TILBURG UNIVERSITY
Law School

Masters Thesis

Neo-Apartheid in the Levant

An International Legal Analysis of Apartheid and Application of the Laws on Apartheid to Israel's Domestic Practices and Legislation

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Fall Semester 2017
Word Count: 19,062

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*www.law.nyu.edu/sites/default/files/upload_documents/Final_GFILC_pdf.pdf

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List of Abbreviations and Names

ANC – African National Congress
CERD – UN Committee on the Elimination of Racial Discrimination
CUP – Cambridge University Press
DLD – Discriminatory Law Database (Adalah)
ESCWA – UN Economic and Social Commission for Western Asia
EJIL – European Journal of International Law
EU – European Union
HCJ – High Court of Justice (Israel)
ICC – International Criminal Court
ICCPR – International Covenant on Civil and Political Rights
ICERD – International Convention for the Elimination of Racial Discrimination
ICESCR – International Covenant on Economic, Social, and Cultural Rights
ICJ – International Court of Justice
ICSPCA – International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)
ILO – International Labor Organization (UN)
Knesset – Israeli Parliament
MK – Member of the Knesset
OPT – Occupied Palestinian Territories
OUP – Oxford University Press
PAC – Pan-African Congress
PM – Prime Minister
PUP – Princeton University Press
Rome Statute – Rome Statute of the International Criminal Court
TRC – Truth and Reconciliation Commission of South Africa
UN – United Nations
UNGA – UN General Assembly
UNSC – UN Security Council
US – United States of America

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An International Legal Analysis of Apartheid and Application of the Laws on Apartheid to Israel's Domestic Practices and Legislation

Abstract: The overarching question of this thesis is 'Is Israel committing apartheid within its official borders against its Palestinian Arab minority?' In Chapter 1 I prove that the geographical scope of apartheid *can* and *must* be applied outside of South Africa. I also seek to show that the Apartheid Convention applies to Israel as the law is custom, and that the racial discrimination requirement fits because the two groups in Israel are indeed racial groups. I also show what I term 'Israeli apartheid' or 'neo-apartheid', is based on the same legal components that define classical apartheid. Neo-apartheid, like classical apartheid, consists of a grand apartheid vision and is based on constitutional control, socially, territorial, and politically segregationist and racially discriminatory laws, and political repression through security laws. In Chapter 2, I embark on a survey of the tenants of classical apartheid in order to begin proving that Israeli apartheid is based on those same legal components. I analyze Israel's status as a 'racial state' that has set up a system of racial domination. Through the 'peace process', which pushes the dominant 'two-state solution', I claim is no different from the South African bantustanization process. I find the creation of an 'independent' state(s) for the Palestinian people as a whole is actually creating a Palestinian 'homeland' inspired and based on the South African model. In Chapter 3, I am able to commit to a thorough and comprehensive review of Israeli practices and policies relevant to the prohibition of apartheid.

Introduction

As former United States (US) President Barack H. Obama's 2013-2014 Israeli-Palestinian Conflict peace initiative was collapsing after Prime Minister (PM) Benjamin Netanyahu halted the fulfillment of a negotiation condition,[1] former US Secretary of State John Kerry stated candidly to senior officials from Japan, Russia, and European Union (EU) member states that the State of Israel would become 'an apartheid state' if it did not achieve a solution to the Israeli-Palestinian Conflict based on the peace process's 'two states for two peoples' foundation.

> A two-state solution will be clearly underscored as the only real alternative. *Because a unitary state winds up either being an apartheid state with second class citizens — or it ends up being a state that destroys the capacity of Israel to be a Jewish state* (emphasis added).[2]

The analogy is not new, although it was unprecedented for a US cabinet member to make it. From states,[3] to UN agencies,[4] to Israeli NGOs,[5] to decorated South African apartheid activists,[6] even to former US presidents,[7] Israel is frequently accused of either currently being an apartheid state or being on the path to achieving the notorious label. When we look at the critiques, it is always based on Israel's system of occupation of the Palestinian West Bank, Gaza Strip, and East Jerusalem (the Occupied Palestinian

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[1] Michael R Gordon and Isabel Kershner, 'Israel Halts Prisoner Release as Talks Hit Impasse' *New York Times* (3 April 2014) <https://nyti.ms/2sepwY8> accessed 12 June 2017.
[2] Josh Rogin 'Exclusive: Kerry Warns Israel Could Become "An Apartheid State"' *Daily Beast* (27 April 2014) <http://thebea.st/1hE3z8V> accessed 12 June 2017.
[3] Mostly Arab states have made this accusation. Egypt stated it in 2010, see Tsvetelia Tsolova, 'Egypt: Time Running Out for Mid-East Two State Plan' *Reuters* (8 December 2010) <https://goo.gl/l0dP1t> accessed 13 June 2017; Syria stated it in the mid-1980's, see 'Letter Dated 1 May 1984 from the Permanent Representative from the Syrian Arab Republic to the United Nations Addressed to the President of the Security Council' (11 May 1984) UN Doc S/16520, para 5.
[4] The report has since been withdrawn (and scrubbed from UN websites) and its author resigned after Israeli pressure, see UN ESCWA, 'Israeli Practices towards the Palestinian People and the Question of Apartheid: Palestine and the Israeli Occupation, Issue No 1' (15 March 2017) UN Doc E/ESCWA/ECRI/2017/1 <www.scribd.com/document/342220531/UN-ESCWA-report-on-Israeli-apartheid> accessed 13 June 2017.
[5] B'Tselem, 'Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank' (August 2004) 3 <www.btselem.org/download/200408_forbidden_roads_eng.pdf> accessed 13 June 2017.
[6] Desmond Tutu, 'Justice Requires Action to Stop Subjugation of Palestinians' *Tampa Bay Times* (30 April 2012) <https://goo.gl/aK0Q7> accessed 13 June 2017.
[7] Jimmy Carter, *Palestine: Peace Not Apartheid* (Simon & Schuster 2007).

Territories, or OPT). What about inside of 'Israel Proper', that is, official Israeli territory outside of the lines delineated by the 1949 Rhodes Armistice agreement (colloquially the 'Green Line' or '1967 Lines')? This is the geographic focus of this thesis.

Purpose and Motivation

There are several reasons. A prominent one is that the scholarly task of examining the occupation in the OPT including Gaza[8] through the lens of apartheid has been exhausted.[9] Looking inside Israel proper to analyze whether apartheid exists is rarely, if ever, a task sought out by researchers in the field. While academic exercises involving legal analyses of apartheid in the OPT help guide this study, researchers tend to ignore what is going on within Israel's official borders, preferring to focus on the dire situation of the millions of Palestinians living under decades of belligerent occupation. Dr. Virginia Tilley, an expert on Israel-Palestine and South African apartheid, in her first report on apartheid in the OPT suggested that a 'broader geographic ambit' should be pursued by future researchers.[10] This is the gap I intend to fill.

Why would Israel's status as an apartheid state matter? The crime of apartheid is a serious one, falling within the category of 'crimes against humanity'. With the State of Palestine now a party to the Rome Statute of the International Criminal Court (ICC) (Rome Statute) and having the ability to submit a request to the United Nations (UN)

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[8] This author's 2016 bachelor honors thesis showed that the blockade of the Gaza Strip is belligerent occupation, see Justin W MacDowell, 'Besiegement and the Conduct of Hostilities in the Gaza Strip: Applying International Humanitarian Law to Israeli Actions in the Hamas-Israel Conflict' (University College Utrecht December 2016) 24-50.

[9] For a few to start with, see Illan Pappe, *Israel and South Africa: The Many Faces of Apartheid* (Zed Books 2015); Virginia Tilley, *Beyond Occupation: Apartheid, Colonialism & International Law in the Occupied Palestinian Territories* (Pluto Press 2012); Mark Marshall, 'Rethinking the Palestine Question: The Apartheid Paradigm [1995] 25(1) J Palest Stud 15-22; Abigail Bakan and Yasmeen Abu-Laban, 'Israel/Palestine, South Africa and the 'One-State Solution': The Case for an Apartheid Analysis' [2010] 37(2-3) Sou Afr J Pol Stud 331-351; Robert Wintermute, 'Israel-Palestine Through the Lens of Racial Discrimination Law: Is the South African Apartheid Analogy Accurate, and What if the European Convention Applied?' [2017] 28(1) King's Law J 89-129; For the opposite perspective that seeks to discredit the application of apartheid to Israel, see Edward Kaplan and Charles Small, 'Anti-Israel Sentiment Predicts Anti-Semitism in Europe' [2006] 50(4) J Conflict Stud 548-561; Alan Dershowitz, The Case Against Israel's Enemies: Exposing Jimmy Carter and Others Who Stand in the Way of Peace (Wiley 2008); Richard Goldstone, 'Israel and the Apartheid Slander' *New York Times* (1 November 2011) <www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html> accessed 11 November 2017; Benjamin Pogrund, 'Israel is a Democracy in Which Arabs Vote – Not an Apartheid State' [2005] 40 Focus <www.zionism-israel.com/ezine/Israel_democracy.htm> accessed 11 November 2017.

[10] Tilley (n 9) 5.

General Assembly (UNGA) for an advisory opinion from the International Court of Justice (ICJ), Israel risks facing a Palestinian demand for international criminal liability and another embarrassing rebuke via an ICJ Advisory Opinion.[11] This is not the only reason. The label of 'apartheid state' is not a label that states covet.

Research Questions and Background

I could not ignore the question of whether Israel was committing similar acts on its Arab citizens as it does on those in the OPT. *Prima facie,* its easy to believe the detractors of the analogy when they bring up facts like that Arab citizens of Israel have the right to vote and the people of color in South Africa did not, but legal groups like Adalah say that over *fifty* discriminatory and segregationist laws within Israel exist.[12] Thus, the primary and central research question in this thesis is, 'Is Israel committing the crime of apartheid as defined by the Apartheid Convention outside of its occupied territory on its Palestinian Arab citizens?'

Other initial sub-questions must be confronted. In Chapter 1, I first ask how apartheid is defined in international law before inquiring whether the scope of the international prohibition of apartheid can be expanded outside of South Africa or if the law was specifically built for the South African situation. In the following chapter I ask what the tenants of South African (or classical) apartheid were and how those are, if at all, found in Israel. I also ask in Chapter 1 if Israel fits the requirements of the definition of apartheid, namely if Israeli Jews and Palestinian Arabs qualify as 'racial groups', and in the following chapter show that Israel fits the context requirement of the definition, due to the state being established as a racial regime similar to that of White South Africa.

In regards to one of the initial sub-questions, would it not be obvious that the international laws on apartheid apply to all states? Apartheid, in international law, can indeed be found in numerous international conventions, national domestic legislation,[13]

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[11] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136.

[12] 'Adalah Discriminatory Law Database (DLD)' Legal Center for Arab Minority Rights in Israel (25 September 2017) <www.adalah.org/en/law/index> accessed 11 November 2017.

[13] Much of the national legislations on the crime of apartheid codifies into national law the Rome Statute and/or the First Additional Protocol to the Geneva Conventions of 1949, for instance see Wet van 19 juni 2003, houdende regels met betrekking tot ernstige schendingen van het internationaal humanitair recht (The

and other legal instruments.[14] The prohibition on apartheid is not only defined in the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA, or Apartheid Convention)[15] and Rome Statute,[16] but also a war crime codified in international humanitarian legal sources[17] and military manuals.[18] As an international crime, individuals can be prosecuted for this crime against humanity. The laws on apartheid (not to be confused with laws *of* apartheid) can even be considered customary international law at this point. So why would it be a question whether they could be expanded outside South Africa?

In 1995, the UN Commission on Human Rights (now the Human Rights Council) passed a resolution on the implementation of the Apartheid Convention that declared situations of apartheid outside of classical apartheid as not being genuine apartheid.[19] This declaration and other arguments raise the question of whether only classical, or South African apartheid, may be only type of apartheid that can legally exist. More recently and perhaps more urgently, in March 2017 the UN Economic and Social Commission for Western Asia (ESCWA), in a stunning reproach, claimed that Israel was an apartheid regime. This is why a primary topic of Chapter 1 is trying to determine whether the geographic scope of the laws on apartheid can actually be expanded outside of the classical context in which they were drafted and intended for.

In March 2017, in a legal report commissioned by the ESCWA (hereinafter 'ESCWA Report'), Israel was accused of committing apartheid against the Palestinian

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Netherlands) (WIM) art 4, 5; The International Criminal Court Act of 2007 (ICC Act) (Republic of Korea) art 9.

[14] ILC, 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries' (1996) art 20, in Yearbook of the International Law Commission (UN 1996) 2(2) 53; UNTAET, 'Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses' (6 June 2000) UN Doc UNTAET/REG/2000/15, § 5.

[15] International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973) UN Doc A/RES/3068(XXVIII) (Apartheid Convention).

[16] Rome Statute of the International Criminal Court (1 July 2002) 2187 UNTS 90 (RS).

[17] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 (AP 1), art 85.

[18] For instance, see Ministerie van Defensie, Toepassing Humanitair Oorlogsrecht (Koninklijke Landmacht 1993) rule 27-412/1;

[19] [A]partheid as defined by the International Convention on the Suppression and Punishment of the Crime of Apartheid no longer exists anywhere; […] [and] potential situations of practices of racial segregation that might exist outside South Africa would be covered under the International Convention on the Elimination of All Forms of Racial Discrimination, see UN Commission on Human Rights, Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid (17 February 1995) UN Doc E/CN.4/RES/1995/10, art 2-3.

people as a whole. Although Israel slammed the report as anti-Semitic and as more evidence of what they see as persistent UN bias against them, the authors, Richard Falk and Tilley, noted the sensitivity of the question and acknowledged that '[t]o assert that the policies and practices of a sovereign State amount to apartheid constitutes a grave charge.'[20] The charge, albeit 'grave', was a real one that was not meant to be ignored. Nevertheless, the UN immediately withdrew the report due to Israeli pressure. The UN Undersecretary-General who also served as the ESCWA's Executive Secretary, Rima Khalaf, tendered her resignation in protest.[21] But Falk and Tilley's significant findings remain salient for international lawyers and academics.

What the report concludes is that Israel is an 'apartheid regime'. It calls for numerous legal actions at the UN, including seeking an advisory opinion from the ICJ[22] and reviving the 'Special Committee against Apartheid, and the United Nations Centre against Apartheid (1976-1991), which would report authoritatively on Israeli practices and policies relating to the crime of apartheid, including the legal and administrative instrumentalities used to carry out the underlying criminal enterprise.'[23] The report, however, uniquely rejects use of the analogy to South Africa, stating 'such comparison contradicts the universal character of the prohibition of apartheid and because apartheid systems that arise in different countries will necessarily differ in design.'[24] Choosing to do this, however, does not complete the entire picture. This thesis intends to complete the entire picture provided by Tilley and Falk's report (as well as expand geographically outside the OPT).[25]

Thesis and Structure

Tilley and Falk, as I will show, are right to say that the prohibition of apartheid is universal, and I prove such in Chapter 1 that the geographical scope of apartheid *can* and *must* be applied outside of South Africa. I also seek to show that the Apartheid

[20] ESCWA (n 4) vi.
[21] 'Senior UN Official Quits after 'Apartheid' Israel Report Pulled' *Reuters* (17 March 2017) <http://reut.rs/2maBpwr> accessed 18 September 2017.
[22] ESCWA (n 4) 54.
[23] ibid 53.
[24] ibid 14.
[25] This first report actually requests that researchers do what I am setting out to do in this study, see Tilley (n 9) 5.

Convention applies to Israel as the law is custom, and that the racial discrimination requirement fits because the two groups in Israel are indeed racial groups. Tilley and Falk are also right in claiming that systems of apartheid outside of South Africa arise differently and inherently are different because of historical and cultural differences – but that it is still apartheid, but my academic exercise leads down a different path that, unlike Tilley and Falk, shows that what I term 'Israeli apartheid' or 'neo-apartheid', is based on the same legal components that define classical apartheid. Neo-apartheid, like classical apartheid, consists of a grand apartheid vision and is based on constitutional control, socially, territorial, and politically segregationist and racially discriminatory laws, and political repression through security laws. This is the subject of Chapter 2.

In Chapter 2, I embark on a survey of the tenants of classical apartheid in order to begin proving that Israeli apartheid is based on those same legal components. Later in the chapter, I tackle the former two tenants of classical apartheid that we can find in Israel in order to validate the application of the prohibition onto the domestic laws and practices relevant to the latter two tenants in Chapter 3. In Chapter 2, after I discuss the tenants of South African apartheid, I begin to analyze Israel's status as a 'racial state' that has set up a system of racial domination, which is embedded in its constitutional Basic Laws (and other early laws). I finish with presenting and examining a revised theory on Israel's grand apartheid vision. This grand apartheid vision, I claim, illuminates itself through the Israeli-created 'peace process', which pushes the dominant 'two-state solution', which I claim is no different from the South African bantustanization process. I seek to prove that the creation of an 'independent' state(s) for the Palestinian people as a whole in Gaza and West Bank (whether 'united' politically or otherwise) is actually creating a Palestinian 'homeland' or 'bantustan' inspired and based on the South African model.

In Chapter 3, I am able to commit to a thorough and comprehensive review of Israeli practices and policies relevant to the prohibition of apartheid, since I have proven that Israel's laws are based on a system of racial domination, a condition necessary to meet the definition in the Apartheid Convention. The structure of the review, while based on the structure of Tilley's first report, does not include a wide comparative analysis of similar practices found in South Africa. It does, where is felt necessary, include references to similar policies and practices as found in southern Africa, but a wider

comparative analysis falls outside the ambit of this thesis. As already stated, analysis here on classical apartheid is used only to show neo-apartheid contains the same core components – a grand apartheid vision and racial domination based in constitutional control, racially discriminatory laws, and political repression.

With apartheid having collapsed in South Africa, Israel continues to avert the same type of momentum that gathered against South Africa that led to its dismantlement. This study – although not carrying the authority of the ESCWA Report nor the two committees recommended in the report for revival –will deliver more weight to the accusations leveled in the report and others and will provide a wider picture of Israeli practices and laws relative to the prohibition of apartheid.

I will stress the sensitivity and the brevity of the question this thesis is centered around: Is the State of Israel, established as the homeland of the Jewish people who survived an attempt at total annihilation, breaching the prohibition of apartheid within the borders of its originally established state against its minority population? How will I go about answering this question?

Methodology

In Chapter 1, when seeking to show that the scope of the law of apartheid can be expanded geographically, I primarily utilize international legal documents like the Apartheid Convention, the International Convention on the Elimination of Racial Discrimination (ICERD), statements made by states, and the work of highly skilled jurists like South African legal expert John Dugard to base my claims. In fitting the definition of 'racial groups' in the context of the prohibition of apartheid, I look toward local sources and legal documents like the Israeli Declaration of Independence and the Charter of the Palestine Liberation Organization (PLO) and the ICERD to make these determinations. Chapter 2 focuses on similar legal monographs and studies related to South African apartheid to discuss the legal components of classical apartheid and the laws of South Africa during that time. I use an abundance of academic legal research and independent legal analysis in order to present a theory of Israeli neo-apartheid.

Throughout these three chapters, constant reference to the two reports grounding this thesis, the ESCWA Report and Tilley's initial study, are made. In fact, many of their

findings have helped to guide the direction of this study. Chapter 3's methodology is borrowed from Tilley's initial study, *Beyond Occupation*. It uses an 'uncontroversial framework'[26] where I will lay out the relevant domestic law/practice and apply it to the acts found within the Apartheid Convention. The relevant practices and policies I review are compiled by the renowned Legal Center for Arab Minority Rights in Israel, otherwise known as Adalah. Per her methodology,

> Each practice listed by the Apartheid Convention is addressed…in three parts: (1) the legal meaning and significance of the provision […] and (3) a discussion of relevant Israeli practices…[a]s commentary on the Apartheid Convention is scant, discussion of legal meaning is drawn principally from international human rights and humanitarian law…[c]onsideration of Israeli practices and policies, and their impact on Palestinians, draws from reports and findings of the UN and other international organizations, jurisprudence of international and domestic courts including the [HCJ], works by scholars of international law, and reports and documentation by Palestinian and Israeli human rights organizations.[27]

The second part of Tilley's framework falls outside this thesis's purview, which is 'a short overview of relevant practices in apartheid South Africa, for illustrative and comparative purposes.'[28] While brief reference will be made to similar practices and policies of South Africa where found to be relevant, a wider comparative analysis is not necessary for the aim Chapter 3, which is to determine whether Israel is committing apartheid on its Arab citizens.

Chapter 1: An International Legal Analysis of Apartheid: Expanding Apartheid's Geographical Scope Outside of South Africa to Israel

1.1 Defining Apartheid through the Apartheid Convention

[26] Tilley (n 9) 129.
[27] ibid.
[28] ibid.

Apartheid is not merely racial discrimination and segregation. It consists of brutal, inhumane acts motivated by 'racial superiority or hatred'[29] for the purposes of establishing racial domination and maintaining said domination. In this Chapter, the aim is to show that the geographical scope of the international prohibition of apartheid is not restricted to its primary motivator: South Africa. To begin on this inquiry, I first must start by defining apartheid in international law

The Rome Statute says the crime of apartheid must be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'[30] and the Apartheid Convention describes the crime of apartheid as consisting of 'inhumane acts' that are 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.'[31] What are these acts that must be done in conjunction with racial domination and maintenance of such?

Article 2 of the Apartheid Convention holds all the meat, so to speak, listing the inhumane acts needed to accompany such a system of racial exclusion and oppression. I will add, however, that the six acts were 'intended by the Convention's drafters to be illustrative, not all-inclusive or exclusive.'[32] They are

> 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. (1) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, (2) by the infringement of their freedom or dignity, or (3) 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;

[29] International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 UNTS 195 (ICERD) preamble.
[30] Rome Statute (n 16) art 7(1).
[31] ibid.
[32] Tilley (n 9) 129.

> 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 (1) the right to work, (2) the right to form recognized trade unions, (3) the right to education, (4) the right to leave and to return to their country, (5) the right to a nationality, (6) the right to freedom of movement and residence, (7) 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 (1) the creation of separate reserves and ghettos for the members of a racial group or groups, (2) the prohibition of mixed marriages among members of various racial groups, (3) the expropriation of landed property belonging to a racial group or groups or to members thereof;
> e. Exploitation of the labor of the members of a racial group or groups, in particular by submitting them to forced labor;
> f. Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid (numbers in parentheses added).[33]

Moving along this line of inquiry, it is time to discuss whether this international law was written purely for its contemporaneous situation or if it can actually be applied outside of South Africa.

1.2 Expanding the Geographical Scope of the Prohibition of Apartheid Outside of South Africa

The first part of the definition of apartheid includes those 'similar policies and practices' to those in South African (more accurately it states 'southern Africa', which will be addressed further below), or classical, apartheid. A popular argument contended by Israeli circles meant to shut down inquiries into Israeli apartheid is that apartheid could not possibly exist because Palestinian Arabs have the right to vote, while blacks and other

[33] Apartheid Convention (n 15) art 2(a)-(f).

minorities were disenfranchised in South Africa.[34] Due to the two policies being different, they claim apartheid is inapplicable. This presumes that every act in Article 2 of the Apartheid Convention must be committed for comparison to be made. It also ignores that the only qualifier is that any one of the inhumane acts listed (a non-exhaustive list)[35] be done in the context of '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.'[36] Nowhere does it state that each act must be committed and that if one is not committed, apartheid doesn't exist. Also, the law does not say policies must be identical to those in South Africa, but *'similar'*.[37] The granting of political and civil rights to a racial group, in this case the Palestinian Arabs, does not negate the existence of apartheid or even of the ability to apply the laws on apartheid to the situation.

There are other numerous arguments against the analogy of Israel and South Africa that focus on other differences in the regimes of Israel and South Africa, presenting an argument that implies that the prohibition of apartheid and definitions therein are really based solely on the only existing precedent of apartheid, South Africa. The conflation of South Africa and apartheid leads to insistence that it cannot be found elsewhere. This is misguided, since as the ESCWA Report notes, apartheid will always look different in different areas:

> That the design of apartheid regimes in other States must necessarily differ — due to the unique history of their societies and the collective experience shaping local racial thought, such as settler colonialism, slavery, ethnic cleansing, war or genocide — is neglected in such a simplified search for models.[38]

My argument against those who feel apartheid laws are based on solely on South Africa and only applicable there begins with asserting simply that South Africa did not invent apartheid. Of course, it did coin the term and provide motivation to the

[34] For instance, see Ian Buruma, 'Do Not Treat Israel like Apartheid South Africa' Guardian (23 July 2002) <www.theguardian.com/education/2002/jul/23/highereducation.uk> accessed 11 November 2017.
[35] Tilley (n 9) 129.
[36] Rome Statute (n 16) art 7(h).
[37] Apartheid Convention (n 15) art 2.
[38] ESCWA Report (n 4) 18.

international community to tackle precluding the act and acts associated with it, but racial discrimination and segregation for the purposes of establishing and maintaining racial domination of one racial group over another was always the law of the land in South Africa, even before the term came to be the state's ethos. In 1913, the Bantu Land Act[39] made it so non-whites could only own 7% of the land of South Africa (it was increased to 13% in 1936,[40] just 8 years before the National Party came to power) and while 'coloreds' were enfranchised during the first decade of National Party rule, blacks had already been pushed completely out of political processes (what little room they had already been given).[41] So-called 'petty apartheid'[42] already flourished well before 1948, with the state following a US-inspired 'separate but equal' doctrine prior to National Party rule.[43] This did change, as will be talked about later.

Essentially, what existed prior to 1948 in South Africa was still apartheid, with intense racial discrimination and segregation far worse than found in other settler-colonial societies. The National Party rode their way to victory on a reactionary tide of growing concern over the government at the time was granting more political and civil rights to non-whites, as was happening in the other settler-colonial states. The fact that the government raised the land access for blacks from 7 to 13% gave this impression and the National Party rallied those in favor of building an entrenched system of racial separation.

The National Party was based on Afrikaner nationalism and set off after victory on an official government program of 'separate development' and overturned the previous segregationist doctrine of 'separate but equal' to 'separate but unequal'.[44] The political and legal system they built was coined by them as 'apartheid', an Afrikaans word for 'separateness'. All in all, any entrenched legal or political system that discriminates against 'racial groups' for the purpose of domination and maintaining such domination is and must be considered apartheid and because we can find elements of

[39] Bantu Land Act, 27 of 1913 (South Africa).
[40] Bantu Trust and Land Act, 18 of 1936 (South Africa).
[41] John Dugard, *Human Rights and the South African Legal Order* (PUP 1978) 89-102.
[42] Petty apartheid is the term given to segregationist practices that involved separate facilities for bathrooms, movies, buses, beaches, etc.
[43] Dugard (n 41) 64-65.
[44] ibid 65.

such systems inside other nations at the time South Africa developed its own[45] we can safely argue that apartheid is not a phenomenon invented and only experienced in South Africa.

I also argue against the notion that classical apartheid is prohibited in international law because the actual act itself 'was already' prohibited under international law. Romania stated at the time of the Apartheid Convention's drafting that 'in light of the references to apartheid in the United Nations instruments and resolutions mentioned in the preamble to the draft convention, it could be said that apartheid was already regarded in international law as constituting a crime against humanity.'[46] Thus, geographical constraints of the law are not and were never placed.

Others present at the drafting of the convention apparently were not so sure about Romania's comment and felt that classical apartheid was what was being prohibited. Dr. John Dugard, a South African legal expert, noted that '[m]ost delegates saw the [Apartheid] Convention as an instrument to be employed only against South Africa.'[47] The fact that this argument has not disappeared is not surprising. In fact, when apartheid collapsed in South Africa, the Human Rights Council issued a declaration on the implementation of the Apartheid Convention, declaring

> [A]partheid as defined by the International Convention on the Suppression and Punishment of the Crime of Apartheid *no longer exists anywhere*; *[…] potential situations of practices of racial segregation that might exist outside South Africa would be covered under the International Convention on the Elimination of All Forms of Racial Discrimination* (emphasis added).[48]

What that declaration did was add weight twenty years later to the argument used by many delegates present at the drafting that the Apartheid Convention was solely built for South Africa and thus inapplicable elsewhere. The ICERD would take over any cases of racial discrimination and they would be labeled as such, not apartheid. This argument

[45] US Justice William O Douglas once wrote that the segregation of restaurants in America amounted to apartheid, see Bell v Maryland 378 US 226 (1964), 254.
[46] Statement by Romania, Third Committee of the 28th Session of the UNGA (23 October 1973) UN Doc A/C.3/SR.2004.
[47] John Dugard, 'Convention on the Suppression and Punishment of the Crime of Apartheid' UN Audiovisual Library of International Law (2008) 1 <http://legal.un.org/avl/pdf/ha/cspca/cspca_e.pdf> accessed 24 September 2017.
[48] UNCHR (n 19) art 2-3.

ignores that the ICERD predates the Apartheid Convention and mentions the apartheid in its Article 3 as a specific form of racial discrimination.

The Committee on the Elimination of Racial Discrimination (CERD), the UN Treaty Body that monitors implementation of the ICERD, did try and clarify months later that '[t]he reference to apartheid [in Article 3 ICERD] may have been directed exclusively to South Africa', like the Apartheid Convention, but 'the article as adopted prohibits *all forms* of racial segregation in all countries (emphasis added).'[49] Therefore, apartheid is a form of racial segregation and indeed applies to all countries.

Another argument I make against those who would disregard this study and those who worked against the ESCWA Report, is that, like Dugard points out, no single provision relating to the prohibition of apartheid contains a geographical limit.[50] While the Apartheid Convention states clearly that the term apartheid 'shall include *similar* practices and policies (emphasis added)' to those in southern Africa,[51] it cannot, by any interpretative stretch, be said that they must be identical or confined to South Africa. Especially since the actual provision mentions *southern Africa,* not South Africa.

Discussing apartheid as similar practices and policies to those in 'southern Africa' immediately does what we have set out to do here in this section: show that we can legally apply the laws on apartheid outside of South Africa. 'Southern' Africa refers to the lands outside of South Africa occupied by their government forces, namely in what is now known as Namibia (but was then known as South West Africa). In the ICJ's 1970 advisory opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa),* the Court confirmed that South Africa had extended apartheid outside of its borders and that the policy of 'separate development or *apartheid*' was contrary to international law.

> It is undisputed…that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa,

[49] CERD, General Recommendation 19: Racial Segregation and Apartheid (Art 3) (18 August 1995) UN Doc A/50/18, para 2-3.
[50] '[T]hat the Apartheid Convention is intended to apply to situations other than South Africa is confirmed by its endorsement in a wider context in instruments adopted before and after the fall of apartheid,' see ibid 2.
[51] Apartheid Convention (n 15) art 2.

> restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labor or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.[52]

Thus, the Apartheid Convention already declares right off the bat in Article 2 that apartheid was being practiced outside of South Africa in what was then considered South West Africa by the belligerent occupation forces, by using the term 'southern Africa'. Thus, the precedent of applying the international law on apartheid was established as early as 1973 when the Apartheid Convention was adopted.[53]

That being said, I do not think it wrong to say that the *intent* for writing the Apartheid Convention was to end South African apartheid, but a prohibition of classical apartheid itself was not codified. While it was the original intent for its creation, the idea that it cannot be applied to other situations outside of South Africa ignores, as Romania pointed out, all other instruments made about the crime. While many were drafted and passed prior to apartheid's collapse in South Africa in 1994, the Rome Statute, which entered into force nearly a decade after its collapse, proves that the crime of apartheid is seen as one not limited to any geographical area. Dugard reminds us that while

> It may be concluded that the Apartheid Convention is dead as far as the original cause for its creation – apartheid in South Africa – is concerned […] it lives on as a species of the crime against humanity, under both customary international law and the Rome Statute of the International Criminal Court.[54]

The convention however, still leaves us legal researchers with an excellent framework for which to study the existence of the crime anywhere, as Tilley notes.[55] The Apartheid Convention, as stated earlier, combines both the inhumane acts listed with

[52] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion) [1970] ICJ Rep 16, para 130.
[53] Tilley (n 9) 123.
[54] Dugard (n 47) 2.
[55] Tilley (n 9) 129.

'similar policies and practices' to those in southern Africa, but does not list them. I will in Chapter 2.

Next, now that I have proven that the scope of the prohibition of apartheid can be geographically expanded outside of South Africa, and I plan to apply it to Israel, a few tasks need to be accomplished. First, I need to show that the international prohibition of apartheid applies to Israel. Even though Israel is not a party to the Apartheid Convention, the law exists as custom and customary law applies to Israeli domestic law. Apartheid is also a *jus cogens* norm, and thus, non-derogable. In addition, once that is proven, I will need to show that the situation in Israel fits against one of the required conditions: that the racial discrimination being committed is by one racial group against another. Thus, I will have to embark on proving that the two groups in Israel, Jewish Israelis and Palestinian Arabs, are legally racial groups.

1.3 Applying the Apartheid Convention to Israel: Apartheid as *Jus Cogens* and the Role of Custom in Israel

The international laws on apartheid apply to Israel. In the absence of convention or treaty, Israel is prohibited from committing apartheid due to it being a customary rule of international law. The HCJ has stated that customary international rules are legally binding to Israel[56] and because of its status as a *jus cogens* norm, the rules against apartheid are also non-derogable.

When it comes to apartheid in international law, there is one international convention specifically dedicated to the prohibition of apartheid, discussed earlier as the Apartheid Convention, or the International Convention for the Suppression and Punishment of the Crime of Apartheid, is legally binding on all states as it reflects customary international law. There is the Rome Statute, passed in 1998 after apartheid ended in South Africa. The document restates previous definitions. Its establishment in all instruments as a 'crime against humanity' imparts its status as a *jus cogens* norm. Finally, there is the ICERD, which specifically mentions apartheid in its preamble and

[56] HCJ 769/02 **Public Committee Against Torture v Government of Israel** (Elyon) (Targeted Killings), para 4.

Article 3, which creates an obligation for 'States Parties [to] particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.'[57] In the following sections, I will look to these three documents to define apartheid. First, I will briefly show that the prohibition of apartheid is a *jus cogens* norm and thus, an act so serious that it warrants our immediate attention for research and investigation.

Apartheid, just like the horrifying acts of genocide, slavery, and torture, is a *jus cogens* rule. The norms that are now seen as being universally accepted by all states without derogation, a peremptory norm if you will, have a 'long tradition in natural law thinking' but only with the rise and fall of Nazism did many of these solidify into codified international laws governing states and agreed on as custom.[58] The ICJ has called these norms 'intransgressible principles of customary international law' in *Legality of the Threat or Use of Nuclear Weapons*[59] and finally used the term *jus cogens* ten years later in 2006 in *Armed Activities*.[60] *Jus cogens* norms have brought an element of universality to the realm of international law as states neither consent nor have the ability to place reservations to such rules. They also introduce a hierarchy of human rights. It remains a valid topic when discussing apartheid here because crimes against humanity are always applicable with no derogations ever permitted (and there is no margin of appreciation granted.) In the Rome Statute, apartheid is categorized as such,[61] and even further back in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[62] Through the 'persistent objector' principle,

[57] ICERD (n 29) art 3.
[58] Jan Klabbers, *International Law* (CUP 2013) 60-61.
[59] Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 79; In this particular context, the court likens the ban on indiscriminate weapons to being jus cogens, and this is seen as 'intransgressible' because 'respect of the human person' is fundamental and such norms are 'elementary considerations of humanity' (same paragraph), so we see the ICJ essentially confirming for us that jus cogens norms are rooted in the protection of human dignity.
[60] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Judgment) ICJ Rep 168 (Armed Activities), para 64; The ICJ stressed in this judgment, on numerous occasions, that although genocide is a peremptory norm of international law, these norms do not have primacy over other universally accepted rules of international law, in this case, the principle of states' consent to the ICJ's jurisdiction. Thus, despite a norm having jus cogens status, it does not mean the ICJ has automatic jurisdiction to hear such a case. For more, see Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' [2008] 19(3) EJIL 491-508.
[61] Rome Statute (n 16) art 7(1)(j).
[62] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (11 November 1970) UNGA Res 2391 (XXIII) art 1.

wherein a state persistently objects to the creation of a norm to prevent its solidification as customary rule, South Africa attempted to stop apartheid's acceptance by the international community as a legal norm.[63] The state, isolated and alone in its objection, could not stop its creation.

As a customary rule of international law, even in the absence of a treaty or convention, no state may engage in the act of apartheid. Customary international law has a binding character on all states, and Israel's HCJ has confirmed the binding nature of custom on the state. Yoram Dinstein has written that customary norms of international law are 'automatically assimilated into Israeli law and become a part thereof' and the HCJ has recognized that these norms 'obligate Israel'[64] and are 'part of the law of the land, subject to any contradictory provision in Israeli legislation.'[65] What would matter here in a discussion on custom is that Israel is bound to respect the rules on apartheid not signed or ratified by Israel. While analyses involving the OPT could also look to apartheid prohibitions found in international humanitarian law sources, custom or codified, this study only focuses within Israel's 1948-1967 borders and as such, war crimes fall outside the ambit of this study.

Although we have just discussed that the ban on apartheid, which is a customary rule of international law, can be applied to Israel whether or not they have ratified the relevant instruments, we have yet to explain if the definition of apartheid applies to Israel, and thus whether we can review Israeli practices and policies against the definition of it.

1.4 Applying the Apartheid Convention to Israel: Defining Racial Discrimination and Racial Groups and Identity in Israel

When we discuss apartheid, we are discussing a system based on brutal and intensified *racial* discrimination and segregation. When we discuss Israel, we're discussing a state that defines itself as both 'Jewish and democratic'[66] but as the 'National Home' of

[63] Christine Chinkin 'Sources' note 22, in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn OUP 2014) 75-96.
[64] Targeted Killings (n 56) para 4.
[65] HCJ 785/87 **Afo v IDF Commander in the West Bank** (Hamoked) para 5(b).
[66] Basic Law: Knesset, 1958 (Israel) art 7(a).

specifically all Jewish people.[67] The overall population comprises of a majority of Jews (74.8%) and a minority of Palestinian Arabs (20.8%). The Apartheid Convention[68] and the Rome Statute[69] both require the condition of 'racial groups'. Opponents to the apartheid analogy to South Africa use this to say that the laws on apartheid cannot be applied to Israel based, *prima facie,* on the fact that apartheid is defined as one *racial* group separating and discriminating against another racial group for the purpose of that racial group's continued domination over the other.[70] From that, they say Jews and Arabs are not races, and thus, the application cannot go forth. They follow a definition of racism as discrimination more based purely on one's race rather than the wider scope encompassed in international law discussed below. Claiming that neither Jews nor Arabs are races means neither racial segregation and discrimination are seen as capable of occurring.

In classical apartheid, a system of racial classification created categories like 'white' and 'colored' and were strictly defined by the National Party in the Population Registration Act.[71] Definitions of what qualifies as a particular race focused on 'appearance' and whether one is 'generally accepted' as such.[72] Due to Nazi Germany's systematic attempt to exterminate European Jewry based on racial hatred and superiority, labeling Jewish as a race today is discredited and insensitive.[73] Thus, the question of whether we can ever consider Palestinian Arabs and Israeli Jews in Israel as 'racial groups' in the context of apartheid is a difficult and sensitive one. I will look toward legal sources and local perceptions for guidance here for the purpose of figuring out whether we can even apply the laws on apartheid to Israel based on definitions of *racial* segregation and discrimination, and thus qualify both peoples as 'racial groups' for the purposes of the application of the Apartheid Convention to relevant Israeli domestic practices and legislation.

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[67] Declaration of the Establishment of the State of Israel, 1948 (Israel).
[68] Apartheid Convention (n 15) art 2.
[69] Assembly of State Parties to the Rome Statute of the ICC, Elements of Crimes and Rules of Procedure and Evidence (14 September 2011) ICC-ASP/1/3 (part II-B) 12.
[70] Tilley (n 9) 109.
[71] Population Registration Act, 30 of 1950 (South Africa).
[72] ibid § 1.
[73] 'What is Judaism?' *Judaism 101* (1 February 2002) <www.jewfaq.org/judaism.htm> accessed 11 November 2017.

In Israel's Law of Return of 1950, it states that a Jew is 'a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.'[74] Thus, the Jewish identity has a religious and ethnic dimension. The Declaration of Independence that established Israel as a 'Jewish State' says it is the 'National Home' of the Jewish people, defining it as

> [T]he birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books.[75]

This gives the identity of Jews (at least in Israel) a national quality, and maintains the religious dimension. The Palestinian group identity, on the other hand, evolved after the State of Israel's establishment in 1948 but is similar in composition to how Israel defines its Jewish identity. It passes through the parent (the father as opposed to mother) and has an intractable spiritual and political tie to the land is claimed to be apart of a much larger group (Israel is the state for the Jewish nation, Palestinian Arabs are apart of the nation of Arabs). It was declared by the Palestine Liberation Organization (PLO) – recognized by Israel as 'the representative of the Palestinian people'[76] – two decades after Israel was founded as

> [A] genuine, essential, and inherent characteristic; it is transmitted from fathers to children. The Zionist occupation and the dispersal of the Palestinian Arab people…do not make them lose their Palestinian identity and their membership in the Palestinian community, nor do they negate them…The Palestinians are those Arab nationals who, until 1947, normally resided in [Mandatory] Palestine regardless of whether they were evicted from it or stayed there. Anyone born, after that date, of a Palestinian father – whether in Palestine or outside it – is also a Palestinian.[77]

So in relation to the Jewish and Palestinian peoples of Israel, do these categories fall within the ambit of international law's definition of racial discrimination and thus

[74] The Law of Return, 1950 (Israel) § 4(b).
[75] Declaration of Establishment (n 33).
[76] Letter from Yitzah Rabin to Yasser Arafat (9 September 1993).
[77] PLO, Palestine National Charter (1968) art 4-7.

follow through to the definition of apartheid? The International Convention for the Elimination of Racial Discrimination, which entered into force in 1969, states that racial discrimination is

> [A]ny distinction, exclusion, restriction or preference based on *race, color, descent, or national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (emphasis added).[78]

According to the ICERD then, racial discrimination is not based only distinction made based on race but instead it is a wider category encompassing national and ethnic origin. What this means is that the claim that racial discrimination can only be narrowly applied to discrimination based solely on race, and thus apartheid would not apply in areas where there are groups vying for domination over the other, groups not considered to be officially racial in category, is wrong. How are the identities presented under the category of racial discrimination connected to each other and considered as racial groups?

The identities of race, religion, national, or ethnic origin are all inherent in the person from the moment they are born, and thus all connected 'racial groups' capable of being racially discriminated against. The International Criminal Tribunal for Rwanda (ICTR) looked to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[79] and its four categories of groups of people legally susceptible to the crime. These categories are 'national, ethnical, racial or religious'.[80] The Tribunal further defined each group, but more importantly they stated what bound them together: 'a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.'[81]

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[78] ICERD (n 29) art 1(1).
[79] Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277 (Genocide Convention).
[80] ibid art 2.
[81] *Prosecutor v Jean-Paul Akayesu* (Trial Judgment) [1998] ICTR-96-4-T, para 511.

With the ICTR's linking of the identities laid out by the ICERD as all capable of experiencing racial discrimination, we can consider for the purposes of this study and application of the law that Palestinian Arabs and Jewish Israelis constitute distinct racial groups in their local context. The term 'racial groups' regarding the prohibition of apartheid can be found within the Apartheid Convention, written at a time when South Africa was doubling down on its apartheid system with 'continued intensification and expansion'.[82] It alludes that apartheid is connected to colonialism, considering such practices as 'associated therewith'.[83] It declares that apartheid consists of 'policies and practices of racial segregation and discrimination'[84] and was written in accordance with the ICERD.[85] It then connects apartheid to 'similar' policies and practices 'as practiced in southern Africa' and lists six 'inhumane acts' that when '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 (emphasis added)' amount to apartheid.[86]

The point is, the Palestinian Arabs and Jewish people of Israel fall under the 'racial group or groups' required by Apartheid Convention and Rome Statute because of their immutable qualities discussed above. Again, we can confidently apply the laws on apartheid to Israel, discrediting the idea that the laws can only narrowly and rigidly be applied to situations involving equally narrow definitions of racial groups.

Chapter 2: Israel's Grand Apartheid: How Israel Tests Positive for Apartheid through an Examination of the Tenants of Classical Apartheid

[82] Apartheid Convention (n 15) annex.
[83] ibid.
[84] ibid art 1.
[85] ibid annex.
[86] Apartheid Convention (n 15) art 2.

2.1 The Tenants of Classical Apartheid: Constitutional Control, Total Segregation, and Political Repression

In 1974, South African Ambassador to the UN R.F. Botha stated in defense of his country's apartheid regime,

> Our policy is not based on any concepts of superiority or inferiority, but on the historical fact that different peoples differ in their loyalties, cultures, outlooks, and modes of life and that they wish to retain them…We do have discriminatory practices and we do have discriminatory laws…Those laws and practices are a part of the historical evolution of our country…But I want to state here today very clearly and categorically: my Government does not condone discrimination purely on the grounds of race or color.[87]

As disturbing as it appears on first read, it is no secret that South Africa went above and beyond to express that its apartheid regime was non-racist, a view that the world never bought.

In this chapter, I continue on the path to applying the Apartheid Convention to Israeli domestic practices and policies, but more is required after showing that Jewish Israelis and Palestinian Arabs are racial groups in Israel. Article 2 demands that the acts be committed with a particular intent or purpose. I prove this exists in Israel by applying the tenants of classical apartheid as enunciated by Dugard.

Apartheid in South Africa had 'three principle features: constitutional control; political, territorial, and social segregation; and political repression.'[88] The laws that established those features could be 'broadly' divvied up into two categories: 'first, those laws which prescribe the personal, social, and economic, cultural, and educational status of the individual in society; and second, those laws which construct the institutions of separate development and determine the political status of the individual.'[89]

Those laws, broken up into further categories, involved racial classification, separate facilities, marriage and sexual relations, separate freedoms (especially regarding

[87] House of Assembly Debates (7 February 1975) vol 55, 382-383 quoted in Dugard (n 41) 54.
[88] John Dugard, 'The Law of Apartheid' 3-31 in John Dugard, Nicholas Haysom, and Gilbert Marcus, *The Last Years of Apartheid: Civil Liberties in South Africa* (Ford Foundation 1992) 4.
[89] Dugard (n 41) 58-59.

movement), separate areas, separate education, and labor. The political institutions and the judiciary were critical to entrenching the entire system. Dugard reflected in the 1980s, as apartheid clung on, that the entire legal order of apartheid had three components

> First, 'grand apartheid' created separate political institutions for Africans in order to justify their exclusion from the central political process. This process was, euphemistically, given the name of 'separate development.' Second, the government, building on existing laws and practices, pursued policies to achieve as much territorial separation of the races as possible. Third, discriminatory segregation laws ensured that blacks were denied basic rights and treated as inferior citizens. Sometimes these laws were described as 'petty apartheid' in order to distinguish them from grand apartheid.[90]

How can we utilize these different categorizations of the essence of classical apartheid? The ESCWA Report claiming that Israel is an apartheid regime states that

> A test of apartheid cannot be confined, methodologically, to identifying discrete policies and practices, such as those listed under the Apartheid Convention. Such policies and practices must be found to serve the purpose or intention of imposing racial domination and oppression on a subordinated racial group.[91]

Thus, in this chapter, I intend to show that Israel is committing the acts listed in Article 2 with the 'purpose of establishing and maintaining domination by one racial group of persons [Jewish Israelis] over any other racial group of persons [Palestinian Arabs] and systematically oppressing them.'[92] I set out on this task using the ESCWA Report as a guide but using, unlike Falk and Tilley, the South African situation to complete the task. While the ESCWA Report uses a non-comparative methodology in part to discourage the analogy between South Africa and Israel, I welcome the analogy.

For one, South Africa offers the most rich and undisputed framework of an apartheid regime and while the tenants of classical apartheid were not codified but instead guided the creation of the legal definition, its essence (the 'three principle features') can be used as a test of apartheid in Israel. Because as the ESCWA Report

[90] Dugard, Haysom, and Marcus (n 88) 10.
[91] ESCWA Report (n 4) 30.
[92] Apartheid Convention (n 15) art 2.

states, our test cannot be isolated to identifying discrete policies and practices, such as those listed under the Apartheid Convention, to those found in Israel.

We must first show that the policies and practices that I review in Chapter 3 are done in conjunction with the requirement that they be 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.'[93] Israel's neo-apartheid differs, indeed, but recognizing a link between South Africa and Israel assists in meeting the critical legal requirements of the prohibition in order to correctly review Israeli domestic laws against the prohibition's inhumane acts. This approach allows us to show how apartheid forms, exists, and evolves in different political and geographical contexts and, perhaps more importantly for future researchers, how we can move forward regarding the dismantling of apartheid.

Classical apartheid consisted of an institutional aspect through 'constitutional control', which uses the highest legislative authority to establish a political system whose institutions explicitly exclude and disenfranchise a racial group, or give them token representation,[94] a component of apartheid we could also label as institutionalized racial domination. The Constitution provided for the judiciary, which could not strike down acts of Parliament in British-style parliamentary supremacy, made up of the racial group committing the apartheid. The executive, as mentioned, is in the hands of the ruling party of parliament.

This constitutional control links to perhaps the most important tenant of classical apartheid, 'grand apartheid, a vision of separate development in the spirit of 'separate but unequal' where the racial group being segregated is cut off completely from political and judicial processes. In South Africa, grand apartheid was meant to result in the natives and biracial (colored) folks being stripped of South African citizenship and moved to their own separate territory (borders of which are delineated by the apartheid regime) or 'homelands' where they would develop their own political and judicial institutions and become sovereign states, due, according to Ambassador Botha, to 'the historical fact that

[93] Rome Statute (n 16) art 7(1).
[94] See for example the 1983 South African constitution, which offered two new chambers for coloreds and Indians separately to govern their own affairs, although the State President, through powers of the constitution is the real 'puppet master', see Dugard, Haysom, and Marcus (n 88) 6.

different peoples differ in their loyalties, cultures, outlooks, and modes of life and that they wish to retain them.'[95] Grand apartheid, under the guise of benevolence and respect for different cultures, would result, of course, in a pure white state of South Africa.

To implement this vision, the apartheid regime needed an entrenched legal order to begin the process of separating the whites from the non-whites politically, territorially, and socially. This was what I call total segregation. It had the legal basis to implement grand apartheid through the constitution, which created the institutions to create the laws that would further the vision and a judiciary that would never (or rarely)[96] question it. Now, they needed to create laws to implement the vision – laws that would politically and socially segregate but perhaps even more importantly in regards to grand apartheid, territorially segregate the 'others'.

There is one more component of classical apartheid: political repression. Political repression manifested itself, like total segregation, through acts of parliament.

> [T]hreats to Afrikaner political hegemony – that is, to National Party rule – were vigorously repressed by a formidable arsenal of security laws. These laws, which formed an integral part of the law of apartheid, attracted as much hostile attention [from the international community] as the race laws.[97]

It is time now for a brief survey of the primary laws of apartheid, from the security laws to the laws of 'petty' apartheid. This is done not just to show how the tentacles of the laws of apartheid spread into every facet of life, but primarily to help contribute toward identifying 'similar practices and policies' in Chapter 3's review.

Afterwards, I put forward a test of apartheid that seeks to show that Israel's policies and practices 'serve the purpose or intention of imposing racial domination and oppression on a subordinated racial group.'[98] I do this by demonstrating that Israel has a grand apartheid vision practiced via its 'peace process'. I also begin to show that they fit the three-pronged legal order found in classical apartheid by showing Israel's foundation as a purely Jewish state through its constitutional control (Israel has an unwritten

[95] See note 87.
[96] Dugard (n 41) 27-36.
[97] Dugard, Haysom, and Marcus (n 88) 21.
[98] ESCWA Report (n 4) 30.

constitution where its Basic Laws are of that same high constitutional legal status). The other two prongs, total segregation (political, social, and territorial), and repressive security laws, are the focus, of course, of the review of Israel's domestic laws in Chapter 3.

2.2 A Survey of the Laws of South African Apartheid

The laws of South Africa prior to 1948 set the stage for furthering the vision of grand apartheid – specifically the Bantu Land Act that allocated 13% of lands claimed by South Africa for black use and ownership and the 'Pass Laws', which can be found as far back as 1809.[99] The Pass Laws restricted the movement of non-whites between provinces and cities. When the National Party came to power in 1948, it used the existing land and movement laws along with a new racial classification law (the Population Registration Act) to form the 'very bedrock of the apartheid state'.[100] Social segregation began with the Reservation of Separate Amenities Act.[101] But that does not explain all of it. While segregation was certainly the law of the land and part of the social tradition of South Africa pre-1948, the National Party's takeover lead parliament to transform 'the laissez-faire pattern of pre-1948 segregation into a systematic pattern of legalized racial discrimination, and constructed a huge internal security apparatus and armed it with awesome legal powers to crush opposition generated by the first process.'[102] The system went from discriminatory to 'systemic, all-pervading, and evil',[103] and officially became apartheid. Thus, what is more important for our analysis here are laws passed after 1948.

To recognize 'similar' policies and practices of South African apartheid in conjunction with Article 2, I feel it necessary to provide a (non-exhaustive)[104] list of the laws of South African apartheid. With apartheid, maintenance of the racial domination through security laws is just as critical as the laws (constitutional and otherwise) solidifying racial domination. This is why the following list of apartheid laws post-1948

[99] Dugard, Haysom, and Marcus (n 88) 75.
[100] TRC, 'Truth and Reconciliation Commission of South Africa Report: Volume 1' (29 October 1998) 30.
[101] Reservation of Separate Amenities Act, 49 of 1953 (South Africa).
[102] TRC Report (n 99) 30.
[103] TRC Report (n 99) 29.
[104] South Africa's apartheid laws are far too numerous to discuss in full here, but the core legislation must be analyzed if we plan to recognize 'similar' policies to South Africa.

will be broken down into 4 categories: social segregation, territorial segregation, political segregation, and security laws. Of course, many are intertwined. The Truth and Reconciliation Committee of South Africa's (TRC) report on apartheid, Tilley's own compilation,[105] and literature from Dugard is used here to survey South Africa's apartheid legislation.

Social Segregation Laws: The Reservation of Separate Amenities Act of 1953,[106] the Population Registration Act of 1950,[107] the Prohibition of Mixed Marriages Act of 1949,[108] the Immorality Amendment Act of 1950,[109] the Bantu Education Act of 1953,[110] the Extension of University Education Act of 1959,[111] the Riotous Assemblies Act of 1956,[112] and the Mines and Work Amendment Act of 1956.[113]

Territorial Segregation Laws: The Group Areas Act of 1950,[114] the Prevention of Illegal Squatting Act of 1951,[115] and the Native Resettlement Act 1954.[116] While the latter was actually just for one particular urban area, other acts were passed throughout South Africa that had the same effect of forcibly moving populations of non-whites.

Political Segregation Laws: The Suppression of Communism Act of 1950,[117] the Bantu Authorities Act of 1951,[118] the Promotion of Black Self-Government Act of

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[105] Tilley (n 9) 127-128.
[106] This act 'designated all public amenities and facilities (parks, libraries, zoos, beaches, sports grounds, and so on) for the exclusive use of specified racial groups. The allocation was made on a wholly unequal basis with the result that most facilities and amenities were closed to black people.' See, TRC Report (n 99) 32.
[107] This law 'provided for the classification of every South African into one of four racial categories.' The definitions are described by the TRC as 'truly bizarre.' This connects to the territorial segregation laws, specifically the Group Areas Act, that sent different racial groups to different areas of South Africa, see ibid 30.
[108] Prohibition of Mixed Marriages Act, 55 of 1949 (South Africa).
[109] The National Party may have banned interracial marriages in 1949, but they went even further. The Immorality Act prohibited sexual relations between whites and different racial groups, amending the previous 1927 ban on sexual relations between whites and blacks to include all other racial groups, see Immorality Amendment Act, 21 of 1950 (South Africa).
[110] Bantu Education Act, 47 of 1953 (South Africa); This act 'laid the basis for a separate and inferior education system for African pupils' through the establishment of the newly formed Department of Bantu Education, see TRC Report (n 99) 32.
[111] Extension of University Education Act, 45 of 1959 (South Africa).
[112] Riotous Assemblies Act, 17 of 1956 (South Africa).
[113] Mines and Work Amendment Act, 27 of 1956 (South Africa).
[114] Group Areas Act, 41 of 1950 (South Africa); '[T]he result was mass population transfers involving the uprooting of (almost exclusively) black citizens from their homes of generations, and the wholesale destruction of communities,' see TRC Report (n 99) 31.
[115] Prevention of Illegal Squatting Act, 52 of 1951 (South Africa).
[116] Natives Resettlement Act, 19 of 1954 (South Africa).
[117] Suppression of Communism Act, 44 of 1950 (South Africa).

1959,[119] the Unlawful Organizations Act of 1960,[120] the Black Homeland Citizenship Act of 1970.[121]

Security Laws: The Public Safety Act,[122] the Terrorism Act of 1967,[123] the Internal Security Act of 1982.[124]

Although not completely exhaustive, this list of core apartheid laws show *prima facie* just how pervasive, humiliating, and destructive apartheid is.

The next task of this study is to show, before reviewing Israel's practices and policies relative to apartheid, that Israel's practices and policies fit the requirement of intending racial domination and the maintenance of such. I will do this by first showing that Israel has its own vision of grand apartheid and that it implements this vision through a similar, but far more subtle legal order to that of South Africa, namely through the 'peace process' that began in the early 1990s, and constitutional control by establishing Israel as a purely racial state.

2.3 Applying the Tenants of Apartheid to Israel: Analyzing Israel as a Jewish State through Constitutional Control

In this section, I contend that Israel has its own vision of grand apartheid that seeks to establish and preserve itself as the Jewish State for and of the Jewish People. This ethos

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[118] Bantu Authorities Act, 68 of 1951 (South Africa).
[119] Promotion of Bantu Self-Government Act, 46 of 1959 (South Africa).
[120] Passed after the Sharpeville Massacre when almost 70 folks protesting the Pass Laws were shot dead by police in order to ban the African National Congress (ANC) (modern South Africa's current ruling party) and the Pan-African Congress (PAC). This law forced both groups to form militant wings, see Tilley (n 9) 128.
[121] Bantu Homelands Citizenship Act, 26 of 1970 (South Africa).
[122] Public Safety Act, 3 of 1953 (South Africa).
[123] Terrorism Act, 83 of 1967 (South Africa); This act legalized indefinite detention without trial or charges for renewable periods of 60 days for anyone considered to 'endanger the maintenance of law and order', in other words, anyone who endangers the apartheid order, see §6 of the Act; Terrorism was widely defined to cover any form of unlawful political activity', see Dugard, Haysom, and Marcus (n 88) 22; This law, in addition, sanctioned forced disappearances because the government was not required to release information on those being held under the law and rarely did. Dugard states that under this law, 'brutal interrogation of detainees became the rule and suspicious deaths in detention a not uncommon occurrence. Prior to the Terrorism Act, political repression manifested itself through banning orders or an order of banishment. The latter curtailed one's civil freedoms while the former would place those ordered into 'exile to some desolate rural area – one of South Africa's "Siberias."', see ibid.
[124] Internal Security Act, 74 of 1982 (South Africa); This act compiled the Terrorism Act, Riotous Assemblies Act, Suppression of Communism Act, and others into one comprehensive security law.

is grounded in its status codified in its founding Declaration, Basic Laws, and refusal to draw up a constitution that guarantees the equal rights espoused in the non-binding founding Declaration. The Israeli grand apartheid vision's overall goal is the eventual creation of a Palestinian homeland created almost entirely on Israel's terms, freeing Israel from demographic threats to its status as the Jewish State. But first, lets look at Israel's status as a racial state. The idea is to point towards how this construction of the state as a state based on racial lines allows for discriminatory practices and policies against the minority Palestinian population. I do this only by looking at Israel's laws and charters establishing its institutions.

After the Declaration of Independence established Israel as the national home of the Jewish people,[125] Israel began passing what it calls Basic Laws, which have the legislative strength of constitutional laws.[126] Basic Law: Israel Lands places nearly all land in Israel in the hands of organizations tasked solely with Jewish settlement and the State,[127] which is Jewish in character. The law prohibits the sale/transfer of '[t]he ownership of Israel lands, being the lands in Israel of the State, the Development Authority (ILA) or the Jewish National Fund (JNF)'[128] to anyone. A whopping 93% of land within Israel proper falls under this category,[129] and non-Jewish citizens cannot lease it.[130] The JNF, by the time Israel was established, owned an eighth of the entire 'land of Israel',[131] where today a whopping '80 percent of Israel's population now lives'.[132] The JNF states it is 'the property of the Jewish people as a whole'.[133]

The Law of Return states that '[e]very Jew has the right to come to this country',[134] not extending this right to Palestinian Arabs who inhabited the land prior to

[125] Declaration (n 67).
[126] CA 6821/93 **United Mizrahi Bank v Migdal Cooperative Village** (Versa).
[127] Basic Law: Israel Lands (1960) (Israel).
[128] ibid art 1.
[129] Tilley (n 9) 117.
[130] ibid.
[131] 'Israel Society & Culture: The Jewish National Fund' *Jewish Virtual Library* (1 February 2002) <www.jewishvirtuallibrary.org/jewish-national-fund-jnf> accessed 14 November 2017; It should be noted that the 'land of Israel' is an undefined term that can be traced back to the biblical era. While early Zionists saw the land of Israel as including parts of Jordan, Saudi Arabia, and Egypt, today it tends to be seen as places of former Jewish kingdoms, thus the West Bank (referred to by Israeli Jews as Judea and Samaria) is seen as inherently Jewish land.
[132] ibid.
[133] 'Our History' JNF (1 March 2003) <www.jnf.org/menu-3/our-history> accessed 14 November 2017.
[134] Law of Return (n 74) art 1.

1948. The Nationality Law actually gives the state the power to 'terminate the Israel nationality of a person who has done an act constituting a breach of allegiance to the State of Israel.'[135] The Prevention of Infiltrators Law does not authorize the deportation of all who enter Israel illegally. On the contrary, it specifically defines 'infiltrator' as those coming from the lands surrounding Israel and Palestinian refugees, defining them as 'a Palestinian citizen or a Palestinian resident without nationality or citizenship or whose nationality or citizenship was doubtful and who…left his ordinary place of residence in an area which has become a part of Israel for a place outside Israel.[136] Land and immigration are all determined by one's racial status as Jewish or non-Jewish. But the laws go in Israel go even further to cement the situation where Palestinians are second-class citizens.

Simply denying that Israel is a Jewish state bars one from running for the Knesset,[137] and ironically, the clause that does so is the first to define Israel as 'Jewish and democratic'.[138] This denial can be done 'expressly or by implication'. The inclusion of 'implication' opens up a wide interpretive scope of what may qualify as implying that Israel is not Jewish and/or democratic. The ESCWA Report mentions that 'Israel reinforces its race-based immigration policy with measures designed to prevent Palestinian citizens of Israel from challenging the doctrine and laws that purport to establish Israel as a Jewish State,' referring to Article 7 of the Basic Law: Knesset, which 'prohibits any political party in Israel from adopting a platform that challenges the State's expressly Jewish character.'[139] An equivalent in South Africa would have been if blacks were enfranchised but their political parties could not legally adopt a platform supporting majority rule.

'Jewish state' was finally defined in 2002, when a 3-tiered amendment on disqualification was added to the Knesset law discussed above. Article 7(a)(1) would be amended to disqualify a candidate that denied 'the existence of Israel as the state of the

[135] Nationality Law (1952) art 11 (b) (Israel).
[136] Prevention of Infiltration (Offenses and Jurisdiction) Law (1954) art 1(3) (Israel).
[137] Basic Law: Knesset (n 66) art 7(a).
[138] ibid art 7(a)(1).
[139] ESCWA Report (n 4) 32; Basic Law: Knesset (n 66) art 7(a)(1).

Jewish people', the state's democratic character, and 'incitement to racism'.[140] Afterwards, a number of Arab parties were blocked from running in the election – one was banned almost identical to the South African equivalent in the last paragraph: The Arab party Balad was banned because its platform called for Israel to be a state for all its citizens.[141] The ban was overturned and the core characteristics of a Jewish state were defined as 'the right of every Jew to immigrate to the State of Israel, *where the Jews will constitute the majority*; Hebrew is the official, principal language of the state, and its holidays and symbols reflect the national revival of the Jewish people; Jewish heritage is a fundamental element of its religious and cultural heritage (emphasis added).'[142] This adds a twist – if Balad were to add support the right of return of Palestinian refugees to its platform of Israel as a state for all its citizens, they support an Israel where Jews do not constitute the majority. Thus, a candidate supporting the right for Palestinians who left in 1948 to return to their homes is considered seditious. In conjunction with the Nationality Law discussed above means those candidates running on right of return can be seen as breaching allegiance to the state and have their nationality revoked. The right of Palestinian return is an invaluable human right found in the Universal Declaration of Human Rights[143] and is demanded by the UN General Assembly.[144]

In 1951, Israel passed a law that granted the ability to seize land by sale, exchange, 'or any other manner…as it may think fit',[145] and in that same law defines Israel as consisting of all land 'in which the law of the State of Israel applies'.[146] Maintaining Israel's demographics on its land as majority Jewish is crucial for the state's Jewish character, hence why a one-state solution where the OPT is absorbed into Israel and Palestinians become the majority population is spoken of in terms of 'destruction'

[140] EC 11280/02 **Central Elections Committee for the Sixteenth Knesset v MKs Tibi and Bishara** (Nakba Files) para 1.
[141] ibid para 13.
[142] ibid para 12.
[143] Universal Declaration of Human Rights (10 December 1948) UN Doc A(III)/RES/217 (UDHR) art 13.
[144] 'Palestine – Progress Report of the UN Mediator' (11 December 1948) UN Doc A(III)/RES/194 para 11.
[145] State Property Law (1951) art 4.
[146] ibid art 1.

and 'annihilation' of the Jewish state.[147] The Status Law assures that Israel's 'central task' remain the maintenance of a Jewish majority in Israel. The law

> [R]ecognizes the World Zionist Organization as the authorized agency which will continue to operate in the State of Israel for the development and settlement of the country, the absorption of immigrants from the [Jewish] Diaspora and the coordination of the activities in Israel of Jewish institutions and organizations active in those fields…*The mission of gathering in the [Jewish] exiles, which is the central task of the State of Israel* and the Zionist Movement in our days, requires constant efforts by the Jewish people in the Diaspora; the State of Israel, therefore, expects the cooperation of all Jews, as individuals and groups*, in building up the State and assisting the immigration to it of the masses of the people*, and regards the unity of all sections of Jewry as necessary for this purpose (emphasis added).[148]

Jewish Israelis maintain their dominance over non-Jewish Israelis through the legal nature of their nationality and citizenship. There is no Israeli nationality, only Israeli citizenship. On an Israeli identity card, one's nationality is listed as either Jewish or Arab.[149] A Palestinian may have an Israeli passport, but all he or she has is Israeli *citizenship*, which took more hoops to jump through to attain than a Jewish person,[150] and Arab nationality – which means drastically less group rights than Jews (like property, for instance). The HCJ has stated that Israel is not the state of the Israeli nation but of the Jewish nation, that the establishment of the nation of Israel was not 'distinct from the Jewish people' because 'the Jewish nation does not only consist of the Jews who live in Israel, but also of the Jews of the Diaspora.'[151] Thus, even if you are not an Israeli Jew, but for example a Canadian Jew, you enjoy the collective rights provided to Jews via Israel solely due one's Jewish nationality. Palestinians, needless to say, do not.

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[147] For example, see Sol Stern and Fred Siegel, 'Mideast Parley Takes Ugly Turn At Columbia U' *New York Sun* (4 February 2005) <www.nysun.com/new-york/mideast-parley-takes-ugly-turn-at-columbia-u/8725/> accessed 7 October 2017; and see Jeffrey Goldberg, 'Anti-Israel One-State Plan Gets Harvard Outlet' *Bloomberg* (28 February 2012) <www.bloomberg.com/view/articles/2012-02-28/anti-israel-one-state-fix-airs-at-harvard-commentary-by-jeffrey-goldberg> accessed 7 October 2017.
[148] World Zionist Organization-Jewish Agency (Status) Law (1952) art 4-5 (Israel).
[149] Although this practice was ended in 2005, the Ministry of Interior still has access to the information.
[150] See for example the Nationality Law (n 135).
[151] CA 630/70 **Georges Raphael Tamarin v Israel** (Nakba Files) 6.

Lastly, I will briefly discuss a law that is on its way to passing. Basic Law: Jewish Nation-State has come in many different drafts, from moderate to extreme,[152] with the latest draft was agreed on during the time of this writing seen as toned down from the original.[153] But the original is a sign that the government is pushing for the Jewish character of the state to have enshrined supremacy over the democratic part, and the current draft must still be criticized for attempting that very same thing. The original 'would have required the courts to give precedence to the Jewish character of Israel in cases where it conflicts with democratic values' and that part has been removed.[154]

That being said, other parts remain and continue to point to the erosion of the democratic character in favor of the Jewish status of the state. Its purpose is to 'to defend the character of Israel as the nation-state of the Jewish people'[155] and its basic principles include that Israel is 'the national home of the Jewish people, in which they realize their aspiration to self-determination in accordance with their cultural and historical heritage' and that the 'right to exercise national self-determination in the State of Israel is unique to the Jewish people.'[156] One of its most egregious section strips the Arabic language of its official status and delineates it to that of 'special status', left undefined.

This section is not exhaustive. The ESCWA Report and Tilley's initial report go even further in dissecting Israeli law to show that 'Israel is designed to be a racial regime'.[157] What they do not use as a foundation for their exercises is the aspect of *constitutional control* as originally demonstrated by the National Party in South Africa. Israel uses its Basic Laws to codify its racial status and I would say, refuses to draw up a constitution and/or bill of rights to ensure that status is not tampered with. Through its laws on land, citizenship, and the status of the state, we see how Israel has solidified itself

[152] Jonathan Lis, 'New Nation-state Bill Will Not Define Israel as "Jewish and Democratic" State' *Haaretz* (7 July 2017) <www.haaretz.com/israel-news/.premium-1.800157> accessed 14 November 2017.
[153] Jonathan Lis, 'Israel Retreats on Contentious "Nation-State Law:" Jewish Identity Will Not Take Precedence Over Democratic Values' *Haaretz* (9 November 2017) <www.haaretz.com/israel-news/1.821868> accessed 14 November 2017.
[154] ibid.
[155] Raoul Wootliff, 'Full Text of MK Avi Dichter's 2017 "Jewish State" Bill' *Times of Israel* (10 May 2017) <www.timesofisrael.com/full-text-of-mk-avi-dichters-2017-jewish-state-bill/> accessed 14 November 2017.
[156] Wootliff (n 155).
[157] ESCWA Report (n 4) 36.

as a 'Jewish state' but more importantly, as a state *not for* Arabs, demonstrated via its forcibly-made minority.[158]

2.4 Applying the Tenants of Apartheid to Israel: The Two State Solution as Israeli Bantustanization with the West Bank and Gaza as Palestinian 'Homelands'

One more task will be accomplished before setting off on Chapter 3's review. I will demonstrate that Israel is committing their own version of Bantustanization, via a mechanism they created called the 'peace process', which would see all Palestinian people moved into their own state(s). This mechanism is based on the world-backed 'two-state solution', where, as said, Palestinians would be moved into a state of their own. A state whose territory was largely decided by Israel in 1948 and borders of which they created via a massive concrete wall. The mechanism was triggered in the early 1990s after a Palestinian uprising that began in the late 80s, perhaps giving the state fears that it would either have to end the occupation and leave the Palestinian state-building to the international community and the Palestinians themselves, or annex the territories and give equal rights to all (a 'national suicide'). Israel chose a unique third option, a 'peace process' that will result in a partitioned Israel based on racial group lines (Jewish Israeli and Palestinian Arab), or 'two lands for two peoples'. This 'peace process' has been going on ever since.

In this chapter I will show that the peace process mimics the South African creation of black homelands via the creation of the Palestinian Authority (PA), the desire to create a state that has limited to no sovereignty (no defense capabilities, limited trade, security dictated by Israel), in an area that has no inherent connection to the Palestinian people as a whole other than the fact that a majority were pushed in there during the establishment of Israel, and whose borders were decided by Israel. I combine my own analysis with that of Tilley in her 2010 report on the implications of a Palestinian unilateral declaration of independence. She states that the similarities are uncanny, as '[b]oth involve cases where a dominant state, self-identified with a particular ethnic or racial group, premised its survival on politically and physically excluding an indigenous

[158] See Illan Pappe, *The Ethnic Cleansing of Palestine* (Oxford One World Press 2006).

population of ethnic others in order to sustain an overwhelming titular majority. In both cases, this perceived imperative inspired the state to award the unwanted population a form of self-governance in part of the territory.'[159]

The peace process has enabled a slow moving Bantustanization. It first created the government Israel said will represent Palestinian self-determination, the PA, in 1994.[160] The provisions that establish the PA and Israeli practices demonstrate that it is under *de facto* Israeli suzerainty.[161] Israel has even unilaterally prepared the future borders.[162] The goal of suzerainty has been stated also in the words of the state, recently it was said that full sovereignty is actually never to be granted to Palestinians. As the current and longest serving Prime Minister in Israeli history, Benjamin Netanyahu, has recently stated on Palestine, 'It's time we reassessed whether the modern model we have of sovereignty, and unfettered sovereignty, is applicable everywhere in the world.'[163]

Homelands in South Africa, like Transkei for example, only had 'powers over local matters…Moreover the Republican Government retained the ultimate veto over legislation…Certain vital matters were expressly excluded…namely, defense, external affairs…internal security…aviation, railways and national roads…'[164] The PA is in almost the exact same situation, as dictated by the Interim Agreement.[165] While external affairs can be attempted with the PLO, they are subject to certain areas like cultural and science agreements.[166] Furthermore and finally, the 40 areas of civil affairs that the PA may engage in, while at first sight may appear as 'something' that is beneficial, in reality,

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[159] Virginia Tilley, 'A Palestinian Declaration of Independence: Implications for Peace [2010] 17(1) Mid East Policy 53.
[160] Agreement on the Gaza Strip and the Jericho Area (4 May 1994) (Israel-PLO) art 3(1).
[161] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (28 September 1995) (Israel-PLO); As Tilley notes, only in Areas A and B, which is around 39% of the West Bank, do the PA have any semblance of authority – and actually only has authority in 40 limited areas of civil affairs, all subject to approval from joint committees, see Tilley (n 159) 59 and ibid annex III.
[162] 'Israel says Separation Wall will be Border' *Al-Jazeera* (6 November 2013) <www.aljazeera.com/news/middleeast/2013/11/israel-says-separation-wall-will-be-border-201311514132609960.html> accessed 14 November 2017.
[163] Anshel Pfeffer, 'Netanyahu Suggests a Sovereign State Might Not Work for Palestinians' *Haaretz* (3 November 2017) www.haaretz.com/israel-news/1.820891> accessed 14 November 2017; He has stated before that, 'I think the Israeli people understand now what I always say: that there cannot be a situation, under any agreement, in which we relinquish security control of the territory west of the River Jordan,' see David Horovitz, 'Netanyahu Finally Speaks His Mind' *Times of Israel* (13 July 2014) <www.timesofisrael.com/netanyahu-finally-speaks-his-mind/> accessed 14 November 2017.
[164] Dugard (n 41) 91-92.
[165] Interim Agreement (n 161) annex III, appendix I.
[166] ibid art 9 (5)(a)-(b)(1-4).

almost all acts associated with those areas are subject to Israeli approval.[167] Even so, they have no jurisdiction over 61% of what is meant to eventually become their 'homeland', being barred from Area C.[168]

In regards to the 'homelands' and the PA, one other startling similarity showing the extent that Israel is practicing bantustanization, is that like the homelands of South Africa, the borders of the Palestinian homelands are entirely artificial and are the result of forced transfer of populations.[169] The point I am making here is that Israel, through the creation of the PA, has sought to ensure South African-inspired 'separate development'. Jewish settlers go to a civilian court while Palestinians go to a military court with a 99% conviction rate.[170] I do not think it is required to go any further in proving that Israel is trying to create a Palestinian 'homeland' in the OPT, but before I turn to Chapter 3, I want to compare one more aspect of the situation of Israeli Bantustanization and South Africa.

The West Bank is not the only 'Palestinian homeland' Israel is trying to create. It has also managed to create a second homeland in the Gaza Strip, allowing a faction it considers to be terrorists to administer it, while holding it as an example not to grant Palestinian sovereignty.[171] While Gaza is considered by law to be one territorial unit,[172] Israel, since disengaging from Gaza, discourages Palestinian reconciliation between West Bank and Gaza factions and threatens severe consequences if Hamas is allowed in the Palestinian Authority's parliament.[173] This has created a *de facto* second Palestinian

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[167] Tilley uses an example of telecommunications and transportation. The PA has, like the Bantu governments did, authority over telecommunications in their jurisdiction, but 'digging for or installing new equipment requires prior Israeli approval' and even though they may be in charge with transportation, the PA is barred from building roads, see Tilley (n 159) 60.
[168] Interim Agreement (n 161) art 17.
[169] One-third of the West Bank Palestinian population are refugees from 1948, two-thirds of Gaza Strip residents are refugees from 1948, see UNRWA, 'New Population Figures from UNRWA' (22 January 2010) <www.unrwa.org/newsroom/press-releases/new-population-figures-unrwa> accessed 14 November 2017.
[170] Chaim Levinson, 'Nearly 100% of All Military Court Cases in West Bank End in Conviction, Haaretz Learns' *Haaretz* (29 November 2011) <www.haaretz.com/nearly-100-of-all-military-court-cases-in-west-bank-end-in-conviction-haaretz-learns-1.398369> accessed 14 November 2017.
[171] Netanyahu has stated recently that '[w]hen Western power leaves and when Israeli power leaves, as we saw in Gaza, it is always immediately replaced by militant Islam.' See Pfeffer (n 163).
[172] HCJ 7015/02 **Ajuri v IDF Commander in the West Bank** (Verso) para 22.
[173] Barak Ravid, 'Netanyahu Slams Palestinian Unity: We Won't Accept Reconciliation at the Expense of Israel's Existence' *Haaretz* (3 October 2017) <www.haaretz.com/israel-news/1.815573> accessed 14 November 2017.

homeland but its uniqueness lies in the fact that it is used like one of South Africa's 'Siberias'[174] where Palestinians are exiled and banished to.[175]

Apartheid's aim of racial domination and maintenance of such cannot be accomplished without laws that are socially, territorially, and politically discriminatory and segregationist, along with laws that maintain the system through repression of all challenges to it. That is the purpose of the final chapter. I will focus on those laws that discriminate against its Palestinian Arab citizens and the security laws meant to repress any challenge to its apartheid regime by Palestinians (and non-Palestinians, alike), and apply such laws and practices to the prohibited inhumane acts found in the Apartheid Convention. Occasional reference, where relevant, will be made to the situation in the OPT.

Chapter 3: An International Legal Application of the Apartheid Convention to the Relative Domestic Israeli Policies and Practices of Neo-Apartheid

This chapter will now review Israeli policies and practices relevant to the prohibition of apartheid. I will be applying the Apartheid Convention but when it comes to interpretation of a particular provision, I turn toward the Rome Statute and the ICERD. Since 'commentary on the Apartheid Convention is scant',[176] I do my best to rely on other legal documents and commentary. Tilley's methodology, utilized here, begins with

[174] Dugard, Haysom, and Marcus (n 88) 22.
[175] The policy of banishing Palestinians to Gaza appears to have began in 2002 after the siege of the Church of Nativity in Bethlehem, when Israel made a condition for ending the siege the immediate deportation of almost 40 Palestinians inside the church. It is not official policy, but one can find report after report of Palestinian folks, since 2002, being forcibly exiled in the Gaza Strip, see for example Isra Namey, 'West Bank Palestinians Exiled to Gaza Dream of Home' *Al-Jazeera* (28 July 2016) <www.aljazeera.com/news/2016/07/west-bank-palestinians-exiled-gaza-dream-home-160719120240893.html> accessed 14 November 2017; 'Israel Expels Man from West Bank' *BBC* (10 November 2003) <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/middle_east/3258745.stm> accessed 14 November 2017; For a wide collection of articles reporting forced exiles to Gaza, see the UCC Palestine Solidarity Campaign, 'Israeli Policy of "Deportation", Banishment, Expulsion to Gaza or Elsewhere; Retail Ethnic Cleansing; Gaza Imprisonment' (2009) <http://cosmos.ucc.ie/cs1064/jabowen/IPSC/php/topic.php?tid=465> accessed 14 November 2017.
[176] Tilley (n 9) 129.

a brief interpretation of the provision being applied before moving toward the relevant Israeli practices and laws. I leave out the wide comparative analysis to South African practices, but reference them if and when appropriate. For some articles, they include a large amount of provisions within, and for those I have artificially included numbers to delineate the different provisions. For instance, Article 2(c) contains 7 separate rights that can be denied and each must be approached separately. This is not meant to be an entirely exhaustive list nor an exhaustive review, as there are space constraints in this thesis. However, by applying the Apartheid Convention's inhumane acts to Israeli practices and laws, I will successfully answer whether Israel is committing apartheid on its Arab citizens. Future researchers, using this as a guide, can help move from this base application and thoroughly review each and every practice and policy.

3.1 Article 2(a)(i) – Denial to a member or members of a racial group or groups of the right to life and liberty of person: by murder

3.1.1 Interpretation

This act concerns extra-judicial, state-sponsored murder, as opposed to killing during war or in accordance with the law (death penalty, for example).[177] According to the Rome Statute, the crime of 'murder',[178] when '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' is an inhumane act of apartheid.[179] This act can be linked to ICERD Article 5(b), which in the context of racial discrimination, prohibits the denial of the 'right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.'[180]

[177] ibid 130.
[178] Rome Statute (n 15) art 7(1)(a).
[179] Rome Statute (n 15) art 7(2)(h).
[180] ICERD (n 29) art 5(b).

3.1.2 Relevant Israeli Domestic Practices – While up to 7,000 Palestinians in the OPT have been killed by Israeli military forces since 1967,[181] there are only a few instances where Israeli state agents, police or otherwise, have killed Arab citizens. The instances of killing I have uncovered mostly revolve around excessive force by Israeli police. Two major examples include:

- In October 1956, Israeli Border Police (Magav) killed nearly 50 unarmed Israeli Arabs in Kufr Qasm, Israel for breaking a curfew they were unaware about.[182]
- In October of 2000, 12 Arab citizens of Israel who were demonstrating against police killings of other Palestinians were killed by Israeli police.[183] Afterwards, the official Or Commission Report acknowledged the motivation of the riots, stating, 'Government handling of the Arab sector has been primarily neglectful and discriminatory…The state did not do enough or try hard enough to create equality for its Arab citizens or to uproot discriminatory or unjust phenomenon.'[184] No police were indicted and the investigation was closed.[185]

In addition, reports of Israeli police killing Israeli Arabs suspected of supporting Palestinian militias who oppose Israel have been recorded by the US Department of State.[186] There is no evidence that Israel utilizes its policy of 'targeted killings' outside of the OPT on its own Arab citizens. According to the Israeli legal center Mossawa, 'Since 2000, state authorities have killed forty-eight Arab citizens.'[187]

3.1.3 Conclusion

[181] Tilley (n 9) 131, note 85.
[182] Barak Ravid and Jack Khoury, 'Rivlin Remembers 1956 Kafr Qasem Massacre: A Terrible Crime Was Committed' *Haaretz* (26 October 2014) <www.haaretz.com/israel-news/.premium-1.622786> accessed 16 November 2017.
[183] 'Israeli Arabs: The Official Summation of the Or Commission Report' *Jewish Virtual Library* (2 September 2003) <www.jewishvirtuallibrary.org/the-official-summation-of-the-or-commission-report-september-2003> accessed 16 November 2017.
[184] ibid para 3.
[185] One of the identified perpetrators was actually promoted to commander, see US Department of State: Bureau of Democracy, Human Rights, and Labor, 'Israel and the Occupied Territories' (28 February 2005) §1(a).
[186] US Department of State: Bureau of Democracy, Human Rights, and Labor, 'Israel and the Occupied Territories' (11 March 2008) §1(a); See also the 2015 report, §1(a). All years of reports can be accessed at <www.state.gov/j/drl/rls/index.htm>.
[187] Mossawa, 'The Mossawa Center's Briefing Paper on Human Rights for Arab Citizens in Israel: Discrimination Against the Arab Minority in Israel' (October 2017) 17.

While reflective of discriminatory practices, I do not believe this meets the threshold required to meet the denial of the right to life by murder in the context of the crime of apartheid, especially when compared to South Africa[188] and Israel's own 'targeted killing' practices in the OPT.[189]

3.2 Article 2(a)(ii) - Denial to a member or members of a racial group or groups of the right to life and liberty of person: by serious bodily or mental harm, by infringement of freedom or dignity, by torture, or by cruel, inhuman or degrading treatment or punishment

3.2.1 Interpretation

The prohibition of torture and cruel, inhuman, or degrading treatment/punishment is a *jus cogens* norm of international law. It is prohibited by the UN Convention Against Torture (CAT),[190] the International Covenant on Civil and Political Rights (ICCPR),[191] and the ICERD.[192] It is an international crime against humanity prohibited by the Rome Statute,[193] and like murder, is an inhumane act of apartheid when committed in such a context.[194]

3.2.2 Relevant Israeli Domestic Practices

Israel is disproportionately jailing its Arab population, as 60% of the prison population is Palestinian.[195] The state is committing acts that are cruel against its predominately Arab

[188] The TRC stated that 'the security forces came to believe that it was no longer possible to rely on the due process of law and that it was preferable to kill people extra-judicially,' See TRC Report (n 99) vol 2, 220.
[189] Tilley (n 9) 131-133.
[190] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85 (CAT).
[191] International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (ICCPR) art 7. Article 4(2) ICCPR states Article 7 is non-derogable.
[192] ICERD (n 29) art 5(b).
[193] Rome Statute (n 15) art 7(1)(f).
[194] ibid art 7(2)(h).
[195] US Department of State: Bureau of Democracy, Human Rights, and Labor, 'Israel and the Occupied Territories' (2016) 8 <www.state.gov/documents/organization/265712.pdf> accessed 16 November 2017.

detainees, acts of which may amount to torture, and does it with impunity and judicial backing.[196]

> Human rights organizations such as the Public Committee Against Torture in Israel (PCATI), Defense for Children International-Palestine, and Military Court Watch reported that 'physical interrogation methods' permitted by Israeli law and used by security personnel could amount to torture. The methods included beatings, forcing an individual to hold a stress position for long periods, and painful pressure from shackles or restraints applied to the forearms. The government insisted it did not use any interrogation methods prohibited by the [CAT]. NGOs continued to criticize other alleged detention practices they termed abusive, including isolation, sleep deprivation, unnecessary shackling, denying access to legal counsel, and psychological abuse such as threats to interrogate family members or demolish family homes.[197]

Interrogations are not recorded due to a loop hole in the law[198] and 'despite more than 800 complaints of torture by detainees in Israel since 2001--*in 15 percent of which cases the government acknowledged that the torture took place*--the government had never brought criminal charges against an interrogator (emphasis added).'[199]

3.2.3 Conclusion

This means that Israel has admitted responsibility for a whopping 120 of the complaints of torture in 2015. This suggests a wide, state-sponsored scale of torture against detainees that are predominately Arab.

3.3 Article 2(a)(iii) - Denial to a member or members of a racial group or groups of the right to life and liberty of person: by arbitrary arrest and illegal imprisonment

3.3.1 Interpretation

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[196] The HCJ ruled that while "'necessity" defense cannot serve as a basis for this authority [to torture]', an agent who tortures 'may find refuge under the "necessity" defense's wings', see HCJ 5100/94 **Public Committee Against Torture et al v Israel** (U of Michigan) para 38.
[197] Israel and the Occupied Territories 2016 (n 194) 3.
[198] 'Police can be exempt from such video recording in cases dealing with security offenses,' see Committee Against Torture, 'Fifth Periodic Reports of States Parties due in 2013: Israel' (17 November 2014) UN Doc CAT/C/ISR/5, para 19.
[199] ibid 5.

The UDHR[200] and the ICCPR[201] prohibit arbitrary 'arrest, detention, or exile',[202] except 'on such grounds and in accordance with such procedures as are established by law.'[203] First, I want to define the grounds on which such procedures may take place in accordance with ICCPR Article 9, and then the term 'arbitrary' in this sense and discuss for a moment the Apartheid Convention's interesting use of the term 'illegal'.

In respect to how a state may deprive liberty legally, the ICCPR's treaty body, the Human Rights Committee, has stated 'in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.'[204] Thus, the nature of a detention becomes arbitrary once the state is incapable of providing 'appropriate justification.' ICCPR Article 9 holds the right of judicial review, so one may determine in court whether one's detention is lawful of not. The Human Rights Committee held that judicial review must include the ability to hear the detainee's arguments and be able to determine lawfulness of detention and the possibility of release in case unlawfulness is found.[205]

Tilley states that the Apartheid Convention's use of the term 'illegal' was a 'careless mistake', as the term is not used in other legal documents on detention and imprisonment nor is it found in any documents on the drafting of the convention.[206] We can safely look toward the Rome Statute to clear things up. It prohibits '[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'.[207]

3.3.2 Relevant Israeli Domestic Practices

Israel arbitrarily targets Israeli Arabs with the "Stop-and-Frisk" Law - Amendment No. 5 to the Power for Maintaining Public Security Law.[208] This law authorizes 'police to stop and frisk people in case of a reasonable suspicion that he or she is about to commit a

[200] UDHR (n 143) art 9.
[201] ICCPR (n 190) art 9.
[202] UDHR (n 143) art 9.
[203] ICCPR (n 190) art 9.
[204] UN Human Rights Committee, Omar Sharif Baban v Australia [2003] UN Doc CCPR/C/78/D/1014/2001, para 7.2.
[205] ibid.
[206] Tilley (n 9) 138, note 151.
[207] Rome Statute (n 15) art 7(1)(e).
[208] DLD (n 11); For full text in Hebrew, see <www.nevo.co.il/law_html/Law01/999_469.htm>.

violent act…The law also authorizes police to frisk any person present in an area declared temporarily as a "stop-and-frisk zone" by a district chief of police, for reasons including potential security threats.'[209] In *Floyd v City of New York,* a federal judge ruled New York City's 'stop-and-frisk' policy as discriminatory, resulting in widespread violations of the Fourteenth Amendment of the US Constitution, an anti-discrimination clause sometimes called the Equal Protection Clause.[210]

The Laws and Administrative Ordinance codifies emergency regulations[211] such as the Emergency Powers (Detention) Law, which allows detainment without charge for renewable 6 month periods.[212] As stated above, arbitrariness of this provision is based on whether there is a right to judicial review. The law holds that there is,[213] but says that at the review, the President of the District Court 'may' confirm or set aside the detention, or shorten the duration. The court is not obligated to make such a decision. This, I believe, violates the right to judicial review, and thus, the law authorizes arbitrary detention.

Amendment No. 4 to the Criminal Procedure Law (Detainee Suspected of Security Offence) (Temporary Order) is an 'order stripping essential procedural safeguards from 'security' detainees, an 'overwhelming majority' of which are Arabs, such as withholding a lawyer for 21 days.[214] Meant to be a temporary order, it has been in force for over 10 years.

3.3.3 Conclusion

I will conclude, in conjunction with the breaches of Article 2(a)(ii), that Israel is committing arbitrary arrests and detentions of its Arab citizens in the context of apartheid.

3.4 Article 2(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

3.4.1 Interpretation

[209] DLD (n 11) see <www.adalah.org/en/law/view/597>.
[210] Floyd et al v City of New York 959 F Supp 540 (SDNY 2013) (US).
[211] Laws and Administrative Ordinance (5708-1948) (Israel) art 9.
[212] Emergency Powers (Detention) Law (5739-1979) (Israel) art 2(a)-(b).
[213] ibid art 4(a).
[214] DLD (n 11) see <www.adalah.org/en/law/view/596>.

This provision is also implanted in the Rome Statute under the definition of genocide.[215] *Elements of Crimes* notes that these living conditions imposed include, *inter alia,* 'deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes'[216] but Israel must have *mens rea*,[217] and the living conditions must be imposed to 'cause' the Palestinian Arabs of Israel 'physical destruction in whole or in part'. This is a difficult task. Tilley points out that not even the TRC agreed that the conditions imposed on black South Africans in homelands constituted a breach of this provision.[218]

3.4.2 Relevant Israeli Domestic Practices

In her study in the OPT, Tilley analyzes the siege of Gaza and does not find that Israel breaches this provision.[219] While the statistics show a major gap in the living conditions of Israeli Arabs and Jewish Israelis, such as higher infant mortality and double the amount of unskilled workers,[220] if the living conditions imposed on the Palestinian people of Gaza cannot be found to be calculated to cause the destruction of the Palestinian people in whole or in part, than I cannot hold that Israel is trying to deliberately impose 'living conditions calculated to cause' the Palestinian citizens of Israel 'physical destruction'. That said, Israel, I claim, is trying to impose detrimental living conditions on Israeli Arabs.

Current Defense Minister Avigdor Lieberman has called for nearly half of Arabs in Israel[221] to be transferred to a Palestinian state, [222] perhaps gaining the same detrimental living conditions imposed as the West Bank and the Gaza Strip. Israel has been found to not 'try hard enough to create equality for its Arab citizens or to uproot

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[215] ibid art 6(c).
[216] Elements of Crimes (n 69) 3, note 4.
[217] ibid art 6(c) element 3.
[218] Tilley (n 9) 145.
[219] ibid 145-146.
[220] Gerald Bubis, 'Israeli Arabs: Expectations and Realities' [2002] 478 Jerus Cent for Pub Affairs <http://jcpa.org/article/israeli-arabs-expectations-and-realities-2/> accessed 16 November 2017.
[221] The Northern District of Israel comprises 43.5% of the Israeli Arab population, see Central Bureau of Statistics, 'Israel in Figures 2010' 10 <www.cbs.gov.il/publications/isr_in_n10e.pdf> accessed 16 November 2017; This is the area that Lieberman wishes to 'swap' in a future peace deal, see note 209.
[222] Judah Ari Gross, 'In Apparent Split with PM, Lieberman calls for moving Arab Israelis to Future Palestinian State' *Times of Israel* (12 September 2016) <www.timesofisrael.com/in-apparent-split-with-pm-liberman-calls-for-moving-arab-israelis-to-future-palestinian-state/> accessed 16 November 2017.

discriminatory or unjust phenomenon',[223] and the same governmental report acknowledges that there are 'serious problems created by the existence of a large Arab minority inside the Jewish state'.[224] The equivalent is the National Party stating there are serious problems simply due to the existence of a non-white population inside White South Africa. I could perhaps draw a conclusion that Israel is wants to deliberately impose on its Israeli Arab citizens less-than-equal living conditions to that of its Jewish citizens, but I will deny there is found intent to have those living conditions annihilate them as a people in whole or in part.

For instance, since the state refuses to recognize most Bedouin villages in the Negev Desert,[225] 75,000 Bedouin Arabs in Southern Israel are denied by the state from being connected to the water main and electrical grid, and those that live in areas connected to water find that they pay a third more than everyone else.[226] The Bedouin also face a sinister plan from the Israeli government to forcibly expel them from their ancestral homes and villages. According to the Association for Civil Rights in Israel,

> The 2012 Memorandum of Law to Regulate the Bedouin Settlement of the Negev currently on the table impose[s] a unilateral solution that perpetuates the policy of discrimination…[the] stated goal is to regulate the issue of property ownership in the Negev, but in fact it is designed to concentrate the Bedouin in a restricted and predetermined area. The practical consequences are the uprooting of dozens of Bedouin communities and the evacuation of over 40,000 residents. The destroyed Bedouin communities are to be replaced by industrial zones, a military base and a Jewish settlement. The Memorandum addresses two central issues: Forced evacuation of unrecognized villages and the transfer of tens of thousands of residents to recognized towns, as well as imposed regulations regarding the land. In the handling of both issues, the government is ignoring the facts on the ground and failing to seriously consider alternatives, especially the recognition of unrecognized villages, *out of a clear intention to expel the residents*.[227]

3.4.3 Conclusion

[223] Or Commission Report (n 183) para 3.
[224] ibid.
[225] Association for Civil Rights in Israel, 'Situation Report: The State of Human Rights in Israel and in the Occupied Territories 2012' (December 2012) 49-53.
[226] Zafrir Rinat, 'Report: 75,000 Bedouin in Negev have Limited or No Running Water' *Haaretz* (6 July 2014) <www.haaretz.com/israel-news/.premium-1.603248> accessed 16 November 2017.
[227] Situation Report 2012 (n 221) 50-51.

Thus, I conclude that Israel is deliberately imposing living conditions that are detrimental to the human dignity of Palestinian Arabs, but are not imposed to cause their destruction in whole or in part. Justice Theodore Or, who authored the Or Commission Report, does call for the state to 'initiate, develop, and operate programs emphasizing budgets that will close gaps in education, housing, industrial development, employment, and services,'[228] but given the still existing inequality gap,[229] one wonders if the government of Israel has the will and desire promote better living conditions for Israeli Arabs and seek greater equality with its Jewish citizens. As for the plan to expel the Bedouin, the CERD has called for Israel to end the plan to forcibly expel them and demanded they halt demolitions of unrecognized villages,[230] but the plan has yet to be shelved.

3.5 Article 2(c)(1) - 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 (1) the right to work and (2) the right to form recognized trade unions

3.5.1 Interpretation

Any measures 'calculated to prevent' Israeli Arabs from the right to work breaches this provision, and we can look toward the ICERD for elaborating that Israeli Arabs shall enjoy the 'rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration.'[231] In regards to the right to form recognized trade unions, ICERD Article 5(e)(ii) affirms this right and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) includes the right to strike in this right.[232]

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[228] Or Commission Report (n 183) para 24.
[229] Jack Khoury, 'OECD Chief Meets Israeli Arab Leaders, Warns of Inequality Between Jews and Arabs' *Haaretz* (13 November 2017) <www.haaretz.com/israel-news/1.822447> accessed 16 November 2017.
[230] CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel' (28 February 2012) UN Doc CERD/C/ISR/CO/14-16, para 20-21.
[231] ICERD (n 29) art 5(e)(i).
[232] International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3 (ICESCR) art 8(d).

3.5.2 Relevant Israeli Domestic Practices – Basic Law: Freedom of Occupation enshrines for Israeli Arabs the enjoyment of the freedom to work in whatever occupation he/she pleases.[233] That said, in the public sector, there are major gaps in Arab versus Jewish workers. For instance, only 6% of public sector workers are Arab, despite being 20% of the population.[234] Of that 5.5%, more than half are in the health sector.[235] In the government, the Prime Minister's office employs less than 2% Arabs, 'the Public Security ministry employs only 1.7% Arabs and the Social Equality ministry only 1.4%...The Finance Ministry employs 3%, the courts administration 3.5%, and the tax authority 4.4%.'[236] There appears then, in the public sector, a preference for Jewish workers. Even in areas of high concentration of Arabs, 'the Ministry for the Galilee and Negev employs fewer than 3% Arab workers.'[237]

In regards to trade unions, Arab citizens may have the right to form them under international law, but in practice, the largest trade union in Israel, Histadrut, runs the show so to speak. There are reports that say that their support for Jewish strikes and frequent opposition to Arab strikes show that Histadrut is not going to seek favorable conditions for Arab workers.[238] One tragic episode showing such took place in 1976, when Histadrut 'actively campaigned against' an Arab strike against land confiscation.[239] At the strike, police shot 6 Israeli Arabs dead.

3.5.3 Conclusion

These are disturbing indicators that I believe breach this particular provision of the Apartheid Convention. Lack of favorable conditions at work for Arabs also indicate this.

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[233] Basic Law: Freedom of Occupation (1994) (Israel) art 3.
[234] Trade Union Friends of Palestine, 'The Histadrut: Its History and Role in Occupation, Colonization, and Apartheid' (2012) 8 <https://bdsmovement.net/files/2012/10/TUFP-The-Histadrut-RI-16.6.11.pdf> accessed 17 November 2017.
[235] Tony Greenstein, 'Histradrut: Israel's Racist "Trade Union"' *Electronic Intifada* (9 March 2009) <https://electronicintifada.net/content/histadrut-israels-racist-trade-union/8121> accessed 17 November 2017.
[236] Ben Lynfeld, 'Many Ministries Failing to Boost Arab Employment Rates, Report Finds' *Jerusalem Post* (19 July 2017) <www.jpost.com/Israel-News/Many-ministries-failing-to-boost-Arab-employment-rates-report-finds-500110> accessed 17 November 2017.
[237] ibid.
[238] In one instance, when Israeli Railways fired 150 Arab workers in 2009, Histadrut was 'silent', see Trade Union Friends (n 234) 9.
[239] Trade Union Friends (n 234) 9.

For instance, in 2004, McDonald's banned Arabic speaking in its restaurants in Israel, despite Arabic having official status.[240] Perhaps worse yet, 'at a building site [Arab workers] had their helmets marked with a red X to facilitate assassination in case of emergency.'[241]

3.6 Article 2(c)(3) - …Denying to members of a racial group or groups basic human rights and freedoms, including (3) the right to education

3.6.1 Interpretation

The right to education is expounded in international law in ICESCR Article 13, dictating that primary education must be free and compulsory[242] and higher education must be made equally accessible.[243] One doesn't necessarily need to be denied education for this right to be infringed. In South Africa, policy was made to 'ensure that Africans received an education that would confine them to working under whites in all sectors.'[244] What we need to look for are policies designed to ensure that Israeli Arabs have a lesser advantage than their Jewish classmates.

3.6.2 Relevant Israeli Domestic Practices

In Israel, 'from elementary school up, Jewish students receive more state funding than their Arab peers. In high school, per-student funding in 2013-14 was 35 percent to 68 percent higher for Jews than for Arabs at the same socioeconomic level. That statistic comes from the Education Ministry itself.'[245] Mossawa's research found that

> 84% of Jewish Israelis aged fifteen and over have completed elementary school, whereas, amongst Arabs of the same age, only 37% have finished elementary school. The Central Bureau of Statistics also demonstrates that the percentage

[240] ibid.
[241] ibid.
[242] ICESCR (n 232) art 13(2)(a).
[243] ibid art 13(2)(c).
[244] Tilley (n 9) 177.
[245] Or Kashti, 'For Jews and Arabs, Israel's School System Remains Separate and Unequal' *Haaretz* (7 July 2016) <www.haaretz.com/israel-news/.premium-1.729404> accessed 17 November 2017.

> of the workforce with higher education degrees among the Arab population is 17%, while the number stands at 40% among Jews. Moreover, PISA exam scores of Arab students are 20% lower than those of Jewish students, regardless of their socioeconomic background. This means that the best Arab pupils still perform 20% worse than the best Jewish ones. Dropout rates further demonstrate an immense gap between the education given to the Jewish population and that given to the Arab population. Whereas only 8% of Jewish students leave high school early, the figure for Arab students is 32%. Rather than mitigate these inequalities through affirmative action, the state invests far less in Arab schools. According to statistics from the Ministry of Education, Jewish students receive 35-68% more funds per student than their Arab counterparts of the same socioeconomic backgrounds.[246]

In addition to those startling statistics, Israel contains zero higher education institutions that offers education in Arabic, despite having a large percentage of Arabic speakers.[247] 61% of Jewish Israelis have bachelors degrees or other post-secondary degrees[248] while a mere 9% of Arab citizens do. It is easy to conclude that Israel is racially discriminating against its Arab population regarding education and is infringing their enjoyment of the right to education.

In Jerusalem, the statistics are more stunning. Six percent of Arab children are not enrolled in elementary education at all and the drop out rate is at 50% compared to 7.4% for Jewish kids in the same city.[249] Tilley points out that the Separation Wall assists in this detrimental educational situation for Palestinians.[250]

3.6.3 Conclusion

Based on my findings, I would conclude that Israel's actions (and non-action) regarding education in the Arab sector is infringing on its Arab citizens' right to education 'in the context of an institutionalized regime of systematic oppression and domination….and committed with the intention of maintaining that regime.'[251]

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[246] Mossawa, 'Israel and its Arab Palestinian Citizens' (2016) <www.mossawa.org/uploads/Israel%20and%20its%20Arab%20Palestinian%20Citizens%20-%2024%20May%202017.pdf> accessed 17 November 2017.
[247] ibid.
[248] 'Jewish Educational Attainment' *Pew Research Center* (13 December 2016) <www.pewforum.org/2016/12/13/jewish-educational-attainment/> accessed 17 November 2017.
[249] Tilley (n 9) 182.
[250] ibid.
[251] Rome Statute (n 15) art 7(1).

3.7 Article 2(c)(5) - …Denying to members of a racial group or groups basic human rights and freedoms, including (5) the right to a nationality

3.7.1. Interpretation

Although the terms 'citizenship' and 'nationality' tend to be used interchangeably, in Israel (as was discussed earlier), separates the two, 'Israeli law distinguishes between citizenship and nationality in constructing Israel as the state of the Jewish nation and not an "Israeli nation".[252] Thus, while Israeli Arabs are Israeli citizens, they are not Jewish nationals, which is what the state considers itself the national home of.

3.7.2 Relevant Israeli Domestic Practices

Israel, though its Law of Return and Nationality Law, is breaching this provision given that hundreds of thousands of Palestinian refugees are not allowed citizenship based solely on the fact that they are not Jewish. In another way as well, the granting of permanent resident cards to Arab residents of East Jerusalem also denies them the right to a nationality. Israel's policies are built to subtly remove Arabs in East Jerusalem from the possibility of becoming Israeli citizens, some actions of which have been called a 'quiet deportation'.[253]

First, the Law of Return expressly states that '[e]very Jew has the right to come to this country,'[254] leaving Palestinians out in the cold. The Nationality Law expressly denies citizenship to those who fled their homes prior to the passage of the law, which targets Arabs.[255] To grant naturalization, one must actually recite a loyalty pledge, 'I declare that I will be a loyal national of the State of Israel'.[256] Citizenship can be revoked if one shows 'disloyalty' toward the state,[257] which could potentially mean being an activist for wanting Israel to be a state for all its citizens.

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[252] Tilley (n 9) 164.
[253] ibid 157.
[254] Law of Return (n 74) art 1.
[255] Nationality Law (n 135) art 2(c)(1).
[256] ibid art 5(c).
[257] ibid art 11(a)(3).

In East Jerusalem, which is considered a part of Israel, Arabs are not given citizenship. On the contrary, 253,000 Palestinians have permanent residency cards that can be 'revoked at the discretion' of the Interior Minister.[258] Israel has and had several policies to ensure a Jewish majority demographic in Jerusalem, residency card policy amongst one of them. One from the past includes the fact that if one was not present during the initial census when Israel took over Jerusalem in 1967, one did not receive permanent residency.[259] Today, policies like that continue. If one is deemed to not have their 'center of life' in East Jerusalem, the residency is revoked, rendering one stateless.[260] This 'center of life' condition can be invoked if the person has left for seven years[261] or if the person went and attained citizenship elsewhere[262] (as anyone may expect one to do, since a permanent residency card is not a passport, meaning you cannot leave Israel). Living in another state for three years for non-educational reasons also means you lose your residency card.[263] From the time Israel took over Jerusalem to 2006, nearly 10,000 Palestinians have had their residency revoked.[264]

3.7.3 Conclusion

The state's annexation of Jerusalem did not bring Israeli citizenship to the Arabs living in the eastern section of the now 'united' and 'indivisible' capital of Israel, but in fact, ushered in a mass denial to the right of nationality. Easily revoked permanent residency means that East Jerusalem Arabs live on the constant cusp of statelessness and many who reside in Jerusalem but beyond the Wall are unable to move around at all. Frustrated, they leave to study or work in third countries, only to find out that the Israeli Interior Ministry has revoked their Jerusalem residency upon return (in fact, many cannot even return through Ben-Gurion Airport in Tel Aviv, but must go through Amman, Jordan and over the land crossings through the OPT). This is a startling breach of the right to nationality based solely on Arabs not being Jewish, as Jews in East Jerusalem are afforded instant Israeli citizenship, thus this breach is committed in the context of apartheid.

[258] ibid art 11.
[259] Tilley (n 9) 157.
[260] ibid.
[261] Nationality Law (n 135) art 11(a)(2).
[262] Tilley (n 9) 157.
[263] Tilley (n 9) 157.
[264] ibid 158.

3.8 Article 2(c)(6) - …Denying to members of a racial group or groups basic human rights and freedoms, including (6) the right to freedom of movement and residence

3.8.1 Interpretation

For the purpose of consolidation, I will include Article 2(c)(4) - …Denying to members of a racial group or groups basic human rights and freedoms, including (4) the right to leave and to return to their country as a part of this article. Tilley notes there is an internal and external factor to this right,[265] internally, one may move about within the border of the state and reside where one pleases. The external factor denotes the ability to freely leave the state and return. Article 5(d)(i) of the ICERD provides that the enjoyment of the 'right to freedom of movement and residence within the border of the State' shall be not be infringed based on racial discrimination.[266] Any denial of this right that prevents the full development of Israeli Arab political, social, economic, and cultural life falls under this provision as apartheid.

3.8.2. Relevant Israeli Domestic Practices

While Palestinians in the OPT face major restrictions to their freedom of movement,[267] Israeli Arabs also face restrictions of movement that hinder their full development, mostly regarding residence.

In a 2014 ruling in *Adalah v Knesset,*[268] the HCJ upheld the Admissions Committees Law,[269] which creates councils for localities in order to refuse or accept new residents. Residents can be denied on a wide range of ambiguous factors, the ones most controversial relate to denial for not being 'suitable for the social life of the community' and 'lack of compatibility with the social-cultural fabric' of the community.[270] The law also dictates that the admissions committees have members of the Jewish Agency and

[265] Tilley (n 9) 147.
[266] ICERD (n 29) art 5(d)(i).
[267] ibid 148-162.
[268] HCJ 2504/11 **Adalah et al v The Knesset et al** (Adalah).
[269] Law to Amend the Cooperative Societies Ordinance (Amendment No 8) (5771-2011) (Israel).
[270] Cooperative Societies Ordinance (n 234) art 6C(a)(4)-(5).

World Zionist Organization,[271] the latter of which is tasked with safeguarding the land of Israel for purely Jewish settlement. The law, in effect, deters 'many segments of the population, especially Palestinian Arab citizens of the state, from applying for housing in these towns for fear of rejection. The law has serious implications' in regards to the freedom of residence of Israeli Arabs and appears to be state-sponsored racial segregation.

The state continues to receive judicial support for its segregationist policies. In *Adalah v National Council for Planning and Building,*[272] the court upheld the 'District Master Plan 4/14/42 of the Regional Council of Ramat HaNegev in the Southern District (the "Wine Path Plan"). This plan affords recognition to the illegal individual settlements that were established in the Negev contrary to local, district and national plans, without obtaining the necessary permits as required by law.'[273] What this means is that Jewish settlements in Bedouin Arab areas of the Negev are being legalized for '[t]he reasons…to preserve state lands… [as] solutions for demographic issues" while non-Jewish Bedouin villages continue to receive zero recognition and thus, no water or electricity.

3.8.3 Conclusion

In terms of freely leaving and returning to their country, it is perhaps needless to say that millions of Palestinian Arabs are barred from returning to their homes in Israel's official borders, contrary to UNGA Resolution 194,[274] while Jews from around the world are given automatic citizenship via the Law of Return[275] and Nationality Law.[276] In addition to the historic and ongoing situation between the Bedouins and the Israeli government, I must conclude that Israel is breaching the provision concerning the freedom of movement and residence.

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[271] ibid art 6B(b)(1).
[272] HCJ 2817/06 **Adalah et al v The National Council for Planning and Building et al** (Adalah).
[273] Adalah, 'Israeli Supreme Court Upholds Planning Authority Decision to Establish Individual Settlements in the Naqab as part of its "Wine Path Plan" Despite Discrimination against Arab Bedouin Unrecognized Villages' (28 June 2010) <www.adalah.org/en/content/view/7130> accessed 17 November 2017.
[274] UNGA Res 194 (n 144).
[275] Law of Return (n 74).
[276] Nationality Law (n 135).

3.9 Article 2(c)(7) - …Denying to members of a racial group or groups basic human rights and freedoms, including (7) the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association

3.9.1 Interpretation

The ICCPR lays out these core civil and political rights in Articles 19 and 21.[277]

3.9.2 Relevant Israeli Domestic Practices

Israel's policy is to shut down opinions and expressions made by Palestinian Arabs that resist the policies and practices of apartheid, most notably on the internet. According to Mossawa,

> Despite widespread racism against Arabs on social media,[278] the state has charged few to no Israeli Jews for incitement on the internet. In contrast, the Israeli state has opened over two hundred criminal files against Arab activists for incitement on social media. In fact, according to Adalah…'70 percent of the 175,000 recorded posts in Israel that specifically incited violence on social networks between June 2015 and May 2016 were actually made by right-wing Israeli Jews against Arabs…' The ambiguity of the term 'incitement,' however, allows the state to administer the law selectively, that is by applying it to Arab citizens who oppose the state's policies.[279]

The 'Anti-Boycott Law'[280] also targets the freedom of expression of those dedicated to ending Israel's policies of occupation and apartheid by prohibiting a boycott of Israel, whether economically, culturally, or academically. This indirectly discriminates against Palestinians, since the movement was started by almost 200 Palestinian NGOs and other organizations.[281] Boycotts are an important part of resistance and one's freedom to express oneself politically. The court backed the state yet again. The HCJ

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[277] ICCPR (n 190) art 19, 21.
[278] 'The Arab Center for the Advancement of Social Media and conducted by VIGO Social Intelligence, revealed that 60,000 Israelis wrote at least one racist or hateful post towards Arabs or Palestinians throughout the course of 2016. With a total of 675,000 posts, this was more than double the number of similar posts in 2015,' see Mossawa (n 246).
[279] Mossawa (n 246).
[280] Prevention of Damage to the State of Israel through Boycott (2011) (Israel).
[281] 'Palestinian BDS National Committee' <https://bdsmovement.net/bnc> accessed 18 November 2017.

stated that 'the law does not violate the "core component of freedom of expression". It is also a proportionate violation intended for a worthy purpose'.[282] The UNGA in the 80s called for the same type of boycott of South Africa to end apartheid through a resolution.[283]

Freedom of association is also infringed by Israel in regards to shutting down organizations that oppose its status as a Jewish state. A major one in particular is the Northern Branch of the Islamic Movement of Israel, banned in 2015, along with 17 other organizations and charities. They were deemed to be criminal by the government, but research shows that '[t]he decision to outlaw the Northern Branch seems to have been based on political calculations, not necessarily security interests.'[284] Stifling Arab citizens' freedom of association appears to be committed in the context of maintaining Jewish domination, since 'by contrast, Jewish Israelis in the OPT and Israel are allowed full enjoyment of their rights to freedom of association and peaceful assembly'.[285] In Jerusalem for example, 'Israeli forces regularly open fire on peaceful Palestinian demonstrations against the Wall, but do not do so in cases of demonstrations by [Jewish] settlers.'[286]

3.9.3 Conclusion

Israeli is clearly denying Palestinian Arab citizens their right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association, based solely on their non-Jewish status.

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[282] HCJ 2072/12 **Coalition of Women for Peace et al v Minister of Finance et al** (Summary by Adalah) <www.adalah.org/uploads/Boycott_decision_apri_2015_english_summary.pdf> accessed 18 November 2017; Because this case is still 'new', official translations have not been made, hence the usage of Adalah's English case summary.

[283] UNGA 'Policies of Apartheid of the Government of South Africa' (17 December 1981) UN Doc A/RES/36/172, §I.

[284] Lawrence Rubin, 'Why Israel Outlawed the Northern Branch of the Islamic Movement' *Brookings Institute* (7 December 2015) <www.brookings.edu/blog/markaz/2015/12/07/why-israel-outlawed-the-northern-branch-of-the-islamic-movement/> accessed 18 November 2017.

[285] Tilley (n 9) 190.

[286] Tilley (n 9) 190.

3.10.1 Article 2(d)(1) - Any measures, including legislative measures, designed to divide the population along racial lines by (1) the creation of separate reserves and ghettos for the members of a racial group or groups

3.10.2 Interpretation

Tilley rightly notes that there is no international law that specifically defines the terms 'reserves' and 'ghettos'. When it comes to the former term, we can look toward South African apartheid law. In listing the lands in which Natives are obliged to reside in (the 'Schedule of Native Areas'), the South African government repeatedly refers to them as 'reserves'.[287] I would define it then as a parcel of land set aside for use by a specific group. The term 'reservations' is also used, but typically in the US to describe areas the government placed Native Americans.[288] The term 'ghettos' too, is undefined in law, but Tilley describes it as 'urban districts characterized by geographic isolation and discrimination.'[289]

3.10.3 Relevant Israeli Domestic Practices

While there is no Israeli law that dictates were Arab citizens are allowed to live, Israeli policy is to ensure that Arabs are confined to the localities Israel did not empty out during its 1948 establishment.

> Although the state of Israel has allocated lands and provided planning services for *over six hundred Jewish communities since its establishment*, *it has not created a single Arab locality,* aside from seven townships that it created to concentrate the Bedouin Arab population in the Naqab (Negev). Meanwhile, the Arab population has grown sixteen-fold since 1948. Only four Arab localities (Nazareth, Taibeh, Tira, and Abu Basma) have planning and building committees. The other Arab localities must rely on regional councils, which do not have the capacity to provide adequate attention or resources for small, local development projects and often prioritize Jewish localities. This results in disproportionately high unlicensed construction in the Arab community.

[287] Bantu Land Act (n 39) schedule of Native Areas.
[288] Bureau of Indian Affairs, 'Frequently Asked Questions' <www.bia.gov/frequently-asked-questions> accessed 18 November 2017.
[289] Tilley (n 9) 197.

> Currently, over 50,000 Arab families in Israel live in houses without permits. Thus, at least 200,000 Arab citizens live under constant threat of home demolition.[290]

3.10.3 Conclusion

In practice, Israel has essentially created reserves for its Arab citizens, and in conjunction with the Admissions Committees Law discussed above, Israel ensures Arab citizens cannot legally live anywhere outside the already established Arab localities.

3.11 Article 2(d)(2) - Any measures, including legislative measures, designed to divide the population along racial lines by (2) the prohibition of mixed marriages among members of various racial groups

3.11.1 Interpretation

This provision does not require interpretation. In regards to Israel, this provision prohibits prohibitions of marriages between Jews and non-Jews, and other racial minorities with other racial minorities (so, Druze and Ethiopians for instance).

3.11.2 Relevant Israeli Domestic Practices

Israel does not outright prohibit mixed, interfaith, or interracial marriages, but in practice it does. The Family Courts Law[291] sets up special courts with each major religion to handle marriages, but by doing this it 'creates insuperable obstacles for couples from different religious groups' or those who are unaffiliated with any.[292] For instance, marriages between Jews and non-Jews, then, would have to take place outside the country. And while the Interior Minister may 'recognize' it, they do not have any genuine jurisdiction over the matter. The respective religious courts do, and for example, the Jewish family court (the Rabbinate) will not recognize them, and that will mean failure to gain the same legal rights as spouses in non-mixed marriages.

3.11.3 Conclusion

[290] Mossawa (n 246).
[291] Family Courts Law (5755-1995) (Israel).
[292] Tilley (n 9) 204.

Thus, 'the absence of a formal law to ban mixed marriages' like in South Africa[293] means little since 'a cluster of other juridical measures ensures the same effect.'[294]

3.12 Article 2(d)(3) - Any measures, including legislative measures, designed to divide the population along racial lines by (3) the expropriation of landed property belonging to a racial group or groups or to members thereof

3.12.1 Interpretation

This provision, like the one before it, needs no further explanation. This would refer to Jewish seizures of Arab land.

3.12.2 Relevant Israeli Domestic Practices

The Absentees Property Law[295] expropriated land from 'absentees', who were defined as any Palestinian or non-Jew who fled during the time of that Israel was taking over the former British Mandate of Palestine.[296] After the initial seizing during the first years of the state's existence, this past decade has seen the law's resurgence, specifically in seizing homes of Arabs in East Jerusalem who happen to live in the OPT, a new application of the law that the HCJ has too upheld.[297]

In 2009, Amendment 7 of the Israel Land Administration Law was passed, which allows the state to privatize and sell absentee property and other land held by the state and JNF for exclusive use of the Jewish people.[298] 'The legislation would eventually lead to the transfer of ownership, even without payment, to Jewish leaseholders and to a "clearance" sale of what remains of Palestinian property.'[299]

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[293] Prohibition of Mixed Marriage Act (n 108).
[294] ibid 205.
[295] Absentees' Property Law (5710-1950) (Israel).
[296] ibid art 1(b).
[297] CA 2250/06 **Custodian of Absentees' Property et al v Daqaq Nuha et al** (Verso).
[298] Adalah, 'Critique of the Draft Bill - Israel Land Administration Law (Amendment No. 7) 2009' (21 July 2009) <www.adalah.org/uploads/oldfiles/newsletter/eng/jul09/Position_Paper_on_Land_Reform_Bill_july_2009.pdf> accessed 18 November 2017.
[299] Yosef Rafiq Jabareen, 'The Geo-Political and Spatial Implications of the New Israel Land Administration Law on the Palestinians' 62 Adalah Newsletter 2 <www.adalah.org/uploads/oldfiles/newsletter/eng/jul09/Yosef_English_on_new_ILA_law%5b1%5d.pdf> accessed 18 November 2017.

3.12.3 Conclusion

Israel's courts continue to give legal authorization for the expropriation of Arab homes in East Jerusalem and those who lived in Israel prior the state's establishment. These homes in East Jerusalem are actually being expropriated for the building of Jewish-only settlements, as the Custodian of the Absentees' Property has given property to Jewish settlement organizations that promise a Jewish majority in the ancient Muslim Quarter of the Old City,[300] thus, Israel is certainly breaching Article 2(d)(3) of the Apartheid Convention.

3.13 Article 2(e) - Exploitation of the labor of the members of a racial group or groups, in particular by submitting them to forced labor

3.13.1 Interpretation

According to the 29th Convention of the International Labor Organization (ILO), 'the term forced or compulsory labor shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'[301] In regards to exploitation, this term refers to 'conditions of extreme worker vulnerability, in which people are under-compensated for their work yet have no effective means of redressing poor wages or conditions.'[302]

3.13.2 Relevant Israeli Domestic Practices

This is the second provision that I have found no evidence of Israel breaching, or reaching any threshold based on precedent. Forced labor is simply not found in Israel. Exploitation of Arab workers, however, may be found when we look back at the previous sections on trade unions. Arab workers, as I showed, are typically unable to find a remedy for their working conditions. Like the example of the 150 Arab Israeli Railway

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[300] Lawyers for Palestinian Human Rights, 'The Absentee Property Law and Israel's Policies of Forced Evictions of Palestinians in East Jerusalem' (28 May 2015) <https://lphr.org.uk/blog/the-absentee-property-law-and-israels-policies-of-forced-evictions-of-palestinians-in-east-jerusalem/> accessed 24 November 2017.

[301] ILO, Forced Labor Convention (No 29) (28 June 1930) art 2(1).

[302] Tilley (n 9) 210.

workers who were fired, their labor union, the Jewish Histadrut, did nothing to defend them and in many similar cases involving Jewish workers, come to their immediate defense.

3.13.3 Conclusion

I believe Histadrut works to make sure Jewish labor is well-paid and well-protected and that Arab labor is undefended and ensured to be low-waged. Whether this exploitation of Arab workers reaches the threshold found in Israel's practices in the OPT[303] or South Africa[304] remain to be seen, but it certainly should be something taken up by labor law experts.

3.14 Article 2(f) - Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid

3.14.1 Interpretation

This is one provision that I will not advance a full review of, since all Israeli laws and practices reviewed so far can be seen as 'persecution…because they oppose apartheid.' In Tilley's review of Israeli practices in the OPT, she enacts another discussion on Israel's civil and political laws which are practiced in the name of 'security'. We have already discussed those, and I do not intend to go further. I will say that, based on Israel's breaches of nearly all of the inhumane acts listed in the Apartheid Convention, that Israel 'persecutes organizations and persons by depriving them of fundamental rights and freedoms because they oppose' Israel's neo-apartheid.

3.15 Conclusion on Findings

The review above may evince feelings reminiscent of those felt before apartheid in South Africa fell. To research and learn of inhumane acts being committed on a marginalized

[303] ibid 211-212.
[304] The Bantu Laws Amendment Act (1965) gave the government the choice to ban 'Black labor in any geographical area and send surplus Black workers to the Bantustans,' see Padraig O'Malley, '1965 Bantu Laws Amendment Act' *Nelson Mandela Foundation* <www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01917.htm> accessed 18 November 2017.

people is disheartening and discouraging. What strikes me about neo-apartheid is how it is seemingly subtle in some ways but in others, indistinguishable from South African apartheid. For instance, in terms of surreptitiousness, Arabs are given the right to vote, join trade unions, and reside in Israel – but candidates must acknowledge the non-Arab, purely Jewish character of the state and pushing for a bi-national state is even seditious (as demonstrated when Balad was banned in the early 2000s), trade unions, the largest being Jewish institutions, go out of their way to defend Jewish workers but completely ignore Arab ones, and Arabs can't move into a town unless an Admissions Committee, made up of no Arabs and Jewish representatives from organizations that are designated to hold the land in Israel in trust for the Jewish people as a whole. These are acts of apartheid.

The inequalities are no accident – they were established and are maintained as such, as Israel is a racial regime. But the pattern is clear, Israel provides rights, but ensures that they are denied when possible and otherwise, provides them in a second-class manner. Sure, Israel says, Bedouins can live in the Negev, but we will not 'recognize' them, thus denying water and electricity. As for the Jewish settlements next door, Israel shrugs, unable to explain why they are instead automatically recognized and hooked up to utilities. Israel may not be murdering its Arab citizens and is not instilling forced labor on anyone, but the other acts reviewed against their policies and practices reveals that Israel is indeed committing apartheid.

Each provision and my findings, based on comprehensive and detailed research from dedicated human rights organizations and lawyers, should be further analyzed and researched with the explicit aim of ending apartheid. Now is the time for a movement against neo-apartheid to mount an academic and legal strike.

Chapter 4: Concluding Remarks and Suggestions for Further Research

The overarching question of this thesis, 'Is Israel committing apartheid within its official borders against its Palestinian Arab minority?' has been answered in the affirmative. Israel is indeed committing acts '*for the purpose of establishing and maintaining*

domination' of Jewish Israelis over Palestinian Arab citizens '*and systematically oppressing them*.'

In Chapter 1, I focused on the geographical scope of the prohibition of apartheid and settled that it *can* and *must* be applied outside of South Africa. In seeking to then apply it to Israel, I established that the Apartheid Convention applies to Israel as the law is customary international law. I also proved that the racial discrimination requirement fits because the two groups in Israel are indeed racial groups, when balanced against the definition in the ICERD. 'Israeli apartheid' or 'neo-apartheid', in Chapter 2, was demonstrated to contain the same legal components that define classical apartheid, or apartheid found in South Africa. Neo-apartheid, like its classical formation, consists of a grand apartheid vision that is legally grounded in constitutional control, socially, territorial, and politically segregationist and racially discriminatory laws, and politically repressive security laws.

Furthermore, the analysis of Israel's status as a 'racial state' showed that the state was established with a system of racial domination built in. As for the grand apartheid vision of Israel, it does this through the 'peace process', which pushes the dominant 'two-state solution'. The creation of an 'independent' state(s) for the Palestinian people as a whole is actually creating a Palestinian 'homeland' inspired and based on the South African model.

In Chapter 3, I was able to commit to a thorough and comprehensive – yet not exhaustive – review of Israeli practices and policies relevant to the prohibition of apartheid. I found that Israel was breaching all provisions except for Article 2(a)(i), on denial of the right to life of Palestinian citizens by murder, the forced labor aspect of Article 2(e), and Article 2(b) on the deliberate imposition of living conditions calculated to destroy Palestinian citizens in whole or in part (although we did find that Israel is imposing detrimental living conditions on its Arab minority, it is not doing it in order to genocide the group). Others need more expounding through future research to guarantee my findings, namely Article 2(c) regarding the right to work, and Article 2(f), which perhaps should focus purely on Israel's emergency regulations.

The purpose of this thesis, as is known, was to step outside the research on Israeli practices in the OPT and move inside domestically to see if Arab citizens of Israel were

facing reprehensible discriminatory measures or living under a brutal regime of apartheid. I believe that the task has been satisfied. Researchers looking to go further should move toward the international criminal legal aspects of the crime of apartheid in Israel. Namely, who is held responsible or accountable, and how? Or, better yet, is it even possible that Israeli apartheid will end? The Boycott movement has gained steam, but is not quite gaining the international support the South African one did, as demonstrated by a General Assembly resolution. Palestinian BDS has a ways to go if it intends to reach that pinnacle of international support.

As John Kerry warned us, if Israel continues on its path, a two-state solution is the only real alternative. As I demonstrated in this thesis, a two-state solution leads us down the South African path of bantustanization. Israel, by committing these acts and establishing itself as a racial regime, tells the world it does not intend to halt the status quo. This means that a continued academic onslaught is required to bring down the gears and cogs holding neo-apartheid together. Only together and as one can we achieve what was accomplished in South Africa just a quarter century ago.

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