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CRIMINAL "APARTHEID" IN THE OCCUPIED PALESTINIAN TERRITORY?:

A CALL FOR A MORE NUANCED APPROACH FROM THE PERSPECTIVE OF INTERNATIONAL CRIMINAL LAW

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ABSTRACT

This is a legal doctrinal inquiry into the claim that Israel's policies and practices in the Occupied Palestinian Territory (OPT) constitute apartheid. Its purpose is to provide a more nuanced analysis which more clearly distinguishes between legal/doctrinal and political/policy arguments. While the popular, non-legal use of the apartheid claim regarding the OPT (and beyond) has dramatically increased in the last years, the legal doctrinal side of the issue, especially regarding the elements of the apartheid crime, remains underexplored. The International Court of Justice (ICJ) has left the issue open in its Israel/Palestine Advisory Opinion of July 19, 2024 (only finding a violation of Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination). This inquiry intends to close this gap. The importance of such an objective legal analysis has even become more obvious with the Hamas' attack on Israel on October 7, 2023 and the ensuing armed conflict in Gaza. Yet, this inquiry is limited in that it only refers to the situation in the OPT and focuses on apartheid as an international crime and the ensuing individual criminal responsibility. After some preliminary and principled considerations on the status of apartheid under international (criminal) law, its substantive and geographical scope, its specific wrong, and the relationship between the relevant treaty instruments (Part I), the second and main part of the paper will offer a detailed analysis of the elements of the crime (Part II). Taking Article 7(2)(h) of the Rome Statute of the International Criminal Court (ICC Statute, ICCS) as the applicable crime

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definition, the following three elements will be examined: (i) "inhumane acts;" (ii) "institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups;" and (iii) the specific "intention of maintaining" the said regime. Applying these elements to the situation in the OPT, it will be shown that, while the first element is quite straightforward, the second element raises some tricky interpretative problems (especially the "racial group" part), and the third element is arguably the most difficult to demonstrate. Ultimately, criminal responsibility for apartheid cannot be established in the abstract but depends on the concrete circumstances of the individual case and the available evidence, with the specific apartheid intent to be inferred from context and conduct as the only reasonable inference.

I. PRELIMINARY AND PRINCIPLED CONSIDERATIONS

This inquiry examines whether the apartheid claim[1] advanced in several UN[2] and NGO[3] reports as well as by some scholars[4]—

1. The origins of the apartheid claims go back to the 1960s with first charges by Palestinian writers, *see* Dov Waxman, *Israel, Amnesty, and the Apartheid Accusation: A Wake-Up Call*, 27 PALESTINE-ISR. J., nos. 1 & 2, 2023, amounting to the equation of Zionism and racism in the United Nations in the 1970s (G.A. Res. 3131 and 3379, *infra* note 201), but they gained traction in the 1980s-1990s and peaked during the second intifada in 2000, *see* Dugard & Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, 24 EUR. J. INT'L L. 867, 868 (2013) [hereinafter "Dugard & Reynolds"]. At the United Nations, the claim was apparently first made at the 2001 World Conference against Racism in Durban where a Draft Declaration, *see* World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/CONF.189/4, (Aug. 20, 2001), mentioned apartheid in relation to "the ethnic cleansing of the Arab population in historic Palestine", *id.* ¶ 29, and the "foreign occupation founded on settlements" was qualified as "a new kind of apartheid", *id.* ¶ 33; yet, the final version of the Declaration no longer contained the reference to Palestine, *cf.* World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration and Programme of Action,* 5 (Sept. 8, 2002), https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf [https://perma.cc/X6R6-LU9R]; Ariel Bultz, *Redefining Apartheid in International Criminal Law*, 24 CRIM. L.F. 205, at 206 (2013). *But see* JOSHUA KERN & ANNE HERZBERG, FALSE KNOWLEDGE AS POWER: DECONSTRUCTING DEFINITIONS OF APARTHEID THAT DELEGITIMISE THE JEWISH STATE 10-14 (2021) [hereinafter NGO MONITOR (KERN)] (criticizing the Durban preparatory process); *see also* John Reynolds, *Apartheid and International Law in Palestine*, *in* PROLONGED OCCUPATION AND INTERNATIONAL LAW 104, 111 (Nada Kiswanson & Susan Power eds., 2023).

2. John Dugard (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council", at 3, U.N. Doc. A/HRC/4/17 (Jan. 29 2007) [hereinafter Dugard Report 2007] ("[E]lements of the occupation constitute forms . . . of apartheid"); Richard Falk (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Final Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 55, U.N. Doc. A/HRC/25/67 (Jan. 13. 2014) [hereinafter Falk Report 2014] (A 2010 report by Falk only mentions the term apartheid in connection with the BDS movement. *See* Richard Falk (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, A/HRC/13/53/Rev.1 (June 7, 2010).); Michael Lynk (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶¶ 35, 52, U.N. Doc. A/HRC/49/87 (Aug. 12, 2022) [hereinafter Lynk Report Aug. 2022]; *id.* at 56 ("apartheid reality in a post-apartheid world"); Francesca Albanese (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 9, U.N. Doc. A/HRC/77/356 (Sept. 21, 2022) [hereinafter Albanese Report 2022] (citing the United Nations and other Non-governmental Organizations); Richard Falk & Virginia Tilley, Israeli Practices towards the Palestinian People and the Question of Apartheid, at 65, U.N. Doc. E/ESCWA/ECRI/2017/1 (2017) [hereinafter ESCWA] ("Israel has established an apartheid regime that dominates the Palestinian people as a whole . . . . [and] is guilty of imposing an apartheid regime."). This Report was withdrawn shortly after its publication for procedural reasons since it had been published without consultation with the UN Secretariat. The affair led the Under-Secretary General and Executive Secretary for the ESCWA, the Jordanite diplomat Rima Khalaf, to resign. In a letter

she referred to pressure from "powerful member states" accompanied by "vicious attacks and threats", *cf. Senior U.N. official quits after "apartheid" Israel report pulled*, REUTERS (Mar. 17, 2017), https://www.reuters.com/article/us-un-israel-report-resignation/senior-u-n-official-quits-after-apartheid-israel-report-pulled-idUSKBN16O24X [https://perma.cc/9FGD-5BCB]. For the official Palestinian position, see the Interstate Communication submitted to the Committee on the Elimination of Racial Discrimination (CERD) on April 23, 2018, see *Inter-state communications: Committee on the Elimination of Racial Discrimination*, U.N. HUM. RTS OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/treaty-bodies/cerd/inter-state-communications#:~:text=Israel,matter%20again%20to%20the%20Committee [https://perma.cc/TM34-YBUU]; PALESTINE LIBERATION ORG. NEGOTS. AFFS. DEP'T, IT IS APARTHEID: THE REALITY OF ISRAEL'S COLONIAL OCCUPATION OF PALESTINE (2021), https://www.nad.ps/sites/default/files/20201230.pdf [https://perma.cc/54GS-KGUT]. Note however that neither Special Rapporteur Wibisono nor two Human Rights Council (HRC) reports took issue with apartheid, let alone discuss the crime, *cf.* Makarim Wibisono, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, U.N. Doc. A/HRC/28/78, Jan. 22, 2015; HRC, *Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*, ¶ 85, U.N. Doc. A/77/328, (Sept. 14, 2022) [hereinafter ComInq Report Sept. 2022] ("only" finding deportation, persecution and war crimes; referring to apartheid only by way of secondary sources in footnote); UN GA, *Report of the UN Fact-Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48, 25 September 2009 [hereinafter Goldstone Report] where different forms of (systematic) discrimination of Palestinians are acknowledged (¶¶ 113, 206-07, 1434, 1492, 1765), including by settlement policy and settler violence (¶¶1546, 1937), but, in terms of criminal responsibility, only the potential commission of persecution as a Crime against Humanity (CaH), especially regarding Gaza, is found (¶¶ 75, 1332, 1502, 1936). Similarly, in the ICJ's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the term "apartheid" is not even mentioned, *see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); yet, it has been referred to by several States during the recent hearings in the ICJ's advisory proceedings on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, *cf. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, INT'L CT. OF JUST., https://www.icj-cij.org/case/186 [https://perma.cc/WVE9-DXA2] (last visited May 30, 2024). In the ICJ Advisory Opinion, *supra* note *, the Court then found a violation of Art. 3 ICERD (¶¶ 226-29) with President Salam (Declaration, ¶¶ 15) and Judge Tladi (Declaration, ¶¶ 36) explicitly in favor of the apartheid claim and Judges Nolte (Separate Opinion, ¶¶ 8) and Iwasawa (Separate Opinion, ¶¶ 12-13) against it. Judge Brant (Declaration, especially ¶ 11) however, left it open. Similarly, the ad hoc Conciliation Commission in the State of Palestine v. Israel (set up under Art. 12(1)(b) ICERD) did not address the apartheid claim. See its findings here: CERD, Report of the Ad Hoc Conciliation Commission on the Inter-State Communication Submitted by the State of Palestine against Israel under Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. CERD/C/113/3 (2024). For analysis critical of the CERD report, see David Keane, *A Missed Opportunity: The Decision in Palestine v. Israel*, EJIL: TALK! (Sept. 5, 2024) https://www.ejiltalk.org/a-missed-opportunity-the-decision-in-palestine-v-israel [https://perma.cc/F2GE-M3CY].

3. RUSSELL TRIBUNAL ON PALESTINE, FINDINGS OF THE SOUTH AFRICAN SESSION, ¶¶ 5.17, 5.44-5.45 (Nov. 7, 2011) [hereinafter RUSSELL TRIBUNAL], https://www.russelltribunalonpalestine.com/en/wp-content/uploads/2011/11/RToP-Cape-Town-full-findings3.pdf [https://perma.cc/FGN7-H3YY] (finding "that Israel subjects the Palestinian people to an institutionalised regime of domination amounting to apartheid as defined under international law" which is aggravated in the OPT); MICHAEL SFARD, THE

OCCUPATION OF THE WEST BANK AND THE CRIME OF APARTHEID: LEGAL OPINION 57 (2021) [hereinafter YESH DIN] (finding the CaH of apartheid in the West Bank given that the occupation "comes with a gargantuan colonization project" cementing the Jewish "domination over the occupied [Palestinian] residents" and ensuring "their inferior status;" in addition considering Israel as an "apartheid regime" given the "creeping legal annexation") B'TSELEM & KEREM NAVOT, THIS IS OURS – AND THIS TOO. ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK 4 (2021) ("Israel appears more determined than ever to continue upholding and perpetuating an apartheid regime throughout the area under its control . . . ."); HUMAN RIGHTS WATCH (HRW), A THRESHOLD CROSSED 80, 170 (2021) [hereinafter A THRESHOLD CROSSED] (distinguishing between Israel proper and OPT); *id.* at 169 (finding "severity of the repression" amounting "to 'systematic oppression' by one racial group over another, a key component for the crime of apartheid . . ." in the OPT); B'TSELEM, THIS IS APARTHEID 5-6 (2022) (supremacy of Jews and exclusion of Palestinians "under a single regime"); AMNESTY INT'L, ISRAEL'S APARTHEID AGAINST PALESTINIANS 267 (2022) ("[T]he patterns of proscribed acts perpetrated by Israel form part of a systematic as well as widespread attack directed against the Palestinian population, and that the inhuman or inhumane acts committed within the context of this attack have been committed with the intention to maintain this system and amount to the crime against humanity of apartheid under both the Apartheid Convention and the Rome Statute."); Al-Haq, Addameer and Habitat, *Entrenching and Maintaining an Apartheid Regime over the Palestinian People as a Whole* (Joint Submission on Apartheid to the UN Special Rapporteur on the situation of human rights in the Occupied Palestinian Territory), Jan. 19 2022, https://www.alhaq.org/cached_uploads/download/2022/01/20/final-draft-lynk-s-apartheid-submission-1-1642656045.pdf [https://perma.cc/TXH7-6GHL]; *see also* Adalah's analysis of the 2018 Basic Law, *infra* note 156. For sources countering the claim of apartheid, see Joshua Kern, *Uncomfortable truths: how HRW errs in its definition of "Israeli apartheid", what is missing, and what are the implications?*, EJIL: TALK! (July 7 2021), https://www.ejiltalk.org/uncomfortable-truths-how-hrw-errs-in-its-definition-of-israeli-apartheid-what-is-missing-and-what-are-the-implications [https://perma.cc/N3WK-B52W] (criticizing the conclusion reached in HUMAN RIGHTS WATCH, A THRESHOLD CROSSED, *supra*); *see also* Eugene Kontorovich, *The Apartheid Accusation Against Israel is Baseless–and Agenda-Driven*, EJIL: TALK! (July 8, 2021), https://www.ejiltalk.org/the-apartheid-accusation-against-israel-lacks-is-baseless-and-agenda-drive [https://perma.cc/Y9AE-4VTC]. For a rejoinder, see Clive Baldwin & Emilies Max, *Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law*, EJIL:TALK! (July 9, 2021), https://www.ejiltalk.org/human-rights-watch-responds-reflections-on-apartheid-and-persecution-in-international-law [https://perma.cc/CPF2-BXD8]. *See generally* NGO Monitor (Kern), *supra* note 1, at 19-20 (reproducing Israel's response); *id.* at 52 (concluding that HRW's interpretation of the elements of the crime is too broad and inconsistent and thus its application "inapposite to the Israeli-Palestinian situation"). For a more aggressive critique, see SALO AIZENBERG, AMNESTY INTERNATIONAL'S CRUEL ASSAULT ON ISRAEL: SYSTEMATIC LIES, ERRORS, OMISSIONS & DOUBLE STANDARDS (2022) [hereinafter NGO Monitor (Aizenberg 1)]; SALO AIZENBERG, A THRESHOLD CROSSED: DOCUMENTING HRW'S "APARTHEID" FABRICATIONS (2022) [hereinafter NGO Monitor (Aizenberg 2)]. I note in passing that NGO Monitor is closely linked to the Israeli government, *cf.* Yossi Gurvitz, *What is NGO Monitor's connection to the Israeli government?* (Apr. 29, 2014), https://www.972mag.com/what-is-ngo-monitors-connection-to-the-israeli-government [https://perma.cc/NVJ2-9HGK] and that its counterclaims are highly personalized. See, for example, NGO Monitor (Kern), *supra* note 1, at 14 (attacking Dugard and Falk).

4. John Quigley, *Apartheid Outside Africa: The Case of Israel*, 2 IND. INT'L & COMP. L .REV 221 (1991) (comparing "Israel's discriminatory practices" to South Africa and qualifying them, under the ApConv "as apartheid policy"); HUMAN SCIENCES RESEARCH COUNCIL OF SOUTH AFRICA (HSRC), OCCUPATION, COLONIALISM, APARTHEID 13, 17, 172,

271, 277 (2009) [hereinafter HRSC]; *id.* at 20-21, 22 (concluding that Israel's "practices in the OPT can be defined by the same three 'pillars' of apartheid" known from South Africa notwithstanding certain differences and "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."); Dugard & Reynolds, *supra* note 1, at 867; *id.* at 911 ("[T]hree 'pillars' of apartheid identified . . . in relation to the former South African regime are broadly reproduced today in Palestine."); *id.* at 912 ("That a system of apartheid has developed in the occupied Palestinian territory" on "the basis of the systemic and institutionalized nature of . . . racial domination" and "in some cases" even "worse" than in South Africa.); INT'L HUM. RTS. CLINIC HARVARD LAW SCHOOL (IHRC) & ADDAMEER, APARTHEID IN THE OCCUPIED WEST BANK: A LEGAL ANALYSIS OF ISRAEL'S ACTIONS 1, 19-22 (2022) [hereinafter IHRC & Addameer] ("Israel's deployment of a dual legal system in the occupied West Bank, and the resulting systematic discrimination against Palestinians and subordination of Palestinians' civil and political rights to the rights of Jewish Israeli citizens settled in the occupied West Bank, amount to a breach of the prohibition of apartheid under international law."); Reynolds, *supra* note 1 at 114 and passim ("[A]partheid regime" because of systematic discrimination against "racialised group for the purpose of . . . domination"); Muriel Asseburg, *Amnesty International's Apartheid Report*, 27 PALESTINE-ISR. J. 1, 4 (2023) (prima facie apartheid in OPT); Tony Klug, *Is Israel an Apartheid State? Is Amnesty International Antisemitic?*, 27 PALESTINE-ISR. J. (2023) (noting that the situation in OPT "tantamount to apartheid" but critical of Amnesty International for failing to establish the necessary "threshold" to assess the conduct of other countries and painting "an almost entirely one-sided picture"); *see also* Alon Liel, *Comparable to South Africa?*, 27 PALESTINE-ISR. J. (2022) ("[C]omparable" in the West Bank in "nominal, demographic sense" and with "institutionalized" inequality but not "within Israel"); POL'Y WORKING GRP., *Recognizing and Ending Israeli Apartheid,* 27 PALESTINE-ISR. J. (2022) (apartheid in West Bank and East Jerusalem, but not in Gaza and Israel proper); Moein Odeh, *How Far is Israel From Being an Apartheid State?*, 27 PALESTINE-ISR. J. (2022) (apartheid in Westbank but as to Israel proper only "getting closer"); Waxman, *supra* note 1 at 1- 2 ("[H]ard to deny" apartheid in West Bank but very critical of Amnesty International for being "historically and analytically inaccurate"); Amos Goldberg, *Apartheid ist Realität in Israel*, FRANKFURTER ALLGEMEINE ZEITUNG (Aug. 23, 2023), https://www.faz.net/aktuell/feuilleton/debatten/nahost-konflikt-apartheid-ist-unsere-realitaet-in-israel-19120442.html [https://perma.cc/7BED-BGQX]. For a different view, see Yaffa Zilbershats, *Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds*, 24 EUR. J. INT'L L. 915 (2013); Frances Raday, *Amnesty's Distorted Framing of an Evolving Tragedy*, 27 PALESTINE-ISR. J. 1, 4-6 (2022) (while admitting "severe violations of human rights" by Israel in the OPT, amounting to "inhumane acts," criticizing "crucial distortions and omissions" in the Amnesty International report and challenging the institutionalized regime element and the intent requirement and thus concluding that the apartheid claim is "misled, if not malicious"). For sources critical of Amnesty International, see Meron Mendel, *Eine Einladung zur Selbstzerstörung*, ZEIT ONLINE, (Feb. 8, 2022) https://www.zeit.de/kultur/2022-02/amnesty-international-israel-apartheidstaat [https://perma.cc/M8FN-XEY2]; CAROLA LINGAAS, THE CONCEPT OF RACE IN INTERNATIONAL CRIMINAL LAW 233 (2019) [hereinafter THE CONCEPT OF RACE] ("[J]udicial examination of the situation in Palestine appears to be within reach, bringing closer the possibility of the first ever judgment on the crime of apartheid." On her works on the "racial group" element, see *infra* Section II.B.2.); *see also* Rainer Grote, *From the Law of Belligerent Occupation to International Human Rights Law: In Search of a New Legal Paradigm for the OPT*, *in* INTERNATIONAL LAW BETWEEN TRANSLATION AND PLURALISM 277, 292-94 (Noorhaidi Hasan & Irene Schneider eds., 2022) (critical of the "separation and discrimination based on nationality/ethnicity" through the wall and of the Israeli High Court's [HCJ] dismissive treatment of the issue but taking no position on the general claim); AEYAL GROSS, THE WRITING ON THE WALL 250-52 (2017) (noting "common elements" and "prolonged/indefinite occupation drawing closer to apartheid").

sometimes there is a personal overlap[5] with regard to the Israel policy in the Occupied Palestinian Territory (OPT)[6]—is legally sound from the perspective of international criminal law (ICL). Thus, this is a legal doctrinal inquiry which wants to close an obvious gap by focusing on the elements of the apartheid crime,[7] in deliberate contrast to the popular, non-technical usage of the term.[8] The inquiry is limited in two ways. In legal terms, it focuses on the crime of apartheid and refers to the underlying prohibition binding States only insofar as it informs the crime. In factual terms, the inquiry is limited to the OPT,[9] that is the West Bank and East-Jerusalem[10] excluding the Golan and Gaza.[11]

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5. For the sake of transparency, I have indicated the authors of collective (NGO) reports in brackets so that readers can themselves attest to this overlap. Note that this overlap is not limited to those advocating the apartheid claim but also to their adversaries. *See,* e.g., NGO Monitor (Kern), *supra* note 1.

6. Paragraph 4 of Falk Report 2014, *supra* note 2, considers it "more appropriate" to employ the term "Palestine" instead of OPT given G.A. Res. 67/19, Nov. 9, 2012 recognizing Palestine as a non-member observer State of the UN; yet, this change of language has largely been ignored in the respective reports.

7. In a similar vein, see NGO Monitor (Kern), *supra* note 1, at 3 ("absence . . . on the content of the elements of the crime itself").

8. *See* Press Release, UN Office of the High Commissioner, UN Expert Urges States to End 'Vaccine Apartheid,' U.N. Press Release (June 14, 2022) https://www.ohchr.org/en/press-releases/2022/06/un-expert-urges-states-end-vaccine-apartheid [https://perma.cc/JW6L-K9DC] (referring to the Special Rapporteur on contemporary forms of racism, E. Tendayi Achiume). With regard to the discrimination of women by the Taliban, see the UN Special Rapporteur for Afghanistan referring to "gender apartheid" as an international crime, *cf. Afghanistan: Taliban 'may be responsible for gender apartheid' says rights* expert, UN NEWS (JUNE 19, 2023), https://news.un.org/en/story/2023/06/1137847 [https://perma.cc/H7CB-Y8MB]. For further examples, see Julia Gebhard, *Apartheid, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶28 (2018). For arguments against such popular usage, see ESCWA, *supra* note 2, at 2 (providing further examples).

9. For the same limitation, see Dugard & Reynolds, *supra* note 1, at 872 (stressing the distinction between Israel proper and the OPT, identifying a "firmer ground of apartheid" in the latter (but not pursuing the distinction throughout the whole text)). In fact, most reports focus on the OPT, distinguishing between three categories of reports, *see* Asseburg, *supra* note 4, at 2.

10. The West Bank and East Jerusalem must also be distinguished in that the latter has been annexed by Israel after the 1967 Six-Day War first by a government decision and then by the 1980 Jerusalem Basic Law, Basic Law: the Knesset, SH 980 (1980) (Isr.), https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawJerusalem.pdf, making the whole of Jerusalem the capital of Israel; see also DAVID KRETZMER & YAËL RONEN, THE OCCUPATION OF JUSTICE 7-8 (2d ed, 2021) [hereinafter KRETZMER & RONEN]; Hostovsky Brandes, *Israel's Legal System, in* ROUTLEDGE HANDBOOK ON CONTEMPORARY ISRAEL 114, 125 (Guy Ben-Porat et al. eds., 2022).

11. As to Gaza it is controversial whether the occupation formally ended with Israel's military withdrawal in 2005. The gist of the issue is whether Israel still exercises sufficient effective control to speak of the continuation of the occupation or whether this

I limit the inquiry to the OPT notwithstanding the plausible argument that the distinction between the OPT and Israel proper is increasingly blurred given the "creeping annexation" by, inter alia, the continuous extension of Israeli law (including jurisprudence) and civilian authority to the OPT[12] (in particular by way of the new

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control was effectively transferred to the Palestinian Authority with the disengagement. For this view, see Shany, *Faraway So Close: The Legal Status of Gaza after Israel's Disengagement*, 8 Y.B. INT'L HUMANITARIAN L. 369, 383 (2005) (concluding that with the disengagement the "transfer of effective control" to the PA took place); Zilbershats, *supra* note 4, at 918 with further references in n.15. For the former view *cf.* ComInq Report Sept. 2022, *supra* note 2, n.10 and ¶ 19 ("Although Israel disengaged from Gaza in 2005, the Commission notes that Israel continues to occupy the territory by virtue of the control it exercises over . . . Gaza . . . . "); HSRC, *supra* note 4, at 15 ("disengagement" not "end of occupation" given the continuous "effective control over the territory"); ESCWA, *supra* note 2 at 43-44 with n.77 (but without reference to the invoked UN position); POL'Y WORKING GRP., *supra* note 4 at 2 ("ongoing occupation"). For a nuanced treatment based on a functional approach (responsibility of occupier follows from exercise of power) and on the *sui generis* nature of Gaza Gross, *supra* note 4, at 6; 204, 213-15, 224, 247 (summarizing the different views at and advocating, his functional, non-binary, *sui generis* approach, and concluding that the Gaza case "raises questions about the continued presence of control elements even in the face of troop withdrawal" and the importance of "the changing political and technological nature of control"). Recently also for a functional approach affirming "effective occupation," Safaa Sadi Jaber & Ilias Bantekas, *The Status of Gaza as Occupied Territory under International Law*, 72 INT'L & COMPAR. L.Q. (2023) 1069, 1080 (arguing that given Israel's technological superiority and the small area of Gaza as well as its proximity to Israel make "the remote exercise of effective control" possible notwithstanding Hamas's authority and armed resistance); *see also* KRETZMER & RONEN, *supra* note 10, at 163, 164-65, 177 (summarizing the different views at stressing the lack of effective control as the "hallmark of belligerent occupation," and analyzing the treatment of the issue by Israel's Supreme Court, which essentially adopted the official position that there is no longer an occupation). The ICJ Advisory Opinion, *supra* note *, ¶ 88, also follows, in essence, the functional approach.

12. *See* YESH DIN, *supra* note 3 at 24-25, 31, 33-35 ("creeping legal annexation" with "annexationist legislation" increasingly unifying Israel and the West Bank through, inter alia, expansion of executive powers to Israeli institutions and the direct application of Israeli law to the West Bank); *see also* POL'Y WORKING GRP., *supra* note 4, at 3 ("*de facto* annexation"); Gross, *supra* note 4, at 176, 249-50, 309-10, 332; Tamar Hostovsky Brandes, The Diminishing Status of International Law in the Decisions of the Israeli Supreme Court Concerning the Occupied Territories, 18 INT'L J. CONST. L. (2020) 767, at 768, 770; ADALAH, ANALYSIS FOR THE NEW ISRAELI GOVERNMENT'S GUIDING PRINCIPLES AND COALITION AGREEMENTS AND THEIR IMPLICATIONS ON PALESTINIANS' RIGHTS 2, 17-19, 20 ("de facto annexation" of West Bank). Note that the ICJ in its Advisory Opinion on the Wall, *supra* note 2, already expressed concerns that it may create a "fait accompli" and a situation that "would be tantamount to *de facto* annexation," ¶¶ 79, 121. Similarly, several States and organizations have pointed to the (*de facto*) annexation of the OPT during the recent hearings before the ICJ (*supra* note 2), *see*, e.g., Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Verbatim Record, 33 (Feb. 21, 2024, 3 p.m.), https://www.icj-cij.org/sites/default/files/case-related/186/186-20240221-ora-02-00-bi.pdf [https://perma.cc/C9GV-LHAY] (Gambia); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Verbatim Record, 38, 40 (Feb. 22, 2024, 10 a.m.), https://www.icj-cij.org/sites/default/files/case-related/186/186-20240222-ora-01-00-bi.pdf [https://perma.cc/X2P3-NUB2] ("[P]rolonged occupation" as "disguised form of

Ministry responsible for the settlements/settlers integrated in the Ministry of Defense, thereby transferring control from the military commander in the OPT to a civilian institution located in Israel[13]), accompanied by the goal of a greater Israel (*Eretz Yisrael*) more

annexation") (Ireland); *id.*, at 49 (annexation through "acquisition by force") (Japan); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Verbatim Record, 13 (Feb. 23, 2024, 10 a.m.), https://www.icj-cij.org/sites/default/files/case-related/186/186-20240223-ora-01-00-bi.pdf [https://perma.cc/8H8V-XAAQ] (Namibia); *id.*, at 24 ("indefinite occupation . . . as tantamount to *de facto* annexation?") (Norway); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Verbatim Record, 29 (Feb. 26, 2024, 10 a.m.), https://www.icj-cij.org/sites/default/files/case-related/186/186-20240226-ora-wri-01-00-bi.pdf [https://perma.cc/L2S8-Q2VW] (League of Arab States); *id.*, at 50 (African Union). The ICJ, supra note *, ¶ 157, has largely followed these views.

13. This transfer of responsibility for and management of the OPT to the new Ministry, led by Bezalel Smotrich, "constitutes a[n] . . . subordination of the West Bank's management to national and social interests of the state [of Israel], in direct contravention of international law," "gives validity to claim that Israel's practices constitute apartheid . . . " and supports "the perception that Israel is annexing territory . . ." *cf.* THE ISRAELI LAW PROFESSORS' FORUM FOR DEMOCRACY, POSITION PAPER NO. 24: IMPLICATIONS OF THE AGREEMENT SUBORDINATING THE CIVIL ADMINISTRATION TO THE ADDITIONAL MINISTER IN THE MINISTRY OF DEFENCE, 1-2, 4 (2023); *see also* Adalah, *supra* note 12, at 18 ("dismantling the Israeli military's Civil Administration over the Israeli Jewish settlers . . . and instead putting their governance under Israeli civil domestic law, while continuing to keep Palestinians under military rule."); Kretzmer, *The "Constitutional Reform" and the Occupation*, 56 ISR. L. REV. 397, 406-07 (incompatible with law of occupation); Tamar Hostovsky Brandes, *The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?*, 56 ISR. L. REV. 415, 420 (2023).

aggressively promoted by the current[14] government.[15] Still, while we certainly come closer to one single (Israeli) regime / State exercising sovereignty in the OPT[16] and this speaks indeed in favor of treating the OPT and Israel proper equally, we are not yet there, i.e., a formal annexation has not yet taken place[17] and, perhaps more importantly,

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14. I am referring here to the thirty-seventh government of Israel formed on December 29, 2022, led by Benjamin Netanyahu and consisting of about thirty ministries and a coalition of seven parties, including from the far (religious) right. Following Hamas's assault on Israel on October 7, 2023 an emergency cabinet was formed, by enlarging the so-called Security Cabinet of the Netanyahu government – a sub-organ of the general government consisting of the Prime Minister and ten ministers and responsible for security-related issues ("Ministerial Committee on National Security Affairs." For the composition, see Press Release, Benjamin Netanyahu, Prime Minister, Cabinet Appoints Members of the Security Cabinet, the Ministerial Committee on the ISA, and Deputy Ministers (Jan. 3, 2023), https://www.gov.il/en/departments/news/spoke-security030123 [https://perma.cc/LV5W-LDM9]) – with five Knesset members from the small opposition party "National Unity" led by Benny Gantz (the larger opposition party Yesh Atid led by Yair Lapid refused to join a government with extremist forces in it). From this Security Cabinet, a further sub-organ–this was one of Gantz's main demands–was formed into a "War Cabinet," which consisted of five people: Netanyahu, Defense Ministers Gallant and Gantz, as well as two observers (Minister Dermer from Likud and Gadi Eisenkot from "National Unity"). The original government coalition therefore continued to exist and had the (clear) majority at all three levels (government, security cabinet and war cabinet), and the extreme forces are also represented at the two higher levels; cf. on the complex institutional structure and the resulting governance problems, Amichai Cohen & Yuval Shany, Israel's War Cabinet: A Brief History of War Powers and Institutional Ambiguity, LAWFARE (Nov. 13, 2023), https://www.lawfaremedia.org/article/israel's-war-cabinet-a-brief-history-of-war-powers-and-institutional-ambiguity [https://perma.cc/8V8Q-7VQL]. The war cabinet was disbanded in June 2024 with Gantz leaving the government. James Mackenzie, *Netanyahu disbands war cabinet as pressure grows on Israel's northern border*, REUTERS (June 17, 2024), https://www.reuters.com/world/middle-east/netanyahu-disbands-his-inner-war-cabinet-israeli-official-says-2024-06-17 [https://perma.cc/QA7G-QEX8].

15. Tamar Megiddo, Ronit Levine-Schnur, & Yael Berda, *Israel is Annexing the West Bank. Don't be Misled by its Gaslighting*, JUST SECURITY (Feb. 9, 2023), https://www.justsecurity.org/85093/israel-is-annexing-the-west-bank-dont-be-misled-by-its-gaslighting [https://perma.cc/DW75-7QME]; Tamar Hostovsky Brandes, *Annexation is in the Details*, VERFASSUNGSBLOG (Jan. 3, 2023), https://verfassungsblog.de/annexation-is-in-the-details [https://perma.cc/835J-KMH7]; Kretzmer, *supra* note 13, at 405; Adalah, *supra* note 12, at 1, 20 (new government's guiding principles and coalition agreements "entrench Israel's institutionalised policy of segregation, discrimination, oppression, and control against Palestinians . . . ."). But note that the goal of a greater Israel has existed for a long time, see for example the statement in 1969 of then Minister of Labour Yigal Allon: "Here, we create a Greater Eretz Israel from a strategic point of view, and establish a Jewish state from a demographic point of view." (quoted in ROBERT I. FRIEDMAN, ZEALOTS FOR ZION: INSIDE ISRAEL'S WEST BANK SETTLEMENT MOVEMENT 17 (1992)).

16. *Cf.* Asseburg, *supra* note 4, at 3; Reynolds, *supra* note 1, at 121-22 (both speaking of a "one-state reality"); Liel, *supra* note 4, at 6 ("nightmares" coming to "apartheid throughout Israel").

17. For such a nuanced treatment see also YESH DIN, *supra* note 3, 24-5, 26, 33 (while still considering Israel and West Bank as two distinct regimes, "as one regime and its subsidiary," also calling for a re-examination if the "creeping legal annexation continues"

there is (still) a difference in treatment of Palestinians in the OPT and in Israel proper (as citizens of the State). For this very reason one should also maintain the distinction between the OPT and Israel proper for the purpose of the examination of the apartheid claim.[18]

A. Status of Apartheid as an International Crime

The *prohibition* of apartheid (which may trigger State responsibility) goes back to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) considering apartheid as a "manifestation of racial discrimination."[19] By contrast, the *crime* (which may trigger individual responsibility), initially classified in the mid-1960s as a crime against humanity (CaH),[20] was only defined in the 1973 Apartheid Convention (ApConv).[21] While the customary, even *jus cogens* status of the

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and foreseeing, in a second phase, a "full annexation by a single legislative act"); *id.* at 57 (but also concluding that the "gradual annexation" in the West Bank, entailing full exercise of Israeli sovereignty creates one single regime, i.e., the Israeli one, which "in its entirety is an apartheid regime.").

18. This criticism has rightly been leveled at Amnesty International. *See,* e.g., Klug, *supra* note 4 at 3 ("blurring the distinctions between sovereign Israel and the occupied West Bank"); Waxman, *supra* note 1, at 3-4 ("effectively erases the Green Line . . ." and "lumps together" Israel's treatment of Palestinians in OPT and Israel); Raday, *supra* note 4, at 3-4 (claim that Israel "apartheid state from its inception . . . decontextualized and inaccurate," no "inhumane acts" within the meaning of apartheid against Palestinians in Israel); Mendel, *supra* note 4; Asseburg, *supra* note 4 at 3 (noting a critical of lack of differentiation and that "conflict dynamics . . . are largely ignored").

19. Pmbl. Regarding the prohibition, see art. 3 ("States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."). The ICJ Advisory Opinion, supra note *, ¶ 226 found a violation of this provision.

20. *See* the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (G.A. Res. 2391 (XXIII), Nov. 26, 1968) which, in its preamble, referring to G.A. Res. 2202 (XXI), Dec. 16, 1966, considers the "policies of apartheid" as CaH and includes, in Art. I, "inhumane acts resulting from the policy of apartheid" in the definition of CaH. The later recognition of "practices of apartheid" as a "grave breach" by the 1977 Additional Protocol I to the Geneva Conventions (Art. 85(4)(c)) did not provide for a definition. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 85(4)(c), June 8, 1977, 1125 U.N.T.S. 3; *see also infra* note 29 and accompanying text.

21. G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid (July 18, 1976) [hereinafter ApConv]. Art. II refers to "the crime of apartheid" "which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa" and "shall apply to the . . . 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." *Id.* art. II. The inhumane acts are then listed as follows:

prohibition is largely uncontroversial, with the International Law Commission (ILC) having accepted the Special Rapporteur's proposal to list it as a peremptory norm of international law,[22] the

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

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

22. Int'l L. Comm'n, Rep. of the Int'l L. Comm'n *Seventy-Third Session*, U.N. Doc. Supplement No. 10 A/77/10, at 16 (2022) (listing inter alia "prohibition of racial discrimination and apartheid"); see previously *Report of the Commission to the General Assembly on the work of its fifty-third session,* [2001] 2 Y.B. Int'l L. Comm'n 62, U.N. A/CN.4/SER.A/2001/Add.1 (Part 2) (listing apartheid, together with genocide and CaH, as "composite [wrongful] acts"). *Id.* at 112 (listing prohibition of "racial discrimination and apartheid" as *jus cogens*); Martti Koskenniemi (Chairman of the Study Group), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission,* Int'l L. Comm'n, U.N. Doc. A/CN.4/L.682 and Add. 1, ¶ 374 (2016) ("most frequently cited candidates" of *jus cogens*); for the literature, see HSRC, *supra* note 4, at 14, 17, 27-8, 51, 54; RUSSELL TRIBUNAL, *supra* note 3, ¶ 5.16; Dugard & Reynolds, *supra* note 1 at 882-3; IHRC & Addameer, *supra* note 4 at 2; Bultz, *supra* note 1 at 209-12; Carola Lingaas, *The Crime Against Humanity of Apartheid in a Post-Apartheid World*, 2 OSLO L. REV. 86, 104 (2015) [hereinafter *The Crime Against Humanity*]; LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 179; Gebhard, *supra* note 8, ¶ 25 (especially referring to ILC); YESH DIN, *supra* note 3, at 14-15, 21; Reynolds, *supra* note 1, at 124; *cf.* Zilbershats, *supra* note 4, at 915-16 (showing support by defenders of Israel policy).

customary status of the *crime* is controversial.[23] The question is complicated by the fact that the more recent development (post ApConv) was by no means uniform or consistent: while the Rome Statute of the International Criminal Court (ICC Statute, ICCS) confirms the criminal character of the prohibition classifying it as a CaH,[24] and this has been copied by the Malabo Protocol on the African Court of Justice and Human Rights[25] and finally also by the

23. In favor, see ESCWA, *supra* note 2, at 10, 12 (even *jus cogens*!); Christopher K. Hall, *Article 7*, *in* COMMENTARY ON THE ROME STATUTE OF THE ICC: OBSERVER'S NOTES, ARTICLE BY ARTICLE marginal number (mn.) 77 n.228 (Otto Triffterer, ed., 2d ed. 2008) (with ICCS); Lingaas, *The Crime Against Humanity*, *supra* note 22, at 87; *id.* at 103 ("most probably"); *id.* at 107-8 (even *jus cogens*); LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 146, 179, 184, 186 (stressing the series of UNGA and later UNSC resolutions since 1946); GUÉNAËL METTRAUX, INTERNATIONAL CRIMES: LAW AND PRACTICE: VOLUME II: CRIMES AGAINST HUMANITY 738-39 (2020) (invoking the inclusion of the crime in the ICCS, in the Malabo Protocol, and in "a variety of related national implementing legislation" and arguing that "the jurisprudence now firmly suggests" that the crime of apartheid form part of CIL); IHRC & Addameer, *supra* note 4, at 2 (but failing to clearly distinguish between the prohibition and the crime); AMNESTY INT'L, *supra* note 3, at 49 (ICCS definition as a CaH "under customary international law"); also ICTY, Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment of the Trial Chamber, ¶ 622 (Int'l Crim. Trib. For the Former Yugoslavia May 7, 1997) (describing customary law status of apartheid as "most egregious" manifestation of CaH). *Contra* Christian Tomuschat, *Crimes against the Peace and Security of Mankind and the Recalcitrant Third State*, 24 ISR. Y.B. ON HUM. RTS. 41, 55 (1995) (stating no "universal opinio iuris" for lack of Western support); 71 Y.B. INST. OF INT'L L. 213, 245 (2005) (also basically invoking the lack of Western support); Bultz, *supra* note 1, at 205, 207, 212-19 (arguing that the ambiguities and weaknesses of the ApConv and its lack of application speak against the customary nature of the crime); *see also* Paul Eden, *The Role of the Rome Statute in the Criminalization of Apartheid*, 12 J. INT'L CRIM. JUST. 171, 191 (2014); *more nuanced, see* ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 107 (3d ed. 2013) (stating that, although the definition of the crime of apartheid under Article 7 ICCS is broader than CIL, "it could be argued that the [Rome] Statute has, however, contributed to recent formation of a customary rule on the matter."); *concurring*, HSRC, *supra* note 4, at 51 ("movement . . . towards" custom); *implicitly* M. Cherif Bassiouni & Daniel H. Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523, 533 (1981) (ApConv treats "apartheid as a 'crime against humanity' and one entailing 'international criminal responsibility'" which is to be "punished in the name of or on behalf of the world community"); *somewhat unclear* YESH DIN, *supra* note 3, at 14 ("prohibition written into international criminal law'); *leaving it open* Gebhard, *supra* note 8, ¶ 26 ("doubtful"); NGO Monitor (Kern), *supra* note 1, at 27 ("uncertainty"); Larissa van den Herik & Raphael Braga da Silva, *Article 7*, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT. ARTICLE-BY-ARTICLE COMMENTARY mn. 186, n.713 (Kai Ambos ed., 4th ed. 2022).

24. *Cf.* Rome Statute of the International Criminal Court art. 7(2)(h), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICCS] ("'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.").

25. *Cf.* Protocol on the Statute of the African Court of Justice and Human Rights arts. 28C(1)(j) and (2)(h), July 1, 2008, https://au.int/sites/default/files/treaties/36398-

ILC,[26] no other international criminal tribunal or court has included the crime.[27] To be sure, there is constant and consistent UN practice since World War II:[28] the General Assembly (GA) considered, for the first time in 1950, that "a policy of 'racial segregation' (apartheid) is necessarily based on . . . racial discrimination"[29] and characterized it as "a crime against humanity" in 1965;[30] the Security Council declared it an "international crime" in 1976[31] and a "crime against humanity" in 1984;[32] also, under International Humanitarian Law (IHL) the practice was recognized as a grave breach in 1977.[33] Yet, while the ICERD counts by the time of publication (September 2024)

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treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf [https://perma.cc/25GF-PE93]. The Protocol establishes apart from a Human Rights Section an ICL Section of the Court with three Chambers. *Id.* art. 16.

26. *Cf.* Int'l L. Comm'n, Draft Articles on Prevention and Punishment of Crimes Against Human., art. 2 (1)(j) and (2)(h), U.N. Doc. A/74/10, at 12-13 (2019). In contrast, the 1991 Draft Code of Crimes against the Peace and Security of Mankind, Art. 20, still proposed a separate crime of apartheid (limiting it to *leaders* or organizers and executed by acts "based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group . . . ." *Report of the Commission to the General Assembly on the work of its forty-third session*, [1991] 2 Y.B. Int'l L. Comm'n, 102, U.N. Doc. A/CN.4/SER.A/1991/Add.l (Part 2). But the 1996 version only included it implicitly in CaH as "institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population" (*Report of the Commission to the General Assembly on the work of its forty-eight session* [1996] 2 Y.B. Int'l L. Comm'n 47, U.N. Doc. A/CN.4/SER.A/1996/Add.l (Part 2)), recognized by the Commentary as "apartheid under a more general denomination," *id.* at 49, and in fact broader than the 1991 definition embracing "ethnical" and "religious grounds" and thus groups. *Cf.* LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 169.

27. But note that the hybrid *Cour Pénale Spéciale* of the Central African Republic (CAR) applies apartheid as a crime against humanity. CODE PÉNAL CENTRAFRICAIN, art. 153 ("Les crimes d'apartheid") (Cent. Afr. Rep.).

28. For a detailed overview of this practice, see LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 146. *See also Durban World Conference Declaration*, *supra* note 1, at 9 (acknowledging that "no derogation from . . . the crime of apartheid" is permitted and stressing its character as CaH).

29. G.A. Res. 395 (V), at 24 (Dec. 2, 1950) (referring to the discriminatory treatment of the Indian population in South Africa).

30. G.A. Res. 2074 (XX), at 60-61, ¶ 4 (Dec. 17, 1965) (condemning "the policies of *apartheid* and racial discrimination" [emphasis in original] of South Africa, constituting a CaH, in the then annexed South West Africa / Namibia).

31. S.C. Res. 392, ¶ 3 (June 19, 1976) (describing "policy of apartheid" as "a crime against the conscience and dignity of mankind").

32. S.C. Res. 556 ¶ 1 (Oct. 23, 1984), ("a system characterized as a crime against humanity").

33. *Cf.* Additional Protocol I, *supra* note 20, art. 85(4)(c).

with 182 State Parties,[34] the ApConv has only 110 Parties (coming largely from the Global South[35] with all G7 States being absent)[36] and its monitoring body was suspended in 1995 (right after the 1994 post-Apartheid election in South Africa).[37] Even the inclusion of apartheid as a CaH in the Rome Statute was by no means a straightforward matter but the result of a protracted process of negotiations which benefitted from South Africa's leadership and decisive intervention.[38] The domestic implementation of the crime

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34. *Ratification of 18 International Human Rights Treaties,* OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. (Aug. 2, 2020), https://indicators.ohchr.org [https://perma.cc/B2ND-XRXD].

35. I note in passing that "Global South" is not to be understood geographically, but socio-economically, as for example proposed by the German Federal Ministry for Economic Cooperation and Development, according to which "a country in the Global South is a politically, economically or socially disadvantaged state." *Global South/ Global North*, FED. MINISTRY FOR ECON. COOP. & DEV., https://www.bmz.de/de/service/lexikon/globaler-sueden-norden-147314 [https://perma.cc/9V9K-CLC5] (last visited May 30, 2024) (translation by Google translate).

36. *Cf.* International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=_en [https://perma.cc/3VZ7-N8JX]. Note that China, Russia and India are State Parties. Tomuschat stresses the lack of Western support and explains it with the overly broad provision on participation and complicity in Art. III ApConv. *See* Tomuschat, *supra* note 23, at 245. For this critique and the one on the (broad) jurisdictional regime, see also LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 153-54. For an early critique on the Western position from an East German perspective, see Graefrath, *Apartheid – ein internationales Verbrechen*, 28 NEUE JUSTIZ 192, 194-95 (1974). The lack of Western interest is also demonstrated by the debate in the 3rd Committee which was dominated by African States and the Soviet Union and its allies. *Cf.* U.N. GAOR, 28th Sess., 3rd Comm., 2005th meeting (Oct. 24, 1973), https://digitallibrary.un.org/record/814750?ln=en [https://perma.cc/6EF2-VZ8W]. Israel is not a State Party either and sold weapons to the South African apartheid regime until the 1980s. *Cf.* Liel, *supra* note 4, at 2.

37. This body consisted of three representatives of States parties (Art. IX ApConv). *See* Victor Kattan & David Johnson, *The Crime of Apartheid beyond Southern Africa: A Call to Revive the Apartheid Convention's "Group of Three"*, EJIL: TALK! (Sept. 21, 2023), https://www.ejiltalk.org/the-crime-of-apartheid-beyond-southern-africa-a-call-to-revive-the-apartheid-conventions-group-of-three [https://perma.cc/9BLH-WPG8].

38. *Cf.* Timothy H.L. McCormack, *Crimes against Humanity*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 179, 198-99 (Dominic McGoldrick et al. eds., 2004) (South African intervention "with the unassailable moral authority of its own painful experience'); *see also* Hall, *supra* note 23, at mn. 77 (all essentially following McCormack); R.S. CLARK, *The Crime of Apartheid*, *in* INTERNATIONAL CRIMINAL LAW, VOL. I 619 (M.C. Bassiouni ed., 3rd ed. 2008); Bultz, *supra* note 1, at 221; CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 68 (Cambridge Univ. Press 2019); LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 170; WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 206 (Oxford Univ. Press 2nd ed. 2016) ("Mexico proposed adding apartheid to the list of crimes against humanity"). Note regarding Mexico that the respective reference (Committee of the Whole,

has only effectively started with the adoption of the ICC Statute,[39] and it is far from consistent, especially with civil law jurisdictions[40] having problems with regard to their legality requirements (especially certainty, *lex certa*, and prohibition of analogy, *lex stricta*)[41] given the lack of precision of the elements of the apartheid crime.[42] This lack of definitional precision is probably also the main reason that there

3rd meeting, ¶ 125, U.N. Doc. A/ CONF.183/ C.1/ SR.3 (June 17, 1998)) only contains a (late) statement by Mexican delegate (and now ICC judge) Flores (¶¶ 123-26) where she discusses the crimes in general and only says that "apartheid should have been included in the list [of CaH]." In fact, Mexico was part of a group of States, including South Africa and some other sub-Saharan African States, which submitted a proposal to include the crime (UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/13, at 239 (July 17, 1998), https://www.legal-tools.org/doc/656f32/pdf [https://perma.cc/TM7D-X72B]) but this does not change the fact that South Africa's intervention already at the beginning of the Rome conference was decisive.

39. Interestingly, the Soviet Union, while a staunch supporter of the ApConv, never implemented the crime but some of its former allies did. *See,* e.g., 1978 évi IV törvény a Büntető Törvénykönyv [Act IV of 1978 on the Criminal Code] §157 (Hung.); Comm. Experts on Terrorism, Czech Republic Criminal Code, COUNCIL OF EUR. (Apr. 2007), https://rm.coe.int/ct-legislation-czech-republic-criminal-code/16806415ce [https://perma.cc/48P7-6X3U] (mentioning apartheid in paragraph 1 of section 263a); Penal Code of 1968 (as of 2011) of Bulgaria, INT'L HUMANITARIAN L. DATABASES, https://ihl-databases.icrc.org/en/national-practice/penal-code-1968-2011 [https://perma.cc/5S34-47AT] (last viewed Apr. 25, 2024) (in Article 417 as of 1975); STRAFGESETZBUCH [PENAL CODE] § 91 (E. Ger) (persecution as a CaH which is said to encompass the apartheid crime).

40. As an example of a very influential civil law implementation, see VÖLKERSTRAFGESETZBUCH [CCAIL] [Code of Crimes Against International Law] (Ger.), which codifies the context element and the specific intent as an aggravated CaH and limits the inhumane acts within the meaning of Art. 7(1)(k) ICCS, *supra* note 24, to "severe physical or mental harm" of the kind mentioned in section 226 StGB (sect. 7(1) no. 8). In contrast common law jurisdictions usually implement the crimes of the ICCS by way of a renvoi to the original text. *See, e.g.*, the International Criminal Court Act 2001, c. 17 (UK), https://www.legislation.gov.uk/ukpga/2001/17/schedule/8 [https://perma.cc/CP72-EJXY] (referring to Articles 6-9 of the ICCS in Schedule 8); Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (S. Afr.), https://www.justice.gov.za/legislation/acts/2002-027.pdf [https://perma.cc/76VT-RKVX] (as amended by Judicial Matters Amendment Act 22 of 2005, copying Art. 6-8 ICCS in Schedule 1). For further references to national law, see van den Herik & Braga da Silva, *supra* note 23, at mn. 185 and n.709.

41. For an analysis with regard to Articles 22-24 of the ICCS and in relation to customary law, see KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: FOUNDATIONS AND GENERAL PART 126, 145 (2d ed. 2021).

42. Bultz is generally critical on the "ambiguous and inoperable" crime definition but his considerations are sometimes confusing and his alternative proposal, to which we return below, is not convincing. *Compare* Bultz, *supra* note 1, at 205, 208, 222 (referencing ICCS's "poor drafting and ambiguity"), and *id.* at 225 (referencing "institutionalized regime"), *with* Bultz, *supra* note 1, at 231.

is virtually no judicial practice with regard to apartheid.[43] The crime has for decades not even been prosecuted in post-apartheid South Africa,[44] with only two people having been indicted for it in 2021.[45] To the best of my knowledge, it is not part of the ICC Prosecutor's Palestine case;[46] yet, it has been mentioned in the collective referral of the Palestine situation by South Africa and other States on November 17, 2023.[47]

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43. There has only been a failed attempt to prosecute then South African Foreign Minister Botha in Uruguay and a case under the US Alien Claims Tort Act. *See* Hall, *supra* note 23, at mn. 119; *see also* Bultz, *supra* note 1 at 218-9; LINGAAS, THE CONCEPT OF RACE, *supra* note 4 at 183.

44. Christian Tomuschat, *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes*, 2005 Y.B. INST. INT'L L. 214, 246 (referring to the non-investigation by the South African Truth and Reconciliation Commission); Clark, *supra* note 38, at 620; Bultz, *supra* note 1, at 219. For a comprehensive analysis of the South African's criminal justice system's treatment of apartheid until the beginning of the 21st century, see VOLKER NERLICH, APARTHEIDKRIMINALITÄT VOR GERICHT: DER BEITRAG DER SÜDAFRIKANISCHEN STRAFJUSTIZ ZUR AUFARBEITUNG VON APARTHEIDUNRECHT (Berliner Wissenschafts-Verlag ed. 2002).

45. *Cf.* Foundation for Human Rights and Webber Wentzel, *Press Release: Historic Crimes against Humanity Indictment in COSAS 4 Case*, Nov. 23, 2021, https://unfinishedtrc.co.za/press-release-historic-crimes-against-humanity-indictment-in-cosas-4-case [https://perma.cc/KL24-J7YQ]. For an analysis, see Gerhard Kemp & Windell Nortje, *Prosecuting the Crime Against Humanity of Apartheid. The Historic First Indictment in South Africa and the Application of Customary International Law*, 21 J. INT'L CRIM. JUST. 405 (2023). Note that these late prosecutions may also explained with the general lack of political will to promote criminal prosecutions of apartheid crimes even long after the publication of the report of the Truth and Reconciliation Commission (TRC) in 1998 and 2001. *See, e.g.*, Cyril Adonis, *Religion and Conflict Resolution: Christianity and South Africa's Truth and Reconciliation Commission, Megan Shore. There Was This Goat: Investigating the Truth and Reconciliation Commission Testimony of Notrose Nobomvu Konile , Antjie Krog, Nosisi Mpolweni and Kopano Ratele. Justice and Reconciliation in Post-Apartheid South Africa, eds. François du Bois and Antje du Bois-Pedain. Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process, Ole Bubenzer*, 4 INT'L J. TRANSITIONAL JUST. 509, 516-17 (2010) ("little or no political will to pursue prosecutions").

46. *Cf. State of Palestine*, INT'L CRIM. CT., https://www.icc-cpi.int/palestine [https://perma.cc/T65C-KMQC] (last visited Jan. 18, 2024). The apartheid crime was not mentioned in any of the Preliminary Examination Reports between 2015 and 2020. *See* Int'l Crim. Ct. Off. of the Prosecutor, Rep. on Preliminary Examination Activities 2020, ¶¶ 45, 215 (Dec. 14, 2020), https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf [https://perma.cc/FV3D-CLTC]. In the first Annual Report of 2022 there is not even any detailed information on the Palestine investigation. *See* Int'l Crim. Ct. Off. of the Prosecutor, Rep. on Preliminary Examination Activities 2022 (Dec. 1, 2022), https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf [https://perma.cc/7767-RCJE].

47. Letter from the Embassy of S. Afr. to the Kingdom of the Neth. to the Prosecutor of the Int'l Crim. Ct. (Nov. 17, 2023), https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf [https://perma.cc/A7YY-QSXC] (South Africa, Bangladesh, Bolivia, Comoros and Djibouti State Party referral in accordance with Article 14 of the Rome Statute of the International Criminal Court).

Thus, while the customary nature of the apartheid crime cannot be affirmed with certainty, it is, at any rate, of limited relevance for the purpose of this inquiry since the ICC's jurisdiction over the OPT and thus the application of the apartheid crime under Article 7(2)(h) of the ICCS, has been triggered by Palestine's declaration of acceptance under Article 12(3) of the ICCS and its later ratification of the ICC Statute.[48] On this basis, PTC I has, by majority,[49] accepted the Court's jurisdiction over acts committed in the OPT since June 13, 2014.[50] While this decision has not been uncontroversial, especially regarding the majority view that it was unnecessary for the purposes of the ICC's territorial jurisdiction[51] to take a general decision on Palestine's statehood under international law,[52] it enables the Prosecutor to advance its investigation into alleged crimes committed by Israeli nationals in the OPT.

B. Substantive and Geographical Scope of the Crime

As to the substantive scope of the crime, it is by now settled that it is not limited to the practices in South Africa during the

48. Palestine lodged the Art. 12(3) declaration on January 1, 2015 (giving it retroactive effect to alleged crimes since June 13, 2014) and deposited the instrument of ratification on January 2, 2015, so that the Statute entered into force on April 1, 2015 (Art. 126(2) ICCS). *See State of Palestine*, *supra* note 46.

49. Situation in the State of Palestine, Case No. ICC-01/18, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" (Feb. 5, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.pdf [https://perma.cc/P8KB-8HB6] (In favor J. Perrin de Brichambaut and Alapini-Gansou, dissenting J. Kovács.)

50. *Id.* at 21.

51. *Cf.* ICCS, *supra* note 24, Article 12(2)(a)(giving the Court jurisdiction over crimes committed in the territory of a State that is a party to the Statute).

52. For a critical discussion, especially examining Judge's Kovács dissent, see Kai Ambos, *"Solid jurisdictional basis"? The ICC's Fragile Jurisdiction for Crimes Allegedly Committed in Palestine*, EJIL:TALK! (Mar. 2, 2021), https://www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine [https://perma.cc/A5L9-58TG]. For sources affirming the ICC's jurisdiction, see Halla Shoaibi & Asem Khalil, *Criminal Jurisdiction under Occupation: The Oslo Accords and the ICC*, *in* PROLONGED OCCUPATION AND INTERNATIONAL LAW, *supra* note 1, at 330 (arguing that the Palestinian exercise of sovereignty – as opposed to effective control–in the OPT and the existence of prescriptive jurisdiction–despite the Oslo accords limiting the adjudicative jurisdiction of Palestinian courts–suffice to delegate jurisdiction to the ICC). he issue has come up again in the context of the Prosecutor's arrest warrant applications against Israeli PM Netanjahu and Defence Minister Gallant and three Hamas leaders of May 2024 and a series of *amicus curiae* submissions to PTC I, see *Court Records*, INT'L CRIM. CT. https://www.icc-cpi.int/case-records?f[0]=c_sit_code:1164 [https://perma.cc/9PKL-U8TR] (last visited Sept. 11, 2024).

apartheid regime.[53] This already follows from the wording of Article II of the ApConv referring to "*similar* policies and practices of racial segregation and discrimination."[54] It also follows from the *travaux*[55] although the Convention was at the time clearly targeting the South African apartheid regime.[56] Article 7(2)(h) of the ICC Statute has then fully emancipated the crime from the South African precedent[57] and introduced a general definition to be discussed in detail below. For these reasons, the South African precedent, while a useful point of reference in illustrating apartheid practices, cannot be adduced as a kind of standard model or template[58] in order to overly restrict the crime definition.[59] Equally, the *ratione loci* application of the crime is not limited to the territory where a certain

53. Hall, *supra* note 23, at mn. 78, 123; Clark, *supra* note 38, at 603; John Dugard, *L'Apartheid, in* DROIT INTERNATIONAL PÉNAL (Hervé Ascensio, Emmanuel Decaux & Alain Pellet eds., 2012) [hereinafter L'Apartheid] at 197; HSRC, *supra* note 4 at 167-8; ESCWA, supra note 2 at 15; Dugard & Reynolds, *supra* note 1 at 876 ("independent"); *id.* at 883-85; Gebhard, *supra* note 8, ¶¶ 13, 29 (referring inter alia to Nazi Germany); Lingaas, *The Crime Against Humanity, supra* note 22 at 87, 98, 102; LINGAAS, THE CONCEPT OF RACE, *supra* note 4 at 143, 155, 172, 173, 176, 185-6, 233; STAHN, *supra* note 38, at 69; IHRC & Addameer, supra note 4 at 2; van den Herik & Braga da Silva, *supra* note 23, at mn. 185. *Contra* Eden *supra* note 23, at 177.

54. ApConv, *supra* note 21, art. II (emphasis added).

55. As reported by H. Booysen, Convention on the Crime of Apartheid, 1976 S. AFR. Y.B. INT'L L. VOL. II 57, 58 (who otherwise is very critical of the Convention and denies the gravity of the apartheid practices in South Africa); *see also* Quigley, s*upra* note 4, at 224; HSRC, *supra* note 4, at 167; Dugard & Reynolds, *supra* note 1, at 884.

56. *Cf.* ApConv, *supra* note 21 ("similar policies . . . as practiced in southern Africa"); *see also* G.A. Res. 3382 (XXX) (which in the context of the right to self-determination and independence "strongly condemns all Governments which do not recognize" these rights and refers explicitly to "the people of Africa and the Palestinian people."); Clark, *supra* note 38, at 603.

57. While the South African apartheid experience was always present in the background, the "small group of delegates involved in the negotiations . . . did not consider itself 'constrained'" by it and the ApConv, *cf.* McCormack, *supra* note 38, at 199. For the same result, see STAHN, *supra* note 38, at 69; Gebhard, *supra* note 8, ¶ 27; Baldwin & Max, *supra* note 3.

58. *Cf.* HSRC, *supra* note 4, at 17, 167 (South African "practices illustrate" but are "not the test or benchmark . . . ."); ESCWA, *supra* note 2, at 14, 16 (necessary differences "in design"); LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 155 (South African "system of apartheid is not standard"); Gebhard, *supra* note 8, ¶ 27 (South Africa as "inspiration" but today "broader" definition).

59. *See* Kern, *supra* note 3 ("The policies and practices [of the South African apartheid regime] . . . can therefore assist us when establishing how 'domination' and 'oppression' may be defined elements of the crime under the Rome Statute."); Kontorovich, *supra* note 3 ("South African template . . . . essential"); NGO Monitor (Kern), *supra* note 1, at 4, 10, 27.

apartheid regime is located but may well apply extraterritorially if State organs of this regime operate outside their own territory.[60]

The prohibition/crime is also applicable during *occupation*. This means that the law of occupation, as codified by the Fourth Geneva Convention of 1949 (GC IV), does not displace the prohibition/crime of apartheid.[61] Rather, "its interaction" with this law "must be assessed on case-by-case basis in relation to specific elements of the prohibition."[62] In case of conflict between these two legal regimes, the prohibition of apartheid can never be superseded given its *jus cogens* character;[63] *a fortiori*, the commission of the crime of apartheid can never be justified by the law of occupation. While the law of occupation entails, on the one hand, by definition, a different treatment of the local population and the nationals of the occupier or of third States, this differentiation must not turn into a discrimination of the former; on the contrary, the local population enjoys a privileged status being protected persons pursuant to Article 4 of GC IV. On the other hand, in a situation of occupation there

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60. This follows from Art. 3 ICERD (extending the prohibition to "territories under their [the States Parties'] jurisdiction") and from the precedent of the South African practice in Namibia. *cf.* G.A. Res. 2074, *supra* note 30, and, more importantly from, ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Rep. 1971, ¶¶ 16, 129-31 [hereinafter Namibia Advisory Opinion] (finding, generally, that South Africa is under an obligation to withdraw and UN Member States to refrain from any acts implying recognition of the legality of the occupation, and, specifically, that the "policy of apartheid as applied by South Africa in Namibia" constitutes a "flagrant violation of the purposes and principles of the Charter"). *See also*, ESCWA, *supra* note 2 at 16; Miles Jackson, "Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law, Diakonia: International Humanitarian Law Centre" ¶¶ 34-35 (Mar. 23, 2021) [hereinafter Jackson, *Expert Opinion*], https://www.diakonia.se/ihl/news/expert-opinion-occupation-palestine-apartheid [https://perma.cc/K37T-LHEN].

61. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. For a recent in-depth treatment, see Jackson, *Expert Opinion, supra* note 60, ¶ 72:

> Situations of occupation entail the subjection of a group of persons to the jurisdiction of a foreign state in relation to their enjoyment of a wide range of rights guaranteed by international law. Depending on the factual situation, that group may be perceived as a distinct racial group. Where the occupant imposes measures or undertakes acts that violate the rights of the group as protected under international law, enumerated acts in the prohibition of apartheid will be committed. If the occupant's purpose in imposing the measures or undertaking the acts is to establish and maintain domination of one racial group – whether within the occupied territory or not – over the group subject to occupation, the wrong of apartheid will be committed.

62. Jackson, *Expert Opinion*, *supra* note 60, ¶ 37.

63. Jackson, *Expert Opinion*, *supra* note 60, ¶ 85; *see also* Lynk Report Aug. 2022, *supra* note 2, ¶ 34; IHRC & Addameer, *supra* note 4, at 4-5.

may even exist a higher risk that a regime of apartheid is established given the (military) coercion exercised by the occupier and the ensuing domination of the local population accompanied by the need to protect its own population.[64] For the situation in the OPT this means that the mere fact that there exists an "occupation"—notwithstanding its (un)lawfulness[65]—does not entail any privileges for the occupier with regard to the apartheid prohibition/crime as compared to a situation of discriminatory, apartheid-like measures by a State within its sovereign territory.[66] Rather, the specific group context with an increasing Israeli settler population aggravates the risks for the local (Palestinian) population actually to be protected by the occupier.[67]

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64. In a similar vein, see YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 39 (Cambridge University Press, 2d ed. 2019) (noting "coercive by nature" and remaining "immanently coercive" over time). *See also* KRETZMER & RONEN, *supra* note 10, at 23 (arguing "inherently unbalanced" and "inherently indeterminate, leave room for interpretation that suits the political agenda of the occupying power"); YESH DIN, *supra* note 3, at 27-28 ("domination and oppression inherent in any military occupation," governing "by force"). *But see* NGO Monitor (Kern), *supra* note 1, at 37 (see in detail *infra* note 67).

65. It seems safe to say that the occupation turned unlawful given its permanency and the partial annexations (ComInq Report Sept. 2022, *supra* note 2, ¶ 75); Gross, *supra* note 4, at 250 ("violation of the substantive constraints imposed by the law of occupation", "conquest in disguise"); Grote, *supra* note 4, at 294. For a four-elements test insofar, see The Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, ¶¶ 29-38, U.N. Doc. A/72/556 (Oct. 23, 2017) [hereinafter Lynk Report 2017]; *see* also Michael Lynk, *Prolonged Occupation or Illegal Occupant?*, EJIL:TALK! (May 16, 2018), https://www.ejiltalk.org/prolonged-occupation-or-illegal-occupant [https://perma.cc/NZS6-LBLY]. For three criteria, see Gross, *supra* note 4, at 3, 35, 248. For an overview of the different positions by mainly Israeli scholars, see KRETZMER & RONEN, *supra* note 10, at 25; for an overview of the respective jus in Bello vs. Jus ad Bellum arguments, see Susan Power, *UN General Assembly Committee Adopts Resolution Requesting Second Advisory Opinion from ICJ on Occupied Palestinian Territory*, EJIL:TALK! (Dec. 20, 2022), https://www.ejiltalk.org/un-general-assembly-committee-adopts-resolution-requesting-second-advisory-opinion-from-icj-on-occupied-palestinian-territory [https://perma.cc/W23Y-7THP]. For the official Israeli position, *see infra* note 125. The ICJ Advisory Opinion, *supra* note *, ¶¶ 103, 244, has now decided the question finding that the accumulated rights violations of Israel (settlement policy, annexation/acquisition of territory by force, discriminatory legislation and measures, denial of Palestinian self-determination) have turned the occupation as a whole unlawful.

66. For these reasons Zilbershats' defense of Israeli practice in the OPT invoking "belligerent occupation" as opposed to "sovereignty" is plainly unconvincing, aggravated by the fact that she essentially quotes the High Court of Justice [HCJ] to justify the permanence of the occupation and the treatment of Palestinians living under it, *see* Zilbershats, *supra* note 4, at 916-19. For an equally unconvincing argument, see NGO Monitor (Kern), *supra* note 1, at 37; *see also*, sources *infra* note 67.

67. YESH DIN, *supra* note 3, at 27-28 (referring to the settler population as "a concrete group context" and the ensuing "process of colonization"). *Contra* NGO Monitor (Kern), *supra* note 1, at 37, 42, 46 (arguing that the law of occupation "is not inherently

C. The Justification of a Specific Crime of Apartheid in its Own Right

In a nutshell, one can consider apartheid as an aggravated (institutionalized) form of racial discrimination.[68] But do we need this crime at all given that the relevant (discriminatory) conduct is covered by other offenses, especially by persecution or—as a fall back—by inhumane acts as crimes against humanity?[69] What is the added value, if any, of apartheid as an international crime?

The answer is that the apartheid crime represents a specific wrong which goes beyond these other crimes, i.e., a wrong that "captures systemic and structural forms of discrimination that destroy equality and freedom"[70] within the framework of a specific institutionalized regime.[71] This specific and unique wrong, going

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oppressive" but rather entails and, in fact, justifies a different "treatment of nationals of the Occupying power and protected persons," i.e. between settlers and Palestinians, with human rights law filling "the [IHL] gaps in protection" regarding the settlers; yet, this whole argument is predicated on flawed assumptions, namely that there is still a [temporary and/or lawful] occupation and that the settlers have a right, contrary to Art. 49(6) GC IV, to be in the OPT in the first place; apart from that, even NGO Monitor admits that the occupier's "discriminatory measures" must not be "arbitrary" which is all too often the case in the here relevant OPT context).

68. *See* HSRC, *supra* note 4, at 14; Lingaas, *The Crime Against Humanity*, *supra* note 22, at 115; Tomuschat, *supra* note 44, at 238 (preferring the "felicitous concept of "institutionalized discrimination" introduced by the 1996 ILC Draft Code over the "backward-oriented blunt term of *apartheid*") (emphasis added).

69. In this vein, see also McCormack, *supra* note 38, at 198; Bultz, *supra* note 1, at 208, 225-28; STAHN, *supra* note 38, at 68; Lingaas, *The Crime Against Humanity*, *supra* note 22, at 95-96. *See generally* Tomuschat, supra note 44, at 246 ("may well amount to crimes against humanity"); Clark, supra note 38, at 619 ("caught by" Article 7(1) or "even" Article 6 of the ICCS).

70. Miles Jackson, *The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination*, 71 INT'L & COMPAR. L.Q. 831, 834-52 (2022) [hereinafter Jackson, *The Definition of Apartheid*] ("set of practices both criminalized, for individuals, and subject to the aggravated responsibility regime, for States, that does not necessarily involve violations of life or bodily integrity . . . . significance of a wrong at whose heart are forms of systematic harm, imposed on racial grounds, that do not involve life or bodily integrity in the narrow sense.").

71. *See* YESH DIN, *supra* note 3, at 16 ("regime focused crime"); *id.* at 23; *see also* TRUTH & RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, ch. 2 (1998), https://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf [https://perma.cc/X847-5BJR] ("Conceptually, the policy of apartheid was itself a human rights violation").

beyond the (undeniable)[72] symbolic[73] or expressive[74] function of the apartheid crime, indeed constitutes its added value.[75] At the same time this unique wrong calls for profound reflection and great care before formulating such a charge.[76] Interestingly, in the Israel-Palestine context, a more radical narrative has been advanced focusing on the (alleged) denial of Palestinian identity and the Zionist Israeli policy as a (post) colonial settlement project[77] constituting the "root causes" of the conflict which are not addressed by the "apartheid framework."[78] While the (post-) colonial features

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72. This function is undeniable as demonstrated by the vehement reactions against the apartheid claim. *See e.g.*, Kontorovich, *supra* note 3 ("significance of the apartheid label goes beyond particular policies"); *see also* Waxman, *supra* note 1, at 3 ("incendiary" and "captures public attention"); Raday, *supra* note 4, at 4-5 ("rare category of pariah states").

73. Clark, *supra* note 38 at 601, 619; GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW mn. 1130 (4th ed. 2020).

74. Jackson, *The Definition of Apartheid*, *supra* note 70 at 834, 853; *see also* STAHN, *supra* note 38, at 69; Bultz, *supra* note 1, at 233 ("greater stigma").

75. Yet, the additional legal consequences only apply to the apartheid prohibition, not necessarily to the crime. *See infra* note 222; Jackson, *The Definition of Apartheid*, *supra* note 70, at 853.

76. Critical of Amnesty International in this regard is Klug, *supra* note 4 at 3 (lowering simplistically the threshold with a view to the apartheid charge against Israel proper so that "most other countries in the region would almost certainly be guilty" of apartheid).

77. The argument of Zionism as a settler-colonial project goes back to Sayegh. *See* Fayez Sayegh, *Zionist Colonialism in Palestine* (1965), *reprinted in* 2 SETTLER COLONIAL STUDIES 206 (2012) (comparing the "racial discrimination" of Palestinian Arabs by the "Zionist settler-state" as a form of South-African-like apartheid with "the Zionist . . . practitioners . . . beguilingly" protesting "their innocence!"); *see also* Dugard Report 2007, *supra* note 2, at 3 ("forms of colonialism"); HSRC, supra note 4, at 13, 119; *id.* at 15-16 ("colonial character" of "Israel's rule in the OPT" pursuant to five factors); John Dugard & John Reynolds, *Apartheid in Occupied Palestine: A Rejoinder to Yaffa Zilbershats*, EJIL:Talk! (Oct. 2, 2013) [hereinafter Dugard & Reynolds EJIL:Talk!], https://www.ejiltalk.org/apartheid-in-occupied-palestine-a-rejoinder-to-yaffa-zilbershats [https://perma.cc/9GDC-MJLK] (reality "not merely a regime of belligerent occupation but also one of expansionary settler colonialism."); Noura Erakat, *Beyond Discrimination: Apartheid is a Colonial Project and Zionism is a form of Racism,* EJIL:Talk! (Jul. 5, 2021), https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism [https://perma.cc/4H8Q-6EKN] ("Zionism . . . better understood as a political and intellectual analog of apartheid . . . . Zionism and Apartheid are political and ideological bedfellows both in their inception as well as their historic strategic alliance . . . . Israel pursues a settler colonial project across this geography and over all Palestinian lives regardless of their juridical status"); Reynolds, supra note 1, at 104; Raif Hussein, *Which Israel are we Facing? A Different View of Israel*, 27 PALESTINE-ISR. J. POL. ECON. & CULTURE 1, 2 (2022) (describing apartheid as a product of neo-Zionism and settler colonialism).

78. Albanese Report 2022, *supra* note 2, ¶¶ 10c, 11 ("bypass the critical issue of the recognition of the Palestinian people's fundamental right to determine their political, social and economic status and develop as a people free from foreign occupation, rule and exploitation.").

of the post-1967 Israeli settlement project can hardly be denied,[79] it is difficult to think of a crime definition, even such a broad one as that of apartheid, which fully captures the "root causes" of the respective underlying social conflict.

Indeed, to expect that of a criminal law offense amounts to an over- expectation that shows little understanding of the limited function and goals of such offences and, indeed, of criminal law in general. From the perspective of a rational criminal law policy and legislation, such offenses should not just have symbolic or expressive effects, but should strive to create a meaningful deterrence with a view to the humane conduct covered and to deal with the ensuing individual criminal responsibility. From this perspective, then, the main criticism of a purely symbolic crime like apartheid is not so much that it does not capture the root causes of the conflict but that it, apparently, produces no meaningful deterrent effect due to the simple fact that it is not applied in judicial practice. In other words, those using the apartheid charge need to self-critically ask themselves whether this alone will improve the plight of the Palestinians. The short answer is no, as long as the material conditions on the ground, especially the occupation with the ensuing violence and discrimination, do not change.[80]

D. Important Nuances: ICERD, Apartheid Convention, and ICC Statute

The clarification of the relationship between the ICERD, the ApConv, and the ICCS is a further preliminary matter before being able to analyze in detail the elements of the apartheid crime. The ICERD apartheid concept informs the ApConv, especially in terms of the definition of racial discrimination in Article 1(1) of ICERD; in contrast, the ICCS definition is autonomous in that it does not affect the preceding conventional definition/customary rule of the

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79. They are also acknowledged by Israeli scholars, albeit without the anti-Zionist undertones, *cf.* Gross, *supra* note 4, at 250-52 (identifying "major features" similar to colonialism and the prolonged occupation "drawing closer to . . . colonialism"); KRETZMER & RONEN, *supra* note 10, at 511, 513 ("characteristics of a settler colonial regime"). For a general analysis of settler colonialism, see Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387 (2006) (arguing that it, albeit not necessarily genocidal, entails a logic of elimination, namely the elimination of the native). *See also* Lila Abu-Lughod, *Imaging Palestine's Alter-Natives: Settler Colonialism and Museum Politics*, 47 CRITICAL INQUIRY 4 (2020) (this elimination may not be completely successful and thus ongoing).

80. *Cf.* Klug, *supra* note 4, at 2, 5 (criticizing Amnesty International for focusing on apartheid instead of calling for an end of the occupation and thus obscuring "the underlying reality of the occupation," "of which apartheid is an ugly offspring").

prohibition.[81] While this also follows from Article 22(3) of the ICCS,[82] it does not deny that the ICC negotiators were influenced by relevant precedents, especially the ApConv, but for the purpose of the ICC proceedings, one has to apply the definition of Article 7(2)(h) of the ICCS as it stands.

Further, it is important to distinguish between the ApConv (Article II) and the ICCS (Article 7(2)(h)). While the former has a subjective focus in that it requires that relevant acts are committed—as part of "similar policies and practices of racial segregation and discrimination as practised in southern Africa"—for the "purpose of establishing and maintaining domination by one racial group . . . over any other and systematically oppressing them,"[83] the latter definition requires objectively, as a specific context element, an "institutionalised regime of systematic oppression and domination by one racial group over any other" and then, subjectively an "intention of maintaining that regime." As a consequence, under Article II of the ApConv two elements (acts as part of a policy and specific purpose) must be proven, but under Article 7 of the ICCS three elements (acts, institutionalized regime, and specific intention) must be proven.[84] This is, arguably, a fine distinction and, perhaps for this reason, is often overlooked or downplayed in the reports and writings on Israel/Palestine;[85] yet, at any rate, it matters in terms of the broader intent/purpose element of Article II of the

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81. *Cf.* Jackson, *The Definition of Apartheid*, *supra* note 70, at 844; Jackson, *Expert Opinion*, *supra* note 60, ¶ 28.

82. "This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

83. For a source stressing this overall purpose, see Clark, *supra* note 38, at 603. *See also* YESH DIN, *supra* note 3, at 17, 20.

84. *Cf.* Jackson, *Expert Opinion*, supra note 60, ¶¶ 14, 22.

85. *See* Falk Report 2014, *supra* note 2, ¶¶ 54, 77 (assuming a "single concept" of apartheid and treating systematic oppression as an objective element; Lynk Report Aug. 2022, *supra* note 2, ¶¶ 30-31 (downplaying relevant differences referring to Amnesty International report ["secondary differences"] and ultimately following the ICCS); RUSSELL TRIBUNAL, *supra* note 3, ¶¶ 5.3, 5.10 (conflating the elements and even omitting the purpose element); Dugard & Reynolds, *supra* note 1, at 881 (overlooking the importance of the specific intent and the distinction); IHRC & Addameer, *supra* note 4, at 5 (ignoring the distinction); *id.* at 904 (focusing on the "intention of maintaining" the apartheid regime); A THRESHOLD CROSSED, *supra* note 3, at 5-6, 33 (conflating ApConv and ICCS and confusingly listing the elements); but correctly stressing the distinction AMNESTY INT'L, *supra* note 3, at 48 (acknowledging that the ApConv "focuses more on the 'purpose' to create or maintain such domination meaning that the crime of apartheid can be committed in the absence of an existing regime . . . as long as there is an intent . . . while the Rome Statute . . . implies that the regime must already exist."). *But see* Kern, *supra* note 3, for a source critical of HRW. For a good comparative distinction between Article II of the ApConv and Article 7(2)(h) of the ICCS, see YESH DIN, *supra* note 3, at 17.

ApConv.[86] While the specific intent must always be inferred from objective circumstances, as will be discussed in more detail below,[87] and these circumstances may imply the specific context element,[88] the distinction still remains important in order to correctly and precisely attribute a given set of facts to alleged perpetrators.

II. THE ELEMENTS OF THE CRIME AND THEIR APPLICATION TO THE OPT

Taking Article 7(2)(h) of the ICC Statute as the applicable crime definition, the following three elements must be demonstrated: (i) "inhumane acts" "similar to those" mentioned in Article 7(1) of the ICCS, (ii) existence of an "institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups," and (iii) (specific) "intention of maintaining" the said regime. As will be shown in the following, the first element is quite straightforward, the second element raises some interpretative problems and the third element is arguably the most difficult to demonstrate.

A. Inhumane Acts

The inhumane acts are the ones explicitly mentioned in Article 7 (1)(a) to (i) the ICCS, e.g. murder, deportation, unlawful imprisonment, torture, but also those "causing great suffering, or serious injury to body or to mental or physical health" and further other inhumane acts similar to those.[89] This broad reading is a consequence of the unqualified reference in paragraph 2(h) of Article 7 of the ICCS to all "acts of a character similar to those

86. This is correctly emphasized by Jackson in *The Definition of Apartheid*, *supra* note 70, at 843-44.

87. *See infra* note 238 and accompanying text.

88. *See also* Jackson, *Expert Opinion*, *supra* note 60, ¶ 27 ("In practice, this difference may not amount to a great deal, given that the kinds of acts sufficient to ground an inference of the required purpose will often mean that the relevant context under the Rome Statute has been established.").

89. ICCS, *supra* note 24, art. 7 (1)(k). This broad reading is confirmed by Element 2 to Article 7(1)(j) of the Elements of Crimes, Rep. of the Assemb. of States Parties to the Rome Statute of the I.C.C., U.N. Doc. ICC-ASP/1/3 (2002) [hereinafter Elements of Crimes] ("Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts."); *see,* e.g., Hall, *supra* note 23, at mn. 120; van den Herik & Braga da Silva, *supra* note 23, at mn. 267 (both concluding that the common element is the inhumanity of the acts); WERLE & JESSBERGER, *supra* note 73, at mn. 1131.

referred to in paragraph 1," i.e., similar in "nature and gravity,"[90] including the inhumane acts of paragraph 1(k). Indeed, the very broad and unspecific inhumane act element led the German legislature—out of legality concerns (*leges certa* and *stricta*)[91]—to limit the "inhumane acts" within the meaning of Article 7(1)(k) of the ICCS to "severe physical or mental harm" of the kind mentioned in section 226 Penal Code (*Strafgesetzbuch*), thus limiting the respective apartheid acts pursuant to Article 7(2)(h) of the ICCS in the same way.[92]

Two consequences follow from this broad reading. First, there is neither a particular severity or gravity threshold going beyond the similarity criterion nor a restriction following from the context element of crimes against humanity.[93] All that is required is that a few inhumane acts (not all!)[94] are being committed—as part of the general context element of crimes against humanity and the specific context of an apartheid regime. Secondly, the ICCS list is not narrower than the one in Article II(a) to (f) of the ApConv.[95] This is only true with regard to the specific acts mentioned in Article II of the ApConv as compared to the ones of Article 7(1)(a)-(i) of the ICCS but each of these specific acts not mentioned there is ultimately covered by the fallback reference to "inhumane acts of a similar character" in Article 7(1)(k) of the ICCS (included in the general *renvoi* to "paragraph 1" in Article 7(2)(h) of the ICCS). Such a fallback category is not contained in the ApConv, thus the Convention is in fact narrower than the ICCS[96] and, at the same time, informs the "inhumane acts" interpretation of the ICCS.[97]

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90. *Cf.* note 29 of Element 2 to Article 7(1)(j) from Elements of Crimes, *supra* note 89 (defining "character" as referring to the "nature and gravity of the act.")

91. *See generally* KAI AMBOS, 2 TREATISE IN INTERNATIONAL CRIMINAL LAW: THE CRIMES AND SENTENCING 131 (2d ed. 2022) (problem of legal certainty which increases with the recourse to the definition of inhumane acts outside the ICC Statute). *Contra* Lingaas, *The Crime Against Humanity*, *supra* note 22, at 97.

92. *Cf.* CCAIL, as quoted *supra* note 40. *See also* Gerhard Werle & Florian Jessberger, *§ 7 Völkerstrafgesetzbuch - VStGB, in* 9 MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH mn. 130 (Christoph Safferling ed., 4th ed. 2022).

93. Incorrect insofar YESH DIN, *supra* note 3, at 20 ("certain degree of severity"); *id.* at 36 (requiring the effect of an act to be "widespread and systemic"). In the same vein, see NGO Monitor (Kern), *supra* note 1, at 50 ("gravity requirement").

94. *See also* RUSSELL TRIBUNAL, *supra* note 3, ¶ 5.14; YESH DIN, *supra* note 3, at 20.

95. *But see* Hall, *supra* note 23, at mn. 120; Bultz, *supra* note 1, at 223; AMNESTY INT'L, *supra* note 3, at 49.

96. *See also* Jackson, *Expert Opinion*, *supra* note 60, ¶ 23 (arguing that "too much should not be made of the difference" between Article 2 of the ApConv and Article 7(2)(h) of the ICCS).

97. WERLE & JESSBERGER, *supra* note 73, at mn. 1131. For a comparison, see van den Herik & Braga da Silva, *supra* note 23, at mn. 267.

At any rate, applying this legal standard to the Israeli practices and activities in the OPT it is fairly uncontroversial that a series of inhumane acts have been and are being committed and thus the existence of this element is largely uncontroversial.[98] Even (Israeli) scholars critical of the apartheid claim admit the existence of inhumane acts,[99] specifically referring to punitive house demolitions, movement restrictions, and deportations of Palestinians.[100]

B. Specific Context Element (Institutionalized Regime)

While the first prong of this element—"existence of an institutionalized regime of systematic oppression and domination"—is met with regard to the situation in the OPT, as discussed in Section II.B.1, the second prong—requiring a domination by one "racial group" over another—faces serious issues of interpretation, as discussed in Section II.B.2.

1. "'Institutionalized' Regime of Systematic Oppression and Domination"

(a) Abstract Standard

This element is the unique feature of the apartheid crime making it a "regime focused crime"[101] and distinguishing it from persecution as a crime against humanity (Article 7(1)(h), (2)(g)

98. *Cf.* Falk Report 2014, *supra* note 2, ¶ 54; Lynk Report Aug. 2022, *supra* note 2, at ¶¶ 50, 55; Albanese Report 2022, *supra* note 2, ¶ 6; *Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*, ¶ 42 (May 9, 2022) [hereinafter ComInq Report May 2022]; ComInq Report Sept. 2022, *supra* note 2, ¶¶ 54, 77, 78; IHRC & Addameer, *supra* note 4, at 19-20; for a detailed analysis with regard to Art. II ApConv, *see* HSRC, *supra* note 4 at 17-20, 172, 272-4; RUSSELL TRIBUNAL, *supra* note 3, ¶ 5.21; Dugard & Reynolds, *supra* note 1, at 891-903 (finding inhumane acts according to Art. II(a), (c), (d) and (f) ApConv); Asseburg, *supra* note 4, at 3-4 (focusing on acts of persecution pursuant to Article 7(2)(g) of the ICCS); YESH DIN, *supra* note 3, at 36 (discussing the West Bank and denial of rights amounting to the denial of Palestinian self-determination, creating, and maintaining a dual legal system, denial of development, expropriation and dispossession of land, persecution of opponents and critics, forcible transfer of population); *see also* ICJ Advisory Opinion, *supra* note *, ¶¶ 11, 180.

99. *See e.g.* Raday, *supra* note 4, at 4 (discussing the West Bank and East Jerusalem).

100. I am indebted to Yuval Shany for pointing out these examples to me. Indeed, they are well documented by Israeli legal scholars. *Cf.* Kretzmer and Ronen, *supra* note 10, at 375 (house demolitions); *id.* at 419 (deportations violating Art. 49(1) GC IV); Gross, *supra* note 4, at 256 (movement restrictions).

101. YESH DIN, *supra* note 3, at 16.

ICCS).[102] Such an institutionalized regime and the ensuing system of oppression and discrimination may call for two restricting requirements: on the one hand, a State structure may be required to establish and maintain such a regime;[103] on the other hand, the institutionalization may be produced and manifest itself by way of a special legislation enforced by special institutions (as typically in South Africa).[104] Yet, none of these restrictions is fully convincing. On the one hand, a State structure does not necessarily entail a particular organizational efficiency in setting up and maintaining such a regime. This may be the case, as for example with the German National Socialist State, but not all States work as smoothly and efficiently in terms of systematic oppression. Rather, depending on the circumstances of the concrete case, a non-State actor, for example a tightly and hierarchically-organized insurgent movement or criminal organization with perhaps partial territorial control,[105] may well be able to set up such a repressive regime.[106] On the other hand, while special discriminatory legislation may constitute a normative basis of such a regime[107] and indeed serve as evidence for it, it is not a legal requirement as is already evident from the ApConv's reference to "policies and practices" of apartheid.[108] Thus, a de facto policy with a less sophisticated or even no proper normative basis but just leadership instructions may suffice.[109]

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102. *Cf.* van den Herik & Braga da Silva, *supra* note 23 mn. 268; *see also* NGO Monitor (Kern), *supra* note 1 at 32; LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 200; IHRC & Addameer, *supra* note 4 at 21-22. Note that the Goldstone Report, *supra* note 2, ¶¶ 75, 1332, 1502, 1936 "only" found the potential commission of persecution as a CaH

103. *See* McCormack, *supra* note 38, at 200 ("government policy"); Bultz, *supra* note 1, at 222; *id.* at 225 (criticizing the concept of the "institutionalized regime" as "overbroad and inoperable"); *id.* at 229 (proposing a restrictive interpretation linking it to a "recognizable state" but accepting a *de facto* policy).

104. *Cf.* Dugard & Reynolds, *supra* note 1, at 873 (describing apartheid in South Africa as an "institutionalized system . . . created by law and enforced by legal institutions"); Werle & Jessberger, *supra* note 73, at mn. 1133 ("anchored in domestic law", South Africa as "prime example"). For an overview of the legislation, see *Truth and Reconciliation Commission of South Africa Report* 448 (1998). *See also* HSRC, *supra* note 4, at 20-21, 168; Dugard & Reynolds, *supra* note 1, at 867, 873; LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 145; Jackson, *The Definition of Apartheid*, *supra* note 70, at 854.

105. The IHL concept of "organised armed group" may be invoked here, i.e. a sufficiently and hierarchically organized military group with a responsible command and (partial) territorial control, see Article 1(1) Add. Prot. II to the Geneva Conventions, which would exclude "loosely organized" groups, *see* Bultz, *supra* note 1, at 225.

106. *See* Hall, *supra* note 23, at mn. 122.

107. *See* Werle & Jessberger, *supra* note 73, at mn. 1133.

108. *Cf.* Art. I ApConv. *See also* Bultz, *supra* note 1 at 223-24 for a report on the discussion in the ILC.

109. AMBOS, *supra* note 91, at 131; *see also* Bultz, *supra* note 1, at 229.

The requirement of "systematic oppression and domination" seems to add a further specific context element to the already existing general context element "widespread or systematic" of Article 7(1) ICCS. To make sense of this, the specific apartheid context element should be understood as a concretization of the general context element.[110] The qualifier "systematic" would then merely confirm that, as in the case of the (systematic) attack within the meaning of Article 7(1) ICCS,[111] some kind of organization and ultimately a policy is required.[112] Thus, this second "systematic" requirement would, so understood, indeed make no "sense"[113] since it adds nothing and is thus plainly redundant. As a further consequence, it would then turn out to be a mere academic question whether the "systematic" is limited to "oppression" or if it also refers to "domination,"[114] for, at any rate, there must be an underlying apartheid policy.

The remaining question, of whether there is a substantive difference between "oppression" and "domination" must be answered in the affirmative[115] if only for the conjunctive ("and") formulation, which would otherwise make no sense but only produce another redundancy. Indeed, domination refers to control (in line with the so-called "control over the act" theory)[116] of the population as a whole or the individuals subjected to apartheid.[117] In contrast,

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110. The relationship between the general and specific context element is neglected in several writings. *See e.g.* NGO Monitor (Kern),*supra* note 1, at 28 (analyzing the general context element without dealing with the issue of the relationship to the specific context element of apartheid in the first place).

111. *Cf.* Kai Ambos, *Article 7, in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 23, at mns. 22, 204.

112. *See* Jackson, *The Definition of Apartheid*, *supra* note 70, at 847.

113. Hall, *supra* note 23, at mn. 123; Van den Herik & Braga da Silva, *supra* note 23 at mn. 268; *see also* Bultz, *supra* note 1, at 229; Werle & Jessberger, *supra* note 73, at mn. 1133 with n.414.

114. The literature is largely silent on the question, but see Jackson, *The Definition of Apartheid*, supra note 70, at 848.

115. *Contra* Hall, supra note 23, at mn. 123 ("essentially the same"); van den Herik & Braga da Silva, supra note 23, at mn. 268; AMNESTY INT'L, *supra* note 3, at 19, 26 (essentially speaking of a/one system of domination).

116. *Cf.* AMBOS, *supra* note 41, at 219-20 & n.460; Kai Ambos, *Article 25, in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 23, at mn. 11

117. "Exercise of power or influence over someone or something, or the state of being so controlled," *Domination*, OXFORD ENGLISH DICTIONARY, https://www.oed.com (last visited April 24, 2024). Lingaas adopts this definition, *see The Crime Against Humanity*, *supra* note 22, at 99. For a slightly different definition, without quoting exactly the source, see van den Herik & Braga da Silva, *supra* note 23, at mn. 268 ("have control of or a very strong influence on . . ."); *accord* Jackson, *supra* note 70, at 847 ("particularly powerful form of

oppression entails the continuous or prolonged and coercive or violent subjugation of the respective population to the respective apartheid regime. In other words, the oppression is employed to maintain the regime.[118] It is important to recall[119] that these concepts, being autonomous elements of the new ICC crime of apartheid, must not be interpreted too narrowly with the South African apartheid practice in mind.[120]

(b) Concrete Application

If one applies this abstract analysis to the Israeli policy and practice in the OPT, it seems safe to conclude that the relevant elements are met.[121] Palestinians are systematically discriminated

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control"); A THRESHOLD CROSSED *supra* note 3, at 39 ("heightened control"). Yet, "domination" cannot (as argued by NGO Monitor (Kern), *supra* note 1, at 33-34) be limited to (racial) supremacy in terms of the South African *baasskap* for this would deny the autonomous meaning of the concept.

118. "[P]rolonged cruel or unjust treatment or exercise of authority," *cf.* Oppression, OXFORD ENGLISH DICTIONARY, https://www.oed.com (last visited April 24, 2024); Lingaas, *The Crime Against Humanity*, *supra* note 22 at 99 (adopting this definition); van den Herik & Braga da Silva, *supra* note 23, at mn. 268; Jackson, *The Definition of Apartheid*, supra note 70, at 847; *see also* A THRESHOLD CROSSED, *supra* note 3, at 40 (correctly stressing that "the methods" are "used to carry out an intent to maintain domination"). *Contra* NGO Monitor (Kern), *supra* note 1, at 36 (arguing that HRW's understanding "renders the element of 'oppression' indistinguishable from . . . 'inhuman acts,' reducing an element . . . to redundancy;" yet, this conflates the objective and the subjective level: the objective "methods" referred to by HRW are only indicative of the necessary intent which does not make them redundant).

119. *See supra* note 59 and accompanying text.

120. Kern, *supra* note 3 (understanding "domination" "through practices of supremacy (*baasskaap*) and segregation" and "oppression" informed by the "reasonableness" of discriminatory measures as compared to South Africa's apartheid).

121. *See also* HSRC, *supra* note 4, at 22, 275-77 ("elements of an institutionalised and oppressive system"); RUSSELL TRIBUNAL, *supra* note 3, ¶¶ 5.42–5.43 ("derived from inhumane acts"); Dugard & Reynolds, *supra* note 1, at 891, 903 (inferring "institutionalised" and "systematic domination" from "sufficiently extensive and wide-ranging" inhumane acts); *id.* at 897 ("breadth and consistency of . . . infringements suggest . . . a system that operates to control and dominate Palestinians . . ."); *id.* at 904 (acts as "part of a widespread and oppressive regime that is both institutionalized and systematic"); *id.* at 910 ("institutionalization of two separate legal systems for two separate racial groups in a manner that underpins a system of domination by one over the other"); ESCWA, *supra* note 2, at 3, 30, 37 ("strategic fragmentation" of Palestinians by law and/or de facto as main method to impose apartheid, "fragmentation to secure Jewish-national domination," "apartheid through fragmentation"); YESH DIN, *supra* note 3, at 27, (focusing on military occupation accompanied by colonial settler project and finding); *id.* at 31, ("a regime centered on systemic domination and oppression of one group by another"); A THRESHOLD CROSSED, *supra* note 3, at 79 (subjugation of "more than 5 million Palestinians living" in OPT amounting to "systematic oppression" for the purpose of the crime of apartheid"); *see also* Asseburg, *supra* note 4, at 3 ("institutionalised and permanent system of discrimination," "systematic oppression").

against by a "dual legal system"[122] privileging the Israeli residents in the OPT (i.e., Jewish settlers and their settlements) to the detriment of the local Palestinian population, thus amounting to a de facto segregation.[123] While, as mentioned above,[124] there is a certain logic of a differentiated application of law under an occupation, this differentiation must certainly not play out to the detriment of one group (the local population) over the other (nationals of the occupier), and amount to full-fledged discrimination against the former, if only in terms of enforcement. One should recall at this juncture that, in principle, the applicable law in the West Bank is in line with the international law of occupation[125]: local (Jordanian)

122. ComInq Report Sept. 2022, *supra* note 2, ¶ 47 ("greater enjoyment of human rights for Israelis"); ComInq Report May 2022, *supra* note 98, ¶ 45; HSRC, *supra* note 4, at 15, 106, 118-19 ("dual and discriminatory legal regime"); RUSSELL TRIBUNAL, *supra* note 3, ¶ 5.43 ("entirely separate legal systems"); Dugard & Reynolds, *supra* note 1, at 905 (generally speaking of a "two-tiered system of civil status"); *id.* at 910 ("two separate legal systems"); ESCWA, *supra* note 2, at 41, 44-45; YESH DIN, *supra* note 3 at 40; POL'Y WORKING GRP., *supra* note 4, at 2 ("two-tier legal system"). *See generally* Association of Civil Rights in Israel, *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank*, Nov. 24, 2014; Reynolds, *supra* note 1, at 118-19; Gross, *supra* note 4, at 158, 172; KRETZMER & RONEN, *supra* note 10, at 511, 512 ("different legal regimes"); NGO Monitor (Kern), *supra* note 1, at 3 ("separate systems of law" regarding West Bank; yet justified with the law of occupation); *see also* sources cited *supra* note 67.

123. Comm. on the Elimination of Racial Discrimination [CERD], *Concluding observations on the combined seventeenth to nineteenth reports of Israel*, CERD/C/ISR/CO/17-19, 15, 22 (Jan. 27, 2020) ("[T]wo entirely separate legal systems and sets of institutions for Jewish communities in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand . . . . Hermetic character of the separation . . . ."); ESCWA, *supra* note 2, at 4, 30, 37 (distinguishing four legal "domains" amounting to "one comprehensive regime" of racial domination); *cf.* ESCWA, *supra* note 2, at 46 ("Jewish-national domination over an area dotted with Palestinian autonomy zones' similar to a 'partition strategy . . . in a unified State"); *id.* at 49 (Israeli occupation of OPT like "Namibia under South African occupation"); HSRC, *supra* note 4, at 21-22, 105, 274-75 (finding a structural similarity to South African legislation).

124. *See supra* Section I.B.

125. Note that the official Israeli position (largely shared by the post-Barak Supreme Court case law) is that the occupation of the West Bank is unique in that it was not conquered from a rightful sovereign (Jordan, Egypt or any other power, "missing reversioner theory") and that therefore the Fourth Geneva Convention (GC IV) is not applicable (apart from lacking customary status) but that its humanitarian provisions would be applied nevertheless, *cf.* Gross, *supra* note 4, at 141, 150 (especially critical of the contradictory approach regarding the 1907 Hague Regulations, accepted by Israel despite protecting the former sovereign of territory); Hostovsky Brandes, *supra* note 12, at 771, 774; KRETZMER & RONEN, *supra* note 10, at 23, 55, 59-60 (showing that originally the application of both the Hague Regulations and GC IV have been accepted and refuting the current official position); Jaber & Bantekas, *supra* note 11, at 1076-77. But note also that the Supreme Court has since the *Elon Moreh* case (1979) accepted that the law of belligerent occupation is applicable; *cf.* KRETZMER & RONEN, *supra* note 10, at 64 (denying the customary status of GC IV (especially Art. 49(1) and (6) and applying it only given the government's "voluntary" application)); *see also* Kretzmer, *supra* note 13, at 400 (summarizing the case law). On the inconsistent treatment of human rights law by the Court, see KRETZMER & RONEN, *supra* note 10, at 89-97.

Law[126] (as the original law applicable at the time of occupation pursuant to Article 43 of the Hague Regulations)[127] and military law of the Israeli occupier in the form of numerous military orders by the respective Israeli military commander. These orders often seek to implement ("pipeline") Israeli law and thus amend the original local law.[128] The military orders (and thus the underlying Israeli law) apply either territorially (i.e., to both Palestinian residents and Israeli settlers) or personally based on citizenship (i.e., only to settlers).[129] In addition, Israeli administrative law governs the conduct of all Israeli State organs in the OPT,[130] especially the military commander. While it thus forms the basis of the respective judicial review,[131] it has also been used to displace the international law of occupation and to undermine the direct application of human rights law.[132] The Israeli law applying to the settlers has been dubbed "enclave law."[133] Under the current government, it has been agreed to apply Israeli law directly to the settlements.[134]

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126. Note that the local law is not limited to Jordanian law but is comprised of various layers, including Ottoman and British Mandate laws, cf. for an analysis of the complex relationship, KRETZMER & RONEN, *supra* note 10, at 41; Hostovsky Brandes, *supra* note 13, at 418-19.

127. For a detailed analysis of the Supreme Court's case law with regard to Art. 43 and its increasing use to control the Palestinian population, see KRETZMER & RONEN, *supra* note 10, at 131, 133.

128. YESH DIN, *supra* note 3, at 40-41 (Jordanian law as amended by military orders for Palestinians and Israeli law made applicable through military orders, "pipelining"); Hostovsky Brandes, *supra* note 12, at 771-72; KRETZMER & RONEN, *supra* note 10, at 126 ("substantively based on Israeli law").

129. *Cf.* Hostovsky Brandes, *supra* note 10, at 126. On the combination of personal (Israeli nationality of settlers) and territorial (Israeli effective control) jurisdiction to the benefit of settlers, see also Gross, *supra* note 4, at 172; KRETZMER & RONEN, *supra* note 10, at 100.

130. For a substantive analysis, see KRETZMER & RONEN, *supra* note 10 at 50 (stressing the importance of the reasonableness and proportionality tests). *See also* Hostovsky Brandes, *supra* note 13, at 419.

131. Hostovsky Brandes, *supra* note 12, at 772, 777; Hostovsky Brandes, *supra* note 10, at 126; KRETZMER & RONEN, *supra* note 10, at 48-49. Interestingly, the Court's jurisdiction was never contested by the Israeli authorities and thus assumed on that basis. *Cf.* Kretzmer and Ronen, *supra* note 10, at 29-31.

132. KRETZMER & RONEN, *supra* note 10, at 52 ("international law of belligerent occupation . . . relegated to a secondary standing"); *id.* at 88 (human rights protection by way of administrative law, thus avoiding the direct application of human rights law); *id.* at 493 (displaces international law).

133. *Cf.* YESH DIN, *supra* note 3, at 41 (referring to A. Rubinstein). On the recognition of such "legal enclaves" by the Supreme Court, see KRETZMER & RONEN, *supra* note 10, at 223.

134. Israeli Law Professors' Forum for Democracy, *supra* note 13, at 2 (referring to the coalition agreements).

While the Israeli Supreme Court has so far not admitted the (extraterritorial) application of ordinary Israeli legislation to the OPT but rather held that, in line with the law of belligerent occupation, Israeli Law does not apply there,[135] it has sometimes applied those Basic Laws[136] providing for individual rights (especially the Basic Law: Human Dignity and Liberty) to Israeli settlers,[137] but also to the local Palestinian population.[138] The recourse to constitutional law has also been used to expand the military commander's authority in order to take protective measures in favor of the Israeli settlers, and to the detriment of the Palestinian population, often displacing the law of belligerent occupation.[139] While the Court's approach is inconsistent and case specific, it ultimately confirms the dual legal regime mentioned above, applying, *a grosso modo*, international law to the Palestinians and domestic (constitutional) law to the Israeli settlers.[140] In fact, the settlers do not only benefit from the application of Israeli domestic law but also from the international law of occupation (especially Article 43 Hague Regulations of 1907) given that the Supreme Court considers them part of the local population, sometimes even protected persons,[141] and selectively applies this law (complemented by constitutional/human rights law) to their benefit.[142] As a

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135. *Silwad Municipality v. The Knesset*, Judgement of 9 June 2020 where the Court held that "the law of the State of Israel does not apply in the region" (quoted according to Adalah, *Initial Analysis of the Israeli Supreme Court's Decision in the Settlements Regularization Law Case*, June 15, 2020, at 1).

136. Note that Israel's constitutional framework consists of fourteen Basic Laws which represent a gradual and ongoing constitutionalization; yet, only two of these Basic Laws, adopted in 1992, concern individual rights (i.e. the one on "Human Dignity and Liberty" and the one on "Freedom of Occupation") while the others concern mostly institutional matters (e.g. the government and judiciary) and thus only apply inside Israel. For an instructive account, see Hostovsky Brandes, *supra* note 10, at 115-16, 121, 124. For a historical perspective, see Barak Medina & Ofra Bloch, *The Two Revolutions of Israel's National Identity*, 56 ISR. L. REV. 305, 309 (2023).

137. *Cf.* KRETZMER & RONEN, *supra* note 10, at 100-01, 104, 222-3.

138. *Cf.* KRETZMER & RONEN, *supra* note 10, at 102-04, 110; Hostovsky Brandes, *supra* note 12, at 777, 778, 780. *See generally* KRETZMER & RONEN, *supra* note 10, at 126.

139. KRETZMER & RONEN, *supra* note 10, at 104, 106-09.

140. KRETZMER & RONEN, *supra* note 10, at 110-11. *But see* Gross, *supra* note 4, at 36, 151, 153, 161 (criticizing the ensuing "pick and choose approach").

141. For a detailed critical analysis, see KRETZMER & RONEN, *supra* note 10, at 217, 494 (showing that the Supreme Court's case law confirms and legitimized the beneficial treatment of the settlers).

142. Showing the selective invocation of the law of occupation to the detriment of the Palestinians *cf.* KRETZMER & RONEN, *supra* note 10, at 294 (regarding the restriction of the Palestinian participation in the planning process); *id.* at 308 (regarding residence and family reunification). On the application of constitutional / human rights law to the benefit of the settlers, see Gross, *supra* note 4, at 248, 352

consequence, the Israeli practice in the OPT is perhaps the paradigmatic example of a kind of reverse application of the law of occupation where this law, complemented by constitutional/human rights law, has been used to the detriment of the local (Palestinian) population, i.e., the population actually to be protected, out of concern for the settlers' security, further restricting the rights of the former and enhancing the structural imbalance between the two groups.[143]

Upon the adoption of the 2017 "Law for the Regularisation of Settlement in Judea and Samaria"[144] by the Knesset, the Israeli High Court of Justice (HCJ), for the first time decided that all branches of government are subject to constitutional review, albeit leaving open the question of the Knesset's authority to enact extraterritorial legislation in the first place.[145] The Court also recognized—somewhat contrary to its general shift to constitutional law[146]—that international law may serve to enhance the constitutional protection of the protected persons (i.e., the Palestinian population).[147] Still, on balance, it is fair to say the Court does not only confirm the beneficial legislative treatment of the settlers[148] but it legitimizes, at least implicitly, the settlement project and policy as a whole.[149] This is of little surprise since, after all, the

143. *Cf.* Gross, *supra* note 4, at 14, 167-68, 248, 293, 328, 343, 345, 376-77, 391 (arguing that the settlers' security and their ensuing – constitutional / human–rights protection adds a further burden to the law of occupation which works to the detriment of the Palestinians and enhances the structural inequality / imbalance between them and the settlers, ultimately amounting to a distortion of international law).

144. For an English translation, see Law for the Regularization of Settlement in Judea and Samaria, 5777-2017, SH 2604 (Isr.), https://www.legal-tools.org/doc/908988 [https://perma.cc/J99C-JKA6]. For a summary, see KRETZMER & RONEN, *supra* note 10, at 184-86.

145. *Cf. Silwad Municipality*, *supra* note 135 (declaring the Settlement Regularization Law unconstitutional for violating the rights to property, equality and dignity as protected by the Basic Law: Human Dignity and Liberty); KRETZMER & RONEN, *supra* note 10, at 111, 499; Hostovsky Brandes, *supra* note 12, at 780-81; Tamar Hostovsky Brandes, *Constitutional Adjudication of International Law Violations*, VERFASSUNGSBLOG (June 14, 2020), https://verfassungsblog.de/constitutional-adjudication-of-international-law-violations [https://perma.cc/JC99-2ZNQ].

146. Hostovsky Brandes, *supra* note 12, at 772 (showing how the Court in its case law on the OPT increasingly has relied on Israeli administrative and constitutional law instead of international law and explaining this with the need to secure domestic legitimacy); KRETZMER & RONEN, *supra* note 10, at 116.

147. *See supra* note 135 and the summary by Adalah, *supra* note 135 (according to which international law (of occupation) applies and the Palestinians are protected persons); *see also* KRETZMER & RONEN, *supra* note 10, at 112-13.

148. *Cf.* KRETZMER & RONEN, *supra* note 10, at 226, 230-31.

149. *Id.* at 191, 214-15, 225-26, 489, 499, 512; *see also* Gross, *supra* note 4, at 152 (criticizing the HCJ for "refus[ing] to rule on the legality of the settlements").

Court is not a neutral actor but an organ of the occupying power dependent on the public trust of its home constituency.[150]

The planning and zoning regime in the OPT constitutes perhaps the most obvious and strongest manifestation of the systematic discrimination of the Palestinians vis-à-vis the settlers. While it generously facilitates the construction of new settlements, it also severely restricts Palestinian construction,[151] essentially excluding it from Area C.[152] Further the zoning regime has produced a system of separate roads for settlers and Palestinians, labelled as "road apartheid."[153] Apart from that, there is a widespread lack of access to basic services for the Palestinian population which is another feature of its systematic discrimination vis-à-vis the settlers.[154] All this shows that the settlements, expanding continuously and deepening the fragmentation of the territory of a future Palestinian State, are key to the apartheid claim. In fact, they are arguably the most visible and ugly face of Palestinian discrimination within the framework of the institutionalized regime of systematic oppression and domination in the OPT, especially the West Bank.

Last but not least, the 2018 Nation-State Law,[155] albeit not directly applicable in the OPT, deserves to be mentioned. For this Law, being a Basic Law, elevates Jewish identity and supremacy to a constitutional level and makes it part of the constitutional identity of

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150. For a detailed and nuanced analysis, see KRETZMER & RONEN, *supra* note 10, at 272, 496, 500; *id.* at 455, 488-489, 512 (legitimizing the function of the Court); *id.* at 491 (discussing the respective judicial tactics); *id.* at 507 (stressing the Court's mitigating role in that it often acts as an intermediator).

151. ComInq Report Sept. 2022, *supra* note 2, ¶ 45 ("Commission notes that the planning and zoning regime applied by Israel reflects a clearly discriminatory approach, as it is a highly restrictive one targeted at Palestinian construction, while a much more permissive regime is applied to planning and zoning in settlements.").

152. According to the 1995 Oslo Interim Agreement, Israel retained full powers over land in Area C but this area comprises two thirds of the whole West Bank and the policy there affects Palestinians in "their" Areas A and B too. *See* KRETZMER & RONEN, *supra* note 10, at 273-74. Palestinians have, de facto, been excluded from this area, *id.* at 294, and the "inherently discriminatory" planning process, *id.* at 295, carried out by the Israeli Civilian administration, is "tailored to the needs of the Israeli settler population" turning it "into a privileged part of the local population, for whom special legal arrangements are made and for whose almost exclusive benefit land resources . . . are harnessed." *Id.*

153. Dugard & Reynolds, *supra* note 1, at 897, 910. On the "Apartheid Road" in East Jerusalem, see THE ISRAELI CTR. FOR PUB. AFFS. & BREAKING THE SILENCE, HIGHWAY TO ANNEXATION: ISRAEL ROAD AND TRANSPORTATION INFRASTRUCTURE DEVELOPMENT IN THE WEST BANK (2020), at 8, 10, 12, 23.

154. On the limited access to (drinking) water, see, for example, Rep. of the U.N. High Comm'r for Hum. Rts., The Allocation of Water Resources in the Occupied Palestinian Territory, including East Jerusalem, 5, 11, 17, U.N. Doc. A/HRC/48/43 (2021).

155. *See generally* The Nation State of the Jewish People, 5779–2018, SH No. 2743 (Isr.).

the State of Israel.[156] This surely has an effect on the OPT, if only expressing a certain State policy, and thus it is of little surprise that this Law characterizes "Jewish settlements as a national value" and encourages their "establishment and consolidation.[157] Against this background, it is, notwithstanding a perhaps contrary intent of some of the drafters, fair to say that this Law, at least de facto, further legitimizes the "continued construction and expansion" of settlements and "unauthorized outposts."[158] In this way, it has

156. *Id.* § 1 (Israel as "historical homeland of the Jewish people," "nation-state of the Jewish people" with right to self-determination "unique to Jewish people"). For a detailed legal analysis with various references, *see* HCJ 5866/18 Adalah v. Knesset, Petition for an Order Nisi, 3 (2018) (Adalah trans.) (Isr.); *see also* ADALAH, PROPOSED BASIC LAW: ISRAEL-THE NATION STATE OF THE JEWISH PEOPLE 1, 5 (2018) (considering it as "a colonial law with characteristics of apartheid," establishing a colonial regime with distinct apartheid characteristics"); *see also* Mordechai Kremnitzer, *Jewish Nation-state Law Makes Discrimination in Israel Constitutional*, HAARETZ (July 20, 2018), https://www.haaretz.com/israel-news/2018-07-20/ty-article/.premium/nation-state-law-makes-discrimination-in-israel-constitutional/0000017f-db7b-df62-a9ff-dfff281b0000 [https://perma.cc/AR3Q-E4TY] ("raises the overt, blunt discrimination to the constitutional level," "apartheid regime (. . . based on ethnicity) is now walking tall in Israel itself"); Comm. on Econ., Soc. & Cultural Rts., Concluding Observations on the Fourth Periodic Report of Israel, 16-17, U.N. Doc. E/C.12/ISR/CO/4 (2019); CERD, *supra* note 123, 13-14; Hum. Rts. Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel, 44, U.N. Doc. A/HRC/50/21 (2022); Hum. Rts. Comm., Concluding Observations on the Fifth Periodic Report of Israel, 10, CCPR/C/ISR/CO/5 (2022); Hussein, *supra* note 77 (expression of neo-Zionism); Liel, *supra* note 4, at 5 ("downgraded the Arab population in law"); POL'Y WORKING GRP., *supra* note 4, at 2; Nada Kiswanson, *Introduction*, *in* PROLONGED OCCUPATION AND INTERNATIONAL LAW, *supra* note 1, at 1-2; Reynolds, *supra* note 1, at 113-14. For a defense of this Law, see Israel's response in Comm. on Econ., Soc. and Cultural Rts., Information Received from Israel on Follow-up to the Concluding Observations on its Fourth Periodic Report, 17, U.N. Doc. E/C.12/ISR/FCO/4 (2022) (arguing that this Law must be read together with other Basic Laws and referring to the HCJ Decision of July 2021 which stressed the general applicability of the principle of equality notwithstanding its omission in this Law and stated with regard to the above quoted section 17 that it "should be fulfilled with flexibility and through balance with the right to equality, and not in a manner which could allow discrimination against individuals who are not Jewish and their rights to land"). For an English summary of this decision, see HCJ 5555/18 Hasson v. Knesset (2020) (Isr.), *translated in* ADALAH, SUMMARY OF ISRAELI SUPREME COURT DECISION ON THE JEWISH NATION-STATE BASIC LAW (2021), https://www.adalah.org/uploads/uploads/Translation_of_Summary_of_JNSL_Judgment.pdf [https://perma.cc/4NPP-TCT2]. *See also* Kontorovich, *supra* note 3 ("largely symbolic and declaratory measure"); Medina & Bloch, *supra* note 136, at 316 (no explicit provisions to prioritize Jewish population). For other (previous) legislation to that effect, see Quigley, *supra* note 4, at 226; Reynolds, *supra* note 1, at 114.

157. *See* § 7, Israel – The Nation-State of the Jewish People, 5778-2018 (Isr.) ("The State views the development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and consolidation.").

158. Hum. Rts. Comm., *supra* note 156, ¶ 14 (referring to respective statements by different treaty bodies, the Security Council, the HRC and the GA). On the ensuing increased settler violence, see *id.* ¶¶ 24-25. On "the financial, legal and planning mechanisms," the "benefits and incentives," employed by Israel "for more than half a century to enable the

prepared the ground for the respective guiding principles of the current government.[159]

All in all, the ensuing expansion of Israeli law to the OPT, either by case law or by legislation (directly or indirectly by military orders) is part of the "creeping annexation" mentioned above[160] and further blurs the line between Israel and the OPT.[161] To be sure, a formal annexation does not necessarily worsen the situation of the local population. On the contrary, their situation may improve it if it comes with citizenship (putting the Palestinians in the West Bank on the same footing with the Palestinian citizens of mainland Israel) or with a resident status giving access to the social system of the host State (i.e. by issuing Israeli blue IDs giving Palestinians in the West Bank the same status as the Palestinian residents of East Jerusalem). By contrast, a de facto, creeping annexation as witnessed in the West Bank only perpetuates and reinforces the systematic discrimination deepening the existing regime of oppression and domination,[162] without being accompanied by the above-mentioned improvements for the local population.

While some of the measures implemented in the OPT may be justified by security concerns,[163] for example the closing off of certain

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establishment and expansion of settlements and sustain them," see B'TSELEM & KEREM NAVOT, *supra* note 3, at 2.

159. *See* Adalah, *supra* note 12, at 1 (guiding principles go beyond Nation State Law stating that "Jewish people have an exclusive and inalienable right over all areas of the Land of Israel" [translated from Hebrew]). See also the recent announcement of Finance Minister Smotrich: "We will continue to develop the settlement of and strengthen the Israeli hold on the territory." *Israel set to approve thousands of building permits in West Bank*, REUTERS (June 19, 2023 6:44 AM), https://www.reuters.com/world/middle-east/israel-set-approve-thousands-building-permits-west-bank-2023-06-18 [https://perma.cc/ZQC4-S35E]. This confirms his earlier views. *See* Bezalel Smotrich, *Israel's Decisive Plan* (2017), https://hashiloach.org.il/israels-decisive-plan [https://perma.cc/R4E6-QRG8] ("[F]ull Israeli sovereignty to . . . Judea and Samaria . . . and settlements deep inside the territory and bringing hundreds of thousands of additional settlers to live therein" leading to a "victory by settlement").

160. *Supra* note 12 and accompanying text.

161. Hostovsky Brandes, *supra* note 12, at 768, 785, 786; KRETZMER & RONEN, *supra* note 10, at 117 (blurring "the distinction between sovereign . . . and occupied territory"); Israeli Law Professors' Forum for Democracy, *supra* note 13, at 4.

162. *See* Megiddo & Berda, *supra* note 15 ("Undertaking annexation therefore arguably further constitutes an imposition of an institutionalized regime of systematic oppression and domination by one racial group over another, with the intention of maintaining this regime, otherwise known as apartheid.").

163. In favor, for example, see Zilbershats, *supra* note 4 at 922-24, who argues that "Israel's actions, while sometimes repressive, are caused by clear and legitimate security concerns." But here again Zilbershats exclusively invokes case law of the Israel HCJ. *See also* Kontorovich, *supra* note 3 ("murderous wave of terror").

roads for Palestinians,[164] this does not apply to all or even the majority of them.[165] The alleged security concerns may also be part of broader political considerations.[166] In fact, the security situation (which, after all, is a consequence of the occupation and above all the settlement policy)[167] is often used to justify "the territorial expansion of Israel" into the West Bank,[168] further deepening the just mentioned fragmentation of the OPT, especially the West Bank,[169] and the ensuing scattering of the Palestinian people as a whole.[170] Even if one accepted a kind of security defense in factual terms, it could not legally justify an institutionalized regime amounting to apartheid since this practice, being prohibited by *jus cogens*, could never be a legitimate means to an end (security).[171] *A fortiori*, a systematic discrimination amounting to an institutionalized

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164. One of the most (in)famous examples is perhaps the Road 443 (Bethoron Ascent), connecting Tel Aviv with Jerusalem going through the West Bank. *Cf. Route 443 – West Bank road for Israelis only*, B'TSELEM (Jan. 1, 2011), https://www.btselem.org/freedom_of_movement/road_443 [https://perma.cc/27WW-KB5G].

165. *See e.g.* AMNESTY INT'L, *supra* note 3, at 264 ("[M]any of the violations . . . have simply no justification in security . . . ."). *See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. ¶ 137 (concluding that it "is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives . . . . The . . . route cannot be justified by military exigencies or . . . national security or public order.").

166. For a nuanced analysis of legitimate security concerns as opposed to mere political considerations, see KRETZMER & RONEN, *supra* note 10, at 311-14.

167. *Cf.* Gross, *supra* note 4, at 37, 153; *id.* at 45 (establishment and ensuing protection of settlement pursuant to "a vague concept of security considerations").

168. ComInq Report Sept. 2022, *supra* note 2, ¶ 79 ("[S]ignificant number of the policies and actions implemented by Israel in the West Bank are not intended to address these concerns, but rather that security is often used to justify the territorial expansion of Israel."); Lynk Report Aug. 2022, *supra* note 2, ¶ 47 ("The intention of Israel in building the settlements was never primarily about security . . . but to ensure that it retained as much of the land as possible."); *see also* HSRC, *supra* note 4, at 22 (invocation as security "to mask a true underlying intent to suppress dissent to its system of domination . . . ."); Amnesty International, *Cruel Assault*, *supra* note 3, at 17, 19, 32-33, 263-65 (policy "under the guise" of security and "implemented in a blanket manner."; "no reasonable basis in security").

169. Asseburg, *supra* note 4, at 3 ("[F]ragmentation of Palestinian territory into enclaves isolated from one another . . . .").

170. *Cf.* ESCWA, *supra* note 2, at 37-48 (distinguishing between four domains or groups of Palestinians, i.e., as Israeli citizens, residents of East Jerusalem, residents of the West Bank and Gaza as well as refugees and exiles).

171. Jackson, *The Definition of Apartheid*, *supra* note 70, at 849; *see also* Baldwin & Max, *supra* note 3 (violation of "human rights en masse" not justified). This also follows from *Draft articles on responsibility of States for internationally wrongful acts*, [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1, art. 26, according to which the "wrongfulness" of a violation of "a peremptory norm of general international law" can never be precluded. In the same vein, see ICJ Advisory Opinion, *supra* note *, ¶ 254 (prohibition of acquisition of territory by force not be displaced by security concerns).

regime within the meaning of apartheid cannot be justified by normative considerations based on justice or reasonableness as a concept distinguishing between permissible and impermissible discrimination/unequal treatment.[172]

2. Racial Group Dominance?

Taken on its face, the crime of apartheid requires (under both definitions) domination by one "racial group" over another "racial group." While Israeli discriminatory policies and practices in the OPT qualify as "racial discrimination" under the broad definition of Article 1 of the ICERD, especially including discrimination based on national or ethnic origin, and the Committee on the Elimination of Racial Discrimination (CERD) has indeed characterised these practices several times as "racial segregation and apartheid" in violation of Article 3 ICERD,[173] the broad concept of "racial discrimination" must not be confused with the concept of "racial group. In other words, the fact of Palestinian discrimination (especially in the OPT) in violation of the apartheid *prohibition* must not be confused with the necessary "racial group" categorization for both groups/peoples under the *crime* definition

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172. *See* Baldwin & Max, *supra* note 3. For such a justification, however, *see* NGO Monitor (Kern), *supra* note 1, at 35-46, and Kern, *supra* note 3, where Kern argues that "oppression" must be informed by reasonableness and thus discrimination by an occupying power is not arbitrary and not oppressive per se. Yet, apart from being factually flawed, *see supra* note 67 (regarding occupation), this position can ultimately not be based on Judge Tanaka's dissenting opinion in South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. 6, 250, 306-10 (July 18) (dissenting opinion by Tanaka, J.). While he discusses the concept of reasonableness (in terms of justice) as a justification of unequal (not arbitrary) treatment and indeed sees it regarding apartheid "in some matters," *id.* at 305, he explicitly considers discrimination as a consequence of apartheid as always "illegal whether . . . *bona fide* or *mala fide,*" *id.* at 309, and the respective measures as mostly unreasonable, *id.* at 310.

173. *See* CERD, Consideration of Reps. Submitted by State Parties Under Article 9 of the Convention: Concluding Observations, ¶ 24, U.N. Doc. CERD/C/ISR/CO/14-16 (Mar. 9, 2012) (drawing the State party's attention to its 1995 General Recommendation 19 concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid, and urging the State party to take immediate measures to prohibit and eradicate any such policies or practices which severely and disproportionately affect the Palestinian population in the Occupied Palestinian Territory, and which violate the provisions of Article 3 of the Convention); *see also* CERD, *supra* note 123, ¶¶ 22-23 (repeating concerns regarding "segregation" and "hermetic character of the separation" in OPT and urging Israel "to give full effect" to Art. 3 ICERD); Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Rep. of Isr., ¶ 7, U.N. Doc. CCPR/C/ISR/CO/4 (Nov. 21, 2014) (expressing concerns that "the Jewish and non-Jewish population are treated differently in several regards.").

(which under the here relevant Article 7(2)(h) of the ICCS does not even contain the word "discrimination").[174]

Thus, there is no way around defining the concepts of "racial group" or "race" in order to be able to decide whether the "racial discrimination" (within the meaning of Article 1 (1) of the ICERD) in the OPT amounts to a domination of the Israeli/Jewish "racial group" over the Palestinian "racial group" (within the meaning of Article 7(2)(h) of the ICCS). In light of the legality principle, especially its *lex stricta* component, this decision cannot be taken lightly. In particular, one cannot simply broaden the concept of "racial group" by reading "racial discrimination"—or "racism" for that matter[175]—into it or even replace it by the latter invoking a broad human rights interpretation.[176]

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174. Quigley, *supra* note 4, at 226 ("domination by one racial group over another"); LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 155; *see also* Caroline Lingaas, *Jewish Israeli and Palestinians as Distinct 'Racial Groups' Within the Meaning of the Crime of Apartheid?*, EJIL: TALK! (Jul. 6, 2021), https://www.ejiltalk.org/jewish-israeli-and-palestinians-as-distinct-racial-groups-within-the-meaning-of-the-crime-of-apartheid [https://perma.cc/V8F8-ZSQZ]; NGO Monitor (Kern), *supra* note 1, at 48. *But see* van den Herik & Braga da Silva, *supra* note 23, at mn. 269 (conflating the two concepts).

175. *See* Isr. Penal Code art. 144A (defining 'racism' broadly as in art. 1 ICERD, as "persecution, humiliation, degradation, a display of enmity, hostility or violence, or causing violence against a public or parts of the population, all because of their color, racial affiliation or national ethnic origin.").

176. *Compare* Carola Lingaas, *The Elephant in the Room: The Uneasy Task of Defining 'Racial' in International Criminal Law,* 15 INT'L. CRIM. L. REV. 485, 515 (2015) [hereinafter Lingaas, *The Elephant in the Room*] (opposing this kind of human rights expansion of the actus reus "racial group" of the apartheid by arguing that the "human rights definition should be applied to international criminal law only with cautiousness"), *and* LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 160, 164, 175, 185, *and* Asseburg, *supra* note 4, at 1, 3 ("questionable to interpret a criminal law provision by reverting to a concept of human rights law"), *with* HSRC, *supra* note 4, at 153, *and* Dugard & Reynolds, *supra* note 1, at 886-7 (both inferring a "broad" reading of "racial" from the broad "racial discrimination" definition of art. 1 ICERD, especially "including descent or national or ethnic origin," and thus arguing that a "racial group" for the purpose of apartheid "need not be limited to a narrow construction" of race). *See also* Hall, *supra* note 23, at 124-25 (arguing that the ICCS drafters did not intend to introduce a more restrictive definition); RUSSELL TRIBUNAL, *supra* note 3, ¶¶ 5.11-2, 5.20 (describing the meaning of racial group "as a broad and practical one" in line with ICERD); Lynk Report Aug. 2022, *supra* note 2, ¶ 32; IHRC & Addameer, *supra* note 4, at 7 (defining "race" and "racial group" broadly with reference to art. 1 ICERD, and referring to "racism" as defined in the Israeli Penal Code); ESCWA, *supra* note 2, at 3, 22; *but see* ESCWA, *supra* note 2, at 22 (discussing descendancy as a feature of "racial groups"). *See also* WERLE & JESSBERGER, *supra* note 73, at mn. 1135 (interpreting "racial group" broadly pursuant to "racial discrimination"); Werle & Jessberger, supra note 92, at mn. 131; van Den Herik & Braga da Silva, *supra* note 23, at 269 (expanding the "original meaning" of "race" without defining it by "reference to the broader discriminatory grounds of persecution" including "other types of discriminatory domination" by "arguments of logic and consistency"); Kern, *supra* note 3 (accepting the ICERD definition "for the purpose of establishing Jews and Palestinians as 'racial groups"' and accepting that "Jews and Palestinians" can be seen "as

One way to perceive Palestinians as a distinct racial group is to follow the so-called subjective approach, which, in contrast to the objective one, does not focus on objective criteria when defining a racial group, but on the self-identification/perception and/or the identification/perception by others (including the perpetrators) of the respective group.[177] However, this approach is flawed for several reasons. First, the relevant case law, apart from being developed in another context (in relation to the groups protected by the crime of genocide), does not uniformly advocate the subjective approach but,[178] at best,[179] opts for a combined (subjective-context specific) approach.[180] Second and more importantly, the subjective approach is far from clear and those in favor of it[181] do not sufficiently clarify it either. Perhaps the best example is Lingaas as the author who most

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groups based on 'descent' or 'national or ethnic origin'"); Jackson, *The Definition of Apartheid*, *supra* note 70, at 850-51(arguing that "[t]here is no reason to think" that the ICERD definition "does not apply to the idea of 'racial' groups' under the apartheid prohibition" and that "it would be strange to think" that certain practices may constitute "*racial* discrimination" but not entail the "domination of a *racial* group," and recognizing that "there may retain the problem of defining 'race' itself") (emphasis in original).

177. *Cf.* Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 70 (Int'l. Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) (declaring it is "more appropriate" to evaluate a group's status from the perspective of those persons "who wish to single that group out from the rest of the community," that is, from the perspective of the alleged perpetrators, rather than referring to more objective criteria); *see also* Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶ 557 (Int'l. Crim. Trib. for the Former Yugoslavia Apr. 19 2004) ("using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime"). *But see* Prosecutor v. Kayishema, Case No. ICTR 95-1-T, Judgment, ¶ 98 (May 21, 1999) (distinguishing "self-identification" from "identification by others"); Comm. on the Elimination of Racial Discrimination, General Recommendation VIII: Identification with a Particular Racial or Ethnic Group, U.N. Doc. A/45/18 (Aug. 22, 1990) (promoting "self-identification by the individual concerned").

178. Lingaas, *The Elephant in the Room*, *supra* note 176, at 499 ("ad hoc . . . tribunals did in most cases not rely purely on the subjective approach, but demanded certain objective elements as well"); *id.* at 505 (noting a "lack of coherence in the ICTR judgments); *id.* at 509 ("favour a subjective approach . . . with consideration of certain objective elements"); *id.* at 510 (noting that there is "no dominant approach"); *see also* LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 103, 137-41. *See generally* AMBOS, *supra* note 91, at 6-8.

179. The first ICTR genocide conviction in *Akayesu* even advocated an (questionable) objective approach relying on a "conventional definition of racial group . . . based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors." (Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 514 (Sept. 2, 1998).

180. For an early decision, see Prosecutor v. Rutaganda, Case No. ICTR- 96-3-T, Judgment, Trial Chamber I, ¶¶ 56-58, (Dec. 6, 1999) (suggesting that a subjective definition alone is not enough, but instead one that is context-specific and case by case).

181. Lingaas, *The Elephant in the Room*, *supra* note 176, at 485, 490-1, 493, 515-6; LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 137, 141, 235; Jackson, *Expert Opinion*, *supra* note 60, ¶ 19; Jackson, *The Definition of Apartheid*, *supra* note 70, at 851.

profoundly dealt with the issue.[182] While she correctly dismisses a (purely) subjective approach as too uncertain,[183] she also rejects a "combination of a subjective approach . . . with objective elements" since the potential expansion "is not necessarily narrowed by the requirement of a certain degree of objectivity"[184] and ultimately opts for a "double subjective approach, allowing for either self-perception, the perpetrator's perception or a combination of both."[185] This additional ("double") complexity does not become much clearer if one looks at the Lingaas quote in context: "It is . . . suggested that race should be interpreted to include the perception and/or self-perception—the so-called double subjective approach, allowing for either self-perception, the perpetrator's perception or a combination of both—for reasons of perceived racial or ethnical differences."[186] While Lingaas sympathizes with the case law's approach to objectivize the subjective approach by context-specific considerations on a case-by-case basis,[187] this objectivization does not seem to inform her "double subjective approach" for it focuses exclusively on perception, either in the alternative (self-perception *or* perpetrator's perception) or in combination (self-perception *and* perpetrator's perception). Also, Lingaas remains on an abstract level and does not apply her definition to a concrete situation.

182. First in two papers (Lingaas, *The Crime Against Humanity, supra* note 22 and *The Elephant in the Room, supra* note 176), which formed the basis of her later monograph (LINGAAS, THE CONCEPT OF RACE, *supra* note 4).

183. Lingaas, *The Elephant in the Room, supra* note 176, at 512-13 ("[A] virtually unlimited number of protected groups could exist . . . thereby risking an expansion of the definition of a racial group to include any kind of discriminatory clause"). *But see* LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 137; *id.* at 4 ("subjective definition"); *id.* at 235 ("purely subjective").

184. Lingaas, *The Elephant in the Room, supra* note 176, at 513.

185. Lingaas, *The Elephant in the Room, supra* note 176, at 516; *see also* LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 139.

186. Lingaas, *The Elephant in the Room, supra* note 176, at 516.

187. *Cf.* Lingaas, *The Elephant in the Room, supra* note 176 at 514 (taking into account the concrete "political, cultural and social setting" as "step into the right direction").

In another paper analyzing more concretely the apartheid crime,[188] Lingaas more explicitly,[189] as in her later monograph,[190] complements the subjective approach with the socio-anthropological understanding of race as "differentness" (or "otherness") and ultimately a "social construct" with the "perpetrator's perception" as the "main determining element":

> people discriminate because someone is *perceived* as being different. In other words, if a group is *perceived* and treated as a distinct racial group, it would qualify as a racial group in the meaning of the crime of apartheid, despite the lack of any 'objective' differences between the groups to which the victim and the perpetrator belong to.[191]

On the basis of this "sociological and legal definition of race as being the perception of a group or a person's "differentness," Lingaas then cautiously concludes that "the two groups in the OPT could indeed be characterised as two racial groups."[192] This is, in principle, a more convincing approach since it connects the subjective view with the socio-anthropological understanding of race which is dominant today—as opposed to the traditional biological and genetic, allegedly

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188. Lingaas, *The Crime Against Humanity*, *supra* note 22, at 86; LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 142.

189. The socio-anthropological understanding was also discussed in Lingaas, *The Elephant in the Room supra* note 176, at 486 ("social construct that includes a combination of personal and social attributes"); *id.* at 491, 511 ("social construct") but it was somewhat displaced by her ICL analysis (*id.* at 493). In the same vein HSRC, *supra* note 4, at 17, 153-4, 157; RUSSELL TRIBUNAL *supra* note 3, ¶¶ 5.12, 5.20; Dugard & Reynolds, *supra* note 1, at 885-6 ("socially constructed identities in a given local setting"); *id.* at 889 ("dominant group constructs a subordinate population as racially distinct"); Lynk Report Aug. 2022, *supra* note 2, ¶ 32 (quoting Lingaas); ESCWA, *supra* note 2, at 21-22; YESH DIN, *supra* note 3, at 9; NGO Monitor (Kern), *supra* note 1, at 47, 49 ("constructed upon," "otherness"); Cewngiz Barskanmaz & Nahed Samour, *Diskriminierungsverbot aufgrund der Rasse*, VERFASSUNGSBLOG (June 16, 2020), https://verfassungsblog.de/das-diskriminierungsverbot-aufgrund-der-rasse [https://perma.cc/U7YF-MU36] ("anti-discriminatory law seeks to view the aspects upon which the discrimination is based not as objective trait but rather as social constructs which constitute inequality") (translated by author); Winant, *Race and Race Theory*, 26 ANN. REV. SOCIOLOGY 169, 172 (2000) ("[R]ace can be defined as a concept that signifies and symbolizes sociopolitical conflicts and interests in reference to different types of human bodies . . . selection of . . . particular human features for purposes of racial signification is always and necessarily a social and historical process."). For a similar analytical approach, see Loic Waquant, *Resolving the Trouble with "Race"*, BERLIN J. SOCIOLOGY 2 (2023) ("to grasp 'race' as a denegated modality of ethnicity entailing the denial of honor and the naturalization, eternalization, and homogenization of inequality" which makes the category of "race" into another modality of "group making.").

190. LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 2-3, 6, 32-33, 35, 139, 164, 175-76, 232.

191. Lingaas, *The Crime Against Humanity*, *supra* note 22, at 101-02 (emphasis added); *see also* Jackson, *Expert Opinion*, *supra* note 60, ¶ 19.

192. Lingaas, *The Crime Against Humanity*, *supra* note 22, at 114.

"scientific" definition[193]—as ultimately a social construct based on an ascription by the majority group/society. In short, "race is real because thoughts, perceptions and behaviour are constructed upon it, but it has no biological foundation."[194] Thus, in this sense the definition of race is essentially subjective—a social construction and ascription based on or due to certain perceptions by the majority or dominant (perpetrator) group—but complemented by certain (objective) context-specific factors.

The problem is that an essentially subjective approach does not necessarily assist in answering the question of whether the Israeli (racial) discrimination of the Palestinians in the OPT can be considered a domination of one "racial group" over another within the meaning of the apartheid crime. Absent any clear official Israeli statement in that regard, i.e, a statement which justifies the discrimination in terms of racial superiority and thus demonstrates that Israel sees the Palestinians as a distinct racial group,[195] one has to infer this perception and the ensuing ascription from the objective policies and practices in the OPT.[196] Yet, it is difficult to find such inferences. There are of course those authors that consider Palestinian Arabs and Jewish Israelis as "distinct racial groups" in line with the broad "racial discrimination" concept of Article 1 of the ICERD, including group identity based on descent, ethnic, or national origin.[197] Yet, this amounts to an expansion of the offence

193. As indeed present in *Akayesu*, supra note 179. For a critique of this traditional view, see Lingaas, *The Elephant in the Room*, *supra* note 176, at 487, 488. For a criticism from a scientific perspective, see Alan Goodman, *Race is Real, but It's Not Genetic*, SAPIENS (2020), https://www.sapiens.org/biology/is-race-real [https://perma.cc/B6BH-QZB2] (arguing that there is no biological or genetic basis for racial classifications).

194. Lingaas, *The Elephant in the Room*, *supra* note 176 (further arguing that "there are no pre-defined criteria to determine the race," but is based on the perception of their race, "which commonly involves elements of phenotype"); *see also* LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 35-37 (rather "reflection of social hierarchies . . . than biological or genetic differences"); *id.* at 231.

195. Coming close is the (in)famous statement of Minister Smotrich that "[t]here is no such thing as a Palestinian people," Hadas Gold, *Israeli minister says there's "no such thing as a Palestinian people," inviting US rebuke*, CNN, https://edition.cnn.com/2023/03/21/middleeast/israel-smotrich-palestinians-intl/index.html [https://perma.cc/98FT-47HX](Mar. 21, 2023, 11:16 AM), thus denying Palestinian identity.

196. On other factors (statements, practices) allowing for inferences in this context, see also LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 235-36.

197. HSRC, *supra* note 4, at 17, 157, 271 ("Jewish" and "Palestinian identities . . . socially constructed as groups distinguished by ancestry or descent as well as nationality, ethnicity, and religion" and thus "can be considered 'racial groups' for the purposes of the definition . . . ."); RUSSELL TRIBUNAL, *supra* note 3, ¶ 5.20 ("two distinct, identifiable groups . . . in . . . practical sense"); Dugard & Reynolds, *supra* note 1, at 889-91 (while acknowledging

definition difficult to reconcile with the legality principle already mentioned above. Lingaas, fully aware of the questionable expansion of a criminal law provision by human rights law,[198] more convincingly explains the discrimination of the Palestinians with "their group membership," "based on an understanding of their lesser value and (racial) inferiority"[199] and infers from this discrimination that Palestinians are considered as "the 'others,' a separate, ostensible distinguishable, identity group," arguably even a "racial" group, with such "a racialized perception of the Palestinian group membership" fulfilling the "racial group" element of the apartheid crime.[200] This view finds a radical but less sophisticated expression in the equation of Zionism and racism,[201] considering the Zionist colonization

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that the "formation and evolution of Jewish and Palestinian identities are remarkably complex" arguing that for the purpose of the definition of apartheid under international law "the interpretation of racial groups . . . appears sufficiently broad to understand Jewish Israelis and Palestinian Arabs as distinct groups," namely "constructed as groups distinguished by ancestry or descent as well as ethnicity, nationality, and religion" and thus as such "distinguished from each other in a number of forms within the parameters of racial discrimination under international human rights law."; Jews "as a group based on descent and/or ethnic or national origin," Palestinians as a "group defined primarily by national origin"; "Jews and Palestinians . . . constructed and perceived both by themselves and by external actors as stable and permanent groups distinct from each other, and therefore can be considered as different racial groups for the purposes of the definition of apartheid."); ESCWA, *supra* note 2, at 21 (focusing on identities of Jews and Palestinians "in the local environment" and on "racial groups" by descent); IHRC & Addameer, *supra* note 4, at 7 (referring to Dugard & Reynolds, *supra* note 1, n.26); Lynk Report Aug. 2022, *supra* note 2, ¶ 33 ("Jewish Israelis and Palestinian Arabs may be understood as distinct racial groups distinguished by their nationality, ethnicity, religion, ancestry and descent"; policies/law define "who is a Jew and who is not a Jew (the non-Jewish population being overwhelmingly Palestinian)"); YESH DIN, *supra* note 3, at 26-27 (two racial groups based on nationality). But note that "'race groups' are impossible to define in any stable or universal way," *cf.* Goodman, *supra* note 193.

198. *See* sources cited *supra* note 176.

199. Lingaas, *The Elephant in the Room*, *supra* note 176; generally on "inferiority" as part of racial/racist thinking, *see* LINGAAS, THE CONCEPT OF RACE, *supra* note 4, at 3, 32, 164, 175. As to the "inferiority" argument in our context, see also Dugard & Reynolds, *supra* note 1, at 904 (elevating "Jews to a higher status," "domination of the 'superior' over the 'inferior' group"). For further discussion, particularly as racial superiority/inferiority discussions may relate to Arabs, see MERON MENDEL, ÜBER ISRAEL REDEN 12 (2023).

200. Lingaas, *The Elephant in the Room*, *supra* note 176; *accord*, Waxman, *supra* note 1, at 1. Note that Lingaas' quote from the HRC Res. S-30/1, May 27, 2001 (establishing a Commission of Inquiry regarding the OPT and Israel), ¶ 1, is somewhat taken out of context: the reference to "racial" identity there is general and complemented by "national," "ethnic," and "religious."

201. G.A. Res. 3379 (XXX), Nov. 10, 1975 (recalling the "unholy alliance between South African racism and Zionism" in G.A. Res. 3131, Dec. 14, 1973 and determining that "Zionism is a form of racism and racial discrimination"). *But see* Shabtai Rosenne, *Israel and the UN: Changed Perspectives, 1945-1976*, 1978 AM. JEWISH Y.B. 3, 45; NGO Monitor (Kern), *supra* note 1, at 7-8, 9-10 (claiming that the "Soviet Union played a central role in

project an expression of racial supremacy[202] or even Israel right away as a racial State, based on a racialized Jewish supremacy.[203]

Indeed, the "racial group" element seems to be predicated on the assumption that the Israeli-Palestinian conflict is to be perceived in racial terms. But what would legally follow if one, for the sake of argument, would perceive the discrimination in the OPT not to be based (primarily) on "race" but (also) on "nationality," as a kind of differentiated treatment between Israeli citizens and Palestinian non-citizens?[204] Would then a "racial discrimination" within the broad meaning of Article 1(1) of the ICERD—pursuant to Article 1(2) of the ICERD—and *a fortiori* a racial group domination within the meaning of the apartheid crime be excluded? The short answer is no. The reason is that the existence of discrimination based on "national" origin pursuant to Article 1(1) of the ICERD—or, for that matter, of (permitted) "distinctions" etc. "between citizens and non-citizens" pursuant to Article 1(2) of the ICERD or between nationals of an occupier and local (protected) population pursuant to the law of occupation[205]—does not—irrespective of the distinction between "national origin" (as per Article 1(1) of the ICERD) as a characteristic "inherent at birth" and "nationality" (as per Articles

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disseminating anti-Zionist propaganda as part . . . of the Cold War," joining forces with Arab States and regarding "the international threat of its Jewish minority"). Note that G.A. Res. 3379 was revoked by G.A. Res. 46/86, Dec. 16, 1991 due to "American pressure,"(NGO Monitor (Kern), *supra* note 1 at 10). *But see* Erakat, *supra* note 77.

202. Sayegh, *supra* note 77, at 214 ("Zionist *racial identification* produces three corollaries": "*racial self-segregation, racial exclusiveness* and *racial supremacy*" as "the core of the Zionist ideology"); *id.* at 215 (racial self-segregation "demands '*racial purity and racial exclusiveness*' requiring the eviction of all non-Jews from . . . Palestine"); *id.* at 216 ("[N]owhere . . . has European race-supremacism expressed itself . . . so passionate . . . for thoroughgoing racial exclusiveness and for the physical expulsion of 'native' populations . . ."), 217 ("*racial elimination* as 'motto of the race-supremacist European settler-regime in Palestine'") (emphasis in original); in the same vein, Erakat, *supra* note 77, contra NGO Monitor (Kern), *supra* note 1, at 8-9 (delegitimizing Sayegh's views primarily by pointing to his function as PLO Executive Committee member and UN representative for the Arab States' Delegation).

203. ESCWA, *supra* note 2, at 30 ("essentially racist character" underlined, inter alia, by authorized agencies like the Jewish Agency and the World Zionist Organization and expressed in the distinction between citizenship and nationality, the latter reserved to Jews).

204. *Cf.* Zilbershats, *supra* note 4, at 921 ("[S]eparation . . . not along racial lines but between Israeli citizens and Palestinians"); Michael Koplow, *The Strange Case of Erasing Nationalism From a National Conflict*, ISR. POL'Y F.: KOPLOW COLUMN (Feb. 3, 2022), https://israelpolicyforum.org/2022/02/03/the-strange-case-of-erasing-nationalism-from-a-national-conflict [https://perma.cc/3UMV-JUKL] ("not a racial conflict, but a national conflict"); *id.* ("see a conflict over race is just about the most egregious possible example of missing the forest for the trees"); Kontorovich, *supra* note 3 ("no racial or ethnic distinctions in Israeli law").

205. *See supra* Section I.B.

1(2) and 1(3) of the ICERD) as a "legal attribute" within the discretionary power of the State[206]—exclude as such the possibility of a discrimination pursuant to other (racial) grounds. Nor does it as such exclude racial group domination within the meaning of the apartheid crime. For the discriminatory grounds are neither mutually exclusive nor strictly interdependent, they may well exist in parallel to a different degree at a given time in a specific geographical area. As correctly argued by Jackson, "the mere fact that a distinction is based on nationality does not mean that differences in treatment cannot also entail a regime of oppression and domination by one racial group over another."[207] As a consequence, if a discrimination has racial ingredients, it may entail a racial group domination within the meaning of the apartheid crime. Ultimately, of course, it depends on the circumstances of the concrete case whether the judges would eventually find the necessary *racial* domination.

C. Specific "Intention of Maintaining" the Respective Regime

1. General vs. Special Intent, State vs. Individual Responsibility

The "intention[208] of maintaining" is a specific (special) mental element (*dolus specialis*)—like the genocidal "intent to destroy"—which is required *in addition* to the general mental element under Article 30 of the ICCS.[209] Generally, a potential

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206. Application of International Convention on Elimination of all Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections, 2019 I.C.J. ¶¶ 74, 81 (Apr. 29); *id.* ¶ 105 (finding that "national origin" does not encompass "current nationality"). *Contra* the broader view of the CERD according to which "differential treatment based on citizenship . . . will constitute discrimination if the criteria for such differentiation . . . are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim", *cf.* CERD, *General Recommendation No. 30*, adopted Oct. 1, 2002, no. 4; *see also* CERD, *Admissibility of the Inter-state communication submitted by Qatar against the United Arab Emirates*, Aug. 30, 2019, CERD/C/99/4, ¶¶ 53, 59-60; *id.* ¶ 63 (adding as a further criterion though that such differentiation results "in a denial of fundamental human rights of non-citizens.").

207. Jackson, *Expert Opinion*, *supra* note 60, ¶ 66; *see also* Jackson, *The Definition of Apartheid*, *supra* note 70, at 851-52 ("[D]istinctions on the basis of nationality may, in certain circumstances, coincide with an operative racial classification in a particular context—that is, nationality may track a conception of race in a certain place and time. Regimes of domination imposed in such cases may entail both discrimination on the basis of nationality and discrimination on the basis of race—and, thus apartheid.").

208. Note that "intent" and "intention" are used synonymously here.

209. *See also* Elements of Crimes, *supra* note 89, General Introduction, no. 2, cl. 1 ("As stated in article 30 . . . a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.").

perpetrator ("person") must act with "intent and knowledge" with regard to the "material elements" of the respective crime (Article 30(1) of the ICCS), i.e., the mental element extends to the context and the specific elements of the respective actus reus.[210] For apartheid this is made clear in the Elements of Crimes (to Article 7(1)(j) of the ICCS) which however need to be complemented by Article 30 as the general fall back provision.[211] As to the general context element of crimes against humanity, Element 7 provides that the "perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population;" in addition, s/he must be aware that his/her acts were part of the institutionalized regime being the specific context element of the apartheid crime. As to the underlying inhumane acts, Element 3 requires that the "perpetrator was aware of the factual circumstances that established the character of the act," that is its nature and gravity.[212] What is required, with regard to all elements, is a factual assessment, not a (normative) "value judgment" as to elements involving such a judgment (e.g. "inhumane").[213]

As to the specific intention, Element 5 makes it clear that it must exist on the part of the respective "perpetrator,"[214] i.e., she must possess it herself.[215] This needs to be qualified in two ways. First, the apartheid crime is not in any way limited to a specific group of perpetrators, in particular, not to leaders. Such a limitation would have to be explicitly provided for by the drafters, as was done in the case of the crime of aggression;[216] instead, an ILC proposal[217] along

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210. *Cf.* AMBOS, *supra* note 41, at 363.

211. *Cf.* Elements of Crimes, *supra* note 89, General Introduction, no. 2, cl. 1 ("Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies.").

212. *Compare* G.A. Res. 395(V) *supra* note 29, *with* Elements of Crimes, *supra* note 89, Element 2.

213. Elements of Crimes, *supra* note 89, General Introduction, no. 4 ("With respect to mental elements associated with elements involving value judgement, such as those using the terms 'inhumane' or 'severe', it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.").

214. Element 5 reads, "The perpetrator intended to maintain such regime by that conduct." Elements of Crimes, *supra* note 89.

215. The same applies to the required (general) knowledge regarding the inhumane acts and the context, *cf.* Elements of Crimes, *supra* note 89, Elements 3 and 7.

216. *Cf.* ICCS, *supra* note 24, art. 8 *bis* (1) ("by a person in a position effectively to exercise control over or to direct the political or military action of a State. . . .").

217. Art. 20(1) ILC Draft Code 1991 limited the crime to a "leader or organizer," *supra* note 26; *see also* Clark, *supra* note 38, at 618.

these lines was explicitly rejected.[218] Secondly, the perpetrator's individual intent cannot be set aside by a kind of collective (State) intent with the consequence that it suffices that the respective perpetrator was just a part of the apartheid system pursued by the collective entity (State).[219] For the here relevant apartheid crime under Article 7(2)(h) of the ICCS, this plainly follows from the principle of *individual*—as opposed to collective—criminal responsibility enshrined in Article 25 (2) of the ICCS[220] which requires that the respective individual (perpetrator) needs to possess the intent.[221] For the crime under Article II of the ApConv the same follows from the juxtaposition of prohibition and crime already explained at the beginning of this paper: while the former addresses States (and thus their intent is required, in addition to the objective violation of the prohibition as "serious breach of an international obligation,"[222] to trigger State responsibility), the latter addresses the individual perpetrators (and thus their intent is required, in addition to the commission of the actus reus, to trigger individual criminal responsibility).[223] Given this distinction between prohibition and crime, it is advisable to avoid any confusion between the two, especially with a view to the mental side of the crime.[224]

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218. Hall, *supra* note 23, at mn. 126; van den Herik & Braga da Silva, *supra* note 23, at mns. 270, 1199. For the same result, see Werle & Jessberger, *supra* note 92, at mn. 132.

219. Clark, *supra* note 38, at 604. *Contra L'Apartheid*, *supra* note 53, at 203.

220. In terms of jurisdiction it also follows from the ICC's limited jurisdiction over "natural" persons pursuant to Article 25(1) of the ICCS. *See* ICCS, *supra* note 24, art. 25(1).

221. *See also* ICCS, *supra* note 24, art. 30 (defining the mental element with respect to "a [natural] person").

222. Given that the Apartheid prohibition is a peremptory norm of international law, *supra* note 75, its breach (ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, annex G.A. Res. 56/83, arts. 2(b), 12-15 (Dec. 12, 2001)) would amount to a serious one (*id.*, art. 40) and give rise to collective countermeasures (*id.* arts. 41, 48, 54). *See also* Namibia Advisory Opinion, *supra* note 60; HSRC, *supra* note 4, at 14, 23, 28, 54, 282; Dugard & Reynolds, *supra* note 1, at 912; Clancy, *Neutral Arms Transfer and The Russian Invasion of Ukraine*, 72 INT'L & COMPAR. L.Q. 527, 537 (2023) (collective countermeasures in case of racial discrimination). Generally on the legal consequence of Israel's policy in the OPT, see now ICJ Advisory Opinion, *supra* note *, ¶ 265.

223. But note that under the law of State responsibility the "objective" or "subjective" nature of responsibility "depends on the circumstances, including the content of the primary obligation in question," although a requirement of subjectivity may be read into the element of attribution pursuant to Art. 2(a) ILC Draft articles (*cf. Commentary on Article 2*, [2001] 2 Y.B. Int'l L. Comm'n 34, ¶ 3, U.N. Doc. A/56/10.

224. Somewhat unclear in this regard is Jackson, *The Definition of Apartheid*, *supra* note 70, at 848, in that he does not clearly distinguish between State and individual responsibility, *id.*, and is apparently referring to the former by a "State's goal" and "agents of the State" whose acts may be "attributable" to the State. *Id.*

2. Meaning vs. Proof

Another important distinction to be made in this context is the one between the meaning of "specific intent/intention" and the ways to prove it.[225] As to the meaning, it follows from doctrine and case law, developed with regard to the specific genocidal intent to destroy, that such an intent (notwithstanding the ambiguity of the intent concept in general)[226] expresses the volitional element in its most intensive form and is purpose-based.[227] In addition, this intent goes—in the sense of an ulterior or surplus of intent—beyond the objective elements of the offence (*actus reus*). That is, it amounts to an extended mental element representing the perpetrator's transcending internal tendency (*überschiessende Innentendenz*).[228] Thus, more concretely speaking and applied to apartheid, the perpetrator must act with the specific purpose, desire, goal, or wish to maintain the respective regime[229]—notwithstanding other purposes pursued by him/her.[230] And this purpose may go well beyond his/her actual acts. In other words, the inhumane acts objectively carried out by the perpetrator, while effectively contributing to the maintenance of the respective regime, may subjectively, in the perpetrator's mind, not have been undertaken with this purpose, thus falling short of the specific apartheid intent. The concept of the "transcending internal tendency" provides the theoretical basis for situating the specific intent within the *structure* of the crime: Strictly speaking, the (inhumane) act/s is/are connected with a result, i.e., maintaining the respective regime. This

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225. *See* Jackson, *The Definition of Apartheid*, *supra* note 70, at 847. Regarding Art. II ApConv, see also HSRC, *supra* note 4, at 166 ("not concerned with any potential ultimate goals of a policy of domination and oppression. Rather . . . concerned with inhuman acts committed for the purpose of establishing or maintaining a system of domination and oppression by one racial group over another").

226. While its core meaning is volitional (desire, purpose etc.), it is either not defined or with "wide language going beyond the ordinary meaning of the word" (*cf.* G. WILLIAMS & D. BAKER, TREATISE OF CRIMINAL LAW ¶ 3.10 (5th ed 2021)); *see also* AMBOS, *supra* note 41, at 363-64 with references (encompassing both a volitional and a cognitive element).

227. *Cf.* with a summary of case law and scholarship AMBOS, *supra* note 41, at 396-98; AMBOS *supra* note 91, at 24; *accord* Jackson, *The Definition of Apartheid*, *supra* note 70, at 848.

228. AMBOS, *supra* note 41, at 396; AMBOS, *supra* note 91, at 21.

229. The wording of the crime leaves no room for the additional specific intent "to bring about discriminatory consequences," as Bultz, *supra* note 1, at 230, advocates, although a perpetrator may arguably possess a general discriminatory intent given that an implicit element of the apartheid crime is its discriminatory character. At any rate, to require a specific discriminatory intent would make the delimitation from persecution more difficult since this crime requires precisely this kind of intent, *cf.* AMBOS, *supra* note 91, at 124-25.

230. *See* Jackson, *The Definition of Apartheid*, *supra* note 70, at 848.

result does not have to be effectively achieved and thus it does not form part of the *actus reus*; yet, the result must be intended (desired, wished etc.) and this (specific) intent forms part of the *mens rea*.[231]

The fact that such a specific intent is difficult to prove[232] is by no means an unintended consequence but it is the very purpose, for the drafters wanted to establish a high threshold, not least with regard to excluding white supremacist groups from criminal responsibility.[233] One cannot get around this high threshold by way of an expansive interpretation to the detriment of the accused, for example by replacing the specific with a collective intent requirement as already mentioned above or by a cognitive reformulation as to low-level perpetrators as advocated by some, including this author, with regard to the genocidal intent to destroy.[234] A similar broadening of the specific apartheid intent does not seem to be possible if only for the fact that this intent, unlike the one of genocide,[235] does not allow for a broader reading going beyond purpose. Apart from that, the knowledge-based approach regarding genocide has never left the ivory tower of academic writing and has in fact been virtually ignored by judicial practice. Lastly, apartheid as a crime needs to be interpreted strictly (*lex stricta*) and in case of doubt in favor of the accused (*lex mitior*) in line with general criminal law principles.[236] This leaves the prosecution with the difficult task of proving the specific apartheid intent of any

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231. CARL-FRIEDRICH STUCKENBERG, VORSTUDIEN ZU VORSATZ UND IRRTUM IM VÖLKERSTRAFRECHT 266 (2007) ("Die überschießende Absicht kann gerichtet sein auf eine weitere (Basis-)Handlung (parallel zum unbeendeten Versuch: unvollkommen zweiaktiges Delikt) oder auf eine weitere Folge der ausgeführten Handlung (parallel zum beendeten Versuch: erfolgskupiertes Delikt)"); *see also* Ingeborg Puppe, *Vorsatz und überschießende Innentendenzen*, 77 JURISTEN ZEITUNG 454–58 (2022).

232. Clark, *supra* note 38, at 604; *L'Apartheid*, *supra* note 53, at 203; also admitted by Reynolds, *supra* note 1, at 130 ("more difficult to prove").

233. *Cf.* McCormack, *supra* note 38, at 199-200 (especially referring to the US delegation's concerns). *Contra* Hall, *supra* note 2323, at mn. 126; van den Herik & Braga da Silva, *supra* note 23, at mn. 270.

234. *Cf.* AMBOS, *supra* note 91, at 22, 25, 27 (discussing the proposals by other authors and proposing, on the basis of a combination of the structure- and knowledge-based approaches to distinguish between low-level and mid-/high-level perpetrators and allowing for the former a purely cognitive threshold of knowing that they are a part of a genocidal campaign).

235. *See* Alexander Greenawalt, *Rethinking Genocidal Intent*, 99 COLUM. L. REV. 2259, 2279 (1999) (arguing on the basis of a historical and literal interpretation that the intent concept in the Genocide Convention and in national (criminal) law allows for "multiple interpretations").

236. *Cf.* AMBOS, *supra* note 41, at 146 (discussing the legality principle of Art. 22-24 ICCS); *L'Apartheid*, *supra* note 53, at 203 ("[I]nterprété strictement en faveur de l'accusé . . ."); *see also* Clark, *supra* note 38, at 604 ("construed favorably to the accused").

perpetrator, be it a low-level soldier or a politician belonging to the leadership level. Clearly, proving intent is more difficult the lower the level to which the perpetrator belongs and the more remote s/he is from the policy/leadership level designing the respective apartheid regime. For this reason, prosecutions of specific intent crimes, including apartheid, should target persons belonging to the leadership level and not just low-level perpetrators. Yet, this is a policy question not affecting the normative structure of the crime, especially the specific intent requirement.[237]

3. Inference and Reasonable Doubts

Absent direct evidence, e.g. a clear incriminatory statement by the accused, intent, be it general or specific, needs to be inferred—in line with the Roman law maxim *dolus ex re* ("intent out of a thing")—from circumstantial (indirect) evidence,[238] i.e. certain (contextual) facts, circumstances or events which may inform about the *factum probandum* (which in our context is the specific apartheid intent).[239] An "inference" is the process of making deductions and may result in a safe conclusion amounting to proof after the evaluation of all possible inferences.[240] This presupposes of course that the relevant circumstantial evidence is itself established beyond

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237. Against this background it may give rise to confusion to speak of "*de facto* leadership crime" as van den Herik & Braga da Silva, *supra* note 2323, at mn. 270 do who apparently misread Dugard in *L'Apartheid*, *supra* note 53, at 203 for he does not advocate a leadership interpretation of the crime (see *supra* note 236) but only refers for practical reasons indicated in the main text to the possible prosecution of leaders ("sauf dans le case de poursuites contre les *leaders* politiques . . ."). In a similar vein stressing the (prosecutorial) focus on leaders, see WERLE & JESSBERGER, *supra* note 73, at mn. 1134; STAHN, *supra* note 38, at 69.

238. Circumstantial evidence, being a form of indirect evidence, does not, in contrast to direct evidence, provide direct knowledge of a fact but requires inferences or presumptions, cf. PAUL ROBERTS, ROBERTS AND ZUCKERMAN'S CRIMINAL EVIDENCE 119 (3d ed. 2022); Tatiana Renno, *Circumstantial Evidence*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW ¶¶ 1-2 (Hélène Ruiz Fabri ed., 2021); *id.* ¶¶ 24-27 (discussing the practical importance in international criminal tribunals); *see also* KAI AMBOS, 3 TREATISE ON INTERNATIONAL CRIMINAL LAW: INTERNATIONAL CRIMINAL PROCEDURE 509 (2016).

239. Merabishvili v. Georgia, App. No. 72508/13, ¶ 317 (Nov. 28, 2017), https://hudoc.echr.coe.int/fre?i=001-178753 [https://perma.cc/DS96-2DTG] ("information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts"); *see also* Elements of Crimes, *supra* note 89, General Introduction, no. 3 ("Existence of intent and knowledge can be inferred from relevant facts and circumstances.").

240. *Cf.* TERENCE ANDERSON, DAVID SCHUM & WILLIAM TWINING, ANALYSIS OF EVIDENCE 94 (2005) ("[Proof is] the conclusion to be reached after the inferences have been evaluated.").

any reasonable doubt.[241] In the analogous case of the specific genocidal intent to destroy, the intent has been inferred from "a number of facts and circumstances," including "the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.'[242]" In addition, a context of dehumanization and stigmatization of a targeted group (its othering) accompanied by statements of the perpetrators may imply the existence of the requisite intent.[243]

In the case of apartheid, the specific intent may be inferred from the totality of inhumane acts and the specific context element, i.e., the "institutionalised regime of systematic oppression and domination" analyzed above. In fact, the more elaborate the respective regime and the more widespread and systematic the respective inhumane acts, the easier or more plausible is it to infer the knowledge of those involved in maintaining this regime. Doctrinally, this goes back to group liability and liability within groups and is accepted in most jurisdictions: wider goals of the group and the group's structure serve as an indication for individual conduct and intent.[244] In other words, an accused involved in such a system can hardly deny knowledge if the existing regime context and the inhumane acts imperatively imply it. Indeed, such an accused would at the very least to be considered willfully blind and this would suffice to constitute or presume his/her knowledge (or some lesser degree of knowledge) as a kind of blameworthy ignorance.[245] To be

241. AMBOS, *supra* note 238, at 510.

242. Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeal Judgement, ¶ 47 (Int'l. Crim. Trib. for the Former Yugoslavia July 5, 2001). For more recent case law, see AMBOS, *supra* note 91, at 25. On the use of circumstantial evidence in judicial practice, see generally AMBOS, *supra* note 238, at 509-10.

243. *Cf.* Hum. Rts. Comm'n, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, ¶ 1419, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018) [hereinafter HRC Myanmar Report] (identifying five factors relevant to finding genocidal intent); *see also* Jackson, *The Definition of Apartheid*, *supra* note 70, at 849.

244. See, for instance, *Claiborne Hardware*, 458 U.S. at 920 (albeit a tort case) ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims"); Bundesgerichtshof [BGH][Federal Court of Justice] Dec. 3, 2009, Neue Juristische Wochenschrift [NJW] 1979, 1983 (2010)(Ger.) (a collective, superior intent of an association exists if its members pursue a common objective going beyond the individual acts and if they act in a coordinated way); *see also* LUTZ EIDAM, DER ORGANISATIONSGEDANKE IM STRAFRECHT 300 (2015) (regarding collective intention); *id.* at 319 (regarding participatory attribution).

245. *Cf.* Williams & Baker, *supra* note 227, ¶ 5.16 (noting that if one "deliberately" shuts her eyes and does not want to know, she is "taken to know"); ALEXANDER SARCH,

clear, there is a difference between inferring knowledge from circumstances and constructing knowledge through ignorance.[246] In turn, knowledge thus inferred is the basis to assume a purpose-based conduct of someone who is known for certain to be a part of an overall apartheid regime but contributes to its maintenance notwithstanding and thus willingly accepts this result, i.e., approves of it at least in the sense of general indifference or reconciles himself with it.[247] This (tacit) acceptance or approval of the harmful (criminal) result—the contribution to the maintenance of the apartheid regime—is no longer just cognitive but has a clear volitional turn, i.e. it may push the original cognitive to a volitional, purpose-based intent amounting to the specific apartheid intent.

While developing this further and delving into the depths of the complex concept of intent[248] would exceed the scope of this paper, it should have become clear that the distinction between the cognitive and volitional side of intent is not that clear-cut. By contrast, knowledge construed through willful ignorance cannot form the basis to assume a purpose-based conduct, since this basis would rather be fault or blame than knowledge. After all, given that the "transcending internal tendency" mentioned above constitutes the basic structural feature of the apartheid crime, it would stand against the drafters' intention if the basis for intending the not necessarily achieved result were to be construed as merely blissful ignorance.

Irrespective of the facts and circumstances allowing for an inference of (specific) intent, the problem arises what of evidentiary standard (threshold) applies to the inference. In the Karadžić proceedings before the ICTY, the Trial Chamber inferred the

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CRIMINALLY IGNORANT: WHY THE LAW PRETENDS WE KNOW WHAT WE DON'T 12 (2019) ("[R]equisite knowledge . . . present if the defendant was merely willfully ignorant of the relevant proposition . . . . The doctrine can apply in any factual setting: from not looking to see if the suitcase one has been asked to carry contains drugs to turning a blind eye to the possibility that one's employees are engaged in money laundering. This doctrine allows courts to treat such defendants as if they had the knowledge required for conviction."). For a comparative (Spanish-Anglo-American) study on the concept of willful blindness, see RAMON RAGUÉS I VALLÈS, LA IGNORANCIA DELIBERADA EN DERECHO PENAL (2007). For a discussion with regard to command responsibility, see AMBOS, *supra* note 41, at 313, 318-19

246. *See* Williams & Baker, *supra* note 226, ¶¶ 5.14-15 (Arguing that inferring knowledge means "the defendant knew it because an ordinary person would have known it", and that constituting knowledge through willful ignorance means the defendant "ought to have known it because a reasonable person would have known it").

247. *See also* United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1121 (D.C. Cir. 2009) (holding a corporation's collective knowledge was sufficient to allow a jury to infer its specific intent to defraud). On this volitional element of *dolus eventualis,* compare AMBOS, *supra* note 41, at 376, 376 n.118.

248. For a comparative and ICL perspective, see AMBOS, *supra* note 41, at 363-65.

accused's genocidal intent (with regard to the events in Srebrenica) on the basis of a reasonableness test without however making it unambiguously clear whether it came to this conclusion since this was the "only reasonable" inference or merely *a* reasonable one in line with the beyond reasonable doubt standard.[249] The only reasonable inference test qualifies the inferential process of making deductions and narrows the beyond reasonable doubt standard in focusing on the "*only* reasonable" inference. It thus entails a higher threshold than the ordinary beyond reasonable doubt standard since under this standard it suffices that the trial judge is convinced that the requisite specific intent follows from the totality of evidence, including any relevant and reasonable inference.[250] At any rate, more recent practice has confirmed the "only reasonable inference" test,[251] so that the specific apartheid intent can, absent direct evidence, only be inferred from the context and external conduct if it appears as the only reasonable inference. However, a large quantity of circumstantial evidence in connection with its "holistic assessment"[252] may make this test more flexible.[253] After all, there is

249. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Trial Judgement, ¶ 5814 (Int'l Crim. Trib for the Former Yugoslavia March 24,2016) ("beyond reasonable doubt"); *id.* ¶ 5830 ("only reasonable inference available").

250. In favor of the lower beyond reasonable doubt test, see AMBOS, *supra* note 238, at 510.

251. KOSOVO SPECIALIST CHAMBERS (KSC) RULES OF PROCEDURE & EVIDENCE (RPE) 140 (3) (explicitly providing that the beyond reasonable doubt standard regarding circumstantial evidence "is only satisfied if the inference from that evidence is the only reasonable one that could be drawn from the evidence presented.") *See* Prosecutor v. Gucati, KSC-BC-2020-07, Trial Judgment, ¶ 37 (May 18, 2022); Prosecutor v. Mustafa, KSC-BC-2020-05, Trial Judgment, ¶ 29 (Dec. 16, 2022). For examples of KSC case law citing Rule 140(3), see generally, Prosecutor v. Bemba, ICC-01/05-01/13-2275-Red, Judgment on Appeal, ¶ 868 (Mar. 8, 2018) (stressing that "merely *a* reasonable conclusion" does not suffice); Prosecutor v. Bemba, ICC-01/05-01/08-3343, Trial Judgment, ¶ 192 (Mar. 21, 2016) (regarding "proof of an accused's state of mind"); Prosecutor v. Bemba, ICC-01/05-01/08-3636-Anx1-Red, Concurring Dissenting Opinions of Judges Mmasenono and Hofmanski in Judgment on Appeal, ¶¶ 268-69 (June 8, 2016); Prosecutor v. Merhi, STL-11-01/A-2/AC, Judgment on Appeal, ¶¶ 48, 55, 95 (March 10, 2022) (only reasonable inference or conclusion from all evidence). *See also* Prosecutor v. Ntaganda, ICC-01/04-02/06-2666-Red, Judgment on Appeal, ¶ 939 (Mar. 30, 2021) (implicitly endorsing the only reasonable inference test by arguing that concluding co-perpetration from certain findings by inference was "reasonable" since Defense did "not set out any alternative conclusion"); HRC Myanmar Report, *supra* note 243, ¶¶ 1434-38. (excluding other reasonable inferences); ICJ Advisory Opinion, *supra* note *, Separate Opinion Judge Nolte, ¶¶ 12-13 (therefore rejecting the apartheid claim). But note that the only reasonable inference test is not applicable if the accused makes an inference based on circumstantial evidence since she does not bear the burden of proof *Cf.* Prosecutor v. Zigiranyirazo, Case No. ICTR 01-73-A, Judgment on Appeal, ¶ 49 (Nov. 16, 2009).

252. *See, e.g.,* Prosecutor v. Lubanga, ICC-01/04-01/06-3121, Judgment on Appeal, ¶ 22 (Dec. 1, 2014) ("holistic evaluation and weighing of *all the evidence taken together* in relation to the fact at issue"). *See also* AMBOS, *supra* note 238, at 452 n.55

253. *Cf.* Renno, *supra* note 238, ¶ 40.

still judicial discretion as to which of the possible reasonable inferences is the "only reasonable one."

4. Existence of Specific Apartheid Intention with regard to the OPT?

What now follows from these fairly abstract considerations for the existence of the specific apartheid intent with regard to Israel's policy in the OPT? While it has been affirmed in a general way with regard to Israel's collective intent,[254] a criminal law analysis is much

254. *See, e.g.,* HSRC, *supra* note, at 22, ("Israel exercises control in the OPT with the purpose of . . . ."); *id.* at 271-72, 277. Dugard & Reynolds, *supra* note 1, at 911 ("only inference that can be drawn from the institutionalized and systematic regime of inhumane acts and discrimination . . . is that *Israel intends* to secure the domination . . . . That this is the *purpose* of Israel's occupation . . . . evidence of an *intention* to maintain the domination of Jews over Palestinians.") (emphasis added); Lynk Report Aug. 2022, *supra* note 2, ¶ 54 ("[T]his system of alien rule has been established with the intent to maintain the domination of one racial-national-ethnic group over another"). Also referring to concrete statements by politicians, see sources cited *infra* note 257; ESCWA, *supra* note 2, at 2 (Israel's "body of laws" as evidence of purpose to maintain regime); *id.* at 5 ("regime developed for the purpose of ensuring . . . domination . . ."); YESH DIN, *supra* note 3, at 31-32 (intention inferred from Israel's policy and conduct, especially settlement project, amounting to a creeping annexation: "evidence . . . of Israel's intent . . . powerful to the point of being unequivocal, manifest and conclusive"); *id.* at 35 ("manifest, deliberate policy of dispossession, settlement and creeping annexation . . . gives away its intent to cement its control and perpetuate the suspension of sovereignty and Palestinians' rights"); AMNESTY INT'L, *supra* note 3, at 218 (Israel's intention "can be inferred from the prolonged nature of the cruel and discriminatory treatment, which indicates the non-accidental nature of the oppression and domination perpetrated against Palestinians . . ."); IHRC & Addameer, *supra* note 4, at 20-21 ("[T]otality of Israeli actions and policies . . . manifests an intent to establish and maintain Jewish Israeli domination and suppression of Palestinians . . . Israel's actions are done with an intent to establish and maintain Jewish Israeli dominance over Palestinians . . ."). *But see* ICJ Advisory Proceedings, *supra* note 2 (twenty out of fifty States have adopted the apartheid claim, yet no European or Western State has adopted it.). *Cf.* Statement by Namira Negm on behalf of the State of Palestine, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion), CR 2024/4, (Feb. 19, 2024), at 80, 82 n.100; Statement by Stemmet on behalf of the State of South Africa, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion), CR 2024/5, at 18-19 (Feb. 20, 2024); Statement by Webb on behalf of the State of Belize, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion),CR 2024/6, at 15-16 (Feb. 20, 2024) (inferring from "scale and institutionalized nature" and "differing effects," but mixing up genocidal and apartheid intention and ignoring the standard of proof); Statement by Dausab on behalf of the State of Namibia, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion), CR 2024/11, at 11-12 (Feb. 23, 2024) (parallel between South African apartheid in Namibia and Palestine); Statement by Wilde on behalf of the League of Arab States, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion), CR 2024/13, at 26, 28 (Feb. 26, 2024) (apartheid as "racial domination"). However, the ICJ Advisory Opinion, *supra* note *, ¶¶ 226-29, left the question open.

more demanding in that it requires specificity with regard to the respective individual perpetrator's intent and this assessment largely depends on the circumstances of the concrete case and the available evidence. Thus, while such an analysis exceeds the natural limits of an academic paper[255] some abstract reflections focusing on the peculiar problems of subjective attribution regarding apartheid may advance the discussion.

While the knowledge-based approach, described above, has been rejected with regard to the specific apartheid intent, it surely makes sense to distinguish between low-level and mid-/- and high-level perpetrators for reasons of the available evidence. Thus, there are statements by Israeli political leaders where these, on the one hand, warn of a possible apartheid system,[256] and, on the other, express their willingness to maintain the existing system of favoring settlers and expanding settlements at the cost of Palestinians. [257] Such statements have become more common and explicit with the current government, often accompanied by historic and religious claims and/or the outright denial of Palestinian self-determination or a Palestinian State.[258] While such statements and the underlying

255. For an example of the correct application of this principle, *see* YESH DIN, *supra* note 3, at 20, 26, which reserves its judgment on individual responsibility given that the "specific liability" of a person "can only be determined individually, according to findings about what the person knew and intended."

256. *Cf.* Mehdi Hasan, *Top Israelis have warned of apartheid, so why the outrage at a UN Report?*, THE INTERCEPT, (Mar. 22, 2017), https://theintercept.com/2017/03/22/top-israelis-have-warned-of-apartheid-so-why-the-outrage-at-a-un-report [https://perma.cc/BLT8-TWYD].

257. *See* Lynk Report Aug. 2022, *supra* note 2, ¶ 46 (quoting Prime Minister Netanyahu stating in 2019 that "[a] Palestinian state will endanger our existence . . . I will not divide Jerusalem, I will not evacuate any community [settlement] and I will make sure we control the territory west of Jordan."); *id.* ¶ 54 ("Israeli political leaders, past and present, have repeatedly stated that they intend to retain control over all of the occupied territory in order to enlarge the blocs of land for present and future Jewish settlement while confining the Palestinians to barricaded population reserves."). In the same year Netanyahu said that "Israel is not a state of all its citizens" but rather "the nation-state of the Jewish people and only them." Benjamin Netanyahu, @b.netanyahu, Instagram post, (Mar. 10, 2019), instagram.com/p/Bu0U2TABMNI (last visited June 9, 2023). More recently he rebuked the UNSC's rejection of settlements arguing that it "denies the rights of Jews to live in our historic homeland," Tuqa Khalid, *Netanyahu blasts UN settlements censure as denying Jews' 'historic' rights, slams US*, AL ARABIYA NEWS, https://english.alarabiya.net/News/middle-east/2023/02/21/Netanyahu-blasts-UN-settlements-censure-as-denying-Jews-historic-rights-slams-US [https://perma.cc/ELP3-UME4] (Feb. 21, 2023, 1:14 AM). For sources stressing the (religious) identity discourse, see also ESCWA, *supra* note 2, at 24-25.

258. In the context of the recent announcement of further settlements, see sources cited *supra* note 159; *cf.* REUTERS, *supra* note 159 (quoting mayor of the Gush Etzion Regional Council and Chairman of the Yesha Council Shlomo Ne'eman as justifying the expansion of the settlements by using Israel's biblical names "Judea and Samaria" for the West Bank);

policies, as e.g. expressed in the current coalition agreements,[259] cannot without more be put on an equal footing with an explicit apartheid intent, they may be taken as indicating such an intent. [260] Also, the above mentioned 2018 Nation-State Law, albeit not directly applicable in the OPT, may be read as an expression of legislative intent[261] with regard to the constitutionalization of the existing discrimination akin to an apartheid regime.[262] Yet, none of these or similar statements (unsurprisingly) refer explicitly to "apartheid" or even come close to admitting that apartheid in legal terms exists. Rather, the official position may fairly be summarized as dismissing

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Letter from Yossi Fuchs, Cabinet Secretary, Israel Office of the Prime Minister, to Adalah Legal Center for Arab Minority Rights in Israel (June 19, 2023), https://www.adalah.org/uploads/uploads/Response_Cabinet_Secretary_19_June_2023.pdf [https://perma.cc/248L-GS4G] (speaking of "settlements in Judea and Samaria" over which "Israel has a right to impose its sovereignty . . . as . . . cradle of the history of the Jewish people . . . "). For an even more radical view, see Smotrich, *supra* note 159 (advocating a "rightwing, Zionist, faith-based approach" amounting to a de facto one state solution since "there is no room in the Land of Israel for two conflicting national movements", stressing the Jews' "exclusive belonging to the Land of Israel" and invoking an orthodox belief in the "State of Israel . . . of our unfolding redemption", the "destiny and mission of the Jewish People for the whole world" and calling for a "victory by settlement", denying, however, that this amounts to apartheid). See also the Knesset's rejection of Palestinian statehood on July 18, 2024, one day before the issuing of the ICJ's Advisory Opinion. *See* Jacob Magid, *Knesset votes overwhelmingly against Palestinian statehood, days before PM's US trip*, TIMES ISRAEL (July 18, 2024), https://www.timesofisrael.com/knesset-votes-overwhelmingly-against-palestinian-statehood-days-before-pms-us-trip [https://perma.cc/9XH3-YLWA].

259. *See* sources cited *supra* note 15

260. *Cf.* Raday, *supra* note 4, at 65 (while rejecting the apartheid claim, admitting that declarations not allowing a Palestinian State, together with promoting settlements, "indicate an intention to maintain the existing regime"); AMNESTY INT'L, *supra* note 3, at 218 (inferring the intent also "from statements by successive Israeli political leaders of various political parties, who have emphasized the overarching objective of maintaining Israel's identity as a Jewish state and the fact that this is perceived to require preventing Palestinians from full enjoyment of equal rights."); Adalah, *supra* note 156, at 2, 22 (guiding principles of new government "indicate clear criminal intent of the coalition members . . . to commit . . . crime of apartheid . . . .").

261. For a seminal treatment of how collective decision-making, e.g. by parliamentary voting, gives rise to a series of other issues related to the evaluation of the voting of each member of the collective entity with regard to its concrete (causal) effect on the final result/criminal conduct, see FRIEDRICH DENCKER, KAUSALITÄT UND GESAMTTAT 179, 217 (1996). With regard to ICL, see KAI AMBOS, LA PARTE GENERAL DEL DERECHO PENAL INTERNACIONAL 188-89 (2005). From the perspective of conspiracy law, see Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147, 155-57, 194-95 (2007) (relevance in tightly knit, horizontal conspiracies).

262. *See also* Adalah (position paper), *supra* note 156, at 4-6 ("Law declares the intention to discriminate . . . .").

any such claim as frivolous, "extreme" or "exaggerated."[263] In addition, such statements will hardly be available from mid or low-level perpetrators, for example civil servants or simple IDF soldiers, unless they carelessly echo similar views which can be proven, for example, by way of recordings or hearsay evidence. At any rate, such statements may suffice, together with the surrounding circumstances, to infer the specific apartheid intent and such an inference will not be disturbed by alleged security motivations given the distinction between intent and motive.[264] Still, the certainty of the inference may well be challenged, especially in light of the only reasonable inference test.

Given this uncertainty, the above discussed difficult relationship between knowledge and (purpose-based) intent becomes relevant. Arguably, all those involved in Israeli policies and practices in the OPT, be it at the leadership, administrative or operational level, may, in line with the considerations in the last Section (II.C.3), possess knowledge with regard to inhumane apartheid acts committed and with regard to the existing "institutionalised regime of systematic oppression and domination." This regime has not only existed for decades now, but the relevant policies and practices have also been widely documented, not only by international bodies, but also by Israeli domestic sources.[265] Against this background, it is highly implausible and indeed incredible if one of these persons invokes a sort of lack of knowledge defense. If she does so notwithstanding, this knowledge could be either ascribed by proving that an ordinary person would have had

263. *See* HCJ 2150/07 Abu Safiyeh v. Minister of Defense, Judgment, PD ¶ 6 (2009) (Isr.) (concurring opinion by President Beinisch) ("great distance between the security measures taken by the State of Israel in defending against terrorism and the unacceptable practices of the Apartheid policy oblige refraining from any comparison or use of the dire phrase . . . not every instance of wrongful discrimination constitutes Apartheid . . . comparing the prevention of movement . . . to the crime of Apartheid is so extreme and exaggerated that there was no room to raise it at all"), (translation from Hebrew) https://hamoked.org/files/2011/8865_eng.pdf [https://perma.cc/R36R-2BRT]. Smotrich, *supra* note 159, also denies that his approach amounts to apartheid. *See also* Andrew Carey, *Amnesty accuses Israel of apartheid over treatment of Palestinians, prompting angry response*, CNN (Feb. 2, 2022), https://edition.cnn.com/2022/02/01/middleeast/israel-apartheid-amnesty-intl/index.html [https://perma.cc/7SA9-R6G7] (political dismissals involving statements by the Foreign Ministry labeling the report "false and biased" and decrying "double standards" and "modern antisemitism"); NGO Monitor (Aizenberg 2), *supra* note 3, at 3 (rebuttal of the Amnesty International report citing "lies, distortions, omissions, and egregious double standards to construct a fraudulent and libelous narrative of Israeli cruelty.").

264. *See* AMBOS, *supra* note 41, at 365-66 (describing this often ignored distinction, the former referring to the mental side [*mens rea*, guilty mind] of an offence and a consequence of the principle of guilt/culpability, the latter informing about the reason why the agent performed the act).

265. *See* B'TSELEM & KEREM NAVOT, *supra* note 3, at 1.

this knowledge, or by way of the willful blindness doctrine, i.e. proving that she ought to have had this knowledge because a reasonable person would have had it. This so established knowledge may then entail a willful acceptance or approval of the harmful consequences in the sense discussed above which may ultimately amount to a purpose-based (intentional) conduct. Thus, while, in principle, every government official and public employee may incur criminal responsibility,[266] it should have become clear by now that proof of the specific apartheid intent is highly demanding and ultimately depends on the concrete circumstances of each case. This case-specificity goes well beyond the contours of an (abstract) academic paper.

III. CONCLUSION

A detailed analysis of the three elements of the apartheid crime required by Article 7(2)(h) of the ICCS shows that only the first element—"inhumane acts" "similar to those" mentioned in Article 7(1) of the ICCS—can be affirmed in a more or less straightforward way. By contrast, both the second element—existence of an "institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups"—and the third—(specific) "intention of maintaining" the said regime—are riddled with normative-doctrinal and factual-evidentiary issues which make it impossible to reach definitive findings in an academic paper. To be sure, there are certain abstract findings which can be reasonably advanced, some more plausibly than others. Thus, on the basis of the available information, it can plausibly be argued that there is an *institutionalized* (apartheid) regime in the OPT whose main driver is the post 1967 settlement project with all of its side effects, especially in terms of public order and security. It can also plausibly be argued, albeit with less certainty, that there is a "*racial*" domination by the Israeli citizens/settlers over the Palestinian local population in the OPT and that at least some of the respective perpetrators act with the specific apartheid intent of maintaining the said regime. However, especially the considerations on the high specific intent threshold show the limits of abstract academic considerations in the face of concrete charges. Thus, ultimately, it depends on the circumstances of each concrete case whether an apartheid charge against a particular defendant can hold water in an independent court of law.

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266. *Cf.* Yaël Ronen, *Taking the Settlements to the ICC? Substantive Issues*, 111 AM. J. INT'L L. UNBOUND 57, at 60 (2017) (for the settlement crime according to Article 8(2)(b)(viii) ICCS).