



Same Game, Different Rules

Practices and Policies of Racial Discrimination by the Occupying Power in the Occupied Palestinian Territories

Legal Brief

Diakonia International Humanitarian Law Resource Centre
May 2016

Same Game, Different Rules

Practices and Policies of Racial Discrimination by the Occupying
Power in the Occupied Palestinian Territories

Legal Brief



Diakonia International Humanitarian Law Resource Centre
May 2016

Do you want to learn more about International Humanitarian Law?
Visit our website: An Easy Guide to IHL in the oPt at: www.diakonia.se/en/IHL/

Or contact us at: ihl@diakonia.se

Published by:

Diakonia
Diakonia International Humanitarian Law Resource Centre
www.diakonia.se/ihl
ihl@diakonia.se

© Copyright 2016 Diakonia IHL Resource Centre
All Rights Reserved

Diakonia IHL Resource Centre encourages use of information contained in this report but requests that full citation to the respective author and to the source be made.



Cover Picture: A Palestinian youth looks from a rooftop in the West Bank town of Beit Jala overlooking Road 60 and the Israeli separation wall, March 31, 2014. Road 60 is the main north-south route connecting Jerusalem to West Bank Israeli settlements, ©Oren Ziv, ActiveStills.

Disclaimer:

With regard to testimonies, case studies and pictures provided by external organisations, the author wishes to acknowledge that the designation employed and the presentation of materials throughout this publication do not imply the expression of any opinion whatsoever on the part of those external organisations concerning the findings of the report, the legal status of any country, territory, city or area or of its authorities or concerning the delimitation of its frontiers or boundaries.

Table of Contents

I. Introduction	5
II. Applicability of International Humanitarian & Human Rights Law to the Occupied Palestinian Territories	5
III. General Prohibitions against Discrimination	6
A. International Humanitarian Law	6
B. International Human Rights Law	7
IV. Specific Prohibitions against Racial Discrimination	7
A. International Convention on the Elimination on All Forms of Racial Discrimination	7
B. Racial Discrimination, in Relation to Apartheid	9
C. International Humanitarian Law	11
D. International Criminal Law	12
V. Racial Discrimination Directly Resulting from the Settlement Enterprise	13
VI. Third State Obligations	16
A. Obligation to Respect and Ensure Respect under International Humanitarian Law	16
B. Article 41 of the Articles on State Responsibility and Consequences of Serious Breaches of Peremptory Norms	18
VII. Conclusions, including Recommendations	19

List of Acronyms (in alphabetical order)

AP1	Additional Protocol I
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CERD	Committee on the Elimination of Racial Discrimination
FFM	Fact-Finding Mission
GC4	Fourth Geneva Convention
GCs	Geneva Conventions
ICC	International Criminal Court
ICCPR	International Covenant for Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHLRC	Diakonia International Humanitarian Law Resource Center
IHRL	International Human Rights Law
ILC	International Law Commission
OP	Occupying Power
oPt	occupied Palestinian territories
UN	United Nations

I. Introduction

Over time, and increasingly, the term “apartheid” has been used to describe the situation in the occupied Palestinian territories (oPt). It is hardly surprising that use of the term brings with it a highly charged debate and strong sentiments, given the not so distant and dark history in southern Africa.

This legal brief aims to provide a deeper understanding of the normative legal framework regulating and qualifying the debate on racial discrimination, and its relation to apartheid. It does not intend to fully appraise the copious volume of writing that has been produced on the topic thus far but, rather, to examine the relevant issues from the perspective of international law and its applicability in the oPt.

More specifically, this brief will examine the rules prohibiting **discrimination** under both international humanitarian law (IHL) and international human rights law (IHRL), as well as the rules pertaining to **racial discrimination**, and its relation to **apartheid**.¹

First, this includes the applicability of IHL and IHRL to the oPt. Second, it analyzes the general prohibition against discrimination under both IHL and IHRL. Third, this brief examines the specific prohibitions against racial discrimination, as well as its relationship to apartheid. Fourth, it assesses the causal relationship between the settlement enterprise and the Occupying Power (OP) practices and policies of racial discrimination in the oPt. Fifth, it looks at third State obligations under international law. Finally, it concludes with a series of policy recommendations to third States.

II. Applicability of International Humanitarian & Human Rights Law to the Occupied Palestinian Territories

The oPt comprises the entirety of the Gaza Strip and the West Bank, including East Jerusalem. Israel’s status as OP in the oPt has been established, and frequently reaffirmed, as a matter of law and fact.² Hence, IHL applies to the oPt and, most importantly, the relevant parts of IHL that govern situations of occupation.

IHRL also applies in situations of occupation. As a State Party to numerous human rights treaties, Israel is obligated to apply them extraterritorially to the oPt. According to Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), States must “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]”.³ The ICCPR’s treaty-body, the United Nations (UN) Human Rights Committee, has confirmed that States must afford those rights to persons who “find themselves in the territory or subject to the jurisdiction of the State Party”.⁴

¹ With respect to analysis on apartheid in particular, see, generally, Max du Plessis, *The Prohibition of Apartheid in International Law*, BADIL Resource Center for Palestinian Residency and Refugee Rights [hereinafter Du Pleiss], http://www.badil.org/en/component/k2/item/1691-art3.html#_ftnref22; John Dugard & John Reynolds, *Apartheid, International Law and the Occupied Palestinian Territory*, 24(3) EUR. J. INT’L L. 867 (2013) [hereinafter Dugard & Reynolds]; Paul Eden, *The Role of the Rome Statute in the Criminalization of Apartheid*, 12 J. INT’L CRIM. JUSTICE 171 (2014) [hereinafter Eden]; Julia Gephard, *Apartheid*, MAX PLANCK ENC. PUB. INT’L L. (Oct. 2010) [hereinafter Gephard].

² Art. 42 of the Hague Regulations of 1907 provides that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army” and that “[t]he occupation extends only to the territory where such authority has been established and can be exercised”. All States, the UN (Secretary-General, special rapporteurs, various fact-finding missions), the ICJ and ICRC all recognize the entirety of the oPt as being occupied. On Gaza specifically, see, e.g., S.C. Res. 1860, U.N. Doc. S/RES/1860 (Jan. 8, 2009); “[s]tressing that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state”. See also ICC-OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report* (Nov. 6, 2014), para 16, [https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf); “Israel continues to be an occupying power in Gaza despite the 2005 disengagement”.

³ International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; “all individuals within its territory and subject to its jurisdiction”.

⁴ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 10.

As reaffirmed by the International Court of Justice (ICJ) in the *Wall* advisory opinion,⁵ IHRL protects the rights of individuals in occupied territory as a matter of international law, in conjunction with the protections guaranteed by IHL.⁶ In the *Wall* advisory opinion, the ICJ identified three different ways in which IHL and IHRL interact in occupied territory: “some rights may be exclusively matters of [IHL]; others may be exclusively matters of [IHRL]; yet others may be matters of both...”.⁷

Israel, as a High Contracting Party and thus bound by the Fourth Geneva Convention (GC4), as well as customary IHL, is prohibited from engaging in discriminatory policies and practices. Israel’s obligations, like those of all States, encompass the general prohibitions against discrimination as stipulated in IHL and IHRL, as well as the specific prohibitions against discrimination based on race.⁸

III. General Prohibitions against Discrimination

A. International Humanitarian Law

IHL prohibits discrimination – or “adverse distinction”.⁹ Distinction cannot be made by a party to an armed conflict “based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria”.¹⁰ This IHL notion of “adverse distinction” implies that while discrimination between persons is prohibited, distinction may be made in situations of armed conflict to give priority to those most in need of care, such as on medical grounds.

Common Article 3 of the Geneva Conventions, which specifies the minimum guarantees afforded to persons not taking part in hostilities in situations of armed conflict, stipulates that such persons “shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.” These minimum guarantees include prohibitions against: violence to life and person; hostage-taking; outrages upon personal dignity; and unfair trials.

In addition to these fundamental guarantees, GC4 specifically obligates parties to protect civilian populations from the effects of war without adverse distinction¹¹ and to treat protected persons in an occupied territory “without any adverse distinction based, in particular, on race, religion or political opinion”.¹² These rules were further developed in Additional Protocol I (AP1).¹³

Israel is party to GC4, but not AP1. Nevertheless, the fundamental rules contained in AP1, including with respect to non-discrimination, apply to all States as a matter of customary international law.¹⁴

⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para 102–113 (July 9) [hereinafter *Wall* Advisory Opinion].

⁶ See also *Armed activities on the territory of the Congo (D.R.C. v. Uganda)*, 2005 I.C.J. 168, para 216 (Dec. 19).

⁷ *Wall* Advisory Opinion, para 106. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 25 (July 8).

⁸ While racial discrimination within Israel proper has been raised by States, international organizations and others, this brief examines the issue of discrimination only within the oPt.

⁹ See Jelena Pejic, *Non-discrimination and armed conflict*, 841 INT’L REV. RED CROSS (2001), <https://www.icrc.org/eng/resources/documents/misc/57jqzq.htm>. Main provisions on non-discrimination include: First Geneva Convention art. 12; Second Geneva Convention art. 12; and Third Geneva Convention art. 16. The Fourth Geneva Convention includes arts. 13 (non-discrimination in the convention’s application) and 27 (non-discrimination in the treatment of protected persons). Additional Protocol I includes arts. 9 (non-discrimination in application), 10 (no distinction in protection, care), 69 (humanitarian aid), 70 (relief actions) and 75 (fundamental guarantees).

¹⁰ See ICRC Customary IHL Study, Rule 88: Non-Discrimination, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88.

¹¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 13, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*].

¹² *Id.*, art. 27. In the oPt, Palestinians are protected persons, while Israeli settlers are not.

¹³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Additional Protocol I*].

¹⁴ See ICRC Customary IHL Study, Practice related to Rule 88: Non-Discrimination, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule88. The ICRC study lists extensive practice related to the prohibition of discrimination, including a specific section on apartheid: https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule88_sectione.

B. International Human Rights Law

The principle of non-discrimination under IHL is linked with the same principle as enshrined in the United Nations (UN) Charter,¹⁵ the ICCPR¹⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁷

ICCPR art. 2(1) requires for States that are party to it, including Israel, to ensure the fulfilment of the rights of the Covenant without distinction. In times of emergency, States may derogate from certain rights, but cannot do so on a discriminatory basis.¹⁸ The ICCPR provides an expansive, non-exhaustive list prohibiting discrimination based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹⁹ More explicitly, the ICCPR prohibits incitement to discrimination²⁰ and equal protection before the law must be guaranteed to all persons without discrimination.²¹

Mirroring ICCPR article 2(1), ICESCR article 2(2) requires for States that are party to it, including Israel, to ensure fulfilment of economic, social and cultural rights without discrimination.²² ICESCR States Parties “should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise”.²³

Thus, Israel is bound by the human rights treaties it is party to (as well as customary IHRL) to prevent and protect those within its territory and subject to its jurisdiction, including extraterritorially in the oPt, from all forms of discrimination.

IV. Specific Prohibitions against Racial Discrimination

A. International Convention on the Elimination on All Forms of Racial Discrimination

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)²⁴ entered into force before both the ICCPR and ICESCR. It is a core IHRL instrument, applicable during both war and peacetime. ICERD defines “racial discrimination” as:

*...any distinction, exclusion, restriction or preference based on race, colour, 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.*²⁵

ICERD prohibits discrimination based on (or “on the grounds of”)²⁶ race and terms akin to it (color, descent, national origin or ethnic origin).²⁷

¹⁵ U.N. Charter, arts. 1(3) & 55(d).

¹⁶ ICCPR art. 2(1). See also Human Rights Committee, General Comment 18, Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.1, at 26 (1994).

¹⁷ International Covenant on Economic, Social and Cultural Rights arts. 2(2) & 3, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

¹⁸ ICCPR, art. 4(1). See also Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); A & Others vs. UK, App. No. 3455/05, Eur. Ct. H. Rts. (Feb. 19, 2009).

¹⁹ ICCPR art. 2(1).

²⁰ Id., art. 20.

²¹ Id., art. 26.

²² See, generally, Rolf Kunnemann, The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights, http://www.lancaster.ac.uk/universalhumanrights/documents/FIAN_ETOsandICESCR.pdf.

²³ CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/20 (July 2, 2009), para 14.

²⁴ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (hereinafter ICERD). There are 178 States Parties to the ICERD, including Palestine and Israel. See, generally, International Convention on the Elimination of All Forms of Racial Discrimination, UN Audiovisual Library of International Law, <http://legal.un.org/avl/ha/cerd/cerd.html>.

²⁵ ICERD art. 1(1).

²⁶ See CERD, General Recommendation 14, Definition of Racial Discrimination, U.N. Doc. A/48/18 at 114 (1994), para 1.

²⁷ See CERD, General Recommendation 8, Membership of racial or ethnic groups based on self-identification, U.N. Doc. A/45/18 at 79 (1991). See also Dugard & Reynolds, 886; Theo Van Boven, Racial and Religious Discrimination, MAX PLANCK ENC. PUB. INT'L L. (Jan. 2007) [hereinafter Van Boven].

ICERD outlines measures that States Parties should take against racial discrimination.²⁸ States Parties are not only obligated to act against racial discrimination, but to positively take “special measures” to ensure equal enjoyment of rights.²⁹

ICERD States Parties must take measures to condemn and eradicate propaganda and organizations promoting racial hatred and discrimination.³⁰ Moreover, they must eradicate incitement to, or acts of, racial discrimination through positive measures, including by punishing participation in organizations that promote racial hatred and discrimination.³¹ When circumstances permit, they also must take “special and concrete measures to ensure the adequate development and protection of certain racial groups...for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms”.³²

ICERD outlines a non-exhaustive list of rights that States Parties must guarantee, free from racial discrimination, including: equality before the law, security of persons and political rights.³³ Civil rights that must be guaranteed to be free from racial discrimination include the rights to: freedom of movement; leave from and return to one’s country; nationality; marriage and choice of spouse; ownership of property; inheritance; freedom of thought, conscience and religion; opinion and expression; and peaceful assembly and association. ICERD further lists a series of economic, social and cultural rights that must be guaranteed to be free from racial discrimination.³⁴

ICERD also established the Committee on the Elimination of Racial Discrimination (CERD).³⁵ CERD is responsible for receiving and analyzing States Parties’ reports covering the “legislative, judicial, administrative or other measures” taken with respect to ICERD.³⁶ States Parties can report not only on measures taken domestically, but internationally vis-à-vis other States to encourage ICERD’s implementation.³⁷

CERD is mandated to make “general recommendations” based on the examination of State reports as well as information received by States Parties. CERD also is mandated to handle inter-State disputes, in the event that a State Party is not meeting its ICERD obligations.³⁸ The ICJ also may handle unresolved such disputes, although this is based on each State accepting ICJ jurisdiction over such a dispute.³⁹ States Parties can recognize CERD’s competence to accept complaints from individuals or groups falling under that State’s jurisdiction.⁴⁰

As a State Party, Israel is bound by ICERD. ICERD does not contain a specific provision equivalent to ICCPR article 2(1), referencing obligations to individuals either within a State’s territory or subject to its jurisdiction.⁴¹ Nevertheless, ICERD includes specific references to extraterritorial obligations, including the obligations to: condemn and combat racial

²⁸ ICERD art. 2(1). These include obligations to: refrain from racial discrimination and ensure public authorities and institutions do the same; not sponsor, defend or support racial discrimination by persons or organizations; take effective measures to review laws that may create or perpetuate racial discrimination; legislate against racial discrimination; and support multiracial organizations and movements.

²⁹ ICERD art. 1(4). See also CERD, General recommendation No. 32: The meaning and scope of special measures in the [ICERD], U.N. Doc. CERD/C/GC/32 (Sep. 24, 2009).

³⁰ ICERD art. 4.

³¹ *Id.*, art. 4(b). CERD, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination, U.N. Doc. A/48/18, at 114 (1994).

³² ICERD art. 2(2).

³³ *Id.*, art. 5. CERD, General Recommendation 20, The guarantee of human rights free from racial discrimination, U.N. Doc. A/51/18, annex VIII, at 124 (1996), para 1.

³⁴ Including, the right to: work and just employment; form and join trade unions; housing; health care and social services; education and training; equal participation in cultural activities; as well as access to all public spaces.

³⁵ ICERD art. 8.

³⁶ *Id.*, art. 9(1).

³⁷ One example was State reporting on “the status of its diplomatic, economic and other relations with the racist regimes in southern Africa”; see CERD, General Recommendation 3, Reporting by States parties, U.N. Doc. A/8718, at 39 (1972).

³⁸ ICERD art. 11. CERD, General Recommendation 16, References to situations existing in other countries, and the content of State reports U.N. Doc. A/48/18, at 116 (1994). ICERD arts. 11–13.

³⁹ ICERD art. 22. This has been used once, unsuccessfully, in the ICJ case between Georgia and Russia. The Court ruled that Georgia did not follow the dispute procedures that must be exhausted before going to the ICJ; see Case Concerning the Application of the [ICERD] (Georgia vs. Russia), Preliminary Objections, 2011 I.C.J. 70 (Apr. 1).

⁴⁰ ICERD art. 14.

⁴¹ See Ralph Wilde, The extraterritorial application of international human rights law on civil and political rights, in ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 635–661 (S. Sheeran & N. Rodley, eds., 2014) [hereinafter Wilde].

segregation and apartheid;⁴² ensure effective protection and remedies;⁴³ and preserve the possibility of receiving and considering complaints of ICERD violations either through the CERD or a qualified national body.⁴⁴ The ICJ explained in *Georgia v. Russia* that Russia's CERD obligations applied extraterritorially due to the lack of any express provision indicating otherwise.⁴⁵ Furthermore, CERD has continuously affirmed the applicability of Israel's ICERD obligations to the oPt.

B. Racial Discrimination, in Relation to Apartheid ⁴⁶

Under ICERD, States Parties have a specific obligation to “particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction”.⁴⁷ Thus, the crime of apartheid is based on ‘racial’ groups in the sense of the definition of racial discrimination contained in ICERD, which outlines a broad understanding to the concept ‘racial’.⁴⁸

This provision subsequently was followed by the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention), which categorized apartheid as a crime against humanity.⁵⁰ The Apartheid Convention states that “inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination” are crimes: “violating the principles of international law, in particular the purposes and principles of the UN Charter”; and “constituting a serious threat to international peace and security”.⁵¹ The Apartheid Convention triggers both State responsibility and individual criminal responsibility.

The Apartheid Convention qualifies the ‘difference’ between racial discrimination and apartheid. Rather than the acts of “distinction, exclusion, restriction or preference” provided in the ICERD, the Apartheid Convention characterizes apartheid by the outcomes of a State’s institutionalized racial discrimination – motivated by creating and maintaining racial domination for one group above another (or others).⁵²

When the International Law Commission (ILC) drafted the Draft Code of Crimes against the Peace and Security of Mankind,⁵³ it listed, as a crime against humanity:

Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of human rights and fundamental freedoms and resulting in seriously disadvantaging a part of the population.

⁴² ICERD art. 3.

⁴³ Id., art. 6.

⁴⁴ Id., art. 14(1–2).

⁴⁵ Wilde, 649.

⁴⁶ See, generally, JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 645–646 (8th ed., 2012).

⁴⁷ ICERD art. 3; see CERD, General Recommendation 19, The prevention, prohibition and eradication of racial segregation and apartheid, U.N. Doc. A/50/18 at 140 (1995). See Dugard & Reynolds, 877; “[t]he express prohibition of apartheid included in the [ICERD] was an exception to allow for the fact that apartheid differed from other forms of racial discrimination ‘in that it was the official policy of a State Member of the [UN]’ and that the South African regime at the time claimed apartheid was not a form of racial discrimination; from UN Doc. A/C.3/SR.1313, para 10 & 18.

⁴⁸ See Dugard & Reynolds, 885–891.

⁴⁹ International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention]. There are 109 States Parties to the Convention, including Palestine, but not Israel. See also John Dugard, Convention on the Suppression and Punishment of Apartheid, UN Audiovisual Library of International Law: Historic Archives [hereinafter Dugard UN] <http://legal.un.org/avl/ha/cspca/cspca.html>. It was adopted by a vote of 91 in favor, 4 against (Portugal, South Africa, the United Kingdom and United States) and 26 abstentions.

⁵⁰ Apartheid Convention art. 1(1). Apartheid was annually condemned by the UN General Assembly as contrary to arts. 55 & 56 of the UN Charter from 1952–1990; it was labelled as a crime against humanity in 1966 by the UNGA, and by the UN Security Council in 1984; see Dugard UN. For UN resolutions condemning apartheid, see Gephard.

⁵¹ Apartheid Convention, art. 1(1).

⁵² Id., art. 2. See also Du Plessis.

⁵³ The Draft Code led to the Rome Statute of the International Criminal Court.



A Palestinian man climbs over the Israeli Wall from the West Bank town of al-Ram to the East Jerusalem neighbourhood of Beit Hanina, to attend the prayer in the Al-Aqsa Mosque, on the second Friday of the Muslim holy month of Ramadan, July 3, 2015. ©ActiveStills.

This was, according to the ILC, “the crime of apartheid under a more general denomination”.⁵⁴

While apartheid was regularly condemned and recognized as unlawful by the UN, the Apartheid Convention declared it to be criminal.⁵⁵ It qualifies the crime, applying to

*inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.*⁵⁶

In summary, these include the following acts directed against a racial group:⁵⁷ denial of the group’s right to life and liberty; deliberate imposition of adverse living conditions; legislative or other measures denying the group’s human rights and development, or serving to divide the population along racial lines; exploitation of labor, particularly forced; or persecution of organizations and persons opposing apartheid.

The crime of apartheid involves “similar policies and practices of racial segregation and discrimination as practiced in southern Africa”.⁵⁸ The reference is to the southern Africa region, rather than South Africa itself,⁵⁹ having faced such practices and policies in then-South-West Africa (Namibia) and then-Rhodesia (Zimbabwe), and through Portuguese colonialism in

⁵⁴ ILC, Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996 (A/51/10), at 49. See Eden, 181 & 174. See also: Dugard & Reynolds, 881; “The essence of the definition of apartheid is thus the systematic, institutionalized, and oppressive character of the discrimination involved, and the purpose of domination that is entailed. It is this institutionalized element, involving a state-sanctioned regime of law, policy, and institutions, that distinguishes the practice of apartheid from other forms of prohibited discrimination”.

⁵⁵ Dugard UN.

⁵⁶ Apartheid Convention, art. 2.

⁵⁷ Id. Dugard & Reynolds, 881; this complements and supplements the prohibition in ICERD art. 5.

⁵⁸ Apartheid Convention art. 2.

⁵⁹ Id. See U.N. Doc. A/9233/Add.1, at 23. As Dugard notes, discussions within the Third Committee showed a split – while some were in favor of only focus on South Africa, others saw it as being wide enough to cover other States that practiced institutionalized racial discrimination; see Dugard UN.

Mozambique and Angola.⁶⁰ The Apartheid Convention was intended to apply beyond southern Africa to all States that have ratified it, consistent with the customary international law status of the prohibition.

States Parties to the Apartheid Convention are obligated to take a number of measures, including: legislative and other measures to suppress and prevent apartheid and similar policies as well as legislative, judicial and administrative measures to prosecute, bring to trial and punish perpetrators (through universal jurisdiction).⁶¹ They also must declare organizations, institutions and individuals committing apartheid as “criminal”.⁶²

The convention delves into international criminal responsibility, not only with respect to acts of apartheid occurring within a State itself, but also “in some other State” – covering perpetrators that may be involved in the commission the crime in another territory.⁶³ States Parties additionally are required to try persons charged that are within their jurisdiction with any committed acts of apartheid.⁶⁴ Until today, there have been no prosecutions for the crime, even in South Africa, due to the truth and reconciliation process.

Israel never ratified the Apartheid Convention, limiting the possibility of investigating and prosecuting organizations, institutions and individuals committing the crime. Thus, the specific provisions aimed at States Parties are not binding upon it. Other States that are party to the Apartheid Convention may carry out investigations and prosecutions, depending on their ability to do so under national law.

Nevertheless, Israel remains bound by ICERD, which it has ratified, including article 3 obligating it to condemn and combat racial segregation and apartheid in particular. Furthermore, because the prohibitions against racial discrimination and apartheid are *jus cogens* norms (peremptory norms of international law), they also bind Israel.

C. International Humanitarian Law

As discussed, prohibitions against racial discrimination and apartheid are found within the IHRL realm. Yet in 1977, AP1 was adopted, explicitly enumerating the grave breaches of IHL, including those within the four GCs.⁶⁵ It also includes, amongst others, under article 85(4) (c),

practices of ‘apartheid’ and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

The authoritative commentary to AP1 explains that it “only condemns *practices*, whether the *practices* of ‘apartheid’ or any other inhuman and degrading practices; as far as the policies are concerned, they will remain exclusively within the domain of crimes against humanity”.⁶⁶ The commentary adds that “[a]lthough the provisions of the [GCs] and [AP1] never mention ‘apartheid’ by name, they contain several articles explicitly prohibiting any adverse distinction founded on whatever criterion, including race”.⁶⁷

⁶⁰ Eden, 177–178. For more on the South Africa apartheid in particular, see Gephard.

⁶¹ Apartheid Convention art. 4. One of the main concerns raised by States was fear of establishing universal jurisdiction. States, especially in the West, feared that their own citizens and corporations could be investigated and prosecuted; see Dugard and Reynolds, 882. See also Zahar, Apartheid as an International Crime, in OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 245 (Antonio Cassese, ed., 2009) [hereinafter Zahar].

⁶² Apartheid Convention art 1(2).

⁶³ Id., art. 3. Such as South Africa in then-South-West Africa (Namibia). For the development of the crime of apartheid and its eventual integration into the Rome Statute, see Eden, 175. For an overview of the apartheid in South Africa, see Dugard & Reynolds, 872; explaining that its three pillars were “discrimination, territorial fragmentation, and political repression.”

⁶⁴ Apartheid Convention art. 5.

⁶⁵ Additional Protocol I art. 85(3). Most noteworthy is the inclusion of violations against rules of distinction, part of customary IHL.

⁶⁶ Commentary to Additional Protocol I art. 85(4)(c), 1002, para 3512, <https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/7bbcfc2d471a1eaac12563cd00437805>. Emphasis added.

⁶⁷ Id., para 3513.

“Inhuman and degrading practices” based on racial discrimination, would qualify as a grave breach of AP1.⁶⁸ For “practices of apartheid” specifically, it may be necessary to deduce the ‘institutionalized’ policy, for the purpose of racial domination, and the consequential inhuman acts within the meaning of article 2 of the Apartheid Convention. The prohibition and criminalization of apartheid practices have been included in several military manuals and the national legislation of a significant number of States.⁶⁹

Under AP1, grave breaches also are regarded as war crimes.⁷⁰ Grave breaches and other serious IHL violations have been defined as war crimes in the statutes of ad hoc international criminal tribunals, including those in the former Yugoslavia and Rwanda, as well as the Rome Statute of the International Criminal Court (ICC).⁷¹

While Israel may investigate and prosecute this particular war crime, it is not obligated to do so by way of AP1. Other States that are party to AP1 may carry out investigations and prosecutions, also depending on their ability to do so under national law. However, as previously mentioned, because the prohibitions against racial discrimination and apartheid are *jus cogens* norms, they also bind Israel.

D. International Criminal Law

The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968 Convention) explains that no statutory limitation should apply to war crimes and crimes against humanity defined by the Nuremberg International Military Tribunals, which included persecution.⁷² Persecution may be related to other war crimes and crimes against humanity committed based on racial discrimination (e.g. ill-treatment due to a person’s race). The 1968 Convention also includes the non-applicability of statutory limitations to “inhuman acts resulting from the policy of apartheid”.⁷³

According to the Rome Statute of the ICC, which includes temporal limits, crimes against humanity are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.⁷⁴ Crimes against humanity may occur in both times of peace and war.

Racial discrimination is not listed in the Rome Statute, although the crime against humanity of persecution description in the Rome Statute includes racial grounds.⁷⁵ Persecution is defined as

*the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.*⁷⁶

⁶⁸ See ICRC Customary IHL Study, Rule 90, Torture and Cruel, Inhuman or Degrading Treatment, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule90.

⁶⁹ See ICRC, Customary IHL Database, Practice Relating to Rule 88: Non-Discrimination, Section E: Apartheid, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule88_sectione.

⁷⁰ Additional Protocol I art. 85(5). See also ICRC Customary IHL Study, Rule 156: Definition of War Crimes, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156. The study lists a series of war crimes based on two categories, those grave breaches, as well as “other serious violations of IHL”.

⁷¹ See, generally, Marco D. Oberg, The absorption of grave breaches into war crimes law, 91 INT’L REV. RED CROSS 163 (2009), <https://www.icrc.org/eng/assets/files/other/irrc-873-divac-oberg.pdf>.

⁷² Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. 1, Nov. 26, 1968, 754 U.N.T.S. 73. This has also been argued on the contrary; see Eden. See also R. Miller, The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 65 AM. J. INT’L L. (1971) 476–501, at 477. There are 55 parties to the convention, including Palestine but not Israel. See also ICRC Customary IHL Study, Rule 160: Statutes of Limitation, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule160.

⁷³ This may mean, to interpret investigation and prosecution only of the acts, similar to the sense within Additional Protocol I, rather than the apartheid policy itself. See Eden, 176.

⁷⁴ Rome Statute of the International Criminal Court art. 7(1), 2187 U.N.T.S. 90 (July 17, 1998) [hereinafter Rome Statute].

⁷⁵ For criticisms of this inclusion, see Eden; Zahar, 246.

⁷⁶ Rome Statute art. 7(1)(g). See Case Matrix Commentary on Apartheid.

The crime is qualified as

*[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender...or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.*⁷⁷

Thus, persecution may be part of a composite crime makeup, related to other crimes committed on a discriminatory basis. Perpetration of other war crimes and crimes against humanity may be on the basis of racial discrimination.

The Rome Statute lists apartheid as a crime against humanity.⁷⁸ The ICC has never opened an investigation into apartheid. According to the Rome Statute, the crime of apartheid

*means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.*⁷⁹

Prohibited inhumane acts must be widespread or systematic and part of an institutionalized regime of racial discrimination. These acts also may encompass a collection of other crimes against humanity, as listed in the Rome Statute.⁸⁰

As a result of Palestine's accession to the Rome Statute and its parallel declaration under article 12(3), the ICC can exercise jurisdiction over crimes committed in the oPt.

V. Racial Discrimination Directly Resulting from the Settlement Enterprise

Arising from the OP's practices and policies, racial discrimination in the oPt comprises two layers of unlawful acts that are inextricably linked: first, transfer of the OP's nationals into the oPt (settlements); and second, practices and policies of discrimination between settlers and oPt Palestinians.⁸¹ Thus, racial discrimination in the oPt is a direct result of the unlawful act of population transfer associated with the OP's settlement enterprise.

Two previous UN **Special Rapporteurs** have made determinations on racial discrimination and apartheid within the oPt.⁸² Former Special Rapporteur John Dugard noted the 2009 comprehensive study by the South African Human Sciences Research Council,⁸³ which was developed into a book in 2012.⁸⁴ As Dugard noted, the report proves "that there exists in the [oPt] an institutionalized and oppressive system of Israeli domination and oppression over Palestinians as a group; that is, a system of apartheid."⁸⁵

⁷⁷ Rome Statute art 7(2)(h).

⁷⁸ Rome Statute art. 7(1)(j). Eden challenges the argument that apartheid was a crime against humanity under customary international law giving rise to individual criminal responsibility; see Eden, 172. See also Gephard.

⁷⁹ Rome Statute art. 7(2)(h). The inhumane acts refers to those crimes against humanity listed in the Rome Statute, but within the apartheid context, somewhat along of the lines of Additional Protocol I.

⁸⁰ See Case Matrix Network, ICC Commentary art. 7(1)(j), [hereinafter Case Matrix Commentary on Apartheid], <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-5-10/#c1882>. As Gephard notes, other crimes against humanity, "could nevertheless also be considered as constituting the crime of apartheid".

⁸¹ With respect to the implementation of legislation in particular, see, generally: <http://orders.arj.org/searchMONo.php>; <http://www.israelawresourcecenter.org/>; http://itisapartheid.org/Documents_pdf_etc/ApartheidLawsOccupied.pdf.

⁸² John Dugard, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/HRC/4/17 (Jan. 29, 2007), at 2; Richard Falk, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/65/331 (Aug. 30, 2010), para 3.

⁸³ Human Sciences Research Council, Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law (May 2009), http://www.alhaq.org/attachments/article/236/Occupation_Colonialism_Apartheid-FullStudy.pdf.

⁸⁴ BEYOND OCCUPATION: APARTHEID, COLONIALISM AND INTERNATIONAL LAW IN THE OCCUPIED PALESTINIAN TERRITORIES 107-221 (Virginia Tilley ed., 2012).

⁸⁵ Dugard & Reynolds, 870.

In its 2012 **Concluding Observations** to Israel's report, CERD found a series of ICERD violations. Most importantly, CERD expressed concern at Israel's position that ICERD did not apply to territories under its effective control (the oPt).⁸⁶

CERD stated that Israel's security measures should "not discriminate in purpose or in effect against...Palestinians in the [oPt]...and [should ensure] that they are implemented with full respect for human rights as well as relevant principles of [IHL]".⁸⁷ Further, CERD reiterated the illegality of settlements under IHL, noting its adverse effects on Palestinian human rights, including the wider consequence of the West Bank's demographic composition.⁸⁸

CERD expressed its concern "at the consequences of policies and practices that amount to *de facto* segregation...of two entirely separate legal systems and sets of institutions between Jewish communities grouped in illegal settlements...and Palestinian populations".⁸⁹ CERD expressed dismay with the separation evident in the lack of equal access to roads, infrastructure, basic services and water resources, "concretized by the implementation of a complex combination of movement restrictions consisting of the Wall, roadblocks, the obligation to use separate roads and a permit regime that only impacts the Palestinian population".⁹⁰ Based on these findings, it found Israel to be in violation of ICERD article 3, which obligates third States to condemn racial segregation and apartheid and to prevent, prohibit and eradicate such practices.⁹¹

CERD raised further concern at the "discriminatory planning policy," which gave preferential treatment to Israeli settlements through allocations of "state land", infrastructure (roads, water systems, high approval rates for settler planning permits, and the role of settlers involved in decision-making processes) – whereas Palestinian communities were "rarely if ever granted construction permits" and "demolitions principally targeted property owned by Palestinians and Bedouins".⁹² CERD thus found that the OP's planning and zoning policy breached ICERD, and called on Israel to reconsider the entire policy and guarantee Palestinian rights to property, access to land, housing and natural resources, as well as to eliminate the policy of "demographic balance" from its Jerusalem Master Plan as well as from its planning and zoning policy in the rest of the West Bank".⁹³ Based on these findings, Israel was found to be in violation of ICERD articles 2, 3 and 5.⁹⁴

CERD expressed its concern "at the existence of two sets of laws, for Palestinians on the one hand and Jewish settlers on the other hand who reside in the same territory, namely the West bank, including East Jerusalem, and are not subject to the same justice system (criminal as well as civil matters)".⁹⁵ It expressed concern at the "increase in the arrest and detention of children and of the undermining of their judicial guarantees, notably in relation to the competence of military courts to try Palestinian children" as well as the "maintenance of administrative detention" for Palestinians, under which they are incarcerated without charges

⁸⁶ CERD, Consideration of reports submitted by States parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Israel, U.N. Doc. CERD/C/ISR/CO/14-16 (Apr. 2 2012), para 10 [hereinafter 2012 CERD Israel Report]. Many of the findings and recommendations echo CERD's conclusions of June 2007; see CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel, U.N. Doc. CERD/C/ISR/CO/13 (June 14, 2007). Palestine, now a State Party to ICERD, can include in their periodic reports clear language demonstrating full understanding of obligations under the ICERD, but inability to carry out those obligations due to the occupation, as has been the case with other occupations elsewhere.

⁸⁷ Id., para 3.

⁸⁸ Id., para 4.

⁸⁹ Id., para 24.

⁹⁰ Id.

⁹¹ The CERD drew Israel's attention to General Recommendation 19, explaining the obligations and measures States must take against racial segregation and apartheid.

⁹² Id., para 25.

⁹³ Id. See also Diakonia IHLRC, "Planning to Fail" The Planning Regime in Area C of the West Bank: An International Law Perspective, <https://www.diakonia.se/en/IHL/News-List/test/>.

⁹⁴ ICERD art. 2 obligates States to condemn and combat racial discrimination. ICERD art. 3 obligates States to condemn and combat racial segregation and apartheid. ICERD art. 5 obligates States to ensure rights free from racial discrimination.

⁹⁵ Id., para 27.

or trial, frequently for extended periods.⁹⁶ CERD also expressed concern at the obstacles faced by Palestinians seeking civil remedies from Israel.⁹⁷ Based on these findings, Israel was found to be in violation of ICERD articles 3, 5 and 6.⁹⁸

CERD expressed concern at “the increase in racist violence and acts of vandalism” by Jewish settlers in the oPt “targeting non-Jews, including Muslims and Christians and their holy places, and about information according to which 90 per cent of Israeli police investigations into settler-related violence carried out between 2005 and 2010 were closed without prosecution”.⁹⁹ CERD also expressed alarm at the impunity of “terrorist groups” such as ‘Price Tag’ attackers, “which reportedly enjoy political and legal support from certain sections of the Israeli political establishment”.¹⁰⁰ Based on these findings, Israel was found to be in violation of ICERD articles 4 and 5.

In 2013, the **UN fact-finding mission on settlements** (FFM) devoted part of its investigation efforts into “equality and the right to non-discrimination”.¹⁰¹ The FFM, like CERD, broadly noted the distinct legal systems applied to Israelis and Palestinians in the oPt.¹⁰² It also noted that the application of Israeli law to Israelis in the West Bank gave them “preferential legal status over Palestinians”.¹⁰³ The FFM explained that Palestinians are subject to, whether by law or practice, a “matrix of military orders...restricting an extensive range of rights”.¹⁰⁴

The FFM further explained that failures to investigate and prosecute settler violence against Palestinians, thereby impeding access to effective remedies, was further exacerbated by multiple barriers existing within the judicial system.¹⁰⁵ The FFM noted the failure of the Israeli High Court of Justice as an effective means of recourse for Palestinians, especially in granting deference to the government in crucial judicial decisions.¹⁰⁶ Further, according to the FFM, Palestinians face a discriminatory military court system “that does not comply with international standards of fair trial and administration of justice”.¹⁰⁷ It went on to note the failure of Israeli authorities to prevent settler violence and “the persistence of impunity”.¹⁰⁸

Additionally, the FFM found that discrimination led to severe restrictions on religious freedom,¹⁰⁹ freedom of movement,¹¹⁰ expression and peaceful assembly,¹¹¹ the right to water,¹¹² and registered serious impacts on economic rights¹¹³ and resulted in dispossession and displacement.¹¹⁴

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ ICERD art. 6 obligates States to ensure effective protection and remedies against acts of racial discrimination and any damage suffered as a result thereof.

⁹⁹ Id., para 28. Especially the effects on women and children rights.

¹⁰⁰ Id. ICERD art. 4 obligates States to condemn and combat all propaganda and organization “based on ideas or theories of superiority of one race or group of persons” through punitive measures.

¹⁰¹ H.R.C. Res. 22/63, Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, U.N. Doc. A/HRC/RES/22/63 (Feb. 7, 2013) [hereinafter FFM Settlements], <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/FFM/FFMSettlements.pdf>.

¹⁰² Id., para 39–40.

¹⁰³ Id., para 40.

¹⁰⁴ Id., para 40. See also paras. 42.43.

¹⁰⁵ Id., para 44.

¹⁰⁶ Id., 45. For more on the negative impact of the Israeli High Court of Justice, see: Al-Haq, Legitimising the Illegitimate (2010), <http://www.alhaq.org/publications/publications-index/item/legitimising-the-illegitimate>.

¹⁰⁷ Id., para 46.

¹⁰⁸ Id., para 56.

¹⁰⁹ Id., para 58–61.

¹¹⁰ Id., para 72–76.

¹¹¹ Id., para 77–79.

¹¹² Id., para 80–88.

¹¹³ Id., para 89–95.

¹¹⁴ Id., para 62–71.

According to the FFM, “the legal regime of segregation operating in the oPt has enabled the establishment and the consolidation of the settlements through the creation of the privileged legal space for settlements and settlers...[resulting]...in daily violations of a multitude of the human rights of the Palestinians in the [oPt], including incontrovertibly violating their rights to nondiscrimination, equality before the law and equal protection of the law”.¹¹⁵

The FFM concluded that “settlements are for the exclusive benefit of Israeli Jews...maintained and developed through through a system of total segregation” supported and facilitated by “strict military and law enforcement control to the detriment of the rights of the Palestinian population”.¹¹⁶ The FFM listed a series of Palestinian rights that are violated on a consistent and daily basis, including, the rights to: freedom of self-determination; non-discrimination; freedom of movement; equality; due process; fair trial, not to be arbitrarily detained; liberty and security; freedom of expression; freedom to access places of worship; education; water; housing; adequate standard of living; property; access to natural resources; and an effective remedy.¹¹⁷

The FFM also found “institutionalized discrimination against the Palestinian people when it comes to addressing [settler] violence” despite the identities of the perpetrators being known to Israeli authorities.¹¹⁸ It called upon Israel to “ensure full accountability for all violations, including for all acts of settler violence, in a non-discriminatory manner and to put an end to the policy of impunity.”¹¹⁹

Finally, the FFM called upon States “to comply with their obligations under international law and to assume their responsibilities in their relationship to a State breaching peremptory norms of international law – specifically not to recognize an unlawful situation resulting from Israel’s violations”.¹²⁰

VI. Third State Obligations

A. Obligation to Respect and Ensure Respect under International Humanitarian Law

States are obligated to *respect* and *ensure respect* for IHL, in accordance with Article 1, common to the four GCs.¹²¹ States must refrain from encouraging IHL violations and exert influence to prevent, bring to an end and reverse the effects of violations to the degree possible.¹²² As noted by the recent commentaries to Article 1, “[c]ommon Article 1 is not a mere stylistic clause but is invested with imperative force and counts among the means available to ensure compliance with the Conventions.” Moreover, per this commentary, “States have also recognized the importance of adopting all reasonable measures to prevent violations from happening in the first place”.¹²³

¹¹⁵ Id., para 49.

¹¹⁶ Id., para 103.

¹¹⁷ Id., para 105.

¹¹⁸ Id., para 107.

¹¹⁹ Id., para 114.

¹²⁰ Id., para 116.

¹²¹ See also Additional Protocol I art. 1.1, 86 & 89.

¹²² ICRC Customary IHL Study, Rule 144: Ensuring Respect for International Humanitarian Law Erga Omnes, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144. See also International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries arts. 34–35 (2001) [hereinafter ARWISA], http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

¹²³ Commentary of 2016 to First Geneva Convention, Article 1: Respect for the Convention, para 4 [hereinafter 2016 Commentary], <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD>.



Palestinians walk into a checkpoint to cross into Shuhada street in the H2 area of Hebron, West Bank, February 24, 2016. ©ActiveStills.

Many customary IHL rules have been categorized as peremptory norms of international law (or *jus cogens*), encompassing obligations of an *erga omnes* character.¹²⁴ States should work towards ensuring universal application of IHL through punitive or restrictive measures.¹²⁵ High Contracting Parties to the GCs are obligated to investigate and prosecute alleged perpetrators of grave breaches and other violations, regardless of nationality.¹²⁶ Additional available measures include exerting diplomatic pressure, taking lawful countermeasures and refusing arms transfers, amongst others.¹²⁷

In practice, the full extent of measures required to comply with Common Article 1 are not entirely clear due to inconsistent State practice and under-enforcement. Nevertheless, States should assume responsibility by taking steps (individually or collectively) to impede all IHL violations based on discrimination generally and racial discrimination specifically, the latter

¹²⁴ See Vincent Chetail, The contribution of the International Court of Justice to international humanitarian law, 85 INT'L REV. RED CROSS 235 (2003), https://www.icrc.org/eng/assets/files/other/irrc_850_chetail.pdf; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para 79 (July 8). Wall Advisory Opinion, para 157. See ARSIWA Commentaries, 113. Jus cogens are peremptory norms of international law which are "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted...."; see Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. Erga omnes obligations are owed by a State towards the international community as a whole; see Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) [hereinafter Barcelona Traction]. See also Jochen A Frowein, Jus Cogens, MAX PLANCK ENC. PUB. INT'L L. (Mar. 2013); Jochen A Frowein, Obligations Erga Omnes, MAX PLANCK ENC. PUB. INT'L L. (Dec. 2008) [hereinafter Frowein Jus Cogens].

¹²⁵ See Umesh Palwankar, Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law, 34 INT'L REV. RED CROSS 9 (1994); Knut Dörmann & Jose Serralvo, Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations, INT'L REV. RED CROSS (2015); Diakonia IHLRC, Accountability for violations of International Humanitarian Law: An introduction to the legal consequences stemming from violations of international humanitarian law (Oct. 2013), <https://www.diakonia.se/globalassets/documents/ihl/ihl-opt/briefs/accountability-for-violations-of-international-law.pdf>.

¹²⁶ 2016 Commentary, para 29.

¹²⁷ Id., para 64.

identified as a grave breach and war crime under AP1.¹²⁸ As noted in the ICRC customary IHL study, “the obligation to respect and ensure respect is not limited to the [GCs] but to the entire body of international humanitarian law binding upon a particular State”.¹²⁹

B. Article 41 of the Articles on State Responsibility and Consequences of Serious Breaches of Peremptory Norms

The prohibition against racial discrimination as well as apartheid¹³⁰ are *jus cogens* norms creating *erga omnes* obligations due to their nature in international law, to which there can be no exceptions.¹³¹ In the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), the ILC notes the long-standing prohibition of racial discrimination and the obligations of States *erga omnes*. In particular, ARSIWA cites the ICJ’s *Barcelona Traction* case in identifying the obligation to protect from racial discrimination.¹³² In relation to the obligations of non-recognition, aid or assistance,¹³³ the ILC cites UN Security Council practice in response to the apartheid regime in South Africa and Portuguese colonial rule.¹³⁴

Breaches also may consist of “composite acts”, or a series of actions or omissions constituting a wrongful act under international law.¹³⁵ Such a breach begins with the first action or omission of the series, and lasts so long as they continue.¹³⁶ Such acts include “systematic acts” of racial discrimination and apartheid.¹³⁷ According to the ILC, apartheid is different from individual acts of racial discrimination, in the same way that genocide is different from individual acts of ethnic or racially-motivated killing.¹³⁸

Serious breaches of *jus cogens* norms, such as racial discrimination and apartheid, create obligations for third States.¹³⁹ In accordance with the ARSIWA and customary international law, States have a collective obligation to “cooperate to bring to an end through lawful means” of such breaches.¹⁴⁰ States must also comply with the obligations of non-recognition and non-aid or assistance in connection with such serious breaches.¹⁴¹ Third States may invoke the responsibility of another State when the obligation breached is owed to the international community as a whole.¹⁴²

¹²⁸ As listed in Additional Protocol I art. 85. See also ICRC, Improving Compliance with International Humanitarian Law (International Humanitarian Law Research Initiative 2–3 (June 25–27 2004), https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf).

¹²⁹ *Id.*, para 9; ICRC Customary IHL Study, Rule 139. Respect for International Humanitarian Law, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule139. See also ICRC Customary IHL Study, Rule 157: Jurisdiction over War Crimes, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule157. Universal jurisdiction can be based on the: territoriality principle (where the crime occurred); active personality principle (nationality of the perpetrator); passive personality principle (nationality of the victim); and protective principle (protection of national interests or security). See also ICRC Study on Customary IHL, Rule 158: Prosecution of War Crimes, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158; as confirmed in the 2016 common Article 1 commentary.

¹³⁰ In the first reading of the ARSIWA, apartheid was listed as an “international crime” that “represented a different kind of internationally wrongful act and involved a special responsibility”; see THE LAW OF INTERNATIONAL RESPONSIBILITY, 407 (James Crawford, Alain Pellet & Simon Olleson eds., 2010); ARSIWA Commentaries, 113 fn 651.

¹³¹ ARSIWA Commentaries, at 85 & 112.

¹³² *Id.*, 33. See *Barcelona Traction* 32, para 34.

¹³³ ARSIWA art. 41(2).

¹³⁴ ARSIWA Commentaries, at 115. With respect to the role of the UN Security Council, it called upon South Africa to end its apartheid and racial discrimination (Res. 134 of 1960) and called for an arms embargo (Res. 181 of 1963).

¹³⁵ ARSIWA Commentaries art. 15, at 62.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*, para 62–63.

¹³⁹ See ARSIWA Commentaries arts. 40, at 112.

¹⁴⁰ ARSIWA art. 41(1).

¹⁴¹ *Id.*, art. 41(2); see ARSIWA Commentaries, at 112 n641.

¹⁴² ARSIWA art. 48. See also ‘State Practice’ in Frowien *Jus Cogens*.

The legal consequences for a State responsible for internationally wrongful acts include cessation and non-repetition¹⁴³ and reparation¹⁴⁴ in the forms of restitution,¹⁴⁵ compensation,¹⁴⁶ satisfaction¹⁴⁷. In terms of restitution, the State should also “ re-establish the situation which existed before the wrongful act was committed”.

VII. Conclusions, including Recommendations

While the general prohibition against discrimination may not be categorized as a “war crime” per se, it has certainly been the basis of a wide scale of violations committed against the protected Palestinian population, through various practices and policies. The more worrying aspect of this is that the discrimination has been found to be racial in nature, carried out singularly against the protected Palestinian population.

There are clear violations of the prohibition of racial discrimination by Israel, the OP in the oPt, through its various policies and practices. The result has constituted clear violations of the ICERD, customary IHL and IHRL and crimes under the Rome Statute perpetrated on the basis of racial discrimination. Based on the findings of relevant UN bodies, a number of these practices and policies (the entirely separate legal systems and sets of institutions between illegal settlements and the Palestinian population, movement restrictions, planning and zoning policies and separate justice systems) seem to fall within the lines of what may amount to institutionalized discrimination, or apartheid. Giving the nature of these violations under international law, the reversal of Israel’s policies and practices based on racial discrimination can only come with the cessation and complete dismantling of the settlement enterprise.¹⁴⁸

It should suffice to say that States must clearly take steps to ensure they meet their obligations with respect to Israel’s IHL and IHRL violations and serious breaches of peremptory norms of international law. These include those obligations flowing from Common Article 1 to the GCs and the consequences of a serious breaches of peremptory norms of international law.

The concluding recommendations include, but are not limited to, the following:

International Community:

- All States should openly condemn Israel’s practices and policies of racial discrimination, as based on the CERD and FFM findings. Proper venues for such action include, but are not limited to: the UN Security Council; UN General Assembly; UN Human Rights Council; and EU Foreign Affairs Council.
- In their reporting obligations to the CERD, all States should take the CERD’s recommendation to include the measures that they have taken at the international level in response to Israel’s violations of the ICERD in the oPt.
- Further act upon the CERD’s concluding observations, and ensure Israel meets its ICERD obligations, especially on the main concerns raised.
- To seriously consider restrictive and other measures against Israel, such as those outlined in the 2016 commentary to the GCs, particularly in response to Israel’s settlement enterprise and related IHL violations based on racial discrimination. These may include, but are not limited to: exerting diplomatic pressure; taking lawful countermeasures; and refusing arms transfers; amongst others.

¹⁴³ ARSIWA art. 30.

¹⁴⁴ Id., art. 31.

¹⁴⁵ Id., art. 35.

¹⁴⁶ Id., art. 36.

¹⁴⁷ Id., art. 37.

¹⁴⁸ ARSIWA Commentaries art. 35, at 98; “In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State’s forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.” This would certainly concern the de jure and de facto annexation of the oPt in East Jerusalem and Area C.

Same Game, Different Rules

- Ensure third State obligations of non-recognition, non-aid or assistance in regards to this serious breach caused by Israel's settlement enterprise.
- Further cooperate to bring, through lawful means, an end to this serious breach, towards Israel's full restitution through dismantling the settlement enterprise.
- Where possible, investigate and prosecute such violations, particularly as defined by the Apartheid Convention and AP1.
- Support the ICC's independence, impartiality and effectiveness, during the course of its preliminary examination - and possible investigation - including on the crimes against humanity of persecution and apartheid.

International Criminal Court:

- In addition to the crime of "transfer, directly or indirectly, by the [OP] of parts of its own civilian population into the territory it occupies", include the crimes against humanity of persecution and apartheid in the preliminary examination, and any subsequent full investigation, of the situation in Palestine.

United Nations:

- Where possible, UN special procedures should investigate the matter of racial discrimination and apartheid by the OP in the oPt, through their various mandates in statements and reports specific to Israel, including the utilization of those covering areas of racism and other human rights that may be violated on the basis of racial discrimination.



What is Diakonia?

Diakonia is a Swedish development organisation working together with local partners for a sustainable change for the most vulnerable people in the world. We support more than 400 partners in nearly 30 countries and believe in a rights-based approach that aims to empower discriminated individuals or groups to demand what is rightfully theirs. Throughout the world we work toward five main goals: human rights, democratisation, social and economic justice, gender equality and sustainable peace.

Diakonia International Humanitarian Law Resource Centre

The goal of Diakonia International Humanitarian Law Resource Centre is to increase the respect for and further implementation of international law, specifically international humanitarian law (IHL), in the Israeli–Palestinian conflict. We believe that addressing violations of IHL and international human rights law tackle the root causes of the humanitarian and protection crisis in the oPt, in a sustainable manner. Our Centre makes IHL expertise available by providing:

- Briefings to groups and organisations on IHL and its applicability to Israel and the oPt;
- Tailored in-depth trainings on specific issues and policies relating to IHL;
- Legal analyses and ongoing research on current IHL topics; and
- Legal advice, consultation and legal review of documents for other actors in the oPt, to support policy formulation and strengthen advocacy with an IHL perspective.

Do you or your organisation want to learn more about IHL and its applicability to the oPt? Visit our website 'An Easy Guide to International Humanitarian Law in the occupied Palestinian territory' at: www.diakonia.se/en/IHL/ – or contact us to set up a general or specialised legal briefing by our legal advisors.

Contact us at: ihl@diakonia.se