achieved.<sup>80</sup> The scale, complexity and cost of the settlement grid, estimated by some researchers at hundreds of billions of United States dollars, further underline the intensity of the Israeli commitment to the settlements. The potential cost of (and political resistance to) withdrawal far exceed the political will or capacity of any Israeli Government.

The dual legal system applied by Israel in the occupied Palestinian territory justifies two brief digressions from the report's method: of eschewing a check-list method (comparing a State's behaviour with the Apartheid Convention's sample "inhuman acts") and avoiding comparisons with southern Africa. A check-list

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<sup>79</sup> Eyal Benvenisti, *The International Law of Occupation* (Princeton, Princeton University Press, 1993), p. 135.

<sup>80</sup> In July 2014, Israeli Prime Minister Benjamin Netanyahu announced: "I think the Israeli people understand now what I always say: that there cannot be a situation, under any agreement, in which we relinquish security control of the territory west of the River Jordan." See David Horowitz, "Netanyahu finally speaks his mind", *The Times of Israel*, 13 July 2014.

approach helps to clarify how Israel imposes apartheid on one racial group in order to ensure the domination of another. Such an item-by-item comparison of Israeli practices with the “inhuman acts” listed in the Apartheid Convention was undertaken for the Human Sciences Research Council of South Africa (HSRC) report issued in 2009. The findings of that study, summarized in annex I, were conclusive: except for the provision on genocide (which was not practiced in southern Africa either), every “inhuman act” listed in the Apartheid Convention is practiced by Israel in the West Bank.

The architects of South African apartheid adopted a strategy of “grand apartheid” to secure white supremacy in the long term through the country’s geographic partition into white areas (most of the country) and disarticulated black areas. That policy inspired the clause in the Apartheid Convention denouncing as a crime the creation of “separate reserves and ghettos for the members of a racial group or groups” (article II (d)). “Bantu” or “black” reserves were controlled by black South Africans appointed as leaders by the State. In the rhetoric of “grand apartheid”, those reserves or “homelands” were slated to become independent States that would provide self-determination to black South African peoples (language groups). Black South African governors were authorized (and armed) to suppress resistance by their African inhabitants, many of whom had been forcibly transferred into them, and to govern their territories in ways compatible with white development interests. That model so closely resembles current premises supporting a two-State solution in Palestine that it calls for sober reflection, not least because of the violent and destabilizing effects it had throughout sub-Saharan Africa.

The question arises as to whether Israel has deliberately pursued fragmentation of the West Bank into an archipelago of Palestinian cantons, divided by intervening Jewish-only areas (the Bantustan model). Certainly, this geography will permanently enfeeble any putative Palestinian sovereignty, preserving the prerogative of Israel to administer intervening land for the Jewish people. Oslo II, paradoxically, facilitated this “grand” strategy by establishing borders for the Palestinian autonomy enclaves. The comparison with South Africa helps to clarify an essential observation: with Israeli Jewish-national domination over an area dotted with Palestinian autonomy zones, apartheid is expressed as fully in a partition strategy as it is in a unified State.

In sum, domain 3 has been configured to exclude indefinitely the 4.6 million Palestinians living under Israeli military law from mounting any claim against the State of Israel for rights under Israeli civil law. International law and diplomacy, with its commitment to reject the acquisition of territory by force, has led to the population of the occupied Palestinian territory being projected as a permanently separate and distinct Palestinian-national entity. Well intentioned and based on

international law, this approach has had the effect of splitting Palestinians in the occupied territory from the 1.7 million Palestinian citizens of Israel and those in East Jerusalem. In that way, the demographic balance in Israel can be maintained as Jewish and a united Palestinian challenge to its apartheid regime can be avoided.

#### Domain 4: Palestinian refugees and involuntary exiles

In early 2016, 3,162,602 Palestinians living outside Mandate Palestine were officially registered as refugees by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).<sup>81</sup> Estimates of the entire refugee population, including those not registered with UNRWA and people who left Palestine under other circumstances and are not allowed to return (referred to as “involuntary exiles” in this report), range from six to eight million people. Although an exact count is difficult given the global diaspora of Palestinians now in their fourth and fifth generations, by any responsible estimate more Palestinians live outside Mandate Palestine than in it.<sup>82</sup>

Palestinian refugees are widely distributed. Approximately two million live in the occupied Palestinian territory: 792,000 in camps in the West Bank and 1.3 million in the Gaza Strip. Living under Israeli occupation, these people fall under domain 3, although they benefit from some protections and special services from UNRWA. The rest live mostly in the frontline States of Jordan (around 2.1 million), Lebanon (around 458,000) and the Syrian Arab Republic (around 560,000).<sup>83</sup> Only about 5 per cent live outside the Middle East. Lacking any citizenship, they are subject, without recourse, to the laws of their host State (not always comfortably, as some States — notably Lebanon — impose special restrictions on Palestinian refugees).<sup>84</sup> Those conditions have contributed to sustaining a strong nationalist nostalgia and sentiment among the great majority of Palestinian refugees regarding their origins in Palestine and a potent sense of enduring injustice resulting from Israeli policies. Their inability to return to their country thus remains a central grievance and a key

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<sup>81</sup> UNRWA lists of total of 5,266,603 refugees, the difference being accounted for by those living in the occupied Palestinian territory. See <https://www.unrwa.org/where-we-work>. Accessed 8 February 2017.

<sup>82</sup> The figure is a middle estimate, as the number of Palestinians who fled in the 1948 war has not been firmly established. Some scholars suggest 700,000 and 750,000 left; the Israelis provide a figure of 520,000; and Palestinian authorities estimate the number at between 900,000 and 1 million.

<sup>83</sup> UNRWA, UNRWA in figures as of 1 Jan 2016. Available from [https://www.unrwa.org/sites/default/files/content/resources/unrwa\\_in\\_figures\\_2016.pdf](https://www.unrwa.org/sites/default/files/content/resources/unrwa_in_figures_2016.pdf).

<sup>84</sup> For a short summary of the conditions in which Palestinian refugees live in Lebanon, see Meghan Monahan, Treatment of Palestinian refugees in Lebanon, Human Rights Brief (2 February 2015). Available from <http://hrbrief.org/2015/02/treatment-of-palestinian-refugees-in-lebanon>.

issue in peace talks. Politically, no Palestinian leadership can acquiesce to a peace agreement that ignores the refugees.

In 1948, General Assembly resolution 194(III) resolved that “the [Palestinian] refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so” and that compensation should be provided to the rest. Israel has rejected the application of that resolution on security grounds and on the basis of the “demographic threat” of a Palestinian majority: in the unlikely event that the entire Palestinian population of refugees and involuntary exiles returned to Palestine *en masse*, the Palestinian population under Israeli rule would total some 12 million, electorally overwhelming the 6.5 million Jews in Israel. Even if that refugee population returned in numbers sufficient only to generate a Palestinian majority (as is far more likely), Israel would be forced into either adopting an explicitly apartheid policy in order to exclude them, and abandoning democracy altogether, or enfranchising them and abandoning the vision of Israel as a Jewish State. As expressed in an article posted on the Israeli Ministry of Foreign Affairs website:

*According to Palestinian sources, there are about 3.5 million Palestinian refugees nowadays registered with UNRWA. If Israel were to allow all of them to return to her territory, **this would be an act of suicide on her part, and no State can be expected to destroy itself** (emphasis added).<sup>85</sup>*

Thus, domain 4 plays an essential role in the apartheid regime of Israel. Its refusal to allow refugees and involuntary exiles to return ensures that the Palestinian population never gains the demographic weight that would either threaten Israeli military control of the occupied Palestinian territory, or provide the demographic leverage within Israel to allow them to insist on full democratic rights, which would supersede the Jewish character of the State of Israel. In short, domain 4 ensures that Palestinians will never be able to change the system in ways that would lead to political equality between the two peoples.

## D. Counter-arguments

Several arguments can be and have been made to deny that the Apartheid Convention is even applicable to the case of Israel-Palestine. Some of them, such

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<sup>85</sup> Ruth Lapidoth, “Do Palestinian refugees have a right to return to Israel?”, posted on Israeli Ministry of Foreign Affairs, 15 January 2001. Available from [www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/do%20palestinian%20refugees%20have%20a%20right%20to%20return%20to.aspx](http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/do%20palestinian%20refugees%20have%20a%20right%20to%20return%20to.aspx).

as the contention that Jews and Palestinians are not “races” and that, because Palestinian citizens of Israel enjoy the right to vote, the treatment of them by the Israeli State cannot constitute apartheid, are addressed and rejected above. Other arguments include:

**1. Consistency with international practice: The Israeli doctrine of maintaining a Jewish majority, enabling the Jewish people to have its own nation-State, is consistent with the behaviour of States around the world, such as France, which express the self-determination of their respective ethnic nations. It is therefore unfair and exceptional treatment – and implicitly anti-Semitic – to target Israel as an apartheid State when it is only doing the same.**

This common argument derives from miscasting how national identities function in modern nation States. In France, for example, anyone holding French citizenship, regardless of whether they are indigenous or of immigrant origin, are equal members of the French nation and enjoy equal rights. According to the Supreme Court, Israel is not the State of the “Israeli nation” but of the “Jewish nation”.<sup>86</sup> Collective rights in Israeli law are explicitly conferred on Jews as a people and on no other collective identity: national rights for Jews, embedded in such laws as the Law of Return and the Citizenship Law (discussed above) do not extend to any other group under Israeli rule. Hence, racial-nationalist privileges are embedded in the legal and doctrinal foundations of the State. That is exceptional and would meet with opprobrium in any other country (as it did in apartheid South Africa).

**2. The standing of Palestinians as foreigners: Palestinian residents of the occupied Palestinian territory are not citizens of the State and so the State does not owe them rights and treatment equal to that accorded to Israeli Jewish citizens and settlers.**

The similarities between the legal situation in Palestinian territory under Israeli occupation and in Namibia under South African occupation have already been noted. Israel has denied Palestinians in the occupied Palestinian territory Israeli citizenship because they are not Jews. As the “in-gathering” of Jews is a central mission of Israeli State institutions and the State promotes naturalisation of Jews from other parts of the world, it is fair to assume that the Palestinians, born in territory under the State’s exclusive control, would have been granted Israeli citizenship had they been Jewish (and had they wanted it). In its General Recommendation No. 30 on discrimination against non-citizens, the Committee on the Elimination of Racial

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<sup>86</sup> George Rafael Tamarin v. State of Israel (1972) C.A.630/70.

Discrimination recommends that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination should:

*Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality.<sup>87</sup>*

The Apartheid Convention cites as crimes of apartheid “measures calculated to deny members of a racial group or groups” basic human rights, including “the right to a nationality” (article II (c)). Thus, the argument that Israel cannot be responsible for Palestinians who are non-citizens reinforces a finding of apartheid when one asks why they are not citizens. At the heart of the Israeli-Palestinian conflict is indeed the exclusion of the Palestinians, as non-Jews, from citizenship in the State that governs their country. (The liminal condition of living in a “State of Palestine” recently recognized by the General Assembly yet lacking all attributes of sovereignty has not provided Palestinians with a “citizenship” that has concrete application.)

**3. *The purpose clause. Israeli policies that oppress Palestinians are motivated by security concerns, and not the intention or desire to impose racial domination.***

The Apartheid Convention and the Rome Statute define crimes of apartheid as acts committed for the purpose of establishing and maintaining domination by one racial group over another. It could be argued that Israeli practices are only temporary measures, the purpose of which is not racial domination, but only to maintain order until a peace agreement removes the need for such measures. However, the 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. Moreover, apartheid is prohibited under international law irrespective of its duration.<sup>88</sup> The Apartheid Convention makes no distinction in terms of the period of time apartheid is carried out or the State’s ultimate vision for the future.<sup>89</sup>

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<sup>87</sup> CERD/C/64/Misc.11/rev.3, para. 14.

<sup>88</sup> The uniquely extended character of the Israeli occupation has generated a new body of literature on the legal implications of “prolonged occupation”. For more on this, see Tilley (ed.), *Beyond Occupation*, chap. 2.

<sup>89</sup> The Government of apartheid South Africa also argued that racial domination was not a goal in itself but a defensive measure designed to preserve the way of life of the white population. Apartheid was presented as merely a stage on the path to a mutually beneficial end, in which all “peoples” of South Africa would enjoy self-determination and peaceful coexistence. In practice, the “homelands” system was geared towards stabilizing the low-cost workforce and white land tenure.

## 3. Conclusions and Recommendations

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### A. Conclusions

This report establishes, on the basis of scholarly inquiry and overwhelming evidence, that Israel is guilty of the crime of apartheid. However, only a ruling by an international tribunal in that sense would make such an assessment truly authoritative. The authors therefore urge the United Nations to implement this finding by fulfilling its international responsibilities in relation to international law and the rights of the Palestinian people as a matter of urgency, for two reasons. First, the situation addressed in the report is ongoing. Many investigations of crimes against humanity have concerned past behaviour or events, such as civil wars involving genocides, which have formally concluded. In such cases, the international community faces no particular pressure to act in a timely way to terminate an ongoing crime prior to investigating the legal facts of culpability. In the case of Israel-Palestine, any delay compounds the crime by prolonging the subjugation of Palestinians to the active practice of apartheid by Israel. Prompt action is accordingly imperative to avert further human suffering and end a crime against humanity that is being committed now.

Secondly, the extreme gravity of the charge requires prompt action. Since the 1970s, when the international campaign to oppose apartheid in southern Africa gathered momentum, apartheid has been considered in the annals of the United Nations and world public opinion to be second only to genocide in the hierarchy of criminality.<sup>90</sup> This report accordingly recommends that the international community act immediately, without waiting for a more formal pronouncement regarding the culpability of the State of Israel, its Government and its officials for the commission of the crime of apartheid.

While urging swift action to oppose and end this apartheid regime, the authors of this report urge as a matter of highest priority that authoritative bodies be requested to review its findings. Opinions of the General Assembly, ICJ and ICC are especially crucial, although assessments by national courts would also be relevant to interpreting international criminal law and appraising its

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<sup>90</sup> Genocide and apartheid are the only two international crimes, the commission of which States have a duty to prevent.



implementation by Member States. On the basis of such findings, States and United Nations bodies could deliberate on a firm foundation of international law how best to discharge their responsibility to address and bring to an end the crime of apartheid and domination of the Palestinian people. In any event, pending that longer deliberative process, the authors of this report conclude that the weight of the evidence supports beyond a reasonable doubt the contention that Israel is guilty of imposing an apartheid regime on the Palestinian people.

The prohibition of apartheid is considered *jus cogens* in international customary law. States have a separate and collective duty (a) not to recognize an apartheid regime as lawful; (b) not to aid or assist a State in maintaining an apartheid regime; and (c) to cooperate with the United Nations and other States in bringing apartheid regimes to an end. A State that fails to fulfil those duties could itself be held legally responsible for engaging in wrongful acts involving complicity with maintaining an apartheid regime. The United Nations and its agencies, and all Member States, have a legal obligation to act within their capabilities to prevent and punish instances of apartheid that are responsibly brought to their attention.

Civil society institutions and individuals also have a moral duty to use the instruments at their disposal to raise awareness of this ongoing criminal enterprise, and to exert pressure on Israel to dismantle apartheid structures and negotiate in good faith for a lasting peace that acknowledges the rights of Palestinians under international law and makes it possible for the two peoples to live together on the basis of real equality.

Apartheid in southern Africa was brought to an end, in part, by the cumulative impact of a variety of measures, including economic sanctions and sports boycotts, undertaken with the blessing of United Nations bodies and many Member States, and with grassroots support in States with strong strategic and economic ties with South Africa. The effectiveness of the anti-apartheid campaign was in large part due to the transnational activism of civil society, which reinforced the intergovernmental consensus that took shape in the United Nations.

## B. Recommendations

The following recommendations cover general responsibilities and those of specific institutional actors. Their purpose is, first of all, to focus attention on the principal finding of this report, that Israel has imposed a regime of apartheid on the Palestinian people as a whole, thereby challenging the United Nations and other international, national and civil society actors (including private citizens) to act in

response. They are also designed to encourage the implementation of practical measures in accordance with international law to exert pressure on Israel to dismantle its apartheid regime and end the unlawful status quo by engaging in a peace process that seeks a just solution.

### General Recommendations

1. United Nations bodies, national Governments and civil society actors, including religious organizations, should formally endorse the principal finding of this report that the treatment by Israel of the Palestinians is consistent with the crime of apartheid.
2. On that basis, those actors should examine what measures can be taken in accordance with their legal obligations, as set forth under the Apartheid Convention. As the crime of apartheid qualifies as a peremptory or *jus cogens* norm of international law, States are bound by the Convention even if they are not parties to it, and would have similar legal obligations even in the absence of the convention, because the crime of apartheid is prohibited under customary international law.

### Recommendations for the United Nations

1. Each United Nations body should promptly consider what action to take in view of the finding that Israel maintains a racist regime of apartheid in its exercise of control over the Palestinian people, taking due account of the fragmentation of that people by Israel, which is itself an aspect of the control arrangements that rely on “inhuman acts” for the purpose of systematic racial domination.
2. ESCWA should take a central role in advocating international cooperation to end the apartheid regime. Its special role in this respect derives not only from the Commission’s geographic position but also its mandate.
3. United Nations entities should cooperate with one another, and in particular with ESCWA, to discuss and disseminate this report. They should consider, possibly in cooperation with the Palestinian Government and other Palestinian institutions, convening a special meeting to assess how to follow up on and implement the recommendations of the report.
4. The General Assembly should, taking inspiration from resolution 1761(XVII) of 6 November 1962, revive the Special Committee against Apartheid, and the United Nations Centre against Apartheid (1976-1991), which would report authoritatively on Israeli practices and policies relating to the crime of apartheid, including the legal and administrative instrumentalities used to carry out the underlying criminal enterprise. Those bodies gathered and

disseminated vital legal analysis and information with respect to South African apartheid. Those resources benefited not only jurists and scholars, but also civil society activists around the world, helping them to shape media presentations and public opinion, legitimating calls for boycotts, divestments and sanctions, and contributing overall to the formation of a transnational movement against apartheid in South Africa.

5. The Human Rights Council should be vested with particular responsibility for examining the findings of this report and reinforcing its recommendations. The Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967 should be instructed to report annually to the Council and the Third Committee of the General Assembly on steps taken to comply with the terms of the Apartheid Convention and to encourage member States of the Council to take appropriate action.
6. The competent bodies of the United Nations should consider seeking an advisory opinion from the ICJ as to whether the means used by Israel to maintain control over the Palestinian people amount to the crime of apartheid and, if so, what steps should be taken to end that situation promptly.
7. Pursuant to article 7 (1) (j) of the Rome Statute, the ICC should be formally encouraged to investigate, as a matter of urgency, whether the State of Israel, its Governments and individuals, in implementing policies and practices with respect to the Palestinian people, are guilty of the crime of apartheid and, if so, to act accordingly.
8. On the basis of this report, the Secretary-General should be respectfully urged to recommend to the General Assembly and the Security Council that a global conference be convened at an early date in order to consider what action should be taken by the United Nations and what might be recommended to civil society and private sector actors.

### **Recommendations for national Governments of Member States**

1. National Governments should be reminded of their legal duty under international law to take appropriate action to prevent the crime of apartheid and punish its perpetrators, taking cognizance of the findings of this report and any parallel findings by competent bodies.
2. National Governments should, within the limits of their legislative, executive and judicial institutions, take appropriate action, including allowing criminal prosecutions of Israeli officials demonstrably connected with the practices of apartheid against the Palestinian people.
3. National Governments, especially of member States of ECSWA, should explore ways of cooperating in the discharge of their duty to oppose and overcome the regime of apartheid.

4. National Governments should support boycott, divestment and sanctions activities and respond positively to calls for such initiatives.

#### **Recommendations for civil society and private sector actors**

1. Civil society actors should be invited to submit to the Human Rights Council reactions to this report. A special meeting should be convened to consider those reactions and to plan appropriate next steps, including recommendations to the Human Rights Council and to the Office of the United Nations High Commissioner for Human Rights (OHCHR).
2. Efforts should be made to broaden support for boycott, divestment and sanctions initiatives among civil society actors.
3. Private sector actors should be made aware of the findings of this report and requested to act accordingly, including by informing the public about the criminality of the apartheid regime, and urging Governments to fulfil their obligations under the Apartheid Convention and to propose initiatives that could be undertaken by civil society. Private sector actors should also be reminded of their legal, moral and political responsibility to sever ties with commercial ventures and projects that directly or indirectly aid and abet the apartheid regime imposed.

# Annex I

## Findings of the 2009 HSRC Report

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Legal analysis cited here from *Beyond Occupation* draws from work by contributors to a study conducted between 2007 and 2009, under the auspices of the Human Sciences Research Council of South Africa (HSRC) and at the request of the South African Ministry of Foreign Affairs. Coordinated, co-authored and edited by Virginia Tilley, that study was issued in 2009 under the title *Occupation, Colonialism, Apartheid? A Reassessment of Israel's Practices in the Occupied Palestinian Territories under International Law*. Principal contributors included Iain Scobbie, Professor and Chair of International Law, University of Manchester (Great Britain); Max du Plessis, Associate Professor of Law, University of KwaZulu-Natal (Durban) and Senior Research Associate, Institute for Security Studies; Rina Rosenberg, Esq., International Advocacy Director of Adalah/Legal Centre for Arab Minority Rights in Israel (Haifa); John Reynolds, formerly researcher at Al-Haq (Ramallah) and now lecturer in international law and critical legal studies, National University of Ireland-Maynooth; Victor Kattan, Senior Research Fellow at the Middle East Institute and an Associate Fellow at the Faculty of Law at the National University of Singapore; and Michael Kearney, now Senior Lecturer in Law at Sussex University (Great Britain).

The method was to review Israeli practices in accordance with the list of “inhuman acts” described in the Apartheid Convention. The team determined that Israel was practicing every act listed in the Convention except genocide and the ban on mixed marriages. Subsequently, Israel passed a law banning mixed marriages by people registered as having different religious identities. The revised version of the report published in 2012 was amended accordingly.

The list provided here is a summary of findings regarding those acts. Detailed empirical evidence, data and citations on each category are available in *Beyond Occupation* (chapter 4).

## **Apartheid Convention, article II**

**(a) denial to a member or members of a racial group or groups of the right to life and liberty of person:**

- (i) by murder of members of a racial group or groups;**
- (ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;**
- (iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;**

Article II (a) is satisfied by Israeli measures serving to repress Palestinian dissent against the occupation and its system of domination. Israeli policies and practices include murder, in the form of targeted extrajudicial killings; torture and other cruel, inhuman or degrading treatment or punishment of detainees; a military court system that falls far short of international standards of due process, including fair trial; and arbitrary arrest and detention of Palestinians, including administrative detention imposed, often for extended periods, without charge or trial and lacking adequate judicial review. All of those practices are discriminatory, in that Palestinians are subject to different legal systems and different courts, which apply different standards of evidence and procedure that result in far more severe penalties than those applied to Jewish Israelis.

**(b) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;**

Article II (b) takes its language from the Convention on the Prevention and Punishment of Crime of Genocide and is interpreted here as signifying a policy of genocide. Israeli policies and practices in the occupied Palestinian territory are not found to have the intent of causing the physical destruction of the Palestinian people in this sense. Israel pursues policies that are inimical to human health and life and so are serious violations of international humanitarian and human rights law: they include policies that cause human suffering, such as closures imposed on the Gaza Strip, thereby depriving Palestinians of access to essential health care, medicine, fuel and adequate nutrition. However, those policies do not meet the threshold of a deliberate policy of mass physical extermination.

- (c) any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;**

Article II (c) is satisfied on all counts:

- (i) Restrictions on the Palestinians' right to freedom of movement are endemic, stemming from Israeli control of the occupied Palestinian territory border crossings, the wall in the West Bank, a matrix of checkpoints and separate roads, and obstructive and all-encompassing permit and ID systems.
- (ii) The right of Palestinians to choose their own place of residence within their territory is severely curtailed by systematic administrative restrictions on residency and building in East Jerusalem, by discriminatory legislation that operates to prevent Palestinian spouses from living together on the basis of which part of the occupied Palestinian territory they originate from, and by the strictures of the permit and ID systems.
- (iii) Palestinians are denied the right to leave and return to their country. Palestinian refugees living in the occupied Palestinian territory are not allowed to return to their homes inside Israel, while Palestinian refugees and involuntary exiles outside Israel and the territory are not allowed to return to their homes in either the territory or Israel. Similarly, hundreds of thousands of Palestinians displaced from the West Bank and Gaza Strip in 1967 have been prevented from returning. Many Palestinian residents of the occupied territory must obtain Israeli permission (often denied) to leave it; political activists and human rights defenders are often subject to arbitrary and undefined "travel bans", and many Palestinians who travelled abroad for business or personal reasons have had their residence IDs revoked and been prohibited from returning.
- (iv) Israel denies Palestinian refugees living in the occupied Palestinian territory the right to a nationality, denying them citizenship of the State (Israel) that governs the land of their birth, and also obstructing the exercise by the Palestinians of the right to self-determination and preventing the formation of a Palestinian State in the West Bank (including East Jerusalem) and Gaza Strip.

- (v) Palestinians are denied the right to freedom and residence through the cantonization of the West Bank, which confines them to designated areas on the basis of race; through bans on their returning to homes in the occupied Palestinian territory from which they were displaced by fighting and terror; and through restrictions on building permits that prevent them from establishing homes where they wish to live.
- (vi) Palestinians are restricted in their right to work through Israeli policies that severely curtail Palestinian agriculture and industry in the occupied Palestinian territory, restrict exports and imports, and impose pervasive obstacles to internal movement that impair access to agricultural land and travel for employment and business. Since the second intifada, access for Palestinians to work inside Israel, once significant, has been dramatically curtailed and is now negligible. The unemployment rate in the occupied Palestinian territory as a whole has reached almost 50 per cent.
- (vii) Palestinian trade unions exist but are not recognized by the Israeli Government or by the Histadrut (the largest Israeli trade union) and cannot effectively represent Palestinians working for Israeli employers and businesses in the occupied Palestinian territory. Palestinian unions are not permitted to function at all in Israeli settlements. Although they are required to pay dues to the Histadrut, the interests and concerns of Palestinian workers are not represented by the Histadrut; nor do they have a voice in its policies.
- (viii) Israel does not operate the school system in the occupied Palestinian territory, but severely impedes Palestinian access to education on a routine basis through extensive school closures; direct attacks on schools; severe restrictions on movement, including travel to schools; and the arrest and detention of teachers and students. The denial by Israel of exit permits, particularly for Palestinians from the Gaza Strip, has prevented thousands of students from pursuing higher education abroad. Discrimination in education is further underlined by the parallel and greatly superior Jewish Israeli school system in Jewish settlements throughout the West Bank, to which Palestinians have no access.
- (ix) Palestinians in the occupied Palestinian territory are denied the right to freedom of opinion and expression through censorship laws enforced by the military authorities and endorsed by the Supreme Court. Palestinian newspapers must have a military permit and articles must be pre-approved by the military censor. Since 2001, the Israeli Government Press Office has drastically limited press accreditation for Palestinian journalists, who are also subjected to systematic harassment, detention and confiscation of materials, and in some cases assassination. The accreditation of foreign journalists working in the occupied territory may be revoked at the



discretion of the Government Press Office Director on security grounds, which include writing stories that are deemed to “delegitimize” the State.<sup>1</sup> Foreign journalists are regularly barred from entering the Gaza Strip.

- (x) The right to freedom of peaceful assembly and association is impeded through military orders. Military legislation bans public gatherings of 10 or more persons without a permit from the Israeli military commander. Non-violent demonstrations are regularly suppressed by the Israeli army with live ammunition, tear gas and arrests. Most Palestinian political parties have been declared illegal and institutions associated with those parties, such as charities and cultural organisations, are regularly subjected to closure and attack.
- (xi) The prevention of full development in the occupied Palestinian territory and participation of Palestinians in political, economic, social and cultural life is most starkly demonstrated by the effects of the ongoing Israeli blockade of the Gaza Strip.

**(d) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;**

Article II (d) is satisfied in the following ways:

- (i) Israeli policies have divided the occupied Palestinian territory into a series of non-contiguous enclaves (Areas A and B in the West Bank, as a whole separated from the Gaza Strip) in which Palestinians are allowed to live and maintain a degree of local autonomy. Land between those enclaves is reserved exclusively for Jewish and State use: the Jewish settlement grid, nature reserves, agro-industry, military zones and so forth. Land not already used is considered “State land” and administered by State institutions for the benefit of the Jewish people. Segregation of the populations is ensured by pass laws that restrict Palestinians from visiting Jewish areas without a permit and ban Jewish-Israeli travel into Palestinian zones. The wall and its infrastructure of gates and permanent and “floating” checkpoints enforce those restrictions.

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<sup>1</sup> “Cards will not be given under these rules to any applicant if the Director is of the opinion, after consultation with security authorities, that providing the Cards may endanger the State security”, article 3 (f), Rules regarding cards for foreign media journalists, press technicians and media assistants. Available from <http://gpoeng.gov.il/media/54705/gpo-rules.pdf>.

- (ii) Inter-faith marriages between Muslims or Christians with Jews are prohibited by law.<sup>2</sup> No civil marriage exists in Israel except for the tiny minority whose faith is not declared. Mixed-faith couples must leave the State to marry. Mixed marriages conducted outside of Israel are recognized by the State, provided that marriages among Jews accord with Orthodox Jewish law.
- (iii) Israel has extensively appropriated Palestinian land in the occupied Palestinian territory for exclusively Jewish use. Private Palestinian land comprises about 30 per cent of the land unlawfully appropriated for Jewish settlement in the West Bank. Approximately 40 per cent of the West Bank is completely closed to use by the Palestinians, and significant restrictions are placed on access by them to much of the rest.

**(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;**

Article II (e) is today not significantly satisfied, as Israel has raised barriers to Palestinian employment inside Israel since the 1990s and Palestinian labour is now used extensively only in the construction and services sectors of Jewish-Israeli settlements in the occupied Palestinian territory. Otherwise, exploitation of labour has been replaced by practices that fall under article II (c), regarding the denial of the right to work.

**(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.**

Arrest, imprisonment, travel bans and the targeting of Palestinian parliamentarians, national political leaders and human rights defenders, as well as the closing down of related organisations by Israel, represent persecution for opposition to the system of Israeli domination in the occupied Palestinian territory, within the meaning of article II (f). Article II (f) is especially important in the occupied Palestinian territory, where “security” measures are focused on resistance to occupation.

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<sup>2</sup> The Israeli prohibition of mixed marriages is mainly concerned with marriages involving Jews. This is effected by requiring that all marriages be conducted by religious authorities. Since Muslim law permits mixed marriages, marriage between Muslims and Christians is not prohibited. The aim of this arrangement is clear: to avoid blurring the social divisions between Jews and non-Jews. Similarly, under apartheid in South Africa, the Prohibition of Mixed Marriages Act of 1949 banned marriages between “Europeans and non-Europeans” but not between non-Europeans and other non-Europeans.

## Annex II

# Which Country?

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Israeli policies confuse the issue in relation to the categorization under the Apartheid Convention of all acts fitting the purpose clause and preventing “participation in the political, social, economic and cultural life of the country” (article II (c)) as crimes of apartheid. The question is, from which “country” are Palestinians being denied equal rights and full participation? This question engages larger questions about the nature of the Israeli-Palestinian conflict itself.

1. The “country” from which Palestinians in the occupied Palestinian territory are excluded could arguably be Mandate Palestine as established by the League of Nations. The League’s intention was for it to gain independence as a State representing the shared patrimony of the entire multi-sectarian population of Palestine. That model, overtaken by events, was confused from the start by language about a “Jewish national home” and in any case was rendered moot by war, expulsion and other events on the ground. However, exclusive Israeli control since 1967 over all of Mandate Palestine has preserved the original geographical unit of Palestine. Hence the “country” in which Palestinians are being deprived of rights could be the Palestine that was never allowed to form, and arguably should form. The remedy in that case is to restore the standing of the original Mandate, which holds that the region is properly one country that has wrongfully been divided by racial agendas.
2. The country from which Palestinians are excluded could be the “Arab State” recommended by resolution 181(II), which also never formed. This view accepts as authoritative the findings of the Special Committee on Palestine in 1947 and as irreversible the events of the 1948 war, in which a “Jewish State” was formed in part of Mandate territory. What in more recent times has been declared the State of Palestine and sought recognition by the United Nations is a much reduced version of that “Arab State”. Israeli policies remain aimed at depriving such a State of the essential attributes of sovereignty; those policies would have to be reversed for this approach to generate a true State. Since Israel shows no indication of changing its position, the alternative is that a Palestinian State be granted some political rights as “reserves” enjoying local autonomy, comparable to the Bantustans of southern Africa or Native American reservations in the United States. Such an arrangement is unlikely to

satisfy Palestinian aspirations for self-determination, however. It is more likely to lead ultimately to violence and insurrection by a terminally frustrated Palestinian population.

3. The "country" from which Palestinians are wrongfully deprived of equal rights may be the State of Israel. Accepting as irreversible the annexation measures of Israel in East Jerusalem and the West Bank, this approach would see Israel incorporating the occupied Palestinian territory fully into its governing institutions but dismantling the policies of racial oppression and domination that make Israel an apartheid State. Jews and Palestinians may, however, fear the consequences: enduring security perils for the former and enduring discrimination against the latter.

This report examines, based on key instruments of international law, whether Israel has established an apartheid regime that oppresses and dominates the Palestinian people as a whole. Having established that the crime of apartheid has universal application, that the question of the status of the Palestinians as a people is settled in law, and that the crime of apartheid should be considered at the level of the State, the report sets out to demonstrate how Israel has imposed such a system on the Palestinians in order to maintain the domination of one racial group over others.

A history of war, annexation and expulsions, as well as a series of practices, has left the Palestinian people fragmented into four distinct population groups, three of them (citizens of Israel, residents of East Jerusalem and the populace under occupation in the West Bank and Gaza) living under direct Israeli rule and the remainder, refugees and involuntary exiles, living beyond. This fragmentation, coupled with the application of discrete bodies of law to those groups, lie at the heart of the apartheid regime. They serve to enfeeble opposition to it and to veil its very existence. This report concludes, on the basis of overwhelming evidence, that Israel is guilty of the crime of apartheid, and urges swift action to oppose and end it.

