



13 August 2018

**VIA OVERNIGHT DELIVERY SERVICE
& FIRST-CLASS MAIL**

HE Fatou Bensouda
Prosecutor, International Criminal Court
Post Office Box 19519
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The Netherlands

**RE: ACCUSATIONS THAT THE STATE OF ISRAEL IS COMMITTING THE
CRIME OF APARTHEID AGAINST ARAB ISRAELIS WITHIN ISRAEL;
ARAB PALESTINIANS WITHIN THE DISPUTED TERRITORIES, THE
“WEST BANK” AND THE GAZA STRIP; AND AGAINST ARAB
PALESTINIANS IN JORDAN, LEBANON, SYRIA, AND ELSEWHERE**

Your Excellency:

By way of introduction, the European Centre for Law and Justice (ECLJ) is an international, Non-Governmental Organisation (NGO), dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the Rule of Law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007.¹

As you will doubtless recall, the ECLJ has filed numerous documents with your office with the object of assisting you and your staff in resolving issues before the Office of the Prosecutor (OTP).

In September 2017, four Arab Palestinian organisations filed a dossier with the International Criminal Court (ICC) accusing Israel of committing the crime of apartheid against Arab Palestinians. Because the dossier has not been made public, we will respond to claims made publicly by other organisations in this vein on the assumption that these are substantially similar to those contained in the dossier.

In May 2009, the Middle East Project of the Democracy and Governance Programme of the Human Sciences Research Council (HSRC) (a South African research organisation) published a report called *Occupation, Colonialism, Apartheid? A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law*.² Similarly, in

¹Econ. & Social Council, List of Non-governmental Organizations in Consultative Status with the Economic and Social Council as of 1 September 2016, E/2016/INF/5 (29 December 2016), *available at* <http://undocs.org/E/2016/INF/5>.

²Hum. Sci. Res. Couns., *Occupation, Colonialism, Apartheid? A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law*, (May 2009) [hereinafter HSRC Report].

2017, the United Nations' Economic and Social Commission for Western Asia published a report (ESCWA Report) called *Israeli Practices Towards the Palestinian People and the Question of Apartheid*.³ Both reports purported to analyse Israel's treatment of Arab Israelis in Israel, Arab Palestinians in the "West Bank" and the Gaza Strip, and Arab Palestinians in Jordan, Lebanon, and Syria and concluded that such treatment constitutes apartheid.

In this brief, we strongly reject the notion that Israeli policies toward Arab citizens of Israel, Arab Palestinians in the "West Bank" and the Gaza Strip, or Arab Palestinians in Jordan, Lebanon, Syria, and elsewhere constitute apartheid. Accordingly, this brief looks at the legal definition of apartheid, its origin and meaning, and its application to the facts, i.e., Israeli policies and practices on the ground.

Section I discusses the origin and the definition of the crime of apartheid under international law. It shows that the crime of apartheid entails institutional policies of discrimination *on the basis of race and not on the basis of any other group identity*. Section II explains that Israel does not maintain racially-motivated policies. This section also explains how Israeli policies towards Arab citizens of Israel differ from its policies towards Arab residents of the "West Bank" and the Gaza Strip, thereby demonstrating conclusively that Israeli policies are founded on geo-political, rather than racial considerations. Section III discusses Israel's alleged discriminatory policies and practices regarding Arab citizens of Israel. Section IV discusses alleged discriminatory policies and practices regarding Arab Palestinians in the "West Bank" and the Gaza Strip and their legality in international law. Finally, Section V covers Israeli policies and practices regarding Arab Palestinians in Jordan, Lebanon, Syria, and other countries.

I. APARTHEID IS RACE-BASED INSTITUTIONAL DISCRIMINATION; IT DOES NOT INCLUDE ANY OTHER FORM OF DISCRIMINATION

A. The Origin and Meaning of Apartheid

Apartheid is a combination of two words: the Afrikaans word for separate, "apart," and the Dutch suffix, "heid," indicating a state of being (i.e., "hood").⁴ The term originated in South Africa where it signified the country's widespread and systematic official policies of discrimination and segregation on the basis of race.⁵

The white minority in South Africa had enacted severe discriminatory policies against the black majority and other racial groups. The whites believed they were superior to, and should exercise control over, black-skinned people⁶ (also referred to as "natives" or "Bantu"), so-called "coloureds" (people of mixed race), as well as Indians and other Asians.⁷

³Econ. & Social Comm'n for Western Asia, *Israeli Practices Towards the Palestinian People and the Question of Apartheid*, ECRI/2017/1 (2017) [hereinafter ESCWA Report].

⁴*Apartheid*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/search?q=apartheid> (last visited 6 July 2018).

⁵John Dugard & John Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, 24 EUR. J. INT'L L. 867, 872-74 (2013).

⁶See *infra* note 26 and accompanying text.

⁷Population Registration Act 30 of 1950 § 1 (S. Afr.) (§ 1(iii): "'coloured person' means a person who is not a white person or a native"; § 1(x): "'native' means a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa"; and § 1(xv): "'white person' means a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person").

Although the general consensus is that apartheid officially began in 1948, legislation that had a disproportionate impact on black persons had been enacted as early as 1856, which helped lay the foundation for apartheid in South Africa.⁸ After 1948, upon the election of a narrow majority to the South African Parliament of the all-white National Party,⁹ Parliament enacted numerous additional apartheid laws systematically discriminating against blacks and other racial groups.

Among these, the Prohibition of Mixed Marriages Act No 55 of 1949 prohibited whites from intermarrying with a person of any other race.¹⁰ The Group Areas Act No 41 of 1950 divided up land into “group areas” and assigned racial groups to certain areas.¹¹ The Bantu Authorities Act No 68 of 1951 established a separate system of governance for blacks.¹² The Population Registration Act No 30 of 1950 required people to register their race: white, coloured, or Bantu (other groups were added subsequently).¹³ The Natives Abolition of Passes & Coordination of Documents Act No 67 of 1952 required blacks to carry an identification document, which contained the holder’s fingerprints, photograph, employment details, permission from the government to frequent a specific area (especially if the person was a “migrant worker”, meaning he/she worked in an area but was not permitted to live there due to his/her race¹⁴), permission to work in that area, and work performance and

⁸Masters and Servants Act No 15 of 1856 (S. Afr.) (repealed 1974) (making breach of employment contract for unskilled labour a criminal offense); Mine and Works Act No 12 of 1911 (S. Afr.) (re-enacted by Mines and Works Amendment Act No 25 of 1926 (S. Afr.)) (helped monopolise certain employment positions for whites by categorically excluding blacks from taking such positions); Black Land Act No 27 of 1913 (S. Afr.) (expressly prohibited blacks from owning or renting lands outside of designated reserves); Native Urban Areas Act No 21 of 1923 (S. Afr.) (permitted blacks to live in their resident localities only if employed and properly sheltered, as decided by a local advisory board):

(e) any native who is at the time actually employed in *bona fide* domestic service and for whom sleeping and sanitary accommodation to the satisfaction of the urban local authority has been provided by his employer. The burden of proving that such a native is so employed shall be on the native or on his employer;

(f) any native for whom accommodation outside a location, native village or hostel is provided by his employer under the provisions of paragraph (e) of subsection (1) of section one.

Id. art 5 § 2(e)–(f). Industrial Conciliation Act No 11 of 1924 (S. Afr.) (precluded blacks from trade union memberships and from forming black trade unions); Immorality Amendment Act No 5 of 1927 (S. Afr.) (prohibited “illicit carnal intercourse” between white and black people). Legislation amending this Act in 1950 extended this prohibition to “Europeans” and “non-Europeans”, meaning that whites were prohibited from illicitly engaging with people of mixed or Asian descent, not just blacks. *Id.* Liquor Bill of 1927 (S. Afr.) (precluded liquor license holders from hiring blacks, from allowing blacks on the premises where liquor was sold, and from allowing blacks inside of delivery vehicles); Representation of Natives Act No 12 of 1936 (S. Afr.) (repealed in 1959 by the Promotion of Bantu Self-government Act No 46 of 1959 (S. Afr.)) (replaced the voting rights of blacks in the Cape with parliamentary representation by the Natives Representative Council (NRC), a purely advisory body made up of white representatives that were to advise Parliament on matters relevant to blacks); Native Laws Amendment Act of 1937 (S. Afr.) (prohibited blacks from acquiring land in urban areas unless authorised by the Governor-General); Pension Laws Amendment Act of 1944 (S. Afr.) (blacks’ maximum pension payments were reduced to 1/3 that afforded to whites); Industrial Conciliation (Natives) Bill of 1947 (S. Afr.) (prohibited black trade unions). *Apartheid Legislation 1850s-1970s*, SAHO (11 Apr. 2016), <http://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s>.

⁹*Apartheid, HISTORY*, <http://www.history.com/topics/apartheid> (last visited 17 Apr. 2018).

¹⁰Prohibition of Mixed Marriages Act 55 of 1949 (S. Afr.).

¹¹Group Areas Act No 41 of 1950 (S. Afr.).

¹²Bantu Authorities Act No 68 of 1951 (S. Afr.).

¹³Population Registration Act No 30 of 1950 (S. Afr.).

¹⁴*See, e.g.*, Group Areas Act No 41 of 1950 (S. Afr.) (established residential zones from which blacks and natives were excluded but could work in).

behaviour reports prepared by his employer.¹⁵ The Reservation of Separate Amenities Act No 49 of 1953 sought to create separate social environments for the white and other population groups.¹⁶

B. Adoption of an International Legal Definition and Prohibition of Apartheid

In the decades after World War II, the United Nations General Assembly (UNGA) adopted a number of resolutions and treaties to combat discrimination and persecution on the basis of race, religion, and national or ethnic origin prevalent in many parts of the world.¹⁷ Specific to racial discrimination, the UNGA adopted the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) in 1965.¹⁸ The ICERD broadly prohibited “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”.¹⁹ The ICERD did not designate racial discrimination a crime.²⁰ Additionally, as racial discrimination in general was not limited to South Africa, the ICERD was not specifically aimed at South Africa and did not define the term apartheid, although it did condemn apartheid as a *form* of racial discrimination.²¹

Finally, in 1973, the UNGA adopted the Apartheid Convention, which made apartheid a crime and provided its legal definition.²² The definition provides:

[T]he term “the crime of apartheid”, which shall include similar policies and practices of *racial segregation and discrimination* as practised in southern

¹⁵Natives Abolition of Passes & Coordination of Documents Act No 67 of 1952 (S. Afr.).

¹⁶The Reservation of Separate Amenities Act No 49 of 1953 (S. Afr.) (as amended by the Reservation of Separate Amenities Amendment Act No 10 of 1960). South Africa passed many additional laws based on race. *E.g.*, Natives Laws Amendment Act No 54 of 1952 (S. Afr.); Natives Labour (Settlement of Disputes) Act No 3 of 1953 (S. Afr.); Public Safety Act of 1953 (S. Afr.); The Criminal Law Amendment Act No 8 of 1953 (S. Afr.); Natives Resettlement Act No 19 of 1954 (S. Afr.); Black Labour (Settlement of Disputes) Amendment Act No 59 of 1955 (S. Afr.); Natives (Prohibition of Interdicts) Act No 64 of 1956 (S. Afr.); The Industrial Conciliation Amendment Act No 28 of 1956 (S. Afr.); South Africa Amendment Act No 9 of 1956 (S. Afr.); Riotous Assemblies Act No 17 of 1956 (S. Afr.); The Natives Taxation and Development Act No 38 of 1958 (S. Afr.); Extension of University Education Act No 45 of 1959 (S. Afr.) (precluded from white universities); Bantu Investment Corporation Act No 34 of 1959 (S. Afr.); The Promotion of Bantu Self-Government Act No 46 of 1959 (S. Afr.). *Apartheid Legislation 1850s–1970s*, SAHO (11 Apr. 2016), <http://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s>.

¹⁷During its first session in 1946, the UNGA adopted a resolution that declared it in the “higher interests of humanity” to end racial discrimination. G.A. Res. 103 (I) (19 Nov. 1946). In 1954, the UN Conference on the Status of Stateless Persons passed the Convention Relating to the Status of Stateless Persons and prohibited contracting nations from applying the provisions in a discriminatory way based on an individual’s race, religion, or national origin. Convention Relating to the Status of Stateless Persons art. 3, 28 Sept. 1954, 360 U.N.T.S. 117. Additionally, in 1966, the UNGA adopted the International Covenant on Civil and Political Rights, which prohibited discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. G.A. Res 2200 (XXI), art. 26 (16 Dec. 1966). Specific to South Africa and apartheid, the UNGA adopted resolutions in 1949 and 1950 regarding the treatment of people of Indian origin in the Union of South Africa and called the policy of racial segregation in South Africa apartheid. G.A. Res. 265 (III), at 6 (14 May 1949); G.A. Res. 395 (V), at 24 (2 Dec. 1950).

¹⁸International Convention on the Elimination of all Forms of Racial Discrimination, 4 Jan. 1969, 660 U.N.T.S. 195 [hereinafter ICERD].

¹⁹*Id.* art. 1, para. 1.

²⁰See ICERD, *supra* note 18.

²¹*Id.* art. 3.

²²International Convention on the Suppression and Punishment of the Crime of Apartheid art. II, 30 Nov. 1973, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention].

Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination *by one racial group of persons over any other racial group of persons* and systematically oppressing them:

(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 recognised 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 organisations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.²³

In July 1998, the UNGA adopted the Rome Statute. While the Rome Statute essentially adopted the Apartheid Convention's definition, in that it defined the crime of apartheid as "*inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group of any other racial group or groups and committed with the intention of maintaining that regime*", it omitted any reference to South Africa and added a

²³*Id.* (emphasis added). Additionally, the International Convention Against Apartheid in Sports, adopted by the United Nations General Assembly in 1985, also defines and condemns apartheid:

The expression "*apartheid*" shall mean a system of institutionalized racial segregation and discrimination for the purpose of establishing and maintaining domination by one racial group of persons over another racial group of persons and systematically oppressing them, such as that pursued by South Africa, and "*apartheid in sports*" shall mean the application of the policies and practices of such a system in sports activities, whether organized on a professional or an amateur basis.

International Convention against Apartheid in Sports art. 1(a), 10 Dec. 1985, 1500 U.N.T.S. 161.

number of other practices to the list of inhumane acts that were not covered by the Apartheid Convention.²⁴

C. The Crime of Apartheid Only Includes Institutional Discrimination on the Basis of Race

In order to accuse Israel of apartheid, groups like the ESCWA and the HRSC argue that the crime of apartheid is not limited to South Africa and that apartheid could occur anywhere and discriminatory policies may vary in the context of where the crime occurs.²⁵ This fact, however, does not change apartheid from being race-based institutional discrimination to something else.

Even the ESCWA and the HSRC do not deny that apartheid is an institutional policy of “racial” discrimination. However, in order to apply the definition of apartheid to the Israeli-Palestinian situation, the ESCWA and HRSC reports look at Israeli policies vis-à-vis Arab Palestinians without considering whether those *policies are racially-motivated or if there is—or can be—a claim that race is involved at all*. Without making this crucial determination, they erroneously conclude that, as long as the Israeli government treats certain Arab Palestinians differently from its own citizens, however such disparate treatment is justified, it must be committing the crime of apartheid. Such a conclusion is a gross *non-sequitur*.

Article II alone of the Apartheid Convention uses the phrase “racial group” at least a dozen times, showing that it does not prohibit discrimination on the basis of any other form of group identity (such as, religious, social, gender, geo-political, or similar identity). It is unthinkable that the States that negotiated such a treaty would agree to such a broadened interpretation. Such an interpretation would turn a treaty aimed at remedying one specific evil into a universal treaty to remedy all perceived evils at the expense of the sovereignty of the States Parties to the treaty.

Furthermore, the South African statutes mentioned above and the South African parliamentary debates show the Apartheid Convention (which expressly cites policies in

²⁴Rome Statute of the International Criminal Court art. 7, 17 July 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (emphasis added). Other practices included the following:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . 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;
- (i) Enforced disappearance of persons;
- . . . [and]
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Id.

²⁵ESCWA Report, *supra* note 3, at 30; HRSC Report, *supra* note 2, at 153–54.

South Africa as examples of apartheid) only addresses discrimination that is motivated by racial difference. The following statement was made during one of the Senate floor debates:

If we are going to make . . . a clear demarcation as to who is going to be classified as European . . . and who is going to be classified as Coloured, then we must definitely take blood into consideration. It is no use saying that we know these people are Coloured. We know these people are Coloured but, because by repute and common consent they are white, we are going to make them white. By so doing, we are going to allow Coloured blood *into this race* which we, some of us, wish to maintain so wonderfully pure.²⁶

Further, during the debate for the Population Registration Bill, it was stated that “it is obvious to all: we know the native and if we see a white man, we know that he is a white man. We . . . have never experienced any difficulties in distinguishing between Europeans and non-Europeans”.²⁷

It is clear from the South African statutes defining racial groups and the discussion between the legislators providing reasons for such classification that the sole basis for discrimination and segregation was the race of each group. Its purpose was to keep the white race pure and to dominate blacks and other races. Political or religious views had nothing to do with South African discrimination. This is further illuminated by the fact that South African laws even prohibited blacks from attending white churches. In 1881, the Dutch Reformed Church established a church for coloured South Africans.²⁸ In 1910, its synods established a church for black South Africans.²⁹ In 1951, an Indian Dutch Reformed Church was formed.³⁰ The 1957 Churches Native Laws Amendment Act was enacted to keep persons of different races from attending church together.³¹

Moreover, throughout the *travaux préparatoires* from 1960 until the Apartheid Convention was adopted by the UNGA in 1973, the discussion at the UNGA centered around race relations in South Africa. In the section entitled “White Domination and Enforcement of Apartheid-Consolidation of racism in the ‘white areas’”, the UNGA in the Report of the Special Committee on Apartheid specifically described apartheid as “racial discrimination and exploitation”, “the worst manifestation of racism”, and “a form of modern slavery”.³²

Furthermore, even though the Rome Statute omitted any reference to South Africa from its definition of apartheid and expanded the list of inhumane acts, it did not change the character of apartheid as a *race-based* crime, for it is not the commission of inhumane acts but whether they are committed *on account of* the group’s race that determines if apartheid occurred. If one wishes to argue that the Rome Statute created a broader crime called

²⁶Deborah Posel, *What’s in a Name? Racial Categorizations Under Apartheid and Their Afterlife*, 47 TRANSFORMATION: CRITICAL PERSP. ON S. AFR. 50, 55 (2001) (emphasis added).

²⁷*Id.* at 56.

²⁸*Religion and Apartheid*, COUNTRY STUD., <http://countrystudies.us/south-africa/53.htm> (last visited 14 May 2018).

²⁹*Id.*

³⁰*Id.*

³¹Elizabeth S. Landis, *Apartheid Legislation*, *Africa Today*, Nov.-Dec. 1957, at 45, 46, <https://www.jstor.org/stable/pdf/4183910.pdf?refreqid=excelsior%3A807d57ac70fa9386172bf46318767296>.

³²U.N. GAOR, 28th Sess., Rep. of the Special Comm. on Apartheid, U.N. Doc. A/9022, 8, 66 (1974).

“apartheid” not previously recognised in international law, one must also recognise that the new crime is then not applicable to all States that have not acceded to the Rome Statute.³³

Additionally, the protection from racial discrimination emerges from the *immutable characteristic of race*. Unlike political opinions, nationality, and religion (which one should not be forced to change, but may choose to change), one simply cannot change one’s race. This immutability factor does not apply to the Israeli-Palestinian situation. Neither South African blacks nor Indians could change anything to make their status equal to whites in South Africa. Whereas, after 1948, Arab Palestinians who remained in Israel became full-fledged Israeli citizens, with full access to the institutions and benefits of the State of Israel and were equal to Jewish citizens before the law. This fact absolutely belies allegations by Arab Palestinians of racial bias by Israelis.

As is clear from the South African statutes mentioned above, the South African parliamentary debates regarding apartheid statutes, the definition of apartheid provided in the Apartheid Convention as well as the Rome Statute, and the *travaux préparatoires* of the Apartheid Convention, apartheid only encompasses discrimination that is motivated by racial hatred.

Therefore, the question is whether Israeli policies are motivated by racial animosity against the Arab Palestinians. As will be shown in the following sections, the answer is clearly no.

II. ISRAEL DOES NOT HAVE RACIALLY-MOTIVATED POLICIES TOWARDS “PALESTINIANS”, WHETHER THEY ARE ARAB CITIZENS OF ISRAEL OR NON-CITIZENS RESIDING ELSEWHERE

When making unfounded allegations of apartheid, pro-Palestinian groups do not acknowledge how differently Israel treats Arab Israelis in Israel compared to Arab Palestinians in the “West Bank” and the Gaza Strip and Arab Palestinians in Jordan, Lebanon, Syria, and elsewhere. Anti-Israel groups claim that Israel is committing the crime of apartheid against all of these people as one disfavoured racial group. Contrary to this claim, while Arab Israelis, Arab Palestinians in the “West Bank” and the Gaza Strip, and Arab Palestinians in other countries all share the same ethnicity, Israel does in fact treat each group differently.

Before discussing that Israel does not maintain racially-motivated policies against any group of people, one must note that using the descriptive terms “Jewish” and “Palestinian” to define two different races is a logical fallacy. It is simply an *argumentum ad populum*. The term “Jewish” is both a religious term (Judaism is a religion) and a racial/ethnic term (most Jewish people obtain their group identity through bloodline rather than solely religion). The term “Palestinian”, on the other hand, is neither religious nor racial. Rather, it is a geopolitical term. The modern term “Palestine” came into being in the post-World War I period to designate the former Ottoman territory that included modern-day Israel, the “West

³³Vienna Convention on the Law of Treaties art. 34, 27 Jan. 1980, 1155 U.N.T.S. 331. *See also* Prosecutor v. Al Bashir, ICC-02/05-01/09, para. 10 (3 Apr. 2018) (“It is common ground that a treaty such as the Rome Statute may not itself impose legal obligations upon States which are not party to it. This follows from the ‘fundamental principle’ known as *pacta tertiis nec nocent nec prosunt*, and is reflected for example in article 34 of the Vienna Convention on the Law of Treaties”).

Bank”, the Gaza Strip, the Hashemite Kingdom of Jordan, and parts of the Golan Heights.³⁴ The term also has an ancient root. During the second century A.D., the name, “Palestine”, was given by the Romans to the region formerly called “Judea” based on the Romans’ hatred of the Jews who lived in that geographic region.³⁵

After the Mandate for Palestine had been created in the post-World War I period, all inhabitants of the area called Palestine (i.e., present-day Israel, the “West Bank”, the Gaza Strip, and Jordan) were called “Palestinians”. Hence, there were Jewish Palestinians, Arab Palestinians, Christian Palestinians, Muslim Palestinians, Druze Palestinians, and so forth. Accordingly, many Jewish “Israelis” today are no less “Palestinian” than their Arab counterparts.

Despite the frequent claim made by Arab Palestinians and their supporters that Israelis are a foreign people who are unlawfully colonising “Palestinian” territory, the Israelis—as *Jewish Palestinians*—have internationally-recognised claims to the land based on the Mandate for Palestine as well as the series of peace treaties ending the First World War. Moreover, Jews have continuously lived in that region for thousands of years.³⁶ To call them “newcomers” is a gross distortion of history.

Shortly after the British were appointed Mandatory for Palestine, they divided the Mandate in two, designating the larger portion east of the Jordan rift valley “trans-Jordan” and retaining the name “Palestine” for the smaller portion between the Jordan rift valley and the Mediterranean Sea.³⁷ When the British granted independence to Jordan, the population east of the Jordan rift valley ceased being known as Palestinians and referred to themselves as Jordanians instead. Similarly, after the creation of the modern-day State of Israel in May 1948, the inhabitants of what became the State of Israel—which included Jews, Arabs, and Druze—acquired Israeli citizenship and became known as “Israelis”.

During the unlawful, belligerent occupation of the “West Bank” and the Gaza Strip by Jordan and Egypt, respectively, from 1948 through 1967, Arab Palestinians who lived in the “West Bank” and the Gaza Strip, and the ones who fled to Jordan, Syria, and Lebanon, came to be identified over time as “the Palestinians”.

As mentioned above, even though Arab Israelis (many of whom still self-identify as “Palestinians”³⁸), Arab Palestinians in the “West Bank” and the Gaza Strip, and Arab Palestinians in the surrounding Arab countries all share the same ethnicity, Israel relates differently to each of the three groups for the purposes of its policies.

For instance, Israel treats its Arab citizens as it treats its Jewish, Druze, and other citizens. As shown below, they all have full and equal rights under the law, full and equal access to State resources, and all can participate fully in the political process.

³⁴ *Israel: Origins of the Name “Palestine”*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/origin-of-quot-palestine-quot> (last visited 14 May 2018).

³⁵ *Id.*

³⁶ See, e.g., *Demographics of Israel: Jewish & Non-Jewish Population of Israel/Palestine*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/jewish-and-non-jewish-population-of-israel-palestine-1517-present> (last visited 10 July 2018); Samuel Katz, *Continuous Jewish Presence in the Holy Land*, ERETZYISRAEL.ORG, <http://www.eretzyisrael.org/~samuel/presence.html> (last visited 10 July 2018).

³⁷ *Transjordan Memorandum*, ECF (17 Jan. 1970), http://ecf.org.il/media_items/293.

³⁸ In one sense, they are correct, but only in the sense that *all inhabitants* of what was once called the Mandate for Palestine can be called “Palestinians”—whether Jewish, Arab, Muslim, Christian, or Druze.

Israel treats the so-called Arab Palestinians in the “West Bank” and the Gaza Strip differently because (1) they are not citizens of the State of Israel and, hence, have no claim to the rights and benefits that accrue to Israel’s citizens; (2) because this population as a collective (via its political leaders) refuses to recognise the Jewish State of Israel while working actively to delegitimise and undermine it; and (3) because many Arab Palestinians, including some of their representative organisations, are engaged in ongoing violent hostilities against the State of Israel and its people.

Similarly, Arab Palestinians in other countries are not citizens of Israel and, thus, do not possess rights under Israeli law.

It is well-recognised and well-established that sovereign States have the inherent right to prefer their own citizens over non-citizens, i.e., to “discriminate” between citizens and non-citizens. For instance, most countries do not grant non-citizens the right to vote.³⁹ To say that such differential treatment does not constitute apartheid is obvious and trite.

Because Israel demonstrably does not maintain racially-motivated policies against people of Arab ethnicity (or any other ethnicity for that matter), a refutation of the “Israeli apartheid” canard should end here. However, for the sake of thoroughness, we will respond to specific allegations made by anti-Israel organisations regarding specific Israeli policies that they allege constitute inhumane acts of apartheid.

III. ISRAELI POLICIES AND PRACTICES REGARDING ARAB CITIZENS OF ISRAEL

The HSRC, the ESCWA, and Palestinian organisations like Al-Haq and Adalah argue that Israel discriminates against its Arab citizens.⁴⁰ The ESCWA report claims that the “[a]pproximately 1.7 million Palestinians [who] are citizens of Israel” and “constitute . . . about 20 per cent of the population” do not enjoy equal rights in Israel.⁴¹

Contrary to this claim, Arab Israelis enjoy full civil and political rights in Israel.⁴² Arab citizens of Israel, 20 percent of Israel’s population, enjoy full citizenship rights, including the right to vote and to run for election to the Knesset (the Israeli Parliament).⁴³ In fact, Arab Israelis have fully integrated into Israeli society. They are members of the Knesset, judiciary, military, diplomatic corps, and other government sectors.⁴⁴ This is not to say that the integration of Arab Israelis into wider Israeli society could not be better, but the level of

³⁹See, e.g., The United States government discriminates against non-citizens who live in the United States by prohibiting them from voting in federal elections or receiving social security benefits. 8 U.S.C.S. § 1612 (2008); 18 U.S.C.S. § 611 (2000). Likewise, France does not allow non-citizens to vote. 1958 CONST. art. 3.

⁴⁰See, e.g., *Discriminatory Laws in Israel*, ADALAH, <https://www.adalah.org/en/law/index> (last visited 6 July 2018) (listing Israeli laws that are allegedly discriminatory).

⁴¹ESCWA Report, *supra* note 3, at 4, 29, 32, 39, 47.

⁴²See *infra* note 51 and accompanying text.

⁴³See, e.g., Basic Law: The Knesset (1958) (“Every Israeli citizen of or over the age of eighteen years shall have the right to vote in elections to the Knesset. . . . Every Israeli citizen who on the day of the admission of a candidates list containing his name is twenty-one years of age or over shall have the right to be elected to the Knesset . . .” (emphasis added)); see also Basic Law: The President of the State (1964) (“Every Israeli citizen who is a resident of Israel is qualified to be a candidate for the office of President of the State” (emphasis added)).

⁴⁴Deroy Murdock, *Arabs are Prominent in Israel's Government*, NAT’L REV. (25 Nov. 2013, 5:00 AM), <http://www.nationalreview.com/article/364746/arabs-are-prominent-israels-government-deroy-murdock>.

integration is consistently rising and faces no legal obstacles. On the contrary, in many sectors there are affirmative action programmes in place aimed at improving such integration.

In the 20th Knesset, for example, seventeen of the 120 representatives are Arab Israelis. Arab Israelis also serve in the judiciary, police, and armed forces. Between 2004 and 2010, the number of Arab Israelis serving as judges increased from 11 per cent to 16 per cent and has continued to increase.⁴⁵ One Arab Israeli serves on the Supreme Court and ten Arab Israelis serve in the district courts.

Furthermore, while only several hundred Arab Israelis serve as officers and soldiers in the Israel Defence Forces (IDF), in part because they are not obligated to serve like non-Arab citizens are, there has been a steady increase in Arab Israelis volunteering to serve.⁴⁶ The national police force also has a significant number of Arab officers, and recent years have seen a dramatic rise in the number of Arab recruits, including women.⁴⁷ A Deputy Commissioner of Police is also an Arab.⁴⁸

Israel has no constitution.⁴⁹ Instead, it is governed by Basic Laws that function with constitution-like authority.⁵⁰ The Basic Law: Human Dignity and Liberty guarantees certain rights to “all persons”, including preservation and protection of life, body, and dignity; property; personal liberty; and privacy.⁵¹ This Basic Law draws no lines between Jews and non-Jews; all are guaranteed these rights. No exceptions are based on race. Further, the prohibitions against discrimination are enforced by the Israeli Supreme Court.⁵²

In the following subsections, this brief discusses the Israeli policies that allegedly discriminate against Arab Israelis.

A. Maintaining the Jewish Identity of Israel is No More Discriminatory Against Arab Citizens than Maintaining the Arab Identity of Surrounding States is Discriminatory Against Non-Arabs in Those States

Even though Israeli law treats Jewish and non-Jewish citizens equally, the ESCWA argues that the explicit language in the World Zionist Organization-Jewish Agency (Status

⁴⁵Moses Shayo & Asaf Zussman, *Conflict and the Persistence of Ethnic Bias*, 8 MAURICE FALK INST. FOR ECON. RES. IN ISR. 1, 12–13 (2014).

⁴⁶Jane Corbin, *Israel's Arab Soldiers who Fight for the Jewish State*, BBC (8 Nov. 2016), <http://www.bbc.com/news/world-middle-east-37895021>.

⁴⁷Greer Fay Cashman, *Presence of Arab Women in Israel Police Increasing*, JERUSALEM POST (20 June 2018, 9:01 PM), <https://www.jpost.com/Israel-News/Presence-of-Arab-women-in-Israel-Police-increasing-560481>.

⁴⁸Diaa Hadid, *Israel Seeking Police Recruits: Eager, and Arab*, N.Y. TIMES (3 Sept. 2016), <https://www.nytimes.com/2016/09/04/world/middleeast/israeli-police-recruiting-arabs-to-join-the-force-not-resist-it.html>.

⁴⁹Israel Government & Politics: Constitution, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/constitution-of-israel#1> (last visited 6 July 2018). Britain does not have a constitution either.

⁵⁰*Id.*

⁵¹Basic Law: Human Dignity and Liberty paras. 2–4.

⁵²H CJ 1113/99 Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs 54(ii) PD 164 (2000) (Isr.) (requiring the Ministry of Religious Affairs to allocate funds for cemeteries of members of various religions including Muslim Arabs and Christian Arabs in an equal manner); H CJ 11163/03 Supreme Monitoring Committee for Arab Affairs in Israel and others v. Prime Minister of Israel 61(1) PD 1 (2006) (Isr.) (holding that a government provision which gave benefits to “national priority areas” was discriminatory because hardly any Arab towns were included in the areas).

Law of 1952 regarding Israel's Jewish character, and the language of Article 7(a) of the Israeli Basic Law that does not allow anyone to challenge the Jewish identity of the State of Israel, are "essentially racist in character" and therefore constitute an apartheid policy.⁵³

Notwithstanding that every State has the right to maintain its identity and promote its religious, cultural, ethnic, or other values, opponents of Israel's Jewish identity see nothing wrong with the proclaimed *Arab* identity of a future "State of Palestine" or of neighbouring Arab States.

For instance, the Palestinian Liberation Organization (PLO) Charter calls Palestine—including present-day Israel, the "West Bank", and the Gaza Strip—the "Arab homeland".⁵⁴ Yet, this is acceptable to the ESCWA and others. Even as Palestinian leaders condemn Israel as an apartheid State, they announce that a future Palestinian State will be *Judenrein*,⁵⁵ a policy, which—if implemented—would actually discriminate against Jews based solely on race and would amount to ethnic cleansing, which violates international law and is far more extreme than anything Israel is alleged to be doing.⁵⁶ Additionally, Article 7 of the PLO's Charter states that only "Jews of Palestinian origin are considered Palestinians if they are willing to live peacefully and loyally in Palestine". No one considers such a policy as apartheid.

Moreover, organisations like the ESCWA see nothing wrong with Israel's neighbors who promote their Arab identity. For example, Lebanon's Constitution declares that the country "has an Arab identity and belonging",⁵⁷ while Jordan's Constitution establishes the country as "an independent sovereign Arab state".⁵⁸ In addition, Syria,⁵⁹ Saudi Arabia,⁶⁰ and Egypt⁶¹ all promote similar Islamic or Arab identities.

None of these nations is accused of apartheid because maintaining a national identity is accepted worldwide as a sovereign prerogative. That is the very essence of being a sovereign nation-state.⁶² International law does not prohibit national laws that promote national identity, but, rather, laws that foster unequal treatment of citizens.

⁵³ESCWA Report, *supra* note 3, at 32, 35.

⁵⁴*Id.* at 23 (quoting PLO Charter, art. 5 (1964): "The Palestinian personality is a permanent and genuine characteristic that does not disappear. It is transferred from fathers to sons"; art. 1: "Palestine is an Arab homeland bound by strong Arab national ties to the rest of the Arab countries and which together form the great Arab homeland"). See also PLO Charter, art. 2 (1964) ("Palestine, with the boundaries at the time of the British Mandate, is a regional indivisible unit").

⁵⁵Joseph Puder, *Mahmond Abbas' "Judenrein" Palestine*, FRONTPAGE MAG (3 Oct. 2016), <https://www.frontpagemag.com/fpm/264355/mahmond-abbas-judenrein-palestine-joseph-puder>.

⁵⁶Alex Joffe, *Palestinians and Internationalization: Means and Ends*, BESA (26 Nov. 2017), <https://besacenter.org/perspectives-papers/palestinians-internationalization-means-ends>.

⁵⁷CONSTITUTION OF LEBANON 23 May 1926, pmbi.

⁵⁸THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN 1 Jan. 1999, art. 1.

⁵⁹CONSTITUTION OF THE SYRIAN ARAB REPUBLIC OF 2012 26 Feb. 2012, pmbi.

⁶⁰BASIC LAW OF SAUDI ARABIA 1 Mar. 1992, art. 1.

⁶¹CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT 18 Jan. 2014, art. 1.

⁶²See Jan-Herman Reestman, *The Franco-German Constitutional Divide*, 5 EU. CONST. L. REV. 374 (2009) ("[N]ationality is not a question of identity, but of identification [T]he essential elements of the national identity include fundamental structures and essential functions of the member states, and notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organization of armed forces".).

Contrary to the allegations that Israel maintains a racial identity to the exclusion of others, the Israeli Sabbath, adherence to dietary laws, and other religious laws and customs observed by the organs of the State show that the Israeli nation's identity is substantially based on the Jewish religion and culture. Most Jews residing in Israel today come from many different nations and cultures. But Israel, as a nation, maintains its Jewish, religious identity while not imposing its religion on its Christian, Muslim, Druze, or Baha'i minorities. Instead, Israel permits its Christian and Muslim citizens to be governed by their own religiously-based family law and family courts so as not to subject them to Jewish religious law.⁶³ As such, there is no evidence that the Jewish identity of Israel is race-based or that such identity jeopardises anyone's rights, including the rights of its Arab citizens.

An Arab Palestinian organisation called Adalah cites the Israeli Broadcasting Authority Law, which calls for "radio broadcasts and television broadcasts provided to the public" to have the goal of "[s]trengthening the bond with Jewish heritage and values and enhancing the knowledge thereof" and of "[p]romoting Hebrew and Israeli creativity", as discriminatory towards non-Jews since it promotes Jewish values and heritage.⁶⁴

The same law, however, provides for "maintaining broadcasts in the Arabic language for the needs of the Arabic-speaking population and broadcasts for promoting understanding and peace with the neighboring states".⁶⁵ Nonetheless, while Israel is condemned for broadcasting material promoting Jewish heritage and values, no one condemns Arab Palestinians who broadcast hateful, offensive, and violent material against the Jewish people and Israel.⁶⁶ Such examples show that many of those who oppose the State of Israel are themselves guilty of exactly what they falsely accuse Israel of doing. Thus, they have turned to the ICC with "unclean hands", and on these grounds alone should be barred from being heard by the Court.

B. While Israel Does Distinguish Between "Citizenship" and "Nationality" of its Citizens, One's Nationality Protects One's Religious and Cultural Identity Within Israeli Society Without Changing the Fact that All Citizens are Equal Before the Law

The ESCWA argues that Israel discriminates by distinguishing between citizenship (*ezrahut*) and nationality (*le'om*) and that "[n]ational rights are reserved to Jewish nationality".⁶⁷ This allegation is specious and meant to mislead the ignorant and uninformed.

⁶³*Israel Judicial Branch: Rabbinical Courts vs Civil Courts*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/rabbinical-courts-vs-civil-courts-in-israel> (last visited 6 July 2018).

⁶⁴*Israeli Broadcasting Authority Law*, ADALAH, <https://www.adalah.org/en/law/view/527> (last visited 6 July 2018).

⁶⁵*Id.*

⁶⁶*Hamas Mickey Mouse Teaches Jihad*, SPIEGEL (9 May 2007), <http://www.spiegel.de/international/zeitgeist/the-islamist-mouseketeers-hamas-mickey-mouse-teaches-jihad-a-481940.html>; *Hamas Launches Television Network*, NPR (3 Feb. 2006, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=5186883>; *Al-Quds, Hamas's Second Satellite TV Channel, Went on Air on November 11, Further Expanding that Movement's Media Empire*, TERRORISM INFO. (16 Nov. 2008), <http://www.terrorism-info.org.il/en/18388/>; *Palestinian Kids TV Show with a Terrorist Jew-eating rabbit!*, YOUTUBE (8 Oct. 2015), https://www.youtube.com/watch?v=5v_IaFWWARw; *White and Black - Political Cartoons from Palestine*, CARTOON MOVEMENT (11 Apr. 2017, 11:34 AM), <http://blog.cartoonmovement.com/2017/04/white-and-black-political-cartoons-from-palestine.html>.

⁶⁷ESCWA report, *supra* note 3, at 35.

Israeli citizens belong to different ethnic and religious groups, such as Jewish, Arab, or Druze.⁶⁸ Arab Israelis are Arab by nationality, but they remain fully Israeli by citizenship.⁶⁹ Israeli law does not allocate rights based on one's nationality. All citizens, whether Jewish or Arab nationals, are equal before the law.⁷⁰

Contrary to the ESCWA's claims, *the citizenship-nationality distinction is made in order to protect the religious and cultural rights of Israel's minorities, not to injure them.* In fact, under Israeli law, certain aspects of society—like family law and marriage—are not regulated by the civil authorities, but by the respective religious communities.⁷¹

C. Land Transfer Laws

The ESCWA report claims that the Israeli policy of restricting the use of the state-owned Israeli land (which the ESCWA claims constitutes 93 percent of Israeli territory) to only Jewish citizens is a policy of apartheid.⁷² The short answer to this allegation is that it is an untrue statement because Israel does not have such a policy. The truth is that all state-owned land is only available to be leased, not purchased.⁷³ This policy applies equally to Jewish and non-Jewish citizens.

Basic Law: Israel Lands (1960) prohibits the sale or transfer of state land, regardless of the recipient citizen's nationality, whether Jewish or Arab.⁷⁴ Instead, state land is generally leased out for periods of 49 or 98 years.⁷⁵ Not only is there no restriction on leasing land to Jewish or Arab citizens, “the rights granted to leaseholders under the current Israeli leasehold system closely resemble full property rights. Israeli citizens and the Israeli market treat leased lands as owned by the leaseholders”.⁷⁶

The Israeli government owns roughly 75 percent of the land and the Jewish National Fund (JNF) owns about 13 percent.⁷⁷ The remaining 5 percent, previously acquired by the Development Authority in 1950, has since been leased or sold.⁷⁸ Originally, the 13 percent JNF-owned land was only available to Jews; Arabs could not lease this land.⁷⁹ However, in 2000, the Supreme Court of Israel ruled that the Israel Land Administration (ILA) (which administers all government-owned as well as JNF-owned land) could not lease exclusively to Jewish Israelis because this amounted to unlawful discrimination against Arab and other

⁶⁸Yedidia Z. Stern, *Why 'Israeli' is Not a Nationality*, JTA (3 Mar. 2014, 6:15 PM), <https://www.jta.org/2014/03/03/news-opinion/israel-middle-east/op-ed-why-israeli-is-not-a-nationality>.

⁶⁹*Israeli Arabs: Status of Arabs in Israel*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/the-status-of-arabs-in-israel> (last visited 21 May 2018) [hereinafter *Israeli Arabs*].

⁷⁰See *supra* note 51 and accompanying text.

⁷¹*State of Israel*, EMORY U. SCH. OF L., <https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/israel-state-of/> (last visited 21 May 2018).

⁷²ESCWA report, *supra* note 3, at 33–34.

⁷³*Basic Law: Israel Lands (1960)*, KNESSET GOV., https://www.knesset.gov.il/laws/special/eng/basic13_eng.htm (last visited 5 July 2018).

⁷⁴*Id.*

⁷⁵*Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages*, HRW, § 1V (30 Aug. 2013), <https://www.hrw.org/report/2008/03/30/map/land-and-housing-rights-violations-israels-unrecognized-bedouin-villages> [hereinafter *Off the Map*].

⁷⁶*Israel Society & Culture: Israel Lands - Privatization or National Ownership?*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/israel-lands-privatization-or-national-ownership> (last visited 21 May 2018).

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Off the Map*, *supra* note 75, § 1V.

Israeli citizens.⁸⁰ Additionally, in 2004, the Israeli Attorney-General decided that all land administered by the ILA—including land owned by the JNF—would be “marketed without discrimination or limits[,] including to non-Jews”.⁸¹

D. Segregation in Separate Neighbourhoods

Another false claim is that Israel has a segregation policy that does not allow its Arab citizens to live in Jewish neighbourhoods. The truth is that many members of minority groups, such as Arabs, Druze, Bedouin, and ultra-orthodox Jews choose to live in communities that are socially and religiously homogenous. The government has no policy mandating that they do so.

Israel does have residential zoning and regulatory laws like any other country. A law that is often criticised is the Law to Amend the Cooperative Societies Ordinance (No. 8), 5771-2011.⁸² This amendment codified the longstanding practice of admissions committees.⁸³ Admissions committees exist within Israeli rural communities where the number of households does not exceed 400.⁸⁴ These committees are responsible for deciding whether a person may obtain or transfer land within such rural communities.⁸⁵ Committees consider various criteria when deciding whether to approve or deny an application to secure or transfer land, such as (1) the age of the applicant, (2) whether the applicant is financially able to “establish a home” in the community within the “land allocation agreement” timeframe, and (3) whether the applicant is “suitable for the social life in the community . . . based on a professional opinion by someone who is expert in identifying such suitability”.⁸⁶

⁸⁰HCI 6698/95 Ka’adan v. Israel Lands Administration 54(1) PD 258 (2000) (Isr.).

⁸¹Amiram Barkat & Yuval Yoaz, *BIG Mazuz Rules JNF Land can now be Sold to Arabs*, HAARETZ (27 Jan. 2005, 12:00 AM), <https://www.haaretz.com/ag-mazuz-rules-jnf-land-can-now-be-sold-to-arabs-1.148348>.

⁸²*Law to Amend the Cooperative Societies Ordinance (No. 8), 5771-2011*, ADALAH, <https://www.adalah.org/uploads/oldfiles/Public/files/Discriminatory-Laws-Database/English/12-Admissions-Committees-Law-2011.pdf> (last visited 6 July 2018).

⁸³*Id.*

⁸⁴*Id.* § 2, (1)(3)(1).

⁸⁵*Id.* § 2, 6B(A)(2).

⁸⁶*Id.* The full criteria are:

6C. (A) An admissions committee is entitled to refuse to accept a candidate for a community town based on one or more of these considerations only:

- (1) The candidate is a minor;
- (2) The candidate lacks the economic ability to establish a home in the community town within the period of time stipulated in the land allocation agreement;
- (3) The candidate has no intention of establishing the center of his life in the community town;
- (4) The candidate is not suitable for the social life in the community; a decision by the admissions committee to refuse to accept a candidate due to this consideration will be based on a professional opinion by someone who is expert in identifying such suitability;
- (5) The candidate’s lack of compatibility with the social-cultural fabric of the community town, when there is reason to assume that this would harm this fabric;
- (6) Unique characteristics of the community town or acceptance criteria defined in the society’s regulations, if there are such, provided that they received the approval of the Registrar.

(B) In weighing the considerations cited in subsection (A), the admissions committee will take into account the future of the community town, how long it has existed, its strength and the nature of its population.

(C) The admissions committee will not refuse to accept a candidate for reasons of race, religion, gender, nationality, disability, personal status, age, parenthood, sexual orientation, country of origin, political-party opinion or affiliation.

Some organisations have criticised the criteria as being problematically “vague” and for putting too much discretion into the hands of committees which are partially made up of representatives from the Jewish Agency and the World Zionist Organization, bodies which strongly promote Jewish identity, values, and culture.⁸⁷ Additionally, selection committees have been accused of using the vague criteria and discretion to discriminate against Arabs by disproportionately denying Arab applications, thereby excluding them from Jewish communities.⁸⁸

Given the historical and religious differences between Jews and Arabs, one may assume the possibility of some bias at the hands of individual officials who might favour Jews over Arabs in granting residential permits in these communities. However, such conduct can hardly be considered to reflect an apartheid-like policy, because the Israeli government *neither encourages nor condones* such discrimination. Such phenomenon is marginal, affecting only a small number of people who specifically want to live in such communities. Nevertheless, government agencies are barred by law from discriminating on the basis of race or religion,⁸⁹ and the very housing law which organisations criticise for discriminating against Arabs *explicitly prohibits* such discrimination. It states: “The admissions committee will not refuse to accept a candidate for reasons of *race, religion, gender, nationality, disability, personal status, age, parenthood, sexual orientation, country of origin, [or] political-party opinion or affiliation*”.⁹⁰

Further, Israel gives aggrieved persons an avenue to obtain relief for unlawful discriminatory behavior when it occurs. Applicants who believe they were unfairly rejected by a selection committee may, on whatever grounds, appeal such decisions to higher authorities within the land governmental agencies.⁹¹ Applicants may also challenge decisions of these agencies in the Israeli court system.⁹² Challenges to alleged discrimination by selection committees have been, and likely will continue to be, made in Israeli courts through the appeals process. This does not even begin to resemble anything that existed in South Africa, which maintained an official policy of segregation and offered no avenue for affected persons to challenge government practices on the grounds of discrimination.

E. Funding for Schools

Anti-Israel organisations also falsely claims that Israel’s school system is segregated since most Arab Israelis attend schools where the medium of instruction is Arabic, rather than Hebrew-language State schools. Detractors also claim that Israel discriminates against Arab Israelis by not providing sufficient funding for the Arab education system while the predominantly Jewish education system obtains the vast majority of government funds.

⁸⁷See, e.g., *Off the Map*, *supra* note 75, § IV.

⁸⁸*Id.*

⁸⁹See, e.g., Ka’adan, *supra* note 80 (holding that the ILA cannot tender JNF land exclusively to Jews because such conduct constitutes discrimination).

⁹⁰*Law to Amend the Cooperative Societies Ordinance*, *supra* note 82, § 2, 6C.(C).

⁹¹See, e.g., *id.* § 2, 6B(D) (showing that an applicant who is denied is “entitled to submit a reservation about the admissions committee’s decision to the reservations committee”); *Off the Map*, *supra* note 75, § IV n.108 (“According to Resolution 1064, rejected applicants have a right to appeal to an appeals committee, headed by a public figure and consisting of representatives of the Register of Cooperative Societies and a representative of the ILA”).

⁹²See, e.g., Ka’adan, *supra* note 80 (petitioners challenging Jewish Agency’s objectives to only grant membership to Jews in the land settlement).

Israel does not maintain a segregated school system by law.⁹³ In fact, Israeli law *prohibits* it.⁹⁴ Yet, both Arab and Jewish Israelis have the right to *choose* which type of school to attend, and many are guided by differences in language, heritage, culture, and religion.⁹⁵ Since the majority of Arab Israelis live in Arab communities by choice,⁹⁶ their choice of residence also affects which schools their children attend.

While, in the past, the Arab education system suffered neglect and funding issues, Israel has recently taken steps towards “significant improvement[s]”.⁹⁷ For example, Israel has greatly increased funding to Arab schools in recent years.⁹⁸ Israel has also taken steps to upgrade the qualifications of teachers in the Arab school system and reduce class sizes.⁹⁹ Latest studies suggest that the performance level of Arab students is increasing to near that of Jewish students, a dramatic improvement from previous studies.¹⁰⁰ Any comparison with apartheid education in South Africa is a blatant fallacy. South Africa passed laws *prohibiting* whites and blacks from attending the same schools and establishing curricula that gave blacks inferior education by design—specifically teaching blacks subservience to whites and that their place was to support the white-run economy and society. South Africa did not deem education of blacks necessary and did little to address “[d]ilapidated school buildings, overcrowded classrooms, inadequate instruction, poor teacher training, and a lack of textbooks”.¹⁰¹ Such a system is light-years away from Israel, where Arabs and Jews predominantly attend separate schools by *choice* and where the Israeli government has not only acknowledged the funding disparities but has taken affirmative steps to address and eradicate the educational gap.

F. Law of Return

⁹³ *Israeli Arabs*, *supra* note 69 (stating that there is “no institutional segregation” within Israel’s school system); see also Yarden Schwartz, *The Two-School Solution*, FOREIGN POL’Y (18 May 2016, 5:57 PM), <http://foreignpolicy.com/2016/05/18/the-two-school-solution-israeli-arab-children-education-integration/> (“Arabs are not restricted from Jewish public schools, or vice versa”).

⁹⁴ See, e.g., *Students’ Rights Law (2007)*, IDC, <https://www.idc.ac.il/en/students/Documents/docs2017/students%20rights%20law.pdf> (last visited 5 July 2018) (prohibiting Israeli institutions of higher education from discriminating against applicants); *The Israel Compulsory Education Act, 1949*, TAYLOR & FRANCIS ONLINE (11 Aug. 2006), <https://www.tandfonline.com/doi/abs/10.1080/0021642500210314?journalCode=ujjc19> (prohibiting discrimination in primary education schools).

⁹⁵ Schwartz, *supra* note 93.

⁹⁶ See *Israel’s Religiously Divided Society*, PEW RES. CTR. (8 Mar. 2016), <http://www.pewforum.org/2016/03/08/israels-religiously-divided-society/#few-friendships-and-marriages-in-israel-cross-religious-lines>.

⁹⁷ *The Arab Education System in Israel: Are the Gaps Closing?*, TAUB CTR. (8 Nov. 2017), <http://taubcenter.org.il/the-arab-education-system-in-israel/> [hereinafter *The Arab Education System in Israel*].

⁹⁸ Or Kashti, *Israeli Arabs to Get Greater School Funding, Settlements Less*, HAARETZ (6 Mar. 2007, 12:00 AM), <https://www.haaretz.com/israeli-arabs-to-get-greater-school-funding-settlements-less-1.214753>; see also Yarden Skop, *Israel’s Funding for Empowering Arab Students Not Used Properly*, HAARETZ (13 Mar. 2017, 5:01 AM), <https://www.haaretz.com/israel-news/.premium-1.776809> (showing drastic increase in funding, \$245 million for increasing Arab graduates from higher education); see also *The Main Developments in the Allocation of Resources in Israel’s Formal Education System*, EDUC. ACAD., <http://education.academy.ac.il/SystemFiles/23117.pdf> (last visited 22 May 2018).

⁹⁹ *The Arab Education System in Israel*, *supra* note 97.

¹⁰⁰ *Id.*; see also Judy Maltz, *How Have Some Arab High Schools Become Israel’s Top Performers?*, HAARETZ (30 Aug. 2017, 7:00 AM), <https://www.haaretz.com/israel-news/.premium-1.809657> (acknowledging that Arab schools have been performing dramatically better in recent years).

¹⁰¹ *Bantu Education*, OVERCOMING APARTHEID, <http://overcomingapartheid.msu.edu/sidebar.php?id=65-258-2&page=2> (last visited 22 May 2018).

Another example often used in accusations of apartheid is the Israeli Law of Return. The ESCWA and others complain that Israel only allows Jews to immigrate but does not offer the same benefit to Arab Palestinians. However, non-citizens wherever they reside have no rights under Israeli law, and Arab Palestinians are no different in this regard. Since Israel has no obligation to receive non-citizens in the first place, the issue of unequal treatment is irrelevant. Israel can legally discriminate as far as non-citizens are concerned. This type of discrimination *vis-à-vis* non-citizens is universally accepted and permissible for all sovereign states under international law.¹⁰²

Many countries have immigration laws that give preferential treatment to certain applicants based on their ethnicity or ancestors' citizenship but no one condemns their policies as apartheid. For example, Armenia, Belarus, and Bulgaria grant citizenship to persons with ethnic origins in each respective country through simplified processes.¹⁰³ Finland offers citizens of other Nordic countries a simplified path to citizenship.¹⁰⁴ Ireland, India, and Japan offer legal residence status or citizenship via special processes to non-residents having at least one recent ancestor who once possessed citizenship.¹⁰⁵

France and Spain have, in times past, each taken specific measures to restore citizenship to displaced ethnic groups. From 1790 to 1945, France granted automatic citizenship to descendants of the Huguenots, French Protestants, who were expatriated from France in the seventeenth century.¹⁰⁶

Notably, as a gesture designed to make amends for the expulsion of Jews from Spain in the fifteenth century, Spain will allow descendants of Sephardic Jews to obtain citizenship through a special process until October 2018.¹⁰⁷

It is also worth recalling that the State of Israel was conceived in the first place to serve as a "Jewish State"—this being the stated purpose of the UN Partition Plan of 1947.¹⁰⁸

¹⁰²ICERD, *supra* note 18, art. 1 § 2–3 ("This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens. 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").

¹⁰³*Law of the Republic of Armenia on Citizenship of the Republic of Armenia: 6 Nov. 1995*, EMBASSY OF ARM., art. 13, http://usa.mfa.am/u_files/file/citizenship/dualcitizenship-final-eng.pdf (last visited 5 July 2018) (as amended by RA Law No. 75-N/2007); *Law of the Republic of Belarus on Citizenship of the Republic of Belarus, Adopted 18 Oct. 1991*, LEGISLATIONLINE, § II, arts. 8–17, <http://www.legislationline.org/documents/action/popup/id/6381> (last visited 5 July 2018); *Republic of Bulgaria National Assembly: Bulgarian Citizenship*, CONSULATES & EMBASSIES, arts. 12–15, <http://embajadas.ossiris.net/bulgaria/bulgarian-citizenship.htm> (last visited 3 Jan. 2018).

¹⁰⁴*Citizenship Declaration for a Nordic Citizen*, FINNISH CITIZENSHIP, <http://migri.fi/en/nordic-citizen> (last visited 22 May 2018).

¹⁰⁵*Irish Citizenship Through Birth or Descent*, CITIZENS INFO., http://www.citizensinformation.ie/en/moving_country/irish_citizenship/irish_citizenship_through_birth_or_descent.html (last updated 9 May 2017); The Citizenship Act No. 57 of 1955, <https://indiacode.nic.in/bitstream/123456789/1522/1/195557.pdf>; The Nationality Law No. 147 of 1950, <http://www.moj.go.jp/ENGLISH/information/tnl-01.html> (as amended by Law No. 88 of 2008).

¹⁰⁶*The Huguenots and Other Protestants Refugees 1500-1750 – OCR B*, BBC, <https://www.bbc.com/education/guides/zpk9frd/revision/1> (last visited 6 July 2018).

¹⁰⁷*Granting of Nationality to Sephardis from Spain*, MINISTERIO DE JUSTICIA, <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/ciudadanos/tramites-gestiones-personales/concesion-nacionalidad> (last visited 9 Jan. 2018) (translated); Max Kutner, *Spain Expects up to 200,000 Jews to Apply for Citizenship*, NEWSWEEK (16 June 2015, 1:18 PM), <http://www.newsweek.com/spain-expects-200000-jews-apply-citizenship-343586>.

It is deeply ironic that the Law of Return, whose objective is the furtherance of Israel's very *raison d'être*, is being invoked in attempts to undermine the State's legitimacy.

G. Election Laws

Other examples of alleged discrimination are amendments to the *Basic Law: The Knesset*. The Basic Law guarantees to every Israeli citizen eighteen years or older the right to vote in Knesset elections as well as the right to every Israeli citizen who is at least twenty-one years of age to run for election to the Knesset.¹⁰⁹ Amendment No. 9 adds to the list of those ineligible to serve in the Knesset persons who do not recognise the "existence of the State of Israel as the state of the Jewish people".¹¹⁰ Additionally, Amendment No. 12 to the Law of Political Parties prohibits the registration of political parties that "deny the existence of the State of Israel as a Jewish and democratic state".¹¹¹

Adalah and other groups claim that these laws discriminate against Arab political parties that do not recognise Israel as a Jewish State. *The Supreme Court of Israel, however, has interpreted these amendments narrowly, allowing both the existence of political parties that do not support Israel being a Jewish State and allowing candidates from those parties to hold office in the Knesset.* For example, Balad is a pro-Palestinian political party which "advocates for an Israeli state which is not Jewish in character".¹¹² In 2003, the Supreme Court of Israel overturned a decision by the Israeli Central Elections Committee banning Balad candidates from running for Knesset seats,¹¹³ and, in 2009, the Court again overturned the Committee's decision to ban Balad along with two other Arab Israeli parties, Ra'am, and Ta'al.¹¹⁴ In both instances, the Court upheld the right of these parties to register and field candidates to run for election to the Knesset.¹¹⁵

Moreover, the fact that Arab Israelis are more likely to be opposed to the existence of a Jewish State than other Israelis does not mean that the legislation is inherently racist. First, there are Jewish Israelis who share the same view.¹¹⁶ Second, although Israel does not have a constitution, one can safely say that the notion of Israel as a Jewish, democratic State has bedrock constitutional status. To wit, Israel's *Basic Law: Human Dignity and Liberty* which has effective constitutional status expressly enshrines this principle.¹¹⁷ In the same way that public office holders in many of the world's greatest democracies are required to swear allegiance to the constitution, it is far from unreasonable to expect a similar commitment

¹⁰⁸G.A. Res. 181 (II), pt. 1.A.3 (29 Nov. 1947) [hereinafter G.A. Res. 181 (II)].

¹⁰⁹Basic Law: The Knesset, KNESSET GOV. (1958), https://www.knesset.gov.il/laws/special/eng/basic2_eng.htm.

¹¹⁰*Id.* § 7A.

¹¹¹*Law of Political Parties*, ADALAH (2002), <https://www.adalah.org/en/law/view/512>.

¹¹²*Israel Political Parties: Balad*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/balad-political-party> (last visited 22 May 2018).

¹¹³*Poll Ban on Arab Israelis Lifted*, BBC NEWS (9 Jan. 2003, 11:29 AM), http://news.bbc.co.uk/2/hi/middle_east/2641227.stm.

¹¹⁴*Israel Political Parties*, *supra* note 112.

¹¹⁵*Id.*; see also Lahav Harkov, *The 20th Knesset by the Numbers: More Arabs and Women, Fewer Orthodox Members*, JERUSALEM POST (18 Mar. 2015, 11:04 AM), <http://www.jpost.com/Israel-Elections/The-20th-Knesset-by-the-numbers-More-Arab-and-female-MKs-fewer-ultra-Orthodox-lawmakers-394305> (Balad, Ta'al, and other Arab Israeli parties subsequently combined into one Joint List party, which currently holds more than a dozen seats in the Knesset).

¹¹⁶See, e.g., Mordechai Beck, *What Makes Israel a Jewish State?*, CHRISTIAN CENTURY (9 June 2018), <https://www.christiancentury.org/article/features/what-makes-israel-jewish-state>.

¹¹⁷*Basic Law: Human Dignity and Liberty*, KNESSET GOV., https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

from Israeli citizens.¹¹⁸ Finally, as stated above, the character of Israel as a Jewish State was the very *raison d'être* of the State's foundation.

H. Revocation of Citizenship for Treason, Espionage, or Terrorism

Adalah also argues that Amendment No. 10 to the Nationality Law, which allows Israeli courts to revoke citizenship as part of criminal sentencing of persons convicted of treason, espionage, assisting the enemy in time of war, violating state sovereignty, serving in enemy forces, or acts of terrorism, constitutes discrimination.¹¹⁹ Revocation of citizenship for serious crimes is not unlawful discrimination. It is a lawful punishment for serious crimes committed against the State. Such laws are widely accepted as valid and necessary for the preservation of a nation-state.¹²⁰

Many countries have similar provisions. Italy, for example, automatically strips citizens of nationality for complicity with an enemy State.¹²¹ Germany allows for revocation of nationality of its citizens who join a foreign armed group.¹²² Finally, a United States' citizen, if acting with the intention to relinquish citizenship, "shall lose his nationality" for joining the "armed forces of a foreign state" that is "engaged in hostilities against the United States", or for committing "any act of treason against . . . the United States", including bearing arms against it or attempting to overthrow it.¹²³ Moreover, while Arab Israelis may have their citizenship revoked for taking up arms against Israel, the law applies to *anyone* who does so, not just to Arabs. It does *not* single out Arab Israelis.

I. Interrogation Law

Another alleged example of "apartheid" policy is Israel's Criminal Procedure Law, which was amended to allow interrogations of "security suspects" not to be recorded. Adalah claims that, since "[a]lmost all [] 'security detainees' are Palestinians from the OPT or Palestinian citizens of Israel," the law is discriminatory.¹²⁴ This is convoluted and flawed reasoning. The Criminal Procedure Law's amendments apply *only* to persons suspected of terrorist activity; there is *no* language which makes the law apply more strictly to Arabs than to Jews. Anyone can become a security suspect. An otherwise neutral law is *not* racially discriminatory just because a disproportionate number of members of one group violate that law. The criminal law is discriminatory in only one respect: It discriminates between criminals and non-criminals. Ethnicity plays no role in such distinction. It should also be

¹¹⁸United States' congressional members must "swear (or affirm) that [they] will support and defend the Constitution of the United States against all enemies, foreign and domestic; that [they] will bear true faith and allegiance to the same . . .". 5 USCS § 3331 (1966). Likewise, members of United Kingdom's parliament are required to swear to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth, her heirs and successors, according to law". Oaths Act 1978, Section 1; Promissory Oaths Act 1868, § 2.

¹¹⁹*Citizenship Law*, ADALAH, <https://www.adalah.org/en/law/view/495> (last visited May 22, 2018).

¹²⁰*Factbox: Other Countries that Strip Citizenship*, SBS NEWS (4 Sept. 2015), <https://www.sbs.com.au/news/factbox-other-countries-that-strip-citizenship>.

¹²¹Act No. 91, art. 12 (15 Aug. 1992), <http://www.refworld.org/docid/3ae6b4edc.html>.

¹²²Nationality Act of 22 July 1913, § 17(1)5, <https://germanlawarchive.iuscomp.org/?p=266>.

¹²³8 U.S.C. § 1481(a)(3), (7) (1988).

¹²⁴*Criminal Procedure Law - Interrogating Suspects - Amendment No. 6*, ADALAH, <https://www.adalah.org/en/law/view/488> (last visited 22 May 2018).

noted that Jewish violent extremists are also among the “security suspects” affected by the law.¹²⁵

J. Tax Benefit Law

Amendment No. 191 to the Income Tax Ordinance gives preferential treatment to “donations to institutions that promote ‘Zionist settlement’”.¹²⁶ The argument made is that such a law may indirectly discriminate against Arab Israelis since they do not receive preferential tax treatment for donations to institutions that are against Jewish settlement. However, this affects *all* institutions and their donors, including Jewish ones, that do not promote or are even opposed to Zionist settlement. Arab Israelis, then, are not being singled out for supporting institutions other than those promoting Zionist settlement. Further, it is common for States to use tax relief as an incentive for promoting conduct that furthers a nation’s goals or values.¹²⁷ Such tax relief is not a guaranteed *right*; it is a *benefit* bestowed by the State subject to compliance with certain express conditions.

K. Other Allegedly Discriminatory Laws

Of the more than fifty Israeli laws which Adalah cites in support of the apartheid accusation, most do not address a citizens’ ethnic or racial origins and, hence, fail the racial animus test.¹²⁸ Most of the remaining laws which *do* address ethnic origins were enacted to *prevent* discrimination. For example, the Use of Hebrew Date Law expressly excludes “institutions and authorities that serve non-Jewish populations”.¹²⁹ Adalah lists this as discriminatory because the law enforces the “use of the Hebrew calendar” while there is “no such law regarding the use of the Islamic calendar”.¹³⁰ Again, as is clear to any reasonable observer, this law is not discriminatory; instead it *exempts* non-Jews from compliance against their faith.

Further, at least eighteen of the allegedly discriminatory laws “reflect customs in other Western democracies,” which no one questions.¹³¹ For example, Israel’s flag allegedly

¹²⁵Yotam Berger, *Israeli Security Forces Cracking Down on Jewish Hate-crime Suspects*, HAARETZ (25 June 2017, 5:05 PM), <https://www.haaretz.com/israel-news/premium-israeli-security-forces-cracking-down-on-jewish-hate-crime-suspects-1.5488314>.

¹²⁶*Income Tax Ordinance - Amendment No. 191*, ADALAH, <https://www.adalah.org/en/law/view/489> (last visited 22 May 2018).

¹²⁷E.g., U.N. Conference on Trade and Development, *Tax Incentives and Foreign Direct Investment: A Global Survey*, 173, U.N. Doc. ASIT Advisory Studies 16 (2000), http://www.unctad.org/en/docs/iteipcmisc3_en.pdf (Uruguay exempts investment corporations whose main activity is abroad investments in securities and titles to movable and immovable property from Uruguay’s corporate income tax); *id.* at 135 (Poland grants tax discounts to achieve community, social welfare, and cultural goals. Such discounts are based on the number of disabled persons employed by a company and on the sale of textbooks and academic publications); *id.* at 127 (Ireland grants tax exemption for patent royalties derived by companies from inventions devised in the State); *id.* at 132 (Malta’s Industrial Development Act of 1998 provides a number of incentives that apply only to companies located on the sister island of Gozo); *id.* at 73 (Australia’s resident taxpayer, who invests in a qualifying Australian film, receives a 100% tax deduction for capital expenditure incurred in producing or contributing to the production of the film if the investor’s becomes the first owner of the copyright); *id.* at 97 (Pakistan provides a five year tax holiday that exempts investment projects in rural areas from customs duties, surcharges, and sales taxes on imported machinery).

¹²⁸Lilach Danzig, *Adalah vs. the State of Israel*, INST. FOR ZIONIST STRATEGIES (17 July 2016), <http://izs.org.il/2016/07/adalah-vs-state-israel/>.

¹²⁹*Id.*

¹³⁰*Use of Hebrew Date Law*, ADALAH, <https://www.adalah.org/en/law/view/513> (last visited 22 May 2018).

¹³¹Danzig, *supra* note 128.

constitutes discrimination despite the fact that *every* nation has a national flag and many flags have crosses or other religious symbols on them.¹³² One wonders if the opponents of the Israeli flag are equally bothered by the flags of Greece, Georgia, and Switzerland, which contain crosses, or by the flags of Turkey, Pakistan, and Mauritania, which include the Islamic crescent.¹³³ One can easily argue that the use of such religious symbols that do not represent the views of all nationals of those countries could be “discriminatory” because some inhabitants would prefer different symbols on the flag, but to call the mere existence of such symbols on the flag proof of apartheid is nonsense.

First of all, in the case of the Israeli flag (and the others mentioned above), such symbols are religious, not *racial*. Hence, the required racial element to establish apartheid is missing. Second, selection of the flag that represents a State is the sovereign act of that State and not subject to the approval or disapproval of any other State or of dissatisfied persons who might prefer some other symbol for the State.

This type of strained reasoning continues throughout the alleged “list” of Israeli discriminatory laws, as Israel’s detractors seek to wring support for their apartheid claims from patently neutral language. *This “clutching at straws” merely highlights the spuriousness of the accusations.*

L. Recently Passed Jewish Nation-State Law

The most recent apartheid allegation against Israel attacks the Jewish nation-state law passed by the Knesset in July 2018.¹³⁴ There is no explicit or implicit indication that the law discriminates against any Israeli citizen, including Arab Israelis. In fact, it restates existing laws and creates no new rights or responsibilities. Section 1(a) and 1(b) both state that “Israel is the historic homeland of the Jewish people”¹³⁵ and that “the state of Israel is the nation-state of the Jewish people”¹³⁶, mirroring the Balfour Declaration’s description of the territory then designated as Palestine as “a national home for the Jewish people”.¹³⁷ While some critics have expressed concern at section 1(c), which recognises “the right of national self-determination in the State of Israel [as] unique to the Jewish people”¹³⁸, this determination is in accordance with the Balfour Declaration’s call for “the establishment in Palestine of a national home for the Jewish people”,¹³⁹ the Palestine Mandate’s call for “the establishment

¹³² *Id.*

¹³³ Morocco’s flag includes a pentacle which represents the five pillars of Islam, while Iran’s flag is green to symbolise Islam and says “Allah Akbar” eleven times. Numerous other nations such as Algeria, Tunisia, Azerbaijan, Comoros, Libya, Malaysia, Turkmenistan, Maldives, and Uzbekistan include the Islamic crescent on their flags, whereas Bermuda, Tonga, Denmark, Sweden, Faroe Islands, Guernsey, Jan Mayen, Dominican Republic, Finland, Iceland, Norway, and Svalbard all have flags containing crosses. *The World Factbook*, CTR. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/docs/flagsoftheworld.html> (last visited 27 June 2018).

¹³⁴ Basic Law: Israel – The Nation State of the Jewish People, JEWISH VIRTUAL LIBR. (19 July 2018), <https://www.jewishvirtuallibrary.org/israel-s-basic-laws-the-israel-nation-state-law> [hereinafter Basic Law: Israel – The Nation State of the Jewish People].

¹³⁵ *Id.* § 1(a).

¹³⁶ *Id.* § 1(b).

¹³⁷ Balfour Declaration, YALE L. SCH. LILLIAN GOLDMAN L. LIBR. (2 Nov. 1917), http://avalon.law.yale.edu/20th_century/balfour.asp [hereinafter Balfour Declaration].

¹³⁸ Basic Law: Israel – The Nation State of the Jewish People, *supra* note 134, § 1(c).

¹³⁹ Balfour Declaration, *supra* note 137.

of the Jewish national home”¹⁴⁰, and the UNGA Resolution 181’s call for an independent “Jewish” State.¹⁴¹

Section 4 identifies Hebrew as the State language and gives Arabic a “special status in the state”.¹⁴² Far from being an example of racial discrimination, the law could be seen as giving honorary and respected status to Arabic, especially since it “does not change the status given to the Arabic language before the basic law was created”¹⁴³. Note that Israel has historically made and continues to make accommodations for its Arabic speaking population.¹⁴⁴ No international law requires States to give official status to each minority group’s language. In fact, there is no such practice in most States with linguistically diverse populations. In sum, nothing in this provision reflects any aspect of apartheid.

Section 5 regarding Jewish immigration and section 7 regarding Jewish settlement are consistent with the Palestine Mandate’s call to “facilitate Jewish immigration” and “close settlement by Jews on the land, including State lands and waste lands not required for public purposes”.¹⁴⁵ Furthermore, both sections 5 and 7 are also consistent with the intent of UNGA Resolution 181, which both envisaged and expressly required the “mandatory Power [to] use its best endeavours to ensure that an area situated in the territory of the Jewish State, including a seaport and hinterland adequate to provide facilities for a substantial immigration, shall be evacuated at the earliest possible date and in any event not later than 1 February 1948”.¹⁴⁶

Provisions for a name, flag, symbol, and national anthem for the State of Israel (section 2); a Hebrew calendar alongside the secular calendar (section 8); national holidays (section 9); and religious holidays for both Jewish and non-Jewish communities (section 10) are already provided for in existing laws. Selecting a name, flag, symbol, national anthem, holidays, calendars, etc., are functions of a sovereign State and are not *ipso facto* racist in nature.¹⁴⁷ Ironically, every country in the world selects such symbols of State identity based on its cultural, historical, and religious background, yet only Israel is demonised by false accusations of apartheid. Further contradicting these false assertions is the fact that the provisions of the new law regarding Hebrew calendar and religious holidays explicitly accommodate non-Jewish communities in that they are not required to use Hebrew calendar¹⁴⁸ and are allowed to observe their religious holidays.¹⁴⁹

As is clear from the text, the law does not treat Arab Israelis or any other community as inferior to Jewish Israelis. It does not discriminate on the basis of race or any other

¹⁴⁰The Palestine Mandate, YALE L. SCH. LILLIAN GOLDMAN L. LIBR. arts. 2, 4 (24 July 1922), http://avalon.law.yale.edu/20th_century/palmanda.asp#art2 [hereinafter Palestine Mandate].

¹⁴¹G.A. Res. 181 (II), *supra* note 108.

¹⁴²Basic Law: Israel – The Nation State of the Jewish People, *supra* note 134, § 4(a)–(b).

¹⁴³*Id.* § 4(c).

¹⁴⁴See *supra* note 65 and accompanying text (providing for Arabic broadcasts for the Arabic speaking population). See also, Section III. E. Funding for Schools (discussing increased funding for Arabic schools).

¹⁴⁵Palestine Mandate, art. 6, *supra* note 140.

¹⁴⁶G.A. Res. 181 (II), pt. I.A.2, *supra* note 108.

¹⁴⁷See *supra* notes 132–133 (discussing flags with religious symbols in many countries).

¹⁴⁸Note that section 8 of the law also provides for a secular calendar. Basic Law: Israel – The Nation State of the Jewish People, *supra* note 134, § 8. See also *supra* notes 129–130 (discussing that Israel does not forcibly impose the Hebrew Date Law on non-Jewish citizens).

¹⁴⁹Section 10 of the law states that “[t]hose who are not Jewish have the right to honor their days of rest and their holidays”. Basic Law: Israel – The Nation State of the Jewish People, *supra* note 134, § 10.

unlawful criterion, such as religion or gender, and simply reflects the *raison d'être* of Israel as a Jewish State.¹⁵⁰

A major criticism levelled against the law is the fact that it makes no mention of equal rights for all Israeli citizens. Some argue that this offends the sensibilities of minority groups. However one views this criticism, it refers to the law's tone rather than to its substance, since the law has no impact on individual rights whatsoever. Individual rights are guaranteed by the Basic Law on Human Liberty and Dignity. Needless to say, this is a far cry from apartheid.

IV. ISRAELI POLICIES AND PRACTICES REGARDING PALESTINIANS IN THE "WEST BANK" AND THE GAZA STRIP

A. Application of Military Law in the "West Bank" and the Gaza Strip Does Not Constitute Apartheid

The ESCWA report alleges that the Israeli practice of applying military law to 4.6 million Arab Palestinians in the "West Bank" and the Gaza Strip, while applying Israeli civil law to the Jewish settlers in the "West Bank", is consistent with apartheid.¹⁵¹ This is both factually and legally incorrect.

First, as a factual matter, Israel does not apply military law, or any law for that matter, in the Gaza Strip since it dismantled its military government and terminated all military and civilian presence in the Gaza Strip in 2005. The Gaza Strip is today ruled *de facto* by Hamas.

In addition, under the "Oslo Agreements", the vast majority (some 95%) of Arab Palestinians in the "West Bank" reside in areas governed by the Palestinian Authority (PA). For the most part, the only interaction of this population with Israeli authorities occurs when PA residents travel into Israel or Israeli-controlled areas or are involved in violent confrontations with Israeli security forces.

Under the Oslo Agreements, Israel transferred much of the governing authority of the "West Bank" and the Gaza Strip to the PA.¹⁵² This included most of the legislative, executive, and judicial authority in these territories.¹⁵³ The PA has its own judiciary; police force; education system; and cultural, health, social welfare, direct taxation, and tourism departments, among others.¹⁵⁴ Israel has no jurisdiction over these aspects of life for Arab Palestinians, except as necessary for external security, security of Israelis, or as agreed upon between the PA and Israel.¹⁵⁵

The above arrangements were all agreed upon in the context of the Oslo Accords. None of them was imposed on Arab Palestinians against their will. *To tout the existence of a voluntary autonomous legal system for Arab Palestinians as proof of apartheid is ludicrous.*

¹⁵⁰See *supra* note 108 and accompanying text.

¹⁵¹ESCWA Report, *supra* note 3, at 43.

¹⁵²Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords I), Isr.-Palestine, annex IV, art. IV, 13 Sept. 1993, 32 I.L.M. 1525 [hereinafter Oslo Accords I] (reserving from Palestinian jurisdiction only Jerusalem, settlements, military locations, and Israelis).

¹⁵³Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo Accords II), Isr.-Palestine, arts. III, IX, 28 Sept. 1995, 36 I.L.M. 551 [hereinafter Oslo Accords II].

¹⁵⁴*Id.* Police (*id.* art. I(3), art. XIV & annex I, art. IV); Education and Culture (annex III, art. 9); Health (annex III, art. 17); Social Welfare (annex III, art. 33); Direct Taxation (annex III, art. 8); Tourism (annex III, art. 37).

¹⁵⁵*Id.* arts. X(4), XII(1), XVII(4)(a-b).

Further, if the Israeli presence in the “West Bank” were to be considered an “occupation” within the meaning of the Fourth Geneva Convention (a position that Israel strongly contests), then Israel would have the right and even a duty to apply military law within that territory.¹⁵⁶

Contrary to the assertions made by some, the law of the State of Israel does not apply territorially in the “West Bank”. The law in place is the local law as existed before Israeli forces captured the territory, amended as necessary by Israeli military ordinances.¹⁵⁷ This law applies to all residents of the territory, Arabs and Jews alike. Accordingly, all residents of the territory are subject to the authority of the military government and military courts. In relation to certain matters, Israeli citizens also fall under the personal (as opposed to territorial) jurisdiction of the State of Israel. This means that in some matters, Israeli government authorities hold jurisdiction over Israeli citizens parallel to that of the military authorities. An example is the court system of the State of Israel to which all Israeli citizens are subject. Thus, if an Israeli citizen commits an offence in the “West Bank”, he or she can be tried either in a military court in the “West Bank” or in a regular Israeli criminal court. Generally, Israeli legal authorities prefer to try Israeli citizens in Israeli criminal courts. This is due to considerations of *forum conveniens* and certainly not out of a belief that the level of justice dispensed by military courts is somehow inferior. It should be noted that this mirrors the legal arrangement in place for Arab residents of the territory suspected of committing offences in Israel—they are subject to the parallel jurisdiction of both Israeli criminal courts and military courts in the “West Bank”. According to the circumstances of the case, defendants will be tried in one forum or the other. A key consideration in this regard will often be the accessibility of the court to the counsel and relatives of the defendant.

In any event, it goes without saying that discrimination between one’s own citizens and non-citizens in any territory under one’s control, so long as that discrimination is not racially based, does not constitute apartheid.

B. Defending Against Attacks by Palestinian Terrorists Does Not Constitute Apartheid

Israel faces an ongoing severe terror threat from terrorist groups in the “West Bank” (hundreds, sometimes thousands of attacks and attempted attacks every year¹⁵⁸) and, as a sovereign nation, has the right and duty to defend its people and territory from such attacks. Among the means employed by Israel to defend itself is the deployment of its security forces on the ground in “West Bank” territory.

Israeli forces carry out arrest operations, patrols, searches, surveillance, identity checks, and other activities in the area as well as operating checkpoints and roadblocks where

¹⁵⁶ Geneva Convention Relative to the Protection of Civilian Person in Time of War art. 66, 12 Aug. 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

¹⁵⁷ See Laws and Customs of War on Land (Hague, IV) art. 43, 18 Oct. 1907, 6 U.S.T. 3516.

¹⁵⁸ In 2015, for example, Judea and Samaria (i.e., the so-called “West Bank”) alone suffered 1,719 terrorist attacks, while Jerusalem was attacked 635 times. Another 44 attacks occurred in the Gaza Strip, with 25 of these being rocket-fire attacks. *2015 Annual Summary: Terrorism and CT Activity Fate and Trends*, SHABAK (22 Feb. 2016),

<https://www.shabak.gov.il/SiteCollectionDocuments/Monthly%20Summary%20EN/Annual%20Summary/2015%20Annual%20Summary.pdf>.

necessary. The sole purpose of these operations is security. The suggestion that such activities are somehow racially motivated is spurious.

Israeli security forces also act against manifestations of violence by Jewish extremists with the object of protecting the Arab Palestinian population in the areas under Israeli responsibility.

C. Israel Does Not Carry Out “Extrajudicial Killings” of Palestinians

Israel is also accused by some of committing “extrajudicial killings” of Arab Palestinians. Such accusations ignore the fact that those killed are militants and terrorists belonging to terrorist “armies” actively engaged in armed hostilities against Israel.¹⁵⁹ Under the Law of Armed Conflict (LOAC), such persons can lawfully be targeted.¹⁶⁰ Moreover, Israel’s Supreme Court has ruled that such persons may be targeted only if arresting the individual in question is not viable.¹⁶¹ There is certainly no racist component to such a practice.

D. Israel Does Not Use Excessive Force Against Palestinian Protestors

Israel has been accused of employing unlawful excessive force against Arab Palestinians who protest against Israel’s actions. This claim is baseless. When protests become violent, Israeli security forces and police use standard riot control methods, such as tear-gas, water cannon, and rubber bullets.¹⁶² In exceptional cases involving extreme life-threatening violence, if less lethal methods of riot control are ineffective, Israeli forces are permitted to fire live rounds at the legs of protesters as a last resort.¹⁶³ Israeli forces may also employ targeted live fire against persons engaged in acts of terrorism under cover of civilian

¹⁵⁹See, e.g., Nidal al-Mughrabi, *Israeli Forces Kill 16 Palestinians in Gaza Border Protests: Gaza Medics*, THOMPSON REUTERS (30 Mar. 2018, 12:12 AM), <https://www.reuters.com/article/us-israel-palestinians-protests/israeli-forces-kill-16-palestinians-in-gaza-border-protests-gaza-medics-idUSKBN1H60AV> (militants armed with military rifles); Wael al-Ahmed, *Israel Kills Islamic Jihad Commanders in W.Bank*, THOMPSON REUTERS (28 Feb. 2007, 8:40 AM), <http://www.reuters.com/article/us-palestinians/israel-kills-islamic-jihad-commanders-in-w-bank-idUSL288388020070228> (armed militant firing at security forces); *Israeli Troops Kill Islamic Jihad Operative*, ISR. TODAY (21 Feb. 2007), <http://www.israeltoday.co.il/NewsItem/tabid/178/nid/11680/Default.aspx> (armed militant opening fire into the air).

¹⁶⁰Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), 8 June 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (entered into force 7 Dec. 1978) (stating that civilians enjoy protection from direct attack “unless and for such time as they take a direct part in hostilities”. Those who directly participate in hostilities may be attacked in the same manner as identified members of an opposing armed force).

¹⁶¹HCI 769/02 Public Committee Against Torture in Israel v. Government of Israel 34 PD 459, paras. 61–64 (2005) (Isr.).

¹⁶²See, e.g., *Standards and Procedures for Crowd Control*, COMMONWEALTH HUM. RTS. INITIATIVE, http://www.humanrightsinitiative.org/programs/aj/police/papers/standard_procedure_for_crowd_control.pdf (last visited 23 May 2018) (showing that use of tear gas is acceptable); Ben Piven, *Crowd Control: Riot Police Techniques from Ferguson to France*, ALJAZEERA AM. (14 Aug. 2014, 5:00 AM), <http://america.aljazeera.com/articles/2014/8/14/crowd-control-techniques.html> (showing that rubber bullets are a common riot control measure used by numerous developed countries around the world).

¹⁶³Yonah Jeremy Bob, *High Court Declares IDF Conduct on Gaza Border Legal*, JERUSALEM POST (24 May 2018, 10:45 PM), <https://www.jpost.com/Arab-Israeli-Conflict/High-Court-declares-IDF-conduct-on-Gaza-border-legal-558341>.

protests.¹⁶⁴ Both the Israeli Supreme Court as well as an official Commission of Inquiry have examined the methods and rules of engagement relative to riot control.¹⁶⁵

E. Israel Does Not Arbitrarily Detain Innocent Palestinians

Groups accuse Israel of arbitrarily detaining Palestinians, but this accusation is also baseless. Israel is a country of laws, where the principle of *habeas corpus* is held sacred. All forms of detention in Israel, whether under criminal procedure or administrative detention, are judicially supervised. Even the detention of unlawful combatants captured on the battlefield is required to be approved by a competent court. All judicial and administrative decisions in relation to detention are subject to challenge and review, including in the Israel Supreme Court.

F. Claims That Torture is Permitted are Unfounded

Despite claims to the contrary, the use of torture is illegal under Israeli law. All interrogations must adhere to article 8 of the Basic Law which requires “Human Dignity and Liberty” to be maintained. In 1999, the Supreme Court of Israel issued its judgement on the interrogation methods applied by the General Security Service (GSS) and held that investigators are prohibited from using “brutal or inhuman means”.¹⁶⁶ This prohibition is absolute, leaving no room for exceptions. If an investigator violates this standard and uses physical force during an interrogation, the investigator is subject to potential criminal liability.¹⁶⁷

Additionally, when a claim of torture is made, Israeli courts hear the claim immediately.¹⁶⁸ A number of applications dealing with physical force by the GSS were brought to the attention of the Israeli Supreme Court between 1996 and 1999, and in each case, an immediate hearing was ordered.¹⁶⁹ In most cases, the government demonstrated that the GSS had not employed physical means, and the applicants requested to withdraw their applications as a result.¹⁷⁰

The Supreme Court held that no investigator was authorised to use physical force against any suspect during an interrogation, other than the ordinary means which can be expected from the “very concept of interrogation”.¹⁷¹ Ordinary means include cuffing the

¹⁶⁴Protocol 1, *supra* note 160, art. 51(3). See, e.g., Wafa Amr, *Israel Blocks “West Bank” Village over Protests*, THOMPSON REUTERS (5 July 2008, 1:13 PM), <https://uk.reuters.com/article/uk-palestinians-israel-barrier/israel-blocks-west-bank-village-over-protests-idJKL0547346520080705>; *Thousands of Palestinians Protest “West Bank” Barrier*, FOX NEWS (21 Feb. 2004), <http://www.foxnews.com/story/2004/02/21/thousands-palestinians-protest-west-bank-barrier.html>.

¹⁶⁵HCI 3003/18 Yesh Din – Volunteers for Human Rights v. Chief of Staff of the Israel Defense Forces (2018) (Isr.) (Supreme Court’s ruling on rules of engagement); *Israeli Arabs: The Official Summation of the Or Commission Report*, JEWISH VIRTUAL LIBR. (2 Sept. 2003), <https://www.jewishvirtuallibrary.org/the-official-summation-of-the-or-commission-report-september-2003>.

¹⁶⁶*Judgement on the Interrogation Methods Applied by the GSS*, ISR. SUP. CT., para. 23, <http://www.derechos.org/human-rights/mena/doc/torture.html> (last visited 23 May 2018).

¹⁶⁷*Id.*

¹⁶⁸*See id.* paras. 2–7.

¹⁶⁹*Id.* para. 17.

¹⁷⁰*Id.*

¹⁷¹*Id.* para. 38.

suspect in a manner that will not cause pain,¹⁷² covering the suspect's eyes in a manner that does not cause suffering,¹⁷³ and divesting the suspect of sleep to the extent dictated by the length of the interrogation.¹⁷⁴

Regarding specific complaints about alleged interrogation techniques such as shaking, playing loud music, tying a suspect's hands behind his back on a chair, and covering his head, the Supreme Court held these techniques to be unconstitutional.¹⁷⁵ Hence, it goes without saying that more extreme forms of violence, such as beatings, are deemed unlawful.

G. Security Checkpoints and Blockades Do Not Constitute Apartheid

Further alleged "proof" of Israeli apartheid are Israeli practices regarding zoning, building and business permits, barricades, check points, and the Israeli blockade of the Gaza Strip. These have allegedly "crippled the Palestinian economy and society, leaving Palestinian cities and towns . . . increasingly under-resourced" and are "suffocating their growth and the welfare of their inhabitants".¹⁷⁶ The argument here is that because certain Israeli policies result in hardship for Arab Palestinians, they are necessarily racist and consistent with apartheid. This is an obvious *non sequitur*. Moreover, resultant hardship is no basis to argue that these policies are unlawful under any criteria. The accusations ignore international law as well as the provisions of bilateral agreements.¹⁷⁷

The LOAC permits security barriers and restrictions on movement for the purpose of maintaining public security and order.¹⁷⁸ Additionally, the Oslo Accords contain detailed provisions regarding movement into, within, and outside the "West Bank" and the Gaza Strip.¹⁷⁹ Given the severe and imminent security threats, manifested by constant attacks and attempted attacks by Hamas, Islamic Jihad and other terrorist elements, Israel is fully justified in placing security checkpoints and barriers.

In September 2011, the United Nations Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident determined that the Gaza Naval Blockade was lawful.¹⁸⁰ Military blockades are allowed under the LOAC as long as they "have a lawful military objective".¹⁸¹ The blockade must allow relief supplies through, but those supplies are lawfully subject to discretionary search at any time by Israel.¹⁸² Moreover, Israel does provide such supplies over land, such that the measures in place fully meet the criteria of the LOAC.

The restrictions in place on movement between Gaza and Israel are entirely legitimate since Israel has every right to regulate entry into and exit from its sovereign territory.

¹⁷² *Id.* para. 26.

¹⁷³ *Id.* para. 28.

¹⁷⁴ *Id.* para. 31.

¹⁷⁵ *Id.* para. 30.

¹⁷⁶ ESCWA Report, *supra* note 3, at 45.

¹⁷⁷ Oslo Accords II, *supra* note 153, annex I, arts. VIII–X, XII.

¹⁷⁸ Geneva Convention IV, *supra* note 156, arts. 27, 49, 78.

¹⁷⁹ Oslo Accords II, *supra* note 153, annex I, app. 5.

¹⁸⁰ U.N. Secretary-General, *Report on the 31 May 2010 Flotilla Incident 4* (Sept. 2011), http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.

¹⁸¹ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC, 2009, at 188–89.

¹⁸² Geneva Convention IV, *supra* note 156, art. 59.

Moreover, the control over goods entering the Gaza Strip has a legitimate military justification and demonstrably is not aimed at causing starvation or any kind of humanitarian crisis.¹⁸³ At most, Israel is required to allow the free passage of medical supplies, objects necessary for religious worship, food, and clothing.¹⁸⁴ Israel also has the right under the LOAC to search any supplies sent to assist Arab Palestinian welfare and to “regulate their passage according to prescribed times and routes”.¹⁸⁵ The closure does not amount to collective punishment of civilians.¹⁸⁶

Therefore, Israel’s actions in the “West Bank” and the Gaza Strip, when analysed under the LOAC, are completely justified and most certainly do not constitute apartheid.

V. ISRAELI POLICIES AND PRACTICES REGARDING PALESTINIANS IN JORDAN, LEBANON, SYRIA, AND ELSEWHERE

Israeli law has no application to Arab Palestinians in Jordan, Lebanon, Syria, and elsewhere. Any potential complaint of apartheid can, by definition, only relate to areas where Israel exerts some form of authority.

The ESCWA report argues, regarding Arab Palestinians in other countries, that a State could enforce apartheid practices outside its sovereign territory with respect to non-citizens.¹⁸⁷ To support this theory, the ESCWA report gives the example of South African rule in South West Africa (Namibia) and cites to the 1972 International Court of Justice (ICJ) opinion regarding the Namibia situation. The ESCWA report states that “the ICJ found South African rule over Namibia illegal partly on the grounds that it violated the rights of the Namibian people by imposing South African apartheid laws there”.¹⁸⁸

This comparison is wholly inapt. What ESCWA’s analysis misses is the fact that South Africa had *de facto* control over Namibia, whereas Israel has neither *de facto* nor *de jure* control over Jordan, Lebanon, or Syria. Clearly, a State’s jurisdiction or control over the racial group claiming to have been discriminated against and the territory where the group resides is essential to even begin an examination into a claim of apartheid.

Finally, every sovereign State has the right to set its own immigration and visa policies and may either allow or limit entry of people based on any criteria the State chooses.

CONCLUSION

Not all unequal treatment of individuals or groups of individuals is unlawful. For example, a sovereign State has the right to discriminate in favour of its own citizens *vis-à-vis* non-citizens. While a State is required to provide fundamental rights (such as, freedom of religion and due process) to people under its sovereign control or jurisdiction, it is not obligated to give non-citizens political rights (such as the right to vote, run for public office,

¹⁸³Report on the 31 May 2010 Flotilla Incident 87, *supra* note 180 (citing 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 189).

¹⁸⁴Geneva Convention IV, *supra* note 156, art. 23; *see also* Protocol I, *supra* note 160, art. 70.

¹⁸⁵Geneva Convention IV, *supra* note 156, art. 59.

¹⁸⁶*Id.* art. 33.

¹⁸⁷ESCWA Report, *supra* note 3, at 16.

¹⁸⁸*Id.*

or obtain social security benefits) that are available to its own citizens. Discriminating in favour of one's citizens in such a way is entirely permissible under international law.

The Apartheid Convention and the Rome Statute prohibit a State from discriminating against a group under its sovereign control or jurisdiction *on the basis of the group's race*. If race is not the motivating factor, i.e., if race is not the *reason for* the alleged discrimination, neither the Apartheid Convention nor the Rome Statute¹⁸⁹ applies. Even if other forms of discrimination occur, they do not constitute apartheid.

Israeli treatment of Arab Palestinians is *not based on race*. It is motivated by geo-political realities and very real security imperatives.

Arabs who are citizens of Israel enjoy equality under the law equal to that enjoyed by Jewish Israeli citizens. Since there is no discrimination in the first place, the question of apartheid does not even arise.

Arab Palestinians of the "West Bank" and the Gaza Strip are not citizens of the State of Israel and thus do not have the same rights as Israeli citizens under Israeli law. The Israeli treatment of this population is founded on geo-political and security considerations and has nothing whatsoever to do with race. The fact that Arab citizens of Israel possess full citizenship rights is in itself sufficient to refute the accusation that Israeli policies regarding the "West Bank" or the Gaza Strip are racially motivated since both groups are *racially* identical.

The Arab Palestinian population as a whole in the "West Bank" and Gaza Strip is, through the entities that purport to act on its behalf (e.g., the PLO and Hamas), engaged in a territorial and political dispute with Israel. Some elements (e.g., Hamas and Islamic Jihad) deny Israel's right to exist altogether and are actively engaged in ongoing hostilities against Israel and Israelis. Israel, as a sovereign nation has the absolute right and duty to defend itself against such attacks. International law allows Israel to employ a variety of means to this end. These include, *inter alia*, attacks on legitimate military targets and militants; arrest, detention and/or trial of individuals involved in terrorism; enforcing restrictions on and monitoring movement of persons and goods—by land, sea or air; erecting and operating security infrastructure such as barriers, check points and outposts; patrols; searches; surveillance; etc.

To label such security measures as "apartheid" is a blatant abuse and misappropriation of the term. The fact that such measures frequently result in hardship to some Arab Palestinians is an unfortunate consequence of the ongoing conflict. If this were to constitute "apartheid", then any country which was ever a party to an armed conflict would be guilty of apartheid towards the population of its adversary. That is ludicrous.

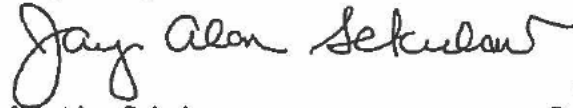
The accusation that Israel applies apartheid towards Arab Palestinians in Lebanon, Jordan, and other countries is, by definition, baseless, since the State of Israel exercises no authority whatsoever in these countries.

In sum, to compare Israel's policies and practices *vis-à-vis* Arab Palestinians to the policies and practices of the Apartheid regime in South Africa is not only libelous and

¹⁸⁹See *supra* notes 24–33 and accompanying text for discussion that the Rome Statute essentially adopted the Apartheid Convention's definition and did not change it from being race-based institutional discrimination to something else.

insulting towards Israel and Israelis, it is libelous and insulting towards the real victims of apartheid. We respectfully urge the OTP to dismiss forthwith such charges against Israel as both inapt and ludicrous.

Respectfully submitted,



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