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

Legal Opinion

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by Adv. Michael Sfard

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Cover Photo: A bypass road for Palestinian connecting the area of the city of Ramallah to the Palestinian village of Bidu in the West Bank, under the 443 road, February 2020. Oren Ziv, Activestills.

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Introduction:
Apartheid?! Us?!

Accusations of apartheid have been leveled at Israel, at varying degrees of intensity, for decades. Apartheid has been attributed to the Israeli regime in various contexts, at various time periods, and in relation to a variety of spaces under Israeli control and its treatment of different populations. So, for instance, the accusation was made in relation to Israel's treatment of its Palestinian citizens, to Zionism as a movement and a concept, control of East Jerusalem, the treatment of Negev Bedouins, the military government in the occupied territories outside the Green Line and the entire Israeli project from the Jordan River to the Mediterranean Sea.

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 20th Century, apartheid is now a term for an international crime that constitutes a crime against humanity. The crime of apartheid has a clear definition, and although 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.

Yesh Din has been working in the West Bank for 15 years, providing legal representation to Palestinians whose rights have been violated by the Israeli authorities or Israeli civilians. Over this long period of time, Yesh Din has become deeply acquainted with the nature of Israel's military regime in the West Bank and the law, policies and practices it employs there. Yesh Din's volunteers, field workers, lawyers and researchers have seen every aspect of the occupation in this time: Colonization through the settlement enterprise, mass land expropriation, partly on false security pretexts, diversion of resources to benefit the Israelis who migrated to the area (the settlers) and all Israeli citizens at the expense of the Palestinian residents, the oppression of the struggle to end the occupation and the dual legal system installed as part of it, with one law applying to Israelis and another to Palestinians. **After 15 years of research and legal representation of Palestinians living under occupation, we feel the time has come to ask ourselves what the**

legal phenomenon we see in this area is. Does the *occupation* paradigm fully explain what goes on in this area and what Israel has created in it, or is some other legal construct at play in addition to it?

Given all this, it is little wonder that for some time now, we at Yesh Din have been grappling with the question of whether the features of Israel's regime in the West Bank meet the elements in the definition of the crime of apartheid. In other words: **Has the State of Israel instituted an apartheid regime in the West Bank, and if so, is the crime of apartheid being committed in the West Bank?**

The opinion before you examines this question.

It begins with an analysis of the crime of apartheid as defined in international law. To this end, we have included a brief historical review of the South African origin of the term and a description of its criminalization in international law. In the second part, we review the main, relevant features of Israel's military rule in the West Bank and assess whether it meets the terms of the crime of apartheid.

Before setting out to write this opinion, we put a great deal of thought into whether it was right to look into the question of apartheid in relation to Israel's military rule in the West Bank separately from other areas it controls (East Jerusalem, the Gaza Strip and Israel within the 1948 borders). This is a difficult question since, on the one hand, the simple fact is that a single power rules between the Jordan River to the Mediterranean Sea, and it employs different forms of discriminatory regimes against Palestinians in every one of its parts. On the other hand, however, the regimes Israel employs in these areas are distinct, each with its own laws and practices. Since apartheid is a regime focused crime, the question is on what regime exactly should the assessment of whether or not it exists focus.

We chose to focus this opinion on the Israeli regime in the West Bank, which fits with Yesh Din's expertise and mandate. We elaborate on this decision in the second part of this opinion.

However, it is important to note that this choice does not preclude the possibility of making the same assessment on a different scale - which we have not done at this stage.

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Part 1:
The crime of apartheid under international law - definition and elements of the crime

1.1 The historical origin of the term apartheid: the regime in South Africa

Beginning in the mid-17th Century, Calvinists of Dutch, German and French ancestry settled around the Cape Colony of South Africa (today's Cape Town). The white European settlers were originally known as Boers (named so for the occupation of the first white settlers - boer or boere in Dutch and Afrikaans mean farmer). They later became known as Afrikaners (people who speak Afrikaans, a local language that developed from a Dutch dialect). Britain conquered the Cape Colony in the late 18th Century, resulting in multiple, severe clashes between the Afrikaners, who migrated north and established two independent republics, and the new British regime.

Over the course of the 19th Century, the British Empire extended its rule in the southern part of the African continent, a process fraught with wars against both the Afrikaners and the black indigenous peoples. The war between Britain and the Afrikaners from 1899 to 1902 (The Second Boer War) ended Boer rule, but at the same time, amplified Afrikaner national identity. In 1910, the independent republics united with the areas under British control to form the Union of South Africa, which remained under British rule but had limited autonomy, controlled by the white settlers (English and Afrikaans speaking). The first government of the Union was led by the South African Party (SAP), which adopted a pro-British line. An opposition party, the National Party (NP), was formed in 1914. One issue on which hardline nationalist Afrikaners did not see eye to eye with the ruling party was South Africa's active participation in the Second World War alongside Britain and the Allied Powers.

The word apartheid (apartness in Afrikaans) expresses the notion of organizing the regime and society in a manner that would ensure separation between races in all aspects of life and the dominance of the white race. It first appeared in 1929,[1] and became a cause of the NP in 1944. On May 28, 1948, the NP won the election (in which only whites voted) and began reforms designed to incorporate the notion of apartheid in South African society and in the country's economy. It should be noted that the NP's apartheid policies were not purely its invention. The party relied heavily on legislation, policies and practices originating

1 Giliomee, Hermann, **The last Afrikaner leaders: A supreme test of power**, University of Virginia Press (2013), p. 22.

in British rule, which gave different rights to black indigenous people (the African majority), colourdes, who lived mostly in the Cape area, Asians, who were brought from India and Southeast Asia and their descendants, and whites.

Most non-white residents of South Africa could not vote or run for public office even before the NP took power, under laws enacted beginning in 1910. By the time the NP won the election and formed a coalition government with another nationalist party, the Afrikaner Party, the notion of racial segregation and white rule had already been ingrained in local politics. Nevertheless, the NP's ascendance saw apartheid being adopted as an official policy dictating actions in various fields of governance.

Proponents of the apartheid policy argued that it was designed to ensure "separate development" for members of the country's different ethnic groups, while preserving their unique features, heritage and culture. In practice, the policy developed into a complex system of laws and regulations that gave the white minority control over all sources of power - politics, economic activity, natural and other resources, including land, all while excluding members of other racial groups.[2] This is known as "grand apartheid." It concerns the **systematic, institutional discrimination of one group by another, in the context of the domination of the discriminating group over the discriminated one and with the intention of perpetuating the said domination.**

In addition to establishing the rule of the white hegemony, as described above, apartheid laws included compulsory physical and social separation in communities, educational facilities, public transportation, access to health services and cultural and leisure activities, with the best reserved for the white minority. This racial segregation, immortalized in photographs taken in public drinking fountains and busses have, over the years, come to symbolize apartheid. The people who fought the regime referred to this as "petty apartheid." Humiliating and hurtful, petty apartheid complemented grand apartheid, whose ramifications for the lives and futures of non-whites were far greater. At their peak, apartheid laws forbade interracial marriage and sexual intercourse, restricted freedom to oppose apartheid and work to end it and banned political and professional associations.

2 For a review of apartheid laws in South Africa, see: John Dugard, **Human Rights and the South African Legal Order**, Princeton University Press (1978).

1.2 The criminalization of apartheid under international law

On December 2, 1950, the UN General Assembly adopted a resolution stating that "a policy of 'racial segregation' (Apartheid) is necessarily based on doctrines of racial discrimination," and calling on South Africa to refrain from enacting laws that define separate living areas for different racial groups.[3]

The term "racial discrimination" was officially defined for the first time in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the UN General Assembly opened for signature on December 21, 1965. The definition included in the ICERD went beyond discrimination on the basis of race alone:

> *[A]ny 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.*[4]

The definition of racial discrimination in ICERD goes beyond the traditional, narrow scope of racial group, which focuses 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 its definition of race as well. Over the years, the conceptualization of race as a social construct has taken hold. For instance, the International Criminal Tribunals for Rwanda and the Former Yugoslavia have ruled that the definition of a certain group as a "racial group" depends on circumstances and on social, cultural and political context. According to the tribunal, such a definition is arrived at on a case by case basis (and is not limited to racial, **biological** origin).[5] The idea that racial groups are determined by self-identification with a social, cultural or political group adopted in the jurisprudence of these tribunals is in line with the recommendations of the UN Committee on the Elimination of Racial Discrimination (1990), whereby membership in a racial group should be based on self-identification.[6]

3 General Assembly Resolution 395 (V), Treatment of people of Indian origin in the Union of South Africa, A/RES/395(V), (Dec. 2, 1950).

4 International Convention on the Elimination of All Forms of Racial Discrimination, Nov. 21, 1965, 660 U.N.T.S. 195, Art. I(1).

5 Prosecutor v. Rutaganda, Case No. ICTR-96-3, Trial Judgment, 6 Dec. 1999, paras 55, 57.

6 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, p. 27. Following this recommendation, the Committee on the Elimination of Racial Discrimination ruled the Convention applied to discrimination against members of the Indian caste system - Committee on the Elimination of Racial Discrimination, 'Concluding Observations: India', UN Doc. CERD/C/IND/CO/19, 5 May 2007, at para. 8) Prosecutor v. Rutaganda, Case No. ICTR-96-3, Trial Judgment, 6 Dec. 1999, paras 55, 57.

Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination sets forth that:

> *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.*[7]

Until 1966, the UN General Assembly addressed South African Apartheid in terms of a violation of the principles and spirit of the Charter of the United Nations (1945)[8] and the Universal Declaration of Human Rights (1948).[9] On December 16, 1966, the UN General Assembly issued its first condemnation of apartheid in terms of **crimes against humanity**.[10] In 1968, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity set forth that "inhuman acts resulting from the policy of apartheid" are considered crimes against humanity.[11] The term "inhuman acts" opened a space for interpretation as to whether the apartheid regime itself is criminal as opposed to inhuman acts resulting from it or carried out as part of it that have been expressly criminalized.[12]

It is against this backdrop that the UN General Assembly began drafting an international convention on the suppression and punishment of the crime of apartheid as a regime.

7 International Convention on the Elimination of All Forms of Racial Discrimination, Article 3.

8 The Charter of the United Nations mentions human rights primarily in Article 1(3) of Chapter I entitled Purposes and Principles and in Articles 55-56, in Chapter IX entitled International Economic and Social Co-operation. Article 1(3) relates to the UN's goal for achieving international co-operation to encourage respect for and protection of human rights, while Article 55 of the Charter sets forth goals to be promoted by the UN to create the stability and well-being required for peaceful relations among nations, based on respect for the principle of equal rights and self-determination. These goals address economic, social and cultural development of various countries and the encouragement of respect to human rights and fundamental freedoms universally, "without distinction as to race, sex, language, or religion."

9 Article 2 of the Universal Declaration of Human Rights declares the right to equal entitlement without discrimination, to the rights and freedoms enshrined therein: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

10 General Assembly Resolution 2202, The policies of apartheid of the Government of the Republic of South Africa, A/RES/2202(XXI) A-B, (Dec, 16, 1966).

11 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 21, 1968, 754 U.N.T.S. 73, Art.

12 Jonathan Alshech, "Apartheid as a Crime against Humanity," **Zmanim: A Historical Quarterly**, Vol 138 (2017), pp. 116-131 (Hebrew).

1.2.1 The Apartheid Convention

On November 30, 1973, the UN General Assembly opened the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA) (hereinafter: Apartheid Convention) for signature. The Convention came into effect on July 18, 1976. The Apartheid Convention defines the crime of apartheid as "**inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them**."[13] The preamble to the final version of the Convention lists the sources for the assertion that apartheid is a crime against humanity. They include the Universal Declaration of Human Rights (1948) which declares all persons are born equal in rights and dignity and that all are entitled to all the freedoms listed in the Declaration regardless of race, color or nationality; the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), in which the UN General Assembly declared that liberation from colonial rule is inevitable and that colonial rule must end along with the practices of separation inherent in it;[14] the Convention on the Prevention and Punishment of the Crime of Genocide (1951), which the preamble to the Apartheid Convention states incriminates certain acts that may also come under the definition of the crime of apartheid; as well as other international conventions and declarations, some of which were mentioned above.

Article I of the Apartheid Convention states that "States Parties declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in Article II of the Convention, are crimes violating the principles of international law, in particular, the purposes and principles of the Charter of the United Nations."[15]

Article II of the Apartheid Convention defines apartheid as (underline emphasis added, M.S.):

For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

13 International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973, United Nations, Treaty Series, vol. 1015, p. 243., Art. II.

14 General Assembly resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV), (14 December 1960).

15 Ibid., Art. I.

1. **Denial to a member or members of a racial group or groups of the right to life and liberty of person:**

   a. **By murder of members of a racial group or groups;**

   b. **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;**

   c. **By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;**

2. **Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;**

3. **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;**

4. **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;**

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

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

As can be seen, the definition revolves around the establishment and maintenance of a system of control by one group over another as part of which and for the sake of which acts considered "inhuman" are committed. Hence, the crime of apartheid is not only a crime committed by a regime, but **a regime whose very existence is illegitimate,**

and, therefore, any act designed to preserve the regime and the control and oppression at its core is criminal. This is also what makes the crime of apartheid unique.

On June 19, 1976, the UN Security Council made its first declaration condemning the crime of apartheid and treating it as a crime against humanity.[16] On June 8, 1977, the First Protocol Additional to the Geneva Conventions of 12 August 1949, was published, listing the crime of apartheid as a grave breach of the Convention and a war crime.[17]

On September 3, 1981, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) entered into effect. In its preamble, the Convention declares that "the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women."[18]

The criminalization of apartheid as an international crime continued after South Africa's apartheid regime collapsed.

In a resolution dated August 18, 1995, the UN Committee on the Elimination of Racial Discrimination affirmed the universal application of Article 3 of ICERD, which prohibits all forms of racial segregation and **apartheid** and emphasized that the prohibition on racial segregation applies to all countries.[19]

In 1996, the Truth and reconciliation commission of South Africa, headed by Archbishop Desmond Tutu, declared that being part of the international human rights community, it considers apartheid a crime against humanity.[20]

Two years later, the Rome Statute was opened for signatures. The statute is the constitution of the International Criminal Court in The Hague (the ICC) and the legal source for its operation.

16 Security Council Resolution 392, Situation in South Africa: killings and violence by the apartheid regime in South Africa in Soweto and other areas, S/RES/392, (June 19, 1976).

17 International Committee of the Red Cross. (1977), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Protocol I, Art. 85(4)(c), 85(5).

18 Convention on the Elimination of All Forms of Discrimination against Women, entered into effect with respect to Israel on November 2, 1991.

19 UN Committee on the Elimination of Racial Discrimination, "General Recommendation XIX: Racial Segregation and Apartheid (article 3), August 18, 1995, para 1.

20 Truth and reconciliation commission of South Africa report (1998), pp. 94-102.

1.2.2 The Rome Statute

On July 1, 2002, the Rome Statute, which constitutes the ICC, went into effect. The Statute lists apartheid as one of eleven crimes against humanity, and defines it as follows:

> **Acts of a character similar to those referred to in paragraph 1, 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.**[21]

The definition of apartheid in the Rome Statute focuses on an "institutionalized regime" and the crime committed as part of it.

The acts the definition refers to are those "of a character similar" to other crimes against humanity included in Article 7 of the Rome Statute (murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery and other forms of sexual violence; persecution; enforced disappearances and "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[22] This last item is a catch-all phrase that applies to cases of particularly grave physical or mental violence as part of a broad attack on a civilian population.[23]

1.1.3 The prohibition on the commission of the crime of apartheid as jus cogens or peremptory norm

As the review above shows, the prohibition on apartheid has become a central, accepted norm in international law, anchored in declarations, resolutions, conventions and even a prohibition written into international criminal law. The elevated status this principle enjoys stems not only from its wide acceptance by the international community and its institutions, but also from the fact that it is rooted in the heart of the moral code which is the foundation of international law.

Today, there is broad consensus that this prohibition has attained the highest status a legal principle can achieve in international law - jus cogens, or peremptory norm. Article 53 of the Vienna Convention on the Law of Treaties (1969)[24] defines a jus cogens norm as

21 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S, Art. 7(2)(h).

22 Rome Statute, Article 2(1)(k).

23 **Elements of the Crime**, (ICC, 2011) p. 12.

24 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, ***United Nations Treaty Series***, vol. 1155, p.331.

a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." The Article also states that any treaty that is in conflict with such a norm is void (as reinforced in Article 64 of the Convention as well), and that a norm of this caliber can only be modified by a later norm of the same character. Norms that have attained jus cogens status in the past include the prohibitions on genocide and on the slave trade.

Evidence of the wide consensus that apartheid belongs among the rare prohibitions with jus cogens status can be found in the fact that it is listed alongside prohibitions whose jus cogens status is uncontested in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, issued in 2001 by the International Law Commission (ILC), as examples of breaches of international law that include a wrongful act component.[25] The ILC, which is the highest level UN body dealing with the interpretation of international law and the drafting of international conventions, also notes the widespread agreement among states regarding the fundamental nature of the prohibition on apartheid, and notes it considers it a norm that admits no exceptions under the general principles of international law.[26] The ILC has recently restated its position in no uncertain terms, and included apartheid in a tentative list of norms that have attained jus cogens status in a report summarizing its draft conclusions on the issue.[27]

It is important to note that jus cogens norms give rise to obligations erga omens, meaning obligations whose violation is considered a violation against the entire international community rather than only the victim or the other party involved in the act, inasmuch as such exists (not every norm that gives rise to obligations erga omens is necessarily a jus cogens norm, but every jus cogens norm does give rise to obligations erga omens). Therefore, a breach of the prohibition on apartheid imposes duties on all states, not just the specific victims of the crime.

It is also worth noting in this context that in the matter of Barcelona Traction, Light and Power Company (Belgium v. Spain), the International Court of Justice (ICJ) ruled that the prohibition on racial discrimination was an erga omens obligation and stated it may arise from "principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[28] It is worth noting that the ICJ is the

25 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', appears in the Yearbook of the International Law Commission, (2001) III, art. 40, comment 4. See also: Robbie Sable, **International Law**, The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew University Faculty of Law, 2003, p. 16 (Hebrew).

26 Ibid., , art. 113.

27 Report of the International Law Commission Seventy-first session (29 April–7 June and 8 July–9 August 2019), Draft conclusion 23.

28 International Court of Justice, Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), Limited Second Phase, Final Judgment (1970), ICJ Rep 3, art. 32, paras 33–34.

highest judicial instance of the UN and the competent authority on the interpretation of international law. Its decisions constitute a source of customary international law.

The aforesaid indicates it is widely accepted that the prohibition on the establishment and maintenance of a regime based on institutional, systemic discrimination and control by the discriminating group over the group subjected to discrimination, such as a regime of apartheid, is a jus cogens norm that gives rise to obligations erga omens.[29]

1.3 The elements of the crime as developed to date

According to the above review, the main legal sources listing the elements of the crime of apartheid as an international crime are the Apartheid Convention and the Rome Statute, each of which contains a full definition of the crime. The ICERD is another relevant instrument, as it specifies the definitions of "racial discrimination" and "racial group," expanding the group classification to include ethnic and national origin, among others.

The definition of apartheid differs between the two conventions, but they share many common features.

Most important to the matter at hand is that under both definitions, apartheid is a regime focused crime. In other words, it is a crime that centers on the existence of a regime that has certain attributes. While unlike the Rome Statute, the Apartheid Convention does not use the term "regime," it does, however, require a body of practices and policies that are implemented systematically, similarly to South Africa, and thus also depicts an institutional crime.

Specific acts, defined as "inhuman acts," carried out as part of this regime, implicate the individuals who commit them in the crime of apartheid.

As for inhuman acts, there are certain differences between the definitions included in the conventions, as well as considerable overlap: Many of the inhuman acts listed in Article 2 of the Apartheid Convention could come under the crime of persecution listed in Article 7(1)(h) and defined in Article 7(2)(g) of the Rome Statute ("the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"), or in the catch-all phrase included in Article 7(1)(k) ("Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.").

29 Dugard, John, and John Reynolds, "Apartheid, international law, and the occupied Palestinian territory," **European Journal of International Law** 24.3 (2013), p. 883.

And so, both definitions, in the Apartheid Convention and in the Rome Statute, list three elements of the crime - act, context and purpose:

1. **Act** - the commission of one of the acts defined as "inhuman;"

2. **Context** - A regime of control and oppression of one group (or groups) by another group (or groups); the terms systemic control and oppression should be read literally and as related to one another: a system that allows enforcing the inferiority of one group to another. This will mostly be manifested in institutionalized discrimination in rights and resources.

3. **Purpose** - The preservation of control by the discriminating group (or groups) over the group (or groups) subjected to discrimination;

These three are complemented by the requirement applicable to all crimes against humanity that the act in question form part of a systematic or widespread attack on a civilian population rather than a single act.

The table below contains a comparison between the elements of the crime in the Rome Statute and in the Apartheid Convention:

Elements	Rome Statute	The Apartheid Convention
Act	**Article (2)(h):** "[I]nhumane acts of a character similar to those referred to in paragraph 1." [Art. 1 includes: • Murder; • Extermination; • Enslavement; • Deportation and forcible transfer of population; • Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; • Torture; • Rape, sexual slavery and other forms of sexual violence; • Persecution of a group; • Enforced disappearance;	**Article 2: "**The following inhuman acts [...]: 1. Denial to a member or members of a racial group or groups of the right to life and liberty of person: a. By murder; b. 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;

Elements	Rome Statute	The Apartheid Convention
Act	Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health **Article 7(1)**: The crime of apartheid belongs to the category of crimes against humanity, and as such, is committed when the relevant inhuman action is carried out "as part of a widespread or systematic attack directed against any civilian population."	c. By arbitrary arrest and illegal imprisonment; 2. Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; 3. 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. 4. 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

Elements	Rome Statute	The Apartheid Convention
Act		group or groups, the prohibition of mixed marriages among members of various racia groups, the expropriation of landed property belonging to a racial group or groups or to members thereof; 5. Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour; 6. Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.
Context	**Article 7(2)(h)**: "in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group."	**Article 2:** "domination by one racial group of persons over any other racial group of persons and systematically oppressing them."
Purpose	**Article 7(2)(h)**: "with the intention of maintaining that regime."	**Article 2:** "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 full list of elements of the crime of apartheid will be extricated from the three mentioned above, act, context and purpose, after adding the required sub-elements (the existence of more than one racial group; the act being committed as part of a widespread attack on a civilian population and others).[30] **For purposes of this opinion, we adopt a restrictive approach that looks only at acts that meet the criteria of both instruments.**

30 **Elements of the Crime**, (ICC, 2011) p. 12.

When the elements listed below are present, a crime of apartheid has allegedly been committed. The word "allegedly" has been added because crimes are perpetrated by people, and liability requires the mental element of awareness of the acts and their context along with intent to maintain the regime as mentioned. **The specific liability of one person or another for a crime can only be determined individually, according to findings about what the person knew and intended.**

Below is a summary of the elements of the crime of apartheid:

The elements of the crime of apartheid

1. **The presence of different "racial groups,"** as per the definition in Article 1(1) of the ICERD (which expressly includes race, color, descent, or national or ethnic origin).

2. The context of a regime in which one group (or groups) dominates another group (or groups) and systematically oppresses its members, in other words, enforcing the inferiority of one group compared to another, usually through institutional discrimination in rights and resources, but also through segregation practices.

3. **The commission of one of the acts defined as inhuman and listed in Article 2(a)-2(f) of the Apartheid Convention or Article 7(1) of the Rome Statute**. It is noted, in this context, that the commission of the crime of apartheid does not require the presence of <u>all</u> inhuman acts listed in the relevant articles. However, since the crime in question is a crime against humanity, it is reasonable to assume a certain degree of severity will be required, and since there is no jurisprudence on the issue, it is difficult to predict how the requirement for an inhuman act will be interpreted in terms of scope.

4. **The commission of the acts <u>for the purpose of establishing and maintaining the context - domination by a racial group (or groups) over another racial group (or groups) and its systematic oppression</u>**. In this context, an assessment must be made to determine whether the acts are sporadic or lack institutional context, or whether they are perpetrated as part of a widespread, systemic, institutionalized regime of oppression.[31]

5. **The act/s form/s part of a systematic or widespread attack on a civilian population** (a requirement for all crimes against humanity).[32]

31 Dugard and Reynolds, p. 881. See supra note 29.

32 Section 7(1)(j) of the Rome Statute lists the crime of apartheid among crimes against humanity, which are defined as such when committed "widespread or systematic attack directed against any civilian population, with knowledge of the attack."

6. **The mental element:** In addition to these, concrete criminal liability requires the mental element of awareness of the nature of the inhuman acts, their being part of a larger apparatus for their commission and the aforesaid regime context. It also requires intent to maintain the regime context.

1.4 The crime of apartheid: summary

The international community has condemned, prohibited, and criminalized apartheid, and it is now considered a crime against humanity. The normative status of the prohibition on apartheid is the highest attainable in international law - jus cogens, a prohibition with no exceptions. Like any crime, the crime of apartheid is committed by human beings. States do not commit crimes. People do. The crime of apartheid, however, is committed within the context of a specific type of regime. It is committed in the context of domination and oppression of one group by another, in other words, when the oppressed group is subjected to systemic discrimination and forced inferiority, usually through institutional discrimination in rights and resources.

In this context, it is important to pay attention to a common mistake: Despite its historical origin, the crime of apartheid can exist without racist ideology. Racism may be what motivates the establishment of an apartheid government system, but as in any other criminal offense, motive is not an element of the crime, and so, a system of government dominating over and oppressing a racial group (in the sense described) established for other motives (for instance, economic or political), would also implicate the responsible parties in the crime of apartheid.

It is also important to note that not all discriminatory treatment, even if it is systemic or institutional, establishes the crime of apartheid. The focus of the crime of apartheid and what sets it apart is the establishment and maintenance of a **regime that revolves around domination and oppression of a group or groups of people**. But even this is not enough, as the definition of the crime requires that the perpetrators have a particular intent in mind - the **preservation of the system of domination and oppression, or the preservation of the inferiority of one group and the superiority of the other.** Domination and forced inferiority are features that must be central to the regime, a part of its DNA, seen in every part of it rather than in just one area.[33]

Both the nature of the crime as an unlawful regime and the classification of acts carried out as part of it as crimes against humanity (a required feature of which is that they constitute widespread attacks on a civilian population) indicate that to establish the crime, the discrimination and oppression must meet some minimal bar in terms of scope. As such,

33 Dugard and Reynolds, p. 881, see supra note 29.

one discriminatory or injurious policy, even if wide in scope, would not be enough, nor would statutory discrimination in one area, even if severe. The crime of apartheid requires the policies or legislation to be so central to the life of the regime that they are a central feature of it.

A regime is composed of public institutions, laws, regulations, policies and practices. To ascertain whether the specific regime features described above, and as noted, are a requirement for the crime of apartheid, exist, we must look at all of these.

Part 2:
Is the crime of apartheid being committed in the West Bank?

2.1 What regime should be the focus for assessing the commission of the crime of apartheid in the Israeli-Palestinian context?

The geographic area between the Mediterranean and the Jordan River[34] is ruled by a single power - Israel.

The Israeli government employs several systems of government within this area, each with its designated governmental institutions, a mostly separate normative system and distinct policies and practices. The West Bank is under a military occupation regime; Israel has been laying siege to the Gaza Strip since 2007 and imposes a particular occupation regime; East Jerusalem is occupied territory that has been annexed in defiance of international law, which is why Israeli sovereignty over it remains internationally unrecognized; and in Israel that lies within the Green Line, there is a civilian parliamentary regime.

As detailed in the previous section, what makes the crime of apartheid singular is its focus on the presence of a **regime** whose central feature is domination and oppression of one group by another. Without such a regime, acts of the type listed in the definition of the crime, even if they meet the criteria of "inhuman acts," and even when carried out for the purpose of preserving control over a racial group, do not give rise to the crime of apartheid.

A regime is a comprehensive system of government. It is usually composed of institutions that have political power to make and implement decisions about its subjects; a normative framework that regulates and manages the system of rights, obligations and powers both the regime and the subjects have; and a plethora of policies and practices applied to the subjects and the area under the regime's control.

The question is whether the military occupation in the West Bank is a separate regime from Israel's parliamentary regime within the Green Line. Another question is whether these two

34 The issue of the Gaza Strip is complex, and it will be left out of this report. However, Israel undoubtedly has some control over the Gaza Strip, which it has kept under siege for the past 13 years. The State of Israel controls most of Gaza's land borers, its sea border and air space and more.

regimes are separate from the one Israel employs in the Gaza Strip, or whether the powers the Israeli government employs everywhere it controls should be seen as a single regime?

Admittedly, this is a tough question. Not only does a single political entity pull the strings of all the regime systems mentioned, but the situation in the West Bank complicates matters further. Israeli steps towards annexation, put in place in the very beginning of the occupation and ramped up in the last decade, have pushed towards unification between Israel and the West Bank, seen, in part, through the expansion of powers given to Israeli institutions,[35] the application of Israeli laws in the West Bank and the design and implementation of a uniform policy for Israel and the West Bank on a slew of issues.[36] All of this is compounded by Israel's settlement enterprise, which is discussed in more detail further below. More than a few Israeli authorities currently engage in governmental action in the West Bank (mostly in settlements), since these are the agencies charged with overall policy design in their fields of expertise, and in some cases, implementation as well.[37] In addition, East Jerusalem, an integral part of the West Bank, occupied along with it in 1967, has been annexed to Israel, in a breach of international law. Israeli institutions and law govern East Jerusalem directly, with no intermediaries such as the Civil Administration or the military.

For these reasons, many identify a single regime between the Mediterranean and the Jordan River.[38] We do not deny that this is a possible analysis.

Nevertheless, our answer to the issue of "regime identification" is that at **this point**, despite the trend towards annexation and unification, when assessing the issue of apartheid, it is **still** possible to view the regimes in the West Bank and inside Israel proper as distinct, or as one regime and its subsidiary. At this stage, so long as the West Bank has not been fully and officially annexed, the West Bank is ruled by the Israeli military (both directly and through the Civil Administration, which is also a military agency) under a system of laws that combines Israeli military law with Jordanian, British and Ottoman law, all of which are governed by the law of belligerent occupation (or the law of occupation) under international law. The institutional differences between the West Bank and Israel, along with the disparities between the arrays of rights, obligations and powers in the two areas are distinct, and, at this stage, **genuine** (in the sense that they were not put in place as a masquerade for an otherwise unified regime)**,** which leads us to the conclusion that it is

35 See: Through the Lens of Israel's Interests: The Civil Administration in the West Bank, Yesh Din (January 2018).

36 See: Annexation Legislation Database on the Yesh Din website. https://www.yesh-din.org/en/legislation/

37 Some examples are the Israel Nature and Parks Authority, which is involved managing nature reserves in the West Bank; the Israel Land Authority, which is deeply involved in land management in the West Bank; and the Israel Antiquities Authority which runs archeological digs in the West Bank.

38 This was the argument made by eight Palestinian NGOs in a report filed with the Committee on the Elimination of Racial Discrimination: Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports (100th session, 10 November 2019). See also the fascinating essay by sociologist Ra'if Zreik, "The Settler-Right New Regime Discourse" **Hazman Haze** (May 2020) (Hebrew).

possible to view them, from a legal standpoint, as distinct regimes with different features. The fact that the Israeli military is subordinate to the Israeli government does nothing to change this analysis. This hierarchy does render the government of Israel legally liable for the actions of the military in relevant cases, but it does not make the two systems one.

In some sense, the efforts made in recent years to apply Knesset laws in the West Bank and extend the powers of Israeli authorities so they apply to the West Bank as well (as, for example, was the case with the Council for Higher Education)[39] actually underscore the fact that by default, the two regimes are distinct. This remains true even if the connections between them are fluid, and even though in the past few years, there has been some "spillover" between the two. This situation can be likened to the attraction between stars. Because of the strong gravitational force between them, one star constantly sheds matter, which settles on the other (in this analogy, the "matter" is governmental powers). In the early stages of the process, two celestial bodies are identifiable. At some point, however, observers will agree that it is a single star.

None of this precludes an alternative analysis of this issue that does see Israel and the territories it controls as a single regime. However, we believe that although the Israeli regime, in the sense of a governing system, is clearly in the process of expansion into the West Bank, **at this stage**, these are two regimes undergoing a fluctuating **process** of unification.

East Jerusalem creates another difficulty. As occupied territory that has been unlawfully annexed, Israeli state authorities operate in it directly, but it shares many commonalities with the West Bank: Its Palestinian residents are not Israeli citizens, and as such, do not vote and have no political representation. Additionally, Israel has implemented a number of policies in East Jerusalem that are analogous, and sometimes identical, to those it employs in the West Bank: massive colonization through Israel-focused development, incentivizing tens of thousands of Israeli citizens to settle in the area, mass expropriation and dispossession of Palestinian land and property, prevention of Palestinian development and diversion of resources to benefit Israelis who move the city. All of these, and, chiefly, the unlawful annexation that must not be recognized, justify treating East Jerusalem and the West Bank as a single unit.

But apart from all these complexities and difficulties, for us, the fact that Yesh Din's expertise on Israeli policies and practices and the vast amount of information it has amassed over the last decade and a half, are focused on the West Bank, is reason to consider the question of the crime of apartheid in this area, with which we are well familiar. Once again, this does not preclude analysis on a different scale. **Yesh Din's work revolves around the Israeli occupation in the West Bank, and after 15 years of research and legal representation of Palestinians living under occupation, we feel the time**

39 The Council for Higher Education Law (Amendment No. 20) 5778-2018 (enacted on February 12, 2018), extended the powers vested in the institution that regulates academic institutions in Israel to academic institutions in the West Bank.

has come to ask ourselves what the legal phenomenon we see in this area is. Does the "occupation" paradigm fully explain what goes on in this area and what Israel has created in it, or is some other legal construct at play in addition to occupation?

We are well aware that an analysis that focuses on the West Bank comes with no small risk. It could echo and amplify Israeli policies aimed at splitting and disconnecting Palestinian society in order to weaken it. It may also serve the attempt to obfuscate the fact that Israel is engaged in a campaign designed to obtain control over all Palestinians living between the Jordan River and the Mediterranean, not just those living in the West Bank. We are aware of this. This risk merits paying attention to the fact that the system of control and its perpetuation exist within Israel as well, and, of course, in Gaza. However, it does not justify forgoing a separate legal analysis of a crime that focuses sharply on the exact nature of the regime. The fact that different systems of governance exist in Israel, the West Bank and the Gaza Strip, in term of features, governing authorities and bureaucracy - does, at this time, allow for a separate analysis, at least in the context herein.

This also makes it clear that if the creeping legal annexation continues, and all the more so if a certain part of the West Bank is annexed through legislation that applies Israeli law and administration to it, an analysis of the situation from the perspective of two separate regimes would have to be reexamined.

We proceed with an analysis of the elements of the crime of apartheid and an examination of whether they are present in the West Bank. We begin with an evaluation of the regime and whether it is a regime of domination and oppression of a group ("the context"). We then move on to assessing whether the special intent of maintaining and preserving this type of regime is present. Finally, we investigate whether, in the context of this regime, inhuman acts of the type noted in the definition of the crime, are committed.

Prior to proceeding with the aforesaid analysis, we wish to highlight an important reservation: Crimes are committed by people, not countries. Criminal law, including international criminal law, relates to people. Therefore, the following analysis focuses on whether the crime of apartheid is being committed in the West Bank, not who is committing it. Further legal analysis, which is beyond the scope of the present document, will be required to examine specific liability and, particularly, the required mental element.

2.2 The presence of two groups

The presence of two groups, an element in the definition of the crime of apartheid, certainly applies in the space examined here. Two racial groups, in the meaning of the term as explained above, currently live in the West Bank: Israeli Jews on the one hand and

Palestinians on the other. These are two national groups perceived as such both by their members and by others. National origin is expressly written into the definition of "racial groups" in ICERD.

The group of Israeli Jews lives in 132 settlements and more than 120 unauthorized outposts, with a total population of some 430,000 as of October 2019[40],[41] and an additional 230,000 in East Jerusalem, as of 2017.[42] The magnitude of the Israeli settlement enterprise in the West Bank has generated a reality in which two national groups live in the same geopolitical area, with one, the Palestinian, making up some 86% of the total population.[43]

2.3 A regime centered on systemic domination and oppression of one group by another

The requirement of a system of domination and oppression for the crime of apartheid, as explained in the previous section, necessitates the identification of a regime that imposes and enforces 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 group context - the presence of the Israeli settler population. Together they distinctly constitute this element of the crime of apartheid. It is important to note in this context and in view of the fact that Israel rejects the legal classification of its presence in the West Bank as "occupation" (a position that is dismissed by the international community, all international legal institutions and the International Committee of the Red Cross), for purposes of assessing this element of the crime of apartheid, it is irrelevant whether or not the West Bank is occupied territory in the sense of the term under the laws of war. The fact that Israel holds this territory under "belligerent occupation," namely, by force, under innately undemocratic military rule opposed by the population subjected to it, is sufficient for the element to be identified.

In general terms, the international laws of occupation confer on the Israeli military commander all state powers in the West Bank, and as such, he plays the role of legislative, executive and judicial branch in the area he commands. This means the military units to which the military commander's powers are delegated, the Judea and Samaria Brigade and the Civil Administration, exercise governmental powers and govern the territory and

40 Figures from Peace Now website (last accessed May 4, 2020).

41 According to Peace Now update released on October 2, 2019.

42 **East Jerusalem - Main Figures**, Ir Amim, February 2019.

43 Figures from Peace Now website (last accessed May 4, 2020).

its residents by force – through the barrel of their guns. This is the case with any military occupation, and the Israeli occupation of the West Bank is no different.

In specific terms, Israel's military occupation of the West Bank coincides with a process of **colonization**, the settlement of citizens of the occupier in the area and the creation of a civilian occupier community. Indeed, in the West Bank, the occupying force is an organic part of one of the groups living in the area, the Israeli-Jewish minority. Members of this group are citizens of the occupying power, the State of Israel, whose military is the occupying force. The presence of Israeli settlers in the occupied territory forces governmental institutions in the West Bank to serve and protect them and see to their welfare. As noted, the magnitude of the Israeli settlement enterprise in the West Bank has forced a reality of two national groups living in a single geopolitical area. One community is made up of civilians living under occupation, ruled by the military and subject to laws the creation of which they cannot influence (with the exception of the very limited legislative powers of the Palestinian Authority).[44] The other is made up of citizens of the occupying country. One community has no civil rights by definition (or rather its civil rights are suspended because of the occupation), while the other enjoys the full gamut of civil rights and has all the political influence citizens of a democracy have. One is politically invisible, while the other enjoys a great deal of political power, with connections to, access to and membership in the centers of power that shape everyone's future. This civic reality, in which rightless subjects live in the same territory and under the same rule as masters who enjoy both power and rights inevitably leads to systemic, institutionalized discrimination between the two groups through practice, policy and even legislation. That is exactly what happened in the West Bank.

The settlers' built-in advantage was enshrined in law, policy and practice. In rough terms, it can be said that this process has produced two West Banks over the years - one where Palestinians live under a, sometimes cruel, military regime, governed by oppressive military law and rigid military legislation which they have no part in shaping. Generally speaking, these residents live in economic and governance conditions typical of developing countries. Israeli settlers live in the other West Bank. The legal regime that applies to them is largely civilian, made up of the modern, democratic legislation passed by the Israeli parliament - to which they are eligible to vote and for which they may run. The legal means by which Israeli laws are applied to settlers living in the West bank involve a "pipelining" technique: military orders, which constitute the primary source of governance in the occupied territory, stipulated that Israeli legislation, mostly administrative, shall apply in the settlements. This

44 The agreement between Israel and the PLO, which regulates the legislative powers of the Palestinian Authority (among others, The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed on September 28, 1995, also referred to as Oslo B) sates that the Palestinian Legislative Council will have legislative powers in areas marked as A and B (primarily the built-up areas of Palestinian cities, towns and villages). However, these powers do not apply to Israelis and do not include issues the agreement left for permanent status negotiations such as refugees and foreign relations. The legislative powers of the Palestinian Authority also do not apply to areas marked as C, some 60% of the West Bank (see Articles XVII and XVIII of the interim agreement).

way, Israeli government ministers were given de facto powers in the settlements without annexing them de jure. This is also how Israel's legal principles were applied to settlers only. In addition, extra-territorial legislation enacted by the Knesset, meaning legislation intended to apply outside the borders of the legislative body's country, were applied directly to "Israeli residents of the Area," in other words, settlers, and in some cases also individuals eligible under the Law of Return (i.e. Jews), brought Israelis in the West Bank (and previously in Gaza too) under Israeli law, despite the fact that they do not live in Israel.

Alongside the system that institutionalizes the discrimination of one group deprived of their rights, 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. This is true for the allocation of public land (as of 2013, 99.76% of public land allocations were designated for settlements [674,459 dunams], while only 0.24% were earmarked for Palestinian use [1624 dunams], including the forcible resettlement of Palestinian communities).[45] This is also true for the areas handed over to Israeli local councils in the West Bank (which span 40% of its total area, though only 15% of the overall population live in them).[46] It also holds true for dispossession - forced exclusively on Palestinians (more than one million dunams of land were declared as state land, which, as noted, is nearly exclusively allocated for Israeli use, and[47] thousands more dunams were expropriated for public needs or seized for security needs). The same holds true for the granting of mining and quarrying licenses (see HCJ petition and report on the issue by Yesh Din).[48] As noted, resources are diverted by official means such as orders, contracts and administrative decisions, but also informally, thanks to widespread, systemic practices of willfully ignoring ideologically motivated crime by Israeli civilians against Palestinians and their property and chronic non-enforcement. Friction between Israelis and Palestinians in the West Bank is a result of a struggle for control of land, and the violence directed at Palestinians is designed to keep them confined to built-up Palestinian areas and deny development. Figures collected by Yesh Din over the years indisputably indicate Palestinians are forsaken by the authorities and deprived of basic protections. This, in turn, enables permanent changes on the ground and land takeovers, many of which are ultimately legally sanctioned.[49]

45 Figures originate from response given by the Civil Administration to a Freedom of Information Application file by Peace Now and the Movement for Freedom of Information, June 13, 2018: in Peace Now website

46 Figures from B'Tselem website (last accessed March 30, 2020).

47 **Under the Guise of Legality**, B'Tselem (February 2012) p. 15.

48 See: HCJ 2164/09 **Yesh Din - Volunteers for Human Rights v. Commander of IDF Forces in the West Bank et al.** (judgment dated December 26), 2011; **The Great Drain: Israeli quarries in the West Bank: High Court Sanctioned Institutionalized Theft**, Yesh Din, (September 2017).

49 Law Enforcement on Israeli Civilians in the West Bank Yesh Din (Data Sheet, December 2019). Yesh Din's research shows that in the years 2005-2019, the Samaria & Judea District Police failed in the investigation of more than 80% of the complaints it received from Palestinians about offenses against them allegedly perpetrated by Israelis. See also:

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.[50] The military regime relies heavily on administrative detention[51] and criminalization of political associations in order to prevent dissent.[52] All major Palestinian political organizations, including FATAH and the PLO, with which the government of Israel entered into agreements, have been declared unauthorized associations or terrorist organizations, and thousands of Palestinians have been imprisoned for membership in these groups, even if they did not engage in violence.

The Age of Regularization - The Zandberg Committee Expropriation Report for Retroactive Authorization of Israeli Outposts and Illegal Construction in the Settlements: Analysis, Ramifications and Implementation, Yesh Din (Position Paper, January 2019). The position paper lists the numerous acts Israeli authorities had undertaken to retroactively authorize outposts built by settlers without permits, many on privately owned Palestinian land and land used by Palestinian communities. According to the position paper, as of early 2019, about 30 outposts had been retroactively authorized and 70 were undergoing approval

50 In August 1967, the Israeli military issued Military Order No. 101 which criminalizes participation in a gathering of more than ten people without a permit around a topic that "may be interpreted as political," and stipulates a penalty of up to ten years in prison and a slew of other restrictions on political engagement. See, **Born without Civil Rights**, Human Rights Watch, (December 2019).

51 Since the beginning of the occupation, thousands of Palestinians have been held in administrative detention for several months to several years. According to figures B'Tselem received from the Israel Prison Service (IPS) and the IDF Spokesperson, the record number of administrative detainees in a given time was 1,794. This occurred during the first intifada, in November 1989. Throughout that year, 3,300 people were held in administrative detention. After the Oslo Agreements were signed and the intifada subsided, the number of detainees decreased and in the first half of the 1990s, it dropped to an all time low of less than ten. The average, however, was 100 to 350 administrative detainees at any given time. With the outbreak of the second intifada, the number spiked back to an average of around 1,000 detainees at the end of 2002, and settled at 700-750 from 2005 to 2007. When the second intifada ended, the number once again dropped dramatically. In January 2011, 219 Palestinians were kept in administrative detention and 307 in December of that year. The number began climbing again after the 2014 military operation in the Gaza Strip (Protective Edge) and the wave of violence in 2015, reaching nearly 660 by the end of that year. In April 2016, there were 696 administrative detainees (figures from B'Tselem website, http://www.btselem.org/administrative_detention/statistics (last accessed April 5, 2020). According to a response provide by the IPS to a freedom of information application filed by HaMoked: Center for the Defence of the Individual, as of March 8, 2020, Israel was holding 431 adult male Palestinians in administrative detention, of whom 169 were being held for up to six months (including four residents of East Jerusalem, the rest from the West Bank); 159 were held for six to 12 months (all from the West Bank); 100 for a year to two (including one from East Jerusalem); three have been kept in administrative detention for more than two years. We note that the durations mentioned above were true at the time the information was provided and are not indicative of the final detention durations, which are not known until the detainees are released. Additionally, four women are currently held in administrative detention. Two for up to six months and two for a year to two. Two minors are also in administrative detention for up to six months.

52 Since 1967, the Israeli Ministry of Defense outlawed more than 430 organizations. All major Palestinian political parties are included in that number, counting President Mahmoud 'Abbas' FATAH party, See: **Born without Civil Rights**, Human Rights Watch, (December 2019).

Thus, the conditions that developed in the West Bank are of two groups, one of which suffers from forced political, legal and economic inferiority. It is dominated by the other group, discriminated against in terms of rights and resources, and any efforts made by its members to be liberated of this inferiority are suppressed.

All of this leads to the conclusion that the element of a regime centered on systemic domination and oppression of one group by another is present in the West Bank.

2.4 Intent to maintain control

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. Having examined whether the regime exists, we now turn to an in-depth review of whether this regime exhibits that inherent element designed to preserve it. With respect to the preservation of control in Israel's case, we will describe several channels that, in our view, evince the intention to maintain the regime: Israel's conduct in the territory and its actions therein; the changes in Israel's declarations about the occupied territories over the years; the slow but steady trickle of legislative changes that cumulatively grow into creeping legal annexation of the West Bank and, finally, explicit, direct proclamations by the government of Israel and its leadership regarding plans to annex part or all of the occupied territories.

The "disputed territories" stance

In recent years, the Israeli government's characterization of Israeli control over the West Bank has undergone a substantial transformation. For five decades after 1967, successive Israeli governments argued in international forums, and before the courts in Israel, that the territories Israel occupied are "disputed territories."[53] The phrase "disputed territories" has no legal meaning, but the international community took it as a commitment on Israel's part that control of these territories was temporary and that its future and permanent status would not be determined unilaterally but through negotiations and agreement. Israeli governments consistently affirmed this interpretation.[54] This means that, while Israel maintained it had a claim to some or all of the territory, it had no desire, at least officially and rhetorically, to control the Palestinians permanently and that whatever control it did have was temporary.

53 A text dated to December 2009 on the Israeli Ministry of Foreign Affairs website reads: "As the West Bank had no prior legitimate sovereign, under international law these areas cannot be considered as 'occupied' Arab or Palestinian lands, and their most accurate description would be that of disputed territories."
https://mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx#Settlements1

54 This position was expressed in the early days after the 1967 War, in statements made by then Foreign Minister Abba Eban at the 1382nd meeting of UN Security Council, which culminated with Resolution 242: 1382nd Meeting of the UN Security Council (November 22, 1967) S/PV.1382 (Official Records),paragraph 85. Eban made similar statements in a meeting held on November 13, 1967; S/PV.1375 (Official Records), page 3, paragraph 24.

The international community saw the "peace process" between Israel and the Palestinians, which began with the 1991 Madrid Peace Conference and continued through the Oslo process and the adoption of a position favoring the establishment of a Palestinian state alongside Israel as proof that Israeli governments did not strive to maintain control over the Palestinian people. The horizon of Israel's policy, as understood by the international community, was to end control over the Palestinians in the territories it occupied in 1967.

Throughout those years, however, the situation on the ground told a different story. Israel made far-reaching changes in the West Bank, violating the most fundamental principles of the laws of occupation and using the territory and its resources for its own needs. Israel's actions in the West Bank were those of a sovereign, not an occupier, effecting long term changes in every aspect of life in the area, including land management policy, infrastructure development, planning and building, legislation and even taxation. Israel usurped West Bank lands for its own financial gain and social needs and encouraged the Israeli business sector to exploit its natural resources.

One policy, however, has had an unparalleled long-term, profound impact on the West Bank – Israel's settlement project. As noted, this policy has altered the demographic makeup of the occupied territory and diverted its resources to serve the colonizers. Not only that, but the settlement policy is based entirely on a breach of an absolute prohibition in the laws of occupation, recognized as a war crime in the Rome Statute: the transfer of the occupier's civilian population into the occupied territory.[55]

In their actions, successive Israeli governments have demonstrated their intention to make Israeli control of the occupied territory permanent, even if they kept saying everything they did would be subject to principles reached in negotiations and agreements with the Palestinian leadership. As a matter of fact, the changes Israeli governments effected in the West Bank have been so profound, the efforts put into tightening Israelis' grip on the area and weakening Palestinians so intense, that the evidence, accumulated over the years, of Israel's intent to maintain control over the area permanently is powerful to the point of being unequivocal, manifest and conclusive.

Israel's conduct has increasingly pointed towards this conclusion, to the extent that ignoring it requires a great deal of deftness at turning a blind eye. The aggregate policies and actions of successive Israeli governments over the years now have only one possible interpretation - they were designed to put irreversible facts on the ground in the West Bank and use them to **preserve Israel's control** over the territory and its Palestinian residents indefinitely.

55 Article 49 (paragraph 6) of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) and Article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court (1998), which clarified that the prohibition applies whether the transfer was made "directly or indirectly."

If this were not enough, in recent years, particularly since the establishment of Netanyahu's fourth government in May of 2015, the gap between words and actions has narrowed, and the Israeli government is working towards official, legal, de jure annexation of West Bank territories.

Creeping legal annexation

Annexation is, for the most part, a declarative act, whereby a state proclaims it considers a certain area to be part of its sovereign territory. **In other words, annexation of an area controlled by a state is, among other things, a declaration of intent to retain this control completely and indefinitely.** In this regard, it is worth noting that while the application of a country's laws to a certain area is an expression of annexation, annexation can be carried out without such application of laws, by declaration only.

The shift in the Israeli government's approach to the West Bank, from a "disputed territory" whose future will be determined in negotiations to an area over which Israel seeks to apply sovereignty unilaterally, has two recognizable phases: First, creeping legal annexation (a slow, incremental application of fragments of Israeli legislation in the territory), and second, full annexation by a single legislative act. At the time of writing, the Israeli government has begun implementing the first phase and declared its intentions to implement the second. Both these developments preceded the release of President Donald Trump's plan for the Middle East in early 2020 and have continued since. The plan, known as the "Deal of the Century," includes annexation not conditioned on Palestinian consent.

The process of creeping legal annexation had several indicators. A seminal moment occurred on February 6, 2017, when the Knesset enacted the Regularization Law.[56] This was the first time the Knesset, Israel's parliament, passed a law with **direct territorial** application to the West Bank (rather than it being pipelined through an order issued by the military commander). The law set out to change land law in the West Bank by clearing a way for the expropriation of privately owned Palestinian land invaded by Israelis and its allocation to the invaders.[57] A law of this kind, designed to apply in a territory outside the country, is not an "ordinary" extra-territorial law, as it does not fit one of the recognized categories of extra-territorial legislation (for example, laws that apply to nationals of a country outside its borders, or laws designed to prevent foreign nationals from harming a country's interests or citizens from abroad). Therefore, such legislation demonstrates an element of sovereignty over the territory, or, to put it in other terms, it is legislation with an annexationist effect. This type of legislation does not constitute full annexation, as it does not come with a declaration that full sovereignty is being applied. In addition, the application of Israeli law in this instance is also extremely partial, as it is limited to the

56 Law Regularizing Settlement in Judea and Samaria 5777-2017.

57 The law was repealed by the High Court of Justice: HCJ 1308/17, 2055/17 **Silwad Municipality et al. v. Knesset et al.** (judgment dated June 6, 2020). The undersigned is one of the lawyers who represented the petitioners.

specific norm it regulates. Israeli legislation of this kind, intended to apply in the West Bank, will be referred to here as "annexationist legislation."

The Regularization Law was the harbinger. Then came waves of work on annexationist legislation, and dozens of bills made their way along the legislative track. Some went all the way to pass second and third readings in the Knesset (a process that was halted with the elections for the 21st Knesset in April 2019 and the political deadlock that followed it). Between 2017 and 2019, the Knesset passed more annexationist laws in various fields, from higher education, to finance and regulation of basic commodity production to management of criminal records, all of which were applied in the West Bank.[58] Alongside this process, an attorney general directive from December 2017 required all bills proposed by the government henceforth to relate to their application in the West Bank to the extent possible.[59] The ministers of justice and tourism issued a similar directive to the rest of the cabinet.[60]

Declarations of intent to implement full annexation with a single legislative act

On December 31, 2017, members of the Central Committee of the ruling Likud Party voted in favor of a proposed resolution stating the Government of Israel should annex the West Bank.

In early April 2019, a few days before the elections for the 21st Knesset, Prime Minister Binyamin Netanyahu declared he would promote the gradual application of Israeli sovereignty in the West Bank in several interviews in the Israeli media. Netanyahu said he had discussed "consensual annexation" of the territories in question with the American administration.[61] After Netanyahu failed to form a government, another election was held, for the 22nd Knesset, on September 19, 2019. In the leadup to this election, Netanyahu repeated his declarations about Israeli sovereignty over the West Bank, and about a week before the election date, he held a special press conference with other Likud Knesset members and politicians where he made a similar declaration, namely that he intends to annex Israeli settlements in the West Bank, and in particular, the Jordan Valley and the Northern Dead Sea.[62]

58 Yesh Din maintains a database of annexationist laws and bills. See: Annexation Legislation Database, Yesh Din website.

59 Revital Hovel, "New Laws Should Also Consider Settlers in West Bank, Says Israeli Attorney General," **Haaretz English website**, December 31, 2017.

60 http://peacenow.org.il/wp-content/uploads/2018/01/Shaked_Levin_Legislation_letter_May2017.pdf (Hebrew).

61 See, e.g.: "Netanyahu: We will gradually apply is Israeli sovereignty in the West Bank, not just the blocs" **Maariv**, April 6, 2019 (Hebrew).

62 Netanyahu says Israel will annex Jordan Valley if he wins reelection", **Ynet** (English) October 9, 2019.

This was when Netanyahu first mentioned American President Donald Trump's so-called deal of the century for a permanent agreement between Israel and the Palestinians. The plan was set for publication after the Israeli election. It was ultimately released in January 2020. In the statements he made in September 2019, Netanyahu said: "This is a historic opportunity, a one-time opportunity, to extend Israeli sovereignty on our settlements in Judea and Samaria, and also on other important regions for our security, for our heritage, and for our future."[63] Details of the plan were unveiled by the White House on January 28, 2020, with President Trump and Prime Minister Netanyahu in attendance. Netanyahu declared Israel would apply Israeli law in Israeli settlements in the West Bank and Jordan Valley which "the US agreed to recognize as part of Israel."[64] The plan calls for the establishment of a demilitarized Palestinian state and states Israel would be able to apply its laws to the settlements and the areas around them and retain security control over the West Bank.[65] Chair of the opposition at the time, MK, Benny Gantz, also declared that, "The peace plan faithfully reflects the basic principles" of his party's platform and called for its full implementation.[66]

In conclusion: For years, Israel has used the state of occupation as mere temporary suspension of sovereignty and civil rights as an alibi when confronted with accusations that the crime of apartheid was being committed in the West Bank. Its manifest, deliberate policy of dispossession, settlement and creeping annexation, both on the ground and in the legal realm, gives away its intent to cement its control and perpetuate the suspension of sovereignty and Palestinians' rights – and with that, shatters its alibi.

2.5 Interim summary

Israel operates a regime of control and oppression by one racial group over another (in the meaning of the term "racial group" under ICERD) in the West Bank. Israel clearly intends - as proven by its actions, and recently, also in official declarations - to preserve and perpetuate its control **over the land**, and, as a necessary outcome, also on members of the other group living on it.

The final issue to clarify is, therefore, whether as part of this control, Israel commits acts defined in the Rome Statute and/or the Apartheid Convention as inhuman acts in furtherance of preserving control.

63 Ibid.

64 Noa Landau, "Trump Unveils Mideast Plan, Gratifying Netanyahu and Angering Palestinians", **Haaretz**, January 28, 2020.

65 The Trump plan: Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People.

66 Jonathan Lis, "Gantz: I Will Bring Trump's Plan for Approval in Knesset Next Week", **Haaretz**, January 29, 2020.

2.6 Inhuman acts

As detailed in the first part of this opinion, the element of "inhuman acts" has several iterations under the Apartheid Convention and the Rome Statute. Israel employs many policies and practices that violate the rights of Palestinian residents of the West Bank. Many of them are eligible for this dubious category.

However, given the requirement that like other crimes against humanity, an act considered to fulfill the requirements of the crime of apartheid must be **part of a systemic or widespread attack on a civilian population**. Not every practice technically covered by the definition of inhuman act would meet this requirement - only those whose injurious effect is **widespread and systemic**.

Various scholars have pointed to a number of Israeli policies and practices targeted at Palestinians only as matching the element of "inhuman acts" in the crime of apartheid. So, for instance, it has been argued that Israel's assassination policy (which Israel refers to in Hebrew by the euphemism "targeted preemptive operations") and its frequent, excessive use of force during arrest raids and other military operations constitute the inhuman act of denial of the right to life (Section 2(a) of the Apartheid Convention).[67] It has also been argued that the widespread, ongoing detention of Palestinian activists, many of them political activists, and many in administrative detention, with numbers reaching tens of thousands or more over the years, constitutes the inhuman act of arbitrary arrest and illegal imprisonment (Article 2(a)(iii) Apartheid Convention).[68] It has also been argued that the system of access restrictions imposed exclusively on Palestinians both with respect to entering and exiting the West Bank and with respect to movement inside it, the restrictions Israel imposes on Palestinian work and employment, the severe restrictions on organization, association and protest and the interference with the residency status of many of them, constitute, both severally and jointly, the inhuman act of denial of basic rights (Section 2(c) of the Apartheid Convention).[69]

Without making a definitive pronouncement on whether these examples, as well as many other injurious practices Israel employs in the West Bank against Palestinians only, attain the level of "inhuman acts," we wish to focus on a limited number of practices that are central to Israel's control over the West Bank, and which, to our understanding, define its character and form part of the regime's DNA. These practices fall into the following categories: Practices constituting the inhuman act of "persecution" (in the language used in the Rome Statute) or "denial of rights" (the term used in the Apartheid Convention); practices constituting the inhuman act of "dividing the population along racial lines" (Article

67 Dugard and Reynolds, supra note 29, pp. 891-892.

68 **Ibid**, pp. 892-895.

69 V. Tilley (ed.), **Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories** (2012), p. 216.

2(d) of the Apartheid Convention, which may also constitute "persecution" per the Rome Statute); and practices that constitute the inhuman act of "Persecution of organizations and persons [...] because they oppose apartheid" (Article d(f) of the Apartheid Convention, and "persecution," under the Rome Statute).

The policies reviewed below are the denial of civil rights; the application of a dual legal system; prevention of development; the separation policy; land expropriation; persecution of people who oppose and resist the regime and forcible population transfers.

2.6.1 Persecution (Rome Statute) and denial of basic rights (Apartheid Convention)

The Rome Statute defines the crime of persecution (Article 7(2)(g)) as, "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." For our purposes, the relevant collective or group identity is national.[70] In the context of persecution of dissenters, the group affiliation is also political. The crime of persecution is also included in the statutes of previous international tribunals such as the Nuremberg Military Tribunal, which operated after WWII, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY). The crime concerns denial of rights on a collective basis without requiring a particular motive (such as racism or ideology). For the element of "persecution" to be present, it is enough that the denial of rights occurs as a result of the victim's belonging to a group rather than on a personal basis. As an independent crime, persecution has to be tied to the commission of other crimes against humanity, on top of denial of rights on a collective basis. However, in our context, the persecution need not be committed in full, as the definition of the crime of apartheid requires "inhumane acts of a character similar to" other crimes against humanity, including persecution.

There is a great deal of overlap between the inhuman act of persecution and several of the inhuman acts listed in the Apartheid Convention:

1. Article 2(c) - "**[D]enying to members of a racial group or groups basic human rights"** (in order to prevent them "from participation in the political, social, economic and cultural life of the country" or creating "conditions preventing the full development of such a group or groups.")

2. Article 2(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**

70 National identity is among the groups to which the crime of persecution applies, see: **Elements of the Crime** (International Criminal Court, 2011), p. 10.

marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof."

3. Article 2(f) - **"Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid."**

The definition of "persecution" under the Rome Statute contains two conditions that are not explicitly listed in the Apartheid Convention. These will be addressed in the analysis below.

Firstly, the denial of rights must be "severe." It is clear that not every instance of denial of rights or discrimination amounts to persecution. These must be attended by a degree of severity that raises it to the level required for the crime.[71] The denial must have a profound impact on the lives of the victims. It must deprive them not simply of comfort, but of the ability to maintain their social, cultural and economic existence and to develop both individually and collectively. The ICTY has ruled that severity should not be examined with respect to an isolated act of discrimination, but from a broader view of the context and the cumulative effect of discriminatory acts and policies.[72]

Secondly, the denial must take place "contrary to international law." This condition has been interpreted as relating to a violation of fundamental rights recognized in what has become known as the "International Bill of Human Rights", which includes the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).[73] In other words, the denial must be of rights that are recognized in international law and must be carried out in a manner that is incongruent with the provisions of this legal field, namely, without a protection, derogation or exception that permits the violation.

Several key policies and practices Israeli authorities employ in the West Bank constitute, we believe, the act of "persecution" under the Rome Statute and/or "denial of rights" under the Apartheid Convention. We review them below, referencing the relevant articles in each of the instruments.

71 William A. Schabas, **The international Criminal Court - A Commentary on the Rome Statute** (Oxford University Press, p.198

72 *Kupreskic et al.*, (Trial Chamber), January 14, 2000, para. 622.

73 Schabas, supra note 71, p. 195.

2.6.2 Denial of civil rights

Under the Apartheid Convention: Article 2(c) - denial of basic rights

Under the Rome Statute: Article 7(1)(h) - persecution

Palestinian residents of the West Bank have had no representation in governing institutions since 1967. They have no 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. At the same time, military legislation has severely curtailed most of the Palestinian residents' political rights (to the point where they can be said to have been suspended), including the right to form associations and the freedom to protest.[74]

This is a clear case of denying a group rights in order to prevent it from taking part in the country's political life.

This denial of political rights (primarily the right to vote and run for public office) is an inherent part of a military occupation, as designed in international law. If Israel were able to argue that the situation is temporary and that it is working to end it, this denial could have been considered a lawful temporary suspension stemming from the international laws of war. However, as we have demonstrated, over the years, Israel has engaged in widespread actions that are clearly designed to preserve and cement its rule over the West Bank, without releasing the suspension of Palestinians' civil rights. Civil rights may be suspended under the laws of occupation on condition of temporariness, meaning the end of the state of occupation is being pursued. Since Israel is not working toward ending its control, but the opposite, cementing and perpetuating it, the condition that the violation is permissible under international law is not met.

It is also important to remember that at the same time, members of the other group - Israelis living in the West Bank - enjoy the full range of civil rights, and many occupy positions within the Civil Administration.

74 Order Regarding the Prohibition of Acts of Incitement and Hostile Propaganda (No. 101) 5727-1967 prohibits rallies, processions and assemblies, (with the latter defined as gatherings of ten people or more "for the purpose of a speech or discussion on a political topic or a topic that may be interpreted as political"). See: **Born Without Civil Rights: Israel's Use of Draconian Military Orders to Repress Palestinians in the West Bank**, Human Rights Watch (December 2019). Israel has also extensively used the option to outlaw organizations available under the Defence (Emergency) Regulations 1945, which date back to the British Mandate, using very a broad interpretation of the "incitement" offense, which includes: "words of praise, sympathy or support for a hostile organization, its actions or objectives," as well as "identification with a hostile organization, with its actions or its objectives or sympathy for them, by flying a flag, displaying a symbol or slogan or playing an anthem or voicing a slogan" (Section 251, Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009).

As for Palestinians' rights to vote and run for public office within the Palestinian Authority, these do very little to mitigate the violation of their civil rights. Under the Oslo Accords, and mainly as reality plays out on the ground, the Palestinian Authority itself is under occupation, making its powers to institute norms and policy, let alone to enforce them, extremely limited. Israel's powers remain both more numerous and peremptory, and it makes frequent use of them. The Palestinian Authority has no powers whatsoever regarding a number of areas (for instance, air space and flight paths, foreign relations, external security, Jerusalem, areas under the jurisdiction of settlements and Israelis). Additionally, in a variety of other areas, Israel has veto rights (for instance, anything to do with the development of water sources and the allocation of electromagnetic frequencies). Of course, the Palestinian Authority has no power whatsoever over land management in most of the West Bank - Area C - where Israel retains planning and building authorities.

In practical terms, the Palestinian Authority is more akin to a local rather than central government, and a weakened one at that. **As a governing body, the Palestinian Authority lacks meaningful powers and authorities, and as a result, the right to vote for its institutions and run for office in them fails to fulfill the purpose of these fundamental human rights – namely access to effective participation in the political life and institutions that make law and policy and govern the lives of the citizenry. In the West Bank, these institutions largely belong to the Israeli regime.**

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 20th Century.

In the context of a system striving to cement control, this otherwise legal aspect of a regime of occupation turns into the inhuman act of "**denying to members of a racial group or groups basic human rights**," or "persecution."

2.6.3 Dual legal system

Under the Apartheid Convention: Article 2(c) - denial of basic rights;

Under the Rome Statute: Article 7(1)(h) - persecution

In the years since the institution of a military government in the West Bank, the military regime has made far-reaching changes to the law applicable in the West Bank through declarations and orders. Theoretically, the military government and the laws it enacts, along with Jordanian law, which survived Jordanian rule, apply to anyone who is present in the West Bank, whether they are visitors or residents. In practice, however, as the military

legal system developed, 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 Israeli bureaucracy the same powers it would have had inside Israel. As noted, this is done through "pipelining," whereby Israeli law (made by the Knesset) is applied to Israeli local authorities in the West Bank through military orders.

This created two types of communities in the West Bank. One type is Palestinian villages and towns that come under Jordanian law (as well as British Mandate and Ottoman laws the military did not repeal), and the military orders that altered it (and the laws of the Palestinian Authority in areas A and B). The other is Jewish local and regional councils that come mostly under Israeli law and administration. The Israeli administrative law that applies to Israeli communities has been dubbed "enclave law."[75]

The result is a regime in which one territory has two legal systems. Israelis are largely governed by ex-territorial and pipelined Israeli legislation, while Palestinians are governed by Jordanian and military law (and, to a limited degree, laws enacted by the Palestinian Authority). In broad terms, this process can be said to have resulted in widespread, deep, systemic discrimination of Palestinians, who, as stated, are subjected to military rule, compared to Israelis, who are governed mostly by a civilian legal system. Decades of settlement by Israeli citizens in the heart of the occupied territory have produced systemic discrimination, enshrined in legislation and jurisprudence and affecting many aspects of the lives of Palestinian residents of the West Bank.[76]

This deprives Palestinians (among other things) of the right to equality in every sense, but primarily in its most basic sense: equality before the law.[77] This degree of systemic, institutionalized discrimination according to group affiliation also constitutes a severe violation of the right to dignity, and, in fact, undermines the broadest basis for the concept of human rights: the shared humanity of all persons.

75 "Enclave law" is a term coined by Prof. Amnon Rubinstein; see A. Rubinstein, "The Changing Status of the Territories - From Escrow to Legal Mongrel," **Iyunei Mishpat** 11:439, 450 (1987) (Hebrew).

76 **One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank**, The Association for Civil Rights in Israel (October, 2014). The report lists the differences between the law applicable to Israelis and Palestinians in the West Bank in terms of criminal law, the right to due process, the definition of crimes and the penalties they carry, traffic law, freedom of expression and protest, planning and building law, freedom of movement and immigration policy.

77 Since the French Revolution, the concept of "personal law" has been gradually replaced with the concept of territoriality, whereby legal norms apply to all persons within the territorial jurisdiction of the legislature. The 14th Amendment to the American Constitution, made in 1868, expresses this principle succinctly - "No State shall… deny to any person within its jurisdiction the equal protection of the laws."

Aside from the issue of discrimination, the military regime denies Palestinians many rights, such as the right to due process[78] (which Israelis enjoy given that they are investigated and tried by Israeli civil institutions); the right to leave and enter the West Bank and travel freely inside it,[79] privacy and family rights,[80] the rights to assemble and freedom of expression and protest.[81] The severe legal discrimination has not spared Palestinian minors. While Israeli minors benefit from the Youth Law (Adjudication and Treatment) 5731-1971, an advanced modern law that brings the principle of the child's best interest into the criminal system, Palestinian youths are subjected to military legislation that is geared towards establishing authoritarian rule and focused on deterrence. Military legislation does not begin to approach the standards set in international law for the treatment of minors, meaning that at any given moment, hundreds of Palestinian youths are held in the custody of Israeli authorities while their rights, as minors, are violated.[82]

The fact that the application of Israeli laws to settlers confers rights should not cloud the fact that it also withholds rights from Palestinians. Therefore, though the dual system of laws could be seen as an act of extending rights to one group, it is, at the same time, an act of denying them to the other.

The dual legal system described above constitutes a policy of systemic, institutionalized discrimination that **denies Palestinians' basic human rights** in the sense that it creates a legal system in which rights are granted or denied on the basis of group affiliation. This dual legal system certainly 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. Finally, the dual legal system contributes to the development of "**conditions preventing the full development**" of members of the group that is subjected to discrimination. In other words, this policy constitutes, "**intentional and severe**

78 **Backyard Proceedings**, Yesh Din (December 2007).

79 **Ground to a Halt: Denial of Palestinians' Freedom of Movement in the West Bank**, B'Tselem (August 2007).

80 A stark example of how the dual system violates Palestinians' right to privacy while upholding Israelis is the law governing entry into private quarters and searches. While military law gives every officer nearly limitless powers to enter the private homes of Palestinians and carry out searches in them, Israeli law, which applies to Israel, normally requires court sanctioned search warrants, which are given only if one of a few, well-defined, grounds has been shown. When Yesh Din argued this was wrongful discrimination, the Legal Advisor – Judea & Samaria (LA-JS) responded: "Given that the criminal legal systems applicable to Israelis and Palestinians in the are different, the fact that search laws are also different does not attest to discrimination, but rather a distinction made on the basis of relevant legal and factual differences" (quoted in a High Court petition filed by Yesh Din and Physicians for Human Rights - Israel, HCJ 2189/20 **Rab'a al-'Azia 'Abdallah Hamed et al. v. IDF Commander in the West Bank**, filed March 22, 2020.

81 See supra note 74.

82 **Minors in Jeopardy: Violation of the Rights of Palestinian Minors by Israel's Military Courts**, B'Tselem (March 2018); see also, **One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank**, The Association for Civil Rights in Israel (October, 2014).

deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

2.6.4 Denial of development

Under the Apartheid Convention: Article 2(c) - denial of basic rights; Article 2(d) - separation of racial groups

Under the Rome Statute: Article 7(1)(h) - persecution

With the occupation of the West Bank in 1967, planning powers for the area were transferred to the military commander. In 1971, the military commander signed the Order regarding Town, Village and Structure Planning (No. 418), which inserted changes to Jordanian planning laws and laid down the infrastructure for the planning system that has been at work in the West Bank since then and throughout the occupation.

The order transferred the powers of the local and regional planning committees, which included representation of West Bank communities, to the Supreme Planning Council instituted by the military commander and its subcommittees, which have no Palestinian representation. Another change was made to the planning council itself. The order stipulates that the council would include representatives of the central military government only (including the Civil Administration), unlike its previous makeup, which included representation of local councils. Palestinians also have no representation in the Subcommittee for Local Planning and Licensing, which is responsible for approving construction in Palestinian communities as well as plans in villages.

On the other hand, in the settlements, military law established local planning committees and stipulated that local and regional councils would function as local planning committees,[83] thus giving them planning powers.

Separating the planning systems for Israelis and Palestinians in the West Bank has allowed Israel to implement a policy that encourages construction in the settlements on the one hand and freezes it in Palestinian communities on the other. Whereas settlements in the West Bank have detailed masterplans that allow for expansion, development and issuance of construction permits, the planning status of Palestinian communities has been static for years.

Add to that Israel's land allocation policy in the West Bank. Figures provided by the Civil Administration in 2013 (and, according to organizations that work on this issue, have not

83 Appointment of Special Planning Committees (Local and Regional Councils) (Judea and Samaria) 5768-2008.

significantly changed since) reveal that since 1967, only about 0.7% of the lands under the charge of the Civil Administration have been allocated to Palestinian entities, while more than 50% of this land has been allocated to the World Zionist Organization which develops settlements, Israeli cellular companies, settlement municipal authorities, government ministries and Israeli infrastructure companies such as Bezeq (telecommunications), the Electrical Company and Mekorot (water supply).[84] **Of all public land (" state land") in the West Bank allocated by the Civil Administration, 99.76% was handed over to Israeli entities, and only 0.24% to Palestinians**.[85]

And so, the Israeli regime has been allocating public land resources almost exclusively to Israelis and projects that serve them. It is, therefore, little wonder, that in the 53 years since Israel took over the West Bank, more than a hundred Israeli settlements have been built, but only two new Palestinian communities: The city of Rawabi, established by the Palestinian Authority and a community on the outskirts of Jerusalem where members of the Jahalin tribe were forcibly relocated to make way for the construction of the settlement of Ma'ale Adumim, in violation of international law (more on this to follow).

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.

2.6.5 The policy of separation between Israelis and Palestinians in the West Bank

Under the Apartheid Convention: Article 2(c) - denial of basic rights; Article 2(d) - separation of racial groups

Under the Rome Statute: Article 7(1)(h) - persecution

One of the main features of the regime in the West Bank is a system of physical separation between the two groups living there. Some might say this is separation between parties that

84 AP 40223-03-10 **Bimkom - Planners for Planning Rights v. West Bank Civil Administration.** For the submissions and the detailed information exposed thanks to this petition, see, **Allocation of State Land in OPT**, The Association for Civil Rights in Israel website, April 2013.

85 See supra note 45.

are not interested in living together. However, international law prohibits such separation regardless of what members of the separated groups might want. Moreover, Israel's separation policy does not "ask" Israelis and Palestinians what they want. It is simply there, physically and legally, according to national origin. That is why, for instance, these rules apply to peace and human rights activists who are not interested in being separated. Arguing that the separation is put in place for security reasons does not make it legal either. Separation between groups is prohibited regardless of the motive, and it constitutes an "inhuman act."

Separation between population groups in the West Bank began quietly. In 1992, Palestinians were banned from entering settlements. A system of orders was put in place, and settlement security coordinators were given the power to block Palestinians who wished to travel through settlement lands.[86] This system of orders is backed by a bureaucratic apparatus that issues entry permits to Palestinian laborers who build, clean and landscape for the settlers. The system that controlled entry into settlements laid down the principles that remained with the separation policy for years to come: no Palestinians may enter areas with Israeli presence, unless they have "cause" to be there and received a permit for this purpose from the military commander.

Later on, the ban on Palestinian access was expanded to vast areas around and near settlements, designated as Special Security Areas, or SSAs. Hundreds of dunams around dozens of settlements have been declared SSAs and fenced in. Many of these areas include Palestinian farmland where crops and orchards are grown. Keys to the gates of these SSAs are kept by settlement security coordinators, and with them, the power and authority to prevent Palestinian landowners from accessing their own land or allow it through the "coordination mechanism." Access to much more land in areas near settlements has also been permanently or seasonally blocked and subjected to permit regimes.

Then came the separation fence and along with it, the seam zone: the project of installing a physical barrier, which began in 2003 and has so far torn away about 8% of West Bank land in areas near the Green Line, through a system of fences and walls. Dozens of settlements on the other side of the fence were kept connected to Israel, swallowing with them a few dozen Palestinian villages and hundreds of thousands of dunams of Palestinian land. The majority of the Palestinian population was left on the other side of the fence. Building the fence along this route produced a Palestinian civilian space that is trapped between the it and the Green Line. Israel calls this space the seam zone. A declaration issued by the IDF commander in the West Bank stipulated that the entire space was a closed military zone, access to which is prohibited to all except three "types of people" (the exact expression used in the order) to whom the declaration does not apply.[87] The first two "types" are Israelis and tourists who have a visa to enter and remain in Israel. The third

86 See, e.g. Declaration of Closed Military Zone (Israeli Communities) (Judea and Samaria) 5756-1996.

87 Declaration regarding Closure of Area No. 03/2/S (Seam Zone) (Judea and Samaria) 5764-2003.

"type" are Palestinians with permits allowing them to work in settlements. It is important to note that the definition of "Israelis," which, as recalled, are excluded from the closed zone declaration, covers Israeli citizens, permanent residents of the State of Israel and anyone entitled to Israeli citizenship under Israel's Law of Return, i.e., anyone who is Jewish.

This is how the physical and legal reality of separation began developing. A Palestinian who owns land passed down through generations must visit the offices of the Civil Administration and ask for a permit to pass through the gate that leads to it. At the same time, any Jew, from anywhere in the world, even if they have never lived in Israel or the West Bank, may cross the fence freely. The permit regime has turned Palestinians who live in the separation fence enclaves into illegal aliens on their own lands and in their own homes, unless they were granted a permit to keep living in the zone, and severely violated their basic rights - primarily the right to freedom of movement, the right to make a living and live in dignity and the right to family. The permit regime leads to systematic dispossession of Palestinians from their lands in the seam zone: A study conducted by the UN Office for the Coordination of Humanitarian Affairs (OCHA) regarding 67 Palestinian communities in the West Bank found that only 18% of the residents who used to farm in the closed area prior to the construction of the separation fence received a permit and continued farming there.[88]

Travel by Israelis has also been restricted, and military legislation forbade them from accessing Area A (Palestinian cities), with some exceptions who receive permits from the military commander.[89]

The settlements, SSA's and particularly the separation fence and permit regimes have changed the land. Entire areas have been painted with national colors: Jewish areas and Palestinian areas, white areas and black areas. An intricate system of separate roads (referred to as "bypass" roads) was built to minimize interaction between the populations on traffic routes as well.

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.

88 **The Barrier Gate and Permit Regime Four Years on: Humanitarian Impact in the Northern West Bank**, UN Office for the Coordination of Humanitarian Affairs (OCHA), (November 2007). Recent figures obtained by HaMoked: Center for the Defense of the Individual show a steady decline in the **percentage of applications for permits granted: HaMoked to the HCJ: Dismantle 6 kilometers of the Separation Barrier in the West Bank; this section dispossesses farmers with no security rationale**, HaMoked website.

89 Declaration regarding Area Closure (Prohibition on Access and Stay (Israelis) (Area A), 5761-2000.

2.6.6 Expropriation and dispossession of land

Under the Apartheid Convention: Article 2(c) - denial of basic rights; Article 2(d) - separation of racial groups

Under the Rome Statute: Article 7(1)(h) - persecution

Until 1967, most of the area now considered by the Civil Administration as "state land" was not considered government property. Under Israeli rule, a million dunams of West Bank land were declared public land (Israeli authorities refer to it as "state land"), thanks to an extremely controversial interpretation of the Ottoman Land Law of 1858. The law stipulates that the government would gain usage rights to unregistered farmland that has not been cultivated continuously, even if the land had been cultivated in the past or is used in the present for grazing. Using this interpretation, between 1978 and 1992, Israel declared close to a million dunams of land in the West Bank as state land (hereinafter: declared land). Palestinians whose land was declared government property had a right to file objections that were heard by a military appeals committee. However, given the highly controversial legal basis on which the committee relied for its rulings, the process was practically ineffective, and the vast majority of the declarations were readily upheld. And so, in just 13 years, Israel increased West Bank land considered public land to some 1.6 million dunams, which are close to 30% of the land area of the West Bank (excluding East Jerusalem). These declarations were mainly made in areas the government designated for Israeli settlements,[90] and they are the tool that was used to dispossess Palestinian communities of their collective lands, used primarily for grazing livestock and for developing Palestinian towns and villages. While such declarations purport to merely formalize an existing legal situation, in practice, particularly given the land allocation policy described below, they effectively constitute the expropriation of collective usage rights.

Nearly all declared land in the West Bank is currently located within the jurisdiction of settlement local and regional councils, meaning Palestinians are entirely barred from using it. As noted above, figures show that since 1967, only about 0.24% of the public land in the area has been allocated to Palestinian entities, while more than 99.26% has been allocated to the World Zionist Organization which develops settlements, Israeli cellular companies, settlement municipal authorities, government ministries and Israeli infrastructure companies such as Bezeq (telecommunications), the Electrical Company and Mekorot (water supply).[91] In addition, land has also been expropriated, for instance, in the area where the settlement of Ma'ale Adumim was built.

90 **The Prohibited Zone: Israeli planning policy in the Palestinian villages in Area C**, Bimkom - Planners for Planning Rights, (June 2008).

91 AP 40223-03-10 **Bimkom - Planners for Planning Rights v. West Bank Civil Administration** (Hebrew). Since these figures were provided, 2011-2013, the policy has not changed and there have been no significant declarations or allocations.

Palestinians are also dispossessed of their land 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. Yesh Din's research over the years proves the consistent exploitation and retroactive official sanctioning of these land takeovers, first through chronic lack of enforcement[92] and then through retroactive legitimation for them.[93]

In February 2017, the Knesset passed the Regularization of Settlement in Judea and Samaria Law 5777-2017, which instituted a mechanism for the expropriation of privately owned Palestinian lands and their allocation to Israelis who illegally invaded them. In June 2020 the Israeli High Court of Justice repealed the law, declaring it both unconstitutional and a violation of international law. Organizations that have studied the issue estimated that the law would have resulted in the expropriation of tens of thousands of dunams of privately owned Palestinian land.[94]

Expropriation of privately owned land and dispossession of land from communities due to their collective identity (in this instance, nationality) constitutes the inhuman act of persecution under the Rome Statute. As held by the ICTY:

> In the same context [of the crime of persecution], "the plunder of property is defined as the unlawful, extensive and wanton appropriation of property belonging to a

92 Law Enforcement on Israeli Civilians in the West Bank, Yesh Din (Data Sheet, December 2019); **Crime without punishment - Failure to prosecute Israelis involved in illegal construction in the West Bank**, Yesh Din (February 2017); **The Road to Dispossession: A case study - the outpost of Adei-Ad**, Yesh Din Report (April 2013). See also dozens more datasheets, position papers and report on the Yesh Din website, www.yesh-din.organization.

93 See: **The Age of Regularization - The Zandberg Committee Expropriation Report for Retroactive Authorization of Israeli Outposts and Illegal Construction in the Settlements: Analysis, Ramifications and Implementation**, Yesh Din (Position Paper, January 2019). The position paper lists the numerous acts Israeli authorities had undertaken to retroactively authorize outposts built by settlers without permits, many on privately owned Palestinian land and land used by Palestinian communities. According to the position paper, as of early 2019, about 30 outposts had been retroactively authorized and 70 were undergoing approval, including through the Regularization Law (Regularization of Settlement in Judea and Samaria Law 5777-2017). The law was repealed by the High Court of Justice: HCJ 1308/17, 2055/17 **Silwad Municipality et al. v. Knesset et al.** (judgment dated June 6, 2020). During the proceedings in this case, the Attorney General announced he was considering relying on other legal doctrines, such as market ouvert to retroactively approve some of the unlawful construction on privately owned Palestinian land. See also: **From Occupation to Annexation: the silent adoption of the Levy report on retroactive authorization of illegal construction in the West Bank**, Yesh Din (Position Paper, February 2016).

94 Peace Now estimated that the law would result in the expropriation of more than 8,000 dunams of lands where houses were illegally built (**The Grand Land Robbery,** Peace Now [December 2016]; According Kerem Navot Research Institute, Israelis cultivate about 27,000 dunams of land owned by Palestinians (**Israeli Settlers' Agriculture as a Means of Land Takeover in the West Bank**, Kerem Navot [October 2013], p. 7). All this land is set to be expropriated under this law.

particular population, whether it be the property of private individuals or of state or 'quasi-state' public collectives. [95]

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 groups were deprived of their collective rights to benefit from this land. Not only that, but Israel has systematically allocated expropriated land to members of the other, dominating, group of Israeli residents of the West Bank, completing the dispossession. This is an extremely widespread policy and a practice that is central to the nature of the military regime in the West Bank, which falls under the definition of the inhuman act of persecution according to the Rome Statute, as well as the definition of the inhuman act of denial of rights and separation along group lines under the Apartheid Convention. The latter refers specifically to the expropriation of the land of one group by the other.

2.6.7 Persecution of regime opponents and critics

Under the Apartheid Convention: Article 2(f) - persecution for opposition to apartheid

Under the Rome Statute: Article 7(1)(h) - persecution

From the first day of the Israeli occupation, any opposition was suppressed with an iron fist and draconian measures.

The Israeli authorities used a great deal of power, both physical and legal, to maintain control of the area and prevent Palestinian opposition. This opposition took many forms, some of them violent, including, at times, terrorism against innocent civilians. Some were political and non-violent. Over the years, measures taken to suppress opposition to the occupation have resulted in the death of thousands of Palestinians and the injury of tens of thousands. Tens of thousands more were deprived of their liberty and put in administrative detention - detention without trial or evidence that can be renewed indefinitely, or in prison.

Clearly, a distinction must be drawn between force used to prevent violent attacks on civilians or in self-defense, and force used to crush protest, silence criticism and prevent political opposition to Israel's military rule or the promotion of Palestinian independence. The latter may be considered persecution of opponents of the regime, while the former

95 *Blaskic*, (Trial Chamber), March 3, 2000, para. 234.

cannot. The history of the Israeli occupation shows that the Israeli authorities portray any harm to Palestinians as having taken place as part of its battle against terrorism, even in cases of assault, including deadly, or extremely severe sanctions against purely political opposition that is not part of terrorist activity.

So, for instance, in the 1970s, 1980s and early 1990s, Israel routinely deported Palestinian activists from the West Bank (and the Gaza Strip). These expulsions were targeted at individuals who were unmistakably political activists at all levels, from neighborhood organizers to national leaders. Thousands of Palestinian activists were deported to Jordan and Lebanon in this manner.[96]

Similarly, and as already noted in this opinion,[97] the military regime has instituted far-reaching prohibitions on political expression, which it enforces heavy-handedly using criminal law. The Order Regarding the Prohibition of Acts of Incitement and Hostile Propaganda (No. 101) 5727-1967 prohibits rallies, processions and assemblies, (with the latter defined as gatherings of ten people or more "for the purpose of a speech or discussion on a political topic or a topic that may be interpreted as political"). This order has been used against Palestinians only. A violation of this prohibition is a criminal offense that carries a penalty of up to ten years in prison.

The Order regarding Security Provisions, in its various iterations (the most recent of which dates to 2009) defines the incitement offense extremely broadly. It includes: "[W]ords of praise, sympathy or support for a hostile organization, its actions or objectives," as well as "identification with a hostile organization, with its actions or its objectives or sympathy for them, by flying a flag, displaying a symbol or slogan or playing an anthem or voicing a slogan" (Section 251). In addition to the order, the British Mandate era Defence (Emergency) Regulations 1945 were used to outlaw any association, including clearly political ones. In this context, it is worth noting that to this day, the Palestine Liberation Organization (PLO) and its largest faction, FATAH, with which Israel entered into the Oslo Accords, are still defined as unlawful terrorist organizations. Membership in these organizations and expressions of support for them are considered criminal offenses. Over the years, thousands of Palestinians have been arrested, interrogated, sentenced and imprisoned for

96 Transcripts of a 1980 meeting at the Prime Minister's Office unearthed by Akevot Institute record statements made by Chief of Staff Refael Eitan about the decision to deport Palestinian mayors. The statements leave no room for doubt that the expulsions were used as means of political suppression: "In order for them not to have a leadership that encourages action against us in all areas, political and in terms of use of force, the leadership has to be removed every time. Removing means sending abroad, or incarcerating, or outlawing.... When there is a situation in which some were injured, some fled, some are abroad, some have been outlawed, there is disarray, there is confusion, people don't know what to do, and the result is that there is less violence on the ground." (Discussion of the Situation in Judea, Samaria and Gaza Strip at the Prime Minister's Office, Documents, Akevot Institute for Israeli-Palestinian Conflict Research, Document No. 12954, p. 26) (Hebrew). For more see: Michael Sfard, **The Wall and the Gate: Israel, Palestine and the Legal Battle for Human Rights** (Metropolitan Books: NY, 2018), pp. 47-122.

97 See supra note 74.

protest, criticism and political opposition to the occupation, and for fighting for the right of the Palestinian people to self-determination, to independence. Many more thousands were put in administrative detention without being charged or accused of anything.[98]

To complete the picture, we state the obvious (given the nature of Israel's regime in the West Bank as described in previous sections): The approach the Israeli authorities take towards political activism, protest and criticism by Israelis in the West Bank is entirely different from its treatment of Palestinians. This approach is rooted in the legal arrangements in place inside the State of Israel. Israeli citizens are free to protest and enjoy a right to political activism that is not governed by military orders such as the Order Regarding the Prohibition of Acts of Incitement and Hostile Propaganda or the Order regarding Security Provisions, both because the criminal law that applies to them is Israeli civilian law, and because, as a matter of policy, they are not tried in military court. Therefore, their space for action is derived from the principles of Israeli constitutional law, which reflects broad recognition of the importance of freedom of expression and the right to political participation.

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. 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 opposition, effectively constituting the inhuman act of "**Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid**."

2.6.8 Forcible transfer of population

Under the Apartheid Convention: Article 2(c) - denial of basic rights; Article 2(d) - separation of racial groups

Under the Rome Statute: Article 7(1)(d) - forcible transfer

In the first decades of the occupation, Israel deported many Palestinian activists, as noted above. Despite the mass scale of these expulsions and with isolated exceptions in the early 1970s, the deportations were individual in character, even if they did reach hundreds of people at their peak (for instance, with the deportation of 415 Hamas and Islamic Jihad men to Lebanon in 1992). It is, therefore, difficult to say that these amount to deportation

98 For more see: Michael Sfard, **The Wall and the Gate: Israel, Palestine and the Legal Battle for Human Rights** (Metropolitan Books: NY, 2018), pp. 380-393.

of "populations," as required under the definition of inhuman act stipulated in Article 7(1)(d) of the Rome Statute.

However, in recent decades, Israel has been engaging in acts that can unquestioningly be seen as forcible transfer of populations. These acts are part of a policy of demographic engineering, and they serve the dual purpose of splitting Palestinian society as a way to weaken it and of preventing Palestinian development while encouraging Israeli development. The former is achieved by the forcible transfer of Palestinians from the West Bank to the Gaza Strip, and the latter includes the forcible transfer of entire communities from one site to another within the West Bank.

Forcible transfer from the West Bank to the Gaza Strip: When the second intifada broke out in September 2000, Israel, which controls the Palestinian population registry, put a moratorium on address changes from the Gaza Strip to the West Bank, as part of a trend toward splitting between the populations living in these territories.[99] Information registered in the population registry was frozen, with no possibility to correct or contest it. In 2007, Israel began treating Palestinians living in the West Bank whose registered address was in the Gaza Strip as "illegal aliens" in the West Bank, unless they had a military stay permit. Proceeding from this premise, the military began forcibly removing Palestinians from their homes in the West Bank to the Gaza Strip, based on the incorrect or outdated address recorded in the population registry.[100]

Israel further tightened its restrictions on Palestinians' right to live in the West Bank in 2010 in amendments it made to the Order regarding Prevention of Infiltration (Amendment No. 2) and the Order regarding Security Provisions (Amendment No. 112). The amendment to the anti-infiltration order stipulates that anyone found in the West Bank without a permit issued by the military commander or the Israeli authorities is considered an "infiltrator" and faces a prison sentence, even if their permanent residence is in the West Bank. The language of the order makes it applicable to both Israelis and Palestinians, but, upon publication of the order, the military clarified it would not be used against Israelis.[101] The amendment turned tens of thousands of Palestinians living in the West Bank to illegal aliens under threat of deportation. Given the fact that Israel has halted the processing of family unification applications (a process akin to family sponsorship for immigration, culminating in status for the sponsored relative), the impacted individuals cannot receive a residency permit for the West Bank and may be deported (in the sense of a forcible transfer) even if they have lived in the area for many years, or moved there to reunite with their spouse or

99 For more information see HaMoked: Center for the Defence of the Individual website, (last accessed April 28, 2020).

100 **Israel continues to pursue its policy of separation between the West Bank and the Gaza Strip: the Coordinator of Government Activities in the Territories presents a revised procedure for the passage of Palestinians from Gaza to the West Bank for the purpose of relocation, which proves to be no less draconian than the original procedure**, HaMoked: Center for the Defence of the Individual website, (last accessed April 28, 2020).

101 Amira Hass, "IDF Order Will Enable Mass Deportation From West Bank," **Haaretz English website**, April 10, 2010.

parents.[102] Following a petition filed by HaMoked: Center for the Defence of the Individual and other organizations, the policy was changed, ensuring that Palestinians with registered addresses in the Gaza Strip who have lived in the West Bank before September 2005 would not be forcibly relocated to the Gaza Strip.[103] Still, thousands of Palestinians who moved to live in the West Bank after September 2005, be it for marriage, academic studies, work or any other reason, and those who have difficulty proving they moved there before the cutoff date are still living under the threat of deportation.

Living under the threat of forcible transfer to the Gaza Strip constrains the lives of Palestinians who are registered as Gaza residents but live in the West Bank. Fearing arrest and removal to Gaza, they restrict their own movements throughout the West Bank, and doubly so outside it (abstaining from international travel for vacations, work or visits with family and friends). This general policy has some isolated exceptions, cases in which individual solutions were found thanks to High Court petitions and pressure from the justices.

On the other hand, an Israeli citizen who wishes to move to live in the West Bank is free to choose their place of residence. In fact, over the years, Israelis have received incentives to move to the West Bank. In 1970, the General Entry Permit (No. 5) (Israeli Residents and Foreign Nationals) (Judea and Samaria) stipulated that Israelis who wish to live in the West Bank are required to carry a personal permit. However, this order became a dead letter as none of the hundreds of thousands of settlers have ever been required to carry such a permit. The policy followed by Israeli authorities ever since the occupation of the West Bank has been to allow free, unhindered access to the West Bank by Israelis with no need for a special permit (with the exception of restrictions on entering Area A as noted above).

Forcible transfer of communities: The forcible transfer of entire communities is also part of Israel's demographic engineering. For the most part, the relocation of communities is achieved by refusing to give the sites where they live legal recognition, and treating any structures built in them as illegal. Following are a number of examples:

Susiya: In 1986, the military expelled all members of the Palestinian community of Susiya from their homes after the Civil Administration declared the village a national park with an archaeological site at its center. Susiya residents were forcibly removed from their village and forced to live on their farmlands, several hundred meters south-east of the original community. The residents have been living under the constant threat of forcible removal

102 **Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories**, B'Tselem and HaMoked, (2006), p. 19; **One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank**, The Association for Civil Rights in Israel (October, 2014), p. 118.

103 HCJ 4019/10 **HaMoked: Center for the Defence of the Individual et al. v. West Bank Military Commander**, judgement dated April 21, 2013.

from their homes and house demolitions. Incidentally, the administration of the original site of the village was handed over to the South Hebron Hills Regional Council.[104]

The Jahalin: Until the 1950s, members of the Jahalin tribe lived around Tel Arad, in the Negev Desert, which became part of the State of Israel after 1948. In the early 1950s, the Jahalin and several other Bedouin tribes were deported by the military government to the West Bank. The exact time of the Jahalin's arrival in the area now occupied by the settlement of Ma'ale Adumim, as described in the High Court of Justice, is controversial: "While the Petitioners [members of the Jahalin tribe] contend that they have resided in this area since the 1950s, with the consent of the landowners from Abu Dis and al-'Eizariyah, the Respondents [the Minister of Defense and the Civil Administration] maintain that it was not until approximately 1988 that clusters of Jahalin tribe members began settling on and near the land."[105] At any rate, there is no dispute that members of the tribe were pushed to the area located at the top of the Jerusalem-Jericho road because of restrictions imposed by Israel and that over the years, some of the areas they occupied were expropriated in order to establish and expand settlements. The result was that by the late 1980s, the tribe lived permanently in and around an area designated for the expansion of Ma'ale Adumim. Efforts to forcibly transfer them began at this time, as implementation of the settlement's expansion plan was looming. The Civil Administration put pressure on the Jahalin to move to alternative sites that did not suit their way of life and were located near a regional landfill. Members of the tribe staunchly refused these propositions.

In July 1994, removal orders were issued for a cluster of Jahalin tribe members. A petition filed on this matter to the High Court was dismissed in 1996.[106] In January 1997 and February 1998, removal orders were issued for two more clusters totaling 150 Jahalin families. A High Court interim injunction postponed the displacement, but ultimately, under pressure from the justices of the High Court, the Jahalin entered negotiations with the Civil Administration. These culminated in 1999 with an agreement that tribe members would relocate to an alternative site.[107], [108] The remaining members of the Jahalin still live under the threat of displacement as Israeli policy is to forcibly remove all tribe families from their current sites. A study conducted by UNRWA and Bimkom: Planners for Planning Rights, about the displaced families in their new location indicated their social and tribal fabric had

104 This fact was revealed thanks to a freedom of information procedure launched by Yesh Din: AP 37527-07-14 **Yesh Din and Emek Shaveh v. Civil administration in Judea and Samaria et al.** (Respondents' response dated October 23, 2014).

105 HCJ 2966/95 **Muhammad Ahmad Salem Harash et al. v. Minister of Defense**, IsrSC 50 (2), 009 paragraph 2 of the judgment of Justice Barak.

106 HCJ 2966/95 **Muhammad Ahmad Salem Harash et al. v. Minister of Defense**, IsrSC 50 (2), 9.

107 HCJ 1242/98 **'Abdallah Salem Sa'idah Jahalin et al. v. Civil Administration et al.**, Interim Order, issued February 22, 1998.

108 **Acting the Landlord: Israel's Policy in Area C, the West Bank**, B'Tselem, (June 2013).

disintegrated and poverty and unemployment rates were high. The study concluded that the new site was socially and economically unsustainable for the community.[109]

A current example of the efforts to forcibly transfer the communities that make up the Jahalin tribe is the case of **Khan al-Ahmar**, a hamlet of Jahalin families straddling the Jerusalem-Jericho road, near the settlement of Kfar Adumim. Structures in the hamlet were issued demolition orders, some of which were executed over the years. Israeli authorities openly intend to clear the area of all Palestinian residents. In 2011, the Civil Administration began promoting a plan to relocate all Jahalin Bedouins to a Bedouin community the Civil Administration had built near the Abu Dis landfill. A campaign against the displacement followed.

In February 2017, the Civil Administration delivered about 40 demolition orders for all structures in Khan al-Ahmar, as part of the effort to remove the hamlet. In May 2018, the High Court ruled[110] there was no cause to intervene in the decision of the Minister of Defense to execute the demolition orders. The residents neither left their homes nor demolished them, and it remains to be seen whether the state goes forward with a forcible removal.

Firing Zone 918: An area covering 30,000 dunams in the South Hebron Hills that was declared a firing zone by the military. Twelve Palestinian communities live in this area. In August 1999, most members of these communities received eviction orders due to "illegal habitation in a firing zone." In November 1999, security forces forcibly removed more than 700 residents, demolished homes and confiscated property, leaving the victims homeless. In January 2000, the Association for Civil Rights in Israel filed a High Court petition arguing the eviction was illegal.[111] In August 2012, the state announced residents of four of the 12 communities would be allowed to continue living there and would not be expelled.[112] In early 2013, the High Court issued an interim order instructing the state to refrain from forcibly removing members of the other communities in the firing zone.[113] In January 2017, an order nisi was issued, instructing the state to file a response listing alternative solutions for eviction.[114] To this day, Israeli policy is geared toward removing the remaining communities and emptying this vast area from its residents.

109 Al jabal: a study on the transfer of Bedouin Palestine refugees, UNRWA and Bimkom, (2013). (last accessed on May 29, 2020).

110 HCJ 3287/16 **Kfar Adumim et al. v. Minister of Defense et al.** (dated May 24, 2018).

111 HCJ 1199/00 **Ahmad Issa Abu Aram et 81 al. v. IDF Commander in the Judea and Samaria Area.**

112 **Residents of Villages in Msafar Yatta, South Hebron Hills Removed**, update on the Association for Civil Rights in Israel website, January 2017.

113 HCJ 413/13 **Muhammad Musa Shehadeh Abu Aram et al. v. Minister of Defense**, decision dated January 16, 2013.

114 HCJ 413/13 **Muhammad Musa Shehadeh Abu Aram et al. v. Minister of Defense**, decision dated January 11, 2017.

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.

2.7 Widespread, systematic attack

Each inhuman act described and analyzed above is a manifestation of deliberate policies that affect anywhere from thousands to millions of individuals.

This holds true for the denial of civil rights to the entire Palestinian public and the dual legal system. It holds true for the policy of preventing development and the policy of separation. The land expropriation policy is directed against Palestinians only, as is the longstanding policy of persecution of those who oppose and resist the regime. Finally, the practice of forcible transfer of populations does not stop at one community, but rather is directed against many.

All the above leads to the conclusion that the inhuman acts described in this document meet the requirement of a widespread or systematic attack directed against a civilian population, and that this element of the crime of apartheid is present as well.

Conclusion:
Yes, us.

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, 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. As described in this opinion, the government of Israel is carrying out a process of "gradual annexation" in the West Bank. From an administrative perspective, annexation means the revocation of military rule in the annexed area and the territorial extension of powers held by Israeli 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.

That is distressing and shameful. And even if not all Israelis are guilty of the crime, we are all responsible for it.[115] It is our duty, each and every one of us, to take resolute action to stop the commission of this crime.

June 2020
Michael Sfard, Adv.

115 As Rabbi and Theologian Abraham Joshua Heschel famously said in an interview he gave NBC journalist Carl Stern in 1972: "In a free society, some are guilty, all are responsible," https://www.youtube.com/watch?v=WjDNPwVEHdE (last accessed on April, 7 2020).