

## Executive Summary

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# The Occupation of the West Bank and the Crime of Apartheid:

Legal Opinion  
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Accusations of apartheid have been leveled at Israel, at varying degrees of intensity, for decades. For years, the discourse around apartheid in the Israeli context was the purview of relatively marginal, and extremely radical circles in international civil society and in Palestinian society. This discourse rarely included legal analyses that looked at the suitability of the phrase, as defined in international law, to the nature of the Israeli regime, but relied on intuitive analogies to Apartheid South Africa and remained in the political-public realm.

In recent years, apartheid discourse has expanded beyond these boundaries. Accusing Israel of apartheid has become commonplace among growing circles of political activists and even human rights and peace activists, and the question of apartheid in Israel has become the subject of growing legal research.

Apartheid is a name for a type of regime and an international crime. Once an ideology of a regime in a specific time and place in the history of the 20<sup>th</sup> Century, apartheid is now a term for an international crime that constitutes a crime against humanity. The crime of apartheid has a clear definition. Though its origin is historically linked to the racist regime in South Africa, **it is now an independent legal concept with a life of its own, which can exist without being founded on racist ideology.**

This opinion seeks to answer the following question: **Is the crime of apartheid being committed in the West Bank?**

The question could have been asked regarding any other area, for instance, the entire space between the Mediterranean Sea and the Jordan River as a single regime. For reasons listed in the opinion, including Yesh Din's expertise and the vast amount of knowledge it has gained in 15 years of work in the **West Bank** (not including east Jerusalem), the opinion focuses only on the regime Israel created in the West Bank. However, we are not denying that a different analysis is possible.

Specific acts, defined as "inhuman acts," carried out as part of this regime, and with an intention to maintain it, implicate the individuals who commit them in the crime of apartheid. The opinion does not answer the question of **who is committing the crime**, which also relates to the mental element among parties involved in designing and implementing the policy, partly because we lack the investigative tools to do so. However, we conclude that the perpetrators are Israelis, and the victims are Palestinians.

## - Part 1-

# The definition of the crime of apartheid

## The historic origin and the criminalization of apartheid under international law

The word apartheid means separateness in Afrikaans. It was originally a name for a regime and an ideology in a specific time and place in the history of the 20<sup>th</sup> Century.

In 1973, the UN General Assembly introduced the **International Convention on the Suppression and Punishment of the Crime of Apartheid** which defines the crime of apartheid and determines it is a crime against humanity.

In 2002, the **Rome Statute**, which constitutes the International Criminal Court (ICC) and is the source of its power, went into effect. The Statute lists apartheid as one of the crimes against humanity that falls under the jurisdiction of the court.

The prohibition on apartheid has become *jus cogens* over the years, the highest attainable status in international law, meaning no suspension or derogation is permitted, and any contradicting international norm or obligation is null and void.

The main legal sources for the crime of apartheid are, therefore, the Apartheid Convention and the Rome Statute. The definition of apartheid differs between the two conventions, but they share many common features. Accordingly, the crime of apartheid is defined as **inhuman acts committed in the context of a regime of systematic oppression and domination by one racial group over any other racial group or groups with the intention of maintaining that regime.**

The opinion takes a restrictive approach, whereby only acts amounting to an “inhuman act” **under both instruments** are examined.

The following are the elements of the crime as developed to date: **(a) the existence of two racial groups (per the broad definition of "racial group" in international law, primarily in International Convention on the Elimination of all forms of Racial Discrimination - ICERD); (b) the act forms part of a systematic or widespread attack on a civilian population; (c) the context of a regime in which one group dominates another group (or groups) and systematically oppresses its members; (d) the commission of one or more of the acts listed in Articles 2(a)-2(f) of the Apartheid Convention or Article 7(1) of the Rome Statute; (e) commission of the acts for the purpose of establishing and maintaining the aforesaid context; (f) the mental element of awareness by the party committing the acts of the presence of the aforesaid elements.**

## - Part 2 -

# Is the crime of apartheid being committed in the West Bank?

The existence of two distinct groups - the definition of racial discrimination included in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) expanded discrimination beyond the traditional, narrow scope of racial group which focused on a **biological-genetic** classification of humans towards a **social** approach that looks at the political and identity classifications of groups of people and includes these in the definition of racial group as well. Over the years, the conceptualization of racial group as a social construct has taken hold and the prevailing approach now includes national or ethnic origin. It follows that this element is clearly satisfied in the matter at hand, as there are two groups in the West Bank - Palestinian and Jewish-Israeli.

## **A system of government centered on systemic domination and oppression of one group by another (as a constitutive feature of the regime)**

The crime of apartheid is committed, as noted, in the context of a regime that imposes collective inferiority, mainly through systemic, institutionalized discrimination in rights and resources **as a central, constitutive feature of the regime**.

Military occupation is, by definition, a belligerent, coercive regime imposed on the occupied population. In the case of the West Bank, the element of domination and oppression inherent in any military occupation is compounded by a concrete collective context - the presence of the Israeli settler population. The Israeli citizens of the occupying power enjoy the full range of civil rights and political influence available to citizens of a civilian-parliamentary system, while the Palestinian population has no influence on the design of the substantive norms that apply to them. This civic reality inevitably leads to systemic, institutionalized discrimination between the two groups through practice, policy and even legislation. This has occurred in the case of the West Bank.

Settlements were brought under Israeli law, using various techniques, and Israeli government ministries were given powers to operate within them as well. In contrast, Palestinians live under a military regime, ruled by oppressive military law, in economic and governance conditions typical of developing countries.

The settlers' built-in advantage was enshrined in law, policy and practice. Alongside the system that institutionalizes the discrimination of one, rightless, group by another, privileged,

group, and as a result of it, resources in the area have been consistently and dramatically diverted towards the Israeli population at the expense of the occupied Palestinian population. This trend can be seen in every area and with respect to every resource, most notably - land.

In addition to discrimination in rights and resources, the occupation regime also uses a variety of measures, some of them draconian, to suppress any form of resistance, including when it is non-violent. Military orders limit non-violent protest and prohibit demonstrations, rallies and marches. The military regime relies heavily on administrative detention and criminalization of political associations in order to prevent dissent.

## Intent to maintain the regime of domination and oppression

The singularity of the crime of apartheid lies, as noted, in the fact that it is designed to preserve a regime of domination and oppression of one group over another. Israel has used the definition of occupation as mere temporary suspension of (Palestinians') sovereignty and civil rights as an alibi when confronted with accusations of apartheid. The international community took the "peace process" as evidence that Israel did, in fact accept that its rule over this territory was temporary, that its final status would be determined in an agreement and that it had no intention of cementing its control over the Palestinians.

The opinion examines the issue of intent through two lenses: The acts of the State of Israel in the West Bank over the years and its official positions.

Following this examination, the opinion concludes that the policies and practices implemented by successive Israeli governments in the West Bank, their acts which have effected far-reaching and long-term changes in the area (some meant to be irreversible) in relation to every aspect of life - land, infrastructure, legislation and demographics - all evince intent to cement and perpetuate control over the area and, consequently, over the occupied population. One policy that has had an unparalleled **long-term, profound** impact is Israel's settlement project, which has altered the demographic makeup of the occupied territory. It is a breach of an absolute prohibition in the laws of occupation, and the most telling sign of Israel's intent to perpetuate its control.

As for the official position of the Government of Israel, the opinion reviews the dramatic shift that has occurred over the past few years, from an approach that sees the West Bank as a "disputed territory" whose future will be determined in negotiations to an **open policy of gradual annexation**, which is an admission of intent to maintain control.

## Widespread practices constituting “inhuman acts”

Both the Rome Statute and the Apartheid Convention contain lists of acts defined as “inhuman acts”. The relevant ones for the West Bank are the inhuman act of “**persecution**” (Rome Statute) and “**denial of rights**” (Apartheid Convention).

The Rome Statute defines persecution as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. There is a great deal of overlap between this crime and several of the inhuman acts listed in the Apartheid Convention, chiefly, denial of rights by “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”.

The opinion lists several policies/practices Israeli authorities employ in the West Bank, which are key to the nature of the regime and meet the definition of persecution and/or denial of rights, and/or other inhuman acts listed in the conventions: “separation of racial groups” and “persecution for resistance to apartheid”. They are:

**Denial of civil rights** - Since 1967, Palestinian residents of the West Bank have been denied the right to vote for the bodies that institute the norms that apply to them and determine their future, or for the administrative body that rules over them, nor do they have the right to run for office in this system. Concurrently, military legislation has severely curtailed (and in fact, suspended) most of the Palestinian residents’ political rights, including the right to form associations and the freedom to protest. This denial might have been acceptable under international law, had Israel complied with the requirement of the laws of occupation to maintain the temporary nature of occupation and, accordingly, seek to end it. Given the intent to perpetuate Israeli control, the denial is unlawful.

Additionally, the denial of Palestinians’ civil rights forms part of the denial of their collective right to self-determination and independence. The latter is a fundamental right that lies at the core of international human rights law. It is also a foundational principle of international relations as shaped over the second half of the 20<sup>th</sup> Century.

**The dual legal system** - The Israeli legislature applied much of **Israeli law** to Israelis living in the West Bank, and in some cases also individuals covered by Israel’s law of return (i.e., Jews who are not citizens of Israel) *personally and ex-territorially*, most notably, Israeli criminal law. Concurrently, the military commander subjected Israeli local governments in the West Bank (Israeli regional and local councils and their residents) to a string of **Israeli** administrative laws in a number of fields, giving the local and national Israeli bureaucracy the same powers it would have had inside Israel.

This has produced two separate legal systems - one for Palestinians, who are ruled by the Jordanian law in place in 1967 as altered by military orders issued since, and the other for Israeli-Jews, who are mainly ruled by Israeli law and administration. This has led to systemic discrimination enshrined in law which affects many aspects of Palestinians' lives in the West Bank, in a manner that violates the right to equality in its most fundamental sense - equality before the law. Additionally, the dual legal system denies Palestinians, and Palestinians only, many rights such as due process, freedom of movement, privacy and family rights, the right to form associations, freedom of expression and protest. Granting rights to one group (the settlers) is, at the same time, withholding them from the Palestinians, and as such, constitutes "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

This dual legal system serves the purpose of preventing "**participation in the political, social, economic and cultural life**" in that it extends the opportunity to participate to one group and withholds it from the other. It also contributes to creating "**conditions preventing the full development**" of members of the group that is subjected to discrimination and produces "**severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.**"

**Denial of development** - With the occupation of the West Bank, planning powers for the area were transferred to the military commander. A military order issued in 1971 expropriated the powers given to existing regional and local planning committees and stipulated planning committees would have representatives of the Israeli regime only (the Civil Administration and the military). In contrast, in the settlements, military legislation gave planning authorities to local, civilian governments. This discrepancy has resulted in a policy that has encouraged construction in settlements and frozen it in Palestinian communities almost completely for decades. In addition, the military regime employs extremely discriminatory land allocation policies, with more than 99% of all public land allocations benefitting Israelis and less than 0.25% Palestinians.

The statutory planning system in the West Bank, as well as planning policy and the allocation of public lands in practice, are meant to prevent Palestinians "**from participation in the political, social, economic and cultural life of the country**" or creating "**conditions preventing**" their "**full development**", while at the same time, encouraging massive development in the Israeli sector only. This violation of fundamental rights recognized in international law on a collective basis also constitutes persecution under the Rome Statute.

**The policy of separation between Israelis and Palestinians** - Separation in the West Bank is primarily based on a permit regime - no Palestinians may enter areas with Israeli presence, unless they have "cause" to be there and received a permit for this purpose. The policy began with a prohibition on entry by Palestinians to settlement areas, and later, areas surrounding them (called Special Security Areas). Then came the separation fence and the seam zone (where hundreds of thousands of dunams of Palestinian land is trapped), which

Israelis, tourist, or any Jew (!) can freely access, but Palestinians need a permit to enter. Israelis were barred entry into Area A (i.e. Palestinian cities) by military legislation Unless they were granted a permit.

A policy of separation is a classic case of “...**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**”, according to the definition of inhuman act in Article 2(d) of the Apartheid Convention. Separation is also a widespread violation of the right to freedom of movement on a collective basis, and as such, constitutes persecution under the Rome Statute.

**Land expropriation and dispossession** - Several policies employed by Israel in the West Bank have, over the years, resulted in expropriation and dispossession of hundreds of thousands of dunams from Palestinians and Palestinian communities. Relying on a controversial interpretation of the Ottoman Land Law of 1858, throughout the 1980s and early 1990s, the Civil Administration declared about a million dunams of land as “state land” (public lands). The policy on the allocation of public land is patently discriminatory - more than 99% of allocated land was designated for Israeli use. Palestinians are dispossessed of their land both through official expropriations (for instance, in the area of Maaleh Adumim), and through Israeli settler violence. While this violence is not perpetrated by the regime directly, the consistent willful blindness to it, lack of law enforcement on the perpetrators and retroactive legitimization of settler presence on land seized through criminal acts leave no choice but to consider the regime responsible. The declaration policy and the retroactive approval of construction on privately owned Palestinian land constitute “**the expropriation of landed property belonging to a racial group or groups or to members thereof**”. Some of the lands were expropriated in the ordinary sense of the term - the expropriation of proprietary rights from their owners - while others were expropriated collectively, in the sense that members of the group were deprived of their collective rights to benefit from this land.

**Persecution of regime opponents and critics** - For decades, until the 1990s, Israel routinely deported Palestinian political leaders who resisted the occupation and worked for Palestinian independence. The Israeli authorities in the West Bank established an oppressive system designed to stifle Palestinian political activism to resist the occupation and advance independence. Palestinian leaders at every level were arrested, incarcerated, expelled and some even killed by Israel as part of its assassination policy. The military regime has also instituted prohibitions on political expression and protest in the West Bank, enforcing them on Palestinians only. In addition, the offense of “incitement” under the Security Provisions has been defined broadly, to outlaw non-violent distinctly political associations. While some of the Israeli actions were designed to protect Israelis from violent, sometimes murderous, attacks, a significant portion of them were designed to suppress non-violent opposition, effectively constituting the inhuman act of “**Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid**”.



**Forcible population transfer** - In recent decades, Israel has engaged in efforts to forcibly transfer Palestinians from the West Bank to the Gaza Strip. This is achieved by way of halting updates to the population registry since the beginning of the second intifada and treating residents of the West Bank with registered addresses in the Gaza Strip as “illegal aliens”. Israel also practices a policy of forcible transfer of entire communities within the West Bank by withholding official recognition from specific communities, such as the spaces occupied by the Jahalin community in the Adumim area, in Firing Zone 918 and in communities in the Jordan Valley and South Hebron Hills.

The forcible transfers and threats of mass forcible transfers from the West Bank to the Gaza Strip, as well as forcible transfer and threats of forcible transfer of entire communities from their lands within the West Bank over the years, are part of the demographic engineering of the West Bank and constitute the inhuman act of **forcible transfer** under Article 7(1)(d) of the Rome Statute. It also amounts to denial of rights under the Apartheid convention.

**Widespread, systemic attack** - each inhuman act described and analyzed above is a manifestation of deliberate policies that affect anywhere from thousands to millions of individuals, meaning this element is satisfied.

## The opinion's conclusion

**It is a difficult statement to make, but the conclusion of this opinion is that the crime against humanity of apartheid is being committed in the West Bank. The perpetrators are Israelis, and the victims are Palestinians.**

**The crime is committed because the Israeli occupation is no “ordinary” occupation regime (or a regime of domination and oppression), but one that comes with a gargantuan colonization project that has created a community of citizens of the occupying power in the occupied territory. The crime is committed because, in addition to colonizing the occupied territory, the occupying power has also gone to great lengths to cement its domination over the occupied residents and ensure their inferior status. The crime of apartheid is being committed in the West Bank because, in this context of a regime of domination and oppression of one national group by another, the Israeli authorities implement policies and practices that constitute inhuman acts as the term is defined in international law: Denial of rights from a national group, denial of resources from one group and their transfer to another, denial of development to Palestinians and at the same time, encouraged development for Israelis, physical and legal separation between the two groups and the institution of a different legal system for each of them. This is an inexhaustive list of the inhuman acts.**

**The alibi used by successive Israeli governments that the situation is temporary and there is no desire or intent to maintain the domination and oppression of Palestinians in the area or preserve their inferior status falls apart in the face of the clear evidence that the separate policies and practices Israel applies in the occupied territory are designed to maintain and cement the domination and oppression of Palestinians and the supremacy of the Israelis who migrated to the area.**

That is not all. The Government of Israel is carrying out a process of “gradual annexation” in the West Bank, and working towards full annexation of parts of it. From an administrative perspective, annexation means the revocation of military rule in the annexed area and the territorial extension of powers held by Israeli civilian authorities deep into the West Bank.

**Continued creeping legal annexation, let alone official annexation of a particular part of the West Bank through legislation that would apply Israeli law and administration there, is an amalgamation of the regimes. This could mean strengthening the argument, which already is being heard, that the crime of Apartheid is not committed only in the West Bank. That the Israeli regime in its entirety is an apartheid regime. That Israel is an Apartheid state.**

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