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EXECUTIVE SUMMARY



Occupation, Colonialism, Apartheid?

A re-assessment of Israel's practices in the occupied
Palestinian territories under international law

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This Executive Summary and the full version of this report are drafts on which comments are invited. The HSRC editorial team apologises for any typographical errors resulting from desktop printing.

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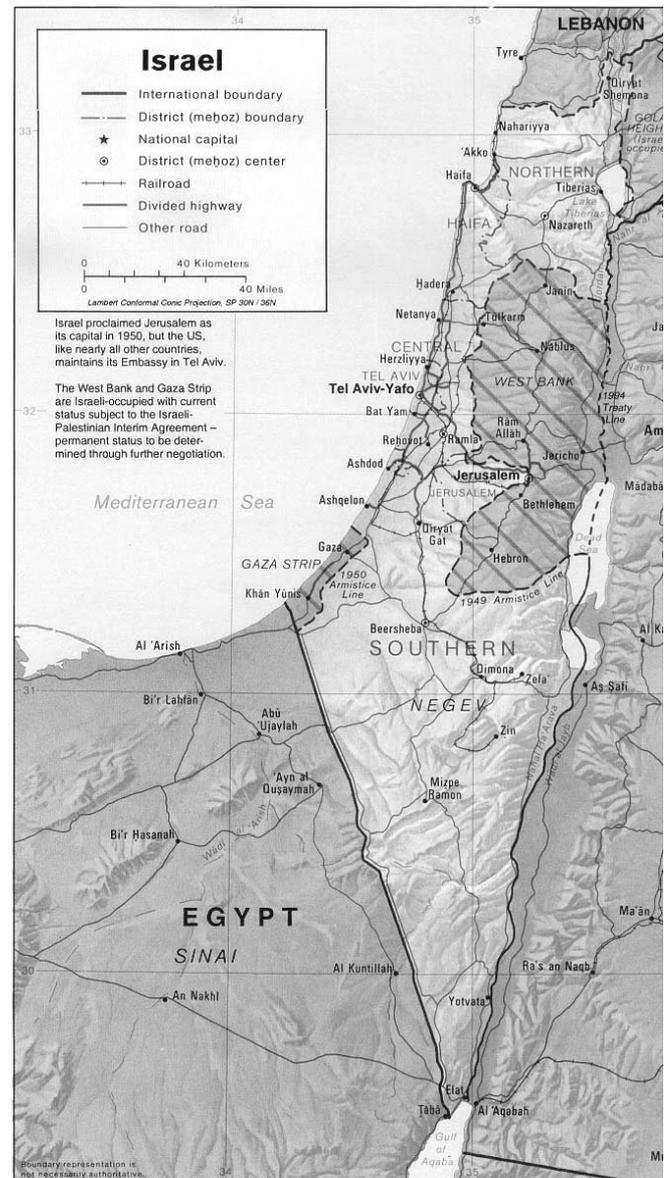
Background Note:

This study was commissioned and coordinated by the Middle East Project (MEP) of the Democracy and Governance Programme, a research programme of the Human Sciences Research Council of South Africa.

The study dates to September 2007, when the MEP approached Professor John Dugard to ask his advice regarding the potential value of a background study of whether regimes of colonialism and apartheid are operating in the occupied Palestinian territories. On his advice that such a study would be valuable to the legal and scholarly community, in February 2008, the MEP hosted the first workshop for contributors (see list) in Pretoria, South Africa. Participants in this initial workshop debated and composed the initial theoretical framework and parameters of the study and volunteered to research and compose various parts of the study in which they had special interest or expertise.

As drafting proceeded through subsequent months, generating first and second drafts, the research team elected four coordinating editors to oversee pressing questions of organization. In September 2008, the MEP hosted these editors to meet at the School for Oriental and African Studies in London and their deliberations generated a third draft. In November 2008, the MEP hosted a final full workshop in Durban, with eight of the study's principal authors. This workshop generated a fourth draft that was again distributed internally for revision and comment. The fifth draft was submitted to five outside readers, whose comments were incorporated into a sixth and final draft for publication.

The Executive Summary was presented for public discussion on 16 May 2009 at the School for Oriental and African Studies (London), co-hosted by the HSRC and the Sir Joseph Hotung Project in Law, Human Rights and Peace Building in the Middle East, School of Law of SOAS, University of London. The full study will be posted on the HSRC website for academic and public comments and revised a final time prior to publication.



The MIDDLE EAST PROJECT is an independent two-year project of the HSRC to conduct analysis of Middle East politics relevant to South African foreign policy. Its funding was provided by the Department of Foreign Affairs of the Government of South Africa. The analysis in this report is entirely independent of the views or foreign policy of the Government of South Africa and does not represent an official position of the HSRC. It is intended purely as a scholarly resource for the Department of Foreign Affairs and the concerned international community.

Occupation, Colonialism, Apartheid?

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A. Introduction

The Human Sciences Research Council of South Africa commissioned this study to test the hypothesis posed by Professor John Dugard in the report he presented to the UN Human Rights Council in January 2007, in his capacity as UN Special Rapporteur on the human rights situation in the Palestinian territories occupied by Israel (namely, the West Bank, including East Jerusalem, and Gaza, hereafter OPT). Professor Dugard posed the question:

Israel is clearly in military occupation of the OPT. At the same time, elements of the occupation constitute forms of colonialism and of apartheid, which are contrary to international law. What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the Occupying Power and third States?

In order to consider these consequences, this study set out to examine legally the premises of Professor Dugard's question: is Israel the occupant of the OPT, and, if so, do elements of its occupation of these territories amount to colonialism or apartheid? South Africa has an obvious interest in these questions given its bitter history of apartheid, which entailed the denial of self-determination to its majority population and, during its occupation of Namibia, the extension of apartheid to that territory which South Africa effectively sought to colonise. These unlawful practices must not be replicated elsewhere: other peoples must not suffer in the way the populations of South Africa and Namibia have suffered.

To explore these issues, an international team of scholars was assembled. The aim of this project was to scrutinise the situation from the nonpartisan perspective of international law, rather than engage in political discourse and rhetoric. This study is the outcome of a fifteen-month collaborative process of intensive research, consultation, writing and review. It concludes and, it is to be hoped, persuasively argues and clearly demonstrates that Israel, since 1967, has been the belligerent Occupying Power in the OPT, and that its occupation of these territories has become a colonial enterprise which implements a system of apartheid.

Belligerent occupation in itself is not an unlawful situation: it is accepted as a possible consequence of armed conflict. At the same time, under the law of armed conflict (also known as international humanitarian law), occupation is intended to be only a temporary state of affairs. International law prohibits the unilateral annexation or permanent acquisition of territory as a result of the threat or use of force: should this occur, no State may recognise or support the resulting unlawful situation. In contrast to occupation, both colonialism and apartheid are always unlawful and indeed are considered to be particularly serious breaches of international law because they are fundamentally contrary to core values of the international legal order.

Colonialism violates the principle of self-determination, which the International Court of Justice (ICJ) has affirmed as ‘one of the essential principles of contemporary international law’. All States have a duty to respect and promote self-determination. Apartheid is an aggravated case of racial discrimination, which is constituted according to the International Convention for the Suppression and Punishment of the Crime of Apartheid (1973, hereafter ‘Apartheid Convention’) by ‘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’. The practice of apartheid, moreover, is an international crime.

Professor Dugard in his report to the UN Human Rights Council in 2007 suggested that an advisory opinion on the legal consequences of Israel’s conduct should be sought from the ICJ. This advisory opinion would undoubtedly complement the opinion that the ICJ delivered in 2004 on the *Legal consequences of the construction of a wall in the occupied Palestinian territories* (hereafter ‘the *Wall* advisory opinion’). This course of legal action does not exhaust the options open to the international community, nor indeed the duties of third States and international organisations when they are appraised that another State is engaged in the practices of colonialism or apartheid.

The scope of this study was determined by the question it poses: whether Israel’s practises in the OPT amount to colonialism or apartheid under international law. Hence Israel’s practices inside the Green Line (1949 Armistice Line) are not examined, except where they illuminate Israeli policies in the OPT. The history of the conflict before Israel’s occupation began in June 1967 as a result of the Six-Day War is also not addressed, except where this is necessary to clarify the application of international law to the OPT. Questions of individual criminal responsibility or culpability for the commission of acts which constitute apartheid are also beyond the scope of this study, which focuses instead on the question of the responsibility of States as a result of internationally wrongful acts.

B. Legal Framework for this Study

This study is based on fundamental concepts and principles of international law and draws on diverse branches of substantive international law, in particular the law regulating belligerent occupation which forms part of the law of armed conflict. Israel remains the belligerent occupant of the OPT as they are territories over which Israel does not possess sovereignty but only a temporary right of administration. Consequently, Israel must abide by the relevant rules of the law of armed conflict—principally the provisions of the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949—in its administration of the territories. The law of armed conflict is supplemented by international human rights law which also applies in occupied territory. The prohibitions on colonialism and apartheid are rooted principally in the field of international human rights law.

Colonialism and apartheid both constitute serious violations of fundamental human rights. Colonialism has been consistently condemned by the international community because it prevents, and aims to prevent, a people from exercising freely its right to determine its own future through its own political institutions and in pursuit of its own economic policy. Although theoretical aspects of colonialism have increasingly been addressed in recent years in post-colonial and third world approaches to international law, the substantive aspects of colonialism have receded from international attention in recent decades following decolonisation in Africa and Asia over the course of the twentieth century. The main instrument of international law regarding colonialism, the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960, hereafter ‘the Declaration on Colonialism’), condemns ‘colonialism in all its forms and manifestations’, which includes ‘settler colonialism’ such as was practiced, for example, in South Africa. Other laws and UN resolutions contribute to an understanding of

colonialism, its threat to the enjoyment of human rights and the obligation of all states to ensure its abolition. This body of law and commentary establishes the basis for and the standard against which the review of Israel's practices is undertaken in this study.

Apartheid is an aggravated form of racial discrimination because it is a State-sanctioned regime of law and institutions that have 'the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'. This definition is employed in the Apartheid Convention, which builds on the International Convention on the Elimination of All Forms of Racial Discrimination (1965, hereafter 'ICERD'). The Rome Statute of the International Criminal Court (1998, hereafter 'Rome Statute') includes apartheid as a crime falling within the Court's jurisdiction and, while this study does not consider the criminal responsibility of individuals, the provisions of these three treaties were employed to develop a working definition of apartheid for the purpose of considering Israel's State responsibility for practices that offend against the norm prohibiting apartheid.

The rules of international law prohibiting colonialism and apartheid are peremptory: that is, they are rules 'accepted and recognised by the international community of States as a whole as [rules] from which no derogation is permitted'. Every State owes a legal duty to the international community as a whole not to engage in practices of colonialism or apartheid. Conversely, all States have an interest in ensuring that these rules are respected because they enshrine fundamental values of international public order. Faced with a violation of the prohibitions of colonialism and apartheid, all States have three duties: to co-operate to end the violation; not to recognise the illegal situation arising from it; and not to render aid or assistance to the State committing it.

C. Legal Framework in the Occupied Palestinian Territories

To examine Israeli practices for qualities of colonialism and apartheid one must first consider the wider framework of law in the OPT, including applicable international law and Israeli law. This framework is structured by three basic legal facts.

First, the Palestinian people has the right to self-determination, with all the attendant consequences this entails under the relevant principles and instruments of international law.

Second, the West Bank, including East Jerusalem, and the Gaza Strip remain under belligerent occupation. Israel's arguments that the Palestinian territories are not 'occupied' in the sense of international law have been rejected by the international community. Israel does not possess sovereignty in these territories but only a temporary right of administration. As a consequence, Israel's annexation of East Jerusalem has been dismissed as unlawful and is not recognised by the international community. The occupied status of the West Bank was confirmed by the ICJ in the *Wall* advisory opinion. Israel's 'disengagement' from the Gaza Strip did not constitute the end of occupation because, despite the redeployment of its military ground forces from Gaza, it retains and exercises effective control over the territory. In all of the occupied Palestinian territories, Palestinians are therefore 'protected persons' under the terms of the Fourth Geneva Convention--namely, they are persons who 'find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.

Third, the prolonged length of Israel's occupation has not altered Israel's obligations as an Occupying Power as set forth in the Fourth Geneva Convention and the Hague Regulations. Israel must therefore abide by the relevant rules of the law of armed conflict in its administration of the territories, as these are supplemented by international human rights law.

In the light of this normative framework, Israel's administration of the OPT systematically breaches the law of armed conflict, both by disregarding the prohibition imposed on an Occupying Power not to alter the laws in force in occupied territory and by enforcing a dual and discriminatory legal regime on Jewish and Palestinian residents of the OPT. Israel grants to Jewish residents of the settlements in the OPT the protections of Israeli domestic law and subjects them to the jurisdiction of Israeli civil courts, while Palestinians living in the same territory are ruled under military law and subjected to the jurisdiction of military courts whose procedures violate international standards for the prosecution of justice. As a consequence of this bifurcated system, Jewish residents of the OPT enjoy freedom of movement, civil protections, and services denied to Palestinians. Palestinians are simultaneously denied the protections accorded to protected persons by international humanitarian law. This dual system has gained the imprimatur of Israel's High Court and constitutes a policy by the State of Israel to sustain two parallel societies in the OPT, one Jewish and the other Palestinian, and discriminate between these two groups by according very different rights, protections, and life chances in the same territory.

This system has entailed serious violations of the law of armed conflict, but, as this study demonstrates, it also involves violations of the international legal prohibitions of colonialism and apartheid.

D. Findings on Colonialism

Although international law provides no single decisive definition of colonialism, the terms of the Declaration on Colonialism indicate that a situation may be classified as colonial when the acts of a State have the cumulative outcome that it annexes or otherwise unlawfully retains control over territory and thus aims permanently to deny its indigenous population the exercise of its right to self-determination. Five issues, which are unlawful in themselves, taken together make it evident that Israel's rule in the OPT has assumed such a colonial character: namely, violations of the territorial integrity of occupied territory; depriving the population of occupied territory of the capacity for self-governance; integrating the economy of occupied territory into that of the occupant; breaching the principle of permanent sovereignty over natural resources in relation to the occupied territory; and denying the population of occupied territory the right freely to express, develop and practice its culture.

Israel's annexation of East Jerusalem is manifestly an act based on colonial intent. It is unlawful in itself, as annexation breaches the principle underpinning the law of occupation: that occupation is only a temporary situation that does not vest sovereignty in the Occupying Power. Annexation also breaches the legal prohibition on the acquisition of territory through the threat or use of force. This prohibition has peremptory status, as it is a corollary of the prohibition on the use of force in international relations enshrined in Article 2(4) of the UN Charter. Israel's acquisition of territory in the West Bank also starkly illustrates this intent: the construction of Jewish-only settlements within contiguous blocs of land that Palestinians cannot enter; a connecting road system between the settlements and the settlements and cities within the Green Line, the use of which is denied to Palestinians; and a Wall that separates Jewish and Palestinian populations, as well as dividing Palestinian communities from each other, with passage between Palestinian areas controlled by Israel. By thus partitioning contiguous blocs of Palestinian areas into cantons, Israel has violated the territorial integrity of the OPT in violation of the Declaration on Colonialism.

The physical control exercised over these areas is complemented by the administration that Israel exercises over the OPT, which prevents its protected population from freely exercising political authority over that territory. This determination is unaffected by the conclusion of the Oslo Accords and the creation of the Palestinian National Authority and Legislative Council.

The devolution of power to these institutions has been only partial, and Israel retains ultimate control. By preventing the free expression of the Palestinian population's political will, Israel has violated that population's right to self-determination.

The law of self-determination further requires a State in belligerent occupation of foreign territory to keep that territory separate from its own in order to prevent its annexation and also to keep their economies separate. Israel has subordinated the economy of the OPT to its own, depriving the population under occupation of the capacity to govern its economic affairs. In particular, the creation of a customs union between Israel and the OPT is a measure of prohibited annexation. By virtue of the structural economic measures it has imposed on the OPT, Israel has violated the Palestinian population's right of economic self-determination and its duties as an Occupying Power.

The economic dimension of self-determination is also expressed in the right of permanent sovereignty over natural resources, which entitles a people to dispose freely of the natural wealth and resources found within the limits of its national jurisdiction. Israel's settlement policy and the construction of the bypass road network and the Wall have deprived the Palestinian population of the control and development of an estimated 38 percent of West Bank land. It has also implemented a water management and allocation system that favours Israel and Jewish settlers in the OPT to the detriment of the Palestinian population. Not only is this practice contrary to the lawful use of natural resources in time of occupation, which is limited to the needs of the occupying army, but it is also contrary to international water law as the allocation employed is both unjust and inequitable. Moreover, it is significant that the route of the Wall is similar to the 'red line' that delineates those areas of the West Bank from which Israel can withdraw without relinquishing its control over key water resources that are used to supply Israel and the settlements. Thus, by its treatment of the natural resources of the OPT, Israel has further breached the economic dimension of self-determination, as expressed in the right of permanent sovereignty over natural resources.

Finally, self-determination also has a cultural component: a people entitled to exercise the right of self-determination has the right freely to develop and practice its culture. Israeli practices privilege the language and cultural referents of the occupier, while materially hampering the cultural development and expression of the Palestinian population. This last issue renders Israel's denial of the right to self-determination in the OPT comprehensive.

In his report, Professor Dugard suggested that elements of the occupation resembled colonialism. This study demonstrates that the implementation of a colonial policy by Israel has not been piecemeal but is systematic and comprehensive, as the exercise of the Palestinian population's right to self-determination has been frustrated in all of its principal modes of expression.

E. Findings on Apartheid

The analysis of apartheid in this study encompasses three distinct issues: (1) the definition of apartheid; (2) the status of the prohibition of apartheid in international law; and (3) whether Israel's practices in the OPT amount to a breach of that prohibition.

Article 3 of ICERD prohibits the practice of apartheid as a particularly egregious form of discrimination, but it does not define the practice with precision. The Apartheid Convention and the Rome Statute have developed the prohibition of apartheid in two ways: they criminalise certain apartheid-related acts and further elaborate the definition of apartheid. The Apartheid Convention criminalises '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'. The Rome Statute criminalises inhumane acts committed in

the context of, and to maintain, ‘an institutionalized regime of systematic oppression and domination by one racial group over any other racial group.’ Both focus on the *systematic, institutionalised, and oppressive* character of the discrimination involved and the purpose of domination that is entailed. This distinguishes the practice of apartheid from other forms of prohibited discrimination and from other contexts in which the listed crimes arise. The prohibition of apartheid has also assumed the status of customary international law and, further, is established as a peremptory rule of international law (a *jus cogens* norm) which entails obligations owed to the international community as a whole (obligations *erga omnes*).

In drafting this study, it was necessary to develop a methodology to determine whether an instance of apartheid has developed outside southern Africa. This aspect of the study was organised according to the definition of apartheid contained in Article 2 of the Apartheid Convention, which cites six categories of ‘inhuman acts’ as comprising the ‘crime of apartheid’. This list is intended to be illustrative and inclusive, rather than exhaustive or exclusive. Accordingly, a determination that apartheid exists does not require that *all* the listed acts are practiced: for example, Article 2(b) regarding the intended ‘physical destruction’ of a group did not apply generally to apartheid policy in South Africa. Practices not expressly enumerated may also be relevant, as Article 2 mentions ‘*similar* policies and practices ... as practiced in southern Africa’. For the purposes of this study, it was therefore assumed that a positive finding of apartheid need not establish that all practices cited in Article 2 are present, or that those precise practices are present, but rather that ‘policies and practices of racial segregation and discrimination’ combine to form an institutionalised system of racial discrimination that has not only the effect but the purpose of maintaining racial domination by one racial group over the other.

Fundamental to the question of apartheid is determining whether the groups involved can be understood as ‘racial groups’. This required first examining how racial discrimination is defined in ICERD and the jurisprudence of the International Criminal Tribunals for Rwanda and the former Yugoslavia, which concluded that no scientific or impartial method exists for determining whether any group is a racial group and that the question rests primarily on local perceptions. In the OPT, this study finds that ‘Jewish’ and ‘Palestinian’ identities are socially constructed as groups distinguished by ancestry or descent as well as nationality, ethnicity, and religion. On this basis, the study concludes that Israeli Jews and Palestinian Arabs can be considered ‘racial groups’ for the purposes of the definition of apartheid in international law.

In examining Israel’s practices under the prism of the Apartheid Convention, this study also recalls the system of apartheid as it was practiced in South Africa because those practices illustrate the concerns and intentions of the drafters of the Apartheid Convention. It must be clear, however, that practices in South Africa are not the test or benchmark for a finding of apartheid elsewhere, as the principal instrument which provides this test lies in the terms of the Apartheid Convention itself.

By examining Israel’s practices in the light of Article 2 of the Apartheid Convention, this study concludes that Israel has introduced a system of apartheid in the OPT. In regard to each ‘inhuman act’ listed in Article 2, the study has found the following:

- o Article 2(a) regarding the denial of the right to life and liberty of person is satisfied by Israeli measures to repress Palestinian dissent against the occupation and its system of domination. Israel’s policies and practices include murder, in the form of extrajudicial killings; torture and other cruel, inhuman or degrading treatment or punishment of detainees; a military court system that falls far short of international standards for fair trial; and arbitrary arrest and detention of Palestinians, including administrative detention imposed without charge or trial and lacking adequate judicial review. All of these practices are discriminatory in that Palestinians are subject to legal systems and courts which apply standards of evidence and

procedure that are different from those applied to Jewish settlers living the OPT and that result in harsher penalties for Palestinians.

- Article 2(b) regarding ‘the deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part’ is not satisfied, as the Israel’s policies and practices in the OPT are not found to have the intent of causing the physical destruction of the Palestinian people. Policies of collective punishment that entail grave consequences for life and health, such as closures imposed on the Gaza Strip that limit or eliminate Palestinian access to essential health care and medicine, fuel, and adequate nutrition, and Israeli military attacks that inflict high civilian casualties, are serious violations of international humanitarian and human rights law but do not meet the threshold required by this provision regarding the OPT as a whole.
- Article 2(c) regarding measures calculated to prevent a racial group from participation in the political, social, economic and cultural life of the country and to prevent the full development of a group through the denial of basic human rights and freedoms is satisfied on several counts:
 - (i) Restrictions on the Palestinian right to freedom of movement are endemic in the West Bank, stemming from Israel's control of the OPT's checkpoints and crossings, impediments created by the Wall and its crossing points, a matrix of separate roads, and obstructive and all-encompassing permit and ID systems that apply solely to Palestinians.
 - (ii) The right of Palestinians to choose their own place of residence within their territory is severely curtailed by systematic administrative restrictions on Palestinian residency and building in East Jerusalem, by discriminatory legislation that operates to prevent Palestinian spouses from living together on the basis of which part of the OPT they originate from, and by the strictures of the permit and ID systems.
 - (iii) Palestinians are denied their right to leave and return to their country. Palestinian refugees displaced in 1948 from the territory now inside Israel who are living in the OPT (approximately 1.8 million people including descendents) are not allowed to return to their former places of residence. Similarly, hundreds of thousands of Palestinians displaced to surrounding states from the West Bank and Gaza Strip in 1967 have been prevented from returning to the OPT. Palestinian refugees displaced in 1948 to surrounding states (approximately 4.5 million) are not allowed to return to either Israel or the OPT. Palestinian residents of the OPT must obtain Israeli permission to leave the territory. In the Gaza Strip, especially since 2006, this permission is almost completely denied, even for educational or medical purposes. Political activists and human rights defenders are often subject to arbitrary and undefined 'travel bans', while many Palestinians who travelled and lived abroad for business or personal reasons have had their residence IDs revoked and been prohibited from returning.
 - (iv) Israel denies Palestinians in the OPT their right to a nationality by denying Palestinian refugees from inside the Green Line their right of return, residence, and citizenship in the State (Israel) governing the land of their birth. Israel’s policies in the OPT also effectively deny Palestinians their right to a nationality by obstructing the exercise of the Palestinian right to self-determination through the formation of a Palestinian State in the West Bank (including East Jerusalem) and Gaza Strip.
 - (v) Palestinians are restricted in their right to work, through Israeli policies that severely curtail Palestinian agriculture and industry in the OPT, restrict exports and imports, and impose pervasive obstacles to internal movement that impair access to agricultural land and travel for employment and business. Although formerly significant, Palestinian

access to work inside Israel has been almost completely cut off in recent years by prevailing closure policies and is now negligible. Palestinian unemployment in the OPT as a whole has reached almost 50 percent.

- (vi) Palestinian trade unions exist but are not recognised by the Israeli government or by the Histadrut (the main Israeli trade union) and cannot effectively represent Palestinians working for Israeli employers and businesses. Although these workers are required to pay dues to the Histadrut, it does not represent their interests and concerns, and Palestinians have no voice in formulating Histadrut policies. Palestinian unions are also prohibited from functioning in Israeli settlements in the OPT where Palestinians work in construction and other sectors.
 - (vii) The right of Palestinians to education is not impacted directly by Israeli policy, as Israel does not operate the school system in the OPT, but education is severely impeded by military rule. Israeli military actions have included extensive school closures, direct attacks on schools, severe restrictions on movement, and arrests and detention of teachers and students. Israel's denial of exit permits has prevented hundreds of students in the Gaza Strip from continuing their education abroad. Discrimination in relation to education is striking in East Jerusalem. A segregated school system operates in the West Bank as Palestinians are not allowed to attend government-funded schools in Jewish settlements.
 - (viii) The right of Palestinians to freedom of opinion and expression is greatly restricted through censorship laws enforced by the military authorities and endorsed by the High Court of Justice. Since 2001, the Israeli Government Press Office has greatly limited Palestinian press accreditation. Journalists are regularly restricted from entering the Gaza Strip and Palestinian journalists suffer from patterns of harassment, detention, confiscation of materials, and even killing.
 - (ix) Palestinians' right to freedom of peaceful assembly and association is impeded through military orders. Military legislation bans public gatherings of ten or more persons without a permit from the Israeli military commander. Non-violent demonstrations are regularly suppressed by the Israeli army with live ammunition, rubber-coated steel bullets, tear gas, improper use of projectiles such as tear gas canisters, and participants are arrested. Most Palestinian political parties have been declared illegal and institutions associated with those parties, such as charities and cultural organisations, are regularly subjected to closure and attack.
 - (x) The prevention of full development in the OPT and participation of Palestinians in political, economic, social and cultural life is most starkly demonstrated by the effects of Israel's ongoing siege and regular large-scale military attacks on the Gaza Strip. Although denied by Israel, the population of the Gaza Strip is experiencing an on-going severe humanitarian crisis.
- o Article 2(d), which relates to division of the population along racial lines, has three elements, two of which are satisfied:
 - (i) Israel has divided the West Bank into reserves or cantons in which residence and entry is determined by each individual's group identity. Entry by one group into the zone of the other group is prohibited without a permit. The Wall and its infrastructure of gates and permanent checkpoints suggest a policy permanently to divide the West Bank into racial cantons. Israeli government ministries, the World Zionist Organisation and other Jewish-national institutions operating as authorised agencies of the State plan, fund and implement construction of the West Bank settlements and their infrastructure for exclusively Jewish use.

- (ii) Article 2(d) is not satisfied regarding a prohibition on mixed marriages between Jews and Palestinians. The proscription of civil marriage in Israeli law and the authority of religious courts in matters of marriage and divorce, coupled with restrictions on where Jews and Palestinians can live in the OPT, present major practical obstacles to any potential mixed marriage but do not constitute a formal prohibition.
 - (iii) Israel has extensively appropriated Palestinian land in the OPT for exclusively Jewish use. Private Palestinian land comprises about 30 percent of the land unlawfully appropriated for Jewish settlement in the West Bank. Presently, 38 percent of the West Bank is completely closed to Palestinian use, with significant restrictions on access to much of the rest of it.
- Article 2(e) relating to the exploitation of labour is today not significantly satisfied, as Israel has raised barriers to Palestinian employment inside Israel since the 1990s and Palestinian labour is now used extensively only in the construction and services sectors of Jewish-Israeli settlements in the OPT. Otherwise, exploitation of labour has been replaced by practices that fall under Article 2(c) regarding the denial of the right to work.
 - Arrest, imprisonment, travel bans and the targeting of Palestinian parliamentarians, national political leaders and human rights defenders, as well as the closing down of related organisations by Israel, represent persecution for opposition to the system of Israeli domination in the OPT, within the meaning of Article 2(f).

In sum, Israel appears clearly to be implementing and sustaining policies intended to maintain its domination over Palestinians in the OPT and to suppress opposition of any form to those policies.

The comparative analyses of South African apartheid practices threaded throughout the analysis of apartheid in Chapter 5 is there to illuminate, rather than define, the meaning of apartheid, and there are certainly differences between apartheid as it was applied in South Africa and Israel's policies and practices in the OPT. Nonetheless, it is significant that the two systems can be defined by similar dominant features.

A troika of key laws underpinned the South African apartheid regime—the Population Registration Act 1950, the Group Areas Act 1950, and the Pass Laws—and established its three principal features or pillars. The first pillar was formally to demarcate the population of South Africa into racial groups through the Population Registration Act (1950) and to accord superior rights, privileges and services to the white racial group: for example, through the Bantu Building Workers Act of 1951, the Bantu Education Act of 1953 and the Separate Amenities Act of 1953. This pillar consolidated earlier discriminatory laws into a pervasive system of institutionalised racial discrimination, which prevented the enjoyment of basic human rights by non-white South Africans based on their racial identity as established by the Population Registration Act.

The second pillar was to segregate the population into different geographic areas, which were allocated by law to different racial groups, and restrict passage by members of any group into the area allocated to other groups, thus preventing any contact between groups that might ultimately compromise white supremacy. This strategy was defined by the Group Areas Act of 1950 and the Pass Laws—which included the Native Laws Amendment Act of 1952 and the Natives (Abolition of Passes and Co-ordination of Documents) Act of 1952—as well as the Natives (Urban Areas) Amendment Act 1955, the Bantu (Urban Areas) Consolidation Act 1945 and the Coloured Persons Communal Reserves Act 1961.

This separation constituted the basis for the policy labeled 'grand apartheid' by its South African architects, which provided for the establishment of 'Homelands' or 'Bantustans' into which denationalised black South Africans were transferred and forced to reside, in order to allow the white minority to deny them the enjoyment of any political rights in, and preserve

white supremacy over, the majority of the territory of South Africa. Although the Homelands were represented by the South African government as offering black South Africans the promise of complete independence in distinct nation-States, and thus satisfying their right to self-determination, the Homelands were not recognised by either the African National Congress or the international community and were condemned by UN resolutions as violations of both South Africa's territorial integrity and of the right of the African people of South Africa as a whole to self-determination.

Having divided the population into distinct racial groups, and dictated which groups could live and move where, South Africa's apartheid policies were buttressed by a third pillar: a matrix of draconian 'security' laws and policies that were employed to suppress any opposition to the regime and to reinforce the system of racial domination, by providing for administrative detention, torture, censorship, banning, and assassination.

Israel's practices in the OPT can be defined by the same three 'pillars' of apartheid. The first pillar derives from Israeli laws and policies that establish Jewish identity for purposes of law and afford a preferential legal status and material benefits to Jews over non-Jews. The product of this in the OPT is an institutionalised system that privileges Jewish settlers and discriminates against Palestinians on the basis of the inferior status afforded to non-Jews by Israel. At the root of this system are Israel's citizenship laws, whereby group identity is the primary factor in determining questions involving the acquisition of Israeli citizenship. The 1950 Law of Return defines who is a Jew for purposes of the law and allows every Jew to immigrate to Israel or the OPT. The 1952 Citizenship Law then grants automatic citizenship to people who immigrate under the Law of Return, while erecting insurmountable obstacles to citizenship for Palestinian refugees. Israeli law conveying special standing to Jewish identity is then applied extra-territorially to extend preferential legal status and material privileges to Jewish settlers in the OPT and thus discriminate against Palestinians. The review of Israel's practices under Article 2 of the Apartheid Convention provides abundant evidence of discrimination against Palestinians that flows from that inferior status, in realms such as the right to leave and return to one's country, freedom of movement and residence, and access to land. The 2003 Citizenship and Entry into Israel Law banning Palestinian family unification is a further example of legislation that confers benefits to Jews over Palestinians and illustrates the adverse impact of having the status of Palestinian Arab. The disparity in how the two groups are treated by Israel is highlighted through the application of a harsher set of laws and different courts for Palestinians in the OPT than for Jewish settlers, as well as through the restrictions imposed by the permit and ID systems.

The second pillar is reflected in Israel's grand policy to fragment the OPT for the purposes of segregation and domination. This policy is evidenced by: Israel's extensive appropriation of Palestinian land, which continues to shrink the territorial space available to Palestinians; the hermetic closure and isolation of the Gaza Strip from the rest of the OPT; the deliberate severing of East Jerusalem from the rest of the West Bank; and the appropriation and construction policies serving to carve up the West Bank into an intricate and well-served network of connected settlements for Jewish-Israelis and an archipelago of besieged and non-contiguous enclaves for Palestinians. That these measures are intended to segregate the population along racial lines in violation of Article 2(d) of the Apartheid Convention is clear from the visible web of walls, separate roads, and checkpoints, and the invisible web of permit and ID systems, that combine to ensure that Palestinians remain confined to the reserves designated for them while Israeli Jews are prohibited from entering those reserves but enjoy freedom of movement throughout the rest of the Palestinian territory.

Whether the confinement of Palestinians to certain reserves or enclaves within the OPT is analogous to South African 'grand apartheid' in the further sense that Israel intends Palestinian rights ultimately to be met by the creation of a State in parts of the OPT whose rationale is based

on racial segregation engages political questions beyond the scope and method of this study. Within the scope of this study is that, much as the same restrictions functioned in apartheid South Africa, the policy of geographic fragmentation has the effect of crushing Palestinian socio-economic life, securing Palestinian vulnerability to Israeli economic dominance, and of enforcing a rigid segregation of Palestinian and Jewish populations. The fragmentation of the territorial integrity of a self-determination unit for the purposes of racial segregation and domination is prohibited by international law.

The third pillar upon which Israel's system of apartheid in the OPT rests is its 'security' laws and policies. The extrajudicial killing, torture and cruel, inhuman or degrading treatment and arbitrary arrest and imprisonment of Palestinians, as described under the rubric of Article 2(a) of the Apartheid Convention, are all justified by Israel on the pretext of security. These policies are State-sanctioned, and often approved by the Israeli judicial system, and supported by an oppressive code of military laws and a system of improperly constituted military courts. Additionally, this study finds that Israel's invocation of 'security' to validate sweeping restrictions on Palestinian freedom of opinion, expression, assembly, association and movement also often purports to mask a true underlying intent to suppress dissent to its system of domination, and thereby maintain control over Palestinians as a group. This study does not contend that Israel's claims about security are by definition lacking in merit; however, Israel's invocation of 'security' to validate severe policies and disproportionate practices toward the Palestinians often masks the intent to suppress Palestinian opposition to a system of domination by one racial group over another.

Thus, while the individual practices listed in the Apartheid Convention do not in themselves define apartheid, these practices do not occur in the OPT in a vacuum, but are integrated and complementary elements of an institutionalised and oppressive system of Israeli domination and oppression over Palestinians as a group; that is, a system of apartheid.

In summary, this study finds that Jewish and Palestinian identities function as racial identities in the sense provided by ICERD, the Apartheid Convention, and the jurisprudence of the International Criminal Tribunals for Rwanda and the former Yugoslavia. Israel's status as a 'Jewish State' is inscribed in its Basic Law and it has developed legal and institutional mechanisms by which the State seeks to ensure its enduring Jewish character. These laws and institutions are channelled into the OPT to convey privileges to Jewish settlers and disadvantage Palestinians on the basis of their respective group identities. This domination is associated principally with transferring control over land in the OPT to exclusively Jewish use, thus also altering the demographic status of the territory. This discriminatory treatment cannot be explained or excused on grounds of citizenship, both because it goes beyond what is permitted by ICERD and because certain provisions in Israeli civil and military law provide that Jews present in the OPT who are not citizens of Israel also enjoy privileges conferred on Jewish-Israeli citizens in the OPT by virtue of being Jews. Consequently, this study finds that the State of Israel exercises control in the OPT with the purpose of maintaining a system of domination by Jews over Palestinians and that this system constitutes a breach of the prohibition of apartheid.

F. Implications and Recommendations

International law is inherently biased towards the protection of State interests. Although the Palestinian people has some international status because of its entitlement to self-determination, the remedies available to it on the international sphere are limited, and principally lie in recourse to human rights bodies in attempts to ensure that Palestinian rights are respected. This relative absence of remedies available to the right-bearer does not, however, have the

consequence that Israel's obligations are lessened or extinguished. The conclusion that Israel has breached the international legal prohibitions of apartheid and colonialism in the OPT suggests that the occupation itself is illegal on these grounds. The legal consequences of these findings are grave and entail obligations not merely for Israel but also for the international community as a whole.

Israel bears the primary responsibility for remedying the illegal situation it has created. In the first place, it has the duty to cease its unlawful activity and dismantle the structures and institutions of colonialism and apartheid that it has created. Israel is additionally required by international law to implement duties of reparation, compensation and satisfaction in order to wipe out the consequences of its unlawful acts. But above all, in common with all States, whether acting singly or through the agency of inter-governmental organisations, Israel has the duty to promote the Palestinian people's exercise of its right of self-determination in order that it might freely determine its political status freely pursue its own economic policy and social and cultural development.

The realisation of self-determination and the prohibition on apartheid are peremptory norms of international law from which no derogation is permitted. Both express core values of international public policy and generate obligations for the international community as a whole. These obligations adhere to individual States and the intergovernmental organisations through which they act collectively. Breaches of peremptory norms, which involve a gross or systematic failure by the responsible State to fulfil the obligations they impose, generate derivative obligations for States and intergovernmental organisations of cooperation and abstention.

States, and intergovernmental organisations, must cooperate to bring to an end any and all serious breaches of peremptory norms. The obligation of cooperation imposed upon States may be pursued through intergovernmental organisations, such as the United Nations, should States decide that this is appropriate, but must also be pursued outside these organisations by way of inter-State diplomatic measures. One possible mechanism is that States may invoke the international responsibility of Israel to call it to account for its violations of the peremptory prohibitions of colonialism and apartheid. All States have a legal interest in ensuring that no State breaches these norms, and accordingly all States have the legal capacity to invoke Israel's responsibility. Above all, however, all States and intergovernmental organisations have the duty to promote the Palestinian people's exercise of its right of self-determination in order that it might freely determine its political status and economic policy.

The duty of abstention has two elements: States must not recognise as lawful situations created by serious breaches of peremptory norms nor render aid or assistance in maintaining that situation. In particular, States must not recognise Israel's annexation of East Jerusalem or its attempt to acquire territory in the West Bank through the consolidation of settlements, nor may they bolster the latter's economic viability. Should any State fail to fulfil its duty of abstention then it risks becoming complicit in Israel's internationally wrongful acts, and thus independently engaging its own responsibility, with all the legal consequences of reparation that this entails.

In short, for States the legal consequences of Israel's breach of the peremptory norms prohibiting colonialism and apartheid are clear. When faced with a serious breach of an obligation arising under a peremptory norm, all States have the duty not to recognise this situation as lawful and have the duty not to aid or assist the maintenance of this situation. Further, all States must co-operate to bring this situation to an end. If a State fails to fulfil these duties, axiomatically it commits an internationally wrongful act. If a State aids or assists another State in maintaining that unlawful situation, knowing it to be unlawful, then it becomes complicit in its commission and itself commits an internationally wrongful act.

States cannot evade these obligations through the act of combination. They cannot claim that the proper route for the discharge of these obligations is combined action through an

intergovernmental organisation and that if it fails to act then their individual obligations of cooperation and abstention are extinguished. That is, States cannot evade their international obligations by hiding behind the independent personality of an international organisation of which they are members.

Moreover, like States, intergovernmental organisations themselves bear responsibility for their actions under international law. Obligations *erga omnes* generated by a breach of a peremptory norm of international law are imposed on the international community as a whole and are thus imposed equally on intergovernmental organisations as well as States. As the International Court of Justice stated in the *Legal consequences of the construction of a wall in occupied Palestinian territory* advisory opinion, the United Nations bears a special responsibility for the resolution of the Israel-Palestine conflict.

While both States and intergovernmental organisations have a degree of discretion in determining how they may implement their duties of cooperation and abstention, the authors of this study agree with Professor Dugard's suggestion that the parameters of these duties might best be delineated by seeking advice from the International Court of Justice. Accordingly we respectfully suggest that, in accordance with Article 96 of the Charter of the United Nations and pursuant to Article 65 of the Statute of the International Court of Justice, an advisory opinion be urgently requested on the following question:

Do the policies and practices of Israel within the Occupied Palestinian Territories violate the norms prohibiting apartheid and colonialism; and, if so, what are the legal consequences arising from Israel's policies and practices, considering the rules and principles of international law, including the International Convention on the Elimination of all forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly Resolution 1514 (1960), the Fourth Geneva Convention of 1949, and other relevant Security Council and General Assembly resolutions?

