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**Human Rights situation in Palestine and  
other occupied Arab territories**

## **Report of the Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967\***

### *Summary*

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, submitted pursuant to Commission on Human Rights resolution 1993/2 A and Human Rights Council resolution 5/1. In it, the Special Rapporteur examines the current human rights situation in the Occupied Palestinian Territory, with a particular emphasis on question of whether Israeli rule over the occupied Palestinian territory can now be called apartheid.

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\* The present report was submitted after the deadline in order to reflect the most recent developments.

## I. Introduction

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, pursuant to Commission on Human Rights resolution 1993/2 A and Council resolution 5/1.
2. The Special Rapporteur would like to note that he has yet to be granted access to the Occupied Palestinian Territory, nor have his requests to meet with the Permanent Representative of Israel to the United Nations been accepted. The Special Rapporteur notes again that access to the Occupied Palestinian Territory is a key element in the development of a comprehensive understanding of the human rights situation on the ground.
3. The present report is based primarily on written submissions. The Special Rapporteur was unable to travel to the region for further consultations owing to COVID-19.
4. The Special Rapporteur wishes to express his appreciation for the full cooperation extended to his mandate by the Government of the State of Palestine. He further acknowledges the essential work of civil society organizations and human rights defenders to create an environment in which human rights are respected and violations of human rights and international humanitarian law are not committed with impunity and without witnesses.

## II. Current human rights situation

5. The human rights situation of Palestinians in the West Bank, East Jerusalem and Gaza was marked by a significant deterioration. The amount of violence that Israel is employing in order to sustain its occupation, is constantly increasing and impacting Palestinian lives in a myriad of different ways. Palestinians continue to face daily and ongoing state violence with a high incidence of arbitrary use of force – physical and administrative. The result is daily harassment and abuse sometimes for no apparent reason, or other times, based on weak security grounds.<sup>1</sup>
6. Although it is not possible to provide a comprehensive review of all human rights concerns since his previous report, submitted to the Human Rights Council at its forty-seventh session, the Special Rapporteur would like to highlight concern over settler violence, and actions targeting civil society.

### A. Settler violence

7. The growth of settlement populations in the West Bank continues to result in confrontations between settlers and Palestinian populations. Settler violence has increased, not only in number of incidents but also in severity.<sup>2</sup> Settlers have regularly invaded Palestinian villages, sometimes in the proximity of or with the support of Israeli security forces. Settler violence has taken many forms, including physical violence, shooting with live ammunition, destruction of property, trees and crops, as well as stone throwing and intimidation. Settler violence has also continued unabated in 2022. For instance, on 21 January 2022, settlers from Givat Ronen outpost, south of Nablus, violently attacked Palestinians and Israeli activists who were planting trees on Palestinian-owned land near the village of Burin in the northern West Bank. Footage of the attack shows settlers beating

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<sup>1</sup> [https://www.btselem.org/topic/routine\\_founded\\_on\\_violence](https://www.btselem.org/topic/routine_founded_on_violence).

<sup>2</sup> <https://www.ohchr.org/en/press-releases/2021/11/un-experts-alarmed-rise-settler-violence-occupied-palestinian-territory>.

people with clubs, throwing stones, and burning a car. Seven activists suffered light wounds and one man had his hand broken.<sup>3</sup>

8. The ubiquity of these settler attacks, and the credible reports of the Israeli security forces' passivity in combating this violence, has deepened the atmosphere of fear and coercion throughout the West Bank. The rising levels of violence have been made possible by a permanent lack of accountability for settler violence and attacks on Palestinians and Palestinian property. Israel has the obligation to take all measures in its power to restore and ensure, as far as possible, public order and life in the Occupied Palestinian Territory and, in all circumstances, to protect the Palestinian population against all acts or threats of violence.<sup>4</sup>

## B. Civil Society

9. Israeli authorities continued to take actions against Palestinian civil society organisation, which contributed to undermining the work of organizations promoting and supporting the human rights of Palestinians. These actions included the use of counter-terrorism legislation and military orders to restrict and criminalise human rights and humanitarian work, the denial of visas of staff with the United Nations and international non-governmental organizations, the use of Pegasus spyware of Israeli NSO group on mobile phones of Palestinian human rights workers<sup>5</sup>, arbitrary arrests and criminal prosecution of human rights defenders.

10. On 19 October 2021 the Israeli Minister of Defense announced the designation of six Palestinian human rights and humanitarian organizations<sup>6</sup> as "terrorist organizations" under Israel's Counter-Terrorism Law of 2016. The designation decisions were based on unsubstantiated links between these organizations and the Popular Front for the Liberation of Palestine, including alleged diversion of funds. At the time of drafting this report, no evidence proving these allegations has been presented by Israeli authorities despite several requests by the international community and concerned organizations.

11. The potential impact of these designations and subsequent declarations by the Chief Military Commander is substantial.<sup>7</sup> Both the Israeli Counter-Terrorism Law and the Defence (Emergency) Regulations of 1945 foresee prison terms for membership or any type of support or cooperation with such organizations, prohibition of activities, confiscation of property and closure of offices.<sup>8</sup>

## III. From Occupation to Apartheid

### A. Introduction

12. When the facts change, so must our minds.

<sup>3</sup> [https://www.btselem.org/video/20220302\\_settlers\\_attack\\_israeli\\_activists\\_in\\_burin](https://www.btselem.org/video/20220302_settlers_attack_israeli_activists_in_burin).

<sup>4</sup> Hague Regulations, arts.43, 46; and the fourth Geneva convention, of 12 August 1949, art.27.

<sup>5</sup> <https://www.amnesty.org/en/latest/research/2021/11/devices-of-palestinian-human-rights-defenders-hacked-with-nso-groups-pegasus-spyware-2/>.

<sup>6</sup> Addameer Prisoner Support and Human Rights Association; Al Haq; Defense for Children International – Palestine; Union of Agricultural Work Committees (UAWC); Bisan Center for Research and Development; and the Union of Palestinian Women's Committees.

<sup>7</sup> On 7 November 2021, the Israel's Chief Military Commander declared five of the Palestinian organizations as unlawful associations through military orders. According to Israeli law, the declarations of unlawful associations through military orders are applied in the West Bank and Gaza, while the terrorist designations under the Counter-Terrorism Law are applied in occupied East Jerusalem and Israel.

<sup>8</sup> Counter-Terrorism Law No 5766-2016, sections 20,21,22,23,24,56,and 69-70. Israeli Defence (Emergency) Regulations of 1945, sec.84,85; Military Order No.1651, sect.60,65, 237A, 237B, 251; and Military Order No. 101.

13. In the Palestinian territory that Israel has occupied since 1967, there are now five million stateless Palestinians living without rights, in an acute state of subjugation, and with no path to self-determination or a viable independent state which the international community has repeatedly promised is their right.<sup>9</sup> Over the past five decades, Israel has created 300 Jewish-only civilian settlements, all of them illegal,<sup>10</sup> with 700,000 Israeli Jewish settlers now living in East Jerusalem and the West Bank in the midst of, but apart from, three million Palestinians. In Gaza, Israel has barricaded the two million Palestinians into what former British Prime Minister David Cameron called “an open-air prison,”<sup>11</sup> a method of population control unique in the modern world. In recent years, Israeli prime ministers have regularly and openly proclaimed that the country’s rule over the Palestinians and their land is permanent and that no Palestinian state will emerge.<sup>12</sup>

14. The international community has declared time and again that the Israeli rule over the Palestinian territory is an occupation, strictly governed by international humanitarian law,<sup>13</sup> as well as by international human rights law.<sup>14</sup> By their very nature, occupations are required to be built with wood, not concrete. Accordingly, Israel’s occupation must be temporary, it must be short-term, it is prohibited from annexing even a millimetre of occupied territory, any changes to the occupied territory must be as minimal as possible, it must comply fully with international law and United Nations resolutions, and it must cooperate in good faith with the Palestinian leadership to completely end the occupation and realize a genuine two-state solution.<sup>15</sup>

15. None of this has happened. Nor, on the available cogent evidence, is any of this likely to happen, absent concerted international intervention. Israel’s occupation has been conducted in profound defiance of international law and hundreds of United Nations resolutions, with scant pushback from the international community.<sup>16</sup> Its 55-year-old occupation long ago burst through the restraints of temporariness. It has progressively engaged in the *de jure* and *de facto* annexation of occupied territory. It insists that the laws of occupation and human rights do not apply to its regime. And its proliferating facts on the ground have virtually extinguished what lingering prospects remain for a genuine Palestinian state. A legal oxymoron has emerged: an occupation in perpetuity.

16. The inescapable question becomes: has the Israeli occupation curdled into something darker and more ominous? While the laws of occupation continue to apply in full force to the Palestinian territory, they have become an increasingly inadequate legal and political framework by which to accurately understand, let alone effectively regulate and end, the transformative reality that Israel has been imposing on the ground. Even as the protracted Israeli occupation has crossed the bright red line into illegality,<sup>17</sup> this does not appear to sufficiently capture the full extent of the qualitative changes occurring in the Palestinian territory.

17. Distinguished voices in recent years have concluded that these inexorable facts amount to, or closely resemble, apartheid. Ban Ki-Moon, the former Secretary-General of the United Nations, wrote in 2021 that Israel’s “structural domination and oppression of the Palestinian people through indefinite occupation...arguably constitutes apartheid.”<sup>18</sup> Nobel

<sup>9</sup> UNGA Resolution A/RES/76/150 (16 December 2021). Adopted 168-5-10.

<sup>10</sup> UNSC Resolution 2334 (23 December 2016) declared that the Israeli settlements are “a flagrant violation under international law.”

<sup>11</sup> [David Cameron describes blockaded Gaza as a 'prison' - BBC News](#).

<sup>12</sup> Prime Minister Benjamin Netanyahu stated in 2018 that the Palestinians could have a “state-minus”, where Israel would maintain security control over all of the Palestinian territory: *Jewish Telegraphic Agency*, 24 October 2018. In 2022, Prime Minister Naftali Bennett said that: “I oppose a Palestinian state, and I am making it impossible to conduct diplomatic negotiations that might lead to a Palestinian state”: *Al-Monitor*, 31 January 2022.

<sup>13</sup> UNSC Resolutions 237, and 2334, as well as 20 other resolutions.

<sup>14</sup> *Wall Advisory Opinion*, ICJ Reports 2004, para.149.

<sup>15</sup> A/72/556.

<sup>16</sup> A/74/507, A/75/532.

<sup>17</sup> A/72/556.

<sup>18</sup> *Financial Times*, 29 June 2021.

Laurate Desmond Tutu stated in 2014 that: “I know firsthand that Israel has created an apartheid reality within its borders and through its occupation.”<sup>19</sup> South African Foreign Minister Naledi Pandor spoke in 2022 about her country’s: “...significant dismay at the continued apartheid practices of Israel against the long-suffering people of Palestine.”<sup>20</sup> Michael Ben-Yair, a former Attorney-General of Israel, said in 2022 that Israel has become: “...an apartheid regime... a one state reality, with two different peoples living with unequal rights.”<sup>21</sup> Ami Ayalon, the former Director of Shin Bet, wrote in his memoir that: “We’ve already created an apartheid situation in Judea and Samaria, where we control the Palestinians by force, denying them self-determination.”<sup>22</sup> And two former Israeli ambassadors to South Africa – Ilan Baruch and Alon Liel – stated in 2021 that Israel’s systematic discrimination: “...on the basis of nationality and ethnicity” now constitutes apartheid.<sup>23</sup>

18. If these responsible figures have determined that this reality is apartheid, then it is incumbent upon the rest of us to test, through the tools of international law and human rights, whether these observations accurately reflect what is happening in the Palestinian territory.

19. Palestinians have urged the international community to understand their predicament as apartheid. Palestinian ambassador Riyad Mansour stated to the United Nations Security Council in February 2022 that apartheid is now entrenched in the occupied Palestinian territory.<sup>24</sup> Two of Palestine’s premier human rights organizations – Al-Haq and Addameer – have concluded that Israel is maintaining an apartheid regime over the Palestinian people as a whole.<sup>25</sup> Al Mezan, another leading Palestinian human rights group, recently reported that the enclosure of Gaza has become an integral part of Israel’s apartheid regime.<sup>26</sup>

20. International and Israeli human rights organizations have likewise issued substantive reports which have determined that Israel has created an apartheid rule, either in the West Bank or throughout Israel and the occupied Palestinian territory. Human Rights Watch stated in 2021 that “...the Israeli government has demonstrated an intent to maintain the domination of Jewish Israelis over Palestinians across Israel and the OPT.”<sup>27</sup> Amnesty International concluded in 2022 that “Israel has perpetrated the international wrong of apartheid, as a human rights violation and a violation of international public law wherever it imposes this system.”<sup>28</sup> B’Tselem found in 2021 that Israel has created a “regime of Jewish supremacy from the Jordan River to the Mediterranean Sea”, which constitutes apartheid.<sup>29</sup> And Yesh Din issued a comprehensive legal opinion in June 2020 by human rights lawyer Michael Sfard which determined that the crime of apartheid is being committed by Israel in the West Bank.<sup>30</sup>

21. Israel and its supporters have strongly resisted the labelling of Israel’s policies and practices as amounting to apartheid. In January 2022, Israeli Foreign Minister Yair Lapid responded to the Amnesty International report by stating that its finding of apartheid was “false, biased and antisemitic.”<sup>31</sup> David Harris, the CEO of the American Jewish

<sup>19</sup> [Presbyterian General Assembly Biennial Meeting: My Message on Israel and Palestine | HuffPost Communities](#) (16 June 2014).

<sup>20</sup> *Jerusalem Post*, 18 February 2022.

<sup>21</sup> *thejournal.ie*, 10 February 2022.

<sup>22</sup> *Friendly Fire* (Steerforth Press, 2021), at.260.

<sup>23</sup> *GroundUp*, 8 June 2021.

<sup>24</sup> Statement, 23 February 2022, Permanent Observer Mission of the State of Palestine to the United Nations.

<sup>25</sup> Al-Haq and Addameer, together with Housing and Land Rights Network: “Entrenching and Maintaining an Apartheid Regime over the Palestinian People as a Whole” (Submission to the Special Rapporteur, January 2022).

<sup>26</sup> Al-Mezan, *The Gaza Bantustan: Israeli Apartheid in the Gaza Strip* (November 2021).

<sup>27</sup> Human Rights Watch, *A Threshold Crossed* (April 2021).

<sup>28</sup> Amnesty International, *Israel’s Apartheid against Palestinians* (February 2022).

<sup>29</sup> B’Tselem, *A Regime of Jewish Supremacy* (January 2021).

<sup>30</sup> Yesh Din, *The Israeli Occupation of the West Bank and the Crime of Apartheid* (June 2020).

<sup>31</sup> *Times of Israel*, 31 January 2022.

Committee, said that Israel's shortcomings cannot be compared with apartheid South Africa.<sup>32</sup> In a more reflective comment, Michael Koplow of the Israel Policy Forum criticized the use of "apartheid" as conceptionally wrong in the context of Israel and Palestine, because it would lead decision-makers away from solving the true problem on the ground.<sup>33</sup>

22. This section of the report examines whether Israeli rule over the occupied Palestinian territory can now be called apartheid. The Special Rapporteur acknowledges that a number of human rights groups (Al-Haq, Addameer, Human Rights Watch, Amnesty International and B'Tselem) have analyzed the issue of apartheid in the context of Israel and the occupied Palestinian territory together, taking the view that it is impossible to have "democracy here and apartheid there".<sup>34</sup> However, consistent with the mandate of the Special Rapporteur, the focus is on Israeli practices in the West Bank, including East Jerusalem, and Gaza.

## B. International Law and the Prohibition of the Crime of Apartheid

23. The concept of apartheid – the term means 'apartness' in Afrikaans – as an oppressive system of rule and a cornerstone legal prohibition in international law arose from the legal, political and social practices developed in southern Africa between the 1940s and the 1990s. It originated in South Africa as a declared state policy in 1948,<sup>35</sup> and was also implemented in other settler-colonies in southern Africa, including Namibia and Rhodesia. Today, apartheid has acquired a universal meaning that transcends the specific practices in southern Africa and is applicable wherever it may exist.

24. The legal prohibition against apartheid has become well-established through both customary and conventional international law. It is regarded today as a *jus cogens* norm, a peremptory norm of international law for which no derogation is allowed.<sup>36</sup> Elevating apartheid to the most serious of crimes in international law places it in the same category as war crimes, wars of aggression, territorial annexation, genocide, slavery, torture and crimes against humanity. And as a *jus cogens* norm, this gives rise to obligations *erga omnes*, creating a legal duty on all states to cooperate in order to end the violation.<sup>37</sup>

### Customary International Law

25. The United Nations General Assembly first approved a resolution critical of apartheid in South Africa in 1950,<sup>38</sup> and subsequently adopted a volume of resolutions condemning the practice over the next 40 years. In 1968, the General Assembly declared that: "...the policies of apartheid practised by the Government of South Africa [are] a crime against humanity," stating that it was part of the policy of South Africa to deny the majority population its right to self-determination.<sup>39</sup> In its Advisory Opinion on Namibia in 1971, the International Court of Justice ruled that the application of apartheid in Namibia by South Africa was a "flagrant violation of the purposes and principles of the Charter [of the United Nations]."<sup>40</sup> And in 1980, the United Nations Security Council stated that the "...policy of apartheid is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of man, the Charter of the United Nations and the Universal Declaration of Human Rights."<sup>41</sup> Legal scholars have accepted that the prohibition against

<sup>32</sup> *Politico*, 1 February 2022.

<sup>33</sup> *In Koplow Column*, Israel Policy Forum, 3 February 2022.

<sup>34</sup> Also see N. Thrall, "The Separate Regimes Delusion", *London Review of Books* (7 January 2021).

<sup>35</sup> N. Clark & W. Worger, *South Africa: The Rise and Fall of Apartheid* (3<sup>rd</sup> ed.) (Routledge, 2016).

<sup>36</sup> [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), commentary on art.40.

<sup>37</sup> D. Tladi, Special Rapporteur, *Fourth Report on Peremptory Norms of General International Law (Jus Cogens)*, International Law Commission, A/CN.4/727 (31 January 2019), paras.91-101.

<sup>38</sup> UNGA Resolution 395(V)(2 December 1950).

<sup>39</sup> UNGA Resolution 2396 (XXXIII)(2 December 1968). Also Tladi, *supra* note.29, at para.96.

<sup>40</sup> *Advisory Opinion on Namibia*, ICJ Reports 1971, para. 131.

<sup>41</sup> UNSC Resolution 473 (13 June 1980).

apartheid has acquired the status of a rule of customary international law,<sup>42</sup> meaning that it applies universally, regardless of whether a state has ratified a convention or international instrument outlawing apartheid.

### Conventional International Law

26. In conventional international law, the prohibition against the crime of apartheid is firmly anchored in the instruments of international human rights law, international humanitarian law and international criminal law.

27. In international human rights law, the 1965 International Convention for the Elimination of All Forms of Racial Discrimination (ICERD)<sup>43</sup> was adopted by the UN General Assembly to combat the scourge of racial supremacy, segregation and separation through the prohibition of discrimination on the basis of race, colour or ethnic origin.<sup>44</sup> Article 3 states 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.”<sup>45</sup>

28. In international humanitarian law, apartheid has been designated by the High Contracting Parties to the Geneva Conventions as a grave breach under the 1977 Protocol Additional 1 if committed during circumstances regulated by the Conventions, such as an armed conflict or an occupation.<sup>46</sup> Article 85(4) defines a series of “wilfully committed” acts as “grave breaches” of the Protocol. Among the specifically-listed acts are:

“practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based upon racial discrimination.”

Additionally, Article 85(5) declares that “grave breaches” shall be regarded as “war crimes” under international humanitarian law.

29. The International Committee of the Red Cross, the guardian of the Geneva Conventions, considers that the prohibition against apartheid in international humanitarian law has achieved the status of customary international law.<sup>47</sup> and in international criminal law, the UN General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>48</sup> in 1973. Article 1 of the Convention declares that apartheid is a “crime against humanity.” Article 2 defines the crime against humanity of apartheid as including:

“...similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”

In defining the crime, Article 2 goes on to provide a detailed list of inhuman acts which would characterize a system of control amounting to the crime against humanity of apartheid, which in summary form includes:

<sup>42</sup> Tladi, *supra*, note.37; A. Cassese, *International Criminal Law* (2<sup>nd</sup> ed.)(OUP, 2008)25.

<sup>43</sup> (1965), 660 UNTS 195, entered into force 4 January 1969. As of 1 February 2022, 182 states had ratified the ICERD.

<sup>44</sup> ICERD was ratified by Israel in 1979 and by the State of Palestine in 2014.

<sup>45</sup> In a 1995 resolution, the UN Committee on the Elimination of Racial Discrimination stated that Article 3 has universal application, and the prohibition applies to all countries:  
<http://hrlibrary.umn.edu/gencomm/genrexix.htm>

<sup>46</sup> (1977), 1125 UNTS 195, entered into force 7 December 1979. As of 1 February 2020, 174 states had ratified the Additional Protocol I. Israel ratified the *Geneva Conventions* in 1951, but has not ratified Additional Protocol I.

<sup>47</sup> [Customary IHL - Rule 88. Non-Discrimination \(icrc.org\)](http://www.icrc.org/customary-ihl-rule-88-non-discrimination)

<sup>48</sup> (1973), 1015 UNTS 243, entered into force 18 July 1976. As of 1 February 2022, 110 states ratified the *Convention*. The State of Palestine ratified the *Convention* in 2014. Israel has not ratified it.

(a) Denial to the members of a racial group of the right to life and liberty of person, through such means as murder, serious bodily or mental harm or arbitrary arrest and imprisonment;

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

(c) Legislative actions calculated to prevent a racial group from full participation in all features of a society's economic, social, political and cultural life;

(d) Any measures designed to divide the population along racial lines by the creation of separate reserves or ghettos, the prohibition of mixed marriages, or the expropriation of land;

(e) Exploitation of the labour of a racial group; and

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

30. In 1998, the international community further developed the criminality of apartheid with the adoption of *the Rome Statute of the International Criminal Court*.<sup>49</sup> Article 7(2)(h) of the Statute defines the crime of apartheid as:

“...inhumane 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 another racial group or groups and committed with the intention of maintaining that regime.

Paragraph 1 of Article 7 lists a number of inhumane acts, including:

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of liberty;

(f) Torture;

(h) Persecution against an identifiable group on political, racial, ethnic, cultural, religious, gender...or other grounds;

(k) other inhumane acts of a similar nature intentionally causing great suffering, or serious injury to body or to mental or physical health.

31. In February 2021, the Pre-Trial Chamber of the International Criminal Court ruled that it has criminal jurisdiction to hear complaints regarding purported violations of *the Rome Statute* with respect to the situation in Palestine.<sup>50</sup>

32. Accordingly, the relevant international law establishes that the occupied Palestinian territory is a territorial unit where the prohibition against apartheid can be applied to assess whether apartheid practices exist. Among the factors that support this conclusion: the universal application of customary international law; the ratification by both Israel and Palestine of the ICERD; the ratification by Palestine of *the Convention Against Apartheid* and *the Rome Statute*; and the customary international humanitarian law status of the prohibition against apartheid.

### Legal Definition of Apartheid

33. Only the *Convention Against Apartheid* and the *Rome Statute* provide legal definitions of apartheid. The two instruments were drafted and adopted in distinct eras, which likely explains the differences in their respective terminology. The *Convention Against Apartheid's* drafting in the early 1970s reflected the international community's focus on the specific practices of racial supremacy in southern Africa. When the *Rome Statute* was drafted and adopted 25-years-later, the apartheid era in southern Africa had

<sup>49</sup> (1998), 2187 UNTS 3, entered into force 1 July 2002. As of 1 February 2022, 123 states had ratified the *State*. The *Statute* was ratified by the State of Palestine in 2015. Israel has not ratified it.

<sup>50</sup> [CR2021\\_01165.PDF \(icc-cpi.int\)](#).



already ended, and the *Statute*'s purpose was to provide a forward-looking definition with a universal application. In particular, it made no reference to South Africa or southern Africa. Given this approach, there is no reasonable basis to think that the existence of apartheid is limited either in time or in geography. Furthermore, while the historical practice of apartheid in southern Africa provides useful reference points for assessing the possible existence of apartheid elsewhere, such historical and political comparisons are never exact, and cannot be expected to be.<sup>51</sup> Rather, the legal and political starting point to determine the presence of apartheid in another time and place is the application of a commonly-accepted definition, drawn from the *Convention* and the *Statute*.

34. Amnesty International's report correctly notes that there are two secondary differences between the definitions of apartheid in the *Convention Against Apartheid* and the *Rome Statute*.<sup>52</sup> First, the *Statute* requires the existence of "an institutionalized regime of systematic oppression and domination by one racial group over any other racial group", with the intent of maintaining that regime. In contrast, the *Convention* takes a less-specific approach in that it does not refer to an "institutionalized regime." Nonetheless, since the *Convention* specifically mentions the "similar policies and practices" that were applied in southern Africa during the apartheid era, it stands to reason that these practices amounted to the sort of 'institutionalized regime' that the *Statute* has in mind. The second difference goes to the broader list of "inhuman acts" proscribed in the *Convention*. However, a purposive reading of the respective lists indicates that there is considerable overlap, and the broad language used in the *Statute* – i.e., "other inhumane acts" – can reasonably be said to include the same prohibited provisions that are found on the *Convention*'s list.

35. These differences between the *Convention* and the *Statute* are secondary and reconcilable. Accordingly, the construction of a definition of the "crime against humanity of apartheid" that draws from, and is consistent with, both instruments would be made up of the following three features:

- (a) There exists an institutionalized regime of systematic racial oppression and discrimination,
- (b) established with the intent to maintain the domination of one racial group over another, and
- (c) which features inhuman(e) acts committed as an integral part of the regime.

This definition has been accepted by scholars and human rights organizations who have assessed the contemporary meaning of apartheid in international law.<sup>53</sup> It must be noted that all three features are required: examples or patterns of racial discrimination by themselves are insufficient.

### **The Question of 'Race' and 'Racial Group'**

36. The question of race and racial groups in the context of apartheid and domination requires an explanation. Neither the *Convention Against Apartheid* nor the *Rome Statute* define 'racial group.' The initial approach towards "racial group" in the *Convention* might suggest that it was influenced by the racial categories employed by the apartheid regimes in southern Africa, which focused on black and white skin colour.<sup>54</sup> However, our understanding of 'race' and 'racial groups' have evolved significantly in recent decades, such that we have recognized for some time that 'race' and 'racial group' are social constructs rather than a biological determination based on skin colour and/or assumptions

<sup>51</sup> J. Dugard and J. Reynolds, "Apartheid, International Law and the Occupied Palestinian Territory" (2013), 24:3 *EJIL* 867, at 883-4.

<sup>52</sup> Amnesty International, note.28, at.47-49.

<sup>53</sup> Dugard and Reynolds, note.51; Human Rights Watch, note.27; Amnesty International, note.28; Harvard Law School, International Human Rights Clinic and Addameer, *Apartheid in the Occupied West Bank* (February 2022).

<sup>54</sup> C. Lingaas, <https://www.ejiltalk.org/jewish-israeli-and-palestinians-as-distinct-racial-groups-within-the-meaning-of-the-crime-of-apartheid/>

regarding inherent racial differences.<sup>55</sup> Indeed, Article 1 of the ICERD – which preceded the *Convention Against Apartheid*, and is specifically mentioned in the *Convention's* preamble – provides a broad definition of “racial discrimination” that goes beyond ‘race’ and ‘colour’ to include ethnicity, descent and national origin:

“...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms...”<sup>56</sup>

37. Therefore, in the context of Israel’s actions towards the Palestinians living in the occupied territory, Jewish Israelis and Palestinian Arabs may be understood as distinct racial groups distinguished by their nationality, ethnicity, religion, ancestry and descent.<sup>57</sup> As social constructions, the creation of racial identity should be seen as a matter of perception, particularly in the eyes of a dominant group that distinguishes itself from other groups based on these various social markers. In our case, the Israeli government has determined the allocation, and the denial, of rights in the occupied Palestinian territory through a series of laws, practices and policies which define who is a Jew and who is not a Jew (the non-Jewish population being overwhelmingly Palestinian). The important point in international law is not what these respective groups represent in terms of any purported fixed identity, but rather how these respective groups are *treated* because of their perceived identity and classification.

#### **The Laws of Occupation and the Legal Prohibition Against Apartheid**

38. The crime against humanity of apartheid is capable of being committed during an occupation that is governed by international humanitarian law. First, Article 2 of the ICERD obligates states to “prevent, prohibit and eradicate all practices of this nature (i.e., ‘racial segregation and apartheid’) in territories under their jurisdiction.” This definition, drafted in the shadow of apartheid South Africa’s illegal mandate rule over Namibia, would capture the practices of any alien rule by a state beyond its recognized borders. Second, Additional Protocol 1 of the Geneva Conventions expressly prohibits apartheid, meaning that the High Contracting Parties anticipated that this crime could be committed during an occupation. And third, the application of one body of law does not displace the operation of the other, except in cases of express contradiction. The application of *lex specialis* – a traditional approach in international humanitarian law which postulates that, if two laws govern a particular situation, the more specific law overrides the more general law – must be interpreted carefully in these circumstances, in order not to deny the intended beneficiaries the robust protection of these laws.<sup>58</sup> The ascendent legal view is that different bodies of laws can apply simultaneously to a given situation where they may provide complementary and concurrent protection.<sup>59</sup> This applies equally to the laws of occupation and the prohibition against apartheid.<sup>60</sup>

### **C. The Application of the Apartheid Test to the Occupied Palestinian Territory**

39. Since the beginning of its occupation in June 1967, Israel’s rule over the Palestinian territory has been epitomized by two core features. First, the establishment of designed-to-

<sup>55</sup> C. Lingaas, *The Concept of Race in International Criminal Law* (Routledge, 2019).

<sup>56</sup> This definition was applied by the International Court of Justice in its *Advisory Opinion on Namibia*, note.40, at para.131.

<sup>57</sup> Harvard Law School, note.53; R.Falk and V.Tilley, *Israeli Practices towards the Palestinian People and the Question of Apartheid* (UN ESCWA, 2017).

<sup>58</sup> M.Jackson, University of Oxford, *Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law* (Diakonia, 2021).

<sup>59</sup> *Wall Advisory Opinion*, note.14.

<sup>60</sup> Jackson, note.58; Al-Haq, Addameer and Housing and Land Rights Network, note.25.

be irreversible ‘facts-on-the-ground:’ the creation of 300 civilian settlements, with 700,000 Jewish settlers, meant to demographically engineer an unlawful sovereignty claim through the annexation of the occupied territory while simultaneously thwarting the Palestinians’ right to self-determination. And second, the development of an oppressive system of military rule over the 2.7 million Palestinians in the West Bank, a shrunken and tenuous range of residency rights for the 360,000 Palestinians living in East Jerusalem, and a medieval military blockade of the two million Palestinians in Gaza.

40. These two features are deeply intertwined: it is impossible for an acquisitive occupying power to settle hundreds of thousands of its citizens into occupied territory, create for them attractive living conditions equivalent to the home territory, and expropriate and alienate huge swaths of land and resources for their benefit and security, without also immiserating the indigenous people and triggering their perpetual rebellion. The past 70 years has taught us that a covetous alien power has two choices: either to abandon the fever-dream of settler-colonialism and recognize the freedom of the indigenous people, or instead to double-down with increasingly more sophisticated and harsher methods of population control as the inevitable consequence of entrenching permanent alien rule over a people profoundly opposed to their disenfranchisement and destitution.

41. Israel has chosen the second path. Kofi Annan described this as a “prolonged and sometimes brutal occupation.”<sup>61</sup> Ban Ki-Moon has written that Israel’s “indefinite occupation” has been imposed by “inhumane and abusive acts.”<sup>62</sup> Barak Obama has criticized the “slow-motion annexation” of Palestinian land by Israeli settlements.<sup>63</sup> We must ask ourselves: Has this occupation now congealed into apartheid?

**(i) An Institutionalized Regime of Systematic Racial Oppression and Discrimination**

42. At the heart of Israel’s settler-colonial project is a comprehensive dual legal and political system which provides comprehensive rights and living conditions for the Jewish Israeli settlers in the West Bank, including East Jerusalem, while imposing upon the Palestinians military rule and control without any of the basic protections of international humanitarian and human rights law.<sup>64</sup> Against the grain of the 21st century, Israel assigns, or withholds, these rights and conditions on the basis of ethnic and national identity.

43. Politically and legally, Jewish Israeli settlers enjoy the same fulsome citizenship rights and protections as Israeli Jews living inside the country’s 1949 borders. The 475,000 Israeli settlers in the West Bank, all of whom live in Jewish-only settlements, have the full panoply of laws and benefits of Israeli citizenship extended to them personally and extra-territorially. Like Israelis in Tel Aviv or Eilat, the West Bank settlers have the same access to health insurance, national insurance, social services, education, regular municipal services and the right of entry into and out of Israel and around much of the West Bank. They also received targeted benefits and incentives from the Israeli government to live and work in the settlements.<sup>65</sup> The settlers are an integrated part of a wealthy society with a European standard of living.<sup>66</sup> The utilities and services which the settlements enjoy – water, power, housing, access to well-paid jobs, roads and industrial investment – are far superior to those available to the Palestinians. If settlers are charged with a crime, they are tried in an Israeli court with the full protection of Israeli criminal law. These settlers have the right to vote in Israeli elections, even though Israeli laws formally restrict the ability of Israeli citizens who live outside the country’s territory to vote. To be sure, there are some

<sup>61</sup> K. Annan, *Interventions* (Penguin, 2012), at 268.

<sup>62</sup> Ban Ki-Moon, note 18.

<sup>63</sup> B. Obama, *A Promised Land* (Crown, 2020) at 632.

<sup>64</sup> Harvard Law School, note 53; Thrall, note 34; Amnesty International, note 28; The Association for Civil Rights in Israel, *One Rule, Two Legal Systems* (October 2014); Human Rights Watch, note 27; Al-Haq et al, note 25; and D. Kretzmer and Y. Ronen, *The Occupation of Justice* (2<sup>nd</sup> ed.) (Oxford, 2021).

<sup>65</sup> [https://www.btselem.org/publications/202103\\_this\\_is\\_ours\\_and\\_this\\_too](https://www.btselem.org/publications/202103_this_is_ours_and_this_too)

<sup>66</sup> World Bank: Israeli GDP per capita in 2020 was \$44,168(US).

citizenship rights possessed by an Israel citizen that are not automatically extended territorially to the West Bank settlers, particularly regarding property, planning and building laws. However, Israeli military orders have been created to assign these rights to the local and regional settler councils in the West Bank, which effectively bridges the gap. These settler councils are regarded by Israel as equivalent to municipal councils inside Israel, and they are allocated substantial benefits and budgets by the Israeli government accordingly. The major para-statal institutions that have been given the authority to operate in the occupied territory – the Jewish National Fund, the Jewish Agency, the World Zionist Organization and a multitude of foreign charities – work solely for the benefit of consolidating the presence of Israeli Jews in the settlements.

44. In sharp contrast, the 2.7 million Palestinians living in the West Bank enjoy none of the rights, protections and privileges possessed by the Israeli Jewish settlers living among them. They can vote in elections (when they are held) for the Palestinian Authority, but it has exceptionally limited powers. They have no democratic or political rights to hold accountable the occupying power which exercises the overwhelming control over their lives. The ubiquitous barriers to freedom of personal and commercial movement throughout the occupied territory has resulted in a structurally de-developed economy. The United Nations Conference on Trade and Development has estimated that Israeli closures, the confiscation of land and resources, rapacious settlement growth and military operations have cost the Palestinian economy \$57.7 billion (US) in arrested development since 2000.<sup>67</sup> Yet, notwithstanding the travails of the occupation, Palestinian society has become highly literate and quite well-educated.<sup>68</sup> The result is a dynamic and talented population whose economy has become depleted and impoverished by a protracted military occupation, which is heavily dependent on international aid and which has only 1/13th the GDP per capita of Israel.<sup>69</sup>

45. The lives of the Palestinians in the West Bank are governed by more than 1800 military orders issued since 1967 by the Commander of the Israeli Defence Forces, covering such issues as security, taxation, transportation, land planning and zoning, natural resources, travel and the administration of justice. In particular, Israel has imposed a military legal system in the West Bank which applies to Palestinians, but not the Jewish settlers. The focus of the military legal system is the regulation of security, which covers such offenses as participating in protests and non-violent civil disobedience, standard criminal acts, traffic violations, terrorism, membership in over 400 banned organizations, taking part in political meetings and engaging in civil society activities. Palestinians arrested for security offences can be detained without charge for a much longer time period than Israeli settlers. The military legal system is presided over by Israeli military judges, trials are conducted in Hebrew (which many Palestinian detainees do not speak), it offers very few of the procedural and substantive protections of a purposive criminal legal system, the prisoners' lawyers are significantly restricted in their access to evidence, and the conviction rate is over 99 percent.<sup>70</sup> Even more draconian, there are, at any one time, hundreds of Palestinians imprisoned indefinitely through administrative detention, where they are incarcerated without the façade of a formal proceeding, that is: without charges, evidence, a trial or a conviction, and whose detention can be extended indefinitely. Investigations by Israel's military into deaths and serious injuries rarely result in any accountability.

46. A central strategy of Israeli rule has been the strategic fragmentation of the Palestinian territory into separate areas of population control, with Gaza, the West Bank and East Jerusalem physically divided from one another. The West Bank itself is further splintered into 165 disconnected enclaves. This strategic fragmentation – *divide et impera* – is geographically enforced by Israel through an elaborate series of walls, check-points,

<sup>67</sup> [https://unctad.org/system/files/official-document/a76d309\\_en\\_0.pdf](https://unctad.org/system/files/official-document/a76d309_en_0.pdf)

<sup>68</sup> Palestine Central Bureau of Statistics, *Palestine in Figures 2020* (2021).

<sup>69</sup> According to the World Bank, Palestinian GDP per capita in 2020 was \$3,239(US). (The World Bank only measures the West Bank and Gaza, and excludes East Jerusalem).

<sup>70</sup> [Judge\\_Jury\\_Occupier\\_report\\_War\\_on\\_Want.pdf](https://www.waronwant.org/Judge_Jury_Occupier_report_War_on_Want.pdf) (waronwant.org)

barricades, military closure zones, Palestinian-only roads and Israeli-only roads.<sup>71</sup> Israel closely monitors Palestinian society through advanced cyber-surveillance and its full control over the Palestinian population registry. The occupied Palestinian territory lacks any secure land, sea or air access to the outside world, with Israel controlling all of its borders (with the exception of the Rafah crossing between Gaza and Egypt). Palestinians require difficult-to-obtain special permits from the Israeli military to travel between the West Bank, East Jerusalem and Gaza.<sup>72</sup> This geographic division not only severs the Palestinians under occupation from each other socially, economically and politically, but also from Palestinians living in Israel and the wider world.<sup>73</sup> As the Special Rapporteur has previously observed: “No other society in the world faces such an array of cumulative challenges that includes belligerent occupation, territorial discontinuity, political and administrative divergence, geographic confinement and economic disconnectedness.”<sup>74</sup>

47. In the West Bank and East Jerusalem, Palestinian lands – the single most important natural resource in the territory – are being steadily expropriated by Israel for Jewish-only use and settlement, buttressed by discriminatory planning laws and military orders. Since 1967, Israel has confiscated more than two million dunams of Palestinian land in the West Bank,<sup>75</sup> which have been used to build settlements, Israeli-only highways and roads, recreational parks, industrial centres and military bases and firing zones, all for the purpose of cementing a permanent and immovable demographic presence. Israel has employed three primary methods for land confiscation: (i) the appropriation of land for ‘military needs,’ some of which have later been converted for civilian Jewish settlements; (ii) the designation of land for ‘public needs’, with the purpose of primary or exclusive Jewish Israeli use; and (iii) the declaration of ‘state land’, with the ultimate aim of using these lands primarily for Jewish Israeli purposes. According to Peace Now in 2018, the allocation of 99.76 percent of state land has been for the exclusive use of Israeli settlements.<sup>76</sup> Unlike Jewish settlers, Palestinians have no representation or voice on decision-making over zoning and property use throughout most of the West Bank. The United Nations has observed that, because permits for construction for Palestinian homes and property in East Jerusalem and Area C of the West Bank “are nearly impossible to obtain,” Palestinians often build without one. In turn, the Israeli military frequently orders the demolition of Palestinian homes and property built without a permit: the number of structures demolished in 2020 and 2021 are the second and third highest annual rates since these figures were first recorded in 2009.<sup>77</sup> And outside of official expropriation policies are the tolerated actions of Israeli settlers, who violence has been regularly employed to seize Palestinian land or make its use untenable.<sup>78</sup>

48. In East Jerusalem, the 360,000 Palestinians have a more enhanced social and legal status than Palestinians on the West Bank, but their position is still greatly inferior to the 230,000 Jewish settlers, who live among them in Jewish-only settlements. The Jewish settlers are regarded by Israel as residing in sovereign Israeli territory (arising from its two-stage illegal annexation of East Jerusalem in 1967 and 1980)<sup>79</sup> and, as such, they enjoy full citizenship rights, benefits and privileges. Almost all East Jerusalemite Palestinians possess residency status as opposed to Israeli citizenship; while this entitles them to some Israeli

<sup>71</sup> Regarding the separate highway system, see [Highway-to-Annexation-Final.pdf \(breakingthesilence.org.il\)](#)

<sup>72</sup> Gisha, *Separating Land, Separating People* (June 2015).

<sup>73</sup> Former prime minister Benjamin Netanyahu explained in 2019 that: “...maintaining a separation policy between the Palestinian Authority in the West Bank and Hamas in Gaza helps prevent the establishment of a Palestinian state.” [Netanyahu: Money to Hamas part of strategy to keep Palestinians divided - The Jerusalem Post \(jpost.com\)](#)

<sup>74</sup> A/71/554, para.41.

<sup>75</sup> Metric dunam is 1,000 square metres.

<sup>76</sup> [State Land Allocation in the West Bank — For Israelis Only - Peace Now](#)

<sup>77</sup> [Data on demolition and displacement in the West Bank | United Nations Office for the Coordination of Humanitarian Affairs - occupied Palestinian territory \(ochaopt.org\)](#).

<sup>78</sup> [State Business: Israel’s misappropriation of land in the West Bank through settler violence | \[site:name \(btselem.org\)\]](#)

<sup>79</sup> UNSC resolutions 476, 478 and 2334.

social rights (including health insurance), this residency status could be cancelled if they leave Jerusalem for a period of time, a threat which Jewish Israelis do not face. Approximately 75 percent of Palestinian families in East Jerusalem live below the poverty line, compared to 22 percent of Jewish families. Around 38 percent of land in East Jerusalem – mostly private Palestinian land, but some of it public land – had been expropriated by 2017 by the Israeli government for Jewish-only use, leaving Palestinian Jerusalemites with a diminished land base to accommodate its growing population.<sup>80</sup> The Palestinian neighbourhoods in East Jerusalem live with significant shortages in schools, much higher housing congestion, the discriminatory application of zoning and housing permits and much poorer access to municipal services (including sewage and water) than the Jewish settlers in their midst. Around 120,000-140,000 Palestinian Jerusalemites have been forced to live on the West Bank side of the separation wall, physically separated from access to the city and its services.<sup>81</sup> The intentionally discriminatory neglect of Palestinians in East Jerusalem is best illustrated by the Jerusalem Master Plan, which has created a target of maintaining a Jewish demographic majority of a 60:40 ratio, after having failed to maintain an earlier target of 70:30.<sup>82</sup>

49. In Gaza, Israel's apparent strategy is the indefinite warehousing of an unwanted population of two million Palestinians, whom it has confined to a narrow strip of land through its comprehensive 15-year-old air, land and sea blockade<sup>83</sup> (with further restrictions by Egypt on Gaza's southern border). Ban Ki-Moon has called this political quarantining of the population a "collective punishment",<sup>84</sup> a serious breach of international law.<sup>85</sup> The World Bank reported in 2021 that Gaza has undergone a multi-decade process of de-development and deindustrialization, resulting in a 45 percent unemployment rate, a 60 percent poverty rate and with 80 percent of the population dependent on some form of international assistance, in significant part because of the hermetic sealing of Gaza's access to the outside world.<sup>86</sup> Gaza's coastal aquifer, its sole source of natural drinking water, has become polluted and unfit for human consumption because of contamination by seawater and sewage, substantially driving up water costs for an already destitute population. The Strip is heavily dependent on external sources – Israel and Egypt – for power, and Palestinians live with rolling power blackouts of between 12-20 hours daily, severely impairing daily living and the economy. The entry and export of goods is strictly controlled by Israel, which has throttled the local economy. Gaza's health care system is flat on its back, with serious shortages of health care professionals, inadequate treatment equipment and low supplies of drugs and medicines. Palestinians in Gaza can rarely travel outside of the Strip, a denial of their fundamental right to freedom of movement. More acutely, they have endured four highly asymmetrical wars with Israel over the past thirteen years, with enormous loss of civilian life and immense property destruction. Gaza's suffering was acknowledged by Antonio Guterres in May 2021 when he said: "If there is a hell on earth, it is the lives of children in Gaza."<sup>87</sup>

**(ii) Established with the intent to maintain the domination of one racial group over another**

50. Across most of Israel's political spectrum is a widely-held consensus: Israel will keep East Jerusalem and either most or all of the West Bank, whether or not there is a peace agreement, and the Palestinians will remain under its permanent security control. Former prime minister Benjamin Netanyahu said in 2019: "A Palestinian state will endanger our

<sup>80</sup> UN Habitat, *Right to Develop: Planning Palestinian Communities in East Jerusalem* (2015).

<sup>81</sup> [East Jerusalem: Facts and Figures 2021 \(usrfiles.com\)](https://www.usrfiles.com)

<sup>82</sup> [Reversing Israel's Deepening Annexation of Occupied East Jerusalem | Crisis Group](#)

<sup>83</sup> Al Mezan, note.26; Gisha, *Area G: From Separation to Annexation* (June 2020); D. MacIntyre, *Gaza* (Oneworld, 2017).

<sup>84</sup> [UN chief Ban Ki-Moon calls for Israel to end 'collective punishment' blockade of Gaza - Middle East News - Haaretz.com](#)

<sup>85</sup> *Fourth Geneva Convention*, Article.33.

<sup>86</sup> World Bank, *Economic Monitoring Report* (17 November 2021). These are among the highest rates of any economic unit in the world monitored by the Bank.

<sup>87</sup> [Gaza children living in 'hell on earth', UN chief says, urging immediate end to fighting || UN News](#)

existence... I will not divide Jerusalem, I will not evacuate any community [settlement] and I will make sure we control the territory west of Jordan.”<sup>88</sup> Before he became prime minister, Naftali Bennett stated that: “The world does not respect a nation that is willing to give up its homeland. We need to apply Israeli law in Judea and Samaria.”<sup>89</sup> Defence Minister Benny Gantz declared in 2019 that: “We will strengthen the settlement blocs and the Golan Heights, from which we will never retreat. The Jordan Valley will remain our eastern security border.”<sup>90</sup> Minister of Transportation Merav Michaeli, when campaigning in 2019, stated: “No one thinks that half-a-million settlers will be evacuated from Judea and Samaria.”<sup>91</sup> And before he became foreign minister, Yair Lapid explained in 2016 that: “My principle says maximum Jews on maximum land with maximum security and with minimum Palestinians.”<sup>92</sup> Among recent and current Israeli political leaders, the only debate regarding the Palestinians has come down to tertiary issues: whether the Palestinians will be granted a shrunken statelet with its own postage stamps and a seat at the United Nations, or alternatively be kept in their present state of statelessness. Either way, the intent is for the Palestinians to be encased in a political ossuary, a museum relic of 21st century colonialism.

51. Except for a few weeks immediately following its 1967 occupation of the West Bank, East Jerusalem and Gaza, Israel has never accepted the international community’s wall-to-wall consensus that the Palestinian territory is occupied, the Geneva Conventions apply, and therefore the strict rules of international humanitarian law apply.<sup>93</sup> Israel’s refusal to accept the international community’s direction is not a honest difference over the interpretation of international law, but the obfuscation of an acquisitive occupier determined to maintain permanent control over the land and its indigenous population.. Within a few months of the June 1967 war, the Israeli cabinet was debating not whether to return the territory, but whether to either keep all of it or return only the major Palestinian cities to Jordan in a condominium arrangement.<sup>94</sup> In the summer of 1967, Israel initiated the construction of its first civilian Jewish settlements, covertly at first, and then openly. The most reliable route for an alien power that covets the territory it occupies is to establish irreversible facts on the ground through the creation of civilian settlements. This not only establishes a thickening demographic footprint that consolidates the planting of the national flag, but it also generates a growing domestic political constituency which will support the embryonic claim for territorial annexation. Israel’s intention in building the settlements was never primarily about security or increasing the incentive of neighbouring Arab states to negotiate a final peace agreement, but to ensure that it retained as much of the land as possible. As Yigal Allon, the Israeli Minister of Labour and a leading proponent of the settlements explained in 1969: “Here, we create a Greater Eretz Israel from a strategic point of view, and establish a Jewish state from a demographic point of view.”<sup>95</sup> Today, 10 percent of Israel’s Jewish citizens live in settlements in the occupied Palestinian territory, and the political constituency among Israeli Jews in support of settlement expansion continues to grow ever larger.

52. In 2018, the Israeli Knesset enacted the *Basic Law: Israel the Nation-State of the Jewish People*.<sup>96</sup> While Israel does not have a constitution, it has adopted a series of Basic Laws that have acquired a quasi-constitutional status. The Nation-State Law entrenches constitutional inequality and racial-national discrimination into Israel law by distinguishing

<sup>88</sup> <http://www.haaretz.com/misc/article-print-page/netanyahu-says-will-annex-west-bank-in-next-term-1.7089387>

<sup>89</sup> <https://www.jns.org/on-aipac-sidelines-israeli-ministers-express-support-for-settlemen>

<sup>90</sup> <https://www.haaretz.com/israel-news/elections/benny-gantz-netanyahu-rival-campaign-launch-speech-full-english-transcript-1.6892617>

<sup>91</sup> Michaeli: No one thinks half a million settlers will be evacuated - The Jerusalem Post (jpost.com)

<sup>92</sup> Yair Lapid: US helped Iran fund its next war against Israel - The Jerusalem Post (jpost.com)

<sup>93</sup> T.Meron, “The West Bank and International Humanitarian Law” (2017), 111:2 *American Journal of International Law* 357.

<sup>94</sup> A.Eldar & I. Zertal, *Lords of the Land* (Nations Books, 2007).

<sup>95</sup> R.Friedman, *Zealots for Zion* (Random House, 1992).

<sup>96</sup> <https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawNationState.pdf>

the rights of Jewish Israelis from Palestinians and other non-Jewish citizens of Israel.<sup>97</sup> Senior American foreign policy scholar David Rothkopf has written in Ha'aretz that: “[The Nation-State Law] creates an apartheid society in which ethnic identity trumps fundamental human rights.”<sup>98</sup> The Nation-State Law is consistent with the regular proclamation by Israeli political leaders, including Benjamin Netanyahu, that “Israel is not a state of all its citizens, but the nation-state of the Jewish people and them alone.”<sup>99</sup> The constitutionality of the Nation-State Law was upheld by the Israeli High Court in July 2021.<sup>100</sup> For the purposes of this report, Article 7 proclaims that:

“The State views the development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and strengthening.”

The reach of the Nation-State Law is not limited to the pre-1967 boundaries of Israel, as the Law refers to ‘the Land of Israel’, a broader and more flexible term applying to areas of historic Jewish settlement, including the occupied Palestinian territory. As Israel considers the Jewish settlements in East Jerusalem and the West Bank to be part of the country, it is to be expected that Article 7 will be employed by Israel in the future to justify further settlement expansion and the related methods to achieve that, including the expropriation of Palestinian land and resources.

### (iii) Inhuman(e) acts committed as an integral part of the regime

53. Israel’s administration of its occupation has been replete with a range of inhuman(e) acts prohibited by the Convention Against Apartheid and the Rome Statute. In summary form, these acts would include:

- Denial of the right to life and liberty: Israel’s rule is requiring increasingly more violence and confinement to be maintained: between January 2008 and February 2022, 5,988 Palestinians have been killed in the context of the occupation and conflict. (262 Israelis have died during the same time period). 2021 has been the deadliest year for Palestinians since 2014.<sup>101</sup> State-sanctioned extra-judicial killings by Israel continues to be part of its toolbox, including the killings of civilians posing no immediate threat to Israeli troops, and with little or no internal accountability.<sup>102</sup> In addition, Israel’s military courts incarcerates thousands of Palestinians on security charges through a judicial system that offers few of the international protections regarding due process, and the prevention of arbitrary arrest and detention.<sup>103</sup> Additionally, hundreds of Palestinians languish in administrative detention under open-ended confinement.<sup>104</sup> Collective punishment is frequently employed, whether it is the blockade of Gaza, the demolition of family homes of terror suspects or the withholding of bodies.<sup>105</sup>
- Denial of Full Participation in All Features of a Society: Palestinians not only have no voice or vote to hold accountable the military regime which governs much of their lives, they are also severely restricted through Israeli military orders in the exercise of their inherent rights to freedom of expression, assembly, association and

<sup>97</sup> Adalah, [Israel's Jewish Nation-State Law - Adalah](#).

<sup>98</sup> <https://www.haaretz.com/us-news/.premium-why-it-s-now-every-american-jew-s-duty-to-oppose-israel-s-government-1.6342202>

<sup>99</sup> Netanyahu Says Israel Is 'Nation-State Of The Jewish People And Them Alone' : NPR. Interior Minister Shaked has made the same remark: [Israel renews law to keep out Palestinian spouses - ABC News \(go.com\)](#)

<sup>100</sup> [Israel's top court rules the nation-state law is constitutional, denies petitions against it - Israel News - Haaretz.com](#)

<sup>101</sup> [Data on casualties | United Nations Office for the Coordination of Humanitarian Affairs - occupied Palestinian territory \(ochaopt.org\)](#)

<sup>102</sup> [A/HRC/40/74; Al-Haq Sends Urgent Appeal to UN Special Procedures on Israel’s Extrajudicial Killing of Three Palestinian Men in Nablus \(alhaq.org\)](#)

<sup>103</sup> [Enforcing Illegality: Israel’s Military Justice in the West Bank - QIL QDI \(qil-qdi.org\)](#)

<sup>104</sup> [Administrative Detention | Addameer](#)

<sup>105</sup> A/HRC/44/60.



movement within their own society. They are confined in travel by hundreds of checkpoints and separate roads and by the permit and ID system. They are restricted in their ability to leave and return to Palestine. Their right to work is impeded by a smothered economy, travel restrictions and the fragmentation of their territory. Hundreds of political and civil organizations are banned, and leading human rights organizations have been designated as ‘terrorist’ groups. Israel has imprisoned members of the (dormant) Palestinian Legislative Council. Fragmentation divides Palestinians and ensures more comprehensive control by Israel.

- **Measures which Divide the Population along Racial Lines:** Israel has created hundreds of Jewish-only settlements in East Jerusalem and the West Bank, living separate and apart from Palestinian Arabs. The Israeli settlers enjoy substantially superior rights, benefits, privileges and standards of living. In 2022, the Israeli Knesset adopted The Citizenship Law, which restricts the ability of Palestinians from Israel to marry spouses from the West Bank or Gaza; this does not apply to Israel Jews.<sup>106</sup> The Israeli military application of land, zoning and property rules in East Jerusalem and the West Bank discriminatorily benefits Israeli Jewish settlers and significantly disadvantages Palestinians. Separate settler and Palestinian highways run throughout the West Bank, and Jewish settlers do not encounter the myriad checkpoints and travel obstructions throughout the West Bank. Separate legal systems govern Israeli Jews and Palestinians.
- **Exploitation of Labour of a Racial Group:** Palestinians have become a reserve labour force for Israel and for its settlements. Israel recently announced that it is planning to issue up to 10,000 permits for Palestinians in Gaza to work in Israel.<sup>107</sup> Similarly, around 90,000 Palestinians in the West Bank have permits to work in Israel.<sup>108</sup> Another 35,000 Palestinians work in the Israeli settlements.<sup>109</sup> Many more work without permits. These jobs are almost all menial unskilled and semi-skilled positions in construction, agriculture and manufacturing, at the low end of Israel’s labour market, highly precarious, with no union protection and involving long journeys each day. Palestinians working in Israel are paid more than their counterparts in the occupied territory, but their working conditions and wages are considerably inferior to Israelis in the Israeli labour market, and they are subject to an abusive permit brokerage system. A 2021 report by the International Labour Organization noted the exceptionally harsh impact that the Covid-19 pandemic had on Palestinian employment and working conditions, given that Palestinian society lacks the social shock absorbers possessed by Israel to manage the abrupt labour crisis.<sup>110</sup>
- **Other Inhuman(e) Acts Causing Great Suffering:** Although strictly prohibited under international law, torture continues to be used in practice by Israel against Palestinians in detention. Methods of torture include sleep deprivation, beating and slapping, humiliation, unhygienic conditions and extended shackling in contorted position.<sup>111</sup> Challenges to the Israeli Supreme Court against its use have been unsuccessful.<sup>112</sup> Beatings by Israeli soldiers of Palestinians during an arrest are regularly reported, with little accountability.<sup>113</sup>

<sup>106</sup> [Israel just re-banned Palestinian family unification. What does this law do, and how can it be fought? - Israel News - Haaretz.com](#). In supporting the *Law*, the Israeli Interior Minister said: “There’s no need to mince words. The bill also has demographic reasons”.

<sup>107</sup> [Israel to boost number of Palestinian workers from Gaza, Gantz says | The Times of Israel](#)

<sup>108</sup> [Israel Considers Expanding Number of Work Permits for Palestinians in Gaza - Bloomberg](#)

<sup>109</sup> [palestinian-workers-in-israeli-settlements-webversion-1-page-view-1619871735.pdf \(alhaq.org\)](#)

<sup>110</sup> [wcms\\_793285.pdf \(ilo.org\)](#)

<sup>111</sup> [סופי-אנגלית-סעיני-נגד-הוועד-2021-מידע-דף.pdf \(stoptorture.org.il\)](#)

<sup>112</sup> <https://www.omct.org/en/resources/blog/its-now-even-more-official-torture-is-legal-in-israel>

<sup>113</sup> [Torture and Abuse in Interrogation | B'Tselem \(btselem.org\)](#)

## IV. Conclusion

54. International humanitarian law permits differential treatment of an indigenous population during an occupation, but only in a restricted fashion. Such treatment must be anchored in the principle that any infringements to human rights and equality is to be as minimal and proportional as possible during the conduct of an occupation that is both temporary and short-term. This is not the case in Israel's 55-year-old occupation. Permanent alien rule over occupied territory and its indigenous population is the antithesis of international humanitarian law and, in recent decades, the inexorable Israeli occupation has become indistinguishable from annexation.

55. Is this situation now apartheid? Applying each of the three steps of the amalgamated test from the Convention Against Apartheid and the Rome Statute, the Special Rapporteur has concluded that the political system of entrenched rule in the occupied Palestinian territory which endows one racial-national-ethnic group with substantial rights, benefits and privileges while intentionally subjecting another group to live behind walls, checkpoints and under a permanent military rule "*sans droits, sans égalité, sans dignité et sans liberté*" satisfies the prevailing evidentiary standard for the existence of apartheid.

56. First, an institutionalized regime of systematic racial oppression and discrimination has been established. Israeli Jews and Palestinian Arabs in East Jerusalem and the West Bank live their lives under a single regime which differentiates its distribution of rights and benefits of the basis of national and ethnic identity, and which ensures the supremacy of one group over, and to the detriment of, the other. (The Palestinian Authority exercises restricted jurisdiction and provides services in limited parts of the West Bank that Israel has no interest in delivering.) The differences in living conditions and citizenship rights and benefits are stark, deeply discriminatory and maintained through systematic and institutionalized oppression.

57. Second, this system of alien rule has been established with the intent to maintain the domination of one racial-national-ethnic group over another. Israeli political leaders, past and present, have repeatedly stated that they intend to retain control over all of the occupied territory in order to enlarge the blocs of land for present and future Jewish settlement while confining the Palestinians to barricaded population reserves. This is a two-sided coin: Israel's plans for more Jewish settlers and larger Jewish settlements on greater tracts of occupied land cannot be accomplished without the expropriation of more Palestinian property together with harsher and more sophisticated methods of population control to manage the inevitable resistance. Under this system, the freedoms of one group are inextricably bound up in the subjugation of the other.

58. And third, the imposition of this system of institutionalized discrimination with the intent of permanent domination has been built upon the regular practice of inhuman(e) acts. Arbitrary and extra-judicial killings. Torture. The violent deaths of children. The denial of fundamental human rights. A fundamentally flawed military court system and the lack of criminal due process. Arbitrary detention. Collective punishment. The repetition of these acts over long periods of time, and their endorsement by the Knesset and the Israeli judicial system, indicates that they are not the result of random and isolated acts but integral to Israel's system of rule.

59. This is apartheid. It does not have some of the same features as practiced in southern Africa; in particular, much of what has been called 'petit apartheid' is not present. On the other hand, there are pitiless features of Israel's 'apartness' rule in the occupied Palestinian territory that were not practiced in southern Africa, such as segregated highways, high walls and extensive checkpoints, a barricaded population, missile strikes and tank shelling of a civilian population, and the abandonment of the Palestinians' social welfare to the international community.<sup>114</sup> With the eyes of the international community wide open, Israel has imposed upon Palestine an apartheid reality in a post-apartheid world.

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<sup>114</sup> J.Dugard, *Confronting Apartheid* (Jacana,2018).

## V. Recommendations

60. The Special Rapporteur recommends that the Government of Israel fully comply with its obligations under international law and completely and unconditionally end the occupation of the Palestinian territory, with all deliberate speed.

(i) Throughout this process, it must end all discriminatory and apartheid laws, practices and policies which privilege Jewish Israelis living in the occupied territory and subjugate Palestinian Arabs.

(ii) Throughout this process and thereafter, it must fully respect the national rights and human rights of the Palestinians, it must enable them to exercise their freedom of movement, assembly, expression and association, and it must remove all arbitrary and inequitable restrictions on family life, property, employment, access and enjoyment of resources, education and daily life.

61. The Special Rapporteur recommends that the international community accepts and adopts the findings by Palestinian, Israeli and international human rights organizations that apartheid is being practised by Israel in the occupied Palestinian territory and beyond.

(i) The international community should assemble a diplomatic menu of accountability measures to bring the Israeli occupation and its practice of apartheid in the Palestinian territory to a complete end.

(ii) The international community should support any references or applications to the International Criminal Court and/or the International Court of Justice with respect to the legal consequences of the practice of apartheid in the occupied Palestinian territory.

62. The Special Rapporteur recommends that the United Nations re-establish the Special Committee Against Apartheid to investigate any and all practices of systematic discrimination and oppression purportedly amounting to apartheid anywhere in the world, including the occupied Palestinian territory.

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