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# Apartheid, International Law, and the Occupied Palestinian Territory

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## Abstract

*Apartheid is a loaded term; saturated with history and emotion. It conjures up images and memories of discrimination, oppression, and brutality; indulgence, privilege, and pretension; racism, resistance, and, ultimately, emancipation. All of which come to us through the history of apartheid in South Africa. Although prohibited and criminalized by international law in response to the situation in southern Africa, the concept of apartheid was never given enormous attention by international lawyers. Following an awakening of interest in the international legal prohibition of apartheid as a potentially appropriate lens through which to view the situation of the Palestinians, this article examines the merits of such a claim in the context of Israeli law and practice in the occupied Palestinian territory.*

## 1 Introduction: The Apartheid Narrative

*Apartheid is a loaded term, saturated with history and emotion. It instantly conjures up images and memories of discrimination, oppression, and brutality; indulgence, privilege, and pretension; racism, resistance, and, ultimately, emancipation. All of these images come to us, of course, through the history of apartheid in South Africa. Although prohibited and criminalized by international law in response to the situation in southern Africa, the concept of apartheid was never given enormous attention by international lawyers. Even after the codification of*

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its prohibition in various international treaties, as the regime of racial supremacy continued to fester in South Africa itself, the primary thrust of the global anti-apartheid struggle that emerged in opposition to it was framed in moral and political terms, rather than in legal language. With the collapse of the apartheid system in South Africa came the suspension of the UN treaty-monitoring body for the International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>1</sup> (the ‘Group of Three’),<sup>2</sup> as well as the dissolution of the Special Committee against Apartheid and the UN Centre Against Apartheid.<sup>3</sup> Meanwhile, South Africa’s own internal transition focused on truth and reconciliation rather than the prosecution of the crime of apartheid.<sup>4</sup>

The Group of Three asserted at the time that ‘thus far there is no claim by any State party that apartheid, as defined by the Convention, exists anywhere else than in southern Africa’.<sup>5</sup> However, following isolated suggestions of apartheid in Israel/Palestine in the 1980s–1990s,<sup>6</sup> the narrative of ‘Israeli apartheid’ gained prolificacy in the wake of the outbreak of the second Palestinian *intifada* in 2000. Popular references to apartheid began to infiltrate mainstream media circles and bestseller lists.<sup>7</sup> Prominent South Africans spoke and wrote about the painful memories of apartheid that were resurrected upon visiting the West Bank and Gaza Strip,<sup>8</sup> adding weight to the powerful symbolism of the analogy. The South African government has in recent years begun to describe Israeli occupation practices as reminiscent of apartheid: policies of Jewish settlement and forcible displacement of Palestinians in East Jerusalem are ‘reminiscent of apartheid forced removals’;<sup>9</sup> Israeli military order 1650<sup>10</sup> is

<sup>1</sup> Convention on the Suppression and Punishment of the Crime of Apartheid (1973), 1015 UNTS 243, entered into force 18 July 1976.

<sup>2</sup> UN Economic and Social Council, ‘Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid: Report of the Group of Three established under the Convention’, UN Doc. E/CN.4/1995/76, 25 Jan. 1995, at para. 20.

<sup>3</sup> *Ibid.*, at para. 12.

<sup>4</sup> See Truth and Reconciliation Commission of South Africa Report (1998).

<sup>5</sup> Report of the Group of Three, *supra* note 2, at para. 17.

<sup>6</sup> U. Davis, *Israel: An Apartheid State* (1987); Shah, ‘On the Road to Apartheid: The Bypass Road Network in the West Bank’, 29 *Columbia Hmn Rts L Rev* (1997–1998) 221.

<sup>7</sup> See, e.g., M. Bisharah, *Palestine/Israel: Peace or Apartheid: Occupation, Terrorism and the Future* (2001); Noam Chomsky interviewed by Christopher J. Lee: ‘South Africa, Israel-Palestine, and the Contours of the Contemporary Global Order’, *Safundi*, 9 Mar. 2004; U. Davis, *Apartheid Israel: Possibilities for the Struggle Within* (2004); McGreal, ‘Worlds Apart’, *The Guardian*, 6–7 Feb. 2006, available at: [www.guardian.co.uk/world/2006/feb/06/southafrica.israel](http://www.guardian.co.uk/world/2006/feb/06/southafrica.israel); J. Carter, *Palestine: Peace Not Apartheid* (2006); Finklestein, ‘The Ludicrous Attacks on Jimmy Carter’s Book’, *Counterpunch*, 28 Dec. 2006.

<sup>8</sup> See, e.g., Tutu, ‘Apartheid in the Holy Land’, *The Guardian*, 29 Apr. 2002, available at: [www.guardian.co.uk/world/2002/apr/29/comment](http://www.guardian.co.uk/world/2002/apr/29/comment).

<sup>9</sup> South African Government Information, ‘South Africa’s response to latest Israeli settlement activities in East Jerusalem’, 24 Nov. 2009, available at: [www.info.gov.za/speeches/2009/09112415151001.htm](http://www.info.gov.za/speeches/2009/09112415151001.htm).

<sup>10</sup> Order regarding Prevention of Infiltration (Amendment No. 2) (Judea and Samaria) (No. 1650) 5769–2009), 13 Oct. 2009. This order significantly expands the definition of ‘infiltrator’, and potentially allows for the arrest or deportation – without judicial review – of any Palestinian in the West Bank, even those born or permanently residing there.

'reminiscent of pass laws under apartheid South Africa'.<sup>11</sup> Israeli academics,<sup>12</sup> journalists and newspaper editors,<sup>13</sup> and even former municipal representatives<sup>14</sup> and government ministers,<sup>15</sup> began to criticize their own government's treatment of the Palestinians as analogous to, or worse than, apartheid. The situation prompted Israeli leaders on the 'moderate' end of the political spectrum to express concerns that a failure to end the occupation would leave Israel facing a South African-style anti-apartheid struggle for equal rights, which would ultimately bring about the demise of Israel, at least as a Jewish national state.<sup>16</sup>

Since 2007, the question of the relevance of apartheid not merely by analogy to South Africa, but as defined by international law, has started to gain currency with authorities in the UN. Then President of the General Assembly, Miguel d'Escoto Brockmann, spoke in late 2008 of the importance of the UN using the apartheid terminology to describe Israeli policies in the occupied Palestinian territory:

I believe it is very important that we in the United Nations use this term. We must not be afraid to call something what it is. It is the United Nations, after all, that passed the International

<sup>11</sup> South African Department of International Relations and Cooperation, 'Media Statement: Israeli Infiltration Order 1650', 21 Apr. 2010. It is also worth noting that in July 2011, the Advertising Standards Authority of South Africa dismissed a complaint lodged by the South African Jewish Board of Deputies against a radio commercial for South African Artists Against Apartheid, finding that the analogy made between Israel and apartheid in the commercial is capable of substantiation through documentary sources, and as such is not misleading. See Advertising Standards Authority of South Africa, Ruling of the ASA Directorate in the matter of *South African Jewish Board of Deputies v. South African Artists Against Apartheid*, 5 July 2011.

<sup>12</sup> See, e.g., Yiftachel, 'Neither Two States Nor One: The Disengagement and "Creeping Apartheid" in Israel/Palestine', 8(3) *The Arab World Geographer/Le Géographe du monde arabe* (2005) 125; Halper, 'Countdown to Apartheid', *Counterpunch*, 25 May 2006; Haaretz Staff and Foratv, 'Prof. Avi Shlaim – Settlements turned Israel into apartheid state', *Ha'aretz*, 21 Nov. 2008, available at: [www.haaretz.com/news/video-prof-avi-shlaim-settlements-turned-israel-into-apartheid-state-1.285464](http://www.haaretz.com/news/video-prof-avi-shlaim-settlements-turned-israel-into-apartheid-state-1.285464).

<sup>13</sup> See, e.g., Goodman, 'Israeli Journalist Amira Hass Reflects on Reporting Under Occupation', *Democracy Now*, 12 Apr. 2005, available at: [www.democracynow.org/2005/4/12/israeli\\_journalist\\_amira\\_hass\\_reflects\\_on](http://www.democracynow.org/2005/4/12/israeli_journalist_amira_hass_reflects_on); Lappin, 'Zionist Federation cancels Haaretz journalist: Columnist Danny Rubinstein reportedly likens Israel to apartheid South Africa', *Yediot Aharonot*, 31 Aug. 2007, available at: [www.ynetnews.com/articles/0,7340,L-3444320,00.html](http://www.ynetnews.com/articles/0,7340,L-3444320,00.html); HaLevi, 'Haaretz Editor Refuses to Retract Israel Apartheid Statements', *Arutz Sheva*, 5 Sept. 2007, available at: [www.israelnationalnews.com/News/News.aspx/123596#.UZPGV3Bqba4](http://www.israelnationalnews.com/News/News.aspx/123596#.UZPGV3Bqba4); Levy, 'Twilight Zone/Worse than Apartheid', *Ha'aretz*, 12 July 2008, available at: [www.haaretz.com/twilight-zone-worse-than-apartheid-1.249503](http://www.haaretz.com/twilight-zone-worse-than-apartheid-1.249503); Laor, 'Israel's apartheid is worse than South Africa's', *Ha'aretz*, 8 Nov. 2009, available at: [www.haaretz.com/print-edition/opinion/israel-s-apartheid-is-worse-than-south-africa-s-1.4590](http://www.haaretz.com/print-edition/opinion/israel-s-apartheid-is-worse-than-south-africa-s-1.4590).

<sup>14</sup> Benvenisti, 'Bantustan Plan for an Apartheid Israel', *The Guardian*, 26 Apr. 2004, available at: [www.guardian.co.uk/world/2004/apr/26/comment](http://www.guardian.co.uk/world/2004/apr/26/comment).

<sup>15</sup> Aloni, 'Indeed there is apartheid in Israel', *Middle East News Service*, 10 Jan. 2007 (translation of Hebrew original published in *Yediot Aharonot* on 31 Dec. 2006, available at: [www.ynet.co.il/articles/0,7340,L-3346283,00.html](http://www.ynet.co.il/articles/0,7340,L-3346283,00.html)); Sarid, 'Yes, it is apartheid', *Ha'aretz*, 25 Apr. 2008, available at: [www.haaretz.com/print-edition/opinion/yes-it-is-apartheid-1.244643](http://www.haaretz.com/print-edition/opinion/yes-it-is-apartheid-1.244643).

<sup>16</sup> McCarthy, 'Israel risks apartheid-like struggle if two-state solution fails, says Olmert', *The Guardian*, 30 Nov. 2007, available at: [www.guardian.co.uk/world/2007/nov/30/israel](http://www.guardian.co.uk/world/2007/nov/30/israel); McCarthy, 'Barak: make peace with Palestinians or face apartheid', *The Guardian*, 3 Feb. 2010, available at: [www.guardian.co.uk/world/2010/feb/03/barak-apartheid-palestine-peace](http://www.guardian.co.uk/world/2010/feb/03/barak-apartheid-palestine-peace).

Convention against the Crime of Apartheid, making clear to all the world that such practices of official discrimination must be outlawed wherever they occur.<sup>17</sup>

Prior to this, the former UN Special Rapporteur on the human rights situation in the Palestinian territories had raised the issue of whether Israel's practices might fit the legal definition of apartheid. In his January 2007 report, he framed the question thus:

Israel is clearly in military occupation of the OPT. At the same time, elements of the occupation constitute forms of colonialism and of apartheid, which are contrary to international law. What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the occupying Power and third States?<sup>18</sup>

This question was taken up by the Human Sciences Research Council (HSRC) of South Africa, which in 2008 convened a team of international lawyers from Palestine, Israel, South Africa, and Europe to examine these questions of whether the international legal prohibitions of colonialism and apartheid had been breached by Israel in the Palestinian territories, and, if so, with what legal consequences. The findings were published as a preliminary study in 2009 and then in full book form in 2012, and concluded, *inter alia*, that there exists in the occupied Palestinian territory an institutionalised and oppressive system of Israeli domination and oppression over Palestinians as a group; that is, a system of apartheid.<sup>19</sup>

Richard Falk, when interviewed in March 2009, not long after taking up the reins as the UN Special Rapporteur, questioned whether the apartheid 'analogy' was a 'tactically useful language to use'. Professor Falk stressed that 'each situation has its originality', and that while there are certainly resemblances between the Palestinian situation and apartheid South Africa, there are also dissimilarities. He thus suggested that drawing comparisons to apartheid is 'less useful than to focus directly on the realities of the occupation as it affects the daily lives of the Palestinian people'.<sup>20</sup> Although the question he was responding to referred to the international crime of apartheid, it was clear from his language that at that point Professor Falk was conceptualizing the question of apartheid as one of analogy to South Africa, rather than one for consideration on its own merits under the norms of international law.

<sup>17</sup> Speech of the President of the UN GA, Miguel d'Escoto, UN Headquarters, New York, 24 Nov. 2008, available at: [www.humanrightsvoices.org/assets/attachments/documents/7245\\_Brockmann\\_GA.pdf](http://www.humanrightsvoices.org/assets/attachments/documents/7245_Brockmann_GA.pdf).

<sup>18</sup> J. Dugard, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967', UN Doc. A/HRC/4/17, 29 Jan. 2007, at 3.

<sup>19</sup> V. Tilley (ed.), *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (2012), at 107–221.

<sup>20</sup> Balsam, 'Palestinians are winning the legitimacy war: interview with Richard Falk', *Alternative Information Center*, 17 Mar. 2009. Professor Falk reiterated the same idea in another subsequent interview, stressing that '[c]omparisons of this sort can be illuminating, although misleading at the same time. ... Prolonged occupation of the West Bank, East Jerusalem, and the Gaza Strip, along with the second class citizenship imposed on the Palestinian minority living behind the green line, are humanly abusive, but distinctive in their character, and it is important to understand these realities on their own terms': see Chehata, 'Richard Falk: "I believe that Hamas should be treated as a political actor"', *Middle East Monitor*, 9 Apr. 2010.

This was before the initial publication of the HSRC study in the summer of 2009. By the time he submitted his Special Rapporteur's report to the General Assembly in October 2010, Professor Falk's views on the matter had evolved:

It is the opinion of the current Special Rapporteur that the nature of the occupation as of 2010 substantiates earlier allegations of colonialism and apartheid in evidence and law to a greater extent than was the case even three years ago. The entrenching of colonialist and apartheid features of the Israeli occupation has been a cumulative process. The longer it continues, the more difficult it is to overcome and the more serious is the abridgement of fundamental Palestinian rights.<sup>21</sup>

The Special Rapporteur derived much of his argument regarding the 'general structure of apartheid that exists in the Occupied Palestinian Territories' from the HSRC study, which he described as 'an expert study that is both reliable and convincing'.<sup>22</sup>

This article seeks to provide an overview of the applicability of the international legal prohibition of apartheid to the occupied Palestinian territory. Before addressing this subject a few brief comments are made in section 2 about the purpose and scope of the article. Section 3 then outlines the laws and practices that embodied the system of apartheid in South Africa itself from 1948 until 1994. Section 4 reviews the development and codification of the prohibition of apartheid in international law, and addresses the question of the relevance and application of the norm prohibiting apartheid beyond South Africa. Section 5 assesses the applicability of the apartheid paradigm to Israel's occupation of Palestinian territory, while the final section offers some concluding remarks.

## 2 Purpose and Scope

Many will find the linking of Israel's practices and policies in the occupied Palestinian territory (OPT) with apartheid to be offensive. They will complain, as Richard Goldstone has, that this is an 'unfair and inaccurate slander against Israel' that seeks to 'demonize and delegitimize it'.<sup>23</sup> In these circumstances it is incumbent upon the authors to explain the purpose of the present article.

The purpose of this article is not to provide fuel for the delegitimization of the state of Israel. It is to consider whether there is any substance in the assertions referred to above that Israel's practices and policies in the OPT fall within the prohibition of apartheid, *as it is understood in international law*. It is a doctrinal legal enquiry conducted in the language of international law and in the context of contemporary norms of international law.

Most objections to the comparison of Israel's treatment of Palestinians with that of apartheid are based on the questionability of such an analogy to Israel's regime in Israel itself rather than in the OPT.<sup>24</sup> It is true that studies have been published

<sup>21</sup> R. Falk, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967', UN Doc. A/65/331, 30 Aug. 2010, at para. 3.

<sup>22</sup> *Ibid.*, at para. 5.

<sup>23</sup> Goldstone, 'Israel and the Apartheid Slander', *NY Times*, 1 Nov. 2011, at A27.

<sup>24</sup> See, e.g., *ibid.*

which make such a comparison.<sup>25</sup> In November 2011, the Russell Tribunal on Palestine, sitting in Cape Town, found that ‘Israel subjects the Palestinian people to an institutionalised regime of domination amounting to apartheid as defined under international law’. While recognizing that Israel’s ‘discriminatory regime manifests in varying intensity and forms against different categories of Palestinians depending on their location’ and that Palestinians living in the OPT are ‘subject to a particularly aggravated form of apartheid’, the Tribunal concluded that ‘Israel’s rule over the Palestinian people, wherever they reside, collectively amounts to a single integrated regime of apartheid’.<sup>26</sup>

Such a finding is controversial insofar as it encompasses the situation inside Israel because, as the Russell Tribunal itself acknowledged, Palestinians in Israel, unlike the black population of apartheid South Africa, are enfranchised citizens entitled to hold public office. Although the ability of the subordinate racial group to vote does not preclude the existence of a system of apartheid – particularly in a context where the dominant group is not a demographic minority as it was in South Africa – considerations of this kind do make characterizations of the discriminatory regime inside Israel as one of apartheid in and of itself more contentious. The present article does not engage in the debate over the applicability of the international legal prohibition of apartheid inside Israel,<sup>27</sup> confining itself to the firmer ground of apartheid in the OPT. Both current and previous Special Rapporteurs have raised the matter of apartheid in the execution of a mandate to address human rights issues in the Palestinian territories occupied by Israel in 1967. We proceed on the basis of a similar territorial mandate, addressing the situation inside the Green Line only where Israel’s internal laws and policies illuminate its practices in the occupied territories. We acknowledge, however, the problems inherent in the prescription of such territorial compartmentalization by international law where Israel’s legal governance does not make such simplistic demarcations.

### 3 Apartheid in South Africa

The ideology of apartheid<sup>28</sup> came to full fruition in South Africa with its formalization as official state policy upon the assumption of power by the (white Afrikaner) National Party in 1948. Its seeds had been sown over the course of three preceding

<sup>25</sup> See Davis, *supra* note 6; S. Nathan, *The Other Side of Israel. My Journey across the Jewish-Arab Divide* (2005).

<sup>26</sup> Russell Tribunal on Palestine, *Findings of the South Africa Session* (Nov. 2011), at paras 5.44 and 5.45. On the role of civil society tribunals such as the Russell Tribunal as truth-telling mechanisms that represent a ‘jurisprudence of conscience’ see Falk, ‘Is Israel guilty of the crime of apartheid?’, *Al-Jazeera*, 5 Dec. 2011.

<sup>27</sup> As the findings of the Russell Tribunal suggest, however, there certainly are grounds for further inquiry into the question of apartheid as a single regime of domination over the Palestinian people as a whole, including the Palestinian population inside Israel. This is relevant not least in the light of legislative developments in the Israeli Knesset under coalition governments led by Benjamin Netanyahu from 2009.

<sup>28</sup> *Apartheid* is the Afrikaans word for ‘separateness’, also used to connote ‘separate development’. See further D. Welsh, *The Rise and Fall of Apartheid* (2009).



centuries of European settlement and colonialism, during which time black South Africans were stripped of their land, liberties, and political rights. Segregation was long established as the foundation for race relations in South Africa. The pass system, for instance, entailing the restriction of the movement and residence of Africans through permit requirements, was first introduced by the British colonial authority in 1809. For the National Party, by 1948, such forms of segregation, which resembled those found in many European colonies of that time, were not enough to guarantee sustainable white domination in South Africa. Apartheid went further by institutionalizing racial discrimination. Initially this took the form of white domination by means of unequal access to social services, but was later extended to include territorial separation, which the National Party labelled as a form of self-determination known as 'separate development'. This led in due course to the granting of 'independence' to four Bantustans – Transkei, Ciskei, Bophutatswana, and Venda.<sup>29</sup>

Apartheid in South Africa was a system structured on three pillars: discrimination, territorial fragmentation, and political repression. It was an institutionalized system in the sense that it was created by law and enforced by legal institutions. While reinforced by social convention and practice, it was this institutionalized character that made it particularly visible and offensive.<sup>30</sup>

## A Discrimination

Racial groups in South Africa were determined by a strict system of race classification.<sup>31</sup> The Population Registration Act of 1950<sup>32</sup> directed the Secretary of the Interior to compile a register of the entire South African population which was to reflect the classification of each individual 'as a white person, a coloured person<sup>33</sup> or a Bantu,<sup>34</sup> as the case may be, and every coloured person and every Bantu whose name is so included shall be classified by the Secretary according to the ethnic or other group to which he belongs'.<sup>35</sup> The 'coloured' group was divided into seven sub-groups which included Indian and Chinese. Race classification was made on the basis of appearance, social acceptance, and descent. The purpose of race classification was to determine the social, economic, and political status of South Africans. It was not a system of differentiation but one of discrimination, as persons classified as 'coloured' or 'Bantu' were relegated to an inferior racial stratum with lesser rights. The 'purity' of each

<sup>29</sup> For a history of the political institutions of apartheid see J. Dugard, *Human Rights and the South African Legal Order* (1978), at 89–102; J. Dugard, N. Haysom, and G. Marcus (eds), *The Last Years of Apartheid: Civil Liberties in South Africa* (1992), at 10–17.

<sup>30</sup> For a full examination of the laws of apartheid see Dugard, *supra* note 29, at 53–202, and Dugard *et al.*, *supra* note 29, at 3–54.

<sup>31</sup> See Suzman, 'Race Classification and Definition in the Legislation of the Union of South Africa 1910–1960', *Acta Juridica* (1960) 339.

<sup>32</sup> Act 30 of 1950.

<sup>33</sup> That is, a person of mixed descent.

<sup>34</sup> This was the term used to describe black Africans in the apartheid era.

<sup>35</sup> S. 5(2) of the Act.

group was maintained by laws prohibiting inter-marriage between the races<sup>36</sup> and sexual relations between members of different racial groups.<sup>37</sup>

Other statutes prescribed the discriminatory regime of apartheid. The Reservation of Separate Amenities Act of 1953<sup>38</sup> provided for separate but unequal facilities for different racial groups in all spheres of life – trains, buses, restaurants, theatres, cinemas, libraries, parks, playing fields, beaches, and swimming pools. Schools and universities were segregated by law, with inferior institutions created for coloureds, Indians, and blacks (Bantu).<sup>39</sup> Prestigious and well-paid jobs were reserved by law for whites.<sup>40</sup> Residential areas in the towns and cities were zoned into separate racial suburbs with the better developed and more prosperous areas allocated to whites.<sup>41</sup> Rural areas were likewise zoned along racial lines, with just 13 per cent of the country allocated to the black majority and the rest reserved for exclusive white ownership and occupation.<sup>42</sup> As a result, the majority of South Africa's agricultural land was held by whites. The racial zoning of areas in both towns and country resulted in large-scale population displacements with untold suffering.

Serious restraints were placed on the movement of black people in the towns and cities. They were required at all times to carry a permit – a 'pass' – indicating permission to be in the town or city in question. Failure to produce such documentation to a police officer on demand, or to be present in the town or city in question without permission was a criminal offence.<sup>43</sup> Thousands of blacks were sentenced to short periods of imprisonment each year for violation of the hated 'pass laws'.<sup>44</sup> General respect for the law was seriously undermined by the implementation of such laws.

## B Territorial Fragmentation

The National Party inherited the system of territorial separation in 1948 that had set aside 87 per cent of the country's land for exclusive white ownership and occupation.<sup>45</sup> When Hendrik Verwoerd became Prime Minister in 1958, the apartheid regime – in response to international pressure to respect the principle of self-determination – sought to portray apartheid as a policy of separate development rather than one of racial domination. This required the allocation of territory to the different tribal groups within the black community and resulted in an institutionalization of the extant system of territorial fragmentation.<sup>46</sup>

<sup>36</sup> Prohibition of Mixed Marriages Act 55 of 1949.

<sup>37</sup> Immorality Act 23 of 1957.

<sup>38</sup> Act 49 of 1953, as amended by Act 10 of 1960.

<sup>39</sup> Extension of University Education Act 49 of 1959.

<sup>40</sup> See Dugard, *supra* note 29, at 85–89.

<sup>41</sup> In terms of the Group Areas Act 41 of 1950.

<sup>42</sup> Bantu Land Act 27 of 1913 and the Bantu Trust and Land Act 18 of 1936.

<sup>43</sup> See the Bantu (Urban Areas) Consolidation Act 24 of 1945 and the Bantu (Abolition of Passes and Co-ordination of Documents) Act 67 of 1962.

<sup>44</sup> See Dugard, *supra* note 29, at 71–78.

<sup>45</sup> *Ibid.*, at 78–79.

<sup>46</sup> The principal statute in this regard was the Promotion of Bantu Self-Government Act 46 of 1959.



The black population, comprising some 80 per cent of the population of South Africa, was divided into ten tribal groups with a separate homeland or Bantustan created for each: Transkei, Ciskei, Bophutatswana, Venda, KwaZulu, Lebowa, Gazankulu, Qwaqwa, KaNgwane, and KwaNdebele. All of these tribal groups advanced to self-government with their own representative authorities. Four – Transkei (1976), Bophutatswana (1977), Venda (1979), and Ciskei (1981) – became ‘independent’, having their own presidents, executive governments, legislatures, and courts. They were, however, controlled both covertly and overtly by the apartheid regime’s security forces and heavily subsidized by Pretoria. Such subsidies included the construction of hospitals, schools, universities, roads, and dams, and the development of industrial areas. None of the ‘independent’ Bantustans – known collectively as the ‘TBVC’ states – were recognized by other states, as a result of calls by the UN for non-recognition.<sup>47</sup>

One of the consequences of the nominal independence of the Bantustan states was that all persons ethnically connected with such a homeland, including those who lived and worked in ‘white’ South Africa, lost their South African nationality and became nationals/citizens of the unrecognized state in question. In this way the apartheid regime sought to rid itself – at least on paper – of South Africa’s black population.

### **C Political Repression**

Apartheid was enforced and maintained by a brutal security apparatus operating under Draconian laws which gave wide powers to the security forces and largely removed the review powers of the courts.<sup>48</sup> Opposition parties, such as the African National Congress, the Pan Africanist Congress, and the Communist Party, were proscribed;<sup>49</sup> political assembly, freedom of speech, and press freedom were curtailed and censorship was rife. Political opponents were subjected to house arrest or restriction orders limiting their movement, careers, and right to meet with others. Indefinite detention without trial for the purpose of interrogation was authorized,<sup>50</sup> resulting in widespread torture and unexplained deaths. Administrative detention was enabled although not widely practised.<sup>51</sup> Emergency powers were invoked in 1960 and from 1985 to 1990.<sup>52</sup> The security police, freed from judicial oversight and political accountability, committed murder and torture and were responsible for the disappearance of political activists. The openly authorized targeted killing of political opponents as practised by Israeli forces in Palestine was, however, largely unknown.

### **D South West Africa/Namibia**

The policies and practices of apartheid were replicated by the South African authorities in the territory of South West Africa – present-day Namibia – which South Africa

<sup>47</sup> See J. Dugard, *Recognition and the United Nations* (1987), at 96–97.

<sup>48</sup> See further, Dugard, *supra* note 29, at 107–202; Dugard *et al.*, *supra* note 29, at 21–27, 32–94.

<sup>49</sup> Internal Security Act 44 of 1950, previously known as the Suppression of Communism Act; Internal Security Act 74 of 1982; Unlawful Organizations Act 37 of 1960.

<sup>50</sup> By s. 6 of the Terrorism Act 83 of 1967.

<sup>51</sup> Dugard, *supra* note 29, at 113.

<sup>52</sup> Marcus, ‘Civil Liberties Under Emergency Rule’, in Dugard *et al.*, *supra* note 29, at 32–54.

administered under a mandate conferred by the League of Nations.<sup>53</sup> Most of the discriminatory and repressive laws of the apartheid legal order were extended to South West Africa, and different racial groups were allocated separate territories and representative authorities along the lines of separate development in South Africa itself.<sup>54</sup> In 1971 the International Court of Justice held that South Africa unlawfully occupied the territory following the revocation of the Mandate for South West Africa by the UN General Assembly, and that apartheid as applied in the territory violated South Africa's obligations under the Charter of the UN.<sup>55</sup> Despite this ruling, South Africa continued to occupy and administer the territory until it achieved independence in 1990.

The policies and practices of apartheid in South Africa and South West Africa featured sporadically on the agendas of the political organs of the UN from its inception. When pleas for abandonment of these policies failed, the UN sought to outlaw and criminalize apartheid.

## 4 Apartheid in International Law

Apartheid has acquired a legal content that derives from – but is at the same time independent of – the South African experience, and now permeates a number of branches of public international law. From the 1960s onwards, with the 'non-aligned' states having assumed a majority at the UN in the wake of the wave of decolonization in Africa and Asia, concerns over the inherent malice of the apartheid system in southern Africa were addressed in treaties of international human rights and humanitarian law, the adoption of a specific international convention to criminalize apartheid, and through the procedures and resolutions of the General Assembly and Security Council.

### A Human Rights Law

While any system of institutionalized racial discrimination would inherently conflict with the non-discrimination clause contained in Article 2 of the Universal Declaration of Human Rights, the first instrument of international law expressly to proscribe the practice of apartheid was the International Convention for the Elimination of All Forms of Racial Discrimination.<sup>56</sup> In the Convention's preamble, the states parties emphasize their alarm at 'manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation'. Article 3 then lays down an obligation for the signatories to oppose and eliminate apartheid:

<sup>53</sup> See generally J. Dugard, *The South West Africa/Namibia Dispute* (1973).

<sup>54</sup> *Ibid.*, at 431–435.

<sup>55</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16.

<sup>56</sup> International Convention on the Elimination of All Forms of Racial Discrimination (1965), 660 UNTS 195, entered into force 4 Jan. 1969.

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

The general practice adopted by the drafters had been not to single out specific forms of discrimination in the Convention. The express prohibition of apartheid included in the treaty was an exception to allow for the fact that apartheid differed from other forms of racial discrimination 'in that it was the official policy of a State Member of the United Nations'.<sup>57</sup>

Subsequent treaties of international human rights law also made specific reference to apartheid. The Convention on the Elimination of Discrimination Against Women,<sup>58</sup> for instance, prescribes 'the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination' as essential to the full enjoyment of the rights of men and women alike. Conventions prohibiting contact in certain fields with countries practising apartheid, such as the International Convention against Apartheid in Sports,<sup>59</sup> were also adopted.

In 1971, in its advisory opinion on Namibia,<sup>60</sup> the International Court of Justice held that the policy of apartheid as applied in Namibia was a 'flagrant violation of the purposes and principles of the Charter'.<sup>61</sup>

## **B International Criminal Law**

The International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>62</sup> (the 'Apartheid Convention') was adopted subsequent to the initial prohibition in international human rights law with the aim of making it possible 'to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid'. The Apartheid Convention is thus intended to complement the requirements of Article 3 of the International Convention for the Elimination of All Forms of Racial Discrimination, with its *chapeau* referring directly to Article 3. It goes beyond the prohibition of apartheid by making it a criminal offence, declaring apartheid to be a crime against humanity which is subject to universal jurisdiction. The Convention accordingly obliges states parties to adopt legislative measures to suppress, discourage, and punish the crime of apartheid.

The establishment of apartheid as an international crime underlines the gravity with which it is treated under international law and highlights the commitment

<sup>57</sup> UN Doc. A/C.3/SR.1313, at para. 18. An additional reason stated for the exception was to counter the South African government's claim that apartheid was not a form of racial discrimination: *ibid.*, at para. 10.

<sup>58</sup> Convention on the Elimination of Discrimination Against Women (1979), 1249 UNTS 13, entered into force 3 Sept. 1981.

<sup>59</sup> International Convention against Apartheid in Sports (1985), 1500 UNTS 161, entered into force 3 Apr. 1988.

<sup>60</sup> *Namibia*, *supra* note 55.

<sup>61</sup> *Ibid.*, at para 131.

<sup>62</sup> Convention on the Suppression and Punishment of the Crime of Apartheid (1973), 1015 UNTS 243, entered into force 18 July 1976.

undertaken by the international community of states to its eradication. The codification of the crime in the Apartheid Convention followed references to apartheid as a crime against humanity in various instruments of soft law from the mid-1960s onwards.<sup>63</sup> In 1968, Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity included among crimes against humanity ‘inhuman acts resulting from the policy of apartheid’. The delineation of apartheid as a crime against humanity was retained in the 1998 Rome Statute of the International Criminal Court.<sup>64</sup> Apartheid was also framed as a crime amounting to a grave breach of the Geneva Conventions when practised in the context of an armed conflict, by virtue of Additional Protocol I to the Geneva Conventions.<sup>65</sup>

### **C Public International Law**

The resolutions of the General Assembly pertaining to apartheid emphasized it as an inherent violation of the right to self-determination, and accordingly consistently associated the rights of those subject to a regime of racial domination with the rights of those subject to colonialism and foreign occupation. In 1970, for example, the General Assembly affirmed ‘the legitimacy of the struggle of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to them that right by any means at their disposal’, and condemned ‘those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine’.<sup>66</sup> Such coupling of the Palestinian and South African causes was commonplace in resolutions during the 1970s.<sup>67</sup> Perhaps even more significantly in terms of apartheid policies constituting violations of the right to self-determination, the General Assembly was forceful in its condemnation of South Africa’s Bantustan model:

Considering that the establishment of Bantustans and other measures adopted by the Government of South Africa in pursuance of apartheid are designed to consolidate and perpetuate domination by a white minority and the dispossession and exploitation of the Africa and other non-white people of South Africa as well as of Namibia, [the General Assembly] again condemns the establishment of Bantu homelands (Bantustans) and the forcible removal of the African people of South Africa and Namibia to those areas as a violation of their inalienable rights, contrary to the principle of self-determination and prejudicial to territorial integrity of the countries and the unity of their peoples.<sup>68</sup>

The General Assembly similarly rejected South Africa’s subsequent endeavours to bestow independence upon certain Bantustan territories as ‘invalid’. Two days after

<sup>63</sup> See, e.g., GA Res. 2202 (XXI), 16 Dec. 1966, at para. 1; *Proclamation of Teheran, Final Act of the International Conference on Human Rights*, UN Doc. A/CONF.32/41, 13 May 1968, at para. 7.

<sup>64</sup> Art. 7(1)(j), Rome Statute of the International Criminal Court (1998), UN Doc. A/CONF.183/9, 2187 UNTS 90, entered into force 1 July 2002.

<sup>65</sup> Art. 85(4)(c), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3, entered into force 7 Dec. 1978.

<sup>66</sup> GA Res. 2649 (XXV), 30 Nov. 1970.

<sup>67</sup> See, e.g., GA Res. 3070 (XXVIII), 30 Nov. 1973.

<sup>68</sup> GA Res. 2775 (XXVI), 29 Nov. 1971.

the granting of so-called independence to Transkei in 1976, a resolution was adopted by 130 votes to none denouncing 'the establishment of Bantustans as designed to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights'.<sup>69</sup>

The General Assembly's call for non-recognition of the severing of the Transkei from South Africa was endorsed by the Security Council.<sup>70</sup> This marked a shift towards a policy of more pro-active engagement on apartheid by the Security Council. While it had adopted a number of resolutions in the early 1960s deploring the apartheid regime's racial policies, and recognizing the situation in South Africa as a disturbance to international peace and security, the Security Council limited itself to requesting that the South African government cease its discriminatory practices, and to calling upon third states to cease the sale of arms and military equipment to South Africa.<sup>71</sup> The weight that may have been felt by South Africa as a result of these resolutions was diluted somewhat by frequent abstentions at the Security Council by France and the UK. From 1964 to 1972, as the noose of apartheid continued to tighten in South Africa, the Security Council fell silent on the issue,<sup>72</sup> and draft resolutions for the imposition of economic sanctions against South Africa and its expulsion from the UN were vetoed by the three Western permanent members. Following its call for non-recognition of the independence of the Transkei Bantustan<sup>73</sup> and its condemnation of South Africa's violent response to the Soweto uprising in 1976,<sup>74</sup> by 1977 the Security Council's language had sharpened, now 'strongly condemning' South Africa's racist regime, and 'demanding' the abandonment of apartheid.<sup>75</sup> Notably, these resolutions were now being adopted unanimously. In November 1977, the Security Council took another unanimous decision under Chapter VII of the UN Charter to impose a mandatory arms embargo on South Africa.<sup>76</sup> This decision was followed up and recalled by subsequent resolutions in the years that followed,<sup>77</sup> and when the South African government declared a state of emergency in large parts of the country in 1985, the Security Council called for the adoption of sectoral economic boycotts and the suspension of sports and cultural relations.<sup>78</sup>

<sup>69</sup> GA Res. 31/6A (1976), 26 Oct. 1976.

<sup>70</sup> SC Res. 402, 22 Dec. 1976; SC Res. 407, 25 May 1977. Similar denunciations came from the UN in response to the granting of 'independence' to Bophuthatswana in 1977, Venda in 1979, and Ciskei in 1981.

<sup>71</sup> See, *inter alia*, SC Res. 134, 1 Apr. 1960; SC Res. 181, 7 Aug. 1963; SC Res. 182, 4 Dec. 1963; SC Res. 191, 18 June 1964.

<sup>72</sup> It is noted that the SC did address the situation in Namibia during this period, condemning South Africa's continuing occupation as illegal and criticizing the extension of 'the evil and abhorrent policies of apartheid' beyond South Africa's borders: see SC Res. 264, 20 Mar. 1969; SC Res. 276, 30 Jan. 1970; SC Res. 282, 23 July 1970.

<sup>73</sup> SC Res. 402, 22 Dec. 1976; SC Res. 407, 25 May 1977.

<sup>74</sup> SC Res. 392, 19 June 1976.

<sup>75</sup> SC Res. 417, 31 Oct. 1977.

<sup>76</sup> SC Res. 418, 4 Nov. 1977.

<sup>77</sup> See, *inter alia*, SC Res. 421, 9 Dec. 1977; SC Res. 473, 13 June 1980; SC Res. 558, 13 Dec. 1984.

<sup>78</sup> SC Res. 569, 26 July 1985 (with the UK and US abstaining).

The Security Council's sporadic engagement, which continued until the termination of the arms embargo following South Africa's transition to a democratic, non-racial government in 1994,<sup>79</sup> underscores the view taken by the international legal system of apartheid as a threat to international peace and security, and the violence and repressive measures necessary to sustain it as contrary to international law. That apartheid is unlawful under the general rules of public international law is reiterated by its listing alongside genocide and other crimes against humanity as an example of a breach of an international obligation consisting of a 'composite wrongful act' under Article 15 of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts.<sup>80</sup>

#### D *The Definition of Apartheid*

The above treaties of international human rights law and criminal law provide the basis of a working definition of apartheid for the purpose of considering Israel's practices in the occupied Palestinian territory under the norm prohibiting apartheid. Reference to the apartheid practices of South Africa is also made to provide an indication or clarification of what the international community sought to prohibit through the treaties. The present study is concerned with appraising the responsibility of the Israeli state under the norms of public international law, as opposed to the responsibility of its individual agents under international criminal law.<sup>81</sup> Thus, reliance on the formulation of criminal statutes – as among the most elaborate sources of law on the question of apartheid – is for the purposes of informing a comprehensive definition rather than any evaluation of individual criminal guilt.

The International Convention for the Elimination of All Forms of Racial Discrimination defines racial discrimination, details a long list of rights which all people are entitled to enjoy free from racial discrimination, and prohibits the practice of apartheid as a particularly egregious form of racial discrimination. Beyond that, however, the Convention does not define the practice of apartheid with any precision. The Apartheid Convention and the Rome Statute of the International Criminal Court provide further clarity on the definition of apartheid. Article 2 of the Apartheid Convention identifies a list of inhuman acts which amount to apartheid if they are:

committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.

<sup>79</sup> SC Res. 919, 25 May 1994.

<sup>80</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) II(2) *Yrbk Int'l L Comm* 31, at 62. According to the commentary, '[s]ome of the most serious wrongful acts in international law are defined in terms of their composite character'.

<sup>81</sup> An approach involving the ascertainment of individual responsibility would require the discovery of factual evidence to tie specific individuals to criminal offences arising under the rubric of apartheid. This would be a later step in the process of interrogating Israel's policies and practices – if state responsibility for a breach of the prohibition of apartheid is *prima facie* established, then individual criminal responsibility could arise consequentially.

Article 7(2)(h) of the Rome Statute similarly refers to apartheid as criminal acts

committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

The essence of the definition of apartheid is thus the systematic, institutionalized, and oppressive character of the discrimination involved, and the purpose of domination that is entailed. It is this institutionalized element, involving a state-sanctioned regime of law, policy, and institutions, that distinguishes the practice of apartheid from other forms of prohibited discrimination.

Article 2 of the Apartheid Convention provides the most detailed list of practices that are discrete human rights violations in themselves, but that may further amount to acts of apartheid when committed in a systematic fashion for the purpose of maintaining domination by one racial group over another:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
  - (i) By murder of members of a racial group or groups;
  - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
  - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (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;
- (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;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

This complements and supplements the prohibited acts of racial discrimination under Article 5 of the International Convention for the Elimination of All Forms of Racial Discrimination (discrimination in the enjoyment of the rights to *inter alia*: security of person, nationality, education, work, formation of recognized trade unions, freedom of movement and residence, freedom of opinion



and expression, freedom of assembly and association) and the inhumane acts of apartheid envisaged by the Rome Statute (*inter alia* murder, deportation or forcible transfer, imprisonment or other severe deprivation of physical liberty, torture, persecution).

### *E The Status of the Prohibition of Apartheid*

A crucial preliminary question in applying the definition of apartheid to Israel's occupation of the West Bank and Gaza Strip relates to the status of the prohibition of apartheid under international law, given that Israel is not a party to two of the key treaties in this regard – the Apartheid Convention and the Rome Statute. The customary status of the prohibition of apartheid is indicated by its location within general UN efforts aimed at the eradication of all forms of racial discrimination. As a particularly pernicious manifestation of racial discrimination, the practice of apartheid is contrary to one of the ostensible guiding principles of international law – that of respect for human rights and fundamental freedoms without distinction as to race – as laid down in Article 55 of the UN Charter and Article 2 of the Universal Declaration of Human Rights. The subsequent adoption of international legal instruments explicitly proscribing and sanctioning apartheid testifies to a more concerted effort under international law to address the particular practice of apartheid.

Although the majority of states – including Israel – accept the general prohibition of apartheid in the International Convention for the Elimination of All Forms of Racial Discrimination and other treaties,<sup>82</sup> fewer have ratified the Apartheid Convention,<sup>83</sup> primarily on account of political contestations at the time of its adoption over the appropriateness of establishing universal jurisdiction for international crimes. The convention was seen by critics as seeking to 'extend international criminal jurisdiction in a broad and ill-defined manner'.<sup>84</sup> Western states such as Canada, France, Germany, Italy, the Netherlands, the UK, and the US, amongst others, refrained from signing or ratifying the treaty for fear that their own citizens and corporations would have been exposed to prosecution for aiding and abetting apartheid.<sup>85</sup> That said, a majority of states have ratified Additional Protocol I to the Geneva Conventions of 1949,<sup>86</sup> and an ever-increasing number have become parties to the Rome Statute.<sup>87</sup> There is no demonstrable hostility by non-states parties to the treaties to the provisions pertaining to apartheid, nor to the jurisdiction of the International Criminal Court over the crime

<sup>82</sup> As of 30 Sept. 2011, there were 175 states parties to the International Convention for the Elimination of All Forms of Racial Discrimination and 187 states parties to the Convention on the Elimination of Discrimination Against Women, demonstrating near-universal support and legal commitment to the elimination of racial discrimination and the prohibition of apartheid.

<sup>83</sup> 108 ratifications as of 19 Apr. 2012.

<sup>84</sup> M.S. McDougal, H.D. Lasswell, and L. Chen, *Human Rights and World Public Order* (1980), at 545.

<sup>85</sup> Zahar, 'Apartheid as an International Crime', in A. Cassese, *Oxford Companion to International Criminal Justice* (2009), at 245.

<sup>86</sup> 173 states parties following South Sudan's accession in Jan. 2013.

<sup>87</sup> 122 states parties following Côte d'Ivoire's accession in Feb. 2013.

of apartheid, and several non-parties to the Apartheid Convention – including South Africa itself – have ratified the later instruments.<sup>88</sup> The movement of the international crime of apartheid towards customary status<sup>89</sup> reinforces the fact that the prohibition itself is established as a rule of customary international law.

The prohibition of apartheid can also be considered a norm of *jus cogens* giving rise to obligations *erga omnes*. The International Law Commission views the prohibition of apartheid as a peremptory norm of general international law and emphasizes that the practice of apartheid amounts to ‘a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being’.<sup>90</sup> The Commission notes the ‘widespread agreement’ is shared by states as to the peremptory character of the prohibition on apartheid, and that apartheid is ‘prohibited in widely ratified international treaties and conventions admitting of no exception’.<sup>91</sup>

In its discussion of obligations *erga omnes* in the *Barcelona Traction* case, the International Court of Justice considered the prohibition of racial discrimination a norm of *jus cogens*, stating that obligations *erga omnes* would arise, for example, ‘from the principles and rules concerning the basic rights of the human person, including protection from slavery and from racial discrimination’.<sup>92</sup> With the prohibition of racial discrimination established as a rule of *jus cogens*,<sup>93</sup> it follows that the prohibition of a particularly severe form of racial discrimination – apartheid – must amount to a peremptory norm, entailing obligations *erga omnes*.

## F *Apartheid beyond Southern Africa: the Universality of the Prohibition*

Despite the comprehensive treatment of apartheid by the international legal system, there remains a sense among many international lawyers that it was a *sui generis* regime, specific to South Africa, that has now been confined to the annals of legal history. Alexandar Zahar, for instance, calls the existence of the crime of apartheid into question, partly on the basis of apartheid having been eliminated in South Africa:

Considering the dubious legal history of the so-called crime of apartheid, as well as the demise of South African apartheid in 1994, it is remarkable that in 1998 a homonymous offence was incorporated as a crime against humanity into the ICCSt (Art 7(1)(j)).<sup>94</sup>

Zahar concludes that ‘politics rather than legal engineering is behind the placement of “apartheid” in the Statute’,<sup>95</sup> without providing an explanation of what – or whose – politics he is hinting at. It can only be assumed that he is suggesting that apartheid

<sup>88</sup> The UK being another prominent example.

<sup>89</sup> A. Cassese, *International Criminal Law* (2008), at 25.

<sup>90</sup> International Law Commission, *supra* note 80, at 113.

<sup>91</sup> *Ibid.*, at 112.

<sup>92</sup> *Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain)*, Limited Second Phase, Final Judgment [1970] ICJ Rep 3, at 32, paras 33–34.

<sup>93</sup> See, e.g., *United States (Third) Restatement of the Foreign Relations Law* (1986), Section 702, note 11.

<sup>94</sup> Zahar, *supra* note 85, at 246.

<sup>95</sup> *Ibid.*

was retained in the Rome Statute merely as a token measure to placate the nations of the global South, for whom apartheid had been an important rallying call around which to make their presence felt in the international legal system following emancipation from European colonial rule. The Apartheid Convention has 108 states parties, predominantly from the global South, in comparison to the near-universal ratification of the Convention on the Rights of the Child.<sup>96</sup> There have been only six new states parties to the Apartheid Convention since 1994,<sup>97</sup> and post-apartheid South Africa itself has not ratified the Convention. As we noted at the outset, the treaty-monitoring body for the Apartheid Convention was suspended in 1995, and both the Special Committee against Apartheid and the UN Centre Against Apartheid dissolved.<sup>98</sup> On these grounds the relevance of the international legal prohibition on apartheid beyond South African history is disputed from certain quarters.

Such contestations are easily refuted with reference to the universally applicable nature of international human rights treaties, as well as to the specifics of the prohibition of apartheid. The Apartheid Convention makes reference to ‘southern Africa’, reflecting the fact that the history of apartheid relates to a larger swathe of the southern part of the African continent than just South Africa. Moreover, while the Convention may have been drafted with prevailing circumstances in southern Africa in mind, it was not intended to be confined to those circumstances.<sup>99</sup> Apartheid is described as policies of racial segregation and discrimination *similar* to those practised in southern Africa, indicating that its prohibition is applicable beyond that region. Roger Clark notes that ‘the Convention is drafted in such a way as not to apply solely to the South African case, although South Africa is mentioned as an example’.<sup>100</sup> Such an interpretation is supported by reference to the *travaux préparatoires*. During the drafting process, state representatives envisaged that the terms of the Apartheid Convention would apply beyond the geographical limits of southern Africa.<sup>101</sup> The delegate of Cyprus, for example, stated, ‘When drafting and adopting such an international convention, it must be remembered that it would become part of the body of

<sup>96</sup> Montenegro became the Convention’s 193rd state party in Oct. 2006.

<sup>97</sup> Serbia, Guatemala, Honduras, Moldova, Montenegro, and Uruguay.

<sup>98</sup> Report of the Group of Three, *supra* note 2, at paras 20, 12.

<sup>99</sup> See, e.g., I. Bantekas and S. Nash, *International Criminal Law* (2nd edn, 2003), at 121–122. See also J.S. Morton, *The International Law Commission of the United Nations* (2000), at 27: ‘apartheid was declared to be a crime against humanity, with a scope that went far beyond South Africa. While the crime of apartheid is most often associated with the racist policies of South Africa after 1947, the term more generally refers to racially based policies in any state.’

<sup>100</sup> Clark, ‘Apartheid’, in M. Cherif Bassiouni (ed.), *International Criminal Law, Volume 1: Crimes* (1999), at 643–644. See also Dugard in H. Ascensio, E. Decaux, and A. Pellet (eds), *Droit international pénal* (2nd edn, 2012), at 197.

<sup>101</sup> See, e.g., statement by Mr. Wiggins (USA), UN GA, Official Records, 28th Session, 1973, 3rd and 4th Committees, 2003rd meeting, 22 Oct. 1973, Agenda Item 53, Draft Convention on the Suppression and Punishment of the Crime of *Apartheid*, UN Docs. A/9003 and Corr.1, chaps XXIII, sect. A.2; A/9095 and Add.1, at 142, para. 36: ‘Article I would be open to very broad interpretations going beyond both the intentions of its drafters and the geographical limits of southern Africa’: statement by Mr. Petherbridge (Australia) at 143, para. 4: ‘the concept of apartheid was being widened to such an extent that it could be applicable to areas other than South Africa’.

international law and might last beyond the time when *apartheid* was being practiced in South Africa'.<sup>102</sup>

The prohibition of apartheid is also more widely embedded in international law than solely with reference to the Apartheid Convention. The Committee on the Elimination of Racial Discrimination has confirmed the universal application of Article 3 of the International Convention on the Elimination of all forms of Racial Discrimination, which 'prohibits all forms of racial segregation in all countries'.<sup>103</sup> The retention of apartheid as an international crime in the Rome Statute of the International Criminal Court, negotiated and adopted subsequent to the fall of the apartheid regime in South Africa, is further evidence of the continuing applicability of the prohibition 'to other situations in which discriminatory racial practices entailing a dual structure of rights and duties are imposed by prevailing law on a subordinated people'.<sup>104</sup>

## 5 Apartheid in the Occupied Palestinian Territory

Based on the legal content of apartheid as discussed in the previous section, with Article 2 of the Apartheid Convention as a primary guiding compass, Israeli law and practice in the West Bank (including East Jerusalem) and Gaza Strip can be appraised. Such an appraisal must have reference to the purpose for which acts of apartheid are practised according to the terms of the *chapeau* of Article 2, and the associated list of 'inhuman acts'. For such inhuman acts to amount to apartheid they must be committed systematically, for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group or groups.<sup>105</sup> The crucial preliminary question to be addressed therefore is whether Jews and Palestinians constitute distinct 'racial groups' for the purposes of the definition of apartheid. If so, we must then ascertain whether prohibited inhuman acts are being perpetrated against one racial group, and whether in the context of an institutionalized system of domination.

### A Racial Groups

Answering the above question entails obvious sensitivities and controversies in the light of the experiences of both Jews and Arabs in historic Palestine. The situation in the occupied territories is not as clearly defined in terms of traditional conceptions of 'race' as was the case in apartheid South Africa.<sup>106</sup> The idea of race itself has long been shown as social construct rather than scientific reality, with a process of 'racialization' entailing the social utilization of the concept of race as a biological category in order to organize and distort perceptions of the world's various populations.<sup>107</sup> The

<sup>102</sup> Statement by Mr. Papademas (Cyprus), *ibid.*, at 142–143, para. 39.

<sup>103</sup> UN Committee on the Elimination of Racial Discrimination, 'General Recommendation XIX: Racial segregation and apartheid (Art. 3)', UN Doc. A/50/18, 18 Aug. 1995, at para. 1.

<sup>104</sup> Falk, *supra* note 21, at para. 5.

<sup>105</sup> Art. 2 of the Apartheid Convention and Art. 7(2)(h) of the Rome Statute are consistent on this point.

<sup>106</sup> See notes 31–35 above.

<sup>107</sup> M. Banton, *The Idea of Race* (1977).

evolutive denotations and usages of the term ‘race’ in history bear noting. Where ‘race’ once comprised a synonym for ‘people’ or ‘nation’, western thinking on race shifted as European imperialism unfurled itself around the globe.<sup>108</sup> Earlier cultural and territorial conceptions of race as implying nationality or tribe membership ceded ground by the 19th century to a scientific discourse that framed race in genetic, biological, and physically observable terms, giving rise to the fields of ‘social Darwinism’ and ‘scientific racialism’. This in turn has since come to be seen as ‘a pseudo-scientific way to categorise the human species’ that was discredited by the mid-20th century, since which time race has been understood as signifying socially constructed identities in a given local setting, with the term ‘race’ falling out of technical usage except in the context of racial discrimination.<sup>109</sup>

For these reasons, and with our appraisal of apartheid being conducted in the legal context, it is both appropriate and necessary for us to turn to international law for guidance. Simply put, international human rights law allows wider scope for the meaning of race or racial group than observable ‘black vs. white’ binaries. The Charter of the United Nations, the Universal Declaration of Human Rights, and the International Convention for the Elimination of All Forms of Racial Discrimination all prohibit discrimination on the basis of race. They are equally consistent in their failure to define the content of race itself. The Convention for the Elimination of All Forms of Racial Discrimination does, however, give broad construction to the meaning of ‘racial’ in the context of ‘racial discrimination’. A wide-ranging spectrum of group categories is encompassed in the prohibition of discrimination, with Article 1(1) of the Convention listing race among several other group identities that can amount to a basis for racial discrimination:

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.

The International Convention for the Elimination of All Forms of Racial Discrimination can thus be interpreted as including descent or national or ethnic origin within the meaning of the term ‘racial’; categories that Jewish Israelis and Arab Palestinians may be classified by, even if not clearly discernible under the more ambiguous indicators of race or colour.

The preamble to the Apartheid Convention invokes the International Convention for the Elimination of All Forms of Racial Discrimination and holds apartheid as including ‘similar policies and practices of racial segregation and discrimination as practised in southern Africa’. This reference provides grounds to interpret the Apartheid Convention as applying to a system of institutionalized domination and oppression by one racial group over another in the broad sense conveyed by the International

<sup>108</sup> See, e.g., C. Bolt, *Victorian Attitudes to Race* (1971); Drescher, ‘The Ending of the Slave Trade and the Evolution of European Scientific Racism’, 14(3) *Social Science History* (1990) 415.

<sup>109</sup> Tilley (ed.), *supra* note 19, at 109–111.

Convention for the Elimination of All Forms of Racial Discrimination, and that a 'racial group' in the context of apartheid need not be limited to a narrow construction of race. In interpreting and applying the Convention in practice, the Committee on the Elimination of Racial Discrimination has incorporated groups that may not sit within traditional conceptions of 'race', including non-citizen groups such as migrant workers, ethno-cultural groups such as particular nomadic tribes, and descent-based caste groups in India.<sup>110</sup>

In their adjudication of matters of genocide and persecution, the International Criminal Tribunals for Rwanda and the former Yugoslavia were faced with the inherent difficulty of determining group identities within the context of the elements of the crimes concerned. The jurisprudence concludes that no clear scientific or impartial method exists for determining whether any group is a racial group, and that the question rests to a large extent on local perceptions. Even racial classifications inscribed on identity documents – particularly apposite in the Rwandan context – were found not to be conclusively determinate in all cases.

In its seminal *Akayesu* decision, the Rwanda tribunal set out criteria for determinations of national, ethnic, racial, or religious identities, which, following the Genocide Convention, were listed in Article 2 of the tribunal's founding statute as the four groups against whom genocide might be perpetrated. The trial judgment found a national group to be 'a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'. An ethnic group is one 'whose members share a common language and culture', while '[t]he conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors'. A religious group was defined as 'one whose members share the same religion, denomination or mode of worship'.<sup>111</sup> The tribunal subsequently explained that the various group conceptions 'partially overlap'<sup>112</sup> and should be considered 'on a case-by-case basis', with each 'assessed in the light of a particular political, social and cultural context'.<sup>113</sup>

The *ad hoc* tribunals recognized the difficulty of externally determining any of these categories with reliability and consistency. Rather, local perceptions of group identities

<sup>110</sup> See, e.g., Committee on the Elimination of Racial Discrimination, 'Concluding Observations: India', UN Doc. CERD/C/IND/CO/19, 5 May 2007, at para. 8.

<sup>111</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 Sept. 1998, at paras 512–515.

<sup>112</sup> *Prosecutor v. Krstic*, Case No. IT-98-33, Trial Judgment, 2 Aug. 2001, at para. 555. The overlap between ethnic and racial groups (as well, perhaps, as discomfort over the continuing use of the language of 'race'), for example, had been tacitly acknowledged as far back as 1950 when the Sub-Commission on Prevention of Discrimination and Protection of Minorities resolved to replace 'racial' with 'ethnic' in all references to minority groups described by their ethnic origin. See F. Capotorti, *Study on the Rights of the Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1 (Sales No. E.78XIV.1, 1979), at para. 197. State practice in many instances can also be found to reveal overlaps between various group categories. The census system in the US, for instance, treats 'race' and 'national origin' as a single category, established by self-identification as opposed to external determinations. See Tilley (ed.), *supra* note 19, at 114, n. 19.

<sup>113</sup> *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Judgment, 6 Dec. 1999, at paras 57, 55.



were held to be a conclusive factor in ascertaining protected groups. Even where racial or group specifications are assigned in legislation or identity cards, the jurisprudence from the Rwanda tribunal demonstrates that of principal significance is whether the victims are considered by the perpetrator, or consider themselves, as belonging to one of the protected groups.<sup>114</sup> The Trial Chamber of the Yugoslavia tribunal summarized its sister institution's precedent as follows:

In accordance with the case-law of the Tribunal, a national, ethnical, racial or religious group is identified by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its *perceived* national, ethnical, racial or religious characteristics.<sup>115</sup>

In *Jelisc*, the court affirmed that attempting to define a racial group using objective and scientifically irreproachable criteria would be 'a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation' and found it more appropriate to evaluate group status 'from the view of those persons who wish to single that group out from the rest of the community'.<sup>116</sup>

The weight given by tribunal jurisprudence to the subjective element of determinations of racial groups is consonant with a general recommendation that had been issued by the UN Committee on the Elimination of Racial Discrimination in 1990, endorsing self-identification as a valid basis for verification of membership of a racial group:

The Committee on the Elimination of Racial Discrimination,

Having considered reports from States parties concerning information about the ways in which individuals are identified as being members of a particular racial or ethnic groups or groups,

Is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.<sup>117</sup>

With regard to all of the relevant group identities, the body of jurisprudence on the Rwandan genocide further emphasizes the 'stable and permanent' constitution of the protected group, holding that group membership is typically acquired by birth,

<sup>114</sup> See *ibid.*, at para. 55: 'membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.'

<sup>115</sup> *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Trial Judgment, 17 Jan. 2005, at para. 667 (emphasis added).

<sup>116</sup> *Prosecutor v. Jelisc*, Case No. IT-95-10, Trial Judgment, 14 Dec. 1999, at para. 70.

<sup>117</sup> UN Committee on the Elimination of Racial Discrimination General Recommendation VIII, 'Identification with a particular racial or ethnic group', UN Doc. A/45/18, 22 Aug. 1990. Analogous examinations of the broader category of 'peoples' under public international law have also resulted in similar weight being given to the subjective element of group identification. In *Gunme v. Cameroon*, for instance, the African Commission on Human and Peoples' Rights provided a broad reading of the meaning of the term 'people' in holding that the people of Southern Cameroon qualify as such, 'because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection, and political outlook. More importantly they identify themselves as a people with a separate and distinct identity. Identity is an innate characteristic within a people. It is up to other external people to recognise such existence, but not to deny it': *Kevin Mgwanga Gunme et al. v. Cameroon*, ACHPR, Comm. No. 266/2003, 27 May 2009, at para. 179.



retained throughout life, and 'normally not challengeable by its members, who belong to it automatically'.<sup>118</sup> Group identities under the International Convention for the Elimination of All Forms of Racial Discrimination are similarly understood as generally immutable, with the intrinsic nature of group membership emerging as 'the common denominator of identities based on race, colour, descent, and national and ethnic origin: that is, the groups cited by ICERD as being targets of racial discrimination'.<sup>119</sup>

No uniform or universal criteria exist for distinguishing different group identities from one another, with the labels often interchangeable and subject to political manipulation and cultural variations.<sup>120</sup> For the purposes of applying the definition of apartheid in international law, therefore, assessment must be made of whether Jews and Palestinians comprise distinct racial groups in their localized relation to one another, in the broad sense of the term under international law. Of critical importance is whether they can be identified as groups whose membership is generally understood as fixed and incontestable from acquisition at birth, and which are entwined in a relationship of domination. Such an interpretation is compatible with contemporary race theory that now sees racial discrimination as the product of a process of 'racial formation', whereby a dominant group constructs a subordinate population as racially distinct in order to ensure its political and/or economic marginalization.<sup>121</sup> In essence, the question of racial groups is a sociological rather than a biological one.

The formation and evolution of Jewish and Palestinian identities are remarkably complex, and we by no means intend nor purport to expound them in all of their socio-historical and cultural complexity here. For the purposes of applying the definition of apartheid to the situation in the occupied Palestinian territory, however, the interpretation of racial groups as developed in international law appears sufficiently broad to understand Jewish Israelis and Palestinian Arabs as distinct groups. Jewish and Palestinian identities, while not typically seen as 'races' in the old (discredited) sense of biological or skin colour categories, are constructed as groups distinguished by ancestry or descent as well as ethnicity, nationality, and religion. As such they are distinguished from each other in a number of forms within the parameters of racial discrimination under international human rights law.

While being Jewish clearly connotes a religious identity, this provides only a partial account. There is significant but by no means complete overlap between 'Jewish' in the sense of those who practise the religion of Judaism, and 'Jewish' in the sense of the ancient Israelites and their descendants.<sup>122</sup> Religious law and social norms provide that Jewish identity is primarily descent-based, conveyed from mother to child. This aspect of Jewishness is codified in Israel's Law of Return: '[f]or the purposes of this

<sup>118</sup> *Prosecutor v. Akayesu*, *supra* note 111, at para. 511.

<sup>119</sup> Tilley (ed.), *supra* note 19, at 114.

<sup>120</sup> This was borne out by South Africa's experience in implementing its race classification laws. Great hardships resulted from classifying people of mixed descent. In many instances, members of the same family were classified as belonging to different racial groups.

<sup>121</sup> See, e.g., M. Omi and H. Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (1994); P. Spickard (ed.), *Race and Nation: Ethnic Systems in the Modern World* (2005).

<sup>122</sup> See further Nusseibeh, 'Why Israel can't be a "Jewish State"', *Al-Jazeera*, 30 Sept. 2011.

Law, “Jew” means a person who was born of a Jewish mother’. Significantly, being Jewish is not considered a religious identity by those who acquire Jewish identity at birth but who do not to adhere to the religious faith. They consider themselves ‘secular’ Jews and are seen as Jewish solely on the basis of their Jewish ancestry. In this sphere of descent, the idea of ‘race’ also persists, the legacy of a Zionism that traditionally framed Jews and Jewish interests in Palestine in ethno-racial terms. The Jewish National Fund, an organization exercising state-like functions in Israel, includes in its incorporating articles the aim to ‘benefit, directly or indirectly, those of Jewish race or descendancy’.<sup>123</sup> The Zionist movement had also framed Jews as a people with the right to self-determination over a particular territory; that is, a nation. Such a concept of Jewish nationality is also inscribed in Israel’s laws and in the founding charters of state agencies and ‘parastatal’ organizations such as the World Zionist Organization, the Jewish Agency for the Land of Israel, and the Jewish National Fund. The official denomination of Israel as a ‘Jewish state’ and insistence on its recognition as such are themselves inherently premised on the idea of a distinct group that the state is designed to privilege.<sup>124</sup> Thus, while Jewish identity may be based in some contexts on religion, Jews can also be understood as a group based on descent and/or ethnic or national origin.

Palestinians, for their part, are a group defined primarily by national origin, based on family roots in historic Palestine, distinguishable from the broader Arab ‘nation’ of which it forms a part by reference to specific local customs and a strong affinity to the common homeland.<sup>125</sup> *Vis-à-vis* Jewish Israelis, the Palestinians emerge as a separate group by virtue of ethnic indicators including a distinct language and culture, as well as claims to self-determination and indigeneity in territory occupied by Israel. Palestinians are of mixed religious composition, and thus religion itself is not a defining feature of Palestinian identity, although it does impact directly upon identity politics in the region insofar as Israel excludes and discriminates against Palestinians on the basis of a constructed ‘non-Jewish’ identity.

Identity distinctions within Israeli jurisdiction are rooted not merely in social practice but in the laws and practice of the state and its institutions:

Under Israeli law and policy, group membership is an official category imposed and monitored by the state, not simply a voluntary identity. Israeli Jews are a group unified by law, sharing the same legal status wherever they reside, while Palestinian Arabs are a separate group, subdivided into citizens, occupied residents (whose residence rights may be lost if they leave the territory in which they live), and refugees who do not have the right to return to any part of historic Palestine.<sup>126</sup>

As noted, an appraisal of whether distinct racial groups exist must include consideration of whether two groups can be shown to hold separate identities acquired at birth

<sup>123</sup> Jewish National Fund, Memorandum of Association, Art. 3(c).

<sup>124</sup> As Sari Nusseibeh points out, ‘recognition of Israel as a “Jewish state” implies that Israel is, or should be, either a theocracy (if we take the word “Jewish” to apply to the religion of Judaism) or an apartheid state (if we take the word “Jewish” to apply to the ethnicity of Jews), or both’: Nusseibeh, *supra* note 122.

<sup>125</sup> See, e.g., R. Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (1997).

<sup>126</sup> Russell Tribunal on Palestine, *supra* note 26, at para. 5.19.

that are generally immutable. In the context of Israel/Palestine, there are sufficient grounds to conclude that Jews and Palestinians are constructed and perceived both by themselves and by external actors as stable and permanent groups distinct from each other, and therefore can be considered as different racial groups for the purposes of the definition of apartheid.

## B *Inhuman Acts*

A forensic examination of Israeli law and practice in the Palestinian territories is necessary in order to ascertain the extent to which the many 'inhuman acts' specified in Article 2 of the Apartheid Convention are being committed. Evidence of violations of Palestinian rights has been extensively documented by human rights organizations and UN monitoring bodies, and is readily available. It is not our intention to replicate such documentation in detail here; rather to provide an overview and emphasize that the cumulative effect of such consistent and wide-ranging violations is such that they not only amount to individual breaches of international human rights and humanitarian law when taken in isolation, but are sufficiently extensive and wide-ranging as to amount to a form of systematic domination within the meaning of apartheid.

The available evidence suggests that Israel is responsible for committing inhuman acts within the meaning of Article 2(a), (c), (d), and (f) of the Apartheid Convention, while it does not suggest Israeli culpability for the inhuman acts described by Article 2(b) and (e) of the Convention.

Article 2(a) relates to the denial to a member or members of a racial group of the right to life and liberty of person. Israel's policies and practices in the West Bank include denial of the right to life through state-sanctioned extra-judicial killings of Palestinians opposed to the occupation, including the targeting of political leaders and militants at times when they were not participating in hostilities and were thus protected by international humanitarian law.<sup>127</sup> To aggravate matters, such targeted killings have often resulted in the killing of innocent bystanders as 'collateral damage'.<sup>128</sup> The Israeli Supreme Court has placed restraints on this practice short of declaring it unlawful,<sup>129</sup> but it continues unabated. In many cases the killing of Palestinian militants constitutes the extra-judicial killing of persons who could be arrested and brought to trial rather than summarily executed. South Africa's apartheid security forces on occasion killed political opponents in an arbitrary and secretive manner,<sup>130</sup> but in most instances

<sup>127</sup> Official Israeli policy on targeted killings was altered following the outbreak of the second *intifada* in Sept. 2000, with the political establishment giving the military 'a broader license to liquidate Palestinian terrorists', allowing the army 'to act against known terrorists even if they are not on the verge of committing a major attack': Harel and Benn, 'Kitchen cabinet okays expansion of liquidation list', *Ha'aretz*, 4 July 2001, available at: [www.haaretz.com/print-edition/news/kitchen-cabinet-okays-expansion-of-liquidation-list-1.64082](http://www.haaretz.com/print-edition/news/kitchen-cabinet-okays-expansion-of-liquidation-list-1.64082).

<sup>128</sup> The killing of 14 civilians, including 9 children, in the operation to assassinate Hamas military leader Salah Shehadeh is one prominent example. See Weill, 'The Targeted Killing of Salah Shehadeh: From Gaza to Madrid', 7 *J Int'l Criminal Justice* (2009) 617.

<sup>129</sup> *The Public Committee against Torture in Israel v. Government of Israel et al.*, HCJ 769/02, 13 Dec. 2006.

<sup>130</sup> See P. Harris, *In a Different Time: The Inside Story of the Delmas Four* (2008).

they preferred to bring such persons to trial. This was because treason and terrorism were capital crimes in a country that then practised the death penalty. Arguably, South Africa's judicially approved execution of militants was more forthright than Israel's extrajudicial executions, which allow militants to be killed while at the same time allowing Israel to proclaim proudly that it does not practise the death penalty. Certainly apartheid South Africa did not practise systematic extrajudicial killings openly and with the public authorization of senior security and political officials as is done by Israel.

The right to life is also violated by Israel in the course of the Israeli military's regular raids into Palestinian territory during which militants and innocent civilians are often killed. Excessive and disproportionate force against civilian demonstrators, frequently resulting in death, is an unexceptional occurrence in Palestine.<sup>131</sup> Such killings appear to form part of a broader policy aimed at suppressing opposition to the occupation. The apartheid regime in South Africa likewise showed little regard for human life in the suppression of dissent of this kind.

The denial of liberty of person is similarly prevalent. Since the beginning of its military occupation, Israeli policy has involved the arrest and detention of Palestinians on a mass scale. One count puts the number of Palestinians imprisoned at some time since 1967 at over 650,000, close to 40 per cent of the male population.<sup>132</sup> The torture and ill-treatment of Palestinian detainees during that time has been well documented.<sup>133</sup> The absolute prohibition on torture in international law has not been incorporated into domestic Israeli law,<sup>134</sup> and while Israel's Supreme Court in 1999 held 'brutal or inhuman means' of interrogation deployed by the security services to be unlawful, it allowed for a defence of 'necessity' and effectively sanctioned the continued use of pressure and discomfort for the purpose of extracting information from 'security' prisoners.<sup>135</sup> The overwhelming majority of such detainees are Palestinians: according to the Israel Prison Service, from a total 9,498 security prisoners incarcerated in Israel in 2006, only 12 were Jewish Israelis.<sup>136</sup> In contrast

<sup>131</sup> See, e.g., B'Tselem, 'Soldier kills Palestinian demonstrator Mustafa Tamimi, 28, by shooting tear-gas canister at him', 11 Dec. 2011, available at: [www.btselem.org/firearms/20111209\\_killing\\_of\\_mustafa\\_tamimi](http://www.btselem.org/firearms/20111209_killing_of_mustafa_tamimi); Al-Haq, 'Right To Life of Palestinian Children Disregarded in Ni'lin as Israel's Policy of Wilful Killing of Civilians Continues', 7 Aug. 2008, available at: [www.alhaq.org/10yrs/advocacy/628-right-to-life-of-palestinian-children-disregarded-in-nilin-as-israels-policy-of-wilful-killing-of-civilians-continues](http://www.alhaq.org/10yrs/advocacy/628-right-to-life-of-palestinian-children-disregarded-in-nilin-as-israels-policy-of-wilful-killing-of-civilians-continues).

<sup>132</sup> Addameer, Prisoners' Support and Human Rights Association, 'Political Detention', available at: [www.addameer.org/detention/background.html](http://www.addameer.org/detention/background.html).

<sup>133</sup> See, e.g., B'Tselem and Hamoked, *Absolute Prohibition: The Torture and Ill-treatment of Palestinian Detainees* (2007); *Public Committee Against Torture in Israel, Ticking Bombs: Testimonies of Torture Victims in Israel* (2007). The UN Committee Against Torture has expressed concern that from over 600 complaints of ill-treatment by the Israel Security Agency (ISA) received by the Inspector of Complaints (an ISA employee) between 2001 and 2008, not a single criminal investigation has resulted, while 'out of 550 examinations of torture allegations initiated by the General Security Services (GSS) inspector between 2002 and 2007, only four resulted in disciplinary measures and none in prosecution': UN Committee Against Torture, 'Concluding Observations of the Committee Against Torture: Israel', UN Doc. CAT/C/ISR/CO/4, 14 May 2009, at para. 21.

<sup>134</sup> *Ibid.*, at para. 13.

<sup>135</sup> *The Public Committee Against Torture in Israel v. The Government of Israel*, H.C. 5100/94, 53(4) PD 81.

<sup>136</sup> Letter from the Israel Prison Service to Adalah, 6 Nov. 2006.

to the ill-treatment to which Palestinians are routinely subject while incarcerated, Jewish Israeli detainees classified as security prisoners have been granted privileges including conjugal visits.

Arbitrary arrest and detention, including 'administrative detention' imposed without charge or trial, has been a prominent feature of the occupation, particularly during the Palestinian *intifadas*.<sup>137</sup> Under the Israeli military regime in the occupied Palestinian territory, executive power is vested in the armed forces, giving military commanders authority to issue detention orders. Israel bases such authority on the British Mandate Government of Palestine's Defence (Emergency) Regulations, 1945, augmented by a series of military orders imposed from 1967 onwards. Such military legislation is implemented by a military court system which appears incompatible with fundamental international standards regarding due process and the administration of justice,<sup>138</sup> and which since 1967 has served as a tool of mass and often arbitrary detention of Palestinians. This persists in the West Bank, where military courts continue to convict Palestinian civilians – including children<sup>139</sup> – *en masse*, and military orders continue to authorize local commanders to issue orders

<sup>137</sup> By way of example, over 50,000 Palestinians were arrested during the height of the first *intifada* between Dec. 1987 and Dec. 1989, of whom more than 10,000 were placed under administrative detention: Al-Haq, *A Nation Under Siege* (1990), at 285.

<sup>138</sup> See, e.g., L. Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (2005); Cavanaugh, 'The Israeli Military Court System in the West Bank and Gaza', 12 *J Conflict and Security L* (2007) 197; Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (2007). In his 2007 Mission report on Israel and the occupied Palestinian territory, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, reported that the military courts 'have an appearance of a potential lack of independence and impartiality, which on its own brings into question the fairness of trials': see M. Scheinin, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Addendum: Mission to Israel, including visit to the Occupied Palestinian Territory', UN Doc. A/HRC/6/17/Add.4, 16 Nov. 2007, at para. 29.

<sup>139</sup> The principal piece of relevant legislation for the prosecution of minors is Military Order No. 132, Order Concerning Adjudication of Juvenile Offenders, 24 Sept. 1967, which until Oct. 2011 defined Palestinians as minors only up to the age of 15, with those aged 16–17 legally defined by Israel as adults (whereas in Israel the age for an individual legally to qualify as an adult was 18). Although that anomaly has been corrected with the definition of a Palestinian minor now extended up to 17 years of age, others remain. A Palestinian must be aged 11 or under to be defined as a child under Military Order No. 132, meaning that Palestinian minors aged 12 upwards are treated under the same procedures as adults in the military legal system. Consequently, Palestinians from the age of 12 are subject to prosecution under Israeli military legislation, including Military Order No. 378, under which they face, e.g., sentences of up to 10 years' imprisonment for throwing a stone at a stationary object such as the wall, and 20 years for throwing a stone at a moving vehicle. In the Israeli civil court system applicable to Jewish settlers, by contrast, children under the age of 14 cannot be subject to prison sentences. The discrepancy over the affording of the same treatment and punishment for Palestinian juveniles as adults has repeatedly been raised as a matter of concern by the UN Committee Against Torture as well as by the Committee on the Rights of the Child: see, e.g., UN Committee Against Torture, 'Conclusions and Recommendations: Israel', 25 Sept. 2002, UN Doc. A/57/44, at para. D(6)(d); 'Concluding Observations of the Committee on the Rights of the Child: Israel', 9 Oct. 2002, UN Doc. CRC/C/15/Add. 195, Art. 62(a).

detaining individuals for up to six months without charge or trial (renewable).<sup>140</sup> While the Gaza Strip arguably remains under belligerent occupation,<sup>141</sup> Israel presented its unilateral disengagement in 2005 as serving to ‘dispel claims regarding Israel’s responsibility for the Palestinians in the Gaza Strip’.<sup>142</sup> The jurisdiction of Israeli military orders in Gaza was thus repealed. This has not, however, resulted in the transfer of full authority over the administration of justice in Gaza from Israel to the Palestinians. Israel instead enacted specific legislation in the form of the 2006 Criminal Procedure Law<sup>143</sup> to allow it to incarcerate ‘security suspects’ – primarily Palestinians from the Gaza Strip – in detention facilities in Israel, and to prosecute them in Israeli civil courts. This statute appears to have been born from a desire to retain direct control over aspects of the administration of justice in Gaza, and has been applied almost exclusively against Gazans.<sup>144</sup> According to estimates submitted to the Knesset Constitution, Law and Justice Committee by the head of the investigations unit of the Israeli General Security Services (GSS) concerning the applicability of the law, ‘[o]ver 90% of detainees (to which this law was applied) were from the Gaza Strip’.<sup>145</sup> While a provision of the 2006 law that allowed the pre-trial detention of security suspects to be extended *in absentia* was struck down in February 2010 by Israel’s Supreme Court, new legislation was promptly introduced in the form of the 2010 Criminal Procedure Law<sup>146</sup> to bypass the Supreme Court ruling and further remove procedural safeguards from detainees.<sup>147</sup> The 2010 law in practice again applies mainly to detainees from Gaza.

<sup>140</sup> The primary military legislation relating to administrative detention is Military Order No. 378, Order Concerning Security Provisions, 20 Apr. 1970, as amended, most significantly by Military Order No. 1229, Order Concerning Administrative Detention (Provisional Regulations), 17 Mar. 1988. Other military orders have been enacted in specific contexts as they have arisen. Military Order No. 1500, e.g., was issued in Apr. 2002 to provide for mass detention of Palestinians during Israel’s sweeping military incursions in the West Bank. This order gave every Israeli soldier in the territory the authority to arrest Palestinians without providing a reason and without requiring authorization from a superior officer. It also allowed the occupying forces to detain Palestinians for 18 days without bringing them before a judge.

<sup>141</sup> See, e.g., UN SC Res. 1860, UN Doc. S/RES/1860, 8 Jan. 2009; UN GA Res. 63/96, UN Doc. A/RES/63/96, 18 Dec. 2008; UN Human Rights Council Res. S-9/1 UN Doc. A/HRC/S-9/L.1, 12 Jan. 2009; ‘Report of the UN Fact Finding Mission on the Gaza Conflict’ (the ‘Goldstone Report’), UN Doc. A/HRC/12/48, 15 Sept. 2009, at para. 276. For further discussion see Darcy and Reynolds, ‘An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law’, 15 *J Conflict and Security L* (2010) 211; Scobbie, ‘An Intimate Disengagement: Israel’s Withdrawal from Gaza, the Law of Occupation and of Self-Determination’, 11 *Yrbk Islamic and Middle Eastern L* (2004–2005) 3; cf. Shany, ‘Faraway, so Close: The Legal Status of Gaza after Israel’s Disengagement’, 8 *Yrbk Int’l Humanitarian L* (2005) 369.

<sup>142</sup> Israeli Ministry of Foreign Affairs, *The Disengagement Plan – General Outline*, 18 Apr. 2004, Art. 1(vi); *Revised Disengagement Plan*, 6 June 2004, Art. 1(vi).

<sup>143</sup> Criminal Procedure (Enforcement Powers – Detention) (Detainees Suspected of Security Offences) (Temporary Provision) Law 2006.

<sup>144</sup> Darcy and Reynolds, *supra* note 141, at 236.

<sup>145</sup> Quoted in Report of the United Nations Fact Finding Mission on the Gaza Conflict, *supra* note 141, at para. 1443.

<sup>146</sup> Criminal Procedure Law (Suspects of Security Offenses) (Temporary Order) (Amendment No. 2) 2010.

<sup>147</sup> See Israel Democracy Institute, ‘Knesset Extends Temporary Order on Detentions of Security Offense Suspects’, 147 *Terrorism and Democracy* (2011).



Regarding administrative detention without trial for Gazans, on 12 September 2005, the very day that Israel completed the implementation of its disengagement plan and declared an end to the military justice system in the Gaza Strip, the military authorities issued detention orders under the 2002 Internment of Unlawful Combatants Law against two Gaza residents. Since then, the law – enacted originally to intern Lebanese nationals as potential ‘bargaining chips’ for the exchange of Israeli prisoners of war – has been primarily used to detain Palestinians from the Gaza Strip without trial.<sup>148</sup>

As was the case in apartheid South Africa – where ‘executive detention’ was employed but on a lesser scale – measures pursued by the state in denial of the rights to life and liberty of person of a particular group are implemented primarily to eliminate dissent or resistance to Israeli rule. The practices are discriminatory in that they are applied virtually exclusively to Palestinians. Jewish settlers in the West Bank are subject to a separate system of Israeli civil laws and courts that apply far more generous standards of evidence and procedure than the military law and courts to which Palestinians are subject. The use of administrative detention as a form of domination over the local population is indicated by the figures: in contrast to the tens of thousands of Palestinians interned by rolling six-month orders lasting up to several years in many cases, just nine Jewish Israeli settlers in the Palestinian territories have been administratively detained over the course of the occupation,<sup>149</sup> generally for periods of 40 to 60 days.<sup>150</sup>

Article 2(c) of the Apartheid Convention is a broad clause defining as acts of apartheid any measures calculated to prevent a racial group from participating in the political, social, economic, and cultural life of the country and the deliberate creation of conditions preventing the full development of the group, in particular through the denial of basic human rights and freedoms. The provision cites nine such rights and freedoms the denial of which would adversely affect the participation and full development of the subjugated group, encompassing civil and political rights as well as elements relevant to the group’s socio-economic and cultural development. Abundant evidence is available to suggest that Israel persistently denies such rights to Palestinians. For our present purposes it is befitting to highlight the conclusions of the HSRC research pertaining to the nine rights and freedoms to which Article 2(c) refers:

- Restrictions on Palestinians’ right to freedom of movement are endemic, including Israel’s control of the OPT border crossings, extensive impediments to travel and access raised by the Wall, the matrix of checkpoints and separate roads within the West Bank, and the obstructive and all-encompassing permit and ID card systems.

<sup>148</sup> B’Tselem and HaMoked, *Without Trial: Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law* (2009), at 55–69.

<sup>149</sup> B’Tselem, ‘Statistics on Administrative Detention’, as of 20 Mar. 2013, available at: [www.btselem.org/english/Administrative\\_Detention/Statistics.asp](http://www.btselem.org/english/Administrative_Detention/Statistics.asp).

<sup>150</sup> See, e.g., Amnesty International, ‘Administrative detention cannot replace proper administration of justice’, 11 Aug. 2005, AI Index: MDE 15/045/2005, regarding the detention of alleged Kach activists Ephraim Hershkowitz and Gilad Shochat.



- Palestinian freedom of residence is severely curtailed by systematic administrative restrictions on both 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 OPT they originate from, and by the strictures of the permit and ID systems.
- Palestinians are systematically denied enjoyment of their right to leave and return to their country. Palestinian refugees now living in the OPT (approximately 1.8 million people) are not allowed to return to their homes, while Palestinian refugees outside Israel and the OPT (approximately 4.5 million) are not allowed to return to either territory. Similarly, hundreds of thousands of Palestinians displaced from the West Bank and Gaza Strip in 1967 have been prevented from returning to the OPT. Many Palestinian residents of the OPT must obtain Israeli permission to leave the territory (which is often denied), political activists and human rights defenders are often subject to arbitrary and undefined ‘travel bans’, while many Palestinians who travelled abroad for business or personal reasons have had their residence IDs revoked and been prohibited from returning.
- Palestinians are denied their right to a nationality in two ways. Israel denies Palestinian refugees now living in the OPT who fled their homes inside the Green Line the right of return, reside and obtain citizenship in the successor state (Israel) now governing the land of their birth. Israel also effectively denies Palestinians their right to a nationality by obstructing the exercise of the Palestinian right to self-determination and preventing the formation of an independent Palestinian state in the West Bank (including East Jerusalem) and Gaza Strip.
- Palestinians are restricted in their right to work, through Israeli policies that severely curtail Palestinian agriculture and industry in the OPT, restrict exports and imports, and obstruct internal movement by Palestinians, including by impairing their access to their own agricultural land and travel for employment and business. Although formerly significant, Palestinian access to work inside Israel has been curtailed in recent years by prevailing closure policies and is now negligible. Palestinian unemployment in the OPT as a whole has reached almost 50 percent.
- Palestinian trade unions exist but are not recognised by the Israeli government or by the Histadrut (the largest Israeli trade union) and cannot effectively represent Palestinians working for Israeli employers and businesses. Palestinian unions are also prohibited from functioning in Israeli settlements. Although they are required to pay dues, the interests and concerns of Palestinian workers are not represented by the Histadrut, and Palestinians have no voice in Histadrut policies.
- Palestinians’ right to education is not impacted directly by Israeli policy, as Israel does not operate the school system in the OPT, but is severely impeded by military rule. Israeli military actions have included extensive school closures, direct attacks on schools, severe restrictions on movement, and arrests and detention of teachers and students. Israel’s denial of exit permits, particularly for Palestinians from the Gaza Strip, has prevented thousands of students from continuing their education abroad. Discrimination in relation to education is striking in East Jerusalem, and is further indicated by a parallel Jewish Israeli school system in illegal settlements throughout the West Bank, supported by the Israeli government.
- Palestinians 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 publications must be pre-approved by the military censor. Since 2001, the Israeli GPO [Government

Press Office] has drastically limited Palestinian press accreditation. Journalists are regularly restricted from entering the Gaza Strip and Palestinian journalists suffer from patterns of harassment, detention, confiscation of materials, and even killing.

- Palestinians' right to freedom of peaceful assembly and association is impeded through military orders that ban public gatherings of ten 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 organizations, are regularly subjected to closure and attack.<sup>151</sup>

The breadth and consistency of such infringements suggest that they do not occur in isolation, but are part of a system that operates to control and dominate Palestinians in the occupied territory and to suppress any opposition to that domination. It bears noting that the web of relatively obscure and inaccessible military orders and regulations, combined with bureaucratic restrictions that are often racialized in implementation rather than on paper, makes the depth of Israel's systemic discrimination less immediately conspicuous than its counterpart in South Africa, where explicitly racist and freely available legislation made the apartheid regime in some sense more 'honest' in its discriminatory intent. This is nowhere more apparent than in the case of 'road apartheid' (which was not practised in South Africa) in the West Bank which establishes separate but substantially unequal road networks for Jewish settlers and Palestinians, without any clear legal basis and without any notice of reservation<sup>152</sup> of the kind that South Africa used to reserve separate parks, buses, beaches, and other public amenities for exclusively white occupation.

While Richard Goldstone rebutted as slanderous the suggestion that Israeli policy was indicative of apartheid in an opinion piece in the *New York Times* in November 2011,<sup>153</sup> the 2009 report of the UN Fact Finding Mission on the Gaza Conflict (chaired by Goldstone and referred to by himself and others as the 'Goldstone Report') is in fact supportive of a finding of apartheid in the occupied Palestinian territory in respect of Article 2(a) and (c) of the Apartheid Convention. Without explicit recourse to the language of apartheid, the Report invokes evidence of 'discrimination and differential treatment' between Palestinians and Israeli Jews in fields including: treatment by judicial authorities; land use, housing, and access to natural resources; citizenship, residence, and family unification; access to food and water supplies; the use of force against demonstrators; freedom of movement; access to health, education, and social services; and freedom of association.<sup>154</sup> On this basis it asserts conclusions of

<sup>151</sup> Tilley (ed.), *supra* note 19, at 216–218; for full elucidation see 146–196. For further extensive documentation of Israeli practices relevant to Art. 2(c) see, e.g., Human Rights Watch, *Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories* (2010).

<sup>152</sup> Aloni, *supra* note 15.

<sup>153</sup> Goldstone, *supra* note 23.

<sup>154</sup> See Report of the United Nations Fact Finding Mission on the Gaza Conflict, *supra* note 141, at paras 113, 206, 208, 938, 1427, 1577, 1579, and 1616 respectively.

systematic discrimination against the Palestinians, and the potential commission of the related crime against humanity of persecution:

The systematic discrimination, both in law and in practice, against Palestinians, in legislation (including the existence of an entirely separate legal and court system which offers systematically worse conditions compared with that applicable to Israelis), and practice during arrest, detention, trial and sentence compared with Israeli citizens is contrary to ICCPR article 2 and potentially in violation of the prohibition on persecution as a crime against humanity.<sup>155</sup>

Article 2(d) of the Apartheid Convention prohibits measures designed to divide the population along racial lines. Such segregation can be understood as a central underpinning feature of an apartheid system, and evokes the ‘grand apartheid’ element of the South African regime’s policy, particularly through its reference to the creation of separate reserves and ghettos for the members of a particular racial group. The use of the term ‘reserves’ in the Convention stems specifically from the South African experience, stretching at least as far back as the 1913 Natives’ Land Act which restricted land ownership by native South Africans to designated ‘reserves’ comprising just 7 per cent of the territory of South Africa; delineations that would later form the basis for the ‘homelands’ in which nominally independent ‘Bantustan’ statelets were to be created.

Policies pursued by successive Israeli governments over the course of the occupation and particularly since the late 1970s, culminating in the construction of the wall since 2002, have divided the occupied territory into a series of non-contiguous enclaves or ‘reserves’ into which Palestinians are effectively confined.

Closures and restrictions of movement into and out of the Gaza Strip have steadily intensified to the point that it has been effectively severed from the rest of the occupied territory. Since the removal of Jewish settlers in 2005, Gaza effectively amounts to a besieged Palestinian ghetto, with the ‘open-air prison’ analogy repeatedly invoked.<sup>156</sup> The occupied territory’s economic and cultural hub, East Jerusalem, has also been starkly affected, isolated from the rest of the territory through residence and movement restrictions that further the explicit project of ‘Judaizing’ the city and incorporating it fully into Israel.<sup>157</sup> Palestinian residents of East Jerusalem – while subjected to

<sup>155</sup> *Ibid.*, at para. 1534.

<sup>156</sup> Use of this analogy has not been confined to journalists and activists, but has extended to such authorities as the UN Under-Secretary-General for Humanitarian Affairs and the British Prime Minister. See, e.g., ‘UN humanitarian chief warns of disaster if Gaza siege continues’, *Ha’aretz*, 12 Mar. 2010, available at: [www.haaretz.com/news/un-humanitarian-chief-warns-of-disaster-if-gaza-siege-continues-1.266453](http://www.haaretz.com/news/un-humanitarian-chief-warns-of-disaster-if-gaza-siege-continues-1.266453); ‘Gaza is a prison camp, says David Cameron’, *The Daily Telegraph*, 27 July 2010, available at: [www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/7912095/Gaza-is-a-prison-camp-says-David-Cameron.html](http://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/7912095/Gaza-is-a-prison-camp-says-David-Cameron.html).

<sup>157</sup> Upon concluding a 2-week visit to Israel and the OPT in Feb. 2012, Prof. Raquel Rolnik, UN Special Rapporteur on the right to adequate housing, highlighted Israel’s ‘implementation of a strategy of Judaization and control of the territory’ in Palestinian neighbourhoods of East Jerusalem and other parts of the West Bank: Rolnik, ‘Preliminary remarks on the mission to Israel and the Occupied Palestinian Territory – 30 January to 12 February 2012’, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11815&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11815&LangID=E).

Israeli jurisdiction, law, and taxation – have traditionally been excluded from citizenship entitlements and deprived of basic services. They are further targeted for exclusion from residence in the city. Since 1995, over 10,000 Jerusalem resident IDs have been revoked by the Israeli authorities, with tens of thousands more at risk of a similar fate on account of an unduly onerous ‘centre of life’ test. In December 2011, the mayor of Jerusalem signalled an intention to redraw the city’s municipal boundary in order to strip the 70,000 Palestinians living on the eastern side of the wall of their Jerusalem residence status.<sup>158</sup> Such discriminatory bureaucratic realignments can be understood in the context of Israeli ‘master plans’ detailing visions of a ‘Greater Jewish Jerusalem’ in which the Palestinian segment of the city’s population is further reduced.

The rest of the West Bank has been fragmented by the designation for exclusively Jewish use of certain zones of land, to which Palestinian entry is banned without a permit,<sup>159</sup> with Israeli travel into Palestinian enclaves similarly prohibited. The Jordan Valley, comprising approximately 30 per cent of the West Bank and containing its most fertile land and important water sources, is a particularly glaring embodiment of the expropriation of land by the dominant group for the purposes of territorial fragmentation and creation of segregated cantons. Under military legislation passed at the outset of the occupation in 1967, much of the Jordan Valley was closed to Palestinian access and development. In the wake of five decades of settlement construction and confiscation of further land, Israel now maintains full control of 78.3 per cent of the Jordan Valley.<sup>160</sup> 15 per cent of the territory is currently under the direct control of Jewish settlements (enjoyed by just 9,500 Jewish settlers in 37 settlements), with more than 40 per cent designated as ‘closed military zones’ and over 20 per cent as ‘nature reserves’ which are closed to Palestinian residence or movement but often form the basis for settlement expansion.<sup>161</sup> Concerted policies of home demolition and forced displacement have diminished the number of Palestinian residents in the Jordan Valley from an estimated 200,000 in 1967 to just 56,000 in 2011, confined to a small fraction of its land area and prevented from accessing the Palestinian shores of the Dead Sea.<sup>162</sup> Access to the Jordan Valley for Palestinians resident elsewhere in the

<sup>158</sup> Hasson, ‘Israel gearing for effective separation of East Jerusalem Palestinians’, *Ha’aretz*, 23 Dec. 2011, available at: [www.haaretz.com/print-edition/news/israel-gearing-for-effective-separation-of-east-jerusalem-palestinians-1.403034](http://www.haaretz.com/print-edition/news/israel-gearing-for-effective-separation-of-east-jerusalem-palestinians-1.403034).

<sup>159</sup> By Dec. 2011, Israel’s regulation of Palestinian movement had grown into a ‘vast, triple-digit bureaucracy’, with 101 different types of permits now used to govern Palestinian movement. Levinson, ‘Israel has 101 different types of permits governing Palestinian movement’, *Ha’aretz*, 23 Dec. 2011, available at: [www.haaretz.com/print-edition/news/israel-has-101-different-types-of-permits-governing-palestinian-movement-1.403039](http://www.haaretz.com/print-edition/news/israel-has-101-different-types-of-permits-governing-palestinian-movement-1.403039).

<sup>160</sup> UN Office for the Coordination of Humanitarian Affairs, *West Bank Movement and Access Update* (2011), at 22.

<sup>161</sup> *Ibid.*

<sup>162</sup> Here it is worth noting that it is often stated that Israel does not segregate access to beaches, and thus compares favourably to apartheid South Africa where certain beaches were designated as ‘white-only’ and others for non-whites. Access to the Dead Sea’s West Bank beaches for West Bank Palestinians is not on an officially segregated basis but is effectively entirely precluded by permit and checkpoint regimes.

West Bank is heavily restricted by administrative impediments buttressed by a physical ring of checkpoints and trenches. Such contemporary ‘facts on the ground’ correspond neatly with the ‘Allon Plan’,<sup>163</sup> which set out a blueprint for Israeli annexation of the Jordan Valley at the outset of its occupation in 1967.

The wall that Israel commenced building through the West Bank in 2002, and which was held to be contrary to international law by the International Court of Justice in 2004,<sup>164</sup> is a major exercise in both social engineering and territorial fragmentation. Today it is clear that security is at best a secondary justification for the wall. Its primary purpose is the annexation of land in the West Bank and East Jerusalem that accommodates Jewish settlements.<sup>165</sup> The wall not only results in the unlawful seizure of 10.2 per cent of West Bank territory but effectively divides the West Bank into three principal cantons – north, centre, and south – and numerous sub-cantons.<sup>166</sup> Israel’s wall and its associated infrastructure of gates and permanent checkpoints reveal an intention to impose a system of permanent enclaves in which residence and passage are determined by racial identities – within the context of the occupation while it persists, and ultimately facilitating the annexation of large swathes of the West Bank. This will leave for the Palestinians, at best, the possibility of a Bantustan-type state in the remaining reserves.

Formal blueprints aimed at dividing the West Bank into Jewish and Palestinian zones can be traced back at least as far as 1978, when the Jewish Agency, a para-statal Jewish-national organization charged with the development and management of national assets, formally declared the West Bank to be a permanent part of ‘Eretz Israel’, and its sister organization, the World Zionist Organization, presented a ‘Master Plan for the Development of Settlement in Judea and Samaria, 1979–1983’.<sup>167</sup> Outlining the need for the establishment of Jewish settlements in the territory in order to ensure permanent Jewish Israeli control over the land, the plan was adopted by the Likud government at the time.<sup>168</sup> The operation of the Jewish-national institutions in partnership with government ministries as authorized agencies of the state illuminates

<sup>163</sup> Drafted by Deputy Prime Minister Yigal Allon shortly after the Six-Day War in 1967.

<sup>164</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136.

<sup>165</sup> The function of the wall as an instrument of annexation has been consistently clear in the statements of Israeli leaders. For just one example see the assertion of then Justice Minister Tzipi Livni in 2005 that the wall will serve will serve as ‘the future border of the state of Israel’: Yoaz, ‘Justice minister: West Bank fence is Israel’s future border’, *Ha’aretz*, 1 Dec. 2005, available at: [www.haaretz.com/news/justice-minister-west-bank-fence-is-israel-s-future-border-1.175645](http://www.haaretz.com/news/justice-minister-west-bank-fence-is-israel-s-future-border-1.175645). A Jan. 2012 proposal by Israel that its final borders should be based on the route of the wall so as to encompass the settlements on its western side, as well as all of East Jerusalem, is the latest reiteration of this blueprint: Daraghmeh and Perry, ‘Israel proposes West Bank barrier as border’, *Associated Press*, 27 Jan. 2012.

<sup>166</sup> J. Dugard, ‘Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967’, UN Doc. A/62/275, 17 Aug. 2007, at para. 28.

<sup>167</sup> World Zionist Organization, ‘Master Plan for the Development of Settlement in Judea and Samaria 1979–1983’ (Oct. 1978), available as an annex to UN Doc. A/34/605-S/13582, 22 Oct. 1979.

<sup>168</sup> Known also as the ‘Drobles Plan’ after its chief author, Matityahu Drobles (chairman of the World Zionist Organization’s Settlement Division from 1978 to 1992), the plan advised that the ‘best and most effective way to remove any shred of doubt regarding our intention to hold Judea and Samaria forever is a rapid settlement drive in these areas’.

the racially contingent nature of Israel's land and planning policies. The role of the World Zionist Organization includes the planning, funding, and construction of West Bank settlements for exclusively Jewish use.<sup>169</sup> In order to obtain the land necessary for such settlement construction and expansion, Israel has extensively appropriated land in the West Bank, which is censured as an act of apartheid in Article 2(d) of the Convention when carried out for the purpose of dividing the population along racial lines. The World Zionist Organization's follow-up plan regarding implementation of its 1978 settlement master plan, presented in 1980 and adopted by the Israeli government in January 1981, set out clear motives and strategies for land appropriation in the occupied territory:

In light of the current negotiations on the future of Judea and Samaria, it will now become necessary for us to conduct a race against time. During this period, everything will be mainly determined by the facts we establish in these territories and less by any other considerations. ... Therefore, the state-owned lands and the uncultivated barren lands in Judea and Samaria ought to be seized right away, with the purpose of settling the areas between and around the centers occupied by the minorities so as to reduce to the minimum the danger of an additional Arab state being established in these territories. Being cut off by Jewish settlements the minority population will find it difficult to form a territorial and political continuity.<sup>170</sup>

Overall, more than 40 per cent of the land mass of the West Bank has now been appropriated to make way for Israeli settlement infrastructure and is entirely closed to Palestinian use.<sup>171</sup> With the separate road networks connecting the settlement blocs to each other and to Israel creating an extensive grid that in many places cannot be crossed by Palestinians, access to much of the rest of the territory is also significantly restricted. The West Bank, for Palestinians, is thus reduced to a series of dismembered enclaves.

Article 2(f) of the Apartheid Convention relates to the persecution of organizations and persons who oppose a prevailing system of apartheid. Persecution in this context entails the deprivation of fundamental rights and freedoms. While law condones the deprivation of rights in some cases in defence of state security, regimes of racial domination are typically exemplified by illegitimate acts of repression that go beyond what can be justified by reference to national security. Cases of extra-judicial killings, torture, and mass imprisonment of Palestinians coming under the rubric of Article 2(a) of the Convention fall into the latter category, as do restrictions of freedom of expression and association within the meaning of Article 2(c). The systematic targeting of Palestinian political leaders, community activists, and human rights defenders can be understood as persecution for opposition to Israel's regime of domination in the occupied territories within the meaning of Article 2(f). In 2009, for example,

<sup>169</sup> Significantly, the body that approves settlement construction, the Joint Settlement Committee, is comprised of an equal number of relevant Israeli ministers and executive members of the World Zionist Organization.

<sup>170</sup> World Zionist Organization, *Settlement in Judea and Samaria – Strategy, Policy and Plans* (Sept. 1980), available as an annex to UN Doc. A/36/341-S/14566, 19 June 1981.

<sup>171</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), *The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank* (2007).



45 members of the Palestinian Legislative Council (constituting more than a third of Palestine's elected parliamentarians) sat not in parliament but in Israeli jails.<sup>172</sup> With the majority of these individuals convicted of membership of political parties designated as illegal by Israel, and eight of them interned without charge or trial, the aim of suppressing political opposition to Israel's rule is manifest. Recent years have also witnessed the closure of charitable, educational, and cultural organizations affiliated to Hamas and other banned political parties, as well as the imposition of indefinite travel bans on human rights defenders who speak out against Israel's instruments of occupation. Weekly non-violent protests in the West Bank against the wall and the discriminatory administration of land and other resources are routinely met with excessive force and mass arrests by the Israeli military.

A concerted legislative strategy has been pursued in the Knesset by Benjamin Netanyahu's coalition governments since 2009, seeking to further stifle and punish opposition to Israeli domination over the Palestinians. The primary target of this legislative surge are individuals and organizations challenging state policy *vis-à-vis* the Palestinians. Concerned as they are with protecting the institutions and policies that underpin Israel as a state that privileges Jewish nationals, such measures are relevant to any opposition to its regime of domination over the Palestinians, transcending both geographical and racial lines within Israel/Palestine. In this regard, Jewish Israeli individuals or organizations commemorating the Palestinian *nakba*, for example, are as susceptible to persecution as Palestinians.<sup>173</sup> Significantly, Article 2(f), unlike the other provisions detailing acts of apartheid, does not require that the act be committed against a member or members of the subjugated racial group, but relates to persecution against *any* persons or organizations who oppose the apartheid system in question. This stems from the South African experience where numerous white anti-apartheid activists were banned, detained, or even physically targeted for their political beliefs and actions. Jewish Israelis are routinely arrested for participating in protests against Israeli domination over the Palestinians, and, along with Palestinians, are subject to sanction under measures such as the 2011 Law Preventing Harm to the State of Israel by Means of Boycott.

Issued by a broad collective of political parties, unions, and civil society organizations in 2005, the Palestinian call for boycott, divestment, and sanctions against Israeli state institutions and agents is grounded in Israel's failure to dismantle the wall, its continuing occupation and colonization of Palestinian land, and, notably, its 'entrenched system of racial discrimination' against the Palestinians.<sup>174</sup> The boycott movement gained substantial momentum following Israel's 'Operation Cast Lead' offensive in the Gaza Strip in 2008–2009 and its attack in international waters on

<sup>172</sup> Statistics provided by Addameer – Prisoners' Support and Human Rights Association.

<sup>173</sup> Enacted in Mar. 2011, the Law to Amend the 1985 State Budget Law (the 'Nakba Law') authorizes Israel's Minister of Finance to cut funding or support to any institution that conducts activity contradicting the definition of Israel as a 'Jewish and democratic' state, or that commemorates 'Israel's Independence Day or the day on which the state was established as a day of mourning'.

<sup>174</sup> 'Palestinian Civil Society Call for Boycott, Divestment and Sanctions', 9 July 2005, available at: [www.bdsmovement.net/call](http://www.bdsmovement.net/call).



the 'Gaza Freedom Flotilla' in May 2010,<sup>175</sup> and has been supported by sympathetic Jewish groups in Israel and abroad.<sup>176</sup> Article 2 of the Law Preventing Harm to the State of Israel by Means of Boycott makes it a civil wrong to call for a boycott against the state of Israel. This applies to boycotts imposed on actors due to their association with the state of Israel, one of its institutions, or an area under its control,<sup>177</sup> including the occupied Palestinian territory. Boycotts of items produced in illegal Israeli settlements in the West Bank are thus also included.

The available evidence does not suggest that each and every inhuman act allowed for by the definition of apartheid is relevant to the Palestinian context. Article 2(b) of the Apartheid Convention borrows language from the Genocide Convention in its reference to 'the deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part'. Israeli policies of collective punishment in the Palestinian territories generally and in the Gaza Strip in particular entail grave consequences for life and health and amount to serious violations of international humanitarian and human rights law.<sup>178</sup> So too the consistent demolition of Palestinian homes,<sup>179</sup> which combines with other Israeli practices to result in the imposition of living conditions that threaten the welfare, and in some instances the very survival, of sections of the Palestinian people. However inhuman such actions may be, they do not meet the threshold required by this provision of *intent* to cause the physical destruction of the Palestinian people. Here, it bears noting that the South African Truth and Reconciliation Commission arrived at a similar conclusion for its part, holding that despite the devastating effects of apartheid policies on living conditions and health, the South African government did not sustain an intentional policy to destroy the black population.<sup>180</sup>

It is clear from the wording of the Apartheid Convention and from the South African precedent that the existence of an apartheid regime does not require all of the inhuman acts envisaged in Article 2 of the Convention to be prevalent. An apartheid regime is defined by the commission of such acts in a manner sufficiently extensive to qualify as institutionalized and systematic domination.

<sup>175</sup> For documentation and analysis of alleged war crimes and crimes against humanity committed by both Israel's military and Palestinian armed groups in the context of Operation Cast Lead see Report of the United Nations Fact Finding Mission on the Gaza Conflict, *supra* note 141. For documentation and a somewhat patchy legal analysis of the flotilla incident see 'Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance', UN Doc. A/HRC/15/21, 22 Sept. 2010.

<sup>176</sup> Groups such as: Boycott from Within; Not in Our Name; Jews Opposing Zionism; the International Jewish Anti-Zionist Network.

<sup>177</sup> Art. 1, 2011 Law Preventing Harm to the State of Israel by Means of Boycott.

<sup>178</sup> For further discussion of this matter see, e.g., *No Safe Place: Report of the Independent Fact Finding Committee on Gaza*, presented to the League of Arab States on 30 Apr. 2009.

<sup>179</sup> According to UN figures, the demolition of homes by Israel in the West Bank displaced nearly 1,100 Palestinians in 2011, over half of them children. This represents a 42% increase on demolitions carried out in 2010: UN Office for the Coordination of Humanitarian Affairs, 'Demolitions and Forced Displacement in the Occupied West Bank' (Jan. 2012).

<sup>180</sup> Truth and Reconciliation Commission of South Africa Report (1998), i, Ch. 4, Appendix, para. 4, at 94.

### C Institutionalized and Systematic Discrimination and Domination

Article 2 of the Apartheid Convention requires that, for the commission of the crime of apartheid, the inhuman acts must have been ‘committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them’. The primary impetus of the commission of the practices of the Israeli civil and military authorities in the occupied Palestinian territory is to insulate and privilege Jewish settlements and settler infrastructure, and to ensure that Palestinians intrude as little as possible on the lives of settlers. The dominant group for the purposes of the Apartheid Convention is therefore the Jewish settler group, numbering over half a million in the West Bank, including East Jerusalem, whose mere presence violates Article 49(6) of the Fourth Geneva Convention.<sup>181</sup> Having identified the dominant group, the next question that must be considered is whether the acts in question have been committed for the purpose or intention of maintaining domination by the Jewish group over the Palestinian group and systematically oppressing them.

From the above examination of the inhuman acts perpetrated by Israel in the occupied Palestinian territory it is clear that such acts do not occur in a random and isolated manner but are part of a widespread and oppressive regime that is both institutionalized and systematic. This regime is founded on a discriminatory ideology that elevates Jews to a higher status and accords separate and unequal treatment to Palestinians. Inevitably, as shown by the experience of apartheid South Africa, such discrimination results in the domination of the ‘superior’ group over the ‘inferior’ group, and it becomes impossible to refute the conclusion that the purpose of such discrimination is domination. As the discriminatory nature of Israel’s relations with Palestinians may be contested it is necessary to examine this matter in some detail.

Underpinning Israel’s discriminatory policies against the Palestinians – both within Israel and in the occupied Palestinian territory – is a legal system that constructs a notion of ‘Jewish nationality’ and privileges Jewish nationals over non-Jewish groups under Israeli jurisdiction. Israeli law is somewhat unique in distinguishing between nationality (in Hebrew, *le’om*) and citizenship (*ezrahūt*), with Israel constituted as the state of the Jewish nation. For purposes of law as well as policy, no ‘Israeli nation’ exists. Israeli Supreme Court jurisprudence confirms that Israel is defined as the state not of the ‘Israeli nation’ but of the ‘Jewish nation’ (*le’om yahūdi*). In the *Tamarin* case, the plaintiff sought to register his nationality as ‘Israeli’ as opposed to ‘Jewish’, but the Court found that ‘there is no Israeli nation separate from the Jewish nation’, with the Jewish nation ‘composed not only of those residing in Israel but also of Diaspora Jewry’. The decision made it clear that to recognize a common Israeli nationality would be to ‘negate the very foundation upon which the State of Israel was formed’.<sup>182</sup>

<sup>181</sup> UN SC Res. 446, 22 Mar. 1979; *Legal Consequences of the Construction of a Wall*, *supra* note 164, at para. 120.

<sup>182</sup> *George Rafael Tamarin v. State of Israel*, (1970) 26 PD I 197. Another claim for recognition of uniform Israeli nationality was lodged with the Supreme Court in 2004 but at the time of writing remains pending; see Cook, ‘Lawsuit Challenges Israel’s Discriminatory Citizenship Definition’, *The National*, 6 Apr. 2010.

Thus a two-tiered system of civil status among Israeli citizens is created, with Jewish nationals privileged over non-Jewish citizens. Israeli citizenship is based on four criteria: birth, residence, marriage, and immigration; albeit with exclusions provided in the Law of Citizenship and Entry into Israel barring 'enemies of the State' (comprising Palestinians from the occupied territories as well as nationals of Lebanon, Syria, Jordan, and Iran) from entitlement to Israeli citizenship or residence rights. Non-Jews who hold Israeli citizenship remain subordinated by virtue of the fact that they are not Jewish nationals (a primarily descent-based status reserved for those born to a Jewish mother, with allowance also made for tightly restricted procedures of conversion to Judaism). Thus, while Palestinians holding Israeli citizenship make up approximately 20 per cent of the state's population and are entitled to vote as citizens, they are hugely restricted in critical areas such as land use and access to natural resources and key services, excluded by planning laws and institutions, and systematically discriminated against at municipal and national levels in the sphere of economic, social, and cultural rights.<sup>183</sup> Jewish nationals, whose exclusive interests are served by parastatal institutions such as the Jewish Agency and the Jewish National Fund,<sup>184</sup> are privy to exclusive access to most of the state's territory and to claim extra-territorial rights and privileges in areas controlled by Israel.

Such material benefits emanate from the 1950 Law of Return, which defines who is a Jew for purposes of the legal system and entitles every Jew to immigrate to Israel (extending, since 1967, to the occupied Palestinian territory) under an *oleh* visa. The 1952 Citizenship Law then grants such immigrants the right to gain immediate citizenship, while explicitly excluding those who were residents and citizens of Palestine before the creation of the state of Israel if they were not 'in Israel, or in an area which became Israeli territory after the establishment of the State, from the day of the establishment of the State [May 1948] to the day of the coming into force of this Law [April 1952]'.<sup>185</sup> Thus, long-time Palestinian residents who were forcibly displaced during the war of 1948 were legally barred from taking up citizenship in the newly created state and returning to their homes, while others with no prior connection to Israel are entitled to citizenship on the basis of a constructed Jewish nationality. This situation of preferential citizenship is further inscribed in Israel's constitutional law,<sup>186</sup> with a number of the Basic Laws codifying Israel as 'the state of the Jewish people'.<sup>187</sup> The premise of Israel as a Jewish state amounts to more than

<sup>183</sup> See, e.g., Tekiner, 'On the Inequality of Israeli Citizens', 1(1) *Without Prejudice* (1998) 9.

<sup>184</sup> The role of such Jewish national institutions in administering land and exercising governmental functions on behalf of the state has been the subject of consistent concerns raised by UN human rights treaty-monitoring bodies: see, e.g., 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel', UN Doc. E/C.12/1/Add.27, 4 Dec. 1998, at para. 11; 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel', UN Doc. CERD/C/ISR/CO/13, 9 Mar. 2007, at para. 19.

<sup>185</sup> Art. 3, 1952 Citizenship Law.

<sup>186</sup> Israel does not have a written Constitution, but a series of Basic Laws operate in practice as the constitutional law of the state.

<sup>187</sup> See, e.g., Basic Law: Knesset (1992); Basic Law: Human Dignity and Liberty (1992); Basic Law: Freedom of Occupation (1958).

mere symbolism, underpinning as it does much of the Israeli legal system. Notably, for instance, Basic Law: Israel Lands (1960) provides that ownership of real property ('land, houses, buildings and anything permanently fixed to land') held by the state of Israel, the Development Authority, and the Jewish National Fund 'shall not be transferred either by sale or any other manner' but is to be held in perpetuity for the benefit of the Jewish people. According to government sources, '93% of the land in Israel is in the public domain; that is, either property of the state, the Jewish National Fund or the Development Authority',<sup>188</sup> and thus cannot be leased or bought by non-Jews, even non-Jewish citizens of Israel.<sup>189</sup>

The codification of Jewish nationality is equally significant to the situation of the occupied Palestinian territory, where Israeli law is channelled in a number of ways to provide Jewish Israeli settlers with comparable privileges over Palestinian residents. In the sphere of land law, the disparity referred to above regarding exclusive Jewish access relates similarly to any land in occupied territory that is declared or treated as 'state land' by Israel. The 1951 State Property Law allows for the incorporation of state land anywhere 'in which the law of the State of Israel applies',<sup>190</sup> thus encompassing territory occupied by Israel. Large areas of the West Bank have been declared state land by Israel and closed to Palestinian use for the construction of Jewish settlements, military outposts, and nature reserves, placing much of the territory under the rubric of an institutional framework designed to administer state land for the exclusive benefit of the Jewish people.

With exceptions in certain settlements in East Jerusalem, residence in Jewish settlements in the occupied territory is closed to Palestinians; open only to Israelis or 'to persons of Jewish descent entitled to Israeli citizenship or residency under Israel's Law of Return'. The latter category is significant in highlighting the racialized nature of Israel's colonization and administration of the territories, with even non-Israeli Jews

<sup>188</sup> Israel Land Administration, 'General Information', available at: [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>189</sup> Proposed constitutional legislation, tabled in the Knesset in 2011 in the form of the Draft Basic Law: Israel – the Nation-State of the Jewish People, seeks to further elevate the status of the Jewish character of the Israeli state. In response, the Knesset's Legal Advisor, Eyal Yinon, took the unusual step of calling for a broad public and parliamentary debate on the bill, noting its implications for Israel's constitutional make-up as a 'Jewish and democratic state': no longer a horizontal balance between the two parts of the formula (Jewish and democratic), but rather the creation of a vertical balance, so that after the law is passed, at the top of the constitutional ladder will be the principle of the state of Israel as the nation-state of the Jewish people, and only under it will be the principle of the democratic state; and even then, it will be in a 'slim' formula that states 'the State of Israel has a democratic regime', as opposed to 'the State of Israel is a democratic state': quoted in Association for Civil Rights in Israel, 'Knesset Winter Session Begins: Trends and Concerns', 31 Oct. 2011. In Nov. 2011, a revised wording of the bill was tabled following discomfort among some parliamentarians over the perceptions of the original version as overtly racist. The new draft, however, retains in more convoluted language the thrust of the controversial clauses that propose to subordinate democratic rule to the Jewish nation, explicitly to bracket self-determination in Israel as the exclusive prerogative of the Jewish people (in order to abrogate the possibility of a binational state), and to strip Arabic of its status as an official language of the state on an equal footing with Hebrew: see Lis, 'Dichter replaces "Jewish identity" bill with equally contentious draft law', *Ha'aretz*, 15 Nov. 2011. At the time of writing, the Knesset plenary vote on the bill has yet to take place.

<sup>190</sup> State Property Law (5711-1951).

granted privileges over the local Palestinian population. In this way race and nationality are somewhat conflated (or confused), with discrimination present not merely between Israeli citizens and Palestinian non-citizens, but between those defined under Israeli law as Jewish nationals (i.e., those *entitled* to citizenship under the Law of Return) and those who are not. The Goldstone Report notes the ramifications when this underpinning feature of Israeli law extends to the Palestinian territories:

The application of Israeli domestic laws has resulted in institutionalized discrimination against Palestinians in the Occupied Palestinian Territory to the benefit of Jewish settlers, both Israeli citizens and others. Exclusive benefits reserved for Jews derive from the two-tiered civil status under Israel's domestic legal regime based on a 'Jewish nationality,' which entitles 'persons of Jewish race or descendency [*sic*]' to superior rights and privileges.<sup>191</sup>

An even stronger assessment is made by the Independent International Fact-Finding Mission charged by the UN Human Rights Council with the task of investigating the implications of Israeli settlements on the civil, political, economic, social, and cultural rights of the Palestinians throughout the OPT. In its report submitted in February 2013, the mission examines the distinct legal systems that exist in the OPT for settlers and Palestinians and concludes:

The legal regime of segregation operating in the Occupied Palestinian Territory has enabled the establishment and the consolidation of the settlements through the creation of a privileged legal space for settlements and settlers. It results in daily violations of a multitude of the human rights of the Palestinians in the Occupied Palestinian Territory, including, incontrovertibly, violating their rights to non-discrimination, equality before the law and equal protection of the law.<sup>192</sup>

The Fact-Finding Mission shows how the settlers have abused their superior legal status by resorting to violence against Palestinians and their property. It notes that the Israeli authorities have allowed these acts of violence to continue with impunity and reaches 'the clear conclusion that institutionalized discrimination is practiced against the Palestinian people when the issue of violence is addressed'.<sup>193</sup>

The foundation provided by the concept of Jewish nationality for an institutionalized system of discrimination and domination is evidenced most visibly by this dual legal system in place in the West Bank, where Jewish settlers are subject to an entirely separate body of laws and courts from Palestinian residents. At its most basic, this institutional segregation can be expounded as the application of Israeli civilian law and constitutional protection to the former, and of a military administration to the latter. Through a combination of parliamentary and military legislation, the Israeli authorities have created parallel legal universes whereby distinct regimes, premised on a principle of 'separate but unequal', apply to the two groups living in the one territory.

<sup>191</sup> Report of the United Nations Fact Finding Mission on the Gaza Conflict, *supra* note 141, at para. 206, footnotes omitted.

<sup>192</sup> 'Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem', UN Doc. A/HRC/22/63, 7 Feb. 2013, at para. 49.

<sup>193</sup> *Ibid.*, at para. 107.

The extension of Israeli civil legislation and constitutional rights to Jewish settlers in Palestinian territory occurs on the basis of a blend of territorial and personal grounds. In terms of application on a territorial basis, elements of Israeli civil law are incorporated into those military orders that cover the administration of Jewish Israeli settlement municipalities. This has been dubbed ‘channelling’,<sup>194</sup> a process whereby the Israeli Military Commander for the area serves as a conduit for the application of domestic legislation beyond Israeli territory by virtue of military decrees issued in pursuance of a mandate to regulate the management of local and regional Jewish municipal councils in the West Bank.<sup>195</sup> This allows certain Israeli laws to be extended to Israel’s settlements and annexed zones in the West Bank, creating enclaves where the legal and administrative systems differ profoundly from the surrounding territory. This effectively conflates law in the settlements with law inside Israel, erasing the barriers to annexation erected by the Green Line as far as Israeli authority and society are concerned.

Much civil and constitutional legislation is also applied extra-territorially on a personal basis to individual Jewish settlers in the occupied territories, both directly and through secondary legislation promulgated for that purpose. The 1977 Extension of Emergency Regulations Law, for example, allows Israelis suspected of committing criminal offences in the West Bank to be prosecuted, not by military courts under the military legislative system that applies to Palestinians, but by Israeli criminal courts according to Israel’s penal code and criminal procedure:

In addition to the provisions of any law, the court in Israel shall have authority to judge, according to the law in force in Israel, a person located in Israel for his act or omission occurring in the Area [the West Bank], and also an Israeli for his act or omission occurring in the territory of the Palestinian Council, all in case the act or omission would have been an offence, had they occurred within the jurisdiction of the courts in Israel.<sup>196</sup>

The racialized nature of this personal application of Israeli criminal law is highlighted by section 6(b) of the 1984 Addendum to the Law, which extends its application to residents of the West Bank who are not Israeli citizens but who are entitled to immigrate to Israel by virtue of the Law of Return:

For the purposes of the enactments enumerated in the Schedule, the expression “resident in Israel” or any other expression occurring in those enactments denoting residence, living or having one’s abode in Israel shall be regarded as including also a person who lives in a zone [in occupied territory] and is an Israeli national or is entitled to immigrate to Israel under the Law of Return, 5710-1950, and who would come within the scope of such expression if he lived in Israel.

Israeli law as extended to the occupied territories on a personal basis thus includes all Jews, whether they are Israeli citizens or not. Constitutional rights are also granted on

<sup>194</sup> Tilley (ed.), *supra* note 19, at 65.

<sup>195</sup> Military Order No. 783, Order Concerning the Management of Regional Councils (Judea and Samaria), 25 Mar. 1979; Military Order No. 892, Order Concerning the Management of Local Councils (Judea and Samaria), 1 Mar. 1981. The end result of this arrangement is that settlement councils operate with powers and functions that differ significantly from those of local Palestinian municipal councils in the West Bank, but are almost identical to those of the local and regional councils inside Israel.

<sup>196</sup> S. 2(a), The Extension of Power of Emergency Regulations Law (Judea and Samaria and the Gaza Strip – Adjudication of Offences and Legal Aid), 1977.



a personal basis to settlers, with the rationale given being the special link between the state and those settlers in areas under the state's control. Regarding the application of Israeli Basic Laws to settlers claiming compensation for their removal from illegal settlements in the Gaza Strip in 2005, the Supreme Court ruled:

We are of the opinion that the Basic Laws grant rights to every Israeli settler in the area to be evacuated. This application is personal. It derives from the control of the State of Israel over the area to be evacuated. It is the outcome of the view that the State's Basic Laws regarding human rights apply to Israelis located outside of the State but in an area under its control by way of belligerent occupation.<sup>197</sup>

The cumulative result of the extension of Israeli law into the occupied territory on a territorial basis through the administration of settlement municipalities and on a personal basis is that the actual relevance of the existing local law in the West Bank to a Jewish resident of the West Bank is negligible.<sup>198</sup>

In contrast to its treatment of Jewish residents of the same territory, the Supreme Court has refused to extend constitutional protections to Palestinians.<sup>199</sup> Palestinians are instead subject to the personal and territorial application of Israeli military legislation. In the first three months of Israel's occupation in 1967, over 100 pieces of military legislation were enacted in the West Bank and almost as many in the Gaza Strip. That extensive plans had been made in advance for a pervasive and institutionalized occupation is clear. Just two days into the short Six-Day War of 1967, Military Proclamation No. 2<sup>200</sup> vested all legislative, executive, and judicial powers in the Israeli Military Commander. Since then, the military authorities have promulgated over 2,500 military orders altering pre-existing laws, regulating and controlling everything from alcohol taxes<sup>201</sup> to control of natural resources<sup>202</sup> to the types of fruit and vegetables that can be grown by Palestinians.<sup>203</sup> Among the most important security-related military orders are Military Order No. 378 pertaining to criminal offences and detention,<sup>204</sup> and Military Order No. 1229 allowing for 'administrative' detention without charge or trial for prolonged periods.<sup>205</sup> Under this regime of military law,

<sup>197</sup> *The Regional Council of Gaza Coast et al. v. The State of Israel et al.* (the Gaza Disengagement case), HCJ 1661/05, judgment 9 June 2005, at para. 80.

<sup>198</sup> This has long been acknowledged by Israeli constitutional scholars: see, e.g., Rubinstein, 'The Changing Status of the Held Territories'. 11 *Eyunei Mishpat* (1986) 439.

<sup>199</sup> See, e.g., the Gaza Disengagement case, *supra* note 197; *Adalah et al. v. Minister of Interior et al.*, HCJ 7052/03, judgment of 14 May 2006 (the Family Unification case); *Adalah v. The Minister of Defence*, HCJ 8276/05, judgment of 12 Dec. 2006 (the No Compensation Law case).

<sup>200</sup> Military Proclamation No. 2, Concerning Regulation and Authority of the Judiciary, 7 June 1967.

<sup>201</sup> Military Order No. 38, Order Concerning Alcoholic Beverages, 4 July 1967.

<sup>202</sup> See, *inter alia*, Military Order No. 92, Order Concerning Jurisdiction Over Water Regulations, 15 Aug. 1967.

<sup>203</sup> See, e.g., Military Order No. 474, Order Concerning Amending the Law for the Preservation of Trees and Plants, 26 July 1972; Military Order No. 1039, Order Concerning Control over the Planting of Fruit Trees, 5 Jan. 1983; Military Order No. 1147, Order Concerning Supervision over Fruit Trees and Vegetables, 30 July 1985.

<sup>204</sup> Military Order No. 378, Order Concerning Security Provisions, 20 Apr. 1970.

<sup>205</sup> Military Order No. 1229, Order Concerning Administrative Detention (Provisional Regulations), 17 Mar. 1988. Due to numbering inconsistencies among Israeli military orders, Military Order No. 1229 is alternatively referred to as Military Order No. 1226, depending on whether it was issued individually or in a bound volume by the Israeli authorities.

Palestinians are systematically subject to far longer pre-charge periods of detention and harsher sentences than their Jewish Israeli counterparts arrested on suspicion of committing the same crime in the same territory.<sup>206</sup> The military orders are enforced in a military court system that has become ‘an institutional centrepiece of the Israeli state’s apparatus of control over Palestinians in the West Bank and Gaza’.<sup>207</sup>

The result of the preferential status accorded to Jewish nationals under Israeli law and the application of Israeli civil law to Jewish settlers as contrasted with military law to Palestinians is clear: the institutionalization of two separate legal systems for two separate racial groups in a manner that underpins a system of domination by one over the other. According to one of Israel’s leading Jewish Israeli human rights organizations:

In the same territorial area and under the same administration live two populations who are subject to two separate and contrasting legal systems and infrastructure. One population has full civil rights while the other is deprived of those rights. ... The settlers’ lives, although they live in an area under military rule, are in almost every respect the same as those of Israeli citizens living in Israel.<sup>208</sup>

In addition to the separate laws applied to the two groups, it must be noted that many further discriminatory features of the architecture of Israel’s occupation are founded in practice deriving from unpublished military regulations or *de facto* military policy without reference in law. The separate road system in the West Bank, for example, central to its territorial fragmentation and distinctly evocative of a sense of apartheid despite the absence of an equivalent in the South African context, evolved in the planning and construction realm as a prop for broader segregationist policies without a legislative foundation.

Few today question the conclusion that the purpose of apartheid was to secure the domination of white South Africans over the black population. This was the only inference to be drawn from the institutionalized and systematic nature of the discrimination that comprised apartheid. Protestations that apartheid, or ‘separate development’ as the apartheid regime preferred to portray its policies after 1960, was a species of self-determination rather than racial superiority failed to impress a sceptical world that looked to the discriminatory and repressive nature of the regime rather than the rhetoric of self-determination and the ‘decolonization’ of the Bantustans. Little credit was given to the apartheid government for the vast sums of money it spent on developing the infrastructure of the Bantustans and building roads, schools, universities, and hospitals in these territories. Deeds of this kind were not seen to remove the taint of discrimination and domination that characterized apartheid.

<sup>206</sup> E.g., a Palestinian and a Jewish settler arrested on suspicion of the same act of manslaughter in the West Bank are subject to markedly different procedures. The Palestinian may be detained for periods of 8 days (renewable) before being brought before a military judge, and is subject to a maximum sentence of life imprisonment. The Jewish settler cannot be detained for more than 24 hours before being brought before a civilian judge, and is subject to a maximum sentence of 20 years’ imprisonment. See ss. 51A and 78 of Military Order No. 378, Order Concerning Security Provisions; s. 29(a) of the 1996 Criminal Procedure Law (Enforcement powers – Arrests); and s. 298 of the 1977 Penal Law.

<sup>207</sup> Hajjar, *supra* note 138, at 2.

<sup>208</sup> Association for Civil Rights in Israel, *The State of Human Rights in Israel and the Occupied Territories, 2008 Report* (2008), at 17.

So too with Israel's occupation of Palestine. The only inference that can be drawn from the institutionalized and systematic regime of inhuman acts and discrimination (unashamedly premised on an ideology of entitlement) towards the Palestinian people is that Israel intends to secure the domination of Jewish Israelis over Palestinians. That this is the purpose of Israel's occupation of the Palestinian territory is confirmed by its failure to facilitate the lives of Palestinians and the infrastructure of the occupied territory by constructing or maintaining hospitals, schools, and universities for the benefit of the protected population as arguably required by the Fourth Geneva Convention.<sup>209</sup> Instead, Israel leaves the welfare of the occupied people to international donors and has created a cycle of aid dependency. Israel's lack of regard for the needs of the Palestinian people stands in contrast to the action taken by South Africa's apartheid regime to improve material living conditions in the Bantustans it created. Such failure, coupled with the commission of inhuman acts in a systematic, oppressive, and discriminatory manner, *a fortiori* provides evidence of an intention to maintain the domination of Jews over Palestinians.

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The three 'pillars' of apartheid that we have identified above in relation to the former South African regime are broadly reproduced today in Palestine. The demarcation of distinct racial groups under the 1950 Population Registration Act in South Africa finds its equivalent in the Israeli–Palestinian context in the preferential legal status granted to those defined as Jewish nationals under the 1950 Law of Return. This superior status underpins the creation of a dual legal system as well as systematic discrimination against Palestinians across a wide spectrum of rights. The second pillar – a 'grand apartheid'-like policy of territorial fragmentation and racial segregation – is evidenced by Israel's land appropriation and settlement policies, and its cantonization of Palestinian territory. These policies serve to subject the Gaza Strip to hermetic closure and isolation, while carving the West Bank into an intricate network of well-connected colonies for Jewish settlers on the one hand, and an archipelago of non-contiguous and poorly connected enclaves for Palestinians on the other. A visible grid of walls, fences, trenches, roads, tunnels, and checkpoints and an invisible grid of administrative controls on movement and residence in the form of permit systems akin to South Africa's pass laws combine to ensure the stringent segregation of the Palestinian and Jewish populations. The third pillar upon which Israel's systematic domination in the occupied Palestinian territory rests is the matrix of security laws and practices (extra-judicial killing, internment and arbitrary detention, torture and ill-treatment, use of force against demonstrators, various forms of banning of individuals and organizations, implementation of military law by military courts) invoked to validate the suppression of opposition to the occupation and to buttress the extant system of racial domination.

<sup>209</sup> Arts 50 and 55–56 oblige an occupying power to facilitate the proper working of educational institutions, ensuring proper medical supplies and maintaining hospitals and public health.

## 6 Conclusions: Situating Apartheid

In March 2012, the UN Committee on the Elimination of Racial Discrimination took the unprecedented step of censuring Israel under the rubric of apartheid and segregation as prohibited by Article 3 of the International Convention for the Elimination of All Forms of Racial Discrimination. Having reiterated previous concerns about the general segregation of Jewish and non-Jewish communities under Israeli jurisdiction, the Committee declared itself ‘particularly appalled at the hermetic character of the separation’ between Jewish and Palestinian populations in the occupied Palestinian territory and urged Israel to prohibit and eradicate policies or practices of racial segregation and apartheid that ‘severely and disproportionately affect the Palestinian population’.<sup>210</sup>

On the basis of the systemic and institutionalized nature of the racial domination that exists, there are indeed strong grounds to conclude that a system of apartheid has developed in the occupied Palestinian territory. Israeli practices in the occupied territory are not only reminiscent of – and, in some cases, worse than – apartheid as it existed in South Africa, but are in breach of the legal prohibition of apartheid.

The implications of such a conclusion are significant. The absolute prohibition of apartheid stands in contrast to ‘grey area’ doctrines of international humanitarian law such as proportionality and military necessity that remain prone to manipulation and distortion in the narratives that seek to justify given military actions.<sup>211</sup> As a ‘composite wrongful act’ of international law, apartheid involves ‘a series of acts or omissions defined in aggregate as wrongful’ and ‘give[s] rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct’.<sup>212</sup> The holistic portrait of a systematic apparatus of domination connects the dots between discrete and disparate rights violations, illuminating them against a common backdrop. In doing so it contributes to a small body of literature that advances the legal analysis of the situation in the West Bank and Gaza beyond the ‘habitual focus on *specific actions undertaken within* the occupation, as distinct from *the nature of* the occupation as a normative regime’,<sup>213</sup> and facilitates an assessment of the cumulative effect of almost half a century of belligerent occupation where patterns of domination have proliferated.

The existence of a regime of apartheid, amounting to an internationally wrongful act, has clear implications under public international law – both for the state of Israel in terms of cessation and reparation, and for third states in terms of the duties of co-operation, and of non-recognition and non-assistance. As an internationally wrongful act and an international crime, apartheid may also assume a relevance to

<sup>210</sup> Committee on the Elimination of Racial Discrimination, ‘Concluding observations: Israel’, UN Doc CERD/C/ISR/CO/14–16, 9 Mar. 2012, at para. 24.

<sup>211</sup> On the attempted manipulation of international humanitarian law by the Israeli military apparatus see, e.g., Kearney, ‘Lawfare, Legitimacy, and Resistance: The Weak and The Law’, XVI *Palestine Yrbk Int’l L* (2010) 79.

<sup>212</sup> International Law Commission, *supra* note 80, at 62.

<sup>213</sup> Ben-Naftali, Gross, and Michaeli, ‘Illegal Occupation: Framing the Occupied Palestinian Territory’, 23 *Berkeley J Int’l L* (2005) 551, at 552 (emphasis in original).

legal claims in domestic and international courts, in both the civil and criminal law spheres.<sup>214</sup>

The international campaign against apartheid in South Africa was emblematic of the struggle of the decolonized third world. With the workings of international law rarely favouring the people and nations of the global South, it represents one of the few major political success stories of the human rights movement that post-colonial nations can claim ownership of.<sup>215</sup> Despite consistent Palestinian efforts to engage with the mechanisms of international law, the Palestinians have largely been excluded from international legal protection.<sup>216</sup> The significance of apartheid lies not just in the strength of its legal prohibition, but in the political purchase that it carries.

As happened in South Africa, what begins as segregation is liable to evolve into an institutionalized system of racial domination. Such separateness cannot be sustained without spawning suffering and cycles of violence. The US underwent a process of racial reckoning to confront this incongruity in the 1960s. South Africa underwent its own transformation in the 1990s. Both nations are the better for it, despite tensions persisting and gross socio-economic inequalities continuing to plague society. With the dual system of law that currently prevails in the occupied Palestinian territory best understood as the derivative of an ongoing settler colonial process, logic dictates that Israel will inevitably reach the tipping point at which it is forced to confront its own racial realities *vis-à-vis* the Palestinians. While the shape that such a transformation ultimately takes will depend primarily on social attitudes and political craft, international law may retain a role through the light that it shines on the normative issues to be resolved in this context.

<sup>214</sup> See, e.g., *Ntsebeza v. Daimler*, *Khulumani v. Barclays International*, 617 F Supp. 2d 228 (2009) (*In Re South African Apartheid Litigation*).

<sup>215</sup> Reynolds, 'Third World Approaches to International Law and the Ghosts of Apartheid', in D. Keane and Y. McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (2012).

<sup>216</sup> For further discussion see Kearney and Reynolds, 'Palestine and the Politics of International Criminal Justice', in W. Schabas *et al.* (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (2013).