



REPUBLIC OF NAMIBIA

WRITTEN STATEMENT

INTERNATIONAL COURT OF JUSTICE

ON

**LEGAL CONSEQUENCES ARISING FROM THE POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED
PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM**

(REQUEST FOR AN ADVISORY OPINION)

SUBMITTED BY THE REPUBLIC OF NAMIBIA

July 2023

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WRITTEN STATEMENT OF NAMIBIA

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I. INTRODUCTION

1. This written statement is filed by the Republic of Namibia in accordance with the Order of the Court of 3 February 2023 in response to the request by the General Assembly of the United Nations for an Advisory Opinion contained in Resolution 77/247 of 30 December 2022.¹
2. In Resolution 77/247, the General Assembly requested an Advisory Opinion in the following terms:

The General Assembly,

...

18. Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:

- (a) *What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?*
- (b) *How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?*²

3. The request can be divided into five parts. Paragraph 18(a) of Resolution 77/247 contains three questions. First, the Court is asked to examine and advise on legal consequences arising from the violation by Israel of the right of the Palestinian people to self-determination. Second, the Court is asked to consider the (il)legality of the prolonged Israeli occupation of the Occupied Palestinian Territory since 1967, comprising the West Bank, including east Jerusalem, and the Gaza Strip including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem. Third, the Court is asked to consider Israel's 'adoption of related discriminatory legislation and measures.' Paragraph 18 (b) presents the fourth and fifth questions, which call upon the Court to determine how the above Israeli policies and practices 'affect the legal status of the occupation' and what legal consequences arise therefrom for all States and the United Nations.

¹ UNGA Res 77/247, 30 December 2022, A/Res/77/247.

² UNGA Res 77/247, 30 December 2022, A/Res/77/247, para 18.

4. Namibia respectfully asks the Court to adopt an expansive interpretation of the five questions referred to it by the General Assembly. At this point in proceedings, Namibia will focus on the first and fourth questions referred to the Court – on the ‘violation by Israel of the right of the Palestinian people to self-determination’ and the illegality of the Israeli occupation. Namibia also examines in detail the third question regarding ‘discriminatory legislation and measures’ adopted by Israel with respect to the Palestinian people. The three questions are interrelated but distinct.
 - a. In relation to the first two questions, Namibia draws on the precedent of the Court’s decision in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (1971)* (the *Namibia Advisory Opinion*). Namibia considers that Israel’s continued administration of the former Mandate of Palestine from the Mediterranean Sea to the Jordan River, which has been held on sacred trust for the indigenous Palestinian people, and its occupation of the Palestinian territory since 1967, denies the right of the Palestinian people as a whole to self-determination. Israel’s occupation was illegal ab initio and this illegality has been further compounded by Israel’s prolonged occupation, colonization and annexation of the Palestinian territory and its other breaches of peremptory norms.
 - b. In relation to the third question, Namibia submits that Israel’s adoption of ‘discriminatory legislation and measures’ against Palestinians in the Occupied Palestinian Territory and Palestinian people, as a whole, amounts to the imposition of a system of apartheid, which also violates the right of the Palestinian people to self-determination among other fundamental rights and freedoms.
5. In this respect, it is Namibia’s view that Israel’s policies and practices violate the prohibition of apartheid in customary international law and Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), both of which bind Israel.³ Namibia respectfully requests that the Court make such a determination in the present proceedings and that the Court also sets out the legal consequences that flow from such a determination.
6. While Namibia has decided to focus in this written statement on the prohibition of apartheid in customary international law and Article 3 of CERD, we also draw attention to the fact that apartheid gives rise to *individual* criminal responsibility as a crime against humanity under the Rome Statute of the International Criminal Court.⁴ The fundamental features of apartheid that Namibia addresses are also key features of the crime of apartheid under the Rome Statute.
7. Namibia files this written statement for the following reasons.
 - a. Namibia believes that clarification of the existence, definition, and scope of application of the wrong of apartheid under international law is of critical importance in ensuring the eradication of such an egregious form of racial discrimination. This is particularly so in the light of its peremptory character, as well as in the light of its criminalization. Namibia respectfully asks the Court to provide this clarification in the exercise of its functions as the principal judicial organ of the United Nations.

³ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).

⁴ Article 7(1)(j), Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3. The State of Palestine acceded to the Rome Statute on 2 January 2015. State parties to the Apartheid Convention are also bound to criminalize apartheid, and to bring to trial and punish individuals responsible for the crime of apartheid – Article 4, International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243.

- b. Namibia emphasizes the historical role of the General Assembly in relation to decolonization generally and the fight against racial discrimination, in particular. This Advisory Opinion will be valuable to the General Assembly in the continuing exercise of this role.
 - c. Namibia has its own historical experience of systematic racial discrimination imposed by South Africa both before and after the termination by the General Assembly of the League of Nations Mandate in South West Africa in 1966.⁵ In Resolution 2074 (XX) of 1965, the General Assembly condemned 'the policies of *apartheid* and racial discrimination practiced by the Government of South Africa in South West Africa, which constitute a crime against humanity.'⁶ These policies – imposed by the regime in South Africa on the people of Namibia – continued until independence on 21 March 1990.
8. It is in the light of these considerations that Namibia voted in favour of Resolution 77/247 in the General Assembly,⁷ which included the General Assembly's request for an Advisory Opinion. On this occasion, the Permanent Representative of the Government of Namibia stated:

"The responsibility of the UN towards the resolution of the question of Palestine is a permanent one. We therefore support and have full respect for all UN-mandated processes geared at bringing about a resolution to this complex question. It is therefore perplexing that Israel continues to be shielded, despite being inconsistent flagrant violation of international law, and humanitarian and international human rights law. And in so doing, denying the Palestinian people their most basic rights. This blatant inconsistency remains difficult to fathom.

The Government of Namibia continues to implore Israel to work with international systems, processes and institutions to allow them unfettered access to carry out their responsibilities in accordance with their respective mandates, including humanitarian work. In the same vein, we further call on Israel to honour its obligations by its membership to the UN and in accordance with international law and international human rights law. The practice of unabated continued annexation and expansion of settlements is untenable. War is destructive, it maims, injures and destroys. Oppression is unkind. Occupation is not a means by which peace is birthed.

It is in this vein that Namibia welcomes, as a concrete next step, the proposal to request an advisory opinion from the International Court of Justice on the legal consequences of Israel's prolonged occupation and colonization of the Palestinian Territory, including East Jerusalem, and its violation of the Palestinian people's right to self-determination and policies and measures of discrimination against them. With the passing of 20 years since the General Assembly last asked the ICJ for an advisory opinion regarding the Palestine question, we support the decision to once again seek guidance from the international legal system on how best to seek recourse for the long-oppressed people of Palestine."

9. This written statement is structured in the following way:

⁵ UNGA Res 2145 (XXI), 27 October 1966, A/Res/2145. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.

⁶ UNGA Res 2074 (XX), 17 December 1965, A/Res/2074, para 4.

⁷ UNGA Res 77/247, 30 December 2022, A/Res/77/247.

- a. Section II will briefly consider the jurisdiction of the Court. It is Namibia's view that the Court is competent to issue this Advisory Opinion and that no compelling reasons prevent it from doing so.
 - b. Section III will address the (A) existence; (B) definition; and (C) geographical and territorial scope of application of the prohibition of apartheid. It first sets out (A) the prohibition of apartheid in customary international law and Article 3 of CERD. Thereafter, it will show (B) that the definition of apartheid contained in both of these rules is based on the definition set out in the Apartheid Convention of 1973. Finally, it will demonstrate (C) that the prohibition in custom and Article 3 of CERD is applicable to Israel in its treatment of the Palestinian people, including the denial of their right to self-determination.
 - c. Section IV applies the prohibition on apartheid in custom and Article 3 of CERD to Israel's treatment of the Palestinian people. It sets out (A) the elements of the wrong. It then addresses (B) its material elements; (C) the question of racial groups; and (D) the specific intent requirement of apartheid. In relation to (B), it shows how Israel's practices fulfil, in particular, the material elements set out in Articles 2(c) and 2(d) of the Apartheid Convention. In relation to (C), it shows that these practices are committed against a racial group for the benefit of another racial group. Finally, in relation to (D), it shows that these practices were and are being committed with the specific intent of the wrong of apartheid.
 - d. Section V addresses the consequences that arise from Israel's imposition of an apartheid regime against Palestinians in the Occupied Palestinian Territory and the Palestinian people, as a whole. This entails consequences for Israel, for third States, and for the United Nations. This includes those consequences that follow from the peremptory status of the prohibition of apartheid under customary international law.
 - e. Section VI addresses the illegality of Israel's continued administration of the Occupied Palestinian Territory, and specifically compares the current situation in the Occupied Palestinian Territory with that set out in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (1971)*.
 - f. Section VII sets out the consequences that arise for Israel, for third States, and for the United Nations from a finding of illegal occupation.
 - g. Section VIII sets out conclusions and a summary.
10. Namibia reserves the right to address other substantive questions of international law in its comments on the written statements filed by other States and international organizations in these proceedings.

II. THE JURISDICTION OF THE COURT

11. It is Namibia's view that the Court is jurisdictionally competent to issue this Advisory Opinion and that no compelling reasons prevent it from doing so.
12. Article 65(1) of the Statute of the Court provides:

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.
13. Article 96(1) of the Charter of the United Nations provides:

The General Assembly ... may request the International Court of Justice to give an advisory opinion on any legal question.

14. As to the Court's jurisdiction in these proceedings:

- a. First, the present request was duly adopted by the General Assembly in Resolution 77/247,⁸ and was transmitted to the Court in accordance with Article 65(2) of the Statute of the Court.
- b. Second, each aspect of the request concerns a 'legal question,' as required by Article 65(1) of the Statute of the Court and Article 96(1) of the Charter of the United Nations. Resolution 77/247 asks the Court to render its opinion on the legal consequences arising from a specified set of the State of Israel's measures and practices and on the legal status of the occupation of the Palestinian territory.
- c. Third, although the request relates to matters of deep political concern, the Court has consistently found 'that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question.'⁹ The Court has also held that

*Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law.*¹⁰

15. Even where there is jurisdiction, the Court has interpreted Article 65(1) of its Statute as entailing discretion to decline to give an Advisory Opinion in certain circumstances.¹¹ This is to 'protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations.'¹² However, the Court has consistently held that only 'compelling reasons' may lead the Court to refuse to give its opinion.¹³

16. In the present proceedings, there are no such compelling reasons in relation to the integrity of the Court's judicial function:

- a. First, the request relates to matters of longstanding importance to the work and functions of the General Assembly. At least since Resolution 181 (II) of 1947, the question of Palestine has been a central aspect of the General Assembly's work. The General Assembly has consistently expressed support to the inalienable rights of the Palestinian people, including to self-determination, over decades, notably since Resolution 3236 (XXIX) of 1974,¹⁴

⁸ UNGA Res 77/247, 30 December 2022, A/Res/77/247.

⁹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, para 27; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1973, p. 172, para. 14.

¹⁰ *Kosovo Advisory Opinion*, p. 403, para 27.

¹¹ *Wall Advisory Opinion*, p. 156, para 44; *Kosovo Advisory Opinion*, pp. 415-416, para 29; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, p. 95, para 63.

¹² *Chagos Advisory Opinion*, p. 95, para 63.

¹³ *Wall Advisory Opinion*, p. 156, para 44; *Kosovo Advisory Opinion*, p. 416, para 30; *Chagos Advisory Opinion*, p. 95, para 65.

¹⁴ UNGA Res 3236 (XXIX), 22 November 1974, A/Res/3236 (XXIX).

including through the Committee on the Exercise of the Inalienable Rights of the Palestinian People, established by Resolution 3376 of 1975.¹⁵

- b. Second, providing an answer to the legal questions in the request will be of particular value to the General Assembly in its continued performance of its work and functions. Moreover, and in any event, the Court has consistently held that it is not for it – the Court – ‘to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.’¹⁶
- c. Third, the Court will be able to make all necessary factual findings in relation to answering the request. It has received a dossier from the Secretariat of the United Nations, comprising some of the ‘relevant United Nations documents published from 1967, being the start of the occupation, through to the present.’¹⁷ The Court will also receive extensive, relevant information in the form of written statements, written comments and oral statements from States and international organizations in these proceedings.¹⁸

17. In Namibia’s view, it follows that the Court has jurisdiction to render an Advisory Opinion and that no compelling reasons prevent the Court from doing so.

III. THE PROHIBITION OF APARTHEID IN INTERNATIONAL LAW

18. The General Assembly’s request refers to the legal consequences of Israel’s ‘adoption of related discriminatory legislation and measures.’ In considering this aspect of the request, it would be particularly valuable for the Court to clarify the international legal framework concerning a distinctive and egregious discriminatory policy and practice – the imposition of an apartheid regime towards Palestinians.
19. This part of the written statement addresses: (A) the existence of the prohibition of apartheid in customary international law and in Article 3 of ICERD; (B) the definition of apartheid that applies in relation to these two rules; and (C) their geographical and territorial scope of application.

A. The Existence of the Prohibition of Apartheid in International Law

i. Apartheid in Customary International Law

20. In 1962, the General Assembly established a Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa.¹⁹ The following year, the Committee Reported on the ‘mass of discriminatory and repressive legislation’ adopted by South Africa. This legislation, together with the State’s administrative and judicial practices, established a regime of racial domination throughout the country and Namibia.

¹⁵ UNGA Res 3376 (XXX), 10 November 1975, A/Res/3376 (XXX).

¹⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para 16; *Chagos Advisory Opinion*, p. 95, para 76.

¹⁷ United Nations Secretariat, Introductory Note in relation to the Palestine Advisory Proceedings, para 5.

¹⁸ Similarly, *Chagos Advisory Opinion*, p. 95, para 73.

¹⁹ UNGA Res 1761 (XVII), 6 November 1962, A/Res/1761.

21. *In response to these developments, a rule of customary international law prohibiting the practice of apartheid crystallized. In particular, the existence of such a prohibition is evident in the international community's unequivocal rejection from the early 1960s to the end of the 1980s of the practice of apartheid by South Africa.*
22. The central forum for the crystallization of the prohibition of apartheid was the United Nations. As to the General Assembly, its Declaration on the Elimination of All Forms of Racial Discrimination, adopted in 1963, called for an 'end ... without delay to governmental and other public policies of racial segregation and especially policies of apartheid'.²⁰ This was followed by a series of resolutions in the General Assembly which condemned South Africa's practices and policies of apartheid,²¹ and which passed with large majorities. Resolution 2396 of 1968, for instance, which reiterated the Assembly's 'condemnation of the policies of *apartheid* practiced by the Government of South Africa as a crime against humanity', was adopted by 85 votes in favour to two votes against, with 14 abstentions.²² Resolution 43/50 of 1988, which also condemned South Africa's 'racist régime and its policies and practices of *apartheid*' was adopted by 144 votes in favour to 1 vote against, with 9 abstentions.²³
23. In the Security Council, Resolution 473 of 1980 *unanimously* reaffirmed that:

*[T]he policy of apartheid is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of man, the Charter of the United Nations and the Universal Declaration of Human Rights, and seriously disturbs international peace and security.*²⁴
24. The relevant parts of these resolutions of the General Assembly and Security Council have a normative and declarative character as to the illegality of practices of apartheid under international law.²⁵ They provide evidence of state practice and *opinio juris* of States consolidating over time towards virtually universal acceptance of the wrongfulness of apartheid.²⁶ Indeed, with the fall of the last apartheid government in South Africa and the country's first democratic election in 1994, no State today maintains the permissibility of imposing such a policy. In his 4th Report, Professor Dire Tladi, the Special Rapporteur on Peremptory Norms of General International Law of the International Law Commission (ILC), articulated that the resolutions adopted at the United Nations signify the 'complete and total rejection of the policy of apartheid and the discriminatory practices attendant to it'²⁷ by the international community.
25. As a rule of customary international law, the prohibition of apartheid binds all States, including Israel.

²⁰ Article 5, UNGA Res 1904 (XVIII), 20 November 1963, A/Res/18/1904.

²¹ See e.g. UNGA Res 2054 (XX), 15 December 1965, A/Res/2054(XX), para 4; UNGA Res 2074 (XX), 17 December 1965, A/Res/2074 (XX), para 4; UNGA Res 2202 (XXI), 16 December 1966, A/Res/2202 (XXI), para 1; UNGA Res 2307 (XXII), 13 December 1967, A/Res/2307 (XXII), para 1; UNGA Res 2396 (XXXIII), 2 December 1968, A/Res/2396, para 1.

²² United Nations Digital Library, Voting Data on UNGA Res 2396 of 1968.

²³ United Nations Digital Library, Voting Data on UNGA Res 43/50 of 1988.

²⁴ UNSC Res 473, 13 June 1980, S/Res/473 (1980), para 3.

²⁵ As in relation to the right of self-determination in the *Chagos Advisory Opinion*, p. 95, paras 151-153.

²⁶ See similarly *Chagos Advisory Opinion*, p. 95, para 142.

²⁷ ILC, 'Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur', 31 January 2019, A/CN.4.727, para 98.

ii. Apartheid under Article 3 of ICERD

26. The reference in the request to Israel's adoption of 'related discriminatory legislation and measures' also entails consideration of the provisions of ICERD – a cornerstone of the modern system of international human rights law. Indeed, at least some of the political impetus behind the adoption of ICERD itself emerged from the international community's deep abhorrence of South Africa's practices of racial discrimination.²⁸
27. In addition to its general regulation of racial discrimination, ICERD specifically addresses apartheid in the following terms:

*States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.*²⁹

28. Israel ratified ICERD on 3 January 1979.³⁰ There are no relevant reservations. It follows that Israel is bound by the obligation in Article 3 to prevent, prohibit and eradicate all practices of apartheid in territories under its jurisdiction.

B. The Definition of Apartheid in Custom and ICERD

29. The previous sub-section noted the existence of the prohibition of apartheid in custom and in Article 3 of ICERD. This sub-section addresses the definition of apartheid applicable to each rule.
30. As to the customary rule, the target of States' condemnation throughout the 1960s-1980s was the racially discriminatory policies of South Africa. However, this practice does not shed much light on the meaning of the term itself. Similarly, ICERD does not provide a definition of 'apartheid', as prohibited by Article 3 of ICERD. For these reasons, it would be of particular value for the Court to advise on the meaning of the prohibition of apartheid in international law. Clarity on the definition would assist the General Assembly in performing its functions. It would also be of great assistance to States in complying with their international obligations and in cooperating to bring to an end any such practices by other States.
31. It is submitted that it is the definition of apartheid in the Apartheid Convention of 1973 that applies to the prohibition of apartheid in customary international law and to Article 3 of ICERD.
32. The Apartheid Convention, which was negotiated and drafted in the United Nations' Third Committee between 1971 and 1973, provides a definition of apartheid in Article 2:

For the purpose of the present Convention, the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

²⁸ Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016) 236.

²⁹ Article 3, ICERD.

³⁰ The State of Palestine acceded to CERD on 2 April 2014.

- a. *denial to a member or members of a racial group or groups of the right to life and liberty of person:*
 - i. *by murder of members of a racial group or groups;*
 - ii. *by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;*
 - iii. *by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;*
 - b. *deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;*
 - c. *any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;*
 - d. *any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;*
 - e. *exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;*
 - f. *persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.*³¹
33. For State Parties to the Apartheid Convention – numbering 109 States, including Palestine but not including Israel – this definition determines the applicability of the obligations set out therein. The Apartheid Convention is, in essence, a suppression convention – it requires State Parties to suppress, discourage, and prosecute acts of apartheid.³² That is, it aims to ensure the criminalization and punishment of the crime of apartheid.
34. To be clear, the argument is not that the Apartheid Convention – and its suppression obligations – are binding on Israel or any other State that is not a party to it. Rather, it is that this *definition* of apartheid informs the scope of the customary prohibition and the obligation in Article 3 of ICERD. Each will be taken in turn.
- i. The Relevance of the Definition in Article 2 of the Apartheid Convention to the Prohibition of Apartheid in Customary International Law

³¹ Article 2, Apartheid Convention.

³² Article 4, Apartheid Convention.

35. To take the customary prohibition first, the Third Committee of the United Nations' work in drafting and adopting the Apartheid Convention was part of the same programme of legal and political work that led to the crystallization of the customary rule. In this respect, the Preamble to the Apartheid Convention refers explicitly to the condemnation of apartheid in Resolutions of the General Assembly and Security Council that were critical to the crystallization of the customary rule.³³ As Jackson notes:

*There is no evidence indicating that States had in mind two concepts in this process—that is, one definition in relation to the crystallizing customary prohibition binding States and another, different definition for the attempt at criminalization in the Apartheid Convention.*³⁴

36. In other words, the definition of apartheid set out in the Apartheid Convention entails what States understood themselves to be condemning in their practice that forms the basis of the customary prohibition.
37. Moreover, within the Third Committee of the United Nations, the definition was adopted in 1973 by 88 votes to 3, with 21 abstentions.³⁵ This represents a sufficiently general and representative understanding among States of the term's meaning at the time. In addition, there has been no recent, general practice of States which may have since provoked an evolution in the term's meaning.
38. On this basis, the definition of apartheid in the Apartheid Convention is applicable to the customary prohibition.

ii. The Relevance of the Definition in Article 2 of the Apartheid Convention to Article 3 of ICERD

39. The same is true in relation to the reference to apartheid in Article 3 of ICERD. ICERD entered into force on 4 January 1969. In negotiating the Apartheid Convention between 1971 and 1973, it is clear that States also had in mind their pre-existing treaty obligations under Article 3 of ICERD. This is evident in the Preambles of earlier drafts of the Convention submitted by different States in 1971³⁶ and 1972³⁷ as well as in the final text adopted in 1973. That final text explicitly refers to the obligation under Article 3 of ICERD on State Parties to 'prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.'³⁸
40. For this reason, it is correct to understand the Apartheid Convention as an instrument aimed at the criminalization – *using the same definition of apartheid* – of practices addressed by Article 3

³³ Preamble, ICERD:

Observing that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of apartheid are condemned as a crime against humanity

Observing that the Security Council has emphasized that apartheid and its continued intensification and expansion seriously disturb and threaten international peace and security.

³⁴ Jackson, 'The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination' (2022) 71 ICLQ 831, 839.

³⁵ UNGA, Report of the Third Committee (Part II), 'Draft Convention on the Suppression and Punishment of the Crime of Apartheid', 19 November 1973, A/9233/Add.1, para 28.

³⁶ UNGA Third Committee, 'Guinea and Union of Soviet Socialist Republics: draft of a Convention on the suppression and punishment of the crime of apartheid', 28 October 1971, A/C.3/L.1871.

³⁷ UNGA Third Committee, 'Guinea, Nigeria and the Union of Soviet Socialist Republics: revised draft Convention on the suppression and punishment of the crime of apartheid', 24 October 1972, A/C.3/L.1942/Rev.1.

³⁸ Preamble, ICERD.

of ICERD.³⁹ For those States that were parties to ICERD at the time, this entails subsequent practice that contributes to 'the clarification of the meaning of a treaty',⁴⁰ as a supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties.⁴¹ As the ILC noted in its recent Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties:

*A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.*⁴²

41. As set out previously, within the Third Committee of the United Nations, the definition of apartheid set out in the Apartheid Convention was adopted in 1973 by 88 votes to 3, with 21 abstentions.⁴³ Many of the States voting in favour of the definition were, at the time, State Parties to ICERD – and this vote should be understood as conduct of those States which indicates their understanding of the meaning of the term 'apartheid' in Article 3 of ICERD. Moreover, there appears to have been no attempt by other State Parties to ICERD to establish an alternative definition.
42. Since 1973, there has been no general State practice in relation to the meaning of Article 3 of ICERD that employs a different definition.⁴⁴ Moreover, as discussed in the following paragraph, the drafting and adoption of the Rome Statute of the International Criminal Court did not affect the definition of States' pre-existing treaty obligation in ICERD. Finally, as to any practice of the Committee on the Elimination of Racial Discrimination itself, as opposed to States, Thornberry notes that 'clearer specification of the meaning of apartheid has hardly been forthcoming in [CERD Committee] practice'.⁴⁵
43. In sum, the definition of apartheid in the Apartheid Convention of 1973 is applicable to the obligation under Article 3 of ICERD of all State Parties 'to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.'

iii. Apartheid in the Rome Statute

³⁹ Jackson, 'The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination' (2022) 71 ICLQ 831, 841.

⁴⁰ Conclusion 7(2), ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (2018) II(2) YILC.

⁴¹ Article 32, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁴² Conclusion 4(3), ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (2018) II(2) YILC. The Commentaries specify – para 35 – that:

Thus, "subsequent practice" in the broad sense (under article 32) covers any application of the treaty by one or more (but not all) parties. It can take various forms. Such "conduct by one or more parties in the application of the treaty" may, in particular, consist of a direct application of the treaty in question, conduct that is attributable to a State party as an application of the treaty, a statement or a judicial pronouncement regarding its interpretation or application.

⁴³ UNGA, Report of the Third Committee (Part II), 'Draft Convention on the Suppression and Punishment of the Crime of Apartheid', 19 November 1973, A/9233/Add.1, para 28.

⁴⁴ In its Interstate Communication pursuant to Article 11 of ICERD, the State of Palestine adopts the view articulated in this written statement – that the Apartheid Convention 'provides the best definition for the purposes of interpreting Art. 3 ICERD' – CERD, 'Communication submitted to the Committee on the Elimination of All Forms of Racial Discrimination by the State of Palestine pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination', 23 April 2018, ICERDISC-2018/3, para 586.

⁴⁵ Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016) 236.

44. To conclude, it may be noted that the Rome Statute of the International Criminal Court recognises "the crime of apartheid" as a crime against humanity under Article 7. In Article 7(2) it defines the 'crime of apartheid' as:

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

45. This definition, which relates to individual criminal responsibility under international law, is quite similar to that prescribed in the Apartheid Convention. In relation to the definition of the prohibition of apartheid in custom and Article 3 of CERD, a key point is that there is no evidence that States, when negotiating and drafting Article 7 of the Rome Statute, understood themselves to also be putting forward an interpretation relevant to the customary rule or Article 3 of ICERD.⁴⁶ For that reason, the content of the obligations binding States remains unaffected by the adoption of a slightly different definition for the purposes of individual criminal responsibility under the Rome Statute.
46. Nonetheless, given the similarities between the two definitions, any clarification that the Court can provide on the meaning and application of the customary rule and Article 3 of CERD will also be of particular value to the interpretation and application of the Rome Statute.⁴⁷

iv. Apartheid in Additional Protocol I to the Geneva Conventions

47. For completeness, Namibia points out that under Article 85(4)(c) of Additional Protocol I to the Geneva Conventions, apartheid is considered a grave breach. The Commentary to the Geneva Conventions indicates that acts of apartheid were already prohibited as outrages upon human dignity and grave breaches under the Geneva Conventions of 1949.⁴⁸ Notably, the Fourth Geneva Convention is directly binding on Israel as a State party to the Convention and is also binding as customary international law.

C. The Scope of the Prohibition of Apartheid

48. Having addressed the existence and definition of apartheid in relation to the rule-binding States in customary international law and Article 3 of ICERD, the present sub-section addresses each rule's geographical and territorial scope.
49. First, although these rules were generated by the international community's response to the practices of a particular State, there is no reason to think that their geographical scope of application is limited to either the territory of South Africa or the region of southern Africa.⁴⁹ Moreover, their application is not limited to the commission by a particular State – South Africa

⁴⁶ Jackson, 'The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination' (2022) 71 ICLQ 831, 844.

⁴⁷ In its ruling of 5 February 2021, the Pre-Trial Chamber of the ICC held that the Court may exercise its criminal jurisdiction in the *Situation in Palestine*, and that the territorial scope of this jurisdiction extends to 'the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem': ICC, 'Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'' (Pre-Trial Chamber I, Doc No ICC-01/18, 5 February 2021) p. 60.

⁴⁸ Sandoz et al, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' (1986), paras 3513-3515.

⁴⁹ This is further confirmed by the Rome Statute, which omits any reference to southern Africa in its definition of apartheid as a crime against humanity.

– in a particular period. The prohibition on apartheid is a fundamental principle of the international legal order, confirmed by the near-universal ratification of CERD and, as noted in Section V of this written statement, its peremptory status under general international law. The rules bind States in general, in accordance with their respective characters – *all* States for the customary rule and State Parties to ICERD for the treaty rule.⁵⁰

50. Second, both the customary rule and the rule in Article 3 of ICERD apply extraterritorially and in situations of occupation to which the rules of international humanitarian law are applicable:

a. As to the customary rule, this is evident in the fact that the international community's denunciation of the regime in South Africa's practices extended to its imposition of apartheid in Namibia. The General Assembly, for instance, repeatedly condemned these extraterritorial practices, both prior to⁵¹ and after the termination of the League Mandate in 1966.⁵² Likewise, the Security Council condemned the measures taken by South Africa to enforce its policy of apartheid beyond its borders.⁵³ Moreover, in the *Namibia Advisory Opinion*, the Court held that South Africa's implementation of apartheid in Namibia constituted 'a flagrant violation of the purposes and principles of the Charter' of the United Nations.⁵⁴

b. As to Article 3 of ICERD, the text itself entails an obligation on State Parties 'to prevent, prohibit and eradicate all practices [of apartheid] in territories under their jurisdiction.' In the practice of ICERD, this straightforwardly includes situations of occupation,⁵⁵ as in the present proceedings. This is in line with the consistent jurisprudence of the Court, which has repeatedly confirmed the extraterritorial application of international human rights law, including in situations of occupation to which international humanitarian law is applicable.⁵⁶

51. That Article 3 of ICERD on apartheid applies to Israel's policies and practices in both Israel and the Occupied Palestinian Territory is further established in the Concluding Observations of the CERD Committee to Israel, in 2019. There the Committee in paragraph 23:

*Draws the State party's attention to its general recommendation 19 (1995) concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid, and urges the State party to give full effect to article 3 of the Convention to eradicate all forms of segregation between Jewish and non-Jewish communities and any such policies or practices which severely and disproportionately affect the Palestinian population in Israel proper and in the Occupied Palestinian Territory.*⁵⁷

⁵⁰ See further CERD, 'General Recommendation XIX: The Prevention, Prohibition and Eradication of Racial Segregation and Apartheid', A/50/18 (1995) para 1.

⁵¹ UNGA Res 2074 (XX), 17 December 1965, A/Res/2074, para 4.

⁵² See also Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 26th sess, Supp No 18, A/8418 (1971) 36; *Namibia Advisory Opinion*, paras 130-131.

⁵³ UNSC Res 282, 23 July 1970, S/Res/282 (recital 2).

⁵⁴ *Namibia Advisory Opinion*, para 131.

⁵⁵ Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016) 259.

⁵⁶ *Wall Advisory Opinion*, p. 156, paras 106, 111; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, para 216.

⁵⁷ CERD/C/ISR/CO/17-19, Committee on the Elimination of Racial Discrimination, Concluding observationsObservations on the combined seventeenthCombined Seventeenth to nineteenth reportsNineteenth Reports of Israel (12 December 2019) , 27 January 2020, CERD/C/ISR/CO/17-19, para. 23.

52. Significantly, the observations point to policies and practices of racial discrimination, segregation and apartheid as affecting the Palestinian population across two jurisdictions, both in Israel and the Occupied Palestinian Territory. Further, the CERD Committee has established a Conciliation Committee to examine violations of Article 3 including 'policies of racial segregation and apartheid' between the State of Palestine and Israel.⁵⁸

IV. PRACTICES OF APARTHEID AGAINST THE PALESTINIAN PEOPLE

53. This section applies the prohibition of apartheid in custom and Article 3 of ICERD to the situation at issue in these proceedings. To reiterate, each of these rules, whose definition is provided by Article 2 of the Apartheid Convention, is binding on Israel and is applicable within territories subject to its jurisdiction, including the territory inside the Green Line (Israel proper), the Occupied Palestinian Territory, and the occupied Syrian Golan. In relation to the latter, Namibia draws attention to the similarity of Israeli policies and practices towards Syrians therein, including prolonged occupation, illegal settlements and annexation, denial of the right of return, and other discriminatory measures.
54. Namibia notes that there is no constraint within the General Assembly's question limiting the examination of apartheid to the Occupied Palestinian Territory alone. In particular, Namibia draws attention to the use of the conjunctive 'and' in the phrasing of the request – 'and from its adoption of related discriminatory legislation and measures – as presenting a separate standalone question. Namibia respectfully requests consideration of discriminatory Israeli measures with respect of the Palestinian people as a whole.
55. In this respect, Namibia submits that Israel is in breach of its obligations under the customary prohibition of apartheid and Article 3 of ICERD. It has imposed a system of apartheid on (i) Palestinians within the Occupied Palestinian Territory, specifically, and (ii) the Palestinian people, as a whole.
- a. Sub-section A sets out an overview of the elements of the prohibition of apartheid in international law.
 - b. Sub-section B addresses its material elements. It submits that Israel's practices fulfil, in particular, the material elements set out in Articles 2(c) and 2(d) of the Apartheid Convention. They entail inhuman acts committed against Palestinians in the Occupied Palestinian Territory, specifically, and the Palestinian people as a whole.
 - c. Sub-section C concerns the question of racial groups. It submits that Israel's practices are being committed against a racial group, as required by the definition of apartheid. The relevant group is (i) Palestinians in the Occupied Palestinian Territory, and (ii) the Palestinian people, as a whole, comprising Palestinians who have been fragmented in the Occupied Palestinian Territory, Palestinian citizens of Israel, and Palestinian refugees and exiles). Moreover, these practices are undertaken for the benefit of another racial group – Jewish Israelis in the Occupied Palestinian Territory and in Israel.

⁵⁸ CERD/C/100/3, Inter-state communication submitted by the State of Palestine against Israel (12 December 2019) para. B(1) 2.6), available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CERD/CERD-C-100-3.pdf>.

- d. Sub-section D discusses the specific intent requirement of apartheid. It submits that Israel's practices were and are being committed with the specific intent of the wrong of apartheid.

A. Elements of the Prohibition of Apartheid

56. In accordance with the definition set out above, three elements make up the prohibition of apartheid in custom and the rule in Article 3 of ICERD:
- a. First, the State – through its organs and agents – must commit one or more of the inhuman acts of apartheid, as set out in Articles 2(a)-(f) of the Apartheid Convention. In many instances, these enumerated inhuman acts entail violations of fundamental rights and freedoms protected by international law. This may be understood as the material element of the wrong of apartheid.⁵⁹
 - b. Second, these inhuman acts must be committed against a racial group or members of that racial group.⁶⁰
 - c. Third, the State – through its organs and agents – must commit these inhuman acts ‘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’, as set out in Article 2 of the Apartheid Convention. This may be understood as the specific intent element of the wrong of apartheid.⁶¹
57. In relation to these elements, the Court has before it the extensive factual evidence provided by the United Nations Secretariat, and will also have detailed factual evidence provided by participants in these proceedings.
58. This section draws attention to factual evidence of certain specific policies, practices, and statements that together demonstrate that the threshold of the prohibition of apartheid has been met. Almost all of the material referred to below is included in the Secretariat's dossier, and comes from an official United Nations body or institution. Any other materials referred to are readily available online, including the reports of Palestinian, Israeli, and international non-governmental organizations that have addressed the issue of apartheid in the Occupied Palestinian Territories in detail.⁶²

⁵⁹ See analogously *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, paras 276, 319 in relation to the material element of genocide.

⁶⁰ The inhuman act set out in Article 2(f) of the Apartheid Convention is not limited to commission against the racial group or its members: ‘Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.’

⁶¹ See analogously *Bosnia v. Serbia*, p. 43, para 187.

⁶² B’Tselem, ‘A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid’ (Position Paper, 12 January 2021) 4; Al-Haq, ‘Israeli Apartheid: Tool of Zionist Settler Colonialism’ (2022) 99-110; Human Rights Watch, ‘A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution’ (Report, 27 April 2021) 176-183; Amnesty International, ‘Israel’s Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity’ (Report, 1 February 2022) 113-162.

B. The Material Element of Apartheid

59. The commission by the State of *any* of apartheid's enumerated inhuman acts, as set out in Article 2(a)-(f) of the Apartheid Convention, will fulfil the material element of the prohibition of apartheid under international law.
60. The present sub-section focuses on two elements of the prohibition of apartheid. These are the material elements in Articles 2(c) and 2(d) of the Apartheid Convention.
61. In passing, it may be noted that in the factual record before the Court, there is evidence of the commission of other enumerated wrongful acts of apartheid. This includes extensive practices of unlawful deprivation of liberty in breach of Article 2(a)(iii) of the Apartheid Convention.⁶³ It also includes increasingly restrictive measures persecuting individuals who oppose the imposition of a regime of apartheid, as set out in Article 2(f) of the Apartheid Convention.⁶⁴

i. The Material Element in Article 2(c) of the Apartheid Convention

62. Article 2(c) of the Apartheid Convention categorizes as an inhuman act of apartheid:

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

63. Article 2(c) is at the heart of the international legal wrong of apartheid in that it captures the systemic and structural ways that a State might prevent the flourishing and development of a group.
64. Since 1948, Israel has adopted laws, policies and practices aimed at fragmenting the Palestinian people. The Palestinian people have been divided into a number of administrative 'domains' or groups,⁶⁵ with varying degrees of rights, with the purpose of separating and segregating the Palestinian domains from each other. This prevents the flourishing of the group, and in doing so, denies the exercise of the Palestinian people of its right to self-determination.
65. Israel (a) has denied Palestinian refugees, displaced persons, and exiles their right to return to their homes, lands, and properties since 1948 on the basis of their racial identity; (b) discriminates against Palestinian citizens, for the benefit of Jewish nationals, including through the period of military rule from 1948 until 1966 and through ongoing racial oppression and domination; (c) controls the Palestinian people in the occupied West Bank under the laws of

⁶³ Article 2(a), Apartheid Convention reads: '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 of the members of a racial group or groups' – see 1st Report of Special Rapporteur Francesca Albanese, 21 September 2022, A/77/356, para 59.

⁶⁴ Article 2(f), Apartheid Convention reads: 'Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid' – on which see Independent International Commission of Inquiry Report, 9 May 2023, A/HRC/53/22.

⁶⁵ United Nations Economic and Social Commission for Western Asia, 'Israeli Practices towards the Palestinian People and the Question of Apartheid' (2017), UN Doc E/ESCWA/ECRI/2017/1; State of Palestine, *It Is Apartheid: The Reality of Israel's Colonial Occupation of Palestine* (2021) p. 18, available at: <https://www.nad.ps/sites/default/files/20201230.pdf>.

occupation; (d) treats Palestinians in occupied East Jerusalem as 'permanent residents', a temporary and revocable residency status, and (e) treats the occupied Gaza Strip as an 'enemy entity' with severe repercussions on the Palestinians living there.

66. This strategic fragmentation has two underlying objectives: first, it prevents Palestinians from collectively mobilizing against Israel's settler colonial enterprise; second, it ensures the continuation of the settler colonial enterprise by maintaining Israeli Jewish domination over the Palestinian people. Israel's discriminatory laws, policies and practices started with the foundation of the State of Israel in 1948, and continued after the occupation of Palestinian territory in 1967, under military orders.
67. Namibia maintains its position that Israel's apartheid spans two jurisdictions on both sides of the Green Line as a regime of domination over Palestinians in both Israel and the Occupied Palestinian Territory. At the UN Human Rights Council, Namibia stated:

*If Israel continues to ignore calls to put an end to its illegal occupation, apartheid system and related human rights violations, then this Council must explore the possibility of establishing a mechanism, to deal exclusively with Israeli apartheid practices against the Palestinian people on both sides of the Green Line.*⁶⁶

68. Since 1948, Israel has adopted discriminatory laws, policies and practices against the Palestinian people as a whole. The content of these measures is described in-depth in the reports of Palestinian, Israeli and international human rights organizations, including Human Rights Watch and Amnesty International.⁶⁷
- a. The Law of Return (1950) and the Citizenship Law (1952) provides that citizenship 'shall be granted to every Jew who has expressed his desire to settle in Israel' and 'every Jew has the right to come to this country as an *oleh*', while discriminating against the Palestinian people indigenous to the land.⁶⁸ Under Israel's Citizenship Law and the Law of Return, every '*oleh*', which is 'every Jew' who enters territory within Israel's control,

⁶⁶ Item: 7 General Debate (Cont'd) - 31st Meeting, 51st Regular Session of Human Rights Council (30 September 2022), [Namibia, Ms. Hilleni Tangi Ndeyamo Shikongo](#) (at 30:46). See also Presentation of Reports and Item: 7 General Debate - 46th meeting, 49th Regular Session of Human Rights Council (25 March 2022), [Namibia, Mr. Jerry Mika](#) (at 52:00):

Namibia further considers that businesses operating in the settlements, may be 'complicit in the commission of war crimes and crimes against humanity, including apartheid by Israel against the Palestinian people.

⁶⁷ Al-Haq, *Israeli Apartheid: Tool of Zionist Settler Colonialism* (29 November 2022), available at: <https://www.alhaq.org/advocacy/20931.html>; Al Mezan, *The Gaza Bantustan—Israeli Apartheid in the Gaza Strip* (29 November 2021), available at: <https://reliefweb.int/report/occupied-palestinian-territory/gaza-bantustan-israeli-apartheid-gaza-strip>; Amnesty International, *Israel's Apartheid Against Palestinians: A Look Into Decades of Oppression and Domination* (February 2022), available at: <https://www.amnesty.org/en/latest/campaigns/2022/02/israels-system-of-apartheid/>; B'Tselem, *A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid* (12 January 2021), available at: https://www.btselem.org/publications/fulltext/202101_this_is_apartheid; Harvard and Addameer, *A Legal Analysis of Israel's Actions, Joint Submission to the United Nations Independent International Commission of Inquiry on the Occupied Territory, including East Jerusalem, and Israel* (28 February 2022), available at: <http://hrp.law.harvard.edu/wp-content/uploads/2022/03/IHRC-Addameer-Submission-to-HRC-COI-Apartheid-in-WB.pdf>; Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (27 April 2021), available at: <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>. See also, *State of Palestine, It Is Apartheid: The Reality of Israel's Colonial Occupation of Palestine* (2021) p. 18, available at: <https://www.nad.ps/sites/default/files/20201230.pdf>.

⁶⁸ Law of Return 5710-1950 (5 July 1950), available at: <https://mfa.gov.il/mfa/mfa-archive/1950-1959/pages/law%20of%20return%205710-1950.aspx>.

'shall become an Israeli national', again expressly omitting any provision for Palestinian right of return.⁶⁹

- b. The Absentee Property Law provides for the confiscation of Palestinian refugee property from persons classified as 'absentees' or 'persons who were expelled, fled, or who left the country after 29 November 1947, mainly due to the war'.⁷⁰ This appropriated Palestinian property was reallocated to Israel Jews under the Land Acquisition Law (1953) in a mass settlement enterprise.⁷¹
 - c. The Jewish settlement of land continues to be enshrined in the Basic Law, Nation State of the Jewish People (2018) which provides that 'State of Israel is the nation State of the Jewish people' and limits the right to self-determination therein 'to the Jewish people', while providing for the development of Jewish settlements as a national priority. Under No 40 of the Budgets Law, the Minister for Finance can refuse public funding to institutions that reject the existence of Israel as a 'Jewish and democratic state' or that seek to commemorate 'Israel's Independence Day or the day on which the state was established as a day of mourning', laws which directly discriminate against the Palestinian population.⁷²
69. Israel's practices towards Palestinians in the Occupied Palestinian Territory also violate the material element of the prohibition of apartheid, as reflected in Article 2(c) of the Apartheid Convention. This may be illustrated with reference to the following measures and practices:
- a. the establishment of settlements and their associated regimes;
 - b. the exploitation of natural resources, and in particular, water resources throughout areas under Israel's control;
 - c. the control over economic and social development through restrictive zoning practices, including discriminatory allocation of resources and services to the detriment of the full development of the Palestinian people;
 - d. the infliction of disproportionate restrictions on Palestinians' freedom of movement in the Occupied Palestinian Territory and through the policy of denying Palestinian refugees, displaced persons, and exiles their right of return;
 - e. the failure to take reasonable measures to protect Palestinians from private violence committed by settlers in the Occupied Palestinian Territory;
 - f. the establishment of a wider context of a dual system of law in the Occupied Palestinian Territory under which Palestinians' fundamental rights, including political rights of assembly, opinion and expression, and association, are unjustifiably curtailed; and
 - g. the denial of basic human rights and freedoms to Palestinians, notably Palestinians in the Gaza Strip held under illegal closure and siege.

⁶⁹ Nationality Law, 5712 – 1952, available at: https://www.knesset.gov.il/reviw/data/eng/law/kns2_nationality_eng.pdf.

⁷⁰ Article 19(a) of the Absentees' Property Law, 1950, provides that 'it shall be lawful for the Custodian to sell the property to that Development Authority.'

⁷¹ Land Acquisition (Validation of Acts and Compensation) Law (1953). See Adalah to Attorney General and Custodian of Absentee Property: Israel's Sale of Palestinian, available at: <https://www.adalah.org/en/content/view/7003>.

⁷² "Nakba Law" – Amendment No. 40 to the Budgets Foundations Law, 2011, available at: <https://www.adalah.org/en/law/view/496>.

70. First, Israel's establishment and facilitation of the establishment of civilian settlements have continued unabated.⁷³ In and of itself, this practice breaches the prohibition on transfer of a State's own civilian population into occupied territory under Article 49 of the Fourth Geneva Convention, which is binding on Israel. This has been widely recognized by the international community, including by the Security Council,⁷⁴ the General Assembly,⁷⁵ and the Court in the *Wall Advisory Opinion*.⁷⁶ Such practice also constitutes a war crime under Article 8(2)(b)(viii) of the Rome Statute.⁷⁷ Beyond this, the wider project of the settlements as a whole – and the legal regime that surrounds them – prevents the full development of Palestinians as a group.⁷⁸ As the Independent International Commission of Inquiry Report concluded in 2022:

*The establishment, maintenance and expansion of Israeli settlements throughout the West Bank, including in East Jerusalem, has fragmented and isolated Palestinians from their lands and other Palestinian communities. The Commission emphasizes that wherever settlements are located, they have a cascading impact on Palestinians throughout the West Bank.*⁷⁹

71. Second, Israel's practices in relation to the exploitation of natural resources prevent Palestinians from full participation in economic life and prevent their full development as a group. These practices also entail an infringement of the right of the Palestinian people to permanent sovereignty over their natural resources⁸⁰ and exceed any possible justification accruing under the law of occupation.⁸¹ To focus on one resource – water – the same Independent International Commission of Inquiry Report found that: 'Israel has taken control of all water resources in the West Bank and has been using much of the water for its own purposes.'⁸² This has directly affected the economic potential of Palestinian agriculture⁸³ and broader economic development as a group. The question of access to water is also addressed in more detail by the United Nations High Commissioner for Human Rights in their Report to the Human Rights Council of 2021. This Report illustrates how 'Israeli occupation policies and practices negatively affect the enjoyment of human rights of the Palestinian people in terms of rights to safe drinking water and

⁷³ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 25; Fifth Report of Special Rapporteur Michael Lynk, 22 October 2020, A/75/532, para 14 noting that: 'In 2020 alone, Israel has approved or advanced more than 12,150 settlement homes, making it the single highest rate on record since 2012, when such figures started to be recorded by Peace Now.'

⁷⁴ E.g. UNSC Resolution 446, 22 March 1979, S/Res/446; UNSC Resolution 465, 1 March 1980, S/Res/465; UNSC Resolution 2334, 23 December 2016, S/Res/2334.

⁷⁵ E.g. UNGA Resolution 77/126, 12 December 2022, A/Res/77/126.

⁷⁶ *Wall Advisory Opinion*, p. 156, para 120.

⁷⁷ The war crime set out in Article 8(2)(b)(viii) was explicitly referred to in the ICC Prosecutor's 2020 Request for a ruling on the Court's territorial jurisdiction in Palestine – see ICC, 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' (Pre-Trial Chamber I, Doc No ICC-01/18, 22 January 2020) para. 95.

⁷⁸ The settlement project and its associated practices also violate the right of the Palestinian people to self-determination – on which, see UNGA Resolution 2625 (XXV), 24 October 1970; *Wall Advisory Opinion*, p. 156, paras 88, 122.

⁷⁹ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 30.

⁸⁰ See UNGA Resolution 77/187, 22 December 2022, A/Res/77/187, para 1: The General Assembly: 'Reaffirms the inalienable rights of the Palestinian people and of the population of the occupied Syrian Golan over their natural resources, including land, water and energy resources'; and foundationally UNGA Resolution 1803 (XVII), 14 December 1962, A/1803 (XVII)).

⁸¹ Article 55, Hague Regulations (1907). See also Article 11, ICESCR; Committee on Economic, Social and Cultural Rights, 'General Comment No. 15 - The Right to Water', 2002, E/C.12/2002/11.

⁸² Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 35.

⁸³ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, paras 72, 74.

sanitation in the Occupied Palestinian Territory, including East Jerusalem.⁸⁴ In addition, in its Concluding Observations on Israel's Fourth Periodic Report, the Committee on Economic, Social and Cultural Rights urged Israel to:

*cease the destruction of Palestinian water infrastructure and ensure that Palestinians have access to sufficient quantities of safe and clean drinking water.*⁸⁵

72. Third, Israel exercises control over the economic and social development of the Palestinian people through an extensive system of planning and zoning within the West Bank.⁸⁶ Applications for building permits are commonly rejected,⁸⁷ and 'Israeli military application of land, zoning and property rules in East Jerusalem and the West Bank discriminatorily benefits Israeli Jewish settlers and significantly disadvantages Palestinians.'⁸⁸ The system of planning and zoning provides for house demolitions for unlicensed constructions in Area C, and along with punitive house demolitions and the creation of coercive environments,⁸⁹ has forced the widespread and systematic transfer of Palestinian population. Between 2009 and July 2023, OCHA recorded that Israel destroyed 9,629 structures forcing the displacement of 14,051 Palestinians.⁹⁰ Indeed, in its Concluding Observations on the Fifth Periodic Report of Israel in 2022, the Human Rights Committee observed that 'the restrictive zoning and planning regime in the West Bank makes it almost impossible for Palestinians to obtain construction permits.'⁹¹ The practices entailed in this control amount to the deliberate creation of conditions preventing the full development of the Palestinian people. They also have severe effects on the right of Palestinians to work, as protected by international law.⁹²
73. Fourth, the freedom of movement of Palestinians is restricted through the imposition of a coercive system of checkpoints and searches, including of women and girls.⁹³ In its collective application and disproportionality, this coercive system exceeds any possible justification arising under international law.⁹⁴ In addition, in his 6th report to the General Assembly, Michael Lynk, the Special Rapporteur on the Situation of Human rights in the Palestinian Territories Occupied Since 1967, noted how this system of checkpoints and roadblocks 'continue[s] to effectively obstruct Palestinians' access to other rights and services, including health, education and

⁸⁴ Report of the United Nations High Commissioner for Human Rights, Allocation of Water Resources in the Occupied Palestinian Territory, including East Jerusalem, 15 October 2021, A/HRC/48/43, para 3.

⁸⁵ CESCR, Concluding Observations on the Fourth Periodic Report of Israel, 12 November 2019, E/C.12/ISR/CO.4, para 47.

⁸⁶ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, paras 41, 42:

Permits are rarely given to Palestinians for building residential structures or structures for economic activities, or to develop infrastructure. Over the 10-year period lasting from 2009 to 2018, only about 2 per cent of applications for construction permits was approved. In 2019 and 2020, 32 plans and permits for Palestinians were approved and 310 plans were rejected, while the Civil Administration of Israel approved plans for 16,098 units in Israeli settlements.

⁸⁷ 4th Report of Special Rapporteur Michael Lynk, 21 October 2019, A/74/507, para 15.

⁸⁸ Report of Special Rapporteur Michael Lynk to the Human Rights Council, 2022, A/HRC/49/87, para 50.

⁸⁹ OCHA, Coercive environment intensified on herding Communities in southern Hebron (17 December 2017), available at: <https://www.ochaopt.org/content/coercive-environment-intensified-herding-communities-southern-hebron>.

⁹⁰ OCHA, Data on demolition and displacement in the West Bank (Figures as of 15 July 2023), available at: <https://www.ochaopt.org/data/demolition>.

⁹¹ Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Israel, 5 May 2022, CCPR/C/ISR/CO/5, para 42.

⁹² On the content of the right, see Committee on Economic, Social and Cultural Rights, General Comment No. 18, the Right to Work, 2005, E/C.12/GC/186.

⁹³ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, paras 55, 59.

⁹⁴ Article 12, ICCPR.

work.⁹⁵ This is an extension of the specific finding of the Court in the *Wall Advisory Opinion*, where the Court identified the effects of the separation wall on Palestinians' rights to freedom of movement, as well as their access to health services, education, and water.⁹⁶

74. Fifth, in breach of its duties as an occupying power as well as its protective duties under international human rights law,⁹⁷ Israel has failed to take all reasonable measures to protect Palestinians from violence committed by settlers, often providing protection and support to the settlers committing such violence.⁹⁸ This has led to an 'atmosphere of impunity surrounding attacks by settlers',⁹⁹ which itself contributes to the inability of Palestinians to exercise basic freedoms as guaranteed by international law.
75. Sixth, these specific practices take place within a wider context of a dual system of law which provides privileges to the Israeli settlers illegally present in the OPT and denies the human rights of the Palestinian people.¹⁰⁰ Israel undertakes mass arbitrary arrests and imprisonment of Palestinians, including an extensive practice of administrative detention without trial,¹⁰¹ that breaches what might be justified under its derogation to Article 9 of the International Covenant on Civil and Political Rights.¹⁰² It imposes severe limitations on the rights of family reunification.¹⁰³ The Palestinian people's freedom of assembly, opinion and expression, and association is severely restricted¹⁰⁴ in a systematic and collective way that entails a disproportionate limitation under international law.¹⁰⁵ Moreover, there have been severe attacks on the political freedoms of the Palestinian people, including civil society.¹⁰⁶ This has included legislation targeting the civic space, including the use of counter-terrorism legislation, harassment of human rights defenders, and collective punitive measures by Israel as occupying power.¹⁰⁷
76. Seventh, Israel's policies and practices in the Gaza Strip have serious detrimental consequences for Palestinians. The denial of freedom of movement, including preventing and delaying access

⁹⁵ 6th Report of Special Rapporteur Michael Lynk, 22 October 2021, A/76/433, para 13.

⁹⁶ *Wall Advisory Opinion*, p. 156, paras 133, 137.

⁹⁷ Article 43, Hague Regulations (1907); Article 6, ICCPR; Human Rights Committee, General Comment 36, para 21.

⁹⁸ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 66; 4th Report of Special Rapporteur Michael Lynk, 21 October 2019, A/74/507, para 15; 5th Report of Special Rapporteur Michael Lynk, 22 October 2021, A/76/433, paras 16-19; Report of the Special Committee, 29 September 2021, A/76/360, paras 25-26.

⁹⁹ 6th Report of Special Rapporteur Michael Lynk, 22 October 2021, A/76/433, para 19. See also Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Israel, 5 May 2022, CCPR/C/ISR/CO/5, para 24.

¹⁰⁰ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 47; Report of Special Rapporteur Michael Lynk to the Human Rights Council, 2022, A/HRC/49/87, paras 38-45.

¹⁰¹ 1st Report of Special Rapporteur Francesca Albanese, 21 September 2022, A/77/356, para 59.

¹⁰² On the limits to derogation, Human Rights Committee, General Comment No. 29 – States of Emergency (2001) CCPR/C/21/Rev.1/Add.11.

¹⁰³ Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, 27 January 2020, CERD/C/ISR/CO/17-19, para 24.

¹⁰⁴ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 47; 4th Report of Special Rapporteur Michael Lynk, 21 October 2019, A/74/507, para 18.

¹⁰⁵ Articles 19, 21, 22, ICCPR.

¹⁰⁶ Independent International Commission of Inquiry Report, 9 May 2023, A/HRC/53/22.

¹⁰⁷ Independent International Commission of Inquiry Report, 9 May 2023, A/HRC/53/22, paras 11-35.

to medical appointments for chemotherapy and other treatments,¹⁰⁸ as well as the prevention of the besieged occupied population from accessing basic humanitarian supplies including the provision of adequate fuel supply, electricity, water and sanitation, amount to collective punishment. This was affirmed by UN Special Rapporteur Michael Lynk,¹⁰⁹ and entails a violation of Article 50 of the Hague Regulations and Article 33 of the Fourth Geneva Convention.¹¹⁰

77. These measures and practices constitute an institutionalized system where two groups of people subject to Israel's jurisdiction are treated in radically different ways.¹¹¹ As the Committee on the Elimination of Racial Discrimination found in its Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel in 2019, there are two groups within the Occupied Palestinian Territory:

*[W]ho live on the same territory but do not enjoy either equal use of roads and infrastructure or equal access to basic services, lands and water resources. Such separation is materialized by the implementation of a complex combination of movement restrictions consisting of the Wall, the settlements, roadblocks, military checkpoints, the obligation to use separate roads and a permit regime...*¹¹²

78. Similarly, earlier this year, the Human Rights Council called upon Israel, as the Occupying Power:

*To take immediate measures to prohibit and eradicate all policies and practices that discriminate against and disproportionately affect the Palestinian population in the Occupied Palestinian Territory, including East Jerusalem, by, inter alia, putting an end to the system of separate roads for the exclusive use of Israeli settlers, who reside illegally in the said territory, the complex combination of movement restrictions consisting of the wall, roadblocks and a permit regime that only affects the Palestinian population, the application of a two-tier legal system that has facilitated the establishment and consolidation of the settlements, and other violations and forms of institutionalized discrimination.*¹¹³

79. In sum, in relation to Article 2(c) of the Apartheid Convention, Israel's legislative and other measures constitute, in particular through the violation of fundamental rights protected by international law:

¹⁰⁸ National Library of Medicine, Comparative survival of cancer patients requiring Israeli permits to exit the Gaza Strip for health care: A retrospective cohort study from 2008 to 2017 (2021), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8172025/>.

¹⁰⁹ UN OHCHR, Israel's collective punishment of Palestinians illegal and an affront to justice: UN expert (17 July 2020), available at: <https://www.ohchr.org/en/press-releases/2020/07/israels-collective-punishment-palestinians-illegal-and-affront-justice-un>.

¹¹⁰ The Report of the Palestinian NGO, Al Mezan, considers that Israel's policies: "[D]emonstrate Israel's intent to separate and divide Palestinians and re-engineer the demographics of the entire Palestinian population in order to assert its domination over them. As a sealed-off enclave, fragmented from the rest of the OPT and controlled by Israel within its apartheid system, Gaza is a strip of land that can be likened to a South African Bantustan" - The Gaza Bantustan: Israeli Apartheid in the Gaza Strip (2021) - available at <https://reliefweb.int/report/occupied-palestinian-territory/gaza-bantustan-israeli-apartheid-gaza-strip>. See also Human Rights Watch, A Threshold Crossed Israeli Authorities and the Crimes of Apartheid and Persecution (2021), p. 73-77, 128-14 - available at https://www.hrw.org/sites/default/files/media_2021/04/Israel_palestine0421_web_0.pdf.

¹¹¹ Report of Special Rapporteur Michael Lynk to the Human Rights Council, 2022, A/HRC/49/87, paras 38-45.

¹¹² Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, 27 January 2020, CERD/C/ISR/CO/17-19, para 22.

¹¹³ Human Rights Council, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, 20 April 2023, A/HRC/Res/52/35, para 7(c).

- a. measures calculated to prevent Palestinians in the Occupied Palestinian Territory and the Palestinian people as a whole from participation in political, social, economic and cultural life; and
 - b. the deliberate creation of conditions preventing the full development of Palestinians in the Occupied Palestinian Territory and the Palestinian people as a whole.
80. As such, they fulfil the material element, as set out in Article 2(c) of the Apartheid Convention, of the prohibition of apartheid in customary international law and Article 3 of ICERD.
- ii. The Material Element in Article 2(d) of the Apartheid Convention
81. Article 2(d) of the Apartheid Convention categorizes as an inhuman act of apartheid:

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

82. This sub-section considers Israel's imposition of measures that are designed to divide the population along racial lines by the creation of separate reserves for Palestinians, as well as the expropriation of landed property belonging to Palestinians. Each of these practices constitutes an infringement of the material element of apartheid, as set out in Article 2(d) of the Apartheid Convention.
83. First, as to the imposition of measures designed to divide the population along racial lines, a central and intended consequence of the settlement project and related practices is the increased confinement of Palestinians to shrinking and separated parts of the Territories. These measures are 'designed' to divide the population.
84. As previously mentioned, the Palestinian people have been separated from each other into different domains, divided into separate administrative 'reserves' through legislative and other measures. This prevents the Palestinian people as a whole from even physically meeting – Palestinians in Gaza cannot leave the Gaza Strip, and are prevented from travelling to see Palestinians in the West Bank, including Jerusalem, and Palestinian citizens of Israel. In addition, Palestinian refugees cannot return to meet other Palestinians. All domains are denied family unification. Under Israel's Citizenship and Entry into Israel Law (Temporary Provision) (2003), renewed in 2023:

[T]he Minister of the Interior shall not grant the inhabitant of an area (the West Bank and the Gaza Strip) citizenship on the basis of the Citizenship law, and shall not give him a license to reside in Israel on the basis of the Entry into Israel Law, and the Area Commander shall not grant a said inhabitant, a permit to stay in Israel, on the basis with the security legislation in the area.¹¹⁴

¹¹⁴ The Citizenship and Entry into Israel Law (temporary provision) 5763 – 2003, available at: https://www.knesset.gov.il/laws/special/eng/citizenship_law.htm; TOI Staff, Knesset extends law banning Palestinian family unification for another year, The Times Israel (6 March 2023), available at: <https://www.timesofisrael.com/knesset-extends-law-banning-palestinian-family-unification-for-another-year/>.

85. The denial of family unification for Palestinians with different status is part and parcel of the denial of their right to self-determination and amounts to an inhuman act of apartheid.
86. In relation to Gaza, the State of Palestine notes that '[t]he containment of the Palestinian people in the besieged and densely-populated Gaza Strip as a separate and distinct entity is particularly evident from the now permanently entrenched illegal closure and blockade of the Gaza Strip'.¹¹⁵ In purportedly annexed Jerusalem, Israel's application of Article 1(b), Entry into Israel Law, 5712-1952, imposes a temporary and revocable 'permanent residency' status on indigenous Palestinians from Jerusalem requiring them to continually prove that their 'centre of life' is in the city.¹¹⁶ Those who cannot prove residency are forcibly transferred from the City. To date, 14,500 people have been transferred.¹¹⁷ In the rest of the West Bank, Palestinians are denied movement from the construction of the Wall and its associated permit regime, which cuts them off from Jerusalem and fragments the territory.¹¹⁸ Palestinian refugees are systematically denied their right of return to their homes, lands, and properties in Israel and the Occupied Palestinian Territory.¹¹⁹ All these measures serve to divide the population along racial lines, separating Palestinians into segregated groups. Similarly, Palestinian displaced persons within the Green Line are denied their right of return to their towns of origin, and their rights to land and property.
87. As to East Jerusalem, the Independent International Commission of Inquiry concluded in its Report of September 2022 that '[o]ver one third of East Jerusalem has been expropriated for the construction of Israeli settlements, and only 13 per cent of the annexed area is currently zoned for Palestinian construction.' There have been extensive practices of forced evictions,¹²⁰ and the creation of a 'shrunk and tenuous range of residency rights for the 360,000 Palestinians' living in East Jerusalem.¹²¹
88. Similarly, the development of new settlements in the West Bank, sanctioned by Israel and including outposts on private Palestinian land, has further fragmented and isolated Palestinian communities.¹²² In Zone C, Israel has undertaken a widespread practice of declaring land 'State land' and appropriating land as military training zones, nature reserves, and archaeological reserves, amongst others,¹²³ with detrimental consequences for Palestinians. Private violence, as mentioned above, has resulted in 'many Palestinian inhabitants [being] forced to leave these areas as a result of the violence, while Israeli settlements continue to expand, effectively surrounding and reducing the living space for Palestinian communities.'¹²⁴

¹¹⁵ State of Palestine, 'It Is Apartheid: The Reality of Israel's Colonial Occupation of Palestine' (2021) p. 32, available at: <https://www.nad.ps/sites/default/files/20201230.pdf>

¹¹⁶ Article 1(b), Entry into Israel Law, 5712 - 1952.

¹¹⁷ OCHA, West Bank Palestinians at Risk of Forcible Transfer, available at: https://www.ochaopt.org/sites/default/files/palestinians_at_risk_of_forcible_transfer.pdf.

¹¹⁸ See *Wall Advisory Opinion*, para 134.

¹¹⁹ UN CEIRPP Study, The Right of Return of the Palestinian People (1978), available at: <https://www.un.org/unispal/document/auto-insert-210170/>.

¹²⁰ 4th Report of Special Rapporteur Michael Lynk, 21 October 2019, A/74/507, para 19; Report of the Special Committee, 29 September 2021, A/76/360, paras 22-24.

¹²¹ Report of Special Rapporteur Michael Lynk to the Human Rights Council, 2022, A/HRC/49/87, para 35.

¹²² Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 27, 30.

¹²³ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 33; Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Israel, 5 May 2022, CCPR/C/ISR/CO/5, para 15; A/HRC/52/76, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan Report of the United Nations High Commissioner for Human Rights (15 March 2023) para 20-21.

¹²⁴ 4th Report of Special Rapporteur Michael Lynk, 21 October 2019, A/74/507, para 15.

89. Second, as to expropriation of landed property, Israel has undertaken a widespread practice of expropriation of Palestinian property inside the Green Line and in the Occupied Palestinian Territory:
- a. This involves extensive expropriation in occupied East Jerusalem for the construction of settlements,¹²⁵ as well as in the West Bank.¹²⁶ This has included broad transfers of 'property rights from Palestinians in East Jerusalem to the State', with a view to facilitating settlement expansion.¹²⁷ These actions, and related practices, exceed any possible justification arising under the law of occupation or international human rights law, and are in fact, prohibited under the property provisions of Article 46, 52, 55 and 56 of the Hague Regulations of 1907.
 - b. Moreover, demolitions of Palestinian property in the West Bank, also linked to the expansion of settlements, are common.¹²⁸ Under Article 53 of the Fourth Geneva Convention, destruction of private property can only be justified if 'rendered absolutely necessary by military operations'.¹²⁹ This requirement is not met in relation to the vast majority of these ongoing practices. More widely, as the Independent International Commission of Inquiry found in its Report of September 2022:

*The demolition and confiscation of livelihood structures, such as shops, animal shelters, walls and warehouses, as well as of infrastructure, such as water pipes, cisterns and roads, has had a substantial impact on Palestinians' access to livelihoods.*¹³⁰
 - c. These practices are a central part of the creation of an institutionalized regime of discrimination and control, and recall policies targeting, and forced removals of, Black South Africans by the government in South Africa.¹³¹
90. Israel's practices of expropriation and confiscation of Palestinian owned land have been repeatedly condemned by the General Assembly¹³² and Human Rights Council.¹³³ Moreover, in its Concluding Observations on the Fifth Periodic Report of Israel in 2022, the Human Rights Committee urged the State to:

¹²⁵ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 14.

¹²⁶ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, paras 31-40; Report of Special Rapporteur Michael Lynk to the Human Rights Council, 2022, A/HRC/49/87, para 43.

¹²⁷ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 14.

¹²⁸ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, paras 45, 60-63; 4th Report of Special Rapporteur Michael Lynk, 21 October 2019, A/74/507, para 16.

¹²⁹ Article 53, Fourth Geneva Convention.

¹³⁰ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, para 62.

¹³¹ See, in particular, the Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966.

¹³² See e.g. UNGA Resolution 77/126, 12 December 2022, A/Res/77/126, para 8; UNGA Resolution 76/82, 9 December 2021, A/Res/76/82, para 8.

¹³³ See e.g. Human Rights Council, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, 20 April 2023, A/HRC/Res/52/35, para 5; Human Rights Council, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, 20 April 2023, A/HRC/Res/49/29, para 5.

*Put an end to the practice of expropriating private land owned by Palestinians and the Syrian Arab population and declaring it as "State land" for settlement purposes.*¹³⁴

91. In addition, recent reports by Palestinian, Israeli, and international non-governmental organizations describe Israel's practices of expropriation as a central aspect of the imposition of a regime of apartheid by Israel.¹³⁵
92. In sum, in relation to Article 2(d) of the Apartheid Convention, these practices, aimed at Palestinians in the Occupied Palestinian Territory and the Palestinian people as a whole, constitute:
 - a. measures designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group; and
 - b. the expropriation of landed property belonging to members of the racial group.
93. As such, they fulfil the material element, as set out in Article 2(d) of the Apartheid Convention, of the prohibition of apartheid in customary international law and Article 3 of ICERD.

iii. Conclusion on the Material Element of Apartheid

94. Israel's measures and practices fulfil the requirements, as set out in Articles 2(c) and 2(d) of the Apartheid Convention, of the material element of apartheid in customary international law and Article 3 of ICERD. Taken together, and in combination with other violations of the fundamental rights of the Palestinian people, these measures and practices establish a regime of domination and systematic oppression spanning both Israel and the Occupied Palestinian Territory.

C. The Question of Racial Groups

95. The previous sub-section demonstrated how Israel's practices breach the material element of the prohibition of apartheid. The present sub-section addresses the second element of the prohibition – that relating to racial groups. It would be particularly valuable for the Court to interpret this element, and to determine authoritatively that Palestinians in the Occupied Palestinian Territory, as well as the Palestinian people as a whole, constitute racial groups for the purposes of the state wrong and the crime of apartheid.
96. Apartheid entails the systematic oppression of a racial group. First, each of its material elements, as set out in Articles 2(a)-(e) of the Apartheid Convention, concern inhuman acts committed against a racial group or members of a racial group. The exception is Article 2(f): 'Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.' Second, the State's purpose must be to establish and maintain domination by 'one racial group of persons over any other racial group.'

¹³⁴ Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Israel, 5 May 2022, CCPR/C/ISR/CO/5, para 15.

¹³⁵ See e.g. B'Tselem, 'A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid' (Position Paper, 12 January 2021) 4; Al-Haq, 'Israeli Apartheid: Tool of Zionist Settler Colonialism' (2022) 99-110; Human Rights Watch, 'A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution' (Report, 27 April 2021) 176-183; Amnesty International, 'Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity' (Report, 1 February 2022) 113-162.

97. The initial question, then, concerns the meaning of 'racial' for these purposes. Article 1(1) of ICERD provides:

*In this Convention, the term 'racial discrimination' shall mean 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.*¹³⁶

98. This definition of 'racial' equally applies to the term 'apartheid' under Article 3 of ICERD. Indeed, apartheid in Article 3 of ICERD should be understood as a distinctive kind of systematic 'racial discrimination', as defined by ICERD, where the State's aim is to establish a regime of racial domination.
99. The same is true for the customary prohibition on apartheid. The definition set out above in Article 1(1) of ICERD, a convention which has been ratified by 182 States, represents a general understanding of the international community of the meaning of the term 'racial discrimination' in international law. There is no reason to think that its conception of racial discrimination does not also apply to the customary prohibition on apartheid.¹³⁷
100. In sum, the term 'racial groups' in the definition of apartheid in Article 3 of ICERD, and in the customary rule, is defined with reference to identity-based on race, colour, descent, national origin, or ethnic origin.¹³⁸
101. Applying this definition to the situation in Israel and the Occupied Palestinian Territory, it is clear that the measures and practices described in the previous section target Palestinians on the basis of their identity as members of the group.
102. In addition to constituting a 'people' for the purposes of the right of self-determination, as the Court held in the *Wall Advisory Opinion*,¹³⁹ Palestinians constitute a racial group for applying the prohibition on apartheid. This is so both for Palestinians in the Occupied Palestinian Territory and for the Palestinian people as a whole, comprising Palestinians in the Occupied Palestinian Territory, Palestinian citizens of Israel, and Palestinian refugees and exiles. Their status as a group is constituted by both their self-understanding¹⁴⁰ and the perceptions and practices¹⁴¹ of the Israeli authorities in the particular, localized contexts of interaction.

¹³⁶ Article 2, ICERD.

¹³⁷ Similarly, Dugard and Reynolds, 'Apartheid, International Law, and the Occupied Palestinian Territory' (2013) 24 EJIL 867, 886.

¹³⁸ Jackson, 'The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination' (2022) 71 ICLQ 831, 850. This is also implicit in the Court's reasoning in the *Namibia Advisory Opinion*, p. 16, para 131:

Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.

¹³⁹ *Wall Advisory Opinion*, p. 156, para 149.

¹⁴⁰ See Committee on the Elimination of Racial Discrimination, General Recommendation 8, 22 August 1990.

¹⁴¹ See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, para 499.

103. Moreover, the regimes of discrimination constituted by these practices benefits Jewish Israelis inside the Green Line, the Occupied Palestinian Territory, and the occupied Syrian Golan. These communities constitute a racial group in their relationship with Palestinians, as well as in their self-understanding. These communities benefit from the State's discriminatory provision of services, resources, and protection of fundamental rights.
104. This is confirmed in the practice of the Human Rights Committee,¹⁴² Committee on the Elimination of Racial Discrimination,¹⁴³ and in the reports of four successive United Nations Special Rapporteurs on the Situation of Human Rights in the Palestinian Territories since 1967.¹⁴⁴ It is further recognized in the statements of the African Union,¹⁴⁵ the Arab League,¹⁴⁶ and the Organization of Islamic Cooperation,¹⁴⁷ the former UN Secretary-General Ban Ki-moon,¹⁴⁸ and in the Human Rights Council statements of Member States, including Algeria, Bolivia, Brunei Darussalam, Indonesia, Iran, Libya, Malaysia, Mauritania, Namibia, Pakistan, South Africa, Syria, Venezuela.¹⁴⁹ In addition, Belize has adopted a motion recognizing apartheid against the Palestinian people,¹⁵⁰ as has the Catalan Parliament in Spain.¹⁵¹
105. In conclusion, the second element of the prohibition of apartheid is met. The inhuman acts are being committed against a racial group for the benefit of another racial group.

D. The Specific Intent Element of the Wrong of Apartheid

i. The Meaning of the Specific Intent of Apartheid

106. This section addresses the final element of the wrong of apartheid. This is the requirement that the wrongful acts were undertaken with a specific form of intent. As set out in Article 2 of the

¹⁴² Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Israel, 5 May 2022, CCPR/C/ISR/CO/5, para 42.

¹⁴³ Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, 27 January 2020, CERD/C/ISR/CO/17-19, para 21-23.

¹⁴⁴ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard, 29 January 2007, A/HRC/4/17, para. 62; Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, 13 January 2014, A/HRC/25/67, para. 81(b); Report of Special Rapporteur Michael Lynk to the Human Rights Council, 2022, A/HRC/49/87, paras 32-33; Report of Special Rapporteur Francesca Albanese to the Human Rights Council, 21 September 2022, A/77/356, p. 5.

¹⁴⁵ Letter to Representatives of the African Union in Geneva (24 September 2021), available at: https://www.alhaq.org/cached_uploads/download/2021/09/27/joint-civil-society-letter-to-the-african-union-1632731199.pdf.

¹⁴⁶ Arab League, OIC welcome Amnesty's report on Israel's 'apartheid' against Palestinians *Arab News* (3 February 2022), available at: <https://www.arabnews.com/node/2017946/middle-east>.

¹⁴⁷ Arab League, OIC welcome Amnesty's report on Israel's 'apartheid' against Palestinians *Arab News* (3 February 2022), available at: <https://www.arabnews.com/node/2017946/middle-east>.

¹⁴⁸ Ban Ki-moon, Ban Ki-moon: US Should Back a New Approach to the Israeli-Palestinian Conflict *Financial Times* (21 June 2021), available at: <https://www.ft.com/content/c1210a21-0209-4e4b-8cb3-cfa31c3fdee0>.

¹⁴⁹ Sessions at HRC49, HRC50, HRC51 and HRC52.

¹⁵⁰ Belize House of Representatives, HR9/1/13, 2021 available at: <https://www.nationalassembly.gov.bz/wp-content/uploads/2021/10/Supplementary-26-October-2021-1.pdf>. The Parliament of Catalonia has also declared that Israel is committing the crime of apartheid against the Palestinian people – Catalan News, 'Catalonia recognises Israel 'committing crime of apartheid' against Palestinians' available at <https://www.middecasteye.net/news/israel-apartheid-catalonia-first-european-parliament-recognise>.

¹⁵¹ Belize House of Representatives, HR9/1/13, 2021 available at: <https://www.nationalassembly.gov.bz/wp-content/uploads/2021/10/Supplementary-26-October-2021-1.pdf>.

Apartheid Convention, which informs the customary rule and Article 3 of ICERD, the inhuman acts of apartheid must have been 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.

107. This distinctive form of specific intent marks out apartheid as a particularly grave wrong under international law.
108. As to the meaning of the relevant terms in this requirement – that is, *what* the State through its organs and agents must actually intend:
 - a. Domination may be understood as a serious form of control over the group. Amnesty International¹⁵² and Human Rights Watch¹⁵³ in their research found that Israel implements a system of oppression and domination through institutionalized discrimination over Palestinians wherever it exercises control. The Special Rapporteur on the human rights situation in the Palestinian territories occupied since 1967, in his report found that: “... this system of alien rule has been established with the intent to maintain the domination of one racial-national-ethnic group over another. Israeli political leaders, past and present, have repeatedly stated that they intend to retain control over all of the occupied territory in order to enlarge the blocs of land for present and future Jewish settlement while confining the Palestinians to barricaded population reserves.”¹⁵⁴
 - b. The term ‘systematically’ may be understood by analogy to the same term in the definition of crimes against humanity. In that context, emblematically, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia held that the term systematic refers to ‘the organized nature of the acts of violence and the improbability of their random occurrence.’¹⁵⁵
 - c. Oppression may be understood as entailing prolonged cruelty.¹⁵⁶
109. To emphasize, this is a requirement within the mental element of the wrong of apartheid: the state’s intention – through its organs and agents – must be to establish and maintain such a regime of racial domination and systematic oppression.

ii. Inferring Specific Intent – An Analogy from the Law of Genocide

110. The next question concerns how such intent may be found. In this respect, it is appropriate to draw from international jurisprudence concerning genocide. Genocide also includes a requirement of specific intent, namely: the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’¹⁵⁷

¹⁵² Amnesty International (2022) Israel’s apartheid against Palestinians: Cruel system of domination and crime against humanity, Available at: <https://www.amnesty.org/en/documents/indc15/5141/2022/en/>

¹⁵³ Human Rights Watch (2022) A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution, Available at: <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>

¹⁵⁴ Report of Special Rapporteur Michael Lynk to the Human Rights Council, 2022, A/HRC/49/87, para 54

¹⁵⁵ ICTY, Appeals Chamber, *Prosecutor v. Kunarac et al*, IT-96-23 & IT-96-23/1-A, 12 June 2002, para 94 citing ICTY, Trial Chamber, *Prosecutor v. Kunarac et al*, IT-96-23 & IT-96-23/1, 22 February 2001, para 429.

¹⁵⁶ Lingaas, ‘The Crime against Humanity of Apartheid in a Post-Apartheid World’ (2015) Oslo L.R. 86, 99.

¹⁵⁷ Article 2, Genocide Convention.

111. In relation to that requirement, it has long been accepted that such an intent may be *inferred* from the facts and context of the matter. The Court held this in both *Bosnia v. Serbia*¹⁵⁸ and *Croatia v. Serbia*.¹⁵⁹ As to the quality of the inference, the Court found in *Croatia v. Serbia* that: ‘in order to infer the existence of *dolus specialis* [the specific intent] from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question.’¹⁶⁰

112. In addition, as to what might form the basis of such an inference, in the *Jelisić* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia held:

*As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.*¹⁶¹

113. Finally, the Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar of 2018 provides additional guidance on how an inference of specific intent may be made. In relation to the question of genocide, the Report emphasizes the probative importance of the ‘broader context within which the acts occurred and the widely prevalent rhetoric of hatred and contempt toward Rohingya.’¹⁶² This included a general context of dehumanizing rhetoric aimed at the targeted group, and specific violent and derogatory statements and utterances of government officials and politicians.¹⁶³

114. These holdings, which are concerned with the question of finding the specific intent for genocide, may be applied by analogy in relation to the specific intent of the wrong of apartheid.

iii. Application to Israel’s Practices in Occupied Palestinian Territory and Israel

115. The element of specific intent is met in relation to Israel’s wrongful acts in the Occupied Palestinian Territory and Israel.

116. More precisely, it may be inferred from the following facts that the wrongful acts were and are being committed ‘for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them’:

- a. First, the wrongful acts referred to above, as well as detailed in the wider documentary material provided to the Court by the Secretariat, are directed against Palestinians in the Occupied Palestinian Territory, Palestinians in Israel and Palestinian refugees and exiles on account of their identity – that is, their membership of the Palestinian people.¹⁶⁴

¹⁵⁸ *Bosnia v. Serbia*, p. 43, para 373.

¹⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para 145.

¹⁶⁰ *Croatia v. Serbia*, p. 3, para 148.

¹⁶¹ ICTY, Appeals Chamber, *Prosecutor v. Jelisić*, IT-95-10-A, 5 July 2001, para 47.

¹⁶² HRC, ‘Report of the Detailed Findings of the Independent Fact-Finding Mission on Myanmar’, 17 September 2018, A/HRC/39/CRP.2, paras 1419.

¹⁶³ HRC, ‘Report of the Detailed Findings of the Independent Fact-Finding Mission on Myanmar’, 17 September 2018, A/HRC/39/CRP.2, paras 1420–1424.

¹⁶⁴ Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, 27 January 2020, CERD/C/ISR/CO/17-19, para 22; Committee on the Elimination of Racial Discrimination,

- b. Second, these acts are being undertaken at an immense scale, and are being imposed in an institutionalized manner that creates a system of coercion and cruelty. They result from legislative and administrative policy choice at the highest levels of the Israeli State. Collectively, they amount to the imposition of a regime of racial domination and systematic oppression on the Palestinian people,¹⁶⁵ which the State is choosing to maintain and further entrench.
- c. Third, relatedly, the duration of the occupation – since 1967 – and the escalation of discriminatory acts in recent years is evidence of an intention to maintain in place the existing regime of racial domination. Indeed, Israel's ongoing facilitation of further settlement activity in the Occupied Palestinian Territory, including East Jerusalem, further entrenches this discriminatory regime.¹⁶⁶ Moreover, recent statements by senior political leaders demonstrates an intention that the settlements be permanent.¹⁶⁷
- d. Fourth, there exists a context of dehumanizing language and contempt directed at the Palestinian people, as a group. This has included, in recent years, inflammatory and racist statements by high-level political leaders. For instance, in March of this year, Bezalel Smotrich, Israel's Minister of Finance, called for the Palestinian village of Huwara to be 'wiped out'.¹⁶⁸ This was days after a violent rampage of Israeli settlers through the village.¹⁶⁹ Smotrich was also reported as saying that there is 'no such thing as Palestinians because there is no such thing as the Palestinian people'.¹⁷⁰ Smotrich remains the Minister of Finance, and has also been granted legal authority over the administration of much of civilian life in Area C of the West Bank, including a programme to expand existing settlements.¹⁷¹

117. More widely, in its most recent Concluding Observations on Israel's periodic reports, the Committee on the Elimination of Racial Discrimination expressed its concern at the 'tide of racist hate speech in public discourse, in particular by public officials, political and religious leaders, in certain media outlets and in school curricula and textbooks' and the 'proliferation of racist and xenophobic acts' against non-Jewish minorities, including Palestinians in the Occupied Palestinian Territory.¹⁷²

118. Taken together, there is only one inference that can reasonably be drawn from the facts and the wider context. It is that these inhuman acts of apartheid are being undertaken for the purpose of establishing and maintaining domination by Jewish Israelis in the Occupied Palestinian Territory

Concluding observations of the Committee on the Elimination of Racial Discrimination – Israel, 3 April 2012, CERD/C/ISR/CO/14-16, para 24; Human Rights Council, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, 20 April 2023, A/HRC/Res/52/35, para 7(c).

¹⁶⁵ Report of Special Rapporteur Michael Lynk to the Human Rights Council, 2022, A/HRC/49/87, paras 38-45.

¹⁶⁶ UNGA Resolution 77/126, 15 December 2022, A/Res/126; UNGA Resolution 76/82, 15 December 2021, A/Res/76/82.

¹⁶⁷ Independent International Commission of Inquiry Report, 14 September 2022, A/77/328, paras 52-53.

¹⁶⁸ The Times of Israel, 'US prods PM to condemn Smotrich's "repugnant, disgusting" call to wipe out Huwara', 2 March 2023.

¹⁶⁹ BBC News, 'Settlers rampage in West Bank villages after Israelis killed', 27 February 2023.

¹⁷⁰ The Times of Israel, 'Smotrich says there's no Palestinian people, declares his family "real Palestinians"', 20 March 2023.

¹⁷¹ The Times of Israel, 'Smotrich handed sweeping powers over West Bank, control over settlement planning', 23 February 2023; The Times of Israel, 'Netanyahu hands Smotrich full authority to expand existing settlements', 18 June 2023.

¹⁷² Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, 27 January 2020, CERD/C/ISR/CO/17-19, para 26.

and Israel over Palestinians in the Occupied Palestinian Territory and the Palestinian people as a whole and systematically oppressing them.

119. On this basis, apartheid's specific intent requirement is met.

E. Conclusion – Apartheid against the Palestinian people

120. Israel's measures and practices against Palestinians in the Occupied Palestinian Territory, including East Jerusalem, and Israel breach the prohibition of apartheid in customary international law and breach the obligation in Article 3 of ICERD to 'prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction':

- a. First, these measures and practices fulfil the material element of apartheid, as set out in Articles 2(c) and 2(d) of the Apartheid Convention. Together with other discriminatory acts entailing violations of the rights of Palestinians, these measures and practices constitute a prolonged and ongoing regime of racial domination and oppression.
- b. Second, these measures and practices are committed against members of a racial group – Palestinians in the Occupied Palestinian Territory and the Palestinian people as a whole.
- c. Third, these measures and practices are committed with apartheid's specific intent. They are committed for the purpose of establishing and maintaining domination by Jewish Israelis in the Occupied Palestinian Territory and Israel over Palestinians in the Occupied Palestinian Territory and the Palestinian people as a whole and systematically oppressing them.

V. LEGAL CONSEQUENCES ARISING FROM ISRAEL'S PRACTICE OF APARTHEID

121. The question put by the General Assembly asks about the legal consequences that arise from Israel's internationally wrongful acts including its policies and practices. This may be understood as referring to legal consequences for Israel itself, for other States, and for the United Nations.

A. The Peremptory Status of Apartheid in Customary International Law

122. In considering the legal consequences that arise from Israel's imposition of a regime of apartheid and violation of the Palestinian people's right to self-determination, one crucial feature is the status of the prohibition of apartheid in customary international law as a peremptory norm of general international law.
123. In this respect, the Commentary to the Articles on State Responsibility, adopted by the International Law Commission in 2001, lists 'racial discrimination and apartheid' as examples of peremptory norms that have attracted 'widespread agreement'.¹⁷³ This status is reinforced by the inclusion of 'the prohibition of racial discrimination and apartheid' in the Annex to the ILC's Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law, adopted in 2022. In his 4th Report, the Special Rapporteur noted that there is 'ample State practice recognizing the prohibition of apartheid and racial discrimination as a

¹⁷³ Commentary to Article 40, para 4, Articles on State Responsibility.

peremptory norm of general international law.¹⁷⁴ Indeed there is no State on record defending the lawfulness of imposing such a regime of racial domination.

B. Legal Consequences for Israel

124. Israel has violated, and continues to violate, the prohibition of apartheid in customary international law and Article 3 of ICERD. These are unlawful acts of a continuing character.

125. First, Israel is under an obligation to immediately cease the imposition of a regime of apartheid against the Palestinian people.¹⁷⁵

a. This obligation entails dismantling – in full – the regime of institutionalized discrimination against Palestinians in the Occupied Palestinian Territory and in Israel.

b. This obligation also entails the cessation of each wrongful act of apartheid.¹⁷⁶ This includes, but is not limited to, the establishment of settlements, the exploitation of natural resources, the use of restrictive zoning practices, the infliction of disproportionate restrictions on freedom of movement, the failure to take reasonable measures to protect Palestinians from private violence, the imposition of measures designed to divide groups in the Occupied Palestinian Territory on racial lines, the unjustified expropriation of property, and other violations of the fundamental rights of Palestinians, and the imposition of the blockade of Gaza.

126. Second, Israel is under an obligation to provide full reparation for the damage caused by its imposition of a regime of apartheid against the Palestinian people.¹⁷⁷

127. As set out in Article 34 of the Articles on State Responsibility, '[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination...'¹⁷⁸

128. As to restitution, Article 35 of the Articles on State Responsibility provides:

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

129. In the present context, restitution will entail:

¹⁷⁴ ILC, Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur, A/CN.4.727, 31 January 2019, para 94. The prohibition on apartheid is also owed *erga omnes* – see *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3, paras 33–34 in relation to racial discrimination.

¹⁷⁵ Article 30, Articles on State Responsibility; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1986, p. 14, para 292.

¹⁷⁶ See similarly *Wall Advisory Opinion*, p. 156, para 151.

¹⁷⁷ *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; Article 31, Articles on State Responsibility; *Armed Activities on the Territory of the Congo, Reparations*, 9 February 2022, para 70.

¹⁷⁸ Article 34, Articles on State Responsibility; *Armed Activities, Reparations*, para 101.

- a. The return of all land and property in the Occupied Palestinian Territory and Israel belonging to Palestinians unlawfully expropriated or seized. As set out below, if the return of this land and property is not materially possible, Israel is under an obligation to compensate the owners for the damage suffered, including with interest.
 - b. The release of all Palestinians unlawfully detained in connection with the imposition of a regime of apartheid and the facilitation of the return of those subject to forced removal.
 - c. The specific facilitation of the right of return of Palestinian refugees.
 - d. The annulment of all legislative, administrative and judicial acts, measures, or decrees that constitute the regime of apartheid against the Palestinian people.
130. Article 36 of the Articles on State Responsibility reflects the general rule on compensation in international law:
1. *The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*
 2. *The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.*
131. Further, the notion of 'damage' is defined broadly in Article 31(2) as including both 'material' and 'moral' damage.¹⁷⁹
132. In the present context, compensation will entail:
- a. Compensation for all material damage caused to Palestinians' land and property by the inhuman acts of apartheid. This includes all land and property for which restitution is not possible, and losses caused by demolitions and expropriations. It also includes loss of profits.¹⁸⁰
 - b. Compensation for loss of life, deprivations of liberty, and other injuries to Palestinians,¹⁸¹ as well as for the systemic violations of fundamental rights detailed above in the imposition of a regime of apartheid.
 - c. Compensation for the systemic prevention of the Palestinian people from 'participation in ... political, social, economic and cultural life' and from reaching their 'full development' as a group.
 - d. Compensation for the systematic damage caused to, and exploitation of, natural resources within the Occupied Palestinian Territory.
 - e. Compensation can be assessed by reference to the World Bank Study on economic costs of the occupation, and the numerous UNCTAD reports on the deprivation of Palestinian development.¹⁸²

¹⁷⁹ Article 31(2), Articles on State Responsibility; *Armed Activities, Reparations*, para 93.

¹⁸⁰ Article 36(2), Articles on State Responsibility.

¹⁸¹ Commentary to Article 36(2), Articles on State Responsibility, paras 11-12, 17-20.

C. Legal Consequences for all other States

133. As noted above, the peremptory status of the prohibition of apartheid entails distinctive consequences for all States.
134. In the Articles on State Responsibility, the ILC set out specific consequences that follow from what it termed 'serious' breaches of peremptory norms – defined as 'a gross or systematic failure by the responsible State to fulfil the obligation'.¹⁸³ This requirement of a serious breach is met in relation to the imposition of apartheid, entailing in this instance 'an intentional violation on a large scale'.¹⁸⁴
135. Article 41 of the Articles on State Responsibility, in the relevant part, reads:
1. *States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.*
 2. *No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.*¹⁸⁵
136. Two particular obligations on all States will be drawn out – the obligation to cooperate to bring to an end the situation of apartheid and the obligation not to render aid or assistance in maintaining this situation.
137. First, all States are under an obligation to cooperate to bring to an end the situation of apartheid against the Palestinian people:
- a. This obligation requires what the ILC calls a 'joint and coordinated effort by all States' to bring to an end this regime of apartheid. The most likely forum for such coordination will be institutionalized forms of cooperation. This extends to action in the General Assembly, the Security Council, and regional organizations. It also includes cooperation with the responsible United Nations bodies and agencies working to bring an end to this serious breach of international law.¹⁸⁶
 - b. This obligation also requires States to act outside of the context of institutionalized cooperation. This is noted in the Commentaries to the ILC's Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*):

¹⁸² UNCTAD, The economic costs of the Israeli occupation for the Palestinian people: Arrested development and poverty in the West Bank; UNCTAD, Economic costs of the Israeli occupation for the Palestinian people: poverty in the West Bank between 2000 and 2019 (2021), available at: https://unctad.org/system/files/official-document/a76d309_en_0.pdf; World Bank, Economic Monitoring Reports, available at: <https://www.worldbank.org/en/country/westbankandgaza/publication/economic-monitoring-report-ahle>; UNCTAD, 'The Economic Costs of the Israeli Occupation for the Palestinian People: The Unrealized Oil and Natural Gas Potential' (2019) p. 15.

¹⁸³ Article 40(1), Articles on State Responsibility.

¹⁸⁴ Article 40(8), Articles on State Responsibility.

¹⁸⁵ Article 41, Articles on State Responsibility, reproduced in Conclusion 19, ILC, 'Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*)', (2022) A/77/10.

¹⁸⁶ Similarly, *Chagos Advisory Opinion*, p. 139, para. 180 and further Article 42, ILC, Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission, 2011, vol. II, Part Two.

*The obligation to cooperate to bring to an end serious breaches of peremptory norms of general international law (jus cogens) may also be implemented through noninstitutionalized cooperation, including through ad hoc arrangements by a group of States acting together to bring to an end a breach of a peremptory norm.*¹⁸⁷

138. Second, all States are under an obligation not to render aid or assistance in maintaining the situation of apartheid against the Palestinian people.¹⁸⁸

- a. This obligation requires all States, to refrain from the provision of weapons, technology, equipment, financial aid, as well as any other material support, to Israel in connection with sustaining the institutionalized regime of discrimination.
- b. This obligation also requires all States to regulate the activities of private actors, including business entities, under their jurisdiction whose activities are contributing to sustaining the institutionalized regime of discrimination against the Palestinian people. This obligation, which arises as a matter of general international law and is binding on all States, coheres with the approach of the Committee on Economic, Social and Cultural Rights in its General Comment 24.¹⁸⁹ In that General Comment, the Committee recognized the duty of States parties to the International Covenant on Economic, Social and Cultural Rights 'to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control.'¹⁹⁰

D. Legal Consequences for the United Nations

139. In the *Wall Advisory Opinion*, the Court held that:

*the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.*¹⁹¹

140. This applies equally in relation to the bringing to an end of the illegal situation of apartheid against the Palestinian people.

VI. ISRAEL'S ADMINISTRATION OF THE OCCUPIED PALESTINIAN TERRITORY BREACHES THE RIGHT OF THE PALESTINIAN PEOPLE TO SELF-DETERMINATION, AND IS ILLEGAL

141. Israel's Ministry of Foreign Affairs has clearly established that Israel launched a pre-emptive strike on Egypt in 1967, stating:

¹⁸⁷ Commentary to Conclusion 19, para 10, ILC, 'Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*)', (2022) A/77/10.

¹⁸⁸ Similarly *Wall Advisory Opinion*, para 158. This obligation complements the ordinary rule on aid and assistance, set out in Article 16 of the Articles on State Responsibility and held to be one of customary international law by the Court in the *Bosnia v. Serbia*, p. 43, para 420.

¹⁸⁹ Committee on Economic, Social and Cultural Rights, 'General Comment No. 24 - on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities', 2017, E/C.12/GC/24.

¹⁹⁰ CESCR, General Comment No. 24, para 30.

¹⁹¹ *Wall Advisory Opinion*, para 160; *Chagos Advisory Opinion*, para 179.

*On 22 May, in a move that constituted a casus belli [an act that justifies war], Egypt closed the Straits of Tiran to Israeli shipping, cutting off Israel's only route to Asia and Iran, its main supplier of oil... Invoking its inherent right of self-defense, Israel preempted the inevitable attack, striking Egypt's air force while its planes were still on the ground.*¹⁹²

142. Israel's use of force against Egypt and other Arab States in 1967 was a pre-emptive use of force in the absence of an armed attack, and therefore an unlawful act of aggression in violation of Article 2(4) and Article 51 of the UN Charter. Israel's presence in the Palestinian territory has been illegal from the outset in 1967 and the consequent occupation is also illegal.
143. This illegality has been further compounded by Israel's colonization of the Palestinian territory that started in 1967 and continue to this very day and its purported annexation of Palestinian territory, in breach of article 2(4) of the Charter and of the inadmissibility of the acquisition of territory by force. Namibia reiterates its previously stated position that Israel's occupation of the Palestinian territory (i.e., the West Bank, including Jerusalem, and the Gaza Strip) is illegal.¹⁹³ At the UN Human Rights Council, Namibia has highlighted that Israel's occupation is characterized by grave violations 'including crimes against humanity of apartheid and persecution committed by Israeli officials with the aim of prolonging the illegal occupation, and suppressing the right to self-determination' and that international action is required to 'dismantle the system of apartheid and put an end to the illegal occupation'.¹⁹⁴
144. Israel's occupation of the Palestinian territory breaches the right to external self-determination of the Palestinian people, which includes the exercise of the right of the Palestinian people to an independent State.
145. The special status of right of the Palestinian people to external self-determination was recognized under Article 22 of the Covenant of the League of Nations. That Covenant classified Palestine as a Class A mandate, whose 'existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone'. As the International Court of Justice outlined in the *Namibia Advisory Opinion*, the 'ultimate objective' of the Mandate as a sacred trust was the 'self-determination and independence of the peoples concerned'.¹⁹⁵
146. As such, the right of Palestinian self-determination continues as a 'sacred trust'. There is no reversion of this sacred trust – no reversion back to a colonial status. For this reason, Israel cannot argue that the Palestinian territory constituted a no-man's land, or that there was a missing sovereign. As the Court in the *Namibia Advisory Opinion* clearly highlighted in relation to South Africa, '[t]o accept the contention of the Government of South Africa on this point would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates régime by annexation, so determinedly excluded in 1920'.¹⁹⁶
147. In 1948, Israel seized control of 78% of Mandatory Palestine, in breach of the 'sacred trust'. In 1967, Israel occupied the remainder of Mandatory Palestine and has pursued ever since policies

¹⁹² Israel Ministry of Foreign Affairs, '1967: The Six-Day War and the Historic Reunification of Jerusalem (2013).

¹⁹³ Item: 7 General Debate (Cont'd) - 31st Meeting, 51st Regular Session of Human Rights Council (30 September 2022), *Namibia*, Ms. Hilleni Tangi Ndeyamo Shikongo (at 30:46).

¹⁹⁴ Item: 7 General Debate (Cont'd) - 47th meeting, 52nd Regular Session of Human Rights Council, *Namibia*, (at 01:15).

¹⁹⁵ *Namibia Advisory Opinion*, para 53.

¹⁹⁶ *Namibia Advisory Opinion*, para 57.

aimed at further annexing Palestinian territory. As a continuing act of aggression and a denial of the right of the Palestinian people to external self-determination, the occupation of the Palestinian territory is in breach of peremptory norms of international law. Israel's continued presence in the Occupied Palestinian Territory is analogous to South Africa's continued presence in Namibia at the time of the *Namibia Advisory Opinion*. In this respect, the Court determined 'that the continued presence of South Africa in Namibia [was] illegal and contrary to the principles of the Charter'.¹⁹⁷

148. The right of the Palestinian people to national independence and sovereignty has been recognized in numerous UN resolutions. For example, UN General Assembly Resolution 3236 (XXIX) (1974) expressly recognizes the right of the Palestinian people to self-determination without external interference, and the 'right to national independence and sovereignty', and part 2(a) of General Assembly Resolution 3376 (1975), provides for 'the right to self-determination without external interference and the right to national independence and sovereignty'. The most recent General Assembly Resolution 77/208 of 2022 'reaffirms the right of the Palestinian people to self-determination including the right to their independent State of Palestine'.¹⁹⁸
149. The exercise of Palestinian self-determination and Statehood has also been severely impaired by the imposition of unlawful measures (including the expansion of settlements and the construction of the wall and its associated regime in the West Bank, including East Jerusalem).¹⁹⁹ The Palestinian people have been deliberately prohibited from gathering and exercising their inalienable and collective right to self-determination as a result of decades of imposed strategic fragmentation, placing them in different legal and administrative domains and across various spatial geographies in Palestine and exile, by virtue of Israel's regime of racial discrimination and domination. The right to self-determination encompasses sovereignty over natural resources and wealth, most of which has been unlawfully appropriated, exploited, depleted and pillaged by the Occupying Power – oftentimes together with Israeli and multinational private and corporate actors.

VII. LEGAL CONSEQUENCES ARISING FROM ISRAEL'S ILLEGAL OCCUPATION

150. In addition to the legal consequences set out in this written statement arising from the imposition of a regime of apartheid, there are also key legal consequences which the Court provided for in the *Namibia advisory opinion*, and which Namibia requests should be applied in the case of Israel's illegal occupation of the Palestinian territories. These include the following consequences:
 - a. The continued presence of Israel in the Occupied Palestinian Territory and Mandate Territory being illegal, Israel is under obligation to withdraw its administration from occupied Palestine immediately and thus put an end to its occupation of the Territory.
 - b. Member States of the United Nations are under obligation to recognize the illegality of Israel's presence in the Occupied Palestinian Territory and the invalidity of its acts on behalf of or concerning Palestine, and to refrain from any acts and in particular any

¹⁹⁷ UNSC Res 264 The Situation in Namibia (20 March 1969), para. 2; UNSC Res 276 (30 January 1970); See also A/RES/2403(XXIII), 16 December 1968.

¹⁹⁸ Such a right has also been recognized in UNGA Resolution 2672 (XXV) of 1970 and UNGA Resolution 3236 (XXIX) of 1974, and reiterated many times since.

¹⁹⁹ International Criminal Court, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, No. ICC-01/18 (22 January 2022) para 9.

dealings with the Government of Israel implying recognition of the legality of, or lending support or assistance to, such presence and administration.

- c. Member States are under obligation to abstain from entering into treaty relations with Israel in all cases in which the Government of Israel purports to act on behalf of or concerning the Occupied Palestinian Territory.
- d. Member States, in compliance with the duty of non-recognition are obliged to abstain from sending diplomatic or special missions to Israel including in their jurisdiction the Occupied Palestinian Territory.
- e. Member States are obliged to abstain from entering into economic and other forms of relationship or dealings with Israel on behalf of or concerning the Occupied Palestinian Territory which may entrench its authority over the Territory.
- f. The termination of the Mandate and the declaration of the illegality of Israel's presence in the Occupied Palestinian Territory are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with Israel concerning the Occupied Palestinian Territory may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof.
- g. All States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted, namely self-determination.

VIII. CONCLUSION AND SUMMARY

151. For the reasons set out above, Namibia respectfully submits the following conclusions:

- a. The Court is competent to issue this Advisory Opinion and no compelling reasons prevent it from doing so.
- b. With respect to the question's reference to Israel's 'adoption of related discriminatory legislation and measures', the Court should define the prohibition of apartheid in customary international law and Article 3 of ICERD.
- c. The definition of apartheid in customary international law and in Article 3 of ICERD is provided by Article 2 of the Apartheid Convention.
- d. The prohibition of apartheid in customary international law and Article 3 of ICERD is binding on Israel, and is applicable in Israel and the Occupied Palestinian Territory.
- e. Israel's discriminatory practices against Palestinians in the Occupied Palestinian Territory and the Palestinian people, as a whole, breach the prohibition of apartheid in customary international law and the obligation in Article 3 of ICERD to prevent, prohibit and eradicate all practices of apartheid in territories under its jurisdiction.
- f. The Palestinian people have a continuing inalienable right to exercise external self-determination, which continues as a sacred trust since the ending of the Mandate.

- g. As a consequence, Israel is bound to cease the imposition of its illegal occupation of the Palestinian territory and regime of apartheid against the Palestinian people and to provide full reparation to the Palestinian people.
- h. As a consequence, all States are bound to cooperate in bringing to an end the illegal occupation and the illegal situation of apartheid against the Palestinian people, not to recognize that situation as lawful, and to refrain from rendering any aid or assistance in maintaining the situation.
- i. It is important to note that the resolutions of the UN General Assembly call for Israel's 'unconditional and total withdrawal', meaning that withdrawal is not to be made the subject of negotiation but is, rather the termination of an internationally wrongful act.²⁰⁰ It is the position of Namibia that there can be no negotiations or qualifications placed on the termination of internationally wrongful acts.²⁰¹

Dated at Windhoek, Namibia on this ____ day of _____ 2023

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 Netumbo Nandi-Ndaitwah, MP
 Deputy Prime Minister and
 Minister of International
 Relations and Cooperation

**ON BEHALF OF THE
 GOVERNMENT OF THE
 REPUBLIC OF NAMIBIA**

²⁰⁰ UNGA Resolution 36/147E Res (16 December 1981); UNGA Resolution 36/226A (17 December 1981); UNGA Resolution 37/123F (20 December 1982); UNGA Resolution 38/180D (19 December 1983); UNGA Resolution 39/146A (14 December 1984); UNGA Resolution 40/168A (16 December 1985); UNGA Resolution 41/162A (4 December 1986); UNGA Resolution 42/209B (11 December 1987); UNGA Resolution 43/54A.

²⁰¹ See Imseis, *Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020*, (2020) 31(3) *EJIL* 1055.