

**Economic and Social Commission for Western Asia (ESCWA)**

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Justice for the Palestinian people: fifty years of Israeli occupation**The question of apartheid****Summary**

The Economic and Social Commission for Western Asia (ESCWA) is preparing a study aimed at examining whether the policies and practices of Israel affecting the Palestinian people amount to apartheid, in implementation of resolution 316 (XXVIII) of 18 September 2014 in which member States condemned these policies and practices and requested the secretariat to submit periodic reports on the subject.

This progress report on the study presents the adopted approach and premises. It provides a brief overview on the history of the prohibition of apartheid in international law, the nature of apartheid in southern Africa, and apartheid in contemporary human rights discourse. It underlines that testing apartheid in the context of the study must not take practices in southern Africa as a principal benchmark. The report also provides a snap-shot of the policies and practices of Israel towards the Palestinian citizens of Israel, Palestinian residents of East Jerusalem, Palestinians living in the West Bank and the Gaza Strip, and Palestinian refugees living outside Mandate Palestine, viewing these four categories as components of the one Palestinian people rather than treating them as discrete. It examines whether the policies and practices of Israel are synchronized to constitute a comprehensive regime of apartheid. The report finally reviews the main counterarguments that have been made to the thesis of the study and suggests additional fields of inquiry. Participants to the twenty-ninth session of ESCWA are invited to take note of the progress made on the study and provide comments thereon.

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Introduction.....	1-5	3
<i>Chapter</i>		
I. APARTHEID IN INTERNATIONAL LAW.....	6-23	3
A. Short history of the prohibition of apartheid.....	8-12	4
B. The case of southern Africa	13-17	5
C. Apartheid in contemporary human rights discourse	18-22	6
II. AIM AND PREMISES OF THE STUDY	23-38	7
A. Premises	24-27	7
B. Apartheid as a regime	28-38	8
III. ADDITIONAL FIELDS OF INQUIRY.....	39-40	11
IV. THE WAY FORWARD: FINALIZATION, VERIFICATION AND DISSEMINATION.....	41-43	12

Introduction

1. During its twenty-eighth ministerial session, the United Nations Economic and Social Commission for Western Asia (ESCWA) adopted resolution 316 (XXVIII) in which it condemned “the practices and policies of the Israeli occupation in the occupied Palestinian territory, which amount to apartheid, cause a continuous deterioration of their economic and social conditions and violate the collective and individual rights of the Palestinian people”. In the same resolution, member States requested the ESCWA secretariat to submit “periodic reports to the ministerial sessions of the Commission on the practices of the Israeli occupation that violate the economic and social rights of the Palestinian people and other rights guaranteed by international law, charters and conventions”.
2. At its first meeting in Amman, on 8 and 9 June 2015, the ESCWA Executive Committee requested the secretariat to prepare a study on the practices and policies of Israel that violate the rights of the Palestinian people and on the possibility of describing them as apartheid practices. At its second meeting, also held in Amman from 14 to 16 December 2015, the Executive Committee requested that the main findings of the study be presented to the upcoming ministerial session.
3. Historically, apartheid has shown a propensity to spill over country borders and threaten international peace and security. The policy of Israel to rule over all of Mandate Palestine and not to grant Palestinians equal rights with Jews poses grave security risks for the entire region, including through the radicalization of regional politics. Safeguarding collective security thus requires an informed response to this policy, consistent with international law.
4. In this context, ESCWA is preparing a study on the laws, policies and practices of Israel that affect the Palestinian people, examining if they amount to apartheid. The study is guided by the import of this issue on both counts—human rights and international security. It examines the question of apartheid solely by reference to universal definitions established in international human rights law, drawing conservatively on social science theory where necessary to elucidate matters beyond the scope of law, such as the social construction of ethnic and racial identities.
5. This report is a progress report presented to the twenty-ninth ministerial session of ESCWA. It provides a brief summary of the premises and approach of the study, with an overview on the history of the prohibition of apartheid in international law, the nature of apartheid in southern Africa and apartheid in contemporary human rights discourse. It also presents the aim of the study, namely examining whether these policies and practices amount to apartheid, suggesting additional fields of inquiry. Participants to the twenty-ninth session of ESCWA are invited to take note of the progress made on the study and provide comments thereon.

I. APARTHEID IN INTERNATIONAL LAW

6. The rules of international law that prohibit apartheid are peremptory¹ and the duty of each State not to practice apartheid is an obligation towards the international community as a whole. All States have an interest in ensuring that these rules are respected, because their violation contradicts principles of human rights enshrined in the United Nations Charter, and may threaten international peace and security. Faced with a violation of these rules, all States have the duty to cooperate to restore them; all States have the duty not to recognize the illegal situation arising from their violation; and all States have the duty not to render aid or assistance to any State that violates them.²

¹ A peremptory norm is defined as one that is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” (article 53 of the Vienna Convention on the Law of Treaties, in United Nations, *Treaty Series*, vol.1155, I, No. 18232).

² See Virginian Tilley, ed., *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (London, Pluto Press, 2012).

7. The ESCWA study presented in this report is aimed at considering whether Israel's governance of the Palestinian people amounts to apartheid, as defined in international human rights law, such that the international community is legally obliged to act to end it. Briefly positioning the prohibition of apartheid in international law is important to establishing both its applicability to the present case and what international responsibility arises upon a positive finding of apartheid in the case of Israel-Palestine.

A. SHORT HISTORY OF THE PROHIBITION OF APARTHEID

8. The prohibition of apartheid in its earliest form can be traced to Article 55 of the United Nations Charter (1945), which requires Member States to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 2 of the Universal Declaration of Human Rights (1948) further states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The first international instrument to prohibit apartheid expressly was the International Convention on the Elimination of All Forms of Racial Discrimination (1965), whose preamble affirms that States parties are "alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation". Article 3 of the Convention underlines the obligation of parties to oppose apartheid: "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".³

9. The United Nations General Assembly first referred to apartheid as a crime against humanity in paragraph 1 of resolution 2202 (XXI) of 16 December 1961, on the policies of apartheid of the Government of the Republic of South Africa. This position was reaffirmed in resolution 2391 (XXIII) of 26 November 1968 on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which, in article 1, considers as crimes against humanity "inhuman acts resulting from the policy of apartheid". It was also reiterated by the International Conference on Human Rights in the 1968 Proclamation of Tehran (contained in document A/CONF.32/41).

10. On 30 November 1973, the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of *Apartheid* (hereafter the Apartheid Convention), with the aim of making "it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid" (preamble of the Convention). Referring to article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination and also considering apartheid as a crime against humanity, the Apartheid Convention provides the most detailed definition of apartheid appearing in international law in its article II. It further clarifies, in articles III to V, international responsibility and obligations regarding the crime of apartheid. In 1977, the crime of apartheid was included in Additional Protocol I to the 1949 Geneva Conventions (in article 85, para. 4 (c)). In 1979, the Convention on the Elimination of Discrimination against Women emphasized, in its preamble, that "the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women".

11. A great majority of States accept the prohibition of apartheid: 177 are parties to the International Convention on the Elimination of All Forms of Racial Discrimination, 174 are parties to Additional Protocol I to the Geneva Conventions of 1949, but only 109 are parties to the Apartheid Convention. The difference is partly due to disputes about how to treat South Africa in the context of the Apartheid Convention and, for

³ Including a prohibition of apartheid in the International Convention on the Elimination of All Forms of Racial Discrimination was an exception to the practice of not referring to specific forms of discrimination in the treaty. This was done because apartheid differed from other forms of racial discrimination "in that it was the official policy of a State Member of the United Nations" (A/C.3/SR.1313, para. 18).

some, to concerns about the text seeking to “extend international criminal jurisdiction in a broad and ill-defined manner”.⁴

12. The universality of the prohibition of apartheid appeared clearly when, in 1998, four years after South Africa passed its non-racial Constitution and the United Nations Special Committee on Apartheid was disbanded, the Rome Statute of the International Criminal Court (hereafter the Rome Statute) listed apartheid as a crime against humanity (Article 7(j), A/CONF.183/9). The movement of the crime of apartheid towards customary international law reinforces the fact that the prohibition itself is clearly a rule of customary law.⁵

B. THE CASE OF SOUTHERN AFRICA

13. The ESCWA study will not draw many comparisons to apartheid South Africa; it will use international law prohibiting apartheid, rather than its inspirational case, as a benchmark. Still, the southern African case reveals the concerns and intentions of those who drafted international law, and will therefore be briefly described. The use of the term “southern” reflects the extension of apartheid practices into South West Africa (now Namibia), which South Africa had held under a League of Nations mandate that it refused to relinquish after the Second World War.

14. *Apartheid* is an Afrikaans word, commonly translated into English as “apart-hood.” Apartheid South African Governments translated it as “separate development”, in which the different races as defined by the apartheid regime develop politically and economically in distinct, mutually exclusive spheres, albeit in legal arrangements firmly dominated by whites/Europeans.⁶ This doctrine was formalized and implemented by the main Afrikaner political voice, the Nationalist Party, which came to power in South Africa through elections in 1948, and quickly elaborated apartheid into a complex system of laws that reshaped the living conditions and life chances of every resident in the country.

15. The regime’s argument that “grand apartheid” represented a fair solution to racial coexistence was roundly rejected by the African National Congress, human rights activists and eventually the United Nations, which adopted the Afrikaans term “apartheid” in order to denounce it. In 1962, it established the Special Committee on the Policies of Apartheid of the Government of South Africa (later renamed the Special Committee against Apartheid), and in 1976 it established the United Nations Center against Apartheid.

16. In 1973, the term “apartheid” was reified in the Apartheid Convention; however, the reference to South Africa was only comparative. Article II indeed stated: “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”. The Rome Statute omitted any reference to South Africa in using the term to reference apartheid as a crime against humanity.

17. The term, specific to the southern African context, has thus become embedded in international law and was used to create an international instrument not confined to South Africa. Some do argue that applying the Apartheid Convention elsewhere would be a legal error, but this view is not defensible, as John Dugard has pointed out:

⁴ Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, *Human Rights and World Public Order* (New Haven/London, Yale University Press, 1980), p. 545.

⁵ Antonio Cassese, *International Criminal Law* (Oxford, Oxford University Press, 2008), p. 25.

⁶ For a short description of the plenary power reserved by the white South African Government over the Bantustans in comparison with the plenary power reserved by Israel under the Oslo Accords, see Virginia Tilley, “A Palestinian declaration of independence: implications for peace”, *Middle East Policy*, vol. 17, No. 1 (Spring).

That the Apartheid Convention is intended to apply to situations other than South Africa is confirmed by its endorsement in a wider context in instruments adopted before and after the fall of apartheid. ... It may be concluded that the Apartheid Convention is dead as far as the original cause for its creation – apartheid in South Africa – is concerned, but that it lives on as a species of the crime against humanity, under both customary international law and the Rome Statute of the International Criminal Court.⁷

C. APARTHEID IN CONTEMPORARY HUMAN RIGHTS DISCOURSE

18. There are many references to apartheid in contemporary human rights discourse. They at least have a heuristic value in denouncing policies that, in purpose or effect, separate populations on the basis of race, if not physically, then in their participation in the social and political life of their countries. Several types of references will be identified so as to be distinguished from the approach of the study.

19. *Apartheid as isolated acts.* In contemporary parlance, isolated practices are sometimes described as “acts of apartheid”. The question of whether an apartheid regime is operating is not engaged. For example, the term “apartheid wall”, now common among critics of the policies of Israel in the occupied Palestinian territory, has in most cases not given rise to accusations that Israel itself is an “apartheid State” or regime. Similarly, Dugard has used the term “road apartheid” to describe the dual road system in the occupied territory that bans the use of roads developed for settlements by Palestinians. Elsewhere he has mentioned that the occupation “has acquired some of the characteristics of apartheid” (A/62/275). The problem underlined by both Dugard and Richard Falk, as Special Rapporteurs on the situation of human rights in the Palestinian territories occupied since 1967, is determining when multiple features of apartheid constitute apartheid in the legal sense. Both have recommended that the International Court of Justice be asked for an advisory opinion on the matter, Dugard in paragraph 8 of the above-mentioned report (A/62/275), and Falk in the following terms:

In this, his final report, the Special Rapporteur takes the opportunity to reiterate some past recommendations and add several new ones, namely that... (b) The General Assembly request the International Court of Justice to issue an advisory opinion on the legal status of the prolonged occupation of Palestine, as aggravated by prohibited transfers of large numbers of persons from the occupying Power and the imposition of a dual and discriminatory administrative and legal system in the West Bank, including East Jerusalem, and further assess allegations that the prolonged occupation possesses legally unacceptable characteristics of “colonialism”, “apartheid” and “ethnic cleansing” (A/HRC/25/67).

20. *Apartheid as anonymous structural conditions.* In certain contexts, human rights discourse describes apartheid neither as a State regime nor as isolated practices, but as the racialized social impact of structural conditions, such as economic inequality. For example, the term “economic apartheid” has been used to highlight the racialization, whether intended or not, of class structures generated by capitalist development, while “political apartheid” has been used to describe cases in which political participation is leveraged into racially segregated spheres.⁸ The question of agency may become blurred in this usage if responsibility is traced to anonymous forces.

21. *Apartheid as informal practices.* Finally, “apartheid” is used to criticize informal discriminatory measures employed by the dominant racial group—employers, real estate agents, bank loan officers and the like—to enforce racial segregation, oppression and hierarchy outside the constitutional order. Such socially

⁷ John Dugard, “Introductory note to the Convention on the Suppression and Punishment of the Crime of Apartheid”, 30 November 1973. Available from <http://legal.un.org/avl/ha/cspca/cspca.html>.

⁸ For examples, see Grace-Edward Galabuzi, *Canada's Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century* (Toronto, Canadian Scholars' Press, 2006); and Robbie Robertson, “Elections and nation-building: the long road since 1970”, in Jon Fraenkel and Stewart Firth, eds., *From Election to Coup in Fiji: The 2006 Campaign and Its Aftermath* (Canberra, Australian National University E Press, Asia Pacific Press and IPS Publications, 2007), pp. 250-260.

reinforced systems may violate non-discrimination clauses in the State's constitutional law, but as they typically enjoy the support of the dominant society they can persist with great effectiveness, partly by generating a compliant or at least passive judicial system. Where constitutional law is actually contradictory of such discrimination (as it is in the United States of America, for example), private methods of discrimination may rely on proxy laws, such as literacy tests or identification requirements for voting rights, that deliberately have a discriminatory effect in disenfranchising racially subordinate groups. The Jim Crow system of racial segregation that prevailed in the southern United States into the 1960s is a notorious case in which local proxy laws, the racial bias of public officials, including police, public prosecutors and judges, and private punitive sanctions, such as terror and lynchings for any challenge to the system, all operated in synergy to enforce apartheid-like conditions outside of a formally discriminatory constitutional order.

22. The approach of the study stands in contrast to these three tendencies, by (a) concentrating on whether the State's laws and policies exceed the quality of discrete acts and form a regime of domination; (b) adopting a narrow definition of apartheid consistent with the Apartheid Convention in order to avoid challenges of incorrect extrapolations; and (c) treating law and formal institutions, rather than social attitudes, as indicative of an apartheid regime.

II. AIM AND PREMISES OF THE STUDY

23. The ESCWA study is being prepared in the context of rising international concern that an apartheid regime is already effectively operating, or being consolidated, in Israel-Palestine. Over recent years, this concern has moved from polemics and essays, such as President Jimmy Carter's book cautioning against an apartheid future for Israel,⁹ into international diplomacy and the United Nations debate.¹⁰ Still, whether Israel has imposed an apartheid regime on Palestinians is usually treated as a possibility looming down the road rather than an established reality. Hence responsible sources continue to address the question through indirect language and allusions. For example, a 2012 report by the United Nations Committee on the Elimination of All Forms of Racial Discrimination states the following:

The Committee 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 take immediate measures to prohibit and eradicate any such policies or practices which severely and disproportionately affect the Palestinian population in the Occupied Palestinian Territory and which violate the provisions of article 3 of the Convention (CERD/C/ISR/CO/14-16).

A. PREMISES

24. The ESCWA study adopts two premises. First, any test of apartheid must not take, as its principal indicators and benchmarks, practices in apartheid South Africa, although occasional reference to this founding case can sometimes be useful in elucidating what the drafters of related international law intended. Rather, the practices of Israel must be assessed through reference to international law: primarily, the Apartheid Convention and the Rome Statute. Both laws were drafted expressly to provide a universal legal instrument establishing apartheid as a crime against humanity.¹¹

⁹ Jimmy Carter, *Palestine: Peace Not Apartheid?* (New York, Simon & Schuster Paperbacks, 2006).

¹⁰ See, for example, A/HRC/16/72, paras. 8 and 32(b); and A/HRC/4/17, p. 3.

¹¹ Human Sciences Research Council of South Africa, *Occupation, Colonialism, Apartheid? A re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law* (Cape Town, 2009) (note to author: please confirm reference); also see John Dugard and John Reynolds, "Apartheid, international law, and the occupied Palestinian territory", *The European Journal of International Law*, vol. 24, No. 3 (2013), pp. 883-885.

25. The second premise is that a check-list method—testing whether the policies of Israel accord with the list of “inhuman acts” in the Apartheid Convention—would be a misreading of the law. The Convention’s language in the chapeau to article 2 clarifies that the “inhuman acts” cited in subparagraphs (a) through (f) are meant as inclusive, not exclusive or definitive. They are indeed crimes of apartheid only where they serve the overarching “purpose clause” in the Apartheid Convention:

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 practiced 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* (article 2, emphasis added.)

26. Similarly, the Rome Statute incorporates “intention” into its definition of apartheid:

‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and *committed with the intention* of maintaining that regime... (Article 7/2(h), emphasis added).

27. In both instruments, maintaining “domination by one racial group of persons over any other racial group of persons and systematically oppressing them” must be the purpose for which sample inhuman acts are committed for them to be considered as constituting crimes of apartheid. In other words, the purpose clause makes such acts crimes against humanity only if those acts are committed for that purpose. Methodologically, therefore, the actual purpose and effect of such acts must be identified before the acts themselves can be confirmed as forming a regime of apartheid. To take a common example: the Apartheid Convention makes no specific mention of voting rights, but article II (c) defines “inhuman acts” of apartheid to include “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”. Hence Israel’s granting voting rights to Palestinian citizens could be taken as evidence that no such regime exists. Yet allowing people to vote does not negate a finding of apartheid if a country’s laws ensure that voting can have no effect in mitigating racial domination.

B. APARTHEID AS A REGIME

28. Before examining whether Israel has composed a regime of apartheid, it is also important to clarify the meaning of “regime”. The Rome Statute defines apartheid as operating “in the context of an institutionalized regime of systematic oppression and domination’ (Article 7/2/h). The wording of the Apartheid Convention, and the inclusion of “apartheid” as a crime against humanity in the Rome Statute, demonstrate international consensus that apartheid is rightly distinguished from the larger body of racially discriminatory practices, covered in instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination, precisely by its character as a comprehensive system or regime. How then to distinguish a racist regime from a mere collection of discrete racist practices?

29. The term “regime” has several meanings in political science, but is understood here in the oft-cited formulation by Robert Fishman:

A regime may be thought of as the formal and informal organization of the center of political power, and of its relations with the broader society. A regime determines who has access to political power, and how those who are in power deal with those who are not. ... Regimes are

more permanent forms of political organization than specific governments, but they are typically less permanent than the State.¹²

30. This definition focuses on the structure of power in the wider sense of rules, norms and procedures, both formal and informal. In apartheid South Africa, such a regime was clearly identifiable in the national law composed to codify, universalize and administer racial identities for the entire territorial society. The context Israel-Palestine shows no such consistent body of rules and norms across the four categories of Palestinians defined in paragraph 31 of this report. Rather, the system is comprised of several distinct “subregimes”, for want of a better term, in that each category presents radically different conditions for Palestinians regarding “how those who are in power deal with those who are not”. Those subregimes are:

(a) Civil law for Palestinian citizens of Israel, codified by Israeli domestic civil law and putatively equal for all citizens, although with ethnic biases established by Israeli Basic Law and other laws, as will be shown in the study;

(b) Permanent residency for Palestinians with official residences (“centres of life”) in East Jerusalem;

(c) Military law for Palestinians living under Israeli occupation in the West Bank and Gaza Strip, codified as military orders and enforced by the Israeli Defence Forces and other Israeli government authorities. Military law applies only to Palestinian Arabs in the occupied Palestinian territory, as Jews living in East Jerusalem and in West Bank settlements live under Israeli civil law, which results in a dual legal system in these areas.

31. The study thus considers the policy of Israel towards: (a) Palestinian citizens of Israel living within the territory today internationally recognized as the sovereign State of Israel; (b) Palestinian residents of East Jerusalem; and (c) Palestinians living in the remainder of the Palestinian territory occupied by Israel since 1967, i.e. in the West Bank and Gaza Strip. It adds a fourth category to those three living under Israeli authority: Palestinian refugees living outside Mandate Palestine, as established by the League of Nations in 1922, which comprises the majority of Palestinians today and whose mass return to their homeland is barred by Israel. Israeli policy toward refugees lacks the institutional qualities of a regime in Fishman’s sense, but is crucial to Israel for limiting the Palestinian population in Mandate Palestine to about half what it would be otherwise. Hence the policy of Israel towards refugees is integral to securing Israel as a “Jewish and democratic State”.

32. These four categories are usually treated as discrete, each being subject to unique legal and political conditions; the study however addresses them as components of the one Palestinian people. It then examines whether the policies and practices of Israel towards them are synchronized to constitute a comprehensive regime of apartheid.

33. Israel has developed a regime that fragments the Palestinian people geographically, legally and politically. In southern Africa, apartheid was implemented by establishing one set of State laws to govern all relations among the country’s racial groups, which were themselves defined and adjudicated by the State. Thus white, Black, Indian and coloured South African individuals experienced apartheid as one system, in which racial and ethnic identities, imposed by the State, had the homogenizing effect on all their members that racism imposes by definition. Because studies of the policies of Israel will look fruitlessly for a comparable unified system, some may object that no apartheid regime is present. Yet, it is the very diversity of methods applied to Palestinians living under Israeli rule—not least by determining who can be a citizen of the State—that may form and consolidate an apartheid regime by allowing Israel to sustain the systematic domination of one racial group (Jews) over others (particularly Palestinians).

¹² Robert M. Fishman, “Rethinking State and regime: southern Europe's transition to democracy”, *World Politics*, vol. 42, No. 3 (April 1990).

Geographic and political fragmentation of the Palestinian people

Palestinian population	Legal regime applied to the Palestinian population
1. Palestinian citizens of Israel	Israeli civil law, including voting rights
2. Palestinian residents of Jerusalem	Special laws including the right to residency, own businesses, use the school system and travel within Israel; voting rights for municipal elections (rarely used for political reasons) but not for Knesset; no effective representation regarding zoning, development and planning
3. Palestinian residents of the West Bank (excluding Jerusalem) and Gaza Strip, including Palestinians expelled from Israel and registered as refugees	Israeli military law, expressed in military orders; security, development and zoning reserved to Israel; Palestinians are tried in military courts; some Palestinian authority over private affairs, such as marriages and the civil registry; all powers limited by Israeli plenary power
4. Palestinian refugees (and involuntary exiles) outside Mandate Palestine	In refugee camps, under special regimes imposed by host countries; outside camps, under the civil law of their countries of residence

^a Data are from the Israeli Bureau of Statistics as at March 2016.

34. Recognizing this strategic synchronicity among diverse methods helps to resolve apparent conundrums that have too often stalled debate on this question. Proponents of arguments that Israel's policies are consistent with apartheid have mostly ignored the conditions of Palestinian citizens of Israel, eliding such issues as voting rights in order to focus on the graphic disenfranchisement and draconian conditions faced by Palestinians living in the occupied Palestinian territory. This approach has highlighted, for example, how Israel sustains two dramatically unequal legal regimes for Jews and Palestinians living in the same territory, a pattern that clearly resonates of racial discrimination and ultimately of apartheid.¹³

35. By contrast, arguments that Israel's policies are not consistent with apartheid typically ignore these suspicious conditions in the occupied Palestinian territory, emphasizing instead the seemingly equal civil rights experienced by Palestinian citizens of Israel: especially, the right to vote in municipal and national elections that contrasts so strongly with the South African scenario.¹⁴ That such rights are accorded to Palestinian citizens could seem to debunk any accusation of racism against Israel and recast policies towards Palestinians in the occupied Palestinian territory as driven purely by security concerns. But the two subregimes are complementary, synchronized and part of a whole. The right of Palestinian citizens of Israel to vote is undercut by Israeli Basic Law that prohibits any legislative challenge to Israel's identity as a Jewish State.¹⁵ Basic Law could conceivably be changed through legislative action; but concomitantly, Israel's policies in the occupied Palestinian territory and towards Palestinian refugees ensure that Palestinian citizens of Israel remain a permanently small and legislatively ineffective minority that cannot muster enough votes to induce significant changes. Thus, domination over Palestinian citizens of Israel can be ensured through this strategic coordination, despite the trappings of legal equality.

¹³ See, for example, Virginian Tilley, ed., *Beyond Occupation*.

¹⁴ See, for example, Benjamin Pogrund, *Drawing Fire: Investigating the Accusations of Apartheid in Israel* (London, Rowman & Littlefield, 2014).

¹⁵ For example, the Basic Law of Israel stipulates that a candidate's list shall not participate in elections to the Knesset, and a person shall not be candidate for election to the Knesset, if the objects or actions of the list or the actions of the person, expressly or by implication, include negation of the existence of the State of Israel as a Jewish and democratic State (www.knesset.gov.il/laws/special/eng/basic2_eng.htm).

36. Recognizing apartheid as a regime allows a better appreciation of why opposing apartheid constitutes an existential threat to Israel as an ethnic nation State, or at least is readily interpreted by the dominant group as an attack on the (racially defined) nation and even a form of sedition. White supremacy in apartheid South Africa was understood by Afrikaners to be the foundation of South Africa's identity and destiny as a republic: in this view, black majority rule would demolish that republic. Similarly, challenges to the Jewish character of Israel are seen as an existential attack on the Jewish nation State, and by extension on the State of Israel itself. This conflation of statehood with a racial regime is sometimes expressed by the assertions that critics of Jewish statehood seek to destroy Israel.¹⁶

37. Finally, recognizing that apartheid constitutes a regime brings attention to the legal environment. Where a State's constitutional law makes racial discrimination illegal, the law becomes a resource for people to oppose discrimination. For instance, the civil rights struggle in the United States ultimately prevailed against local laws by invoking federal constitutional protections and the constitutional principle of equality. But where constitutional law makes resistance to racial discrimination illegal, then opposition to discrimination becomes effectively seditious in challenging the integrity of the nation State's identity discourse and by extension the State's legitimacy. The Apartheid Convention alludes to this distinction in article II (f), which specifies that the "inhuman acts" characteristic of apartheid include "persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid". Research for the study found only two States that have formally outlawed resistance to racial domination: South Africa and Israel.

38. The ESCWA study will therefore examine whether the policies and practices of Israel constitute an "apartheid State"—that is, a State whose doctrine and laws effect the draconian segregation of groups on the basis of race, with the purpose of ensuring the domination of one such group (Jews) over all others (particularly non-Jewish Palestinians).

III. ADDITIONAL FIELDS OF INQUIRY

39. *Examining Israeli policies governing each category of Palestinians:* After establishing some theoretical groundwork for the study by examining the character of apartheid as a regime, the ESCWA study will move on to clarify whether Israel sustains such a regime. The Apartheid Convention provides a sample list of "inhuman acts" that, if committed according to the purpose clause, would constitute the crime of apartheid. As noted, this list remains heuristically useful for studies of apartheid but is not definitive, since a study of apartheid outside southern Africa must consider that alternative methods will inevitably appear, reflecting the country's different history and social conditions, and no single set of methods is likely to be applied in all settings. The study will thus examine whether Israel's principle method of domination, geographically and politically fragmenting the Palestinian people in order to secure their permanent inability as a people to alter Israel's character as a "Jewish and democratic state", amounts to apartheid. This will be done by examining the policies and practices of Israel that affect each of the four categories of Palestinians.

40. *Counterarguments:* The study will also address the major counterarguments that have been made to deny that the Apartheid Convention is even applicable to the Israeli-Palestinian conflict. These include the argument that Jews and Palestinians are not "races"; ergo, the State cannot be imposing a racial and therefore apartheid regime. A second argument, the one sustaining that because Palestinian Arab citizens of Israel enjoy full democratic rights, Israel's treatment of them cannot constitute apartheid, will also be addressed.

¹⁶ See Amos Oz, "Doves should re-examine their perch", *The Guardian*, 5 January 2001 (available from <https://www.theguardian.com/comment/story/0,3604,417958,00.html>); and Michael Oren, "Seven existential threats", *Commentary*, 1 May 2009 (available from <https://www.commentarymagazine.com/articles/seven-existential-threats>).

IV. THE WAY FORWARD: FINALIZATION, VERIFICATION AND DISSEMINATION

41. After the finalization of the study, ESCWA will conduct internal and external peer review by experts in international law and political science.

42. ESCWA will also present the findings of the study at an expert group meeting, to be held in the beginning of 2017. The presentation and ensuing discussions will constitute the final verification phase of the study. During the meeting, Palestinian and international experts will also examine the question of the cumulative and comprehensive costs and impact of the occupation, a project also currently being undertaken by the secretariat.

43. ESCWA will finally prepare a dissemination and communications plan for the study to ensure maximum exposure. This will include preparation of press kits, presentations in international conferences and meetings, and organization of events to discuss the findings of the study with academics, experts and advocates from the civil society.
