



False Knowledge as Power: Deconstructing Definitions of Apartheid that Delegitimise the Jewish State

Joshua Kern & Anne Herzberg



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NGO Monitor's mission is to provide information and analysis, promote accountability, and support discussion on the reports and activities of NGOs claiming to advance human rights and humanitarian agendas.

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Introduction

The discourse on apartheid in the Israeli-Palestinian context is not new but it has fluctuated in intensity over the course of seven decades. Between January and June 2021, however, the campaign to brand Israel as a violator of the inter-State prohibition of apartheid, or its officials guilty of the crime, redoubled when several influential civil society organisations and authors – most notably Human Rights Watch and B'Tselem – launched a campaign alleging that Israeli officials are responsible for commission of crimes against humanity including apartheid.¹ In parallel, Diakonia, a Swedish aid agency, meanwhile commissioned Professor Miles Jackson for an opinion on the interplay between the legal regimes applicable to belligerent occupation and the inter-State prohibition of apartheid under international law.² Concurrent with these reports, in May 2021 two UN bodies – the Human Rights Council and the Committee on the Elimination of Racial Discrimination (CERD) – empanelled commissions to examine the charge of apartheid.³ There was also renewed lobbying directed at the Office of the Prosecutor of the International Criminal Court to investigate apartheid in Israel/Palestine. However, not one of these reports and initiatives has undertaken a detailed legal analysis of apartheid's definition as a crime against humanity. This is a contribution which this report provides, for use by academics, practitioners, journalists, and others.

The apartheid charge against Israel began with anti-Zionist Soviet propaganda in the 1950s, and has since been adopted and refined, including the rhetoric of Arab states and the PLO of the 1960s, through to the work of UN Rapporteurs John Dugard and Richard Falk from the 2000s, and most recently amplified by NGOs. In 1965, PLO official Fayez Sayegh referred to Israel as an “alien body” in the Middle East and alleged that Jews’ “supposed” common ancestry masks a fake and constructed nationhood, whilst claiming at the same time that “not even in South Africa or Rhodesia has European race-supremacism expressed itself in so passionate a zeal.”⁴ Sayegh highlighted what he described as Zionism’s “congenial, essential” racism and “aspiration to racial self-segregation.” In 2021, his work was endorsed by Noura

¹ Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (2021),

https://www.hrw.org/sites/default/files/media_2021/04/israel_palestine0421_web_0.pdf; B'Tselem, “A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This Is Apartheid, January 12, 2021, https://www.btselem.org/publications/fulltext/202101_this_is_apartheid.

² Miles Jackson, “Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law,” Diakonia, 2021 (hereinafter “Jackson”).

³ United Nations Committee on the Elimination of Racial Discrimination, *Decision on the admissibility of the inter-State communication submitted by the State of Palestine against Israel*, 30 April 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27047&LangID=E>; https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/CERD_C_103_R-6_9416_E.pdf; <https://www.ohchr.org/EN/HRBodies/HRC/ColOPT-Israel/Pages/Index.aspx>.

⁴ Fayez Sayegh, “Zionist Colonialism in Palestine (1965),” *Settler Colonial Studies* 2, no. 1 (January 2012): 206–25, <https://doi.org/10.1080/2201473x.2012.10648833>.

Erakat on the blog of the *European Journal of International Law* and by Tareq Baconi in the *New York Review of Books*.⁵

In 1965, the Soviet Union spearheaded efforts to have Zionism included as a form of racial discrimination during drafting of the International Convention on the Elimination of all forms of Racial Discrimination.⁶ By 1975, the Arab League and the Soviet bloc had succeeded in passing a General Assembly resolution equating Zionism to racism.⁷ Although the resolution was repealed in 1991, the apartheid charge was revived at the UN during the preparations for the 2001 Durban Conference where Israel's "brand of apartheid" was used as the basis for a campaign to isolate and delegitimise the Jewish State in a manner akin to the boycott of apartheid South Africa.⁸ In a 2007 report to the UN Human Rights Council, Dugard queried the "legal consequences of a regime of prolonged occupation with features of colonialism and apartheid," and recommended that it be addressed in an advisory opinion of the International Court of Justice. In 2009, the Human Sciences Research Council of South Africa published a detailed report claiming to scrutinise Dugard's suggestion. This study has since given rise to a series of academic papers, NGO publications, and reports from other UN Rapporteurs and agencies. A paper (authored in part by Falk) and issued by the UN agency ESCWA in 2017, making similar claims was deemed to be "false and biased",⁹ leading UN Secretary General Antonio Guterres immediately to recall it.¹⁰

To date, Israel's response has been dismissive. The apartheid allegation has been met by accusations of antisemitism, and these responses have been rejected by Palestinian advocates and their supporters in turn.¹¹ Yet the debate reveals uncomfortable truths both for those making the allegation, as well as for Israel itself. For Israel and its supporters, after more than 60 years of military administration in the West Bank, a conversation that frames discrepancies in treatment of Israelis and

⁵ Noura Erakat, "Beyond Discrimination: Apartheid Is a Colonial Project and Zionism Is a Form of Racism," EJIL: Talk!, July 5, 2021, <https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism/>; Tareq Baconi, "What Apartheid Means for Israel," The New York Review of Books, November 5, 2021, <https://www.nybooks.com/daily/2021/11/05/what-apartheid-means-for-israel/>. See also Rania Muhareb and Pearce Clancey in, "Palestina Y El Significado de La Dominación En El Colonialismo de Asentamiento Y El Apartheid," *República Y Derecho* 6, no. 6 (October 25, 2021): 1–30, <http://revistaryd.derecho.uncu.edu.ar/index.php/revista/article/view/217>.

⁶ Ofra Friesel, "Equating Zionism with Racism: The 1965 Precedent," *American Jewish History* 97, no. 3 (2013) (hereinafter "Friesel"), 283–313, <https://muse.jhu.edu/article/511600>.

⁷ Daniel P Moynihan and Suzanne Weaver, *A Dangerous Place* (New York: Berkley Books, 1980).

⁸ NGO Forum Declaration paragraph 425; WCAR NGO Forum Declaration, para. 162. <https://academic.udayton.edu/race/06hrights/WCAR2001/NGOFORUM/Palestinans.htm>.

⁹ <https://www.reuters.com/article/us-un-israel-report-resignation/senior-u-n-official-quits-after-apartheid-israel-report-pulled-idUSKBN16O24X>.

¹⁰ See *infra* pp.17-18.

¹¹ See e.g. Palestinian complaint to the UN Committee on the Elimination of Racial Discrimination, "Interstate Complaint under Articles 11-13 of the International Convention for the Elimination of All Forms of Racial Discrimination: State of Palestine vs. Israel, 2018, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_ISC_9325_E.pdf at p. 301.

Palestinians by reference to a discourse of institutional discrimination is inherently unavoidable. An apartheid comparison may not necessarily be antisemitic *per se* as, for example, Nazi comparisons are.¹² Palestinians' rights are curtailed in "Area C" of the West Bank, which is under Israeli effective control (as established by the Oslo Accords, witnessed and endorsed by representatives of the international community as well as the UN Security Council), and Palestinians and Israelis are subject to separate systems of law there. It is reasonable to expect Israel (or any democracy respectful of the rule of law) to provide objective and substantive justifications for the imposition of prolonged restrictions in areas under its overall control, and to expect criticism for a failure to do so.

On the other hand, the discourse of apartheid framed by those accusing Israeli officials of the crime often employs classical, antisemitic, tropes and themes, and frequently evokes maximalist claims of a resistance struggle spanning "from the river to the sea." Such rhetoric constitutes a fundamental impediment to a negotiated solution to the Israeli-Palestinian conflict based on territorial compromise. Unsurprisingly, therefore, this discourse is viewed with significant yet reasonable concern by many Jewish communities in Israel and in the diaspora.

Meanwhile, the legal contours of apartheid as a crime against humanity remain underexplored. To date, the crime has never been prosecuted,¹³ and accordingly, judicial guidance as to its elements remains lacking. The academy has provided contributions from Carola Lingaas and Miles Jackson, supplementing earlier work by Roger Clark. But significant gaps remain. This report examines this position, where a grave allegation of crimes against humanity is made by civil society actors and there is a subsisting absence in both scholarship and reporting on the content of the elements of the crime itself.

The discourse of apartheid inevitably begins with a conversation on the policies and practices of apartheid in southern Africa between 1948 and 1994.¹⁴ Given apparent

¹² But see IHRA, "Working Definition of Antisemitism," <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>. Claiming that "the existence of a State of Israel is a racist endeavor" is provided as a contemporary example of antisemitism under the IHRA's working definition of antisemitism.

¹³ But see Foundation for Human Rights and Webber Wentzel, "Press Release: Historic Crimes against Humanity Indictment in COSAS 4 Case," Foundation for Human Rights, November 23, 2021, <https://unfinishedtrc.co.za/press-release-historic-crimes-against-humanity-indictment-in-cosas-4-case/>; Esther Chihaavi, "Apartheid Charged as Crime against Humanity for First Time in South Africa," Jurist, November 26, 2021, <https://www.jurist.org/news/2021/11/apartheid-charged-as-a-crime-against-humanity-for-the-first-time-in-south-africa/>.

¹⁴ Alternatively, both February 1991 and February 1990 can be posited as the "terminal point" of apartheid in South Africa. In February 1991, De Klerk announced that the remaining legislative pillars of apartheid, the Population Registration Act of 1950, the Group Areas Act of 1950, and the Natives Land Act of 1913 would be repealed. The actual process of repeal was completed in June of that year. The *New Oxford English Dictionary* treated February 1991 as the terminal date of apartheid. However, it "might just as reasonably be argued that De Klerk's announcement of the release of Nelson Mandela in February 1990 spelled the end of apartheid. This initiative clearly entailed a commitment to enter into negotiations to

consensus that the South African experience informs our understanding of apartheid, it bears recalling core features of those practices. Such an analysis not only provides a comparative, empirical context to the discussion, but it also informs the legal analysis and understanding of the crime of apartheid.

This report is therefore comprised of three sections. The first considers the policy and practices of apartheid as practised in southern Africa. In the second, we examine the nature and evolution of the apartheid allegation levelled against Israeli officials, as well as responses and defences to the allegation to date. The third part examines the law of apartheid and seeks to answer questions relating to the crime's customary status, the relevance of the southern African experience to its legal definition, and its elements' definition under the Rome Statute of the International Criminal Court. We unpack the genesis and doctrinal sources of the definition of apartheid applied in recent NGO reporting, and question whether apartheid as a crime against humanity incurring individual criminal responsibility can be said to have crystallised under customary international law at all, irrespective of whether apartheid's inter-State prohibition is of a peremptory nature.

Given the differing contexts in which apartheid is prohibited, and the absence of universal acceptance of its definition in either the 1973 Apartheid Convention or the Rome Statute, we conclude that the legal basis for the definition proposed in certain NGO publications is doubtful. In a companion report to be published at the beginning of 2022, we will address the application of these legal elements specifically to the situation in Israel, the West Bank, and Gaza Strip.

Part I: Introduction to the policies and practices of apartheid in South Africa

The legal system of apartheid ("separateness" or "apartness") was instituted in South Africa as state policy after the Nationalist Party formed a government in May 1948. The South African legal system imposed rigid segregation of races in housing, education, medical care, employment and virtually every area of public and private life and in practice it involved both systematic and widespread violations of human rights.¹⁵

bring about an entirely new political dispensation." Adrian Guelke, *Rethinking the Rise and Fall of Apartheid* (London 2005) (hereinafter "Guelke"), p.17. See also *id.*, p.18-19.

¹⁵ Hall and van den Herik in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Bloomsbury 2016) (hereinafter "Hall and van den Herik"), mn 7-92. See also <https://digitallibrary.un.org/record/2318?ln=en>.

Segregation in South Africa between 1910 and 1948

Racial (white) supremacy and segregation had been cornerstones of policy in southern Africa since the turn of the twentieth century. At the first negotiations during the Boer War (in March 1901), Alfred Milner (British governor of the newly acquired South African colonies) assured the Boers that any franchise rights extended to Africans would be granted only on terms that would ensure “the just predominance of the white race.”¹⁶ This framework corresponded with the “acceptance of a segregationist ideology by most white politicians.”¹⁷ Clark and Worger argue that a commitment to segregation and the institutionalising of white supremacy underpinned the establishment of the Union of South Africa on 31 May 1910.¹⁸

Between 1910 and 1948, the Union government enacted significant segregationist legislation. The Native Land Act of 1913 made it illegal for Africans to purchase lands outside areas designated as native reserves, with equivalent legislation applied to the Cape in 1936.¹⁹ The Apprenticeship Act of 1922 provided that Africans could not be apprenticed.²⁰ Sexual relations between persons of different races were criminalised by the Immorality Acts in 1927.²¹ The victory of the National Party in the 1948 elections and the formal institution of the apartheid system in South Africa had therefore been preceded by a broad spectrum of segregationist legislation. Pass laws, disenfranchisement measures, laws providing for residential segregation, laws banning land sales to Indians, and laws designed to force black South Africans into “locations” were all features of the South African legal landscape before 1948.²²

Apartheid as practised in South Africa after 1948

After 1948, every aspect of the National Party’s legislative programme was determined by race.²³ The Reservation of Separate Amenities Act of 1953 stated that all races should have separate amenities, such as toilets, parks, and beaches, and that these did not need to be of equivalent quality. The Native Labour Act of 1953

¹⁶ Nancy Clark and William H. Worger, *South Africa: The Rise and Fall of Apartheid* (London: Longham 3rd ed., 2016) p.16 (hereinafter “Clark and Worger”), citing Newton and Benians, 1936, vol. 8: 606.

¹⁷ Clark and Worger, p.17-18.

¹⁸ Ibid., p.19-20.

¹⁹ Guelke, p.65.

²⁰ Ibid., p.25.

²¹ Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford University Press (Oxford, New York: Oxford University Press, 2016) (hereinafter “Thornberry”), p.236 citing the Immorality Act of 1927, which prohibited relations between “Europeans” and “Natives”, and was amended in 1950 to prohibit sexual relations between “Europeans” and “non-Europeans”; a second Immorality Act of 1957 (subsequently named the Sexual Offences Act 1957) continued the prohibitions. The Acts were repealed in 1985 by the Immorality and Prohibition of Mixed Marriages Amendment Act.

²² Thornberry, p.236.

²³ Clark and Worger, p.46.

precluded Africans from legal union representation and from staging strikes. The Bantu Education Act of 1953 removed state subsidies from denominational schools, with the result that most mission-run African institutions were sold to the government or closed. At university level, the Extension of University Education Act of 1959 prohibited Africans from attending white institutions of higher education, with few exceptions, while establishing separate universities and colleges for Africans, “Coloureds”, and Indians.²⁴

The Population Registration Act of 1950 provided for racial classification of the entire population.²⁵ The Group Areas Act of 1950 established the main basis for enforcement of residential segregation in urban areas.²⁶ The Prohibition of Mixed Marriages Act of 1949 made mixed marriages illegal. The Immorality Act of 1950 affirmed the prohibition of sexual relations between individuals from different racial groups.²⁷ The Industrial Conciliation Act of 1956 empowered the government to lay down what jobs individuals of a particular race could perform. The Bantu Labour Amendment Act of 1970 empowered the “Minister of Bantu Administration and Development” to prohibit employment of Africans in specified areas, classes of employment, trades, or by specified employees.²⁸

In the 1970s, the Vorster government enacted two significant pieces of legislation, the Bantu Homelands Citizenship Act of 1970 and the Bantu Homelands Constitution Act of 1971. The former “turned the entire African population into citizens of one or another of the homelands, regardless as to whether they had even lived in the homeland in question. The latter empowered the government to confer self-government on the territorial authorities it had created.”²⁹

Clark and Worger conclude that by “the end of apartheid’s first decade, its intent and form had become clear: racial separation under white supremacy backed by increasing police powers.”³⁰ Indeed, “under [Hendrik] Verwoerd’s ideological blueprint,” only abandoned by the National Party in the 1980s, the “intention was that South Africa would be left with no African citizens” and the presence of Africans in white South Africa should be dependent on their capacity to serve the needs of white society.”³¹

²⁴ Ibid., p.54.

²⁵ Guelke, p.25.

²⁶ Ibid., p.26.

²⁷ Ibid., p.27.

²⁸ Ibid., p.29.

²⁹ Ibid., p.125.

³⁰ Clark and Worger, p.70.

³¹ Guelke, p.28.

Part II: The evolution of the apartheid allegation against Israeli officials

From the outset of the Arab-Israeli conflict, Zionism, the movement for Jewish self-determination in Israel, has been portrayed as a form of racism and the existence of Israel as a nation state for the Jewish people illegitimate.³² Following the establishment of the Jewish State in 1948, and coupled with decolonisation and shifting political alliances during the Cold War, these narratives began to appear in UN and other international frameworks.³³

The Soviet Union played a central role in disseminating anti-Zionist propaganda as part of the dynamics of the Cold War, and also to quell what it deemed to be the internal threat of its Jewish minority.³⁴ In the 1950s, Arab League and Soviet strategic interests converged, leading to “unqualified support for the Arab countries, providing them with military, economic and diplomatic aid, organizing support for the Arab cause throughout the world, and mobilizing world public opinion against Israel.”³⁵ This support included mobilizing the Soviet propaganda apparatus against Israel.³⁶

Soviet anti-Zionist propaganda was based on multiple themes – how the “true nature” of the Arab-Israeli conflict was one of world imperialism suppressing national liberation movements;³⁷ the cruelty of Israeli soldiers and how their methods were comparable to the Nazis; and the commission of atrocities committed by Israel both inside and outside of Israel.³⁸ The driving force behind these acts was the “nature of Zionism”. Zionism was portrayed as the central agent of foreign capital and international imperialism,³⁹ it provoked antisemitism and needed it to flourish in order to sustain itself,⁴⁰ and it was a “Trojan horse” for racism.⁴¹ This final theme emphasised the “ideological affinity” between Zionism and South African racism, and claimed that “racist ideology is the substance of Zionism.”⁴² Decades later, and long

³² Robert P. Barnidge, *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine* (Bloomsbury, 2018) (hereinafter “Barnidge”); Steven E. Zipperstein, *Law and the Arab-Israeli Conflict: the Trials of Palestine* (Routledge, 2020).

³³ See, e.g., Baruch A. Hazan, *Soviet Propaganda: A case study of the Middle East Conflict* (Wiley and Sons, New York 1976); William Korey, *Russian Antisemitism, Pamyat, and the Demonology of Zionism* (University of Toronto Press, 1995).

Asmund Borgen Gjerde, “The logic of anti-Zionism: Soviet elites in the aftermath of the Six-Day War”, ³⁴ 2018 *Patterns of Prejudice* 52: 271-92

³⁵ Hazan, p. 6-7.

³⁶ Ibid. at 7.

³⁷ Ibid at 145.

³⁸ Ibid at 144.

³⁹ Ibid at 150.

⁴⁰ Ibid at 152.

⁴¹ Ibid.

⁴² Ibid. at 152, 163.

after the demise of the USSR, these themes continue to be a feature of publications alleging apartheid against Israel.

In October 1964, following Soviet and Arab League lobbying, the Non-aligned movement (NAM) summit conference declared Zionism to be a form of racism,⁴³ and in 1965, during drafting of the Convention on the Elimination of Racial Discrimination (ICERD), the USSR proposed an amendment to the draft Convention including Zionism alongside Nazism, neo-Nazism and antisemitism as a prohibited form of racial discrimination.⁴⁴

Zionism was not only equated with racism but was also portrayed as embodying its aggravated form: apartheid. In 1961, an Iraqi delegate levied the charge at the UN.⁴⁵ He alleged that apartheid was manifest in the State of Israel and was an integral feature of Zionism. A 1965 article by Fayez Sayegh, founder of the PLO's Research Center and Executive Committee member, and a UN representative for the Arab States' Delegation,⁴⁶ exemplified this discourse.⁴⁷ Tropes, including the denial of Jewish peoplehood, accusations of Jewish clannishness, Jewish foreignness to the Middle East, supposed claims of Jewish superiority, and conspiracies about Jewish financiers, were themes underlying this writing. Sayegh alleges:

The Zionist settler state remains an alien body in the region. Not only its vital and continuing association with European imperialism, and its introduction into Palestine of the practices of Western colonialism but also its chosen pattern of racial exclusiveness and self-segregation renders it an alien society in the Middle East.

The Zionist settler state has learned all the lessons which the various discriminatory regimes of white settler states in Asia and Africa can teach it. And it has proved itself in this endeavour an ardent and apt pupil, not incapable of surpassing its teachers... Not even in South Africa or Rhodesia has European race-supremacism expressed itself

⁴³ Barnidge, p. 66.

⁴⁴ Friesel, p. 303. See also James Loeffler, "Three days in December: Jewish human rights between the United Nations and the middle east in 1948," *Journal of Global History* (2021) 1–19, doi:10.1017/S1740022821000322, p. 10. Loeffler, *Rooted Cosmopolitans* (Yale 2018); Ofra Friesel, "Race versus Religion in the Making of the International Convention Against Racial Discrimination, 1965," *Law and History Review*, Vol. 32, No. 2 (May 2014), pp. 351–383.

⁴⁵ John Quigley. "Apartheid outside Africa: The Case of Israel." *Indiana International and Comparative Law Review* 2 (1991) (hereinafter "Quigley"), p. 221–252.

⁴⁶ Sayegh was a co-author of General Assembly resolution 3379, equating Zionism with racism. Sayegh at p. 206.

⁴⁷ This discourse is still employed today and Sayegh remains an influential source. See, e.g. Erakat, Baconi.

in so passionate a zeal... as it has in Palestine under the compulsion of Zionist doctrines.⁴⁸

Whereas, at times, the discourse equated Zionism to apartheid, at others, Zionism was included, in parallel to colonialism and apartheid, as a free-standing yet core evil in the post-World War II international order. In 1973, the NAM Conference called for the eradication of Zionism, a full boycott of Israel, and, echoing the PLO Charter of 1964, the blocking of Jewish immigration to anywhere in the territory of what had been mandatory Palestine west of the Jordan River.⁴⁹ The 1975, the Soviet-Arab campaign extended to the UN Women's Conference in Mexico City, which called for the elimination of Zionism and equated Judaism with the "nastiest forms of racial and group oppression."⁵⁰ Debates surrounding passage of the 1973 Apartheid Convention centred on whether to refer to Zionism expressly, and claims that Zionism equated to racism were replete in UN pronouncements, culminating in the passage in 1975 of General Assembly Resolution 3379.⁵¹

Resolution 3379 reiterated and amplified those earlier statements. It referenced General Assembly Resolution 3151 of December 1973, which condemned "the unholy alliance between South African racism and Zionism."⁵² It further referenced the declaration of the 1975 Women's Conference, taking note that the final declaration promulgated the principle that "international co-operation and peace require...the elimination of colonialism and neo-colonialism, foreign occupation, zionism (sic), *apartheid* and racial discrimination in all its forms."⁵³ The resolution also cited the Organization of African Unity's August 1975 resolution 77 (XII), which considered that "the racist regime in occupied Palestine and the racist regimes in Zimbabwe and South Africa have a common imperialist origin, forming a whole and having the same racist structure and being organically linked."⁵⁴ Finally, the text took note of the 1975 NAM declaration that "most severely condemned zionism (sic) as a threat to world peace and security and called upon all countries to oppose this racist and imperialist

Sayegh p. 216. Erakat quotes Sayegh to conclude that the "Zionist belief that Jews constitute a race and ⁴⁸ a singular people, irrespective of religious piety or identification, produces "three corollaries: racial self-segregation, racial exclusiveness, and racial supremacy."

⁴⁹ Barnidge, p. 78.

⁵⁰ Moynihan, p. 172.

⁵¹ A/RES/3379(XXX), 10 November 1975. As Roberts notes, "The potential of UN resolutions has been undermined by political partiality and intellectual inconsistency. The General Assembly's espousal in 1975 of the resolution equating Zionism with racism was the most spectacular, but not the only, example of a denunciatory and self-defeating approach." Adam Roberts in Emma Playfair, *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip; Proceedings of a Conference Organized by Al-Haq in Jerusalem in January 1988* (Oxford: Clarendon Press, 1992), at 82.

⁵² Resolution 3379.

⁵³ Ibid.

⁵⁴ Ibid.

ideology.”⁵⁵ The resolution concludes with the determination that “zionism (sic) is a form of racism and racial discrimination.”⁵⁶

Throughout the 1970s and 80s, and into the early 1990s, concurrent with these UN activities, studies of the “South Africanization of Israel” and ties between the governments of Israel and South Africa proliferated in academic literature and the media.⁵⁷ Elsewhere, where distinctions were drawn between South Africa and Israel, literature sought to define Israel as a “new form” of apartheid.⁵⁸ Notably, no distinction was made between Israel behind the Green Line and the territories beyond it. The assertion of Israeli Jewish sovereignty anywhere in formerly mandatory Palestine was illegitimate and a violation of international law.

In 1991, following American pressure, General Assembly resolution 3379 was repealed, and due to global and local political developments (including the end of the Cold War and the initiation of the Oslo Peace Process), attacks at the UN on Israel’s legitimacy abated. However, the mechanisms established with 3379 remained active, and a 1995 article in the *Journal of Palestine Studies* advocated a strategy shifting “from the ‘occupied territories’ paradigm to an ‘apartheid’ paradigm as a way for antiracist intellectuals, especially in the US, to analyze the Arab-Jewish conflict in Palestine.”⁵⁹ The article further positioned the conflict as one where a “European colonial population has rights and the indigenous one does not,” that the Palestinians “have never been victims of petty apartheid but grand apartheid,”⁶⁰ and that the two-state paradigm must be “rejected by principled people of good will.”⁶¹ As described below, this strategy would subsequently be promoted in UN frameworks and repeated by UN rapporteurs.

In 2001, as the UN organized a World Conference Against Racism (WCAR) to be held in Durban, South Africa, the Islamic states, Arab League, and Palestinian NGOs sought to place the apartheid narrative at the center of the agenda. Preparatory meetings were held in Tehran, Dakar, Bangkok, and Santiago. The Tehran PrepCom’s draft declaration and plan of action singled out Israel for special opprobrium, equating Israel’s policies to racism in multiple paragraphs. The Declaration was to:

⁵⁵Ibid.

⁵⁶Ibid.

⁵⁷ See, e.g. Israel Shahak, Oded Pilavsky, and Akiva Orr, “An Exchange on Zionism,” *New York Review of Books*, 30 November 1972; Uri Davis, “Palestine into Israel,” 3 *Journal of Palestine Studies* 88-105 (1973); Alfred Moleah, “Israel/South Africa: The Special Relationship,” *Africa Report* (Nov-Dec 1980), 12-17; Moleah, “Violations of Palestinian Human Rights: South African Parallels,” 1981 *Journal of Palestine Studies* 14, Brice Harris, “The South Africanization of Israel,” 6(3) *Arab Studies Quarterly* 169-89 (1984); Letter to the Editor, “Israel and South Africa,” *Los Angeles Times*, 2 September 1985.

⁵⁸ See Quigley.

⁵⁹ Mark Marshall, “Rethinking the Palestine Question: The Apartheid Paradigm”, 25 *Journal for Palestine Studies* 15 (1995).

⁶⁰ Id at 18.

⁶¹ Id at 20.

20. Affirm that a foreign occupation founded on settlements, its laws based on racial discrimination with the aim of continuing domination of the occupied territory, as well as its practices, which consist of reinforcing a total military blockade, isolating towns, cities and villages under occupation from each other, totally contradict the purposes and principles of the Charter of the United Nations and constitute a serious violation of international human rights and humanitarian law, a new kind of apartheid, a crime against humanity, a form of genocide and a serious threat to international peace and security;⁶² [and]

21. Recall with deep regret the practices of racial discrimination against the Palestinians as well as other inhabitants of the Arab occupied territories which have an impact on all aspects of their daily existence such as to prevent the enjoyment of fundamental rights, express our deep concern about this situation and call for the cessation of all the practices of racial discrimination to which the Palestinians and the other inhabitants of the Arab territories occupied by Israel are subjected[.]⁶³

The Conference's Draft Declaration and Programme of Action included as alternative drafts amended versions of these paragraphs,⁶⁴ equated Zionism not only with racism but also antisemitism, characterised Zionism as a "violent movement" based on "racial superiority," and urged member states to educate children and others about its dangers. It stated:

67. [We are convinced that combating anti-Semitism, Islamophobia and [Zionist practices against Semitism] is integral and intrinsic to opposing all forms of racism and stress the necessity for effective measures to address the issue of anti-Semitism, Islamophobia and [Zionist practices against Semitism] today in order to counter all manifestations of these phenomena;]...⁶⁵

68. [We recognize with deep concern the increase in anti-Semitism and hostile acts against Jews in various parts of

⁶² UNGA, *Reports of Preparatory Meetings and Activities at the International Regional and National Levels*, UN Doc A/CONF.189/PC.2/9 (10 April 2001), 7.

⁶³ Ibid.

⁶⁴ UNGA, *Draft Declaration*, UN Doc A/CONF.189/4 (20 August 2001); UNGA, *Conference Themes: Draft programme of action*, UN Doc A/CONF.189/5 (22 August 2001).

⁶⁵ UNGA, *Draft Declaration*, UN Doc A/CONF.189/4 (20 August 2001).

the world, as well as the emergence of racial and violent movements based on racism and discriminatory ideas concerning the Jewish community.] [The World Conference recognizes with deep concern the increase of racist practices of Zionism and anti-Semitism in various parts of the world, as well as the emergence of racial and violent movements based on racism and discriminatory ideas, in particular the Zionist movement, which is based on racial superiority;]⁶⁶...

150. [Calls upon States to commit themselves to undertaking public information campaigns or other more long-term initiatives, inter alia through the media, to alert their societies to the dangers of racism, racial discrimination, xenophobia, [anti-Semitism], Islamophobia and racist practices of Zionism and related intolerance, and to support initiatives of non-governmental organizations in this respect. Such campaigns or initiatives need to be addressed to the whole of society, in particular young people, including children. The World Conference also calls upon States to undertake and facilitate activities aimed at educating young people in human rights and democratic citizenship and instilling the values of solidarity, respect and appreciation of diversity. A special effort to inform and sensitize young people to respect minorities and democratic values should be undertaken or developed to fight against ideologies based on so-called racial superiority;]⁶⁷

173. Expresses concern at the material progression of racism, including contemporary forms and manifestations of racism such as the use of the Internet to disseminate ideas of racial superiority. ... racist practices of Zionism.⁶⁸

Participants in the Durban conference, such as US Representative Tom Lantos, attributes the failure to counter this campaign to Mary Robinson, then serving as the High Commissioner for Human Rights. Lantos wrote "it is clear that much of the responsibility for the debacle rests on [Robinson's] shoulders."⁶⁹ In her

Ibid.⁶⁶

UNGA, *Conference Themes: Draft programme of action*, UN Doc A/CONF.189/5 (22 August 2001).⁶⁷

Ibid.⁶⁸

⁶⁹ Tom Lantos, "Durban Debacle: An Insider's View of the UN World Conference Against Racism," *Fletcher Forum of World Affairs*, 2002, pp.32-33.

autobiography, Robinson claims to have belatedly sought to amend the draft instrument in order to prevent a full-scale European walkout from the conference (the US and Israel had already left).⁷⁰ The Tehran language was largely cut from the declaration, but it remained in the NGO Forum Declaration, which “declared Israel as a racist, apartheid state in which Israel’s brand of apartheid as a crime against humanity has been characterized by separation and segregation, dispossession, restricted land access, denationalization, bantustanization and inhumane acts.”⁷¹

The declaration also repeated references to “Israel’s brand of apartheid” and Israel’s “new form of apartheid regime.”⁷² It asserted Israeli policies on both side of the Green Line were “designed to ensure the continuation of an exclusively Jewish state with a Jewish majority and the expansion of its borders to gain more land, driving out the indigenous Palestinian population.”⁷³ It called for “the reinstitution of UN resolution 3379 determining the practices of Zionism as racist practices which propagate the racial domination of one group over another.”⁷⁴ As a result, the plan of action called for, *inter alia*.⁷⁵

424. ... the launch of an international anti Israeli Apartheid movement as implemented against South African Apartheid through a global solidarity campaign network of international civil society, UN bodies and agencies, business communities and to end the conspiracy of silence among states, particularly the European Union and the United States.

425. ... the international community to impose a policy of complete and total isolation of Israel as an apartheid state as in the case of South Africa which means the imposition of mandatory and comprehensive sanctions and embargoes, the full cessation of all links (diplomatic, economic, social, aid, military cooperation and training) between all states and Israel. [It called] upon the Government of South Africa to take the lead in this policy of isolation, bearing in mind its

⁷⁰ Mary Robinson, *Everybody Matters: My Life Giving Voice* (New York: Bloomsbury, 2014), p. 237-38, 242-43.

⁷¹ WCAR NGO Forum Declaration, para, 162.

<https://academic.udayton.edu/race/06hrights/WCAR2001/NGOFORUM/Palestinans.htm>. Thousands of participants from 1500 NGOs, including Human Rights Watch and Amnesty International, attended the forum. According to eyewitness accounts, Jewish and Israeli NGO representatives were barred from attending several events. Because of these displays of antisemitism, nearly 40 countries boycotted the 20-year commemorative events held at the UN in September 2021, <https://www.worldjewishcongress.org/en/news/38-countries-boycott-antisemitic-durban-iv-conference>.

⁷² Ibid., paras. 98-99, 163, 419.

⁷³ Ibid., para. 160.

⁷⁴ Ibid., para. 419.

⁷⁵ Ibid., paras 419-26.

own historical success in countering the undermining policy of “constructive engagement” with its own past Apartheid regime.

UN Human Rights Council Rapporteurs

In the wake of the Durban Conference, and concurrent with the launch of the BDS campaign, two academics with decades-long records of activist engagement in the Arab-Israeli conflict were appointed as “Special Rapporteurs on the situation of human rights in the Palestinian territories occupied since 1967.” Both have been influential in disseminating and refining the apartheid charge against Israel.

John Dugard

John Dugard is a South African academic whose career initially focused on the legal aspects of South African apartheid. He became prominent through significant roles within several UN institutions, including as a member of the International Law Commission, a judge *ad hoc* for the International Court of Justice, and as a member of UN Human Rights Commission Inquiry to Investigate Violations of Human Rights and Humanitarian Law in the Occupied Palestinian Territories in 2001.⁷⁶

In the mid-1980s, Dugard turned his attention to the Arab-Israeli conflict and was an early promoter of using legal fora and UN mechanisms to promote his views. At a 1988 legal conference sponsored by Al Haq, described as one of the first international events to examine Israel’s administration of the territories “in light of international law,”⁷⁷ Dugard posited turning to the International Court of Justice for an advisory opinion on the “legal status of the Occupied territories.”⁷⁸ He believed such an opinion could be used as the basis for non-recognition, economic coercion, and the exclusion of Israel from international organisations because it “would lend weight to the credibility and effectiveness of these methods.”⁷⁹

From 2001 to 2008, Dugard held the post of UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.⁸⁰ In January 2007, he told the Human Rights Council that the international community has identified three regimes as inimical to human rights, namely “colonialism, apartheid and foreign

⁷⁶CV of John Dugard, in Tiyanjana Maluwa, Max Du Plessis, and Dire Tladi (eds.), *The Pursuit of a Brave New World in International Law : Essays in Honour of John Dugard* (Leiden ; Boston: Brill Nijhoff, 2017) (hereinafter “Maluwa, Du Plessis, and Tladi”), at 548-49.

⁷⁷ Emma Playfair, “Introduction”, Playfair (ed.), *International Law and the Administration of Occupied Territories : Two Decades of Israeli Occupation of the West Bank and Gaza Strip ; Proceedings of a Conference Organized by Al-Haq in Jerusalem in January 1988* (Oxford: Clarendon Press, 1992) (hereinafter “Playfair”), at 2.

⁷⁸ Dugard, “Enforcement of Human Rights in the West Bank and the Gaza Strip,” in Playfair, at 468.

⁷⁹ Dugard in Playfair p. 475-76.

⁸⁰ Dugard CV in Maluwa, Du Plessis, and Tladi, at 548-49.

occupation.” Whereas, he argued, “Israel is clearly in military occupation of the [Occupied Palestinian Territory],” at the same time “elements of the occupation constitute forms of colonialism and of apartheid.” Dugard claimed that Israel was violating not only the International Covenant on the Elimination of Racial Discrimination and the International Convention on the Suppression of Apartheid, but it was also engaging in a crime against humanity as defined by the Rome Statute of the International Criminal Court. He suggested that consideration of the implications might be referred to the International Court of Justice for an advisory opinion.⁸¹

The Human Sciences Research Council (HSRC) of South Africa took up Dugard’s question and in May 2009 published its preliminary report,⁸² followed by a book in 2012.⁸³ The report was the work product of numerous academics and legal professionals who have assumed prominent roles in the (pro-Palestinian) legal discourse concerning the Israeli-Palestinian conflict, including Virginia Tilley (editor), Victor Kattan, Michael Kearney, John Reynolds, and Iain Scobbie. John Dugard and Michael Sfard, among others, also provided contributions, and the HSRC laid the foundation for many of the allegations made in the years to come.

When assessing the development of the discourse of apartheid surrounding Israel-Palestine, the influence of the HSRC’s 2009 report therefore should not be underestimated. Reports authored since – whether by UN rapporteurs or Israeli and international civil society organisations – appear to draw heavily on it (regardless of whether it is acknowledged or referenced expressly).⁸⁴ Following his tenure as rapporteur, Dugard continued to write on the Arab-Israeli conflict and was a frequent speaker at events promoting the apartheid charge, including participation in the Russell Tribunal on Palestine.⁸⁵

Richard Falk

Richard Falk is an American academic who succeeded Dugard as Special Rapporteur on the situation of human rights in the Palestinian territories, and he has written on the Arab-Israeli conflict for nearly fifty years. In 1983, he served as a member of a

⁸¹ J. Dugard, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/HRC/4/17, 29 January 2007, at 3.

⁸² HSRC, *Occupation, colonialism, apartheid? A re-assessment of Israel’s practices in the occupied Palestinian territories under international law* (2009), p.51.

⁸³ Virginia Tilley, *Beyond Occupation Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (Pluto Press, 2015) (hereinafter “HSRC Report”).

⁸⁴ Whereas, for example, Al Haq expressly recognises the ESCWA report of 2017 as being “authoritative,” that report in turn expressly acknowledges and relied substantially on the HSRC study.

⁸⁵ Richard Goldstone, “Opinion: Israel and the Apartheid Slander,” *The New York Times*, November 1, 2011, <https://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html>. NGO Monitor, “Russell Tribunal on Palestine”, October 12, 2012, https://www.ngo-monitor.org/ngos/russell_tribunal_on_palestine/.

fact-finding mission on the 1982 war in Lebanon,⁸⁶ and in 1989 he called for the adoption of an international treaty prohibiting “prolonged occupation” specifically to target Israel’s control of the West Bank and Gaza.⁸⁷

In more recent years, Falk has been the source of controversy. In 2004, he authored a preface to a book that claimed the Bush administration perpetrated 9/11.⁸⁸ On his blog, several years later, he referred to 9/11 as a cover-up.⁸⁹ These comments drew censure from the UN’s Secretary General.⁹⁰ In 2011, in a post alleging that ICC arrest warrants issued against Muammar Gaddafi were politically motivated, he posted a cartoon on his blog showing a dog with “USA” written on its midriff and wearing a kippa, whilst urinating on a depiction of justice and devouring the bones of a skeleton. Falk initially described claims of antisemitism as a “complete lie” but subsequently removed the cartoon, stating “[maybe] I do not understand the cartoon... I certainly didn’t realize that it could be viewed as anti-Semitic, and still do not realize.” He subsequently apologised.⁹¹ The same year, Falk endorsed a book authored by Gilad Atzmon which contained antisemitic claims such as that “to be a Jew is a deep commitment that goes far beyond any legal or moral order,” that this commitment “pulls more and more Jews into an obscure, dangerous and unethical fellowship,” and that the “Holocaust religion is probably as old as the Jews themselves.”⁹²

⁸⁶ Sean McBride et. al, “Israel in Lebanon: Report of the International Commission to Enquire into Reported Violations of International Law by Israel during Its Invasion of the Lebanon,” *Journal of Palestine Studies* 12, no. 3 (April 1983): 117–33, <https://doi.org/10.1525/jps.1983.12.3.00p0462y>.

⁸⁷ Richard Falk, “Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank,” *Journal of Refugee Studies*, Volume 2, Issue 1, 1989, pp. 40–51.

⁸⁸ Yair Rosenberg, “American Studies Association Members Defend Israel Boycott by Citing Anti-Semitic 9/11 Truther,” *Tablet Magazine*, December 26, 2013, <https://www.tabletmag.com/sections/news/articles/american-studies-association-members-defend-israel-boycott-by-citing-anti-semitic-911-truther>.

⁸⁹ Richard Falk, “Interrogating the Arizona Killings from a Safe Distance,” *Global Justice in the 21st Century*, January 11, 2011, <https://richardfalk.org/2011/01/11/interrogating-the-arizona-killings-from-a-safe-distance>.

⁹⁰ Jordana Horn, “Falk’s 9-11 Remarks Are ‘Condemned’ by UN Sec.-Gen.,” *The Jerusalem Post*, January 25, 2011, <https://www.jpost.com/International/Falks-9-11-remarks-are-condemned-by-UN-sec-gen>.

⁹¹ Jeremy Sharon, “UN’s Richard Falk under Fire for ‘Anti-Semitic’ Cartoon,” *The Jerusalem Post*, July 8, 2011, <https://www.jpost.com/International/UNs-Richard-Falk-under-fire-for-anti-Semitic-cartoon>; Richard Falk, “Apology for Unintentionally Posting Anti-Semitic Cartoon in Qaddafi Arrest Warrant Blog,” *Global Justice in the 21st Century*, July 6, 2011, <https://richardfalk.org/2011/07/06/apology-for-unintentionally-posting-anti-semitic-cartoon-in-qaddafi-arrest-warrant-blog/>.

⁹² Rosenberg, “American Studies Association Members Defend Israel Boycott by Citing Anti-Semitic 9/11 Truther”; Andrew Sullivan, “Mearsheimer and the Jewish Anti-Semite, Ctd,” *The Dish*, September 27, 2011, <http://dish.andrewsullivan.com/2011/09/27/mearsheimer-and-the-jewish-anti-semite-ctd/>. Alan Dershowitz, “Why Are John Mearsheimer and Richard Falk Endorsing a Blatantly Anti-Semitic Book?,” *The New Republic*, November 4, 2011, <https://newrepublic.com/article/97030/atzmon-wandering-who-anti-semitism-israel>.

In 2013, Dugard and Falk participated in a conference at Bir Zeit University involving a broad cross section of international and Palestinian academics, NGOs, and PLO/PA officials.⁹³ A primary theme was whether to reject an international humanitarian law framework that emphasized an “occupation” paradigm for the conflict and instead move towards a paradigm of “colonialism, apartheid and ethnic cleansing.”⁹⁴ The adoption of this discourse was viewed as potentially more effective because it would “resonate negatively worldwide and can serve to mobilize public opinion and political support,” as well as be used to garner the support of the African Union for an ICJ advisory opinion.⁹⁵ Some attendees expressed scepticism due to the “resistance of the international community, including UN bodies, against the apartheid framework, because of the political pressure exerted by Israel, the United States and affiliated lobby-groups.”⁹⁶ Another theme at the conference was the proposed reversion to a rejectionist framework contending that a negotiated agreement with Israel would “result in the surrender of substantial Palestinian rights in exchange for a not-fully sovereign Palestinian state.”⁹⁷

In his 2014 report to the Human Rights Council, Falk referenced and repeated the themes of the Bir Zeit conference. He recommended that the situation in the West Bank be described as “‘annexation’ and ‘colonial ambitions’ rather than ‘occupation’.”⁹⁸ Falk was sceptical of the value of direct negotiations and urged Palestinian accession to the ICC so that Palestine could “address violations related to the crime of apartheid.” He also recommended the General Assembly request an advisory opinion from the ICJ.⁹⁹

In 2017, Falk co-authored a report published by the UN Economic and Social Commission for Western Asia.¹⁰⁰ The report relied extensively on the findings of 2009’s HSRC publication – one of Falk’s co-authors, Virginia Tilley, was its main editor – and reiterated Falk’s recommendations from 2014. The authors concluded that “Israel is guilty of the crime of apartheid.”¹⁰¹ The UN Secretary-General formally withdrew the report within days of its publication.¹⁰²

⁹³ Proceedings of an International Law Conference Organized by the Bir Zeit Institute of Law, “Law and Politics: Options and Strategies of International Law for the Palestinian People,” 17 *Palestine Yearbook of International Law* 141 (2014).

⁹⁴ Ibid at 144, 146, 161-62.

⁹⁵ Ibid at 159.

⁹⁶ Ibid at 161.

⁹⁷ Ibid at 157.

⁹⁸ UNHRC, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*, UN Doc A/HRC/25/67 (13 January 2014), at p. 4.

⁹⁹ Ibid at 14, 21.

¹⁰⁰ UNECSWA, “ESCWA Launches Report on Israeli Practices towards the Palestinian People and the Question of Apartheid,” March 15, 2017, <https://www.unescwa.org/news/escwa-launches-report-israeli-practices-towards-palestinian-people-and-question-apartheid>.

¹⁰¹ Ibid. pp. 1, 65.

¹⁰² “Senior U.N. Official Quits after ‘Apartheid’ Israel Report Pulled,” *Reuters*, March 17, 2017, <https://www.reuters.com/article/us-un-israel-report-resignation/senior-u-n-official-quits-after-apartheid-israel-report-pulled-idUSKBN16O24X>.

In November 2019, at the First Global Conference on Israel Apartheid held in Istanbul, Falk and Tilley issued an update to their 2017 report.¹⁰³ The paper called on civil society to adopt an “apartheid discourse and paradigm.”¹⁰⁴ Falk and Tilley argued that this shift should stress that the “structure of apartheid ... applies to the Palestinian people as a whole,¹⁰⁵ and concluded that “a political compromise... at this stage [can] only be achieved by a single unified Palestine with equal rights for all.”¹⁰⁶

New NGO campaigns

In July 2020, Israeli NGO Yesh Din published an opinion claiming that “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... 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 ...”¹⁰⁷ In January 2021, B’Tselem issued “A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid,”¹⁰⁸ and HRW published “A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution” in April 2021.¹⁰⁹ The contents of these publications were not new (largely echoing previous claims and reporting), nor indeed reflective of any “threshold crossed” by Israel in recent years.

On the contrary, the threshold crossed in 2021 was, rather, by the NGOs themselves who this year adopted these decades-old narratives. For more than forty years, the discourse of apartheid had been the product of, and advanced by, the same small group of academics, political actors, and civil society. In 2021, Human Rights Watch and B’Tselem joined them.

In a symposium on “apartheid in Israel/Palestine” published by *EJIL Talk!* in July 2021, Marko Milanovic posited that “there are two different accounts of how Israel is, in fact, committing apartheid against Palestinians.” He wrote:

¹⁰³ Richard Falk and Virginia Tilley, “Update to the ESCWA Report of 15 March 2017 ‘Legal Inquiry into Israel as an Apartheid,’” 2019, <https://secureservercdn.net/160.153.137.218/r0e.5a5.myftpupload.com/wp-content/uploads/2020/04/ESCWA-UPDATE-Falk-Tilley-COMplete-DRAFT-1.pdf>.

¹⁰⁴ Ibid. at 26.

¹⁰⁵ Ibid. at 27.

¹⁰⁶ Ibid at 5.

¹⁰⁷ Yesh Din, “The Occupation of the West Bank and the Crime of Apartheid: Legal Opinion,” Yesh Din, July 9, 2020, <https://www.yesh-din.org/en/the-occupation-of-the-west-bank-and-the-crime-of-apartheid-legal-opinion/> at 5.

¹⁰⁸ B’Tselem, “A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This Is Apartheid, January 12, 2021, https://www.btselem.org/publications/fulltext/202101_this_is_apartheid.

¹⁰⁹ Human Rights Watch, “A Threshold Crossed: Israeli Authorities and the Crime of Apartheid and Persecution,” Human Rights Watch, April 27, 2021, <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>.

Under the first [account], mainly championed by Palestinian scholars and activists, Israel has *always* been guilty of apartheid; the Zionist project was colonialist and racist from its inception and inherently was one of systemic domination by one group over the other. Under the second, now increasingly espoused by external actors, including ‘mainstream’ human rights organizations, Israel’s policies towards the Palestinians have not always constituted apartheid, but have gradually *evolved* in that direction – Israel may not have practiced apartheid in 1981 or 2001, but is doing so in 2021. Thus, even if you believe that Israel is today practicing apartheid, much is at stake (including possibly the legitimacy of the state as a whole) in how you choose to describe it – note, in that regard, how this evolutionary apartheid narrative is explicit even in the very title of the HRW apartheid report, *a threshold crossed*.¹¹⁰

Milanovic identifies a discourse that asserts that Israeli policy towards the Palestinians has *evolved* into apartheid. Yet, on the contrary, it is the discourse of human rights organisations that has harmonised with a narrative that Zionism was “racist from its inception,” and is inherently an ideology of domination by one group over the other.¹¹¹ Whereas Noura Erakat and Tareq Baconi adopt the tropes of Sayegh,¹¹² Human Rights Watch argue that Israeli laws, policies, and senior officials’ public statements “make plain that the objective of maintaining Jewish Israeli control over demographics, political power, and land has long guided government policy,”¹¹³ and that Israeli constitutional law and immigration law re-enforces “that the state is Jewish, rather than belonging to all its citizens.”¹¹⁴ These arguments belie the suggestion that recent events represent any sort of “threshold crossed” by Israel.

Israel’s response

In international frameworks, Israel consistently asserts that it has “strongly challenged any spurious claim regarding apartheid or racial segregation in Israel,”¹¹⁵ and the subject has been described as a “taboo” in mainstream Israeli discourse.¹¹⁶ In its most recent State Report to the CERD, submitted in 2017, the Israeli government

¹¹⁰ M. Milanovic, “Symposium Introduction: Apartheid in Israel/Palestine?” EJIL Talk!, 5 July 2021. <https://www.ejiltalk.org/symposium-introduction-apartheid-in-israel-palestine/>.

¹¹¹ See Anne Herzberg, “HRW’s Inconsistency and Incoherence Continues: EJIL: Talk! Symposium on A Threshold Crossed,” NGO Monitor, 11 August 2021, <https://www.ngo-monitor.org/hrws-inconsistency-and-incoherence-continues-ejil-talk-symposium-on-a-threshold-crossed/>.

¹¹² Erakat.

¹¹³ Threshold, p.2.

¹¹⁴ Threshold, p.45. See also p.46-47, 53.

¹¹⁵ A/68/18, Annex VII, para. 12.

¹¹⁶ Daniel Estrin, “Do Palestinians In Israeli-Occupied West Bank Live Under Apartheid?” NPR, 8 December 2020, <https://www.npr.org/2020/12/08/944332160/do-palestinians-in-israeli-occupied-west-bank-live-under-apartheid?t=1623081495468&t=1631027581161>.

stated: “Apartheid has always been regarded as abhorrent by the GOI [Government of Israel] and society, and continues to be so regarded. Apartheid has never been practiced in Israel. There exists in Israel no restrictions of any kind as to place of residence nor is there any segregation of any kind.”¹¹⁷ Israel has challenged the jurisdiction of the CERD to hear a Palestinian inter-State complaint filed in 2018 alleging racial discrimination and apartheid, as well as the admissibility of the complaint.¹¹⁸ Academics sympathetic to Israel’s position have also dismissed the apartheid allegation as biased, baseless and antisemitic.¹¹⁹ In 2017, Jacques DeMaillo of the International Committee for the Red Cross (ICRC) stated that:

“The Red Cross was very familiar with the regime that prevailed in South Africa during the apartheid period, and we are responding to all those who raise their claim of apartheid against Israel: No, there is no apartheid here, no regime of superiority of race, of denial of basic human rights to a group of people because of their alleged racial inferiority. There is a bloody national conflict, whose most prominent and tragic characteristic is its continuation over the years, decades-long, and there is a state of occupation. Not apartheid.”¹²⁰

Part III: The definition of the crime against humanity of apartheid

In the following section, we trace the historical development of the inter-State prohibition of apartheid, as well as its prescription as a treaty crime. The discussion is illuminating as it reveals a position that, whereas the inter-State prohibition of

¹¹⁷ See, e.g. CERD/C/ISR/17-19, Seventeenth to nineteenth periodic reports of States parties due in 2016: Israel, 14 March 2017, para. 54.

¹¹⁸ See Letter from Israel’s Permanent Mission to the UN in Geneva, 13 November 2019 at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_ISC_9372_E.pdf; Statement by H.E. Ms. Aviva Raz Shechter Permanent Representative of Israel to the United Nations in Geneva, 12 December 2019 at

https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_ISC_9379_E.pdf; Note for the file, Treaty Bodies Secretariat: Transmission of the content of OLA Memorandum at the request of the Committee on the Elimination of Racial Discrimination, 23 August 2019 at

https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_ISC_9360_E.pdf.

¹¹⁹ E. Kontorovich, The Apartheid Accusation Against Israel is Baseless – and Agenda-Driven, *EJIL Talk!*, 8 July 2021 at <https://www.ejiltalk.org/the-apartheid-accusation-against-israel-lacks-is-baseless-and-agenda-driven/>; R. Goldstone Israel and the Apartheid Slander, *New York Times*, 31 October 2011 at <https://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html>; B. Pogrand, Why Israel is Nothing Like Apartheid South Africa, *New York Times*, 31 March 2017 at <https://www.nytimes.com/2017/03/31/opinion/why-israel-is-nothing-like-apartheid-south-africa.html>.

¹²⁰ Sever Plocker, “ICRC official: Israel is not an apartheid state, but there is occupation,” *YNetNews.com*, 26 April 2017, <https://www.ynetnews.com/articles/0,7340,L-4953648,00.html>.

apartheid may be viewed as constituting a peremptory (*jus cogens*) norm of international law, its prescription as a war crime and crime against humanity derives from its treaty bases, rather than under customary international law.

The ICERD's prohibition of apartheid

Pursuant to Article 3 of the International Convention for the Elimination of all forms of Racial Discrimination, "States parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." The ICERD provides no definition of apartheid and there has been little commentary offered by the CERD Committee on it. Reporting guidelines for Article 3 include recall of general recommendations (GRs).¹²¹ Current guidelines elaborate the point made in GR 19 that, while the reference to apartheid may have been directed exclusively to South Africa, the anti-segregation norm applies to all countries.¹²² Thornberry notes that Article 3 "is complemented by Article 4(c), which provides a qualified right of members of national minorities 'to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language.'"¹²³ Separation as such, he concludes, "is not therefore equivalent to impermissible 'segregation.'"¹²⁴

The ICERD has been ratified by 182 States Parties, and signed by three, with no action taken by only 12.¹²⁵ The Convention's status reflects States' near universal acceptance of the prohibition of apartheid under international law.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

In 1968, the UN General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The Convention defines crimes against humanity as including "inhuman acts resulting

¹²¹ Thornberry, p.246.

¹²² Ibid., citing CERD/C/2007/1. See also GR 19, para. 1.

¹²³ Thornberry, p.238 (adding that the right "is not to be exercised in a manner which prevents the members of minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty; standards in such schools should also not be lower than the general standard. The provisions as a whole reflect a strong integrationist perspective").

¹²⁴ Ibid. Thornberry notes during the drafting process, the reference to a specific form of racial discrimination in Article 3 was defended (by Ghana) on the ground that the South African government's claim that apartheid was not racial discrimination made it essential that the unanimous opinion to the contrary be clearly stated in the Convention. Thornberry, p.74 citing A/C.3SR.1313, para. 10.

¹²⁵ See OHCHR Indicators, International Convention for the Elimination of all Forms of Racial Discrimination, Status of Ratification Interactive Dashboard (last updated 18 June 2021) available at <https://indicators.ohchr.org>.

from the policy of *apartheid*.”¹²⁶ The Convention was not widely adopted, however, and to date has only been ratified by 56 States and signed by nine.¹²⁷

The International Court of Justice’s South-West Africa Advisory Opinion of 1971

In 1971, the International Court of Justice confirmed apartheid’s prohibition pursuant to obligations arising under the UN Charter when it advised that the General Assembly had lawfully terminated South Africa’s mandate over South West Africa (Namibia), in part because of the imposition of apartheid in that territory.¹²⁸ The Court opined that South Africa unlawfully occupied the territory following revocation of the Mandate by the General Assembly, and that apartheid as applied in the territory violated South Africa’s obligations under the UN Charter.¹²⁹

International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973

In 1973, the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention). In Article 1, States Parties declare that apartheid is a crime against humanity. Although drafted in response to South Africa’s policies of racial discrimination,¹³⁰ and despite the reference (in Article 2) to the crime of apartheid *including* “similar policies and practices of racial segregation and discrimination as practised in southern Africa,” the territorial scope of the Convention’s subject matter is not confined to southern African situations, and it seems clear that the crime of apartheid can be committed in other situations.¹³¹

The Apartheid Convention has not been widely ratified, with western States in particular declining to accede to it. To date, it has been ratified or acceded to by 109 States Parties and signed by 31.¹³²

¹²⁶ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted and opened for signature, ratification and accession by GA Res. 2391 (XXIII) of 26 November 1968, article I(b).

¹²⁷ See UN Treaty Collection, Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, Status as at 16 November 2021 *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-6&chapter=4&clang=en.

¹²⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Res. 276 (1970)*, (1971) ICJ Rep. 16, 57.

¹²⁹ *Ibid.*

¹³⁰ Hall and van den Herik, mn-94.

¹³¹ Cf. Hall and van den Herik, mn-94.

¹³² See UN Treaty Collection, International Convention on the Suppression and Punishment of the Crime of Apartheid, Status as at 16 November 2021 *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=en.

Additional Protocol I of 1977

In 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts adopted Additional Protocol I to the Geneva Conventions of 1949 (Protocol I) which criminalised, as a grave breach, “practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination” when committed “willfully and in violation of the Conventions or the Protocol.”¹³³ Additional Protocol I has been ratified or acceded to by 174 States Parties and signed by three.¹³⁴ Israel has to date declined to sign or ratify the Protocol.

The four Geneva Conventions of 1949 and Additional Protocols of 1977 include provisions expressly prohibiting “adverse distinction” against persons affected by armed conflict and occupation and require equality of treatment between certain categories of individuals.¹³⁵

UN Security Council

In 1984, the UN Security Council endorsed characterisation of the system of apartheid in South Africa as a crime against humanity.¹³⁶ Nevertheless, it omitted the crime from the enumerated crimes against humanity contained in the Statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda notwithstanding ICRC representations advocating for its inclusion.¹³⁷

¹³³ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter “Additional Protocol I”), Article 85(4)(c).

¹³⁴ See Additional Protocol I.

¹³⁵ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 135, Article 12; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85, Article 12; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, Article 16; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Articles 13 and 27; Additional Protocol I; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, Articles 2, 4 and 7.

¹³⁶ UNSC Resolution 556 (1984).

¹³⁷ See Hall and van den Herik, mn-94.

Rome Statute of the International Criminal Court

In 1991, apartheid was included as an offence in the ILC's Draft Code of Crimes against the Peace and Security of Mankind,¹³⁸ and it was proposed to be criminalised as a crime against humanity under Article 18(f) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind.¹³⁹ In 1998, apartheid was included as a crime against humanity under the Rome Statute. This has been described as “a remarkable achievement” given extant Western reluctance to ratify the Apartheid Convention.¹⁴⁰

The crime has subsequently been included as a crime against humanity in the regulation establishing the Special Panels for Serious Crimes of the District Court of Dili, East Timor.¹⁴¹ As we describe below, the Rome Statute's definition of the crime of apartheid is narrower than the definition of apartheid in Article II of the Apartheid Convention in a number of respects.

The status of apartheid under customary international law

There is no consensus as to whether apartheid exists as a crime against humanity under customary international law.¹⁴² In 2009, the HSRC found that the crime does not yet exist under customary international law but stated there was a “movement” in that direction.¹⁴³ In 2013, Dugard and Reynolds drew a distinction between the prohibition of apartheid (directed at States) and the crime of apartheid (directed at individuals). They suggested that whereas the prohibition had established itself as a rule of customary international law, the crime of apartheid was moving towards customary status but may not have acquired that status yet.¹⁴⁴ In 2021, Jackson

¹³⁸ Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission, reprinted in Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991, UN Doc. A/46/10, Article 20.

¹³⁹ Under Article 18(f) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population” was considered a crime against humanity.

¹⁴⁰ Hall and van den Herik, mn-94.

¹⁴¹ The UNTAET Regulation No. 2000/15 established panels with exclusive jurisdiction over serious criminal offences, including crimes against humanity. According to Section 6(1)(j), “the crime of apartheid” constituted a crime against humanity. UNTAET Reg. 2000/15, Sections 5.1(j) and 5.2(g).

¹⁴² Hall and van den Herik, mn-94. According to Hall and van den Herik, the “reluctance of Western States to ratify the Apartheid Convention, together with lack of clarity of the definition and lack of actual prosecutions.”

¹⁴³ HSRC, *Occupation, colonialism, apartheid?: a re-assessment of Israel's practices in the occupied Palestinian territories under international law* (2009), p.51.

¹⁴⁴ John Dugard and John Reynolds, “Apartheid, International Law, and the Occupied Palestinian Territory,” *European Journal of International Law*, Volume 24, Issue 3, August 2013 (hereinafter “Dugard and Reynolds”), p. 883

affirmed that customary international law prohibits the practice of apartheid by States,¹⁴⁵ but noted that the Apartheid Convention was concerned primarily with the criminalisation of apartheid and did not immediately or later reach universal ratification.¹⁴⁶

The Apartheid Convention is not widely ratified, and its breadth operated to prevent it from obtaining widespread, still less, consensual, support. During the Convention's drafting process, the United States representative argued in Plenary that "certain provisions of this draft convention could be damaging to the very structure of international law."¹⁴⁷

In 2007, in *Khulumani*, the US Court of Appeals for the Second Circuit heard a case in which various plaintiff representatives of South African victims of apartheid appealed the dismissal of claims, under the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA), made against various defendant corporations concerning alleged violations of international law.¹⁴⁸ The Court of Appeals affirmed the lower court's dismissal of the TVPA claims but vacated portions of the lower court's judgment dismissing the plaintiff's ATCA claims. In a separate opinion, Judge Korman stated *inter alia*:

"[Apartheid,] however abhorrent it may have been, has not been regarded as an offense subject to the exercise of universal jurisdiction... Although the *Restatement (Third) of Foreign Relations Law* cites racial discrimination 'when practised systematically as a matter of state policy, e.g. apartheid,' as a violation of customary international law..., it omits apartheid from the list of offenses subject to universal jurisdiction... [Antonio Cassese observed in 2002] that the Rome Statute, enacted in 1998, is broader than customary international law and 'expands general international law' insofar as it, *inter alia*, 'broadens the classes of conduct amounting to crimes against humanity' to include 'the crime of apartheid'... Likewise, the European Commission, the executive body of the European Union, has stated explicitly that, while 'apartheid is widely condemned by states... at least at present, it does not give rise to universal jurisdiction because,

¹⁴⁵ Jackson, p.2 (noting Article 3 CERD; Article 85(4)(c) API). See also p.3 ("The ratifications of ICERD, with its 182 state parties, and API, with its 174 state parties, confirm the broad consensus among states as to the prohibition of apartheid in international law.")

¹⁴⁶ Jackson, p.5.

¹⁴⁷ UN Doc A/PV.2185 at 3 (representative of the United States). Professor Clyde Ferguson of Harvard Law School stated *inter alia*: "Deplorable as it is, we cannot from a legal point of view, accept that *apartheid* can in this manner be made a crime against humanity. Crimes against humanity are so grave in nature that they must be meticulously elaborated and strictly construed under existing international law, as set forth primarily in the Charter of the Nurnberg Tribunal and as applied by the Nurnberg Tribunal."

¹⁴⁸ See ICRC IHL Database, Practice Relating to Rule 88. Non-Discrimination - Section E. Apartheid.

among other reasons, the [Apartheid Convention]... has not been widely ratified.”¹⁴⁹

In 2010, in the *Boeremag* case, South Africa’s North Gauteng High Court considered the customary status of the provisions of Additional Protocol I and noted that at that time the total number of States that had ratified the Protocol was 162. However, despite this, it remained debatable whether the provisions of Protocol I had become part of South African law on account of their customary status. The fact that Parliament had failed to incorporate Additional Protocol I into South African legislation was “indicative that the requirements of *usus* and/or *opinio juris* have not been met.”¹⁵⁰

Carola Lingaas observes that due “to the contentiousness of the Apartheid Convention, some authors claim that the crime of apartheid should not be considered an international crime, and that it has not reached customary law status either.”¹⁵¹ She concludes, however, that apartheid is “most probably also a customary crime.”¹⁵² In coming to this conclusion, Lingaas notes that an “increasing number of national legislations now contain the crime of apartheid, which demonstrates the general high acceptance of the crime and state practice as such.”¹⁵³ Further, she notes that near universal ratification of the International Convention on the Elimination of Racial Discrimination (ICERD),¹⁵⁴ which stipulates States’ Parties obligation to oppose apartheid. However, as we have seen, there is a clear distinction to be drawn between the near universality of the inter-State prohibition of apartheid pursuant to the ICERD, and its criminalisation by treaty as either a grave breach (under Additional Protocol I) or a crime against humanity (under the Apartheid Convention and the Rome Statute), none of which is so widely ratified.

Notwithstanding this picture, Lingaas argues that the crime of apartheid has “reached the status of customary international law and is a crime with *erga omnes* effect” and “it is also an international crime with *jus cogens* status.”¹⁵⁵ With respect to apartheid as a crime against humanity, Lingaas’s conclusion is questionable. Where

¹⁴⁹ ICRC IHL Database, Practice Relating to Rule 88. Non-Discrimination - Section E. Apartheid *citing* United States, Court of Appeals for the Second Circuit, *Khulumani* case, Separate Opinion of Judge Korman, 12 October 2007. Plaintiffs’ claims were ultimately dismissed in subsequent opinions. In 2016, the US Supreme Court denied cert on their appeal ending the litigation. https://www.supremecourt.gov/orders/courtorders/062016zor_e2q3.pdf, p. 6.

¹⁵⁰ ICRC IHL Database, Practice Relating to Rule 88. Non-Discrimination - Section E. Apartheid *citing* South Africa, North Gauteng High Court, *Boeremag* case, Judgment, 26 August 2010, pp.21-22.

¹⁵¹ Carola Lingaas, “The Crime Against Humanity of Apartheid In a Post-Apartheid World,” *Oslo Law Review* no.2 (2015) (hereinafter “Lingaas”), p.87 *citing* Antonio Cassese, *International Criminal Law* (2nd edn Oxford University Press, Oxford 2008) 13; Kriangsak Kittichaisaree, *International Criminal Law* (OUP, Oxford 2001) 3.

¹⁵² Lingaas, p.103.

¹⁵³ *Ibid.*, p.105 *citing* the legislation of Australia, Canada, Congo, Mali, New Zealand and the UK.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*, p.107.

does one identify the sufficiency of State practice and *opinio juris* necessary to establish a rule of customary international law when States (including but not limited to Turkey, the United States, Israel) have not consented to criminalisation of the conduct as a crime against humanity under general international law?

Given uncertainty with respect to the customary status of apartheid as a crime against humanity, and further considering that the Rome Statute is the *more* widely ratified of the two instruments criminalising apartheid, the analysis which follows is grounded on the definition of the elements of the crime under Article 7(2)(h) of the Rome Statute, pursuant to which apartheid is defined as a Rome Statute crime,¹⁵⁶ without prejudice to questions relating to preconditions to the exercise of ICC jurisdiction.

The relevance of the policies and practices of apartheid in southern Africa

Article 7(2)(h) of the Rome Statute and Article 2 of the Apartheid Convention encompass the same subject matter, namely the definition of apartheid as a crime against humanity. Accordingly, it would not necessarily offend the principle of legality to construe the definition of apartheid's elements under Article 7(2)(h) of the Rome Statute by reference to their definition under Article 2 of the Apartheid Convention.¹⁵⁷ This conclusion is supported by the literature. Lingaas notes that the crime of apartheid "is not easily applied to cases other than South Africa" and observes that "any similar suggestion seemingly demands a comparison with South Africa during the apartheid regime."¹⁵⁸ Jackson writes that in "formal terms, it makes sense to use the Apartheid Convention to interpret Article 7(1)(j) of the Rome Statute."¹⁵⁹

Human Rights Watch have commented that although the crime against humanity of apartheid "does have its historic roots in the events of Southern Africa decades ago," courts today in interpreting it "would primarily rely on the language in the definitions themselves." This is true but beside the point. From the perspective of criminal law,

¹⁵⁶ Article 7(2)(h) of the Rome Statute defines the underlying crime against humanity 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 any other racial group or groups and committed with the intention of maintaining that regime."

¹⁵⁷ See Article 22 of the Rome Statute. Whereas recourse to the reference to the policies and practices of southern Africa contained in Article II of the Apartheid Convention would be appropriate and lawful with respect to elements of the crime when they are strictly construed, such recourse arguably cannot be made when to do so would broaden the scope of the definition of the elements beyond such a strict construction. Applying this interpretive methodology to the analysis which follows, whereas recourse to Article II of the Apartheid Convention would be permissible to define the scope of the element of "domination" by reference to the practices and policies of southern Africa (as it narrows the breadth of the element's scope), such recourse would be impermissible when defining the element of "inhumane acts" pursuant to Article 7(2)(h) of the Rome Statute (as reference to Article II of the Apartheid Convention in this context would impermissibly broaden the scope of the element contrary to the requirements of Article 22). *See also* infra pp. 48-50.

¹⁵⁸ Lingaas, p.88.

¹⁵⁹ Jackson, p.9.

the question is how to define the elements of the crime. The South African experience is legally relevant because it is expressly referred to in the text of the Apartheid Convention.¹⁶⁰ Human Rights Watch argue that “a detailed historical comparison” with South Africa would make the terms “a historical relic and the crime impossible to prosecute, undermining the purpose of [apartheid’s] very inclusion in the Rome Statute.”¹⁶¹ This claim is unsupported by authority. Clarity as to the definition of the elements of the crimes provides legal certainty (and thereby renders an offence prosecutable). Human Rights Watch’s suggested approach, on the other hand, simply disregards the language of the Apartheid Convention.

Definition of apartheid as a crime against humanity under the Rome Statute of the International Criminal Court

Apartheid is criminalised as a crime against humanity pursuant to the Rome Statute and the Apartheid Convention of 1973.¹⁶² Under the Rome Statute, to constitute a crime against humanity, a person’s criminal acts must have a nexus with a widespread or systematic attack directed against a civilian population, pursuant to a State or organisational policy.¹⁶³ This flows from the position that the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals, but rather result from a deliberate attempt to target a civilian population.¹⁶⁴

¹⁶⁰ See, e.g. W. A. Schabas, *The Customary International Law of Human Rights* (Oxford 2021), p.168 (“Apartheid is described as practices of racial segregation and discrimination, similar to those in Southern Africa during the twentieth century, 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.”)

¹⁶¹ Clive Baldwin and Emilie Max, “Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law,” EJIL Talk! 9 July 2021, <https://www.ejiltalk.org/human-rights-watch-responds-reflections-on-apartheid-and-persecution-in-international-law/>.

¹⁶² Rome Statute, Article 7(1)(j); Apartheid Convention, Article 1.

¹⁶³ Rome Statute, Article 7. The ICTY Appeals Chamber interpreted these “chapeau” requirements of crimes against humanity as comprising five elements: (a) There must be an attack; (b) The Accused’s acts must be part of the attack; (c) The attack must be directed against any civilian population; (d) The attack must be widespread or systematic; and (e) The perpetrator must know that his acts are part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern. See *Prosecutor v Kunarac*, IT-96-23 and IT-96-23/1-A, Appeals Judgement, 12 June 2002 (“*Kunarac* Appeals Judgement”), para. 85; *Prosecutor v Tadić*, IT-94-1-A, Appeals Judgement, 15 July 1999 (“*Tadić* Appeals Judgement”), para. 248. See also *Prosecutor v. Gotovina*, IT-06-90-T, Judgement, 15 April 2011 (“*Gotovina* Trial Judgement”), para. 1701; *Prosecutor v. Popović et al.*, IT-05-88-T, Judgement, 10 June 2010 (“*Popović* Trial Judgement”), para.751.

¹⁶⁴ *Prosecutor v. Tadić*, IT-94-1, Judgement, Trial Chamber, 2 October 1995 (hereinafter “*Tadić* Trial Judgement”), para.653.

Attack

An “attack” involves a course of conduct of “multiple acts,”¹⁶⁵ which in turn means more than a few isolated incidents or acts.¹⁶⁶ The *Kenya* ICC Pre-Trial Chamber confirmed an “attack” as “a campaign or operation carried out against the civilian population.”¹⁶⁷ Even a systematic attack must involve more than a few incidents. The occurrence of multiple acts alone would not be sufficient to define the term since an “attack” is something more than “a mere aggregate of random acts.”¹⁶⁸ At the ICTY, applying customary international law, the *Krajišnik* Trial Chamber held that an “attack” is formed of conduct causing physical or mental injury, as well as acts preparatory to such conduct,¹⁶⁹ and at the ICTR, also applying customary international law, the Appeals Chamber defined an “attack” as the perpetration of a series of acts of violence or of the kinds of mistreatment enumerated as underlying crimes against humanity.¹⁷⁰ Within a single attack, a combination of the enumerated crimes may occur.¹⁷¹

Accordingly, an “attack” contains a gravity element as it must entail the “kinds of mistreatment enumerated as underlying crimes against humanity.” To establish liability for crimes against humanity under the Rome Statute, the Prosecutor must prove beyond reasonable doubt commission of “multiple acts” of the kind enumerated as underlying crimes against humanity.¹⁷² It follows that an institutionalised regime of racial domination and oppression involving the commission of “inhuman acts” enumerated under the Apartheid Convention may be insufficient to constitute the crime against humanity of apartheid under the Rome Statute. This is because, firstly,

¹⁶⁵ See e.g. ICC Statute, Article 7(2)(a). See also, e.g. *Prosecutor v Blé Goudé*, ICC-02/11-02/11-186, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 11 December 2014, para.125 (“a course of conduct involving the multiple commission of acts”).

¹⁶⁶ *Prosecutor v Bemba*, ICC-01/05-01/08-424, Confirmation Decision, Pre-Trial Chamber, 15 June 2009, para.81.

¹⁶⁷ See *Situation in the Republic of Kenya*, ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010, para. 80. See also *Prosecutor v Bemba*, ICC-01/05-01/08-424, Confirmation Decision, Pre-Trial Chamber, 15 June 2009, para. 75; *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-14-Corr, Corrigendum to “Decision Pursuant to article 15 of the Rome Statute on the Authorisation of an Investigation”, 15 November 2011, para. 31; *Prosecutor v Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, para. 164.

¹⁶⁸ See *Prosecutor v Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, para.209 (“embodies a systemic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts.”)

¹⁶⁹ *Prosecutor v. Krajišnik*, IT-00-39-T, Judgement, 27 September 2006 (“*Krajišnik* Trial Judgement”), para.706

¹⁷⁰ See, at the ICTR, *Prosecutor v. Nahimana*, ICTR-99-52-A, Appeals Judgement, 28 November 2007 (“*Nahimana* Appeals Judgement”), para. 918; *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement, 15 May 2003 (“*Semanza* Trial Judgement”), para. 327; *Prosecutor v. Renzaho*, ICTR-98-13-T, Judgement, 14 July 2009 (“*Renzaho* Trial Judgement”), para.782.

¹⁷¹ *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para.122.

¹⁷² Rome Statute, Article 7(2)(a).

under the Rome Statute the prosecution must prove commission of “multiple” acts to establish an “attack” (whereas the Apartheid Convention simply requires proof of “inhuman acts”). Secondly, whereas enumerated “inhuman acts” under the Apartheid Convention include violations of economic and social rights (including “by denying to members of a racial group ... 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”) under the Rome Statute proof of an “attack” requires proof of multiple acts of the kind enumerated as crimes against humanity, thereby importing a further gravity component into the elements of the crime.

Directed against a civilian population

The Accused’s acts must form part of an attack directed against a civilian population.¹⁷³ To establish that an attack was directed against a “population,” it is sufficient to show that “enough individuals were targeted in the attack,”¹⁷⁴ or that they were targeted in such a way as to establish to the criminal standard that the target was a population, rather than a “limited and randomly selected number of individuals.”¹⁷⁵

The requirement that an Accused’s acts must be part of an attack directed against a civilian population does not imply that the acts must be committed *only* against civilians.¹⁷⁶ The *chapeau* of crimes against humanity requires only a showing that an attack was primarily directed against a civilian population, rather than “against a limited and randomly selected number of individuals.”¹⁷⁷ There is no requirement that individual victims of crimes against humanity be civilians.¹⁷⁸

Widespread or systematic

The element of “widespread or systematic” is disjunctive.¹⁷⁹ With respect to crimes against humanity other than apartheid, a widespread attack need not be systematic, and *vice versa*, and each term has distinct and different qualities.¹⁸⁰ Nor do individual

¹⁷³ *Tadić* Appeals Judgement, para. 248; *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Judgement, 29 July 2004 (“*Blaškić* Appeals Judgement”), para. 98; *Kunarac* Appeals Judgement, para.85.

¹⁷⁴ *Kunarac* Appeals Judgement, para.90.

¹⁷⁵ *Kunarac* Appeals Judgement, para.90.

¹⁷⁶ *Prosecutor v. Martić*, IT-95-11-A, Appeals Judgement, 8 October 2008 (“*Martić* Appeals Judgement”), para.305.

¹⁷⁷ *Martić* Appeals Judgement, para. 305 citing *Kunarac* Appeals Judgement, para.90.

¹⁷⁸ *Martić* Appeals Judgement, paras. 307, 309.

¹⁷⁹ See, e.g. Article 7 of the Rome Statute.

¹⁸⁰ *Kunarac* Appeals Judgement, para. 93. See also Hall and Ambos in in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Bloomsbury 2016) (hereinafter “Hall and Ambos”), mn 7-106.

acts need to be widespread or systematic; it is the attack itself that must be either widespread or systematic.¹⁸¹ However, under the Rome Statute, “systematic” oppression and domination must be proved as an element of the underlying crime. When considering a charge of apartheid, although a “systematic” attack need not be “widespread,” it would follow that a “widespread attack” must also be proved to be “systematic.”

The word “widespread” refers to the large-scale nature of the attacks and the number of victims.¹⁸² The word “systematic” refers to the organised nature of the acts and the improbability of their random occurrence.¹⁸³ A common indicator of systematic attacks is the existence of a pattern of crimes, i.e. “the non-accidental repetition of similar criminal conduct on a regular basis.”¹⁸⁴

To assess whether an attack was widespread or systematic, a Chamber must: (1) identify the population that was the object of the attack; and (2) examine the means, methods, resources, and results of the attack upon the population.¹⁸⁵ In making this assessment, a Chamber may consider the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of any officials or authorities, or any identifiable patterns of crimes.¹⁸⁶ An attack against a civilian population may be classified as systematic even where some members of the civilian population were not targeted.¹⁸⁷ Removing a particular national or ethnic group from an area will almost always involve widespread or systematic attacks against the civilian population and the denial of fundamental human rights.¹⁸⁸

Nexus between underlying acts and attack

To constitute a crime against humanity, an Accused’s acts must be part of the attack.¹⁸⁹ There are two elements to the required nexus between the acts and the attack: (1) the commission of an act which, by its nature or consequences, is objectively part of the attack; and (2) the Accused’s knowledge that there is an attack on a civilian population and that his act is part of that attack (*mens rea*).¹⁹⁰

¹⁸¹ Kunarac Appeals Judgement, para. 96.

¹⁸² Kunarac Appeals Judgement, para. 94; Blaškić Appeals Judgement, para. 101.

¹⁸³ Kunarac Appeals Judgement, para. 94; Blaškić Appeals Judgement, para. 101.

¹⁸⁴ Kunarac Appeals Judgement, para. 94 citing Kunarac Trial Judgement, para. 429; Blaškić Appeals Judgement, para. 101.

¹⁸⁵ Kunarac Appeals Judgement, para. 95.

¹⁸⁶ Kunarac Appeals Judgement, para. 95.

¹⁸⁷ Prosecutor v. Stakić, IT-97-24-A, Appeals Judgement, 22 March 2006 (“Stakić Appeals Judgement”), para. 247 citing Kunarac Appeals Judgement, para. 90.

¹⁸⁸ See Serge Brammertz, Kevin C. Hughes, Alison Kipp, William B. Tomljanovich, “Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY” *Journal of International Criminal Justice* Volume 14 Issue 5 (December 2016), 1162.

¹⁸⁹ Kunarac Appeals Judgement, para. 99.

¹⁹⁰ Kunarac Appeals Judgement, para. 99.

Mens rea

To satisfy the *mens rea* for crimes against humanity, the Accused must: (i) have had the intent to commit the underlying offence or offences with which he is charged;¹⁹¹ (ii) he must know that there is an attack on a civilian population;¹⁹² and (iii) he must know that his acts are related to the attack against a civilian population,¹⁹³ or at least take the risk that his acts were part of the attack.¹⁹⁴ It is not required that the Accused knows the details of the attack.¹⁹⁵ Evidence of the Accused's knowledge depends on the facts of a particular case; accordingly, the manner in which *mens rea* may be proved may vary from case to case.¹⁹⁶

Institutionalised regime

Unlike other crimes against humanity, apartheid has never been prosecuted before as a crime against humanity. There is therefore inevitably a greater degree of uncertainty with respect to the definitions of the elements of the crimes than there is likely to be for the chapeau elements of crimes against humanity, or other underlying crimes such as murder, torture, or indeed persecution that have formed the subject of extensive briefing and jurisprudence. There is, accordingly, a greater emphasis in these sections on the text of the Rome Statute (whose interpretation is aided by the Apartheid Convention), academic literature,¹⁹⁷ and the interpretative guidance provided by the practices and policies of apartheid in southern Africa.¹⁹⁸

Lingaas argues that the inclusion of the term “institutionalized regime” in the definition of apartheid under the Rome Statute represents the most significant difference between the definition of the crime in the Apartheid Convention and under the Rome Statute.¹⁹⁹ The requirement to establish the existence of an “institutionalised regime” qualifies the “systematic oppression and domination” that is necessary to prove commission of the crime of apartheid, and it is this requirement that differentiates apartheid from persecution.²⁰⁰

¹⁹¹ *Kunarac Appeals Judgement*, para. 102; *Blaškić Appeals Judgement*, para. 124.

¹⁹² *Kunarac Appeals Judgement*, para. 102; *Blaškić Appeals Judgement*, para. 126.

¹⁹³ *Tadić Appeals Judgement*, paras. 255, 271; *Kunarac Appeals Judgement*, para. 102; *Blaškić Appeals Judgement*, para. 124.

¹⁹⁴ *Kunarac Appeals Judgement*, para. 102.

¹⁹⁵ *Kunarac Appeals Judgement*, para. 102.

¹⁹⁶ *Blaškić Appeals Judgement*, para. 126.

¹⁹⁷ The implications of the Apartheid Convention are not fully explored. Given there are several States which have acceded to the Apartheid Convention but not to the Rome Statute, it is perhaps curious that civil society has not paid greater attention to the conduct of those States given potential for enforcement pursuant to the Convention.

¹⁹⁸ See *supra* end. 157.

¹⁹⁹ Lingaas, p.97.

²⁰⁰ Hall and Van den Herik, mn 7-146.

Domination

Human Rights Watch assert that the element of “domination” lacks a “clear definition” but “appears in context to refer to an intent by one group to maintain heightened control over another, which can involve control over key levers of political power, land, and resources.”²⁰¹ A conception of “domination” as a severe form of “control” is reflected elsewhere in the literature. Lingaas refers to the Oxford English Dictionary which defines domination as “the exercise of power or influence over someone or something, or the state of being so controlled.”²⁰² Citing Lingaas, Jackson notes that “the literature points to the idea of control” and argues that “domination may be understood as a particularly powerful form of control.”²⁰³

Dugard and Reynolds argued in 2013, however, that “essence of the definition” of apartheid is the “systematic, institutionalized, and oppressive character of the discrimination involved, and *the purpose of domination* that is entailed.”²⁰⁴ This emphasis on the “purpose” of domination suggests that any legal assessment of this element should extend beyond the question of mere factual control and encompass apartheid’s essence as an aggravated form of racial discrimination.²⁰⁵ In other words, the exercise of control must relate to the intent to maintain racial superiority. This also flows from apartheid’s criminalisation as a grave breach of Additional Protocol I, which suggests that the crime of apartheid requires more than proof simply of widespread commission of inhumane acts by one racial group over another in territory under the overall control of the “dominant” group.

A comparison with South Africa during apartheid informs our understanding of “domination” as an element of apartheid as a crime against humanity.²⁰⁶ In particular, the concept of “domination” can be understood through practices of racial supremacy (*baasskap*) and segregation. Writing in 1948, Naboth Mokgatle, a trade unionist, activist and writer, stated that apartheid “means total segregation of the African people and all non-Europeans in the country, permanent denial of human rights, permanent baasskap, master race, and inferiority of anything non-white.” In December 1950, Hendrik Verwoerd, “Minister of Native Affairs” in the first National

²⁰¹ *Threshold*, p.39.

²⁰² Lingaas, p.99 citing www.oxforddictionaries.com.

²⁰³ Jackson, p.7.

²⁰⁴ Dugard and Reynolds, p. 881.

²⁰⁵ Dugard and Reynolds note that “the practice of apartheid is contrary to one of the ostensible guiding principles of international law – that of respect for human rights and fundamental freedoms without distinction as to race – as laid down in Article 55 of the UN Charter and Article 2 of the Universal Declaration of Human Rights”. Dugard and Reynolds, p.882. The HSRC defined apartheid as “an aggravated form of racial discrimination because it is a State-sanctioned regime of law and institutions that have ‘the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.’ HSRC Report, p.14.

²⁰⁶ See supra end. 157.

Party government, met with African members of the Native Representative Council and addressed them on the theory and practice of apartheid. He said *inter alia* that the “present Government adopts the attitude that it concedes and wishes to give to others precisely what it demands for itself. It believes in the supremacy (*baasskap*) of the European in his sphere but, then, it also believes equally in the supremacy (*baasskap*) of the Bantu in his own sphere...”²⁰⁷ Guelke agrees that *baasskap* is “best translated as white domination.”²⁰⁸

As Trevor Huddleston, an Anglican minister and early critic of apartheid South Africa, wrote in 1955: It “is not *apartheid* which has provided the Nationalist government with its immense and growing dominance over all the European groups and parties in this country. It is not the thirst for such a negative state of affairs as ‘separation’ *in itself* that has so stirred enthusiasm and multiplied votes. It is something much deeper and much more appealing. In a word, it is ‘*white supremacy, now and always*’.... It is not white self-preservation that is considered a sufficient motive force today; it is white *supremacy*, that and nothing less.”²⁰⁹ The concept of “domination” as “supremacy” (*baasskap*) appears central to the conception of apartheid as practised in southern Africa, and it informs the definition of “domination” as an element of the crime against humanity of apartheid under the Rome Statute.

A relationship arguably exists between the perpetrator’s *mens rea* and an assessment of whether the “racial group” element of the crime of apartheid is satisfied.²¹⁰ Similarly, an “intent to maintain a regime of domination” may be informed by the perpetrator’s conception of “supremacy,” and thus a relationship is also established between apartheid’s *mens rea* and the assessment of whether an intention to maintain a regime of “domination” can be established.

Oppression

Human Rights Watch argue that the term “systematic oppression” is “also without a clear definition in law” but “appears to refer to the methods used to carry out an intent to maintain domination.”²¹¹ Jackson suggests the incorporation of a gravity component to the definition of oppression and argues that oppression may be understood as “prolonged or continual cruelty.”²¹² Lingaas refers to the Oxford English

²⁰⁷ See Clark and Worger, p.149-154.

²⁰⁸ Guelke, p.96. Frank Welsh summarises South Africa’s history from 1948 as follows: “After 1948, when the policies of apartheid – separate development – and *baasskap* – frank white domination – were introduced, the fabric of decent society began to disintegrate.

²⁰⁹ Clark and Worger, p.45 citing Huddleston, 1956: 252-3 (emphasis added).

²¹⁰ Carola Lingaas, “Jewish Israeli and Palestinians as distinct ‘racial groups’ within the meaning of the crime of apartheid?” EJIL Talk! 6 July 2021, <https://www.ejiltalk.org/jewish-israeli-and-palestinians-as-distinct-racial-groups-within-the-meaning-of-the-crime-of-apartheid/>.

²¹¹ *Threshold*, p.40.

²¹² Jackson, p.7.

Dictionary which defines oppression as “prolonged cruel or unjust treatment or exercise of authority.”²¹³

The term “oppression” is referred to only once in the Rome Statute (in Article 7(2)(h)). There are 12 references to the term “psychological oppression” as vitiating consent in the in Elements of Crimes of genocide by forcibly transferring children,²¹⁴ the crime against humanity of deportation or forcible transfer,²¹⁵ the crime against humanity and war crime of rape,²¹⁶ the crime against humanity and war crime of enforced prostitution,²¹⁷ and the crime against humanity and war crime of sexual violence.²¹⁸

To qualify conduct as “systematic oppression” entails an assessment of the exercise of executive and adjudicative jurisdiction, policy, and legislation. The South-West Africa example suggests that by grounding the analysis in principles of equality and non-discrimination, assessments of reasonableness may operate as a basis to assess whether a discriminatory action or decision by a public body might be characterised as oppressive. In answering the question of what is “the criterion to distinguish a permissible discrimination from an impermissible one,” Judge Tanaka’s dissent in the *South-West Africa Advisory Opinion* of 1966 is instructive.²¹⁹ Judge Tanaka grounded his opinion on principles of justice,²²⁰ fairness, equality, and non-discrimination, which, ultimately, investigation and prosecution of apartheid as a crime against humanity is intended to safeguard.²²¹

Judge Tanaka first disentangled segregation and apartheid from the rights of minorities under the League of Nations minorities treaties.²²² He concluded that

²¹³ Lingaas, p.99 citing www.oxforddictionaries.com.

²¹⁴ Article 6(e) of the Rome Statute. See Elements of Crimes, n.5.

²¹⁵ Article 7(1)(d) of the Rome Statute. See Elements of Crimes, n.12.

²¹⁶ Article 7(1)(g) of the Rome Statute; Article 8(2)(b)(xxii)-1. See Elements of Crimes, p.8, 28.

²¹⁷ Article 7(1)(g) of the Rome Statute; Article 8(2)(b)(xxii)-3. See Elements of Crimes, p.9, 29.

²¹⁸ Article 7(1)(g) of the Rome Statute; Article 8(2)(b)(xxii)-6. See Elements of Crimes, p.10, 30.

Diss. Op. Judge Tanaka, South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, p.307.²¹⁹

Ibid., p.306: “Briefly, a different treatment is permitted when it can be justified by the criterion of ²²⁰ justice. One may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law.”

²²¹ Ibid., p.305: “The most fundamental point in the equality principle is that all human beings as persons have an equal value in themselves, that they are the aim itself and not means for others, and that, therefore, slavery is denied. The idea of equality of men as persons and equal treatment as such is of a metaphysical nature. It underlies all modern, democratic and humanitarian law systems as a principle of natural law. This idea, however, does not exclude the different treatment of persons from the consideration of the differences of factual circumstances such as sex, age, language, religion, economic condition, education, etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently.”

²²² Ibid., p.307: “In the case of the minorities treaties the norm of non-discrimination as a reverse side of the notion of equality before the law prohibits a State to exclude members of a minority group from participating in rights, interests and opportunities which a majority population group can enjoy. On the other hand, a minority group shall be guaranteed the exercise of their own religious and education activities. This guarantee is conferred on members of a minority group, for the purpose of protection of their interests and not from the motive of discrimination itself. By reason of protection of the minority this

“different treatment requires reasonableness to justify it,”²²³ and highlighted that the “important question is whether there exists, from the point of view of the requirements of justice, any necessity for establishing an exception to the principle of equality.”²²⁴ “It is unjust,” he wrote, “to require a sacrifice for the sake of social security when this sacrifice is of such importance as humiliation of the dignity of the personality.”²²⁵ In the case before him, Judge Tanaka opined that the burden of proof lay with South Africa to establish the reasonableness of different treatment. In a criminal trial, by contrast, the burden of proof will remain on the prosecution to prove its case beyond reasonable doubt.

Judge Tanaka noted that two considerations arise on “reasonableness.” The first is whether individual necessity exists to establish an exception to the general principle of equality before the law, and equal opportunity. The “necessity may be conceived as of the same nature as in the case of minorities treaties of which the objectives are protective and beneficial.” The second is consideration of “whether the different treatment does or does not harm the sense of dignity of individual persons.”²²⁶ The principle of equality therefore “does not mean absolute equality” but it “recognizes relative equality, namely different treatment proportionate to concrete individual circumstances.” Different treatment “must not be given arbitrarily; it requires reasonableness,” or it “must be in conformity with justice.”²²⁷

This type of reasoning is largely absent from the human rights reporting on apartheid in the Israeli-Palestinian context. Human Rights Watch’s thesis (namely that oppression “appears to refer to the methods used to carry out an intent to maintain domination”) is unsupported by authority or doctrinal analysis. Instead, Human Rights Watch’s analysis is circular, and arguably renders the element of “oppression” indistinguishable from the element of “inhuman acts,” reducing an element of the crime to redundancy.²²⁸

Human Rights Watch nevertheless reject the suggestion that application of a “reasonableness” standard might inform whether executive and legislative action or policy constitute systematic oppression. In a response to the EJIL Talk! symposium,

protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not.”

²²³ Ibid., p.307, p.309: “Equality being a principle and different treatment an exception, those who refer to the different treatment must prove its *raison d’être* and its reasonableness.” Tanaka, p.309: “We must recognize, on the one hand, the legality of different treatment so far as justice or reasonableness exists in it.”

²²⁴ Ibid.

²²⁵ Ibid., p.312.

²²⁶ Ibid., p. 310.

²²⁷ Ibid., p.313. See also UN Human Rights Committee (HRC), General comment no.30, para 13; R. Dworkin, *Taking Rights Seriously* (Massachusetts 1977), chapters 7 to 12.

²²⁸ The principle of effectiveness (*ut res magis valeat quam pereat*) requires that treaties must not be interpreted in a way that would reduce any part of a treaty to redundancy or inutility.

Baldwin and Max claim that an assessment of an action's reasonableness "should rarely, if ever, be a defence that negates or excuses crimes against humanity."²²⁹ To support this argument, they cite to the European Court of Human Rights (ECtHR) case of *Sejdić and Finci*. Yet, the Grand Chamber in this case, which Baldwin and Max interpret as rejecting a reasonableness standard, in fact explicitly adopt such a standard in its assessment of the legality of discriminatory legislation.²³⁰

A situation of belligerent occupation is not inherently oppressive

A situation of belligerent occupation is "inherently unbalanced" and coercive,²³¹ and a collision between human rights almost inevitably transpires in an occupied territory.²³² The occupied population is not part of the political community that rules it,²³³ democracy is "not of any functional relevance" to the running of occupied territory, and the occupant is not a trustee.²³⁴ For its part, the occupied population owes a duty of obedience to the occupant.²³⁵ Belligerent occupation is not designed to win the

²²⁹ Baldwin and Max.

²³⁰ In *Sejdić*, Jewish and Roma individuals challenged the legality of the provision of the Bosnian constitution, adopted as part of the 1995 Dayton Agreement, which barred them from standing for election to the House of Peoples or serving as President of Bosnia and Herzegovina. The constitution limited membership in the House of Peoples and the Presidency to "constituent peoples" defined solely as Bosniaks, Croats, and Serbs. In examining whether the constitutional provision accorded with the European Convention on Human Rights, the Court laid out a reasonableness test (at [42] – [44]). While the Grand Chamber acknowledged that, at the time of the Dayton Accords, the interest of peace may have provided sufficient justification of the power sharing provisions in the constitution, it had to examine the provisions' legality in light of Bosnia's adoption of the Strasbourg Convention and other commitments made subsequently. In these circumstances, the maintenance of the policy excluding non-constituent peoples could not be sustained. This analysis was omitted by Baldwin and Max. See *Sejdić and Finci v. Bosnia and Herzegovina*, application nos. 27996/06 and 34836/06, Grand Chamber Judgment, 22 December 2009.

²³¹ D. Kretzmer and Y. Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, Second edition* (Oxford 2021) (hereinafter "Kretzmer and Ronen"), p.23. See also Y. Dinstein, *The International Law of Belligerent Occupation, Second Edition* (Cambridge 2019) (hereinafter "Dinstein"), para. 107: "the crux of belligerent occupation is that, at odds with pacific occupation, it is coercive by nature: no coercive occupation can be regarded as pacific."

²³² Dinstein, p.89.

²³³ Kretzmer and Ronen, p.23.

²³⁴ Dinstein, para. 108. *Contra* A. Gerson, "Trustee- Occupant: The Legal Status of Israel's Presence in the West Bank ", 14 Har.ILJ 1 , 39 – 46 (1973).

²³⁵ The duty of obedience does not cancel out protected persons' duty of allegiance. The ICRC Commentary notes that "public officials and judges act under the superintendence and control of the occupant to whom legal power has passed in actual practice and to whom they, like any other protected person, owe obedience. But this duty of obedience does not cancel out the duty of allegiance which subsists during the period of occupation. The occupation authorities may not, therefore, compel judges or public officials to swear allegiance to them, nor demand that they should exercise their functions or pronounce their decisions and sentences in the name of the Occupying Power. There is not in general any inconsistency between the two ideas, provided that the Occupying Power, in exercising its authority, keeps strictly to the Convention and to other rules governing occupation and that it demands nothing of public officials and

hearts and minds of the local inhabitants: it has military – or security – objectives.²³⁶ The occupied population therefore is not generally represented in the institutions that make the decisions that have a major impact on its life, welfare, and property (although pursuant to the mutually agreed Oslo framework the Palestinian population are afforded rights of autonomy under Palestinian leadership),²³⁷ and the occupying power's primary concern is to protect the security of its own forces and its own military interests rather than to cater for the needs of the local population.²³⁸ It is by these legal standards that the reasonableness of the Occupying Power's conduct must properly be assessed when considering whether discriminatory policies in occupied territory may be considered arbitrary and oppressive, or as reasonable and justified.

The corollary of this position is that a military administration exercising government functions in a situation of military occupation (or factually analogous to it) might amount to an institutionalised regime of systematic oppression. This conclusion flows from the text of the relevant Conventions, as well as practice. Apartheid's criminalisation as a grave breach of Additional Protocol I appears expressly to cover the situation.²³⁹ Jackson notes the example of German conduct in Poland in World War II, and concludes that “depending on the specific context, a state's differing treatment of a community of its nationals in occupied territory vis-à-vis a racial group constituting, or within, the category of protected persons may, in fact, entail a relationship of domination which the prohibition of apartheid seeks to prevent.”²⁴⁰ Similarly, there is no suggestion of a territorial limitation to “practices of apartheid” contained in Additional Protocol I, nor in the definition of the crime in the Rome Statute, nor when considering the South-West Africa as an empirical example.²⁴¹ Rather, the interaction between the law of apartheid and “rules in the law of occupation must be assessed on case-by-case basis in relation to specific elements of the prohibition,”²⁴² and the mere fact that international humanitarian law is triggered does not exclude the applicability of other binding rules of international law,²⁴³ including the prohibition and criminalisation of apartheid.²⁴⁴

judges which might constitute an act of treason towards their country. The position is still, of course, a very delicate one in practice; for it is very difficult to avoid some conflict between these duties. It is for that reason that persons holding public posts are left free to abstain for reasons of conscience. In such cases the Occupying Power cannot hold it against them, nor apply sanctions or take any measures of coercion or discrimination.” Commentary of 1958 to Convention IV, at 305.

²³⁶ Dinstein, para. 107.

²³⁷ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 28 September 1995 (hereinafter “Interim Agreement”).

²³⁸ Kretzmer and Ronen, p.156.

²³⁹ Article 85(4)(c) of Additional Protocol I.

²⁴⁰ Jackson, p.27.

²⁴¹ See Jackson, p.14, 15.

²⁴² Ibid., p.15.

²⁴³ Jackson, p.16

²⁴⁴ Ibid.

The interplay between IHL and IHRL

When assessing whether a discriminatory measure is arbitrary (and oppressive), or reasonable (and justified), a tribunal may be called upon to determine its consistency with applicable rules of international law. When considering the applicability of international human rights law in a situation of belligerent occupation, the preliminary question in every case is whether the Occupying Power is a contracting party to an applicable treaty.²⁴⁵ While international humanitarian law pertains primarily in times of war, and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other.²⁴⁶ Nevertheless, their interplay remains highly contested.²⁴⁷ How should courts, practitioners and scholars interpret the notion of IHL as the *lex specialis*?

The International Court of Justice (ICJ) has issued three opinions addressing the conflict. In its 1996 advisory opinion on the *Legality of the Threat of Nuclear Weapons*, the Court noted that the International Covenant on Civil and Political Rights (ICCPR) “does not cease in times of war.” In determining the arbitrary deprivation of life, however, it stated that the issue must be “determined by the applicable *lex specialis*, namely, the law applicable in armed conflict” and “not deduced from the terms of the Covenant itself.”²⁴⁸ In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court elaborated that there are “three possible solutions” regarding the relationship between IHL and IHRL: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” The Court further stated that it “will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”²⁴⁹ Finally, in *Armed Activities*, the Court held that “the rules of international human rights law and

²⁴⁵ Dinstein, p.79.

²⁴⁶ Dinstein, para. 223 citing *Coard et al. v. United States* (Inter- American Commission on Human Rights, 1999), para. 39. (p.223).

²⁴⁷ See Derek Jinks, Jackson Nyamuya Maogoto and Solon Solomon, “Introducing International Humanitarian Law to Judicial and Quasi-Judicial Bodies” in Derek Jinks, Jackson Nyamuya Maogoto and Solon Solomon (eds) *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (TMC Asser Press 2014) 1, 11; Shana Tabak, “Armed Conflict and the Inter-American Human Rights System: Application or Interpretation of International Humanitarian Law?” in Jinks, Maogoto and Solomon (n 27) 219, 222–25; Oona Hathaway and others, “Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law” (2012) 96 *Minnesota Law Review* 1883, 1893–94; Cordula Droege, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict” (2007) 40 *Israel Law Review* 310, 311. See also Anne Herzberg, “*Lex Generalis Derogat Legi Speciali*: IHL in Human Rights Regulation of Military Courts Operating in Situations of Armed Conflict,” (2021) 54 *Israel Law Review* 84.

²⁴⁸ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, [25].

²⁴⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, [105].

international humanitarian law ... are relevant and applicable in the specific situation.”²⁵⁰

Although the notion of jurisdiction is “essentially territorial,” the European Court of Human Rights has found that some extraterritorial acts can exceptionally constitute an exercise of jurisdiction triggering the extraterritorial application of international human rights conventions, including the effective control of relevant territory and its inhabitants abroad as a consequence of military occupation.²⁵¹ In the UK, in *Al-Skeini et al. v. Secretary of State for Defence*,²⁵² a case considering the legality of the Secretary of State’s failure to conduct independent inquiries into or to accept liability for the deaths and torture of Iraqi civilians during the period following the completion of major combat operations in Iraq and prior to the assumption of authority by the Iraqi Interim Government, Lord Rodger identified that where a State has “such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms” of the Strasbourg Convention, then it was obliged to do so.²⁵³ In that case, “the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European court in the utterly different society of southern Iraq” was “manifestly absurd,” and even ran the risk of “human rights imperialism.”²⁵⁴ This was because on the ground, British troops “faced formidable difficulties due to terrorist activity, the volatile situation and the lack of any effective Iraqi security forces.”²⁵⁵ In these circumstances, Lord Rodger did “not consider that the United Kingdom was in effective control of Basra and the surrounding area for purposes of jurisdiction” under the Strasbourg Convention.²⁵⁶

Dinstein concludes that the divergence between international human rights law and the law of belligerent occupation is not necessarily conclusive of the matter, inasmuch as “human rights law may impact on the *jus in bello* in a complementary manner.”²⁵⁷ In *Al-Skeini*, the Grand Chamber of the European Court of Human Rights did not contest the application of international humanitarian law to belligerent occupation.²⁵⁸ However, it pronounced that “[t]he general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities.”²⁵⁹ Such

²⁵⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep 168, [179].

²⁵¹ *Banković v. Belgium (Admissibility)* (European Court of Human Rights, 2001), 41 ILM 517, 527 (2002); *Loizidou v Turkey*, Application no. 15318/89, 18 December 1996.

²⁵² *Al-Skeini v. Secretary of State for Defence* [2007] UKHL 26.

²⁵³ *Ibid.*, para 79 (emphasis added).

²⁵⁴ *Ibid.*, 78.

²⁵⁵ *Ibid.*, 83.

²⁵⁶ *Ibid.*

²⁵⁷ Dinstein, para. 253.

²⁵⁸ *Ibid.*, n.526.

²⁵⁹ *Ibid.*, n.527.

procedural obligations concerning an effective investigation were held to be applicable, even during an armed conflict, in consequence of human rights law.²⁶⁰

If the two legal regimes of international human rights law and the law of belligerent occupation cannot be reconciled, a question arises as to which one of them ought to prevail. For Dinstein, the answer is clear: the (special) law of belligerent occupation “trumps” the (general) law of human rights on the ground of *lex specialis derogat lex generali*.²⁶¹ Thus, during an armed conflict, it is the *jus in bello* as *lex specialis* that determines which acts amount to an arbitrary deprivation of the human right to life,²⁶² and a genuine *lex specialis* approach “militates in favour of the conclusion that freedom of movement in occupied territories is actually subject to stringent restrictions or even suspension by an Occupying Power.”²⁶³ Every right established by the law of belligerent occupation is non-derogable,²⁶⁴ however, and it follows that when derogation from general human rights occurs *jus in bello* rights are called in to fill the space.²⁶⁵

Derogations from human rights norms

In times of “public emergency which threatens the life of the nation,” Article 4(1) of the ICCPR permits States to take measures derogating from their obligations under the Covenant “to the extent strictly required,” provided that such measures are not inconsistent with other international obligations, and that they do not involve discrimination “solely” on the ground of race, colour, sex, language, religion or social origin.²⁶⁶ Dinstein observes that it “is easy to gather from this condition... that discrimination is not precluded on other grounds, e.g., national origin or political opinion,” which, he notes, “are of special consequence in wartime.”²⁶⁷ Thus, that the United States’ Law of War Manual provided that legal provisions relating to political process, such as laws regarding the rights of suffrage and of assembly may be suspended and, for the purposes of security, an Occupying Power may establish censorship or regulation of any or all forms of media and entertainment, of correspondence, and other means of communication.²⁶⁸

Moreover, virtually all human rights, whether derogable or non-derogable, are subject to some limitations.²⁶⁹ The limitation of national security is attached not only to

²⁶⁰ *Al-Skeini et al. v. United Kingdom* (European Court of Human Rights, Grand Chamber, 2011), 50 ILM 995 (2011).

²⁶¹ Dinstein, para. 261.

²⁶² *Ibid.*, para. 265.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*, para. 254.

²⁶⁵ *Ibid.*, para. 255.

²⁶⁶ Article 4(1) ICCPR.

²⁶⁷ Dinstein, para. 235.

²⁶⁸ See Jackson, p.20.

²⁶⁹ Dinstein, para. 241. Dinstein notes by way of example that Article 21 of the ICCPR crafts freedom of assembly (a derogable right) in the following way: “The right of peaceful assembly shall be recognized. No

freedom of assembly (Article 21) but also to freedom of movement (Article 12(3)), freedom from expulsion (Article 13), judicial guarantees (Article 14(1)), freedom of expression (Article 19(3)(b)), and freedom of association (Article 22(2)). Similar restrictions appear in the European and American Conventions.²⁷⁰ This is the general norm, irrespective of the existence of a situation of belligerent occupation.²⁷¹

This general norm reflects that “human rights law must weigh not only the special interests of individuals and groups as against the heterogeneous societal interests of the State, but also conflicting interests (offsetting each other) of sundry individuals and groups.” The reason is that exercise of a certain human right by a given person or group may be irreconcilable with the invocation of the same – or a separate – human right by another individual or group.²⁷² Dinstein notes that the “clash may stir up a bitter and sanguinary dispute,” such as that between Israeli Jews and Palestinian Arabs, who are “both relying on the collective human right of self-determination of peoples in the same territory between the Mediterranean and the River Jordan.”²⁷³

Law of occupation distinguishes between treatment of nationals of the Occupying Power and protected persons

Pursuant to Article 4 of the Fourth Geneva Convention,²⁷⁴ the definition of protected persons excludes nationals of the Occupying Power and of co-belligerent States maintaining normal diplomatic relations with it. International human rights law (or, more precisely, its non-derogable core) can fill the gaps in protection,²⁷⁵ and extends both to settlers and other nationals of the Occupying Power who are present in the area under occupation.²⁷⁶ Jackson concludes that international law “itself demands the application of different legal regimes to (groups of) individuals under a state’s jurisdiction,” whilst noting that in certain circumstances international law recognises “the permissibility of a state treating nationals and non-nationals differently.”²⁷⁷ Put

restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.” Beside the qualifying adjective ‘peaceful’, which perceptibly excludes riots, the specific mention of national security or public safety means that – even if freedom of assembly is not derogated – its implementation in wartime (especially under conditions of belligerent occupation) may be considerably circumscribed. (p.86) Thus, a demonstration calling for violent resistance against the military government of an occupied territory may be banned; and, if it takes place in brazen defiance of the prohibition, it may be forcibly broken up.

²⁷⁰ Dinstein, para. 242 (p.86).

²⁷¹ Dinstein, para. 490.

²⁷² Dinstein, para. 246.

²⁷³ Ibid.

²⁷⁴ As to the position of pre-war refugees, see Dinstein, para. 551.

²⁷⁵ See supra pp. 38-40.

²⁷⁶ See Dinstein, para. 259.

²⁷⁷ Jackson, p.27.

simply, “a requirement that two groups are subject to different laws does not necessarily entail a regime of domination.”²⁷⁸

Settlers, like other nationals of the Occupying Power present in occupied territory, benefit from the premise that – when there is a gap in protection afforded by the law of belligerent occupation, human rights law may step in. Settlers are entitled to security of their lives, to be ensured by the military government.²⁷⁹ Certain commentators may “frown upon this outcome”²⁸⁰ but, as Dinstein argues, the two sets of rights can “be harmonized in sundry sets of circumstances.”²⁸¹

In *Al Skeini*, the House of Lords noted that British citizens in Iraqi territory were “in a different boat” to non-citizens, as international law did not “prevent a state from exercising jurisdiction over its nationals travelling or residing abroad, since they remain under its personal authority.”²⁸² Accordingly, there could be “no objection in principle to Parliament legislating for British citizens outside the United Kingdom, provided that the particular legislation does not offend against the sovereignty of other states.”²⁸³ Moreover, the “[m]ilitary and civilian personnel of the occupying forces and occupation administration and persons accompanying them are not subject to the local law or to the jurisdiction of the local civil or criminal courts of the occupied territory.”²⁸⁴ The Occupying Power is expected to ensure that other tribunals are in existence to deal with civil litigation to which they are parties and with offenses committed by their nationals. On the other hand, Article 43 of the Hague Regulations of 1907, Article 64 of the Fourth Geneva Convention, and Article 66 of the Fourth Geneva Convention anticipate that military courts, established by the military government, will prosecute and punish protected persons under security legislation enacted by the Occupying Power.²⁸⁵ At least in principle, forms of administrative detention that would otherwise be impermissible under human rights law are rendered permissible by the potentially conflicting and more permissive rule in the law of occupation.²⁸⁶ Belligerent occupation is therefore a special situation in which civilians may be tried by a military legal system.²⁸⁷ Moreover, administrative detentions, which are incompatible with international human rights law, might even be rendered legal (in a peacetime emergency) by virtue of a valid derogation.²⁸⁸

²⁷⁸ Jackson, p.27.

²⁷⁹ Dinstein, para. 395.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² *Al-Skeini v. Secretary of State for Defence* [2007] UKHL 26, para. 46 citing Oppenheim’s International Law, 9th ed (1992), vol 1, Pt I, para 138.

²⁸³ Ibid., para. 46.

²⁸⁴ Dinstein, para. 416.

²⁸⁵ Ibid., para. 419.

²⁸⁶ Jackson, p.23. See also Geoffrey S. Corn *et al.*, *The Law of Armed Conflict: An Operational Approach* (New York: Wolters Kluwer 2012) (hereinafter “Corn *et al.*”), p.386.

²⁸⁷ Dinstein, p.150.

²⁸⁸ Dinstein, para. 420.

Article 27(4) of the Fourth Geneva Convention permits the Occupying Power to take necessary measures of control and security over protected persons resulting from the conflict. The occupant can legislate in order to remove any direct threat to its security, the security of members of its armed forces or administrative staff, installations and property of the military government, as well as to maintain safe lines of communication.²⁸⁹ Much is left to the discretion of the Occupying Power.²⁹⁰ The ICRC Commentary enumerates a number of admissible security measures, such as the requirement to carry identity cards, a ban on possession of firearms, prohibitions of access to certain areas, restrictions of movement,²⁹¹ assigned residence, and internment.²⁹² Other recurrent permissible measures include the imposition of curfew at night, censorship curbing freedom of expression, control of means of communication (such as telephones), restraints of freedom of association, and curtailment of freedom of assembly and demonstrations.²⁹³

Property

State property in occupied territory can be used by the occupying State to defray the costs of the occupation. However, an occupant cannot wantonly destroy such property or convert it to use for the benefit of the home economy. Further, it is obligated to respect private property, which cannot be confiscated, nor can it be destroyed except as may be absolutely necessary in connection with military operations.²⁹⁴

The law of occupation prohibits discrimination based on race, religion and political opinion but does not prescribe its duration

An occupant cannot leave in place – let alone implement – domestic legislation that collides with them. Above all, the Occupying Power is permitted to expunge by law “any adverse distinction based, in particular, on race, religion or political opinion.”²⁹⁵ The Occupying Power is also entitled to enact legislation that is genuinely necessary to protect human rights law.²⁹⁶ Nevertheless, occupation is not illegal, nor is its duration proscribed under IHL.²⁹⁷ Article 6(3) of Geneva IV, however, limits the

²⁸⁹ Dinstein, para. 342.

²⁹⁰ Dinstein, para. 343.

²⁹¹ Freedom of movement is subject to admissible limitations, and these include the need to ensure public safety and order in an occupied territory. The range of application of admissible limitations must be assessed on the merits of the concrete case. See Dinstein, para. 518.

²⁹² Commentary of 1958 to Fourth Geneva Convention, at 207.

²⁹³ Dinstein, para. 343.

²⁹⁴ Corn *et al.*, p.382.

²⁹⁵ Article 27(3) of the Fourth Geneva Convention. See also Dinstein, para. 345.

²⁹⁶ Dinstein, para. 346.

²⁹⁷ See Adam Roberts, “Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967,” 84 *American J. Intl Law* 44, 52 (1990) (hereinafter “Roberts”).

applicability of certain provisions of the Convention in occupied territory to one year after the 'close of military operations':

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

The failure of IHL instruments to place a time limit on occupation and the perceived weakening of protections for civilians in an occupied territory under Article 6(3) troubled many diplomats, scholars, and practitioners for both political and humanitarian reasons, particularly in the Arab-Israeli context.²⁹⁸

The issue of whether and how to limit the duration of occupation was therefore a focus during the drafting process of the Additional Protocols.²⁹⁹ While Additional Protocol I did not contain a provision proscribing the length of an occupation, it did not adopt the approach of Article 6(3). Instead, the drafters included Article 3(b), which mandated application of the Conventions and the Protocol until the "general close of military operations and, in the case of occupied territories, on the termination of the occupation." According to the Commentaries, it was argued that this provision would then supplant Article 6(3).³⁰⁰ But Dinstein notes that the claim that Article 6 no longer applies or that Protocol I reflects customary law is "insupportable."³⁰¹

Distinctions based on citizenship

The definition of racial discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is significantly narrowed by

²⁹⁸ See, e.g., Richard Falk, "Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank," 2 *Journal of Refugee Studies* 40, 44-45 (1989); Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967," 84 *American J. Intl Law* 44, 52 (1990); Yutaka Arai-Takahashi, "Unearthing the Problematic Terrain of Prolonged Occupation," 52 *Israel Law Review* 129 (2019). Yael Ronen, 'The DoD Conception of the Law of Occupation,' in *United States Department of Defense Law of War Manual: Commentary and Critique* (Michael Newton, ed. Cambridge 2018); Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge 2017). But see Roberts who questions the assumption that occupations are supposed to be provisional and temporary.

²⁹⁹ Roberts at 56 and citing Bothe, Partsch & Solf, *New Rules for Victims of Armed Conflicts* 59 (1982). Yves Sandoz, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee for the Red Cross 1987 at para 151.

³⁰¹ Dinstein, pp. 303.

limitations contained in subparagraphs (2) and (3) of Article 1 which, like subparagraph (1), apply to the Convention as a whole.³⁰² Nevertheless, the principle that human rights apply to all, irrespective of citizenship, was emphasized by the Human Rights Committee when it noted that aliens “receive the benefit of the general requirement of non-discrimination in respect of the rights... in the Covenant.”³⁰³ The Committee adds:

“Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”³⁰⁴

Conclusion on “oppression”

Applying Judge Tanaka’s reasoning to the discussion, discrimination by an occupying power between the treatment of its own nationals and protected persons would not constitute oppression per se. Where discriminatory measures are not arbitrary, for example because they reflect application of the *lex specialis* of international humanitarian law or where they can otherwise be reasonably justified (for instance, if they arise from a valid derogation from international human rights law), they will not offend against the principles of equality, non-discrimination, fairness, and justice that underpin the prohibition of unreasonable discriminatory treatment.

³⁰² Thornberry, p.140. Article 1 of the ICERD states: “1. In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens. 3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”

³⁰³ Human Rights Committee General Comment (GC) 15, *The Position of Aliens under the Covenant*, paras. 1 -2.

³⁰⁴ Committee on the Elimination of Racial Discrimination, *General Comment No.30: Discrimination Against Non-Citizens*, 1 October 2004, para. 5 cited in HSRC Report, n.777.

The law of occupation contemplates separate legal regimes for protected persons and for nationals of an Occupying Power. To the extent such separate systems are contemplated by the law of occupation, it is foreseeable that the characterisation of such separate systems as giving rise to a breach of the principle of equality will be contested.

By one racial group over another

Pursuant to Article 7(1)(j) of the Rome Statute, in conjunction with Article 7(2)(h), the crime against humanity of apartheid is punishable if it has been committed “by one racial group over any other racial group or groups.”³⁰⁵ There is little agreement among anthropologists concerning the term “race,”³⁰⁶ and ultimately “race is real because thoughts, perceptions and behaviour are constructed upon it,” even though the concept “has no biological foundation.”³⁰⁷

Human Rights Watch argues that the definition of “racial group” under the Rome Statute is “broader” than “a narrower interpretation focused on divisions based on skin color,” and grounds its analysis on the ICERD’s definition of racial discrimination.³⁰⁸ This approach diverges from that adopted by the *ad hoc* international criminal tribunals when considering classification of national, ethnical, racial, or religious groups for the purpose of establishing liability for genocide.³⁰⁹ Dugard and Reynolds further note that the preamble to the Apartheid Convention invokes the ICERD. They argue that this reference provides grounds to interpret the Apartheid Convention as applying to a system of institutionalised domination and oppression by one racial group over another “in the broad sense conveyed by the International Convention for the Elimination of All Forms of Racial Discrimination, and that a ‘racial group’ in the context of apartheid need not be limited to a narrow construction of race.”³¹⁰

As argued by Lingaas,³¹¹ however, although it is correct that international human rights law (as codified by the ICERD) defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or

³⁰⁵ See also Article 2 of the Apartheid Convention (“by one racial group of persons over any other racial group of persons”).

³⁰⁶ Hall and Van den Herik, mn 7-n.922.

³⁰⁷ Carola Lingaas, “Jewish Israeli and Palestinians as distinct ‘racial groups’ within the meaning of the crime of apartheid?” EJIL Talk! 6 July 2021.

³⁰⁸ The ICERD defines “racial discrimination” broadly as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Article 1(1) of the ICERD.

³⁰⁹ Threshold, p.35.

³¹⁰ Dugard and Reynolds, p.887.

³¹¹ Carola Lingaas, “Jewish Israeli and Palestinians as distinct ‘racial groups’ within the meaning of the crime of apartheid?” EJIL Talk! 6 July 2021.

national or ethnic origin,”³¹² this understanding of the concept and definition of racial discrimination was already apparent at the time of drafting of the Apartheid Convention in 1974. Moreover, the concept of “racial discrimination” (under the ICERD) cannot simply be analogised to the concept of “racial group(s)” under instruments of international criminal law. The terms are separate and cannot be conflated by analogy.³¹³

Secondly, as Lingaas observes, “the application of human rights law in the interpretation of an international crime is problematic for a number of reasons,” not least including that international criminal law “is governed by the principles of strict legality, foreseeability, and specificity.”³¹⁴ This means that international criminal law “must always be interpreted strictly, while respecting the procedural rights of the accused,” while international human rights law “will generally be interpreted broadly in order to provide individuals more rights and freedoms.” Lingaas concludes that by “removing the accessibility of human rights law for the interpretation of a criminal provision, the relevance of the Committee on the Elimination of All Forms of Racial Discrimination (CERD)’s observations, which Human Rights Watch use for the broader definition of race (pp. 35–36), becomes marginal.”³¹⁵

The *ad hoc* international criminal tribunals adopted more narrow criteria for determination of national, ethnic, racial or religious identities when considering the groups protected from genocide. The *Akayesu* Trial Chamber found a national group to be a “collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.” An ethnic group was one “whose members share a common language and culture,” while “[t]he conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.” The Trial Chamber defined a religious group as “one whose members share the same religion, denomination or mode of worship.”³¹⁶ The *Rutaganda* Trial Chamber considered that the concepts should be considered “on a case-by-case basis,” with each “assessed in the light of a particular political, social and cultural context.”³¹⁷ In 2005, the *Blagojević* Trial Chamber summarised the ICTY jurisprudence by finding that “a national, ethnical, racial or religious group is identified by using as a criterion the stigmatisation of the group notably by the perpetrators of the crime, on the basis of its *perceived* national, ethnical, racial or religious

³¹² Art. 1(1) ICERD.

³¹³ Article 22 of the Rome Statute.

³¹⁴ Carola Lingaas, “Jewish Israeli and Palestinians as distinct ‘racial groups’ within the meaning of the crime of apartheid?” EJIL Talk! 6 July 2021

³¹⁵ Ibid. See also Triff, mn 7-147; Jackson, p.8.

³¹⁶ *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, paras. 512-515.

³¹⁷ *Prosecutor v Rutaganda*, ICTR-96-3, Judgement, 6 December 2009, paras. 55, 57.

characteristics.”³¹⁸ The *Krstić* Trial Chamber stated that the various conceptions of group “partially overlap.”³¹⁹

Lingaas questions whether the case law on genocide should be relevant for the interpretation of apartheid, and concludes “that the interpretation of ‘racial’ for both crimes is indeed the same.”³²⁰ It follows that in “the context of apartheid and genocide, where individuals are targeted solely for their (perceived) group membership, ‘racial group’ ought to be defined as the perpetrator’s understanding of the racial otherness of the victim group, thereby connecting to the *mens rea*.”³²¹ This analysis is convincing. It conforms with principle of legality and the necessity for strict construction of criminal law.

Inhumane acts

Article 7(2)(h) of the Rome Statute requires proof of “inhumane acts of a character similar” to those referred to in Article 7(1) to establish liability for crimes against humanity. The Elements of Crimes clarify that ‘character’ “refers to the nature and gravity of the act.”³²² Although Lingaas argues that the list of inhuman acts “in the Apartheid Convention could... serve as illustration for the ICC when dealing with the crime of apartheid,”³²³ it is uncertain whether certain “inhuman acts” under Article II of the Apartheid Convention, such as the denial of the right to work or to education, will be held to be of “a similar” nature and gravity to the other acts enumerated as crimes against humanity under Article 7(1). To avoid violating the principle of legality, a Chamber must exercise great caution when determining whether a particular act constitutes an “other inhumane act.”³²⁴ The victim must have suffered serious bodily or mental harm³²⁵ or a serious attack on their human dignity.³²⁶

It has been argued that many of the enumerated acts contained in Article 2 of the Apartheid Convention would constitute the crime against humanity of persecution,³²⁷

³¹⁸ *Prosecutor v Blagojević and Jokić*, IT-02-60-T, Judgement, 17 January 2005, para 667. See also HSRC Report, p.156.

³¹⁹ *Prosecutor v Krstić*, IT-98-33, Judgment, 2 August 2001, para. 555. See also Dugard and Reynolds (2013), p.887.

³²⁰ Carola Lingaas, “Jewish Israeli and Palestinians as distinct ‘racial groups’ within the meaning of the crime of apartheid?” EJIL Talk! 6 July 2021.

³²¹ Ibid.

³²² Elements of the Crimes, n.29.

³²³ Lingaas, p.96 citing Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge 2010) 264; See also Hall and Van den Herik, 145.

³²⁴ *Prosecutor v Martić*, IT-95-11-T, Trial Judgement, 12 June 2007 (hereinafter “*Martić* Trial Judgement”), para. 82.

³²⁵ *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 15 March 2002 (“*Krnojelac* Trial Judgement”), para. 130; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998 (“*Čelebići* Trial Judgement”), para. 533.

³²⁶ *Prosecutor v. Galić*, IT-98-29-T, Judgement, 5 December 2003 (“*Galić* Trial Judgement”); *Krnojelac* Trial Judgement, para. 130; *Čelebići* Trial Judgement, para. 533.

³²⁷ See Hall and Van den Herik, mn 7-145.

and the element of “inhumane acts” would seem to include acts listed in paragraphs 1 (a) – (i) and (k), therefore including acts that would constitute persecution.³²⁸ It may be argued that, in the context of an institutionalised regime of systematic oppression and domination, implemented with an intention to maintain such a regime, denial of the fundamental rights enumerated in Article II of the Apartheid Convention by one racial group over another, should be considered of similar gravity to other enumerated crimes against humanity depending on their severity. This position will be likely to be contested, however, and the better view is that “inhumane acts” have a specific meaning under Article 7 of the Rome Statute, informed not only by the concept of crimes against humanity itself but also by the gravity requirement inherent in the underlying crimes against humanity of “other inhumane acts,” and persecution.

Moreover, if one argues, that the reference to southern Africa in Article 2 of the Apartheid Convention is *not* relevant to the definition of the crime under the Rome Statute, it seems – at best – inconsistent to claim that Article 2 can then be used (selectively) to broaden the scope of inhumane acts under the Rome Statute, contrary to the interpretative rule contained in Article 22.³²⁹

To constitute an “other inhumane act,” the act or omission must be sufficiently similar in gravity or seriousness to other underlying crimes against humanity.³³⁰ The degree of severity of the harm is to be assessed on a case-by-case basis, taking into account the individual factual circumstances.³³¹ The circumstances to be assessed may include: the nature of the act or omission; the context in which it occurred; the personal circumstances of the victim; including age, sex, and health; and the physical, mental, and moral effects of the act or omission upon the victim.³³² The duration of the effects of the act or omission upon the victim may also be a factor to consider when determining the seriousness of the act.³³³

Denial of a “right of return” as an “inhumane act”

The ICC’s Pre-Trial Chamber I found, in its Decision on the OTP’s Request for a Ruling on Jurisdiction under Article 19(3) of the Rome Statute in the Situation in Bangladesh, that Article 7(1)(k) of the Statute, which criminalises “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” as a crime against humanity, may be violated by “preventing a person from returning to his or her own country” when that denial

³²⁸ See Hall and Van den Herik, *mn* 7-n.912 *citing* Werle and Jessberger, *Principles* (2014) 260; Ambos, *Treatise on ICL II* (2014) 11.

³²⁹ Baldwin and Max.

³³⁰ *Naletilić and Martinović* Trial Judgement, para. 247; *Galić* Trial Judgement, para. 152.

³³¹ *Martić* Trial Judgement, para. 84.

³³² *Prosecutor v Vasiljević*, IT-98-32-A, Judgement, Appeals Chamber, 25 February 2004; *Galić* Trial Judgement, para. 153; *Krnjelac* Trial Judgement, para. 131; *Martić* Trial Judgement, para. 84.

³³³ *Krnjelac* Trial Judgement, para. 144.

causes “great suffering, or serious injury [...] to mental [...] health.”³³⁴ The Chamber noted that “following their deportation, members of the Rohingya people allegedly live in appalling conditions in Bangladesh and that the authorities of Myanmar supposedly impede their return to Myanmar.”³³⁵ Noting that no one may be arbitrarily deprived of the right to enter one’s own country under international human rights law, the Chamber’s found that “preventing the return” of members of the Rohingya people fell within Article 7(1)(k) of the Statute.³³⁶ Such conduct was of a character similar to the crime against humanity of persecution, namely “the intentional and severe deprivation of fundamental rights contrary to international law.”³³⁷ Furthermore, the Chamber found that preventing a person from returning to his or her own country causes “great suffering, or serious injury [...] to mental [...] health.”³³⁸ Much may then turn on whether such a “right to enter one’s own country” is engaged. This is a subject to which we will return in our paper considering the facts of the Israeli-Palestinian case.

Intention of maintaining “that” regime

Article 7(2)(h) of the Rome Statute requires proof of inhumane acts committed with the specific intention “of maintaining that regime,” namely “an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.”³³⁹ Lingaas argues that the *mens rea* of apartheid comprises

³³⁴ ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, Pre-Trial Chamber I, p. 44, para. 77.

³³⁵ Ibid.

³³⁶ Ibid. citing Article 12(4) of the International Covenant on Civil and Political Rights, 16 December 1966, UNTS vol. 999, p. 171; article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS vol. 660, p. 195; article 2(c) of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, UNTS vol. 1015, p. 243.

³³⁷ Ibid citing Article 7(2)(g) of the Statute.

³³⁸ ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, Pre-Trial Chamber I, p. 44, para. 77.

³³⁹ Article II of the Apartheid Convention, by contrast, refers to “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.” Clark argues that presumably “‘for the purpose of’ refers both to ‘establishing and maintaining domination’ and to ‘systematically oppressing’ so that a purpose to do both of these things must be proven.” (647). Clark notes that the “desultory discussion of the issue during the drafting of the Convention fails to indicate that this fundamental issue was ever squarely faced.” (647) Clark further notes that “Article III of the Convention emphasizes the notion of individual criminal responsibility” and provides that criminal responsibility shall apply “irrespective of the motive involved” which, Clark accepts, “raises further questions about the *mens rea* requirements of the crime of apartheid” under the Apartheid Convention (650). Clark notes that in “normal criminal law usage, ‘motive’ is a distinct concept from intent or *mens rea*. It refers to some kind of ulterior purpose for committing the offense, a purpose which is not relevant to criminal guilt, although it may be relevant to ultimate punishment” (651).

the “specific intention” of “maintaining the institutionalised regime of systematic oppression and domination over a racial group,”³⁴⁰ and suggests that the systematic oppression and domination must not only have the effect but also the purpose of maintaining a regime by one racial group over another racial group. It follows that the crime of apartheid “demands a special intent to sustain an institutionalised system of racial discrimination, in addition to the general intent of committing the crime.”³⁴¹ As a relationship arguably exists between the perpetrator’s *mens rea* and the assessment of whether the “racial group” element of apartheid is satisfied, similarly the element of “domination” is also informed by the perpetrator’s concept of his or her “supremacy,” and a relationship is established between apartheid’s *mens rea* and the assessment of whether a regime of “domination” exists factually.

Conclusion on elements of the crime

We conclude that the elements of the crime have been broadened by Human Rights Watch and others in a manner that is inconsistent with both the principle of legality (under international human rights law) and the presumption that the definition of crimes shall be strictly construed (under international criminal law). The legal elements suggested by Human Rights Watch are arguably inconsistent with the definition of the crime of apartheid under the Rome Statute and the Apartheid Convention, and their application is inapposite to the Israeli-Palestinian situation.

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³⁴⁰ Lingaas, “The Crime against Humanity of Apartheid,” p.102.

³⁴¹ Ibid.