



Apartheid in the Occupied West Bank: A Legal Analysis of Israel's Actions

Joint Submission to the United Nations Independent International Commission of Inquiry on the Occupied Territory, including East Jerusalem, and Israel

February 28, 2022

The International Human Rights Clinic at Harvard Law School and Addameer Prisoner Support and Human Rights Association welcome the opportunity to respond to the call for submissions by the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel. **This submission focuses on the legal regime enforced by Israel in the occupied West Bank that denies Palestinians their civil and political rights in violation of international law.¹ Specifically, this submission finds that Israel's actions in the occupied West Bank are in breach of the prohibition of apartheid and amount to the crime of apartheid under international law.²**

¹ The scope of this submission is confined to analyzing the application of the prohibition of apartheid in the occupied West Bank as it relates to violations of Palestinians' legal rights, including primarily civil and political rights. This submission's limited scope reflects the focus and in-depth research of the International Human Rights Clinic as part of a joint project with Addameer during the 2021-2022 academic year. For more information on Addameer's positions, research, and activism more broadly in the Occupied Palestinian Territories, see <https://www.addameer.org>.

² For more comprehensive discussion and analysis of the crime of apartheid in the Occupied Palestinian Territories and Israel, see Al-Haq, Law in the Service of Man, Addameer Prisoner Support and Human Rights Association, and Habitat International Coalition – Housing and Land Rights Network, "Entrenching and Maintaining an Apartheid Regime over the Palestinian People as a Whole: Joint Submission to the United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Mr. Michael Lynk," January 2022, <https://www.alhaq.org/advocacy/19415.html>; Amnesty International, "Israel's Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity," 1 February 2022, <https://www.amnesty.org/en/documents/mde15/5141/2022/en/>; Human Rights Watch, "A Threshold Crossed: Israeli Authorities and the Crime of Apartheid and Persecution," 27 April 2021, <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>; B'Tselem, "A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This is Apartheid," 12 January 2021, https://www.btselem.org/publications/fulltext/202101_this_is_apartheid; Sfar, Michael, "The Israeli Occupation of the West Bank and the Crime of Apartheid: A Legal Opinion," Yesh Din, June 2020, <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Apartheid+2020/Apartheid+ENG.pdf>; Dugard, John and Reynolds, John, "Apartheid, International Law, and the Occupied Palestinian Territory," 24 *Euro. J. of Int'l L.* 867, 885-891, September 2013, <https://academic.oup.com/ejil/article/24/3/867/481600>.

Since 1967, Israel has exerted full control throughout most of the occupied West Bank, alongside limited Palestinian self-rule.³ Israel's control over the occupied West Bank is codified and enforced through a complex legal regime, which extends distinct and unequal sets of legal rights to Jewish Israelis and Palestinians, respectively. This regime functions in purpose and effect to create a two-tiered structure of rights and protections, systematically privileging Jewish Israeli settlers and discriminating against Palestinians. Israel's deliberate, institutionalized, and explicitly *legal* subjugation of Palestinians leads to the conclusion that Israel is in breach of the prohibition of apartheid under international law. Part I of this submission defines the crime of apartheid in international law and outlines applicable legal norms; Part II describes the legal regime enforced by Israel in the occupied West Bank, with a particular focus on discriminatory measures that affect Palestinian civil and political rights; and Part III examines the merits of applying the term apartheid in this context and concludes that Israel is in violation of the international law prohibition of apartheid.

I. Legal Definitions: The Crime of Apartheid in International Law

While the term “apartheid” was originally coined and applied in the context of South Africa, the crime of apartheid is well-recognized in international law and is understood to apply universally—which is to say, outside the context of apartheid South Africa.⁴ International law prohibits the crime of apartheid both as a matter of customary international law and treaty law.

Customary international law recognizes apartheid as a preemptory norm (*jus cogens*) and prohibits the crime of apartheid. The International Law Commission's (ILC) Special Rapporteur, in the fourth report on preemptory norms of general international law, recognized the prohibition of apartheid as a peremptory norm of general international law, from which no derogation is permitted.⁵ Practices of apartheid committed in the context of an armed conflict also amount to a grave breach of

³ Since 1995, the occupied West Bank has been divided into three areas: Areas A, B, and C. The 1993-1995 Oslo Accords granted the Palestinian Authority varying levels of control over Areas A and B, while Israel was granted full control over security and civil matters in Area C. Area C comprises 60% of the West Bank. *See* Government of Israel and Palestine Liberation Organization “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip,” 1995, <https://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT.aspx>. Over time, Israel has come to exercise *de facto* security control not only over Area C, but also Areas A and B, or in other words, over the entire West Bank. For a discussion of how the rules operate in practice in the different areas, *see* Weill, Sharon, “The Judicial Arm of the Occupation: the Israeli military courts in the occupied territories,” 89 *International Review of the Red Cross* (866), June 2007, https://international-review.icrc.org/sites/default/files/irrc_866_9.pdf; The Association for Civil Rights in Israel, “One Rule, Two Legal Systems, October 2014, <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>.

⁴ The term “apartheid” itself derives from the Afrikaans word for “apartness” or “separateness.” For an outline of the historical development of the prohibition and criminalization of apartheid under international law, *see* Gebhard, Julia, “Apartheid,” *Oxford Public International Law*, January 2018, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e752>; *See also* Amnesty International, “Caged Without a Roof: Apartheid in Myanmar’s Rakhine State,” 21 November 2017, <https://www.amnesty.org/en/documents/asa16/7484/2017/en/> (finding that Myanmar’s laws, policies, and practices towards its Rohingya Muslim population amount to the crime of apartheid under international law).

⁵ International Law Commission, “Fourth Report on Peremptory Norms of General International Law (*jus cogens*) by Dire Tladi, Special Rapporteur,” U.N. Doc. A/CN.4/727 at [94], 2019, <https://digitallibrary.un.org/record/3798216?ln=en>. One consequence of the peremptory status of the prohibition of apartheid under international law noted by Miles Jackson in his expert opinion (*see* Jackson, *infra* note 18) is that the prohibition has priority over other bodies of international law, like IHL, that conflict with it.

Protocol I Additional to the Geneva Conventions,⁶ which, notwithstanding that Israel is not a State Party to Protocol I,⁷ is widely regarded as customary international law.⁸

The Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention) and the Rome Statute of the International Criminal Court (Rome Statute) also prohibit apartheid and declare it a crime against humanity subject to universal jurisdiction.⁹ The State of Palestine has ratified both the Apartheid Convention and the Rome Statute.¹⁰ While Israel is not a State Party to the Apartheid Convention or the Rome Statute, its actions in the Occupied Palestinian Territories subject it to the relevant treaties, because Palestine has signed these treaties.¹¹ The prohibition of apartheid is also codified in article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which both Israel and Palestine have

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3, entered into force 7 Dec. 1978 (hereinafter “Protocol I”), art. 85(4)(c), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=73D05A98B6CEB566C12563CD0051E1A0>.

⁷ See “Treaties, State Parties and Commentaries,” ICRC, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=IL.

⁸ See Henckaerts, Jean-Marie and Doswald-Beck, Louise, “Rule 88,” *Customary International Humanitarian Law*, ICRC, 2005, <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (“State practice establishes this rule [prohibiting adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, or political belief or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria] as a norm of customary international law applicable in both international and non-international armed conflicts.”).

⁹ Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, 1015 UNTS 243, entered into force 18 July 1976 (hereinafter “Apartheid Convention”), art. 1, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf; Rome Statute of the International Criminal Court, 1998, UN Doc. A/CONF.183/9, 2187 UNTS 90, entered into force 1 July 2002 (hereinafter “Rome Statute”), art. 7, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>. Earlier in 1968, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity declared that “inhuman acts resulting from the policy of apartheid” are considered crimes against humanity (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 21, 1968, 754 U.N.T.S. 73, art. 1, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf). A crime against humanity generally refers to the commission of specific prohibited acts carried out as part of widespread or systematic attack against a civilian population or carried out pursuant to a state or organizational policy. See Acquaviva, Guido and Pocar, Fausto, “Crimes Against Humanity,” *Oxford Public International Law*, June 2008, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e768?prd=EPIL>.

¹⁰ The State of Palestine ratified the Apartheid Convention on 2 April, 2014, and the Rome Statute on 1 April, 2015, while Israel is not a signatory to either (“Status of Treaties, Apartheid Convention,” *United Nations Treaty Collection*, December 28, 2021, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-7&chapter=4&clang=en; “State Parties to the Rome Statute,” *International Criminal Court*, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx). In February 2021, the pre-trial chamber of the International Criminal Court (ICC) confirmed the ICC’s jurisdiction over war crimes and crimes against humanity allegedly committed in the Occupied Palestinian Territory (“Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,” Pre-Trial Chamber I, *International Criminal Court*, ICC-01/18-143 05-02-2021 1/60 EC PT, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1566>).

¹¹ See Pre-Trial Chamber I, *International Criminal Court*, ICC-01/18-143 05-02-2021 1/60 EC PT, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1566>; See also Rome Statute, art. 12 (noting that the ICC has jurisdiction if the State on whose territory the crime was committed is a State Party).

ratified.¹² Under article 2 of the ICERD, states “undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”¹³ In short, although Israel is not a State Party to the Rome Statute, the Apartheid Convention, or Protocol I Additional to the Geneva Convention, the prohibition of the crime of apartheid extends to its laws, policies, and practices in the occupied West Bank.¹⁴

Furthermore, the applicability of international humanitarian law in the occupied West Bank—due to Israel’s decades-long occupation—does not displace the applicability of international human rights law nor the prohibition of apartheid.¹⁵ As the International Court of Justice (ICJ) held in the *Armed Activities* case, both branches of law are applicable during armed conflict.¹⁶ The Human Rights Committee has adopted a similar approach, stating that “both spheres of law [international humanitarian and international human rights law] are complementary, not mutually exclusive.”¹⁷ For purposes of the analysis here, it is important to note the peremptory status of the prohibition on apartheid. While international humanitarian law—both within the provisions of the Hague Regulations and the Geneva Conventions—may allow Israel to curtail certain civil and political

¹² International Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 UNTS 195, entered into force 4 Jan. 1969 (hereinafer “ICERD”), art. 3; “Status of Treaties,” *ICERD*, 28 December, 2021, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4. In 1995, the Committee on the Elimination of All Forms of Racial Discrimination reaffirmed the universal applicability of article 3 (Committee on the Elimination of Racial Discrimination, “General Recommendation 19, The prevention, prohibition and eradication of racial segregation and apartheid,” (Forty-seventh session, 1995), U.N. Doc. A/50/18 at 140 (1995), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.6 at 208, 2003, <https://undocs.org/Home/Mobile?FinalSymbol=HRI%2FGEN%2F1%2FRev.6&Language=E>.

¹³ ICERD, art. 2.

¹⁴ In its Advisory Opinion on the Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice opined the law of belligerent occupation and treaties to which Israel is a party apply to Israel’s actions in the occupied territories (“Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,” Advisory Opinion, *ICJ*, 9 July 2004, ICJ Reports 2004, p. 136, paras. 102–114). For a discussion of the application of international human rights law in the context of belligerent occupation and its interaction with international humanitarian law in an occupied territory, see Jackson, Miles, “Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law,” *Diakonia International Humanitarian Law Centre*, 23 March 2021, <https://www.diakonia.se/ihl/news/israel-palestine-publication/expert-opinion-occupation-palestine-apartheid>.

¹⁵ See Bianchi, Andrea, “Dismantling the Wall: The ICJ’s Advisory Opinion and its Likely Impact on International Law,” 47 *German Yearbook of Int’l Law* 343, 2004, pp. 371-75, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1731929 (noting that a literal reading of the ICJ’s *Wall* Opinion lends itself to the interpretation that in situations of armed conflict, international humanitarian law would prevail as the *lex specialis* over international human rights, but contending that such an interpretation would be incorrect because it would be inconsistent with the derogation and limitation provisions provided for by international human rights treaties such as the ICCPR and with the Human Rights Committee’s comments that both spheres of law are complementary); See also Jackson, Miles, “Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law,” *Diakonia International Humanitarian Law Centre*, 23 March 2021, <https://www.diakonia.se/ihl/news/israel-palestine-publication/expert-opinion-occupation-palestine-apartheid>.

¹⁶ See *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 215-221.

¹⁷ See General Comment no. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36, <https://undocs.org/Home/Mobile?FinalSymbol=CCPR%2FC%2FC%2F36&Language=E&DeviceType=Desktop>.

rights¹⁸ Israel may not do so in a way that violates the prohibition of apartheid.¹⁹ Importantly, the prohibition of apartheid is also enshrined in international humanitarian law within Protocol I Additional to the Geneva Conventions,²⁰ leading to the conclusion that even if international humanitarian law displaced international human rights law as the *lex specialis*, such displacement may be of little significance because the prohibition is a part of international humanitarian law.²¹

The analysis of the crime of apartheid in this submission is informed by the definitions set forth in the Apartheid Convention and the Rome Statute and considers only acts that meet the requirements of both instruments. The Apartheid Convention defines the crime of apartheid as “similar policies and practices of racial segregation and discrimination as practised in southern Africa,” which include “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.”²² The Rome Statute defines the crime of apartheid to mean “inhumane acts of a character similar to those in paragraph 1 [crimes against humanity], 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.”²³

The crime against humanity of apartheid, therefore, requires: (i) inhuman acts, (ii) committed with the intent to establish or maintain the domination of one racial group over another, (iii) in the context of an institutionalized regime of systematic racial discrimination and oppression. Article 2 of the Apartheid Convention outlines the following list of “inhuman acts” that may amount to acts of apartheid, when committed systematically for the purpose of establishing or maintaining domination by one racial group over another:²⁴

¹⁸ See Regulations Respecting the Laws and Customs of War on Land, art. 43, 18 October 1907, <https://ihl-databases.icrc.org/ihl/WebART/195-200053?OpenDocument> (permitting the occupying power to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”); See also Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287, entered into force 21 October 1950 (hereinafter “Geneva Convention (IV)”), art. 51, <https://ihl-databases.icrc.org/ihl/WebART/380-600058> (permitting the occupying power to compel protected persons over 18 years of age to work where it is “necessary either for the needs of the army of occupation, or . . . [for the benefit of the] population of the occupied country.”); Geneva Convention (IV), art. 66, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/380-600073?OpenDocument> (permitting the occupying power to try accused protected persons in its “properly constituted, non-political military courts, on condition that the said courts sit in the occupied country.”).

¹⁹ Israel’s dual legal regime could arguably be consistent with IHL were it not for its purpose or intent to maintain domination over the Palestinians in violation of the prohibition on apartheid. See also Amnesty International, “Israel’s Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity,” 1 February 2022, p. 59, <https://www.amnesty.org/en/documents/mde15/5141/2022/en/> (noting that “While the law of occupation allows, and in some cases requires, differential treatment between nationals of the occupying power and the population of the occupied territory, it does not allow the occupying power to do this where the intention is to establish or maintain a system of racial oppression and domination as to do so would violate a peremptory norm of international law (the prohibition of apartheid)”).

²⁰ See Protocol I, art. 85(4)(c), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=73D05A98B6CEB566C12563CD0051E1A0>. Note also that while Israel is not a State Party to Protocol I Additional to the Geneva Conventions, the Protocol is largely seen as customary international law and is thus binding on Israel.

²¹ See Jackson, Miles “Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law,” *Diakonia International Humanitarian Law Centre*, 23 March 2021, <https://www.diakonia.se/ihl/news/israel-palestine-publication/expert-opinion-occupation-palestine-apartheid>, for a more detailed analysis on this point.

²² Apartheid Convention, art. 2.

²³ Rome Statute, art. 7(2)(h).

²⁴ Apartheid Convention, art. 2.

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
 - (i) By murder of members of a racial group or groups;
 - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
 - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
- (d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

Many of the aforementioned inhuman acts are also identified in Article 7 of the Rome Statute among “inhumane acts of a character similar to those referred to in paragraph 1,” which may amount to apartheid, if committed within an institutional system of oppression and domination and with the required intent.²⁵ These include:

- 7(1)(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- 7(1)(f) Torture;
- 7(1)(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- 7(1)(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

²⁵ Rome Statute, arts. 7(1), 7(2)(h).

Palestinians and Jewish Israelis constitute distinct racial groups for purposes of the apartheid definition under international law.²⁶ The understanding of the term “racial group” in international law has evolved away from the traditional category of “race” to encompass broader group identification which may form the basis of discrimination. In the absence of a clear definition of the term in both the Apartheid Convention and the Rome Statute, the jurisprudence of international tribunals and international human rights law can be used to clarify the term.

Several international tribunals have addressed the definition of “racial group” in the context of genocide, persecution, and other war crimes, which were based on harms perpetrated by one racial group against another.²⁷ International tribunals—notably the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY)—have found that determination of race was challenging and that no clear scientific or objective method could be used to determine whether someone belonged to a particular racial group.²⁸ In *Rutaganda*, the ICTR held that group membership under the Genocide Convention was to be understood as “a subjective rather than an objective concept” where “the victim is perceived by the perpetrator as belonging to a group slated for destruction.”²⁹ In *Blagojević and Jokić*, the ICTY held that “a national, ethnical, racial or religious group is identified by using as criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its *perceived* national, ethnical, racial or religious characteristics.”³⁰ Thus, in analyzing the meaning of racial group for purposes of the prohibition of apartheid, a subjective approach is appropriate.

The ICERD, which is referenced in the preamble of the Apartheid Convention, offers further guidance to understanding the term “racial group.”³¹ The ICERD’s definition of “racial discrimination” is broad and incorporates a subjective understanding similar to that used by international criminal tribunals. In its definition of racial discrimination, article 1 of the ICERD clarifies that “race” is not the sole indicator of racial discrimination, but that it may cover “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.”³² In its 2019 review of the State of Israel, the Committee on the Elimination of Racial Discrimination (CERD) expressed grave concerns at the consequences of policies and practices which amount to de facto segregation, and called on Israel “to eradicate all forms of segregation between Jewish and non-Jewish communities,” and to “to take immediate measures to prohibit and eradicate any such policies or practices which severely and disproportionately affect the Palestinian

²⁶ For a discussion of the issue of “racial groups” in the context of Israel-Palestine, see Dugard, John and Reynolds, John, “Apartheid, International Law, and the Occupied Palestinian Territory,” *Euro. J. of Int’l L.* 24(3), August 2013, pp. 885-891, <https://academic.oup.com/ejil/article/24/3/867/481600>.

²⁷ See Lingaas, Carola, “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/>.

²⁸ see Dugard, John and Reynolds, John, “Apartheid, International Law, and the Occupied Palestinian Territory,” *Eur. J. Int’l L.*, 24 (3): 867, 2013.

²⁹ Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Trial Judgment, 6 Dec. 1999, at para. 56.

³⁰ Prosecutor v. Blagojević and Jokić, Case No. I-02-60-T, Trial Judgment, 17 Jan. 2005, at para. 667 (emphasis added).

³¹ See Falk, Richard, “Report of the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967,” A/HRC/25/67, ¶ 53, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/25/67.

³² ICERD, art. 1. General Recommendation VIII (1990) of the Committee on the Elimination of Racial Discrimination further clarifies that the identification of individuals as members of a particular social or ethnic group or groups shall be based upon self-identification. General Recommendation VIII (1990) of the Committee on the Elimination of Racial Discrimination further clarifies that the identification of individuals as members of a particular social or ethnic group or groups shall be based upon self-identification.

population in the Occupied Palestinian Territory,” finding them to be in violation of article 3 of ICERD.³³

Finally, it should also be noted that Israeli law has interpreted the term “race” broadly, extending the definition of racism to acts committed against parts of the population because of their national origin.³⁴

II. A Dual Legal Regime: Systematic Legal Discrimination and Suppression of Palestinians’ Civil and Political Rights in the Occupied West Bank

(a) Since 1967, Israel has created a dual legal system that entrenches Jewish Israeli supremacy and systematically discriminates against Palestinians in the occupied West Bank.

Israel’s occupation of the West Bank began in June 1967, setting in motion a deliberate policy of land confiscation, dispossession, and illegal settlement, coupled with physical and legal segregation between Jewish Israeli settlers and Palestinians in the occupied West Bank.³⁵ A bifurcated system of citizenship and a dual regime of legal rights has been applied since that time, granting superior citizenship and legal status to Jewish Israeli settlers over Palestinians.³⁶ Jewish Israelis who are settled by the State of Israel in the occupied West Bank are afforded full rights and protections guaranteed to citizens under domestic Israeli law, regardless of whether they reside within Israeli borders or in settlements within the West Bank.³⁷ These citizenship rights have not been extended to Palestinians in the West Bank living under Israeli control, and for over five decades, Palestinians in the occupied West Bank have exercised no voting power to influence the Israeli military-legal system that exerts unflinching control over their lives.³⁸

³³ Consideration of reports submitted by States parties under article 9 of the Convention: Concluding Observations, Committee on the Elimination of Racial Discrimination, 19 March 2012, CERD/C/ISR/CO/14-16, <https://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf>. Earlier in 2014, the Human Rights Committee noted the existence of the two as separate groups and expressed concerns that “the Jewish and non-Jewish population are treated differently in several regards.” Human Rights Committee, Concluding observations on the fourth periodic report of Israel, CCPR/C/ISR/CO/4, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjE8R4c4NRTnrnjejYEy%2FQ%2FTfsNhC%2FVcCyV6AaesRq4RWflg0Oz033dIQscGF57fWmil1potdJupmspiFKeg7x4Qa1y8YjI8hYsH0D DwpVxN>.

³⁴ The Israeli Penal Code defines racism, in the context of the crime of “publication of racist incitement,” as “persecution, humiliation, degradation, a display of enmity, hostility or violence, or causing violence against a public or parts of the population, all because of their color, racial affiliation or national ethnic origin” (Penal Law 5737-1977, 6th Ed., Article One “A”: Racism (144A.), <https://www.icj.org/wp-content/uploads/2013/05/Israel-Penal-Law-5737-1977-eng.pdf>

³⁵ See, e.g., Amnesty International, *Israel’s Occupation: 50 Years of Dispossession*, June 2017, <https://www.amnesty.org/en/latest/campaigns/2017/06/israel-occupation-50-years-of-dispossession/>.

³⁶ See, e.g., Human Rights Watch, “A Threshold Crossed: Israeli Authorities and the Crime of Apartheid and Persecution,” April 27, 2021, <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>; The Association for Civil Rights in Israel, “One Rule, Two Legal Systems,” October 2014, <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>.

³⁷ For example, according to Amendment 2 to the Knesset Law (1970), Israeli settlers in the West Bank are permitted to vote in legislative elections from their place of residence. See The Association for Civil Rights in Israel, “One Rule, Two Legal Systems,” October 2014, <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>.

³⁸ B’Tselem, “A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This is Apartheid,” 12 January 2021, https://www.btselem.org/publications/fulltext/202101_this_is_apartheid (also noting that in 2003, the Israeli Knesset passed an order banning the issuance of Israeli citizenship to West Bank Palestinians who marry Israeli

The Commander of the Israeli Defense Forces in the West Bank (hereinafter “Israeli military commander”) acts as the supreme lawmaker and enforcer in the West Bank and deploys his powers through the issuance of military orders, which have the force of law. In 1967, the Israeli military commander proclaimed that “all authority of government, legislation, appointment and administration pertaining to the area or its residents will now be exclusively in my hands and will be exercised only by me or by any person appointed therefore by me or acting on my behalf.”³⁹ The same proclamation provided that the prevailing local law in the West Bank would remain in force, subject to any changes introduced by military orders.⁴⁰ Henceforth, Israeli military commanders have used their legislative powers extensively, issuing over 1800 military orders to date, which cover security matters, fiscal administration, taxation, transportation, land planning and zoning, management of natural resources, education, administration of justice, and more.⁴¹

While military orders ostensibly apply territorially to all persons in the occupied West Bank, Israeli policy has consistently applied military orders selectively to Palestinians, while extending domestic Israeli law to Jewish Israeli settlers.⁴² Unlike Palestinians, Jewish Israeli settlers in the occupied West Bank avail themselves of the fundamental rights protections enshrined in Israeli basic laws, vote in Israeli legislative elections, and fall under the jurisdiction of the Israeli civilian court system and prison system.⁴³ In policy and in practice, therefore, two separate justice systems operate in the West Bank, with the national identity of an individual determining the substantive law that applies and the court that may exercise jurisdiction.⁴⁴

Military orders define broad categories of “security offenses,” ranging from disturbance of the public order and terrorism offenses to regular criminal offenses, participation in non-violent protests, illegal presence in Israel, and even traffic violations, which are subject to prosecution in Israeli military courts.⁴⁵ As a result, thousands of Palestinians in the West Bank are prosecuted in Israeli military courts each year for allegations that include “entering a closed military zone,” which can be a designation attached on the spot to an area of protest, or “membership and activity in an

citizens); The Association for Civil Rights in Israel, “One Rule, Two Legal Systems,” October 2014, <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>. For an examination of whether Israel’s policies in the West Bank give rise, or will give rise, to a right of West Bank Palestinians to Israeli citizenship, see Zemach, Ariel, “The Emerging Right of West Bank Palestinians to Israeli Citizenship,” 42 *University of Pennsylvania Journal of International Law*, 2020, p. 271, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569076.

³⁹ Proclamation No. 2 Proclamation Regarding Regulation of Administration and Law, Israeli Defense Forces, 7 June 1967 [issued by Chaim Herzog, Major General, Commander of IDF Forces in the West Bank Region], sec. 3A.

⁴⁰ *Id.*, sec. 2.

⁴¹ For an analysis of how military orders interact with local law, see, Kretzmer, David and Ronen, Yael, *The Occupation of Justice*, 2021, pp. 41-54. See also Database of Israeli Military Orders in the Occupied Palestinian Territory, Applied Research Institute in Jerusalem (ARIJ), <http://orders.arij.org/index.php>.

⁴² Since 1967, the Israeli legislature (Knesset) amended several major laws to extend their application to Jewish Israeli settlers in the West Bank, including the Election Law, Defense Service Law, the Income Tax Order, the Population Registry Law, the National Insurance Law, the National Health Insurance Law, the Traffic Ordinance and more (The Association for Civil Rights in Israel, “One Rule, Two Legal Systems,” October 2014, pp. 13-75, <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>).

⁴³ Since the early 1980s, the Israeli Attorney General dictated, as a matter of policy, that citizens of the State of Israel will not stand trial before a military tribunal (*Id.*, quoting Yavne, Lior, “Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories,” *Yesh Din*, December 2007, p. 43). In practice, all Israeli citizens brought to trial before military courts were Arab citizens or residents of Israel (*Id.*, p. 37).

⁴⁴ *Id.*, pp. 31-38.

⁴⁵ The Israeli Military Court System, *Addameer*, July 2017, https://www.addameer.org/israeli_military_judicial_system/military_courts.

unlawful association” (note that the Israeli army has assumed power to declare as “unlawful association[s]” groups that advocate for “bringing into hatred or contempt, or the exciting of disaffection against” Israeli occupation authorities).⁴⁶ Similarly, there are military orders that criminalize gatherings of more than ten people that “could be construed as political,” if they take place without a permit; publishing material “having a political significance;” and displaying “flags or political symbols” without prior military approval.⁴⁷ Peaceful expression of opposition to the occupation may run counter to military orders that criminalize anyone who “attempts, orally or otherwise, to influence public opinion in the area [the West Bank] in a manner which may harm public peace or public order,” “publishes words of praise, sympathy or support for a hostile organization, its actions or objectives,” or commits an “act or omission which entails harm, damage, disturbance to the security of the area or of the Israeli Defense Forces.”⁴⁸ These categories are deliberately capacious and provide tools for targeting Palestinian civil society political expression, human rights advocacy, and peaceful opposition to Israeli occupation policies.⁴⁹ Between 2010-2019, an average of 5,500 Palestinians were detained each year by Israeli military authorities on suspicion of committing various “security offenses”.⁵⁰

Procedurally, military orders grant the Israeli military forces wide powers to detain individuals with inadequate due process guarantees. For instance, Military Order no. 1651 provides that the Israeli military commander may authorize the “administrative” detention, for up to six months, of a Palestinian individual not charged with a crime if the commander has reasonable grounds to believe that the individual “must be held in detention for reasons to do with regional security or public security.”⁵¹ This detention is not subject to a warrant, and charges do not need to be disclosed to the detainee.⁵² Military Order no. 1651 further grants the Israeli military broad powers to withhold a detainee’s right to communicate with a lawyer and to be brought before a judge in a timely manner.⁵³ In the course of administrative proceedings to confirm an administrative detention order, military courts may rely exclusively on “secret evidence” that is not made available to the detainee.⁵⁴ If the detention order is affirmed, the Order provides that the military commander may extend the detention order every six months, subject to no total time limitation.⁵⁵

As illustrated in more detail below, the procedures governing detention and military court proceedings fundamentally lack meaningful due process safeguards and deprive Palestinians of their most basic right to a fair trial. The following section outlines specific failures of the military court system to safeguard Palestinians’ fair trial and due process rights in the occupied West Bank.

⁴⁶ Human Rights Watch, “Born Without Civil Rights,” December 2019, <https://www.hrw.org/report/2019/12/17/born-without-civil-rights/israels-use-draconian-military-orders-repress#>).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ In 2010, Military Order No. 1651 (2009) came into effect, consolidating a number of previously issued orders into what is called now “the Criminal Code,” which governs the procedures of the arrest, detention, and prosecution of Palestinians in the West Bank. The Order has been amended several times since then; the up-to-date Hebrew version is available at https://www.nevo.co.il/law_html/law65/666_027.htm.

⁵⁰ Addameer, “Annual Violations Report 2019,” 2020, https://www.addameer.org/sites/default/files/publications/v2020_online.pdf; B’Tselem, “Statistics on Palestinians in the Custody of Israeli Security Forces,” 24 November 2021, https://www.btselem.org/statistics/detainees_and_prisoners.

⁵¹ Order Regarding Security Directives [Consolidated Version] (Judea and Samaria) (No. 1651), art. 285, https://www.nevo.co.il/law_html/law65/666_027.htm.

⁵² *Id.*, art. 273.

⁵³ *Id.*, arts. 57-59; 275.

⁵⁴ *Id.*, arts. 277-80.

⁵⁵ *Id.*, arts. 273-76.

(b) *The Israeli military judiciary systematically violates Palestinians' basic rights to fair trial and due process.*

This section outlines specific violations of due process and fair trial rights that are *de jure* and *de facto* enshrined within Israel's military justice system in occupied West Bank.

The limited fair trial and due process guarantees available to Palestinians in military courts stand in sharp contrast to the constitutional guarantees that the Israeli juridical system affords to Jewish Israeli settlers. Palestinian political prisoners are interrogated and held in military-run detention centers, and human rights organizations have reported prevalent practices of torture and ill-treatment, including beating, physical assault, and positional torture.⁵⁶ Palestinians are also deprived the right to be tried before an independent and impartial tribunal.⁵⁷ The prosecutors, administrative officers, and, most importantly, judges in the military courts are all Israeli military officers.⁵⁸ Amnesty International reported that as of 2017, none of the nearly 1,000 torture complaints filed in the Israeli military court system had been investigated.⁵⁹ Historically, the annual conviction rate of Palestinians in Israeli military courts has exceeded 99%.⁶⁰

⁵⁶ See, e.g., Addameer, "Annual Violations Report 2019," 2020, https://www.addameer.org/sites/default/files/publications/v2020_online.pdf; Addameer, "The Systematic Use of Torture and Ill-treatment at Israeli Interrogation Centers ... Cases of Torture Committed at Al-Mascobiyya Interrogation Center," 23 January 2020, <http://www.addameer.org/publications/systematic-use-torture-and-ill-treatment-israeli-interrogation-centers-cases-torture>; Al-Haq, "Urgent Appeal for the Immediate Release of Human Rights Defender, Ms. Shatha Odeh Abu Fannounch," 23 July 2021, https://www.alhaq.org/cached_uploads/download/2021/07/24/23-july-2021-ms-odeh-urgent-appeal-1627128914.pdf.

⁵⁷ Under the ICCPR, judicial independence has two aspects: First, judges must be *actually* independent, as in they "must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other." Second, the tribunal must "also appear to a reasonable observer to be impartial." In the military court system of the occupied Palestinian Territories, the military serves as the legislator, the police, the prosecutor, judge, and jury. See General Comment no. 32 (2007) on article 14 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/32, <https://ccprcentre.org/ccpr-general-comments>. Further, the UN Working Group on Arbitrary Detention has stated that "military courts should not have jurisdiction to try civilians, whatever the charges they face. They can not be considered as independent and impartial tribunals for civilians." United Nations Working Group on Arbitrary Detention, Opinion No. 27/2008 (Egypt), A/HRC/13/30/Add.1, 4 March 2010, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/13/30/Add.1&Lang=E>.

⁵⁸ In a typical trial, a panel of three judges or a single judge presides over the case; a single judge can pronounce a sentence of up to ten years of imprisonment, while a three-judge panel may impose a sentence of any length. Until 2004, there was no requirement for these officials to have legal training or possess judicial expertise (Order no. 550 of 2004, amending article 4 of the Security Provisions Order, No. 378 of 1970); see also Yesh Din, "Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories," 2007, p.47, [https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/תשפ"ט+בהצטר+האחורית/BackyardProceedingsfullreportEng+full+report.pdf](https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/תשפ).

⁵⁹ Amnesty International, "Israel's Occupation: 50 Years of Dispossession," June 2017, <https://www.amnesty.org/en/latest/campaigns/2017/06/israel-occupation-50-years-of-dispossession/>.

⁶⁰ Quzmar, Khaled, "Israel's Detention of Palestinian Children is an Outrage to Humanity," *Defense of Children International*, 29 September 2021, <https://defenceforchildren.org/israels-detention-of-palestinian-children-is-an-outrage-to-humanity/>; B'Tselem, "Minors in Jeopardy: Violation of the Rights of Palestinian Minors by Israeli Military Courts," March 2018, https://www.btselem.org/sites/default/files/publications/201803_minors_in_jeopardy_eng.pdf; B'Tselem, "Presumed Guilty: Remand in Custody by Military Courts in the West Bank," June 2015, https://www.btselem.org/sites/default/files/sites/default/files2/201506_presumed_guilty_eng.pdf; Levinson, Chaim, "Nearly 100% of All Military Court Cases in West Bank End in Conviction, Haaretz Learns," *Haaretz*, 29 November 2011, <https://www.haaretz.com/1.5214377>.

There are currently two military courts of first instance in the occupied West Bank, each located within an Israeli military base (Ofar and Salem), in addition to a military appeals court.⁶¹ While norms and procedural guarantees of an independent judiciary and fair trial are well substantiated in both international law and Israeli constitutional law, military courts fall short on nearly every dimension of due process rights.⁶² At the outset, Palestinians suspected of security-related offenses can be arrested and held without charge for the purpose of interrogation for a period of 75 days.⁶³ Upon request of the regional Israeli military advisor, an appellate military judge may extend the detention period “from time to time,” for an additional period of up to 90 days.⁶⁴ Palestinians who are not suspected of a particular crime but are considered by the Israeli military to pose a “security concern” may be placed in administrative detention *indefinitely*, without charges or trial, if a military judge finds that the prolonged detention is “justified.”⁶⁵ In comparison, for security offenses that are tried in Israeli civilian (non-military) courts, the Israeli Security Suspects Law limits the initial interrogation period for security offenses to 35 days, which can be renewed only by a request by the Attorney General, and no suspect may be held without indictment for a period exceeding 75 days.⁶⁶ For security offenses, a Palestinian detainee in the military court system can be held for up to 60 days without access to a lawyer, in comparison to a maximum of 21 days in the Israeli civilian court system.⁶⁷ According to Addameer’s statistics, at the time of submission of this report in February 2022, there are currently 500 Palestinians in administrative detention.⁶⁸ In certain cases, administrative detainees have been told that they stand accused of “belonging to an illegal organization” (such as the Union of Agricultural Work Committees), of being “a threat to Israel and the Jewish people,” or that charges exist but are secret and will not be shared with the detainee or

⁶¹ The Israeli Military System, *Addameer*, July 2017,

http://www.addameer.org/index.php/israeli_military_judicial_system/military_courts.

⁶² See, e.g., Addameer, “In the case of The Palestinian People vs. Military Courts,” March 2021,

<https://www.addameer.org/node/4318>; B’Tselem, “Presumed Guilty: Remand in Custody by Military Courts in the West Bank,” June 2015, https://www.btselem.org/download/201506_presumed_guilty_eng.pdf; Yesh Din-Volunteer for Human Rights, “Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories,” 2007, p.47, <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/מִשְׁפָּטִים+בְּהֶצֶר+הָאֶחָד/BackyardProceedingsfullreportEng+full+report.pdf>.

⁶³ Order Regarding Security Directives [Consolidated Version] (Judea and Samaria) (No. 1651), art. 37, <http://www.militarycourtwatch.org/files/server/MO%201651%20.pdf>.

⁶⁴ *Id.*, art. 38.

⁶⁵ The Order Regarding Security Provisions states, “If a trial does not begin within 60 days, the detainee must be brought before a Military Court of Appeals judge who will order his or her release unless the judge believes that the circumstances which justified the original detention persist. In the case of a defendant charged with security offenses, if the trial does not end within 18 months, or one year if the defendant is a minor, or if the case involves a non-security related offense, the suspect will be brought before a Military Court of Appeals judge, who will order his or her release unless the judge believes continued detention is justified. In this case, the judge may extend the detention by six months (or three months in the case of a minor). The judge may continue to extend the detention in subsequent hearings.”

B’Tselem, “Presumed Guilty: Remand in Custody by Military Courts in the West Bank,” June 2015, p. 15,

https://www.btselem.org/download/201506_presumed_guilty_eng.pdf.

⁶⁶ Security Suspects Law, arts. 4(2), https://www.nevo.co.il/law_html/law19/999_640.htm#Seif2; Arrests Law, art. 59,

https://www.nevo.co.il/law_html/law01/055_103.htm#Seif41. The Israeli Arrests Law limits the initial interrogation period to 30 days for “regular” criminal offenses, which may be extended by request of the Attorney General, and no suspect may be held without indictment for more than 75 days (Arrests Law, arts. 17, 59, https://www.nevo.co.il/law_html/law01/055_103.htm#Seif41).

⁶⁷ Order Regarding Security Directives [Consolidated Version] (Judea and Samaria) (No. 1651), arts. 58-59,

https://www.nevo.co.il/law_html/law65/666_027.htm; Arrests Law, art. 35,

https://www.nevo.co.il/law_html/law01/055_103.htm#Seif41.

⁶⁸ Statistics, *Addameer*, 8 February 2022, <http://www.addameer.org/index.php/statistics>.

their lawyer.⁶⁹ No search warrant is required in order for the Israeli military to enter Palestinian homes in the West Bank, but warrants are required to enter Jewish Israel settlers' homes.⁷⁰

Military court proceedings are conducted entirely in Hebrew, the official language of the Israeli state, but one that most Palestinians in the West Bank do not understand.⁷¹ Military courts consistently fail to provide professionally trained interpreters, impeding the ability of the defendant and defense counsel to understand the proceedings and legal documentation attached to the case, including the charges against the defendant.⁷² Palestinian detainees are provided legal counsel by the military court system only if they face charges punishable by imprisonment of ten years or more; otherwise, they must rely on non-profit organizations for legal assistance.⁷³ Addameer's on-the-ground experience shows that lawyers representing Palestinian detainees are regularly subject to movement restrictions and denied permission to meet with their clients.⁷⁴ Palestinian detainees and their lawyers are routinely denied access by the courts to key case documents, including evidence used against the detainee, on account of "confidentiality" concerns.⁷⁵ The lack of access to such information denies detainees and their legal counsel the ability to prepare an adequate defense and often conceals actions by Israeli military interrogators, including torture and ill-treatment.⁷⁶ This is especially problematic in the administrative detention context, where the detention is often based solely on this "secret evidence."⁷⁷ As a result, administrative detainees are denied the right to present a meaningful defense. With no charge, and no access to evidence, detainees and their attorneys are unable to refute the military's case, present relevant evidence of their own, or to effectively cross-examine their accusers.⁷⁸

⁶⁹ *Id.* (Hassan Yousef, arrested Nov. 2011, charged with being a 'member of a terrorist organization;' Mohammad Jamal Al-Natsheh, arrested Jan. 2011, charges based on secret evidence not available to Mr. Al-Natsheh or his lawyer; Ahmad Haj Ali, arrested Jun. 2011, charges against him are secret; Nayif Rjoub, arrested Dec. 2010, charged with being a "threat to Israel and the Jewish people;" Mohammad Tel, arrested Dec. 2010, accused of belonging to "illegal organizations;" Omar Abdel Raziq, arrested Jan. 2011, charges are secret and will not be shared with him or his lawyer. These represent a small sample of the responses administrative detainees receive when wishing to exercise their right to be told of the charges against them).

⁷⁰ On September 1, 2021, the Israeli Supreme Court handed down a decision confirming that only Palestinian homes can be raided by the Israeli military without a warrant (Military Court Watch, "Israeli High Court confirms only Palestinian homes can be entered without a warrant," 6 October 2021, <http://www.militarycourtwatch.org/page.php?id=316TyVgssCa1576758AcoFFf4Rge5>. The decision is available in Hebrew at [https://s3.eu-west-1.amazonaws.com/files.yesh-din.org/FHE+petition+March+2020/בג"ץ+היפוישים+בגדה](https://s3.eu-west-1.amazonaws.com/files.yesh-din.org/FHE+petition+March+2020/בג).pdf.

⁷¹ Addameer, "In the case of The Palestinian People vs. Military Courts," March 2021, <https://www.addameer.org/node/4318>.

⁷² *Id.*

⁷³ Order Regarding Security Directives [Consolidated Version] (Judea and Samaria) (No. 1651), art. 77, https://www.nevo.co.il/law_html/law65/666_027.htm.

⁷⁴ Addameer, "In the case of The Palestinian People vs. Military Courts," March 2021, <https://www.addameer.org/node/4318>.

⁷⁵ *Id.*; B'Tselem, "Presumed Guilty: Remand in Custody by Military Courts in the West Bank," June 2015, https://www.btselem.org/download/201506_presumed_guilty_eng.pdf; see also Human Rights Watch, "Born Without Civil Rights," December 2019, <https://www.hrw.org/report/2019/12/17/born-without-civil-rights/israels-use-draconian-military-orders-repress#>.

⁷⁶ Addameer, "In the case of The Palestinian People vs. Military Courts," March 2021, <https://www.addameer.org/node/4318>.

⁷⁷ *Id.*

⁷⁸ B'Tselem, "Without Trial," October 2009, pp. 19-20, https://www.btselem.org/publications/summaries/200910_without_trial.

Palestinian children are also subject to grave human rights violations in the Israeli military court system. Palestinians are tried as adults in Israeli military courts starting at the age of 16, while the Israeli civilian justice system sets the age of majority at 18.⁷⁹ Each year, between 500-700 Palestinian children under the age of 18 from the occupied West Bank are prosecuted in Israeli military courts.⁸⁰ According to Defense of Children International, the most common charge levied against Palestinian children is throwing stones, a crime that is punishable under military law by up to 20 years in prison.⁸¹ Many Palestinian children arrested on such charges reported being blindfolded, strip-searched, subjected to physical violence, and coerced to sign confessions in Hebrew, a language that they do not understand.⁸² No Israeli child is tried in military courts.⁸³

Israel's use of administrative detention and military court trials raises serious concerns under both international humanitarian law and international human rights law. Because of the fundamental importance of a fair trial and due process, international humanitarian law contemplates the use of administrative detention during occupation only in limited circumstances. Specifically, administrative detention is permitted where "the Occupying Power considers it *necessary*, for *imperative reasons of security*."⁸⁴ The International Committee of the Red Cross (ICRC) has stated that "deprivation of liberty" under administrative detention "is an exceptional measure of control" and implored that "it must end as soon as those security reasons cease to exist or, at the latest, when hostilities cease."⁸⁵ Under international human rights law, fair trial rights are protected under the International Convention on Civil and Political Rights (ICCPR).⁸⁶ These rights may only be derogated during a public emergency *that threatens the life of the nation*, and then, only to the extent strictly necessary to address that threat.⁸⁷ In addition, administrative detention may only be ordered on a case-by-case

⁷⁹ The Israeli Military Court System, *Addameer*, July 2017,

http://www.addameer.org/index.php/israeli_military_judicial_system/military_courts.

⁸⁰ Military Detention, *Defense of Children International*, https://www.dci-palestine.org/military_detention; Imprisonment of Children, *Addameer*, December 2017, https://www.addameer.org/the_prisoners/children.

⁸¹ Military Detention, *Defense of Children International*, https://www.dci-palestine.org/military_detention.

⁸² *Id.*; see also Committee Against Torture, Concluding Observations on the Fifth Periodic Report of Israel, 3 June 2016, CAT/C/ISR/CO/5, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fISR%2fCO%2f5&Lang=en.

⁸³ For a detailed comparison of the standards applied to Palestinian and Israeli children, see Discrimination, *Military Court Watch*, https://www.militarycourtwatch.org/page.php?id=RyO5OsFMaZa27579A0cctVm0lxd#_edn17.

⁸⁴ Geneva Convention (IV), art. 78 (emphasis added).

⁸⁵ International Committee of the Red Cross, "Contemporary Challenges to IHL – security detention," 29 October 2010, <https://www.icrc.org/en/document/security-detention>. See also "UN expert calls for Israel to end practice of administrative detention and immediately release Maher Al-Akhras" *UNOHCHR*, 23 October 2020, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26415&LangID=E>.

⁸⁶ International Convention on Civil and Political Rights, 1966, 999 U.N.T.S. 171, entered into force 23 March 1976, art. 14, (hereinafter "ICCPR"). See Human Right Committee, Concluding Observations of the Human Rights Committee - Israel, 18 August 1998,

<https://undocs.org/Home/Mobile?FinalSymbol=CCPR%2fC%2f79%2fAdd.93&Language=E&DeviceType=Desktop>, U.N. Doc. CCPR/C/79/Add.93 (emphasizing for the first time that the Human Rights Committee is of the view that "the Covenant [ICCPR] must be held applicable to the occupied territories" in part due to Israel's effective jurisdiction over the area, its long-standing presence, and its ambiguous attitude towards the occupied territories' future status).

⁸⁷ ICCPR, art. 4.1.

basis, and without discrimination of any kind,⁸⁸ and may not be used as a substitute for criminal proceedings simply because there is insufficient evidence to convict.⁸⁹

The Israeli military's systematic departures from basic due process rights in its practice of administrative detention of Palestinians in the occupied West Bank have led the UN Working Group on Arbitrary Detention to find that many cases of administrative detention in the occupied West Bank amount to arbitrary detention.⁹⁰ In addition to the shortcomings enumerated above, the Working Group has also found it relevant that administrative detention is often used to elongate a person's incarceration after that person has completed a criminal sentence, or in lieu of a criminal trial when there is insufficient evidence to warrant a conviction.⁹¹ The Working Group has also noted that, because of the length of many administrative detentions, the detainees should be afforded full trial rights.⁹² Finally, the Working Group's decisions have underscored the system of discipline and promotion within the military as fundamentally undermining a military judge's ability to act as an impartial tribunal.⁹³

Taken together, Israeli military orders and the exercise of jurisdiction by military courts act to deprive Palestinians in the West Bank, systematically and uniquely, of a wide range of civil and political rights and liberties, enshrine the inferior legal status of Palestinians in comparison to Jewish Israeli settlers, and criminalize Palestinian opposition to the occupation.

(c) In recent years, Israel has weaponized the military justice system in the West Bank to intensify the suppression of Palestinian civil and political rights, creating a chokehold on Palestinian civil society.

The suppression of Palestinian freedom of association and assembly has intensified in recent years, and criminalization of “unlawful” associations has recently been extended to six prominent Palestinian civil society organizations—Addameer Prisoner Support and Human Rights Association, Al-Haq, Bisan Center for Research and Development, Defense for Children International-Palestine (DCIP), Union of Agricultural Work Committees, and Union of Palestinian Women's

⁸⁸ See UN Working Group on Arbitrary Detention, Revised methods of work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/36/38, 13 July 2017, ¶ 8,

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A_HRC_33_66_E.docx.

⁸⁹ Pictet, Jean S., ed., *Commentary: The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), 367-368.

⁹⁰ See, e.g., Decision of the U.N. Working Group, Opinion No. 60/2021 concerning Amal Nakhleh, 2021, p. 11. The Working Group on Arbitrary Detention further explains that administrative detention amounts to arbitrary detention when one of five circumstances is present: (1) Where there is no legal basis for the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence); (2) When the deprivation of liberty results from the exercise of certain civil and political rights, such as freedom of opinion, expression, or assembly; (3) When the total or partial non-observance of the international norms relating to the right of a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character; (4) When asylum seekers, immigrants, or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy; or (5) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, or any other status that aims towards or can result in ignoring the equality of human beings. UN Working Group on Arbitrary Detention, Revised methods of work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/36/38, 13 July 2017, ¶ 8,

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A_HRC_33_66_E.docx.

⁹¹ Decision of the U.N. Working Group, Opinion No. 60/2021 concerning Amal Nakhleh, 2021, p. 11.

⁹² *Id.*

⁹³ *Id.*, p. 9.

Committees.⁹⁴ These organizations focus primarily on documentation of human rights violations against Palestinians, advocating for Palestinian rights, and providing legal aid and social support services to Palestinians in the occupied territories. Israeli authorities have accused the six organizations of ties to terrorism, but have failed thus far to provide any evidence to support their claim or justify these recent measures,⁹⁵ which were widely rejected by Palestinian civil society and condemned by the UN High Commissioner on Human Rights and UN mandate holders, EU governments, and rights organizations in Israel and around the world.⁹⁶

The designation effectively enables the Israeli military to shut down the organizations' operations, seize their assets and property, arrest and prosecute their staff, and criminalize any contribution or assistance to these organizations, thereby shutting down almost all outlets for Palestinian civil society expression and human rights advocacy.⁹⁷ The criminalization of Addameer, for instance, which offers free legal aid to Palestinian prisoners⁹⁸—further risks depriving Palestinians of critically-needed legal representation and advocacy in military court proceedings. Earlier in January 2021, the Israeli military designated the Palestinian Health Work Committees, a key provider of healthcare services in the occupied West Bank, as an unlawful and illegitimate organization.⁹⁹ In June 2021, the Israeli military raided and shut down the Health Work Committees' offices, leading to potentially catastrophic consequences for the healthcare needs of Palestinians, especially in the context of an ongoing pandemic.¹⁰⁰

⁹⁴ On October 22, 2021, the Israeli Defense Minister declared six Palestinian civil society organizations unlawful under the 2016 Israeli Counterterrorism Act, alleging that they have acted in collaboration with the Popular Front for the Liberation of Palestine (Designations No. 371-376, Israeli Minister of Defense, 19 October 2021, <https://nbctf.mod.gov.il/en/Pages/211021EN.aspx>). Two weeks later, the Israeli military commander in West Bank declared them “illegitimate in accordance with defense regulations” (Declarations 11790-11794, 3 November 2021, https://www.idf.il/media/89776/258-קמצמק_compressed_compressed.pdf).

⁹⁵ See, e.g., Adalah – The Legal Arab Center for Minority Rights in Israel, “The Palestinian Six Organizations Officially Demand that Israeli Security Authorities Reveal the Evidence,” 27 December 2021, <https://www.adalah.org/en/content/view/10504>.

⁹⁶ See, e.g., Al-Haq, “Palestinian Human Rights NGOs will not be Silenced, and Call on the International Community to take Concrete Actions to Rescind Barbarous Israeli Designations,” 23 October 2021, <https://www.alhaq.org/advocacy/19009.html>; UN Human Rights Office of the High Commissioner, “Israel’s “terrorism” designation an unjustified attack on Palestinian civil society – Bachelet,” 26 October 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27708&LangID=E>; “UN Special Rapporteurs Condemn Israel’s Designation of Palestinian Human Rights Defenders as Terrorist Organizations – Press Release,” *United Nations*, 25 October 2021, <https://www.un.org/unispal/document/un-special-rapporteurs-condemn-israels-designation-of-palestinian-human-rights-defenders-as-terrorist-organisations-press-release/>; “EU questions Israeli decision to ban Palestinian NGOs,” *Brussels Times*, 26 October 2021, <https://www.brusselstimes.com/news/eu-affairs/190653/eu-questions-israeli-decision-to-ban-palestinian-ngos>; Addameer, “252 Human Rights Networks and Organizations Condemn the Decision of the Occupation and Apartheid Government Concerning Six Palestinian Civil Society and Human Rights Organizations,” 27 October, 2021, <https://www.addameer.org/news/4549>; B’Tselem, “Joint Statement by Israeli Human Rights Organizations: Draconian Measures Against Human Rights,” 25 October 2021, https://www.btselem.org/press_releases/20211025_draconian_measure_against_human_rights.

⁹⁷ The organizations currently are subject to dual criminalization under both the Israeli Counter-Terrorism Law and military-issued orders (declarations). The Counter-Terrorism Law outlines the legal consequences of the designation: see Counter-Terrorism Law, 5776-2016, <https://nbctf.mod.gov.il/en/legislation/Pages/default.aspx>.

⁹⁸ See Section II(c) of this submission.

⁹⁹ Al-Haq, “Israel’s Attack on the Palestinian Health Work Committees is Part of its Systematic Targeting of Palestinian Civil Society,” 19 June 2021, <https://www.alhaq.org/advocacy/18527.html>.

¹⁰⁰ *Id.*; Amnesty International, “Israeli Army Shutdown of Health Organization Will Have Catastrophic Consequences for Palestinian Healthcare,” 9 June 2021, <https://www.amnesty.org/en/latest/news/2021/06/israeli-army-shutdown-of-health-organization-will-have-catastrophic-consequences-for-palestinian-healthcare/>.

According to Yesh Din, Israeli law enforcement authorities in the occupied West Bank failed to investigate 82% of 1,293 reported settler violence cases between 2009-2019, and out of all cases investigated, 91% were closed without indictment.¹¹⁰ Most recently, in the olive harvest season of 2021, Yesh Din reported 42 offenses committed by Israeli settlers against Palestinian residents of the West Bank, including physical attacks, crop theft, damage or destruction of property, and prevention of access to private land, and observed that Israeli soldiers either failed to protect Palestinians from settler violence or were directly involved in denying Palestinians access to their land.¹¹¹

(e) *The jurisprudence of the Israeli Supreme Court has contributed to perpetuating violations of Palestinian civil and political rights in the occupied West Bank.*

Criminal and administrative processes of the Israeli military justice system in the occupied West Bank lack an effective and meaningful mechanism of judicial review. Since 1967, the Israeli Supreme Court, sitting as the High Court of Justice, has exercised jurisdiction to hear petitions concerning the activities of the Israeli military in the Occupied Palestinian Territories.¹¹² However, it has maintained discretion to accept or reject any petition, with a limited standard of review in comparison to the “regular” appeal process, thus preventing many petitions from reaching the Court.¹¹³ Notably, the Israeli Supreme Court has accepted that “Israeli nationals who reside in territory under the state’s control are subject to different arrangements from those that apply to the Palestinian,” without questioning the implications of the existence of different legal arrangement governing both groups or the nature of the regime in the occupied West Bank.¹¹⁴

When reviewing administrative detention in recent cases, Israeli Supreme Court has opined that the practice is an extreme measure that severely infringes the detainee’s rights.¹¹⁵ The Court has emphasized that administrative detention is allowed only when the alleged danger is posed by the person himself, and when detention actually aids in removing the danger.¹¹⁶ The Court has also emphasized that administrative detention is subject to the principle of proportionality, meaning that it may not be used unless it is *not possible to prevent the alleged danger without it*.¹¹⁷ In practice, however, the jurisprudence of the Israeli Supreme Court has consistently demonstrated significant deference to the determinations of the Israeli military.¹¹⁸ In fact, although the Supreme Court has reviewed

¹¹⁰ Yes Din, “Law Enforcement on Israeli Civilians in the West Bank-Yesh Din Figures 2005-2019,” December 2019, <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/נתונים+חוק+אנגלית/2019+דצמבר+77+נתונים+חוק+אנגלית/Law+Enforcement+Data+Sheet+12.2019+ENG.pdf>.

¹¹¹ Yesh Din, “A Summary of the 2021 Olive Harvest Season,” 13 December 2021, <https://www.yesh-din.org/en/a-summary-of-the-2021-olive-harvest-season/>.

¹¹² Basic Law of 1984-the Judiciary provides that the Supreme Court “shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court,” art. 15(c), <https://www.refworld.org/docid/3ac6b51d24.html>.

¹¹³ For a comprehensive discussion of the Israeli Supreme Court’s procedures and jurisprudence in relation to the Occupied Palestinian Territories, see Kretzmer and Ronen, *The Occupation of Justice*, 2021.

¹¹⁴ *Id.*, p. 512 (noting that in the *Hebron Municipality* case (2019), the Israeli Supreme Court described the existence of a ‘different legal system’ that applies to Israeli nationals who reside in the West Bank as a preordained situation, without so much as querying whether this was lawful.”

¹¹⁵ See Krebs, Shiri, “Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court,” 45 *Vand. J. Transnat’l L.* 639, 2012, p. 657.

¹¹⁶ B’Tselem, “Without Trial,” October 2009, p. 13, https://www.btselem.org/publications/summaries/200910_without_trial.

¹¹⁷ See, e.g., HCJ 253/88, *Sajadiya v. Minister of Defense*, *Piskei Din* 42 (3) 801, 821.

¹¹⁸ See *id.*; B’Tselem, “Fake Justice: The Responsibility Israel’s High Court Justices Bear for the Demolition of Palestinian Homes and the Dispossession of Palestinians,” February 2019,

hundreds of administrative detention orders, as of 2021, only one has resulted in an order's revocation.¹¹⁹ Furthermore, different legal standards appear to apply to Jewish Israeli settlers seeking relief from administrative detention orders as compared to Palestinians,¹²⁰ providing further evidence of the dual legal system that Israel has put in place to discriminate against Palestinians.

The Israeli Supreme Court's jurisprudence on the use of torture is equally troubling. The Supreme Court opined that torture and ill-treatment of detainees is illegal, emphasizing the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law;¹²¹ at the same time, the Court recognized "ticking bomb" scenarios where "necessity" could be a possible criminal defense for using "physical interrogation methods."¹²² The Court held that the "necessity defense" could only apply if those interrogation methods do not reach a degree of severity so as to constitute torture, but provided little guidance beyond acknowledging that a determination of torture is dependent on the "concrete circumstances," and has generally demonstrated significant deference to the determinations of the Israeli Attorney General.¹²³ More recently, the Court upheld the legitimacy of "necessity interrogations," and further expanded the scope of the "ticking bomb" scenario, holding that "necessity" did not depend on the imminence of the danger materializing, but on the immediacy of the need to obtain information.¹²⁴ In practice, the jurisprudence of the Israeli Supreme Court has created a grave legal loophole that has effectively enabled the use of torture and ill-treatment against Palestinian detainees with impunity.

III. Apartheid in the Occupied West Bank

A finding of apartheid in the occupied West Bank requires ascertaining whether the Israeli occupation has committed: (i) inhuman act(s), (ii) with the intent to establish or maintain domination of Jewish Israelis over Palestinians, (iii) in the context of an institutionalized regime of systematic racial discrimination and oppression.

An examination of relevant Israeli law and practice, as outlined in Part II of this submission, suggests that Israeli state actors are responsible for committing several inhuman acts as defined in Article 2 of the Apartheid Convention, particularly under 2(a), 2(c), and 2(f), and that such acts may concurrently amount to inhumane acts under article 7(1) of the Rome Statute. For consistency, the following analysis will refer to acts as "inhuman" whether the relevant law is the Rome Statute or the Apartheid Convention, given the close meaning of the terms.

https://www.btselem.org/publications/summaries/201902_fake_justice; Civilian Legal System, Military Court Watch, <http://www.militarycourtwatch.org/page.php?id=tUvgWlc3zUa32334A20PgXrt21f>.

¹¹⁹ Kretzmer and Ronen, *The Occupation of Justice*, 2021, p. 333.

¹²⁰ *Id.*, pp. 339-340 (noting that the Court applied the more stringent "probability" test in a case involving the administrative detention of a Jewish Israeli (administratively detained under Israel's administrative detention statute), while the Court has never explicitly used such a stringent standard when hearing administrative detention appeals from Palestinians).

¹²¹ HCJ 5100/ 94 *Public Committee Against Torture in Israel v Government of Israel* (6 September 1999), available in English translation at <https://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-israel>.

¹²² *Id.*, para. 34. For a more detailed discussion of the implications of this judgment and its aftermath, see Kretzmer and Ronen, *The Occupation of Justice*, 2021, pp. 357-365.

¹²³ *Id.*; see also Kretzmer and Ronen, *The Occupation of Justice*, 2021, pp. 371-372.

¹²⁴ HCJ 5722/12, *Abu Ghosh v Attorney General* (12 December 2017), available in English translation at <https://versa.cardozo.yu.edu/opinions/tbeish-v-attorney-general>; HCJ 9018/17, *Firas Tbeish et al. v. Attorney General* (26 November 2018, available in English translation at <http://stoptorture.org.il/wp-content/uploads/2017/02/F.-Tbeish-Ruling-Nov.-2018.ENG.pdf>).

Article 2(a) of the Apartheid Convention relates to depriving members of a racial group the right to life and liberty of person. Israel's prevalent and well-documented practices of arbitrarily detaining Palestinians under the guise of broadly defined security offenses, denying Palestinian detainees' basic fair trial and due process rights, using ill-treatment and torture with impunity, and placing Palestinians in prolonged administrative detention without charges or trial, together can amount to the inhuman act of denying Palestinians the right to liberty of person under Article 2(a)(ii) and 2(a)(iii). Israeli practices of tolerating, and in certain cases, enabling and encouraging violent attacks by Israeli Jewish settlers on Palestinian residents in the West Bank constitute another basis for a finding of an inhuman act under Article 2(a) of the Apartheid Convention. These practices can also amount to inhuman acts as defined by the Rome Statute in article 7(1)(e) (concerning imprisonment or severe deprivation of physical liberty in violation of the fundamental rules of international law), article 7(1)(f) (concerning torture), and article 7(1)(k) (concerning the broader category of other inhuman acts intentionally causing great suffering or serious injury).

Article 2(c) of the Apartheid Convention addresses the inhuman act of persecution and encompasses a broad range of legislative and other measures that are calculated to prevent the participation of a racial group in the political, social, economic, and cultural life of the country, and the deliberate creation of conditions preventing the full development of such a group by denying them basic human rights and freedoms. Article 7(1)(h) of the Rome Statute relates to persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, or gender grounds. A wide range of Israeli policies and prevalent practices in the West Bank can amount to a finding of persecution under both articles, including the discriminatory deployment of draconian military orders that severely restrict Palestinians' exercise of their basic rights to free expression and free association and assembly, targeting Palestinian individuals and civil society organizations with criminalization and suppression, denying Palestinian detainees basic fair trial and due process rights, and failing to protect Palestinian residents from ideologically-motivated acts of violence and intimidation by Jewish Israeli settlers. Additionally, Israel's harassment, arrest, and detention of Palestinian Legislative Council members—eight of whom were currently detained as of February 2022—appears calculated to prevent the full participation of Palestinians in the political life of their country, by forcing them to languish in Israeli prisons, potentially indefinitely, based on “secret evidence,” in violation of article 2(c) of the Apartheid Convention and article 7(1)(h) of the Rome Statute.¹²⁵

Article 2(f) of the Apartheid Convention concerns the persecution of organizations and persons by depriving them of their fundamental rights and freedoms, specifically because they oppose apartheid. As discussed above, since 1967, Israel has weaponized military orders and the military judiciary to persecute those who oppose its prevalent discriminatory policies and actions in the occupied West Bank, including through criminalization of peaceful expression and assembly that may “incite” against the occupation. This persecution was demonstrated most recently in 2021 with the mass criminalization and targeting of Palestinian civil society organizations, community activists and human rights defenders. Similarly, such persecution and targeting of Palestinians on political grounds can amount to inhuman acts under Articles 7(1)(h) and 7(1)(k) of the Rome Statute.

A finding of apartheid further requires that the specified inhuman acts be committed with an intent to dominate. The totality of Israeli actions and policies in the occupied West Bank manifests an intent to establish and maintain Jewish Israeli domination and suppression of Palestinians. Since

¹²⁵ See Apartheid Convention, art. 2(c); Rome Statute, art. 7(1)(h).

1967, Israel has put in place institutions, legal instruments, and mechanisms that systematically discriminate against Palestinians in the occupied West Bank, enshrine Jewish Israeli supremacy, suppress Palestinians' exercise of their civil and political rights, and deny Palestinians' basic human rights and freedoms. Notwithstanding Israel's legitimate security interests, the scale and sweeping nature of the ongoing suppression of Palestinian rights fails any justifiable balancing test between the protection of human rights and underlying security needs.¹²⁶ The explicit objective of ensuring Jewish Israeli character and domination across Israel and the Occupied Palestinian Territories was affirmed in the 2018 Jewish Nation-State Law, which enshrines the character of Israel as a "nation-state of the Jewish people" and constitutionally entrenches the privileging of one group of people over another. The law blurs the line between the "State of Israel" and the "land of Israel," which is broadly understood to include the Occupied Palestinian Territories, and explicitly states that the exercise of the right to self-determination within the State of Israel is "unique to the Jewish people." The law also declares "the development of Jewish settlement" as a "national value," which the state would act to encourage and promote, without limiting settlement to the boundaries of the State of Israel.¹²⁷ In 2020, the former prime minister of Israel declared a plan to formally annex parts of the West Bank, bringing them under Israeli sovereignty, while specifically excluding Palestinians,¹²⁸ who have been openly described by Israeli policymakers as a demographic threat to the existence of Israel as a Jewish state.¹²⁹ That there is "no end in sight" to Israel's 55-year occupation of the West Bank,¹³⁰ in conjunction with its encouragement of settlement building, further compels the conclusion that Israel's actions are done with an intent to establish and maintain Jewish Israeli dominance over Palestinians in the occupied West Bank.

Finally, the definition of apartheid requires that the enumerated acts be practiced within an institutionalized regime of systematic racial discrimination and oppression. As discussed above, the Israeli occupation has created and deployed legal frameworks and institutions that directly enable rampant violations of Palestinians' human rights and suppress the exercise of their civil and political rights. These frameworks and institutions, taken together with ongoing long-term Israeli policies of land confiscation and dispossession, restriction of the movement of Palestinians, and expansion of

¹²⁶ For a brief discussion of reasonableness as a defense and the permissible scope of rights restrictions under International Humanitarian Law, see Baldwin, Clive, "Human Rights Watch Responds: Reflections on Apartheid and Persecution under International Law," *Human Rights Watch*, 9 July 2021, <https://www.hrw.org/news/2021/07/09/human-rights-watch-responds-reflections-apartheid-and-persecution-international-law>; see also Jackson, Miles, "Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law," between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law," *Diakonia International Humanitarian Law Centre*, 23 March 2021, <https://www.diakonia.se/ihl/news/israel-palestine-publication/expert-opinion-occupation-palestine-apartheid>.

¹²⁷ See Basic Law: Israel—the Nation-State of the Jewish People, 2018, https://www.adalah.org/uploads/uploads/Basic_Law_Israel_as_the_Nation_State_of_the_Jewish_People_HEB_2507_2018.pdf (Hebrew), https://www.adalah.org/uploads/uploads/Basic_Law_Israel_as_the_Nation_State_of_the_Jewish_People_ENG_TRANSLATION_25072018.pdf (Unofficial English Translation). For additional resources and comprehensive analysis of the Nation-State Law and its practical implications in the occupied territories and within Israel, see Israel's Jewish Nation-State Law, *Adalah*, 20 December 2020, <https://www.adalah.org/en/content/view/9569>.

¹²⁸ "Explainer: Israel, Annexation, and the West Bank," *BBC News*, 25 June 2020, <https://www.bbc.com/news/world-middle-east-52756427>.

¹²⁹ Perry, Dan and Laub, Karin, "In Israel, the 'Demographic Issue' Gains Resonance," *Times of Israel*, 20 February 2014, <https://www.timesofisrael.com/in-israel-the-demographic-issue-gains-resonance/>.

¹³⁰ Human Rights Watch, "Israel/West Bank: Grant Palestinians Equal Rights: 52 Years Into Occupation, Rights Suspension Unlawful, Unjustifiable," 17 December 2019, <https://www.hrw.org/news/2019/12/17/israel/west-bank-grant-palestinians-equal-rights>.

illegal Israeli settlements, systematically serve the purpose of privileging and maintaining the domination of Jewish Israelis over Palestinians. Within this context, Israeli policies and actions in the occupied West Bank are far from isolated incidents, but rather represent a systematic deployment of laws, policies, and institutions to enshrine a dual legal regime that entrenches Israel's control over Palestinians, and the suppression of the rights of Palestinians as a group, while privileging the interests and nurturing the growth and expansion of Jewish Israeli settlement communities.

In conclusion, this submission finds that Israel's deployment of a dual legal system in the occupied West Bank, and the resulting systematic discrimination against Palestinians and subordination of Palestinians' civil and political rights to the rights of Jewish Israeli citizens settled in the occupied West Bank, amount to a breach of the prohibition of apartheid under international law.