

**Interstate Complaint under Articles 11-13
of the International Convention for the
Elimination of All Forms of
Racial Discrimination**

State of Palestine versus Israel

I.	Introduction.....	1
	A. Background.....	1
	B. Object and subject matter of the complaint.....	2
	1. Scope <i>ratione materiae</i> : violations of CERD by Israel.....	2
	2. Scope <i>ratione loci</i> : violations of CERD in the OPT	5
	C. <i>Compétence de la compétence</i> of the CERD Committee/ <i>ad hoc</i> Commission.....	6
II.	Admissibility	7
	A. Palestine and Israel are parties of CERD	7
	1. Israel as a contracting party of CERD	8
	2. Palestine as a contracting party of CERD	9
	B. Extraterritorial applicability of CERD	16
	C. Scope <i>ratione temporis</i> of the complaint: violations of CERD by Israel since its accession in 1979.....	23
	D. Scope <i>ratione personae</i>	29
	E. Ineffectiveness of local remedies	33
	F. Israel’s obligation to cooperate and irrelevance of a possible non- appearance by the respondent State.....	36
	1. Israel is under an obligation to cooperate.....	36

2. Israel’s treaty-based obligation to participate in the CERD interstate complaint proceedings	39
3. Irrelevance of non-appearance by the respondent state	41
III. Contextualisation	47
A. Context and background of this complaint.....	47
B. Irrelevance of simultaneous applicability of international humanitarian law	
57	
IV. Violations of Art. 5 CERD	61
A. Non-exhaustive character of Art. 5 CERD.....	61
B. Equal treatment before tribunals (Art. 5 lit. a CERD).....	65
1. Factual background.....	65
a. Israeli military court system in the OPT	68
b. Israeli criminal law applying in the West Bank.....	71
2. Israel’s obligations under CERD to equal treatment before tribunals and all other organs administering justice	74
a. CERD obliges its parties to equality before the law and equal treatment before tribunals.....	74
b. The discriminatory legal regime applied by Israel in the OPT is not permitted under international humanitarian law	76
aa. Israel cannot rely on the general possibility of military courts in occupied territories according to international humanitarian law	77
bb. The prolonged situation of belligerent occupation requires terminating the military court system.....	79
cc. Art. 66 4 th Geneva Convention cannot justify the discriminatory treatment between Palestinians and Israelis within the OPT.....	80

dd. In any case, the preconditions of Art. 66 4 th Geneva Convention are not met	82
3. Discriminatory treatment of Palestinians in the pre-trial phase: jurisdiction, preparation of trial and bail-out	87
a. Israeli settlers residing in the OPT are not tried before military courts although they fall under Order 1651 (2009)	87
b. Palestinians are prevented from meeting with an attorney longer than Israelis	89
c. Obstruction of representation by Palestinian attorneys by incarceration of Palestinians in Israel	90
d. Period before being brought before a judge	91
e. Discriminatory usage of Hebrew in the trial due to inadequate translation of documents into Arabic	92
4. Discriminatory treatment of Palestinians regarding substantive law and sentencing	94
a. Difference in the definition of offenses treats Palestinian and Israeli offenders unequally	94
b. Penalty policy and maximum sentences discriminate against Palestinian offenders	95
c. Palestinians do not, similarly to Israeli offenders, have the chance to be released prior to their end of sentence	97
C. Discriminatory legal system with regard to under-aged Palestinian offenders	98
1. Palestinian juveniles are subjected to military juvenile courts	99
2. Any selective <i>ad hoc</i> application of the spirit of the Israeli Youth Law by an individual military judge does not cure the differences in the respective laws	

3.	Discriminatory treatment of Palestinians in comparison to Israeli under-aged takes place in all phases of criminal proceedings	103
a.	Discriminatory definition with regard to the age of majority	103
b.	Discriminatory treatment during arrest and detention	105
c.	Discriminatory treatment during criminal proceedings and violation of due process rights of minors.....	109
d.	Discriminatory treatment of sentencing of juvenile Palestinians	110
e.	Discriminatory treatment of minors in East Jerusalem.....	113
D.	Administrative detention	114
1.	Applicable rules of international law	114
2.	Legal background.....	115
3.	Discrimination in the implementation of administrative detention	117
a.	Statistics of detention.....	118
b.	Reasons for detention.....	120
c.	Treatment of detainees	121
d.	Length of detentions.....	122
e.	Conditions of detention	122
f.	Review of detention orders by the courts	123
E.	Freedom of movement	125
1.	Settlers	125
2.	Palestinians.....	128
a.	Bureaucratic procedures: permits	128
b.	Check points and physical obstacles.....	132
c.	East Jerusalem.....	134
d.	Jordan Valley.....	134
F.	Freedom to leave and return	135

1.	West Bank and Gaza	139
a.	West Bank	140
b.	Gaza	141
2.	East Jerusalem	141
G.	Discrimination as to the right to marriage and choice of spouse	144
1.	Family unification in international law	146
2.	Family unification for Palestinians within the OPT, excluding East Jerusalem	148
3.	Family unification between Palestinian citizens of Israel (or residents of East Jerusalem) and Palestinians from the OPT	152
4.	Restrictions on mixed marriages	163
H.	Freedom of religion	165
1.	Factual background	165
2.	Discriminatory treatment of Palestinians affecting the freedom of religion 166	
I.	Discriminatory land distribution and planning regime	172
1.	Land distribution	173
2.	Israeli planning policies in Area C of the West Bank	181
a.	Factual background of the Israeli planning regime	181
b.	Discriminatory nature of Israel's substantive planning regime	184
c.	Discriminatory nature of Israel's planning procedure	185
3.	Discriminatory enforcement of planning and building decisions	191

J.	Right to property.....	197
K.	Right to housing (Art. 5 lit. e (iii) CERD)	203
	1. ‘Punitive’ house demolitions.....	205
	2. ‘Administrative’ house demolitions	211
L.	Right to natural resources.....	218
	1. General issues	219
	2. Factual background.....	220
	3. Nature of access and usage restrictions.....	221
	4. Discriminatory Israeli policies regarding access to and usage of minerals in a violation of Israel’s obligations under Art. 5 CERD	225
	5. Security or environmental concerns do not justify the discrimination ...	230
	6. Rule of usufruct does not justify the discrimination	230
	7. No waiver of right to permanent sovereignty over natural resources.....	233
M.	Right to water.....	234
	1. Factual background: principal sources of water for the OPT and Israel and water usages	237
	2. Principal sources of water.....	238
	a. Jordan River	238
	b. Mountain Aquifer.....	239
	c. Coastal Aquifer.....	240
	3. Control over the water resources of the OPT	241

4.	Discriminatory water allocation between Israel and the OPT	244
5.	Discrimination <i>within</i> the OPT: West Bank.....	247
6.	Discrimination vis-à-vis the Palestinian population of East Jerusalem...	256
7.	Discrimination vis-à-vis the Palestinian population of Gaza	257
N.	Social and economic rights: labour, education and health.....	260
1.	Labour rights	260
a.	Labour rights in the OPT.....	261
b.	Impact of movement restrictions on Palestinian labour rights	267
c.	Restrictions on access to jobs in East Jerusalem and Israel.....	272
d.	Restrictions on imports and exports.....	275
e.	Discriminatory labour law: The ‘Jordan Valley Regulation’.....	278
2.	Education.....	280
3.	Health	283
V.	Art. 2 CERD.....	284
VI.	Art. 3 CERD.....	292
A.	Background and context.....	292
1.	Evolution of the prohibition on apartheid in international law	294
2.	Prohibition on apartheid is not confined to Southern Africa	297
3.	Interpretation of Art. 3 CERD	298
B.	Legal regime in West-Bank as apartheid.....	304
1.	Introduction.....	304

2. Racial groups	304
3. Commission of inhuman acts.....	307
4. Institutionalised and systematic discrimination and domination	314
VII. Conclusions	326
A. Summary of findings	326
1. Admissibility and scope of the complaint.....	326
2. Substantive issues.....	329
a. Violations of Art. 5 CERD	330
b. Violations of Art. 2 CERD	337
c. Violations of Art. 3 CERD (apartheid)	337
B. Relief sought.....	339

**Interstate Complaint under Articles 11-13
of the International Convention for the Elimination of All
Forms of Racial Discrimination**

State of Palestine versus Israel

I. Introduction

A. Background

1. This is the first time in the history of the universal human rights treaties adopted under the auspices of the United Nations that one of its contracting parties, namely Palestine as a member State of CERD, brings an interstate complaint against another high contracting party, namely Israel.

2. The State of Palestine exercises this right under Arts. 11-13 CERD, inherent in its status of being a member of CERD, given the urgency of the situation in the Occupied Palestinian Territory ('OPT') and the blatant, and indeed ever increasing, violations by Israel as the occupying power, of CERD which have taken place, and continue to take place in the OPT ever since Israel occupied Gaza, the West Bank, as well as East-Jerusalem, in 1967.

3. Given the current situation in the OPT, and the ongoing attempt by Israel to further reinforce the discriminatory legal and factual regime it applies in the OPT in violation of CERD, Palestine requests the CERD Committee, and should the case arise, the *ad hoc* Commission, to deal with this complaint as expeditiously as possible.

B. Object and subject matter of the complaint

1. Scope *ratione materiae*: violations of CERD by Israel

4. According to Art. 2 para. 1 CERD, state parties condemn racial discrimination and pursue a policy eliminating racial discrimination in all its forms. More specifically, under Art. 2 para. 1 lit. a CERD, each State Party, and hence also Israel, undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation. As will be shown in the following, Israel however has engaged and continues to engage in large-scale violations of CERD committed in the OPT, including but not limited to violations of Art. 3 CERD, *i.e.* policies of racial segregation and apartheid and numerous violations of Art. 5 CERD concerning a wide number of policies and aspect of the life of Palestinians. Given that this complaint is

based on Arts. 11-13 CERD, it accordingly focuses on these violations of CERD committed by Israel in the OPT.

5. That being said, this ought not to be misunderstood: Palestine considers that Israel is by the same token also committing violations of other human rights treaties of which it is also a contracting party, including but not limited to the ICCPR,¹ ICESCR,² CAT³ and the Convention on the Rights of the Child.⁴ Besides, Palestine also continues to take the position that Israel is simultaneously committing violations of human rights protected under customary law,⁵ as frequently confirmed by various organs of the United Nations.⁶ Most recently, the Security Council in Resolution 2234 condemned the settlements as “flagrant violations under international law”.⁷

¹ International Covenant on Civil and Political Rights (ICCPR), UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976; ratified by Israel 3 October 1991; latest report on Israel: UN Doc. CCPR/C/ISR/4 (11 December 2013).

² International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3; ratified by Israel 3 October 1991; latest report on Israel: E/C.12/ISR/3 (12 July 2010).

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1465 UNTS 85; ratified by Israel 3 October 1991, latest report on Israel: CAT/C/ISR/5 (16 February 2015).

⁴ Convention on the Rights of the Child (CRC), 1577 UNTS 3; ratified by Israel 3 October 1991; latest report on Israel: CRC/C/OPSC/ISR/1 (22 January 2015).

⁵ International Court of Justice (ICJ), *Barcelona Traction, Light & Power Co., Ltd. (New Application) (Belgium v. Spain)*, judgement of 5 February 1970, ICJ Rep. 1970, pp. 3 *et seq.* (33-34); ICJ, *North Sea Continental Shelf, (W Germany v. Denmark, W Germany v. Netherlands)*, judgment of 20 February 1969, ICJ Rep. 1969, pp. 3 *et seq.*; B. A. Boczek, *International Law: A Dictionary* (2005), mn. 159.

⁶ See *e.g.* United Nations, Human Rights Committee, *General Comment No. 24 (52)*, UN Doc. CCPR/C/21/Rev.1/Add.6 (11 November 1994); United Nations, Human Rights Council, UN Doc. A/HRC/22/63 (7 February 2013); United Nations, Human Rights Council, UN Doc. A/HRC/25/67 (13 January 2014); United Nations, General Assembly, UN Doc. A/69/301 (11 August 2014); United Nations, Human Rights Council, UN Doc. A/HRC/28/78 (22 January 2015); United Nations, Human Rights Council, UN Doc. A/HRC/31/73 (11 January 2016).

⁷ United Nations, Security Council UNSC), UN Doc. S/Res/2234 (23 December 2016), para. 1.

6. To state the obvious, Palestine also takes the position that Israel, as the occupying power, is on a daily basis furthermore committing violations of applicable norms of international humanitarian law in the OPT,⁸ including war crimes. This includes, not the least, but is not limited to, the continued and ongoing transfer of parts of its own population into the OPT, as prohibited under Art. 49 para. 6 of the 4th Geneva Convention,⁹ and as amounting to a war crime under customary law,¹⁰ as well as under Art. 8 of the Statute of the International Criminal Court (the customary status of which Israel had at one point itself implicitly acknowledged when signing the Rome Statute)¹¹. Hence, regardless of any violations of CERD, which are the sole focus of this complaint, Israel is under regular rules of State responsibility,¹² and notably the obligation to provide for a *restitutio in integrum*,¹³ *inter alia* under an obligation to resettle back into Israel all of its nationals it has illegally transferred into the OPT ever since 1967.

⁸ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et seq.* (172-177), paras. 89-101.

⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (4th Geneva Convention), 75 UNTS 287, (12 August 1949).

¹⁰ M. Cottier, in: O. Triffterer/K. Ambos (eds.), The Rome Statute of the International Criminal Court – A Commentary (3rd ed. 2016), p. 311.

¹¹ See, Declaration of Israel upon signature, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#3.

¹² Articles on State Responsibility (ASR), adopted by the General Assembly by Res. A/56/10 (2001); The ASR reflect customary international law; See *e.g.* J. R. Crawford, State Responsibility, *MPEPIL*, para. 31, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093>.

¹³ Art. 36 para. 1 ASR.

7. Finally, the focus of this interstate complaint under Arts. 11-13 CERD on violations of CERD taking place in the OPT should not distract from Israel's general obligation to terminate the occupation of the OPT *per se*, including the obligation to rectify the illegal purported annexation of East-Jerusalem (as confirmed by relevant Security Council practice).¹⁴

2. Scope *ratione loci*: violations of CERD in the OPT

8. The sole focus of this current complaint under Art. 11-13 CERD are violations of CERD currently being committed, and previously having been committed, by Israel in the OPT, *i.e.* in Gaza, as well as in the West Bank including East-Jerusalem. Put otherwise, violations by Israel of CERD that have taken place or currently take place in Israel itself are not being discussed as part of this complaint.
9. Palestine does, however, formally reserve its right to eventually later, and depending on the circumstances, should the need arise, bring an additional, supplementary complaint under Arts. 11-13 CERD for violations of CERD occurring in Israel proper, the victims of such violations being ethnic Palestinians, as well as members of other ethnic groups living in Israel.

¹⁴ UNSC, UN Doc. S/RES/446 (22 March 1979); UNSC, UN Doc. S/RES/465 (1 March 1980); UNSC, UN Doc. S/RES/476 (30 June 1980); UNSC, UN Doc. S/RES/487 (19 June 1981); United Nations, Human Rights Council (UNHRC), UN Doc. A/HRC/24/30 (22 August 2013); UNHRC, UN Doc. A/HRC/31/L.36 (22 March 2016); UNHRC, UN Doc. A/HRC/31/L.37 (22 March 2016); UNHRC, UN Doc. A/HRC/31/L.38 (22 March 2016); UNHRC, UN Doc. A/HRC/31/L.39 (22 March 2016).

10. This having been said, the issue of standing simply does not arise,¹⁵ the victims of the violations of CERD that form the substance-matter of this current complaint being undoubtedly nationals of the Applicant State, *i.e.* nationals of the State of Palestine, and Palestine hence being the injured State within the meaning of Art. 42 Articles of State Responsibility (as having codified customary law on the matter).¹⁶

C. Compétence de la compétence of the CERD Committee/ ad hoc Commission

11. In line with the well-accepted principle in international law that a court or tribunal, under the principle of *compétence de la compétence*, is generally in a position to rule on its own jurisdiction, the Committee can decide all questions regarding its own competence to decide about the interstate complaint brought by the state of Palestine against Israel. This includes questions on issues of admissibility including the question of Palestine's

¹⁵ Thus, the question whether the inter-state complaint is a contradictory proceeding concerning two state parties or rather a mechanism to ensure compliance does not need to be decided in the present proceedings, *cf.* providing argument for both see W. Eggers, *Die Staatenbeschwerde – Das Verfahren vor der Vergleichskommission nach der Rassendiskriminierung im Lichte vorliegender Modellverfahren* (1978), pp. 122-125.

¹⁶ German Federal Supreme Court (Bundesgerichtshof), decision of 2 November 2006 (Case No. III ZR 190/05); partial English translation in 'Responsibility of States for internationally wrongful acts; Comments and information received from Governments, United Nations, General Assembly (UNGA), *Report of the Secretary General*, UN Doc. A/62/639 (March 2007), paras. 15–16; J. R. Crawford, *State Responsibility*, MPEPIL mn. 31, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093>; K. Ipsen, in: K. Ipsen (ed.), *Völkerrecht* (6th ed. 2014), § 28, mn. 30, § 30, mn. 11; M. Schröder, in: W. Graf Vitzthum (ed.), *Völkerrecht* (5th ed. 2010), mn. 10.

status as a contracting party of CERD. As will be shown later, the Committee, for that matter, may find Palestine to be a contracting state of CERD since 2014, to be eligible to bring an interstate complaint against Israel in line with and based on the fact that all preconditions for such complaint according to Arts. 11-13 CERD are met.

II. Admissibility

12. The complaint by Palestine against Israel under Arts. 11-13 CERD is admissible as both Palestine and Israel are parties to CERD and all preconditions are met.

A. Palestine and Israel are parties of CERD

13. Art. 11 para. 1 CERD provides that any *State party* of CERD may lodge an interstate complaint under CERD provided it

“(...) considers that another State Party is not giving effect to the provisions of this Convention [*i.e.* CERD],”¹⁷

14. Hence, it is obvious that both the applicant State, *i.e.* in the case at hand the State of Palestine, as well as the respondent State, *i.e.* in the case at hand

¹⁷ Emphasis added.

Israel, must be ‘State parties’ of CERD within the meaning of Art. 11 CERD.

1. Israel as a contracting party of CERD

15. Israel signed CERD on 7 March 1966 and ratified it on 3 January 1979.¹⁸

Israel has lodged a reservation as to the jurisdiction of the ICJ under Art. 22 CERD stating that

“[t]he State of Israel does not consider itself bound by the provisions of article 22 of the said Convention.”¹⁹

16. While the State of Palestine fully reserves its position as to the validity of this reservation, and as to its possible legal effects as far as a possible case to be brought before the ICJ under Art. 22 CERD is concerned, it suffices to note at this stage that Israel has *not*, however, excluded the interstate complaint procedure under Arts. 11-13 CERD by way of a reservation. It is thus fully bound by the said provisions.

¹⁸ United Nations Treaty Collection, Status of CERD, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en.

¹⁹ United Nations Treaty Collection, Declarations and Reservations to CERD, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec.

2. Palestine as a contracting party of CERD

17. On 2 April 2014 Palestine acceded to CERD.²⁰ This led the depositary, the Secretary-General of the United Nations, to note that accordingly, and in accordance with Art. 19 para. 2 CERD, the said convention

“(…) was to enter into force for the State of Palestine on 2 May 2014.”²¹

Palestine has thus become a contracting party of CERD effective 2 May 2014. This is confirmed, if there was need, by the specific provisions contained in Arts. 17 and 18 CERD.

18. For one, Art. 18 para. 1 CERD provides that

“(…) [t]his Convention [*i.e.* CERD] shall be open to accession by any State *referred to in article 17, paragraph 1, of the Convention.*”²²

19. Art. 17 para. 1 CERD, to which Art. 18 para. 1 CERD refers back, in turn provides:

²⁰ United Nations, Depositary Notification, C.N.179.2014.TREATIES-IV.2 (9 April 2014), available at: <https://treaties.un.org/doc/Publication/CN/2014/CN.179.2014-Eng.pdf>.

²¹ United Nations, Depositary Notification, C.N.179.2014.TREATIES-IV.2 (9 April 2014), available at: <https://treaties.un.org/doc/Publication/CN/2014/CN.179.2014-Eng.pdf>.

²² Emphasis added.

“This Convention is open for signature by any State Member of the United Nations *or member of any of its specialized agencies*, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.”²³

20. This constitutes what is commonly referred to as the so-called ‘Vienna formula’. As the authoritative ‘Final Clauses of Multilateral Treaties Handbook’ of the United Nations puts it:

“The ‘Vienna formula’ attempts to identify in detail the entities eligible to participate in a treaty. The ‘Vienna formula’ permits participation in a treaty by (...) States Members of specialized agencies (...).”²⁴

21. Put otherwise, State parties to a treaty containing the ‘Vienna formula’ thereby delegate the power to decide whether a given entity may or may not become a State party, and hence constitutes a State for purposes of the respective treaty, *inter alia* to the various specialized agencies of the United Nations. It is then these agencies which, by deciding upon an application for

²³ Emphasis added.

²⁴ United Nations, *Final Clauses of Multilateral Treaties Handbook* (2003), p. 15, available at: <https://treaties.un.org/doc/source/publications/FC/English.pdf>.

membership, thereby also decide whether such entity is to be eligible for becoming a State party for a treaty containing the ‘Vienna formula’.

22. As a leading authority on the law of treaties puts it, the Vienna formula was thus meant

“(…) [t]o avoid differences over whether [some entities] had the necessary capacity to become party to a particular treaty”.²⁵

23. Hence,

“(…) a disputed entity was entitled to become a party (…) if it was a member of at least one of a number of specified international bodies.”²⁶

24. When it comes more specifically to Palestine, it ought to be noted that the ‘State of Palestine’ became a member of UNESCO effectively 23 November 2011.²⁷ UNESCO in turn constitutes a specialized agency of the United

²⁵ A. Aust, *Modern treaty law and practice* (3rd ed., 2013), p. 106.

²⁶ *Ibid.*

²⁷ See, UNESCO, Palestine, available at: <http://www.unesco.org/new/en/unesco/worldwide/arab-states/palestine/>; Palestine also successfully acceded *inter alia* to the following treaties: UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (‘New York Convention’). Accession of Palestine on 2 January 2015, available at: [http://www.newyorkconvention.org/list+of+contracting+states](http://www.newyorkconvention.org/list+of+contracting+states;); Vienna Convention on Diplomatic Relations, accession on 6 June 2014, available at: <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280033940>; Vienna Convention on Consular Relations, accession on 2 April 2014, C.N.177.2014.TREATIES-III.6; Geneva Conventions and associated protocols and other Conventions according to the ICRC database, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PS; UN

Nations within the meaning of Art. 57 United Nations Charter.²⁸

Accordingly, it stands to reason that Palestine is a member of a specialized agency of the United Nations and, accordingly, thus also eligible to become a contracting party of CERD within the meaning of Arts. 17 and 18 CERD, those provisions having enshrined the ‘Vienna formula’.

25. It is also worth noting that even the Rome Statute of the International Criminal Court (‘ICC’), which in its Art. 125 para. 3 contains an ‘all States’ accession clause²⁹ (rather than the ‘Vienna formula’, with its renvoi to the practice of the specialized agencies of the United Nations), has been interpreted in a similar manner. More specifically, the Prosecutor of the ICC has held that the determination whether or not Palestine constitutes a ‘State’ at least for purposes of that treaty is to be informed by the practice of the United Nations. As the ICC Prosecutor put it:

“The Office [of the Prosecutor] considers that, since Palestine was granted observer State status in the UN by the UNGA, it must be

Convention against Corruption, accession on 2 April 2014, available at: <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

²⁸ W. Meng, in: B. Simma *et al.* (eds.), *UN Charter Commentary* (3rd ed. 2012), pp. 1632-1633.

²⁹ Art. 125 para. 3 Rome Statute reads:

“This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations”, emphasis added.

considered a ‘State’ for the purposes of accession to the Rome Statute (in accordance with the ‘all States’ formula).”³⁰

26. As mentioned in the just quoted statement by the ICC Prosecutor, on 29 November 2012, the General Assembly of the United Nations granted the ‘State of Palestine’ the status of an observer State when adopting UN General Assembly Resolution 67/19 with a majority of 138 votes in favour, 9 votes against and 41 abstentions.

27. The fact that Palestine has therefore validly become a party to CERD (as well as a party of other human rights treaties concluded under the umbrella of the United Nations)³¹ is confirmed by the practice of the various treaty bodies specifically set up to supervise the implementation by contracting parties of their obligations arising under the respective treaty.

28. More specifically, the Committee against Torture under the Convention against Torture, the Human Rights Committee under the ICCPR, the Committee on the Elimination of Discrimination against Women under

³⁰ See, ICC, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, ICC-OTP-20150116-PR1083, available at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx.

³¹ This includes the Convention on the Prevention and Punishment of the Crime of Genocide, ICESCR, ICCPR, the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, the International Convention on the Suppression and Punishment of the Crime of Apartheid, CEDAW, CAT, CRC and CRPD.

CEDAW, as well as, of obvious particular relevance for the case at hand, the Committee on the Elimination of Racial Discrimination itself, have all formally requested Palestine to submit State reports under the respective State reporting mechanism.³² This presupposes, to state the obvious, that those treaty bodies – *including the CERD Committee itself* - have all taken the position that indeed Palestine has validly become a contracting party of each and every of those treaties since otherwise the reporting obligation under Art. 9 CERD (as well as the same obligations under the parallel provisions in the above-mentioned human rights treaties)³³ would simply have not arisen. This is due to the fact that, to use the words of Art. 9 para. 1 CERD:

“*States Parties* undertake to submit to the Secretary-General of the United Nations, for consideration by the [CERD] Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention [*i.e.* CERD].”³⁴

29. It is also worth noting, that, as far as may be discerned, none of the other contracting parties (including Israel) has ever objected to this practice of the

³² See further, UN Human Rights Office of the High Commissioner, 2018 Deadlines for the submission of documentation, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/MasterCalendar.aspx.

³³ Art. 19 CAT, Art. 40 ICCPR, Art. 18 CEDAW.

³⁴ Emphasis added.

various treaty bodies requesting Palestine to submit State reports, including submitting a report under Art. 9 CERD.

30. It would be inherently unfair, and even nonsensical, to subject an entity to the supervision of a treaty body [*i.e.* in the case at hand subject Palestine to the supervision of the CERD Committee], and hence treating such entity as a ‘State party’ when it comes to legal obligations arising under such treaty, while at the same time denying the very same entity the ensuing right to bring an interstate complaint under Art. 11 CERD before the very same treaty body [*i.e.* again the CERD Committee], because it allegedly was not a ‘State party’ of CERD.

31. Indeed, the various treaty bodies play a decisive role in determining whether, and if so to what extent, an entity is bound by the human rights treaty for the supervision of which they are responsible. Thus, all treaty bodies have, for example, considered that they are in a position to decide whether or not a given State has automatically succeeded to the respective human rights treaty (*i.e.* whether it is a contracting party or not), or whether it is bound by such a treaty despite a reservation made was found to be invalid and null

and void (and hence again whether it is to be considered a contracting party or not).³⁵

32. In the same vein, the CERD Committee must now be in a position to decide for purposes of the interstate complaint mechanism whether Palestine is a contracting party of CERD. Yet, in requesting Palestine to submit a State report under Art. 9 CERD, the CERD Committee has already taken a clear-cut position on the matter.
33. Accordingly, the State of Palestine must be considered a State party of CERD for purposes of the interstate complaint procedure under Arts. 11-13 CERD.

B. Extraterritorial applicability of CERD

34. This complaint relates to Israel's violations of its obligations arising under CERD regarding acts or omissions attributable to Israel and occurring in the OPT, *i.e.* outside the borders of Israel. Notwithstanding, Israel is bound by CERD when it acts in the OPT given that CERD does apply extraterritorially.

³⁵ See, for more on this issue, United Nations, Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Art. 41 of the Covenant, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.6&Lang=en.

35. On frequent occasions the CERD Committee has held in its concluding observations concerning the State reports by the United States (concerning the situation in Guantánamo),³⁶ Iraq (concerning the situation in occupied Kuwait),³⁷ and Israel itself (concerning the OPT, as well as the occupied Golan),³⁸ that indeed CERD applies extraterritorially provided the respective State Party exercises jurisdiction in the area concerned.³⁹

36. Specifically with regard to Israel, it stated in its Concluding Observations concerning Israel's 7th, 8th and 9th State reports⁴⁰ that Israel is under an obligation to uphold CERD when it comes to the OPT. As the CERD Committee put it:

“Israel is accountable for implementation of the Convention [*i.e.* CERD], including the reporting obligation, in all areas over which it exercises effective control.”⁴¹

³⁶ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined 7th to 9th periodic reports of the United States of America*, UN Doc. CERD/C/USA/CO/7-9 (24 September 2014).

³⁷ See, United Nations, Committee on the Elimination of Racial Discrimination, *Report*, Supplement No. 18, UN Doc. A/46/18 (27 February 1992), para. 258; cf. Also B. Morris-Take, *Die extraterritoriale Anwendbarkeit der Rassendiskriminierungskonvention* (2015), pp. 151-152.

³⁸ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/14-16 (3 April 2012); UN Doc. CERD/C/ISR/CO/13 (14 June 2007); UN Doc. CERD/C/304/Add.45 (30 March 1998).

³⁹ Cf. B. Morris-Take, *Die extraterritoriale Anwendbarkeit der Rassendiskriminierungskonvention* (2015), pp. 145-149.

⁴⁰ United Nations, Committee on the Elimination of Racial Discrimination, UN Docs. CERD/C/SR.1250, 1251 and 1272 (March 1998).

⁴¹ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/304/Add.45 (30 March 1998).

37. In its Concluding Observations concerning Israel's 10th – 13th periodic reports, the CERD Committee, under the heading “The Occupied Palestinian Territories” reconfirmed this position:

“The Committee reiterates its concern at the position of the State party to the effect that the Convention does not apply in the Occupied Palestinian Territories and the Golan Heights. Such a position cannot be sustained under the letter and spirit of the Convention, or under international law, as also affirmed by the International Court of Justice.”⁴²

38. This view was, once again, reiterated by the CERD Committee, when considering Israel's 14th – 16th periodic reports, stating:

“The Committee takes note of the willingness of the State party delegation to discuss questions regarding the West Bank and the Gaza Strip but regrets that the report did not contain any information concerning the population living in these territories. In this regard, the Committee is deeply concerned at the position of the State party to the effect that the Convention [*i.e.* CERD] does not apply to all the

⁴² United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/13 (14 June 2007), para. 32.

territories under the State party's effective control, which not only include Israel proper but also the West Bank, including East Jerusalem, the Gaza Strip and the Occupied Syrian Golan (OSG). The Committee reiterates that such a position is not in accordance with the letter and spirit of the Convention, and international law, as also affirmed by the International Court of Justice and by other international bodies."⁴³

39. Indeed, while CERD does not, unlike other human rights treaties, contain a specific treaty clause providing for the treaty's extraterritorial application, an interpretation in light of its object and purpose militates in favour of such extraterritorial application.

40. What is more is that the ICJ, in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, gave great weight to the interpretation made by the respective treaty body when applying such a human rights treaty, and specifically when considering the issue of a possible extraterritorial application of such a treaty.⁴⁴

⁴³ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/14-16 (9 March 2012), para. 10.

⁴⁴ ICJ, Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et seq.* (179), paras. 109-113.

41. Besides, the ICJ itself has considered the issue in the Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia versus Russian Federation*), where both parties had argued the question of CERD's extraterritorial applicability at length. The Court found that it indeed does apply. As the Court put it:

“Whereas the Court observes that there is no restriction of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation; and whereas the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.”⁴⁵

42. It is also worth noting that Art. 3 CERD specifically provides that States Parties of CERD condemn practices of apartheid and undertake to “prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction” regardless of the question whether such territories form part of the territory of the respective contracting party of CERD.

⁴⁵ ICJ, Case Concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination (*Georgia v. Russian Federation*), Order on provisional measures, ICJ Rep. 2008, pp. 353 *et seq.* (389), para. 119.

Even though Israel continues to refuse to report on the implementation of CERD in the OPT,⁴⁶ the CERD Committee has requested Israel for almost three decades to report on the Occupied Palestinian Territory in order to monitor the implementation of the Convention.

43. The Committee stressed the need to report on the OPT in 2007 and 2012:

“(...) reiterate[ing] its concern at the position of the State party [*i.e.* Israel] to the effect that the Convention [*i.e.* CERD] does not apply in the Occupied Palestinian Territories and the Golan Heights. Such a position cannot be sustained under the letter and spirit of the Convention, or under international law, as also affirmed by the International Court of Justice. The [CERD] Committee is concerned at the State party’s assertion that it can legitimately distinguish between Israelis and Palestinians in the Occupied Palestinian Territories on the basis of citizenship.”⁴⁷

44. It was in accordance with this statement that the CERD Committee has started in 2007 and 2012 to comment on violations of Israel in the OPT and

⁴⁶ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, 13th Periodic Report of Israel, UN Doc. CERD/C/ISR/CO/13 (14 June 2007), para. 3.

⁴⁷ *Ibid.*, para. 32; See, also, United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, 14th – 16th Periodic Reports of Israel, UN Doc. CERD/C/ISR/CO/14-16 (9 March 2012), para. 10.

to provide specific recommendations how to improve the implementation of the CERD by Israel when it comes to the OPT.

45. However, it is worth noting that even at times, when no consensus had yet emerged among the members of the CERD Committee as to whether Israel should be requested to report on the implementation of CERD in the OPT or not, even those members who were against such a request, stated that

“(...) the [CERD] Committee could not remain indifferent to the situation of the population in the occupied territories.”⁴⁸

46. Following their argument, an alleged violation of CERD could already be found in the situation itself, which in their view constituted

“(...) a violation of the right to self-determination and was thus clear evidence of the existence of a form of discrimination which might be classified as racial.”⁴⁹

47. Ever since 1987, the CERD Committee has taken the unequivocal position that indeed CERD applies in the OPT *vis-à-vis* Israel. Accordingly, given the

⁴⁸ United Nations, Committee on the Elimination of Racial Discrimination, *Report*, Supplement No. 18, UN Doc. A/36/18 (27 February 1992), para. 108.

⁴⁹ *Ibid.*

situation on the ground in the OPT, and in particular the fact that Israel continues to be the occupying power in those areas, CERD does apply extraterritorially within the OPT.

C. Scope *ratione temporis* of the complaint: violations of CERD by Israel since its accession in 1979

48. As previously mentioned, Israel became a contracting party of CERD as early as 1979.⁵⁰ The CERD Committee, as well as possibly the Commission to be set up under Arts. 11-13 CERD, can accordingly deal with any violations having taken place since that year.

49. As a matter of fact, a State Party, such as Palestine, is in a position to invoke the responsibility of another State Party when it comes to violations of CERD that allegedly took place after the latter had become bound by CERD, but prior to the former itself having become bound by it.

50. For one, neither Art. 11 CERD, nor indeed any other provision of CERD, provides that a State Party's power to refer alleged breaches of CERD to the supervisory mechanism established under Arts. 11-13 CERD is limited to breaches of CERD which have taken place after the ratification of CERD by that very State Party, *i.e.* the State party bringing the complaint.

⁵⁰ See, *supra* para. 15.

51. Moreover, it was already the PCIJ which in its *Mavrommatis* judgment held that

“(…) in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment”,⁵¹

even more so since Arts. 11-13 CERD do not contain any reservation, otherwise common in many arbitration or compromissory clauses, regarding disputes arising out of events prior to the entry into force of the treaty as between the parties.

52. What is more is that the very idea of creating rights and obligations *erga omnes* underlying CERD,⁵² rather than merely concede reciprocal rights and obligations, would be undercut, were one to accept the idea that a State Party of CERD could only invoke violations of CERD by another State Party, having taken place after the former has become a State Party of CERD.

53. Besides, Arts. 11-13 CERD stand in sharp contrast to the ICCPR. The latter specifically contains the requirement that both, the applicant and the

⁵¹ PCIJ, Case Concerning the *Mavrommatis Palestine Concessions*, Series A, No. 2 (1924), p. 35.

⁵² C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), pp. 257 *et seq.*; M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), pp. 118 *et seq.*; G. Hernández, *The International Court of Justice and the Judicial Function* (2014), p. 227.

respondent State must have formally accepted the interstate complaint mechanism under Arts. 41 *et seq.* ICCPR, in that it requires that

“(…) a State Party to the present Covenant may at any time *declare* under this Article *that it recognizes the competence* of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered *only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee.* No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.”⁵³

54. Put otherwise, the ICCPR – unlike and in contrast to CERD – does indeed contain the idea of reciprocity.⁵⁴ In contrast thereto, State Parties of CERD are *ipso facto* subject to the interstate complaint system under Arts. 11-13 CERD once they have ratified the treaty (unless they have entered a valid reservation as to the procedure foreseen in Arts. 11-13 CERD which Israel has not done).

⁵³ Emphasis added.

⁵⁴ United Nations, Human Rights Committee, *General Comment*, UN Doc. CCPR/C/21/Rev. 1/Add 6 (11 November 1994), para. 17.

55. Hence, unlike in the case of the ICCPR, had the drafters of CERD wished to make the right to file a complaint under Arts. 11-13 CERD subject to a condition of reciprocity *ratione temporis*, it was open to them to insert an express condition to that effect; yet they did not insert such a requirement into the treaty.
56. On the whole, any State Party, regardless of when it itself has become bound by CERD, may invoke any violations of CERD by the respondent State that allegedly have taken place after the latter has become bound by CERD. This result stands in line, *inter alia*, with the decision of the European Commission of Human Rights, which had found as early as 1963 in the *Austria versus Italy* interstate case (the so-called *Pfunders* case) that Austria could file an interstate complaint in relation to alleged breaches of the ECHR that had allegedly taken place prior to its own accession to the ECHR.⁵⁵
57. In the already previously mentioned case between Belgium and Senegal, concerning CAT, the same question had come up. There, the Court left the issue open and undecided. It merely stated that Belgium, as the Applicant State, (at least) had been in a position to require compliance from the date of its accession onwards. At the same time, the Court did not, however, unequivocally decide whether such claim would then necessarily be limited

⁵⁵ European Commission of Human Rights, Appl. 788/60, *Austria v. Italy*, in particular pp. 13 *et seq.*, available at: [http://hudoc.echr.coe.int/eng?i=001-115598#{%22itemid%22:\[%22001-115598%22\]}](http://hudoc.echr.coe.int/eng?i=001-115598#{%22itemid%22:[%22001-115598%22]}).

to alleged violations past the date of Belgium's accession given that the claims of Belgium related to a later period anyhow. As the Court then put it:

“The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal's compliance with its obligation under Article 7, paragraph 1 [United Nations Convention against Torture]. In the present case, the Court notes that Belgium invokes Senegal's responsibility for the latter's conduct starting in the year 2000 (...).”⁵⁶

58. *Mutatis mutandis*, the very same issue came up again before the ICJ in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia versus Serbia)*.⁵⁷ There, Serbia, as the respondent State, had claimed that Croatia could not allege violations of the Genocide Convention that had, in Croatia's view, taken place prior to 8 October 1991, *i.e.* the date Croatia had become a contracting party of the Genocide Convention.⁵⁸ Once again, the Court did not decide the issue. Rather, it found that where an overall set of events is involved, the Court may in any

⁵⁶ ICJ, Case Concerning Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), judgment of 20 July 2012, ICJ Rep. 2012, pp. 422 *et seq.* (458), para. 104.

⁵⁷ ICJ, Application of the Convention on the Prevention of the Crime of Genocide (*Croatia v. Serbia*) (3 February 2015).

⁵⁸ ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Counter Memorial submitted by the Republic of Serbia Vol. I (December 2009), paras. 367 *et seq.*

event consider events prior to the critical date and be it only to evaluate what happened thereafter. As the Court put it:

“Serbia’s second alternative argument is that, even if a claim might be admissible in relation to events said to have occurred before the FRY came into existence as a State, Croatia could not maintain a claim in relation to events alleged to have taken place before it became a party to the Genocide Convention on 8 October 1991. The Court observes that Croatia has not made discrete claims in respect of the events before and after 8 October 1991; rather, it has advanced a single claim alleging a pattern of conduct increasing in intensity throughout the course of 1991 and has referred, in the case of many towns and villages, to acts of violence taking place both immediately prior to, and immediately following, 8 October 1991. In this context, what happened prior to 8 October 1991 is, in any event, pertinent to an evaluation of whether what took place after that date involved violations of the Genocide Convention.”⁵⁹

59. In the same vein, and at the very least, the interstate complaint procedure under Arts. 11-13 CERD can thus, even under the jurisprudence of the ICJ,

⁵⁹ ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), judgment of 3 February 2015, ICJ Rep. 2015, pp. 1 *et seq.* (52), para. 119.

focus on events prior to May 2014 to the extent they are interwoven with alleged violations of CERD post-2014.

D. Scope *ratione personae*

60. Closely related to the question of the scope of CERD *ratione loci* is its application *ratione personae* regarding Palestinian citizens. CERD obliges its contracting parties to generally condemn racial discrimination as meaning any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin according to Art. 1 para. 1 CERD. As the discriminatory legal and factual treatment of Palestinians is based on one or several of those condemned grounds, Israel is in violation of its obligation not to racially discriminate.

61. The non-applicability of the Convention as to distinctions, exclusions, restrictions or preferences made by one party between citizens and non-citizens according to Art. 1 para. 2 CERD cannot alter Israel obligations with regard to its treatment of Palestinians in the OPT. Art. 1 para. 2 CERD was never meant to function as a general exclusion as to discriminatory practices that typically form the basis for claims based on *inter alia* Art. 5 CERD.⁶⁰ Such an interpretation would be inherently contradictory to

⁶⁰ See, N. Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination – A Commentary* (1970), pp. 65 *et seq.*

the principle of extraterritorial application of human rights treaties. Rather, Art. 1 para. 2 CERD was, given its object and purpose, directed at providing for the possibility to grant certain privileges to a State's citizen *e.g.* when it comes to the right to vote or particular other rights of citizens.⁶¹

62. Thus, the Committee expressly stated in this regard regarding discrimination against non-citizens:

“Article 1, para. 2, must be construed so as to avoid undermining the basic prohibitions of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedom recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.”⁶²

63. Hence, in order not to arrive at a contradiction with regard to the object and purpose of CERD itself as well as other human rights instruments, Art. 1 para. 2 CERD cannot be interpreted as to allow any kind of discrimination of non-citizens. The Committee thus clearly stated that:

⁶¹ *Ibid.*, p. 43.

⁶² United Nations, Committee on the Elimination of Racial Discrimination, *General recommendation No. 30 on discrimination against non-citizens*, Sixty-fifth session (2005), para. 2.

“Article 5 of the Convention incorporates the obligation of State parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all parties. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.”⁶³

64. Any other interpretation that would generally allow discrimination against non-citizens would even contradict the very idea underlying CERD that aims at eliminating discrimination based on grounds such as race or nationality or descent. Thus, the Committee requires differential treatment to be founded in regard to the right in question and the proportionate limitation of the enjoyment of the respective right:

“Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the

⁶³ United Nations, Committee on the Elimination of Racial Discrimination, *General recommendation No. 30 on discrimination against non-citizens*, Sixty-fifth session (2005), para. 3.

Convention, are not applied pursuant to a legitimate aim, and are not proportionate to the achievements of this aim.”⁶⁴

65. Thus, Art. 1 para. 2 CERD does not allow a *general* exclusion of any and all rights to be denied to non-citizens nor the establishment of a system distinguishing between citizens and non-citizens as is the case of Israel’s policies in the OPT and generally different treatment of Israeli and Palestinians in almost all aspects of life by the Israeli authorities. That is even further supported by Art. 1 para. 3 CERD which explicitly prohibits to discriminate against “any particular nationality”, which is the case with regard to Israel’s treatment towards Palestinian citizens.

66. Even more, what is relevant in the case of Israel is the fact that the power exercised over Palestinian citizens follows from the occupation of Israel. Thus, it is not the Palestinians that subjected themselves to the jurisdiction of Israel. Rather, Israel extended its jurisdiction, illegally, to the OPT and Palestinian citizens, rendering an argument based on non-citizenship of Palestinians in contradiction of the principle *venire contra factum proprium*. Israel rather is *bona fide* under the obligation not to extrude the illegality of its occupation by arguing that its obligations in the OPT allow discriminatory policies based on the non-citizenship of Palestinians living in

⁶⁴ *Ibid.*, para. 4.

their own state's territory but under the occupation and thereby under the effective control, at least with regard to some aspects of life, of Israel.

67. To allow Israel to escape its obligations under CERD by referring to Palestinians as non-citizens, would similarly as South Africa's practice of expelling black people to the Bantustans and treating them as non-citizens, contradict the very object and purpose of CERD.

E. Ineffectiveness of local remedies

68. Art. 11 para. 3 CERD provides that [t]he [CERD] Committee shall deal with an interstate complaint only

“(...) after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law (...)”

unless

“(...) the application of the remedies is unreasonably prolonged”⁶⁵,

⁶⁵ This exception is provided for in most human rights treaties, see: Art. 41 para. 1 lit. c ICCPR, Art. 5 para. 2 lit. b Optional Protocol to the ICCPR; Arts. 21 para. 1 lit. c, 22 para. 4 lit. B CAT; Arts. 76 para. 1 lit. c, 77 para. 3 lit. b International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); Arts. 3 para. 1, 10 para. 1 lit. c Optional Protocol to the ICESCR; Art. 7 lit. e Optional Protocol to the CRC; Art. 31 para. 2 lit. d CED; Art. 46 para. 2 American

a requirement also applicable when it comes to individual communications under Art. 14 CERD⁶⁶, as well as required under other human rights treaties, both for inter-State and individual complaints.⁶⁷ The fact that local remedies only have to be exhausted “in conformity with the generally recognized principles of international law” has been interpreted to exclude clearly fruitless or ineffective remedies.⁶⁸

69. More specifically, only remedies available to individual victims, rather than the whole group suffering from racial discrimination need not be exhausted.⁶⁹ Besides, where the complaining State, *i.e.* in the case at hand Palestine, asserts violations of the Covenant due either to laws in conflict with treaty obligations or to the general administrative practice of the respondent State, *i.e.* Israel, then the former need not prove that individual persons resorted to remedies.⁷⁰

Convention on Human Rights (ACHR); Arts. 50, 56 para. 5 African Charter on Human and People’s Rights (ACHPR). Art. 35 European Convention on Human Rights (ECHR) does not include an explicit exception to the exhaustion of local remedies rule.

⁶⁶ Art. 14 para. 7 lit. a CERD.

⁶⁷ See, *e.g.* Art. 41 para. 1 lit. c ICCPR; Art. 5 para. 2 lit. b Optional Protocol to the ICCPR; Arts. 21 para. 1 lit. c, 22 para. 4 lit. B CAT; Arts. 76 para. 1 lit. c, 77 para. 3 lit. b CMW; Arts. 3 para. 1, 10 para. 1 lit. c Optional Protocol to the ICESCR; Art. 7 lit. e Optional Protocol to the CRC (on individual communications); Art. 31 para. 2 lit. d CED (on individual communications); Art. 35 ECHR; Art. 46 para. 1 ACHR; Arts. 50, 56 para. 5 ACHPR; Art. 12 Optional Protocol to CRC as well as Art. 32 CED do not explicitly require the exhaustion of local remedies in inter-State complaint procedures.

⁶⁸ See, for the respective provision under the ICCPR, M. Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd ed. 2005), pp. 769 *et seq.*

⁶⁹ See, *mutatis mutandis* for the identical provision in Art. 21 CAT M. Nowak/ E. McArthur, *The United Nations Convention Against Torture – A Commentary* (2008), p. 715.

⁷⁰ See, for the respective provision under the ICCPR M. Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd ed. 2005), p. 770.

70. However, the violations of CERD by Israel, when it comes to the OPT, have, as in the case of the discriminatory planning regime, either been considered by the Israeli Supreme Court to be legal after they had been challenged,⁷¹ or constitute a general practice based on a general policy by the State of Israel rather than mere individual violations of CERD.⁷²

71. Finally, it ought to be noted that Israel has officially taken the position that CERD does not apply to its acts in the OPT. Hence, ever since 1979 (*i.e.* when it became a contracting party of CERD) it *a limine* rejected any claim that its acts in the OPT might amount to acts of racial discrimination in violation of CERD. This in turn bars Israel from now claiming that the victims of racial discrimination ought to have exhausted local remedies before Palestine triggers the interstate complaint procedure under Arts. 11-13 CERD, since Israel would have rejected any possibility of CERD violations taking place in the OPT in the first place.

72. On the whole, Art. 11 para. 3 CERD therefore does not bar Palestine from bringing an interstate complaint against Israel.

⁷¹ See, Israeli Supreme Court, *Deirat-Rafaiya Village Council et al. v. Minister of Defense et al.*, HCJ 5667/11, judgment of 9 June 2015.

⁷² See, *infra* IV-VII.

F. Israel's obligation to cooperate and irrelevance of a possible non-appearance by the respondent State

1. Israel is under an obligation to cooperate

73. In order to be able to make a thorough investigation about the complaint brought by Palestine, the Committee and the Commission respectively may undertake fact-finding missions and request information from Palestine as well as Israel that is necessary with regard to assessing the legal and factual situation prevailing in the OPT.⁷³

74. For one, it is worth noting that Art. 11 para. 1, 3rd sentence, CERD contains a legally binding obligation ('shall') of the receiving State to "submit to the Committee written explanations or statements clarifying the matter" which forms the subject-matter of the complaint. Similarly, according to Rule 70 of the Rules of Procedure:

"The Committee may call upon the States parties concerned to supply information relevant to the application of article 11 of the Convention. The Committee may indicate the manner as well as the time within which such information shall be supplied."⁷⁴

⁷³ See, F. Viljoen, *Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms*, Max Planck Yearbook of United Nations Law, 8 (2004), pp. 49-100; B. G. Ramcharan, *International Law and Fact-Finding in the Field of Human Rights* (2014), pp. 39 *et seq.*

⁷⁴ Rule 70, Rules of procedure of the Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/35/Rev. 3 (1 January 1986).

75. In that regard, Palestine is willing to actively participate and support any queries by the Committee to the fullest extent possible. However, it should be noted that due to the special circumstances prevailing in the OPT, pertinent information regarding legal, as well as factual questions with regard to some aspects of life and questions of discriminatory practices can only be provided by Israel, which exercises *de facto* control in large parts of the OPT.
76. If an interstate complaint is brought against another State party, *i.e.* Israel, it follows from the object and purpose of the interstate complaint procedure as the mandatory mechanism to settle questions of violations under CERD between State parties that the responding state is under an obligation to cooperate with the CERD Committee/ the *ad hoc* Commission.
77. In this regard, as the Human Rights Committee has recently noted concerning procedures under the ICCPR and its Optional Protocol, by becoming a contracting party of any one of the major human rights treaties, States enter not only into an obligation to abide by the underlying substantive obligation, but enter also into an obligation to *bona fide* cooperate with the respective treaty body. This holds even more true, where, like in the case at hand, the procedure is not (like in the case of the individual complaint procedure under the ICCPR) optional, but forms an integral part of the

treaty system. To paraphrase the position of the Human Rights Committee's position which Palestine fully shares:

“(...) Implicit in a State's adherence to [CERD] is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such [inter-state complaints], and after examination to forward its views to the State party (...) concerned). (...) It is incompatible with these obligations for a State party to take any position that would prevent or frustrate the Committee in its consideration and examination of the [complaint] and the expression of its views. (...) The Committee observes that, by failing to accept the Committee's determination whether a[n] [inter-state complaint] shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility and the merits of the [complaint], the State party violates its obligations under [CERD].”⁷⁵

78. Hence, Israel is under an obligation to provide access, as well as to provide all necessary information in order for the CERD Committee to be in a position to make a finding on Israel's obligations arising under CERD ever since it had become a State party to in 1979,⁷⁶ thereby generally committing

⁷⁵ See, *mutatis mutandis* *Kovalev v. Belarus*, CCPR/C/106/D/2120/2011, para. 9.2. [footnotes omitted].

⁷⁶ See, status of ratification at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en.

itself to fulfil all obligations arising under CERD on the one hand and to allow evaluation of its compliance of CERD on the other hand by the mechanism laid out in Arts. 11-13 CERD.

79. In case Israel were to deny cooperation, and even hinder the Committee or the Commission respectively in fulfilling its mandate, this alone would have to be regarded as constituting a stand-alone violation of CERD.

2. Israel's treaty-based obligation to participate in the CERD interstate complaint proceedings

80. Neither Arts. 11-13 CERD, nor indeed any of the other interstate complaint procedures contained in one of the universal human rights treaties, such as the ICCPR, provide for situations of non-appearance by the respondent State. Put otherwise, CERD does not contain a provision akin to Art. 53 ICJ Statute. Accordingly, *argumentum e contratio*, CERD is to be understood as implying a legal obligation of all contracting parties to participate in the proceedings in case an interstate complaint is being brought, and once the CERD Committee (and eventually the *ad hoc* Commission), has found the complaint to be admissible, and that it has jurisdiction to entertain the complaint.

81. Indeed, as set out *inter alia* by a former member of CERD *Judge Wolfrum* with regard to a structurally parallel situation (*i.e.* the situation under UNCLOS), wherever a treaty provides for a mandatory, compulsory dispute settlement procedure (such as is the case of CERD, and specifically its Arts. 11-13 CERD), States are under a legal obligation to participate in such proceedings once a case has been validly brought. As *Judges Wolfrum and Kelly* put it:

“(...) the Order of the Tribunal could have shed some further light on how non-appearance is to be seen under a mandatory dispute settlement system (...) The non-appearing party not only weakens its own position concerning the legal dispute but also hampers the other party in its pursuit of its rights and interests in the legal discourse of the proceedings in question. But, more importantly, it hinders the work of the international court or tribunal in question. The international court or tribunal may in such a situation have to rely on the facts and the legal arguments presented by one side without having the benefit of hearing the other side. This cannot be fully compensated by recourse to facts which are in the public domain. However, there is a more fundamental consideration to be mentioned. In the case of States having consented to a dispute settlement system in general (...) non-appearance is contrary to the object and purpose of the dispute settlement system (...)

surely (...) the non-appearing State remains a party to the proceedings and is bound by the decisions taken. However, essential as this may be, this does not cover the core of the issue. Judicial proceedings are based on a legal discourse between the parties and the co-operation of both parties with the international court or tribunal in question. Non-appearance cripples this process.”⁷⁷

82. Hence, Israel cannot escape the interstate proceeding by not cooperating and non-appearing in the proceeding.

3. Irrelevance of non-appearance by the respondent state

83. Given that so far no interstate complaint mechanism has ever been used, there exists no relevant practice on the matter. However, both the CERD Committee under Art. 11 CERD, as well as an *ad hoc* Commission to be created under Arts. 12-13 CERD, may proceed with an interstate complaint even in case on non-appearance by the respondent State.

⁷⁷ International Tribunal for the Law of the Sea, *The Arctic Sunrise Case*, Provisional Measures, Separate Opinion Wolfrum and Kelly, paras. 5 *et seq.*, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_sep_op_Wolfrum-Kelly_rev_Eng.pdf.

84. For lack of any guidance by way of a specific rule in the treaty at hand, *i.e.* CERD, one has to apply regular rules of treaty interpretation, as having been codified in the Vienna Convention on the Law of Treaties.
85. As already stressed above,⁷⁸ given the obligation set out in Art. 11 para. 1 3rd sentence of CERD, it would seem contrary to the very text of the treaty, if the respondent State could, by simply not appearing or participating in the proceedings, undercut its very *raison d'être*. This is further supported by Rule 70 of the CERD Committee's Rules of Procedure.
86. At the same time, Art. 11 para. 5 CERD provides that both sides "shall be entitled to send a representative to take part in the proceedings of the Committee (...) while the matter is under consideration." That presupposes, however, that even where a party does not make use of this entitlement, the Committee may nevertheless consider the matter and move further ahead with the proceedings.
87. Art. 12 para. 1 lit. b CERD may be considered as yet another indication that the treaty did not want one of the parties to the proceedings to be able to prevent them from continuing even when it comes to its second phase before the *ad hoc* Commission. Said provision provides that

⁷⁸ See *supra* para. 82.

“(…) [i]f the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected (…) by a two-thirds majority vote of the Committee from among its own members.”

88. By providing for such a fall-back mechanism, when faced with a non-cooperating party to the dispute, the text indicates that such (partial or total) lack of cooperation ought not to hinder the proceedings to move forward.

89. What is more is that Art. 12 para. 7 CERD empowers the Secretary-General of the United Nations

“(…) to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute”

takes place. This is yet another, additional hint that even when one party to the dispute attempts to frustrate the work of the Commission by not covering its part of the expenses of the said Commission, this ought not to stop its work.

90. The very text of the relevant treaty provisions thus makes it clear that even when the respondent State is not at all (or at least partially not) participating in the proceedings they may still move ahead. This result is further buttressed by an interpretation in line with the treaty's object and purpose. If one were to indeed accept that the respondent State, by simply not participating in the proceedings, could bar both, the CERD Committee and the *ad hoc* Commission (or either of them), from considering the complaint, this would effectively enable such State to frustrate one of the specific supervisory mechanisms *expressis verbis* foreseen in the treaty, and designed, contrary to other human rights treaties, to be of a mandatory nature.
91. Put otherwise, empowering a respondent State to simply interrupt proceedings under Arts. 11-13 CERD by not appearing would provide for an opt-out possibility contrary to its very compulsory character, as envisaged in CERD.
92. On the whole, non-appearance or lack of cooperation by the respondent State does not hinder neither the Committee under Art. 11 CERD, nor indeed an *ad hoc* Commission under Arts. 12-13 CERD, to proceed with this case.

93. Besides, Israel is under the obligation not to undertake any measure that would prejudice or further escalate the dispute; especially, it is barred from building new settlements in the West-Bank that would further violate the rights of Palestinians. In line with the Human Rights Committee's recent position

“(…) [i]t is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views [footnote 15].”⁷⁹

94. In particular, Israel may not take action that would render any finding by the CERD Committee/ the *ad hoc* Commission redundant or that would render the secondary obligation of Israel as a State party of CERD to comply with its obligation to *restitution in integrum* more difficult or even impossible.⁸⁰

95. Regarding the situation in the OPT, Israel is especially under an obligation not to further exacerbate the situation especially due to an increase in

⁷⁹ *Kovalev v. Belarus*, CCPR/C/106/D/2120/2011, para. 9.2.

⁸⁰ *Kovalev v. Belarus*, CCPR/C/106/D/2120/2011, para. 9.4 : “Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or to frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile.”

settlements that would make re-establishing the rights of the Palestinians in the OPT impossible or increasingly difficult.

96. In this regard it is worth recalling that in the recent dispute between the Philippines and the People's Republic of China, in which the PRC declared that it would not participate or accept the tribunal's decision, the Arbitral Tribunal found the PRC to be under obligation not to aggravate or extend the dispute once it has been brought before an International Tribunal, especially if irreparable harm is caused:

“The Tribunal held that ‘there exists a duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process’, which exists independently of any order by a court or tribunal to this effect.”

97. Hence, in any case, Israel is under an obligation not to undertake or support any action that would further frustrate and violate the rights of Palestinians under CERD or that might be found to be in breach of Israel's obligations arising under CERD.

III. Contextualisation

A. Context and background of this complaint

98. The State of Palestine, a State Party of CERD, is duty bound towards its citizens to protect and safeguard their rights from abuse, domestically and otherwise. As a State whose territory remains under a foreign belligerent military occupation, the State of Palestine is subjugated to foreign policies imposed upon its citizens for the purpose of maintaining a colonial occupation whose actions aim to displace and replace the indigenous Palestinian population.

99. In this regard, the State of Palestine will take the unprecedented step of lodging an interstate complaint against another member State of CERD in line with its duty to protect its citizens from discrimination and other practices and policies that violate CERD obligations.

100. This introduction is meant to shed light on the context in which Israel's discriminatory policies and practices are taking place, their background and purpose so as to understand how these policies are not meant to stand alone, but rather how they interplay with each other, culminating in the displacement and replacement of Palestinians.

101. In the course of its 50 years of military occupation of Palestine, Israel has consistently flouted its obligations under international humanitarian law, resulting in the wide and systematic denial of the rights of the Palestinian people. Additionally, Israel has consistently refused to recognize its legal obligations as an occupying Power despite the large volume of UN resolutions, outcome documents of High Contracting Parties to the Geneva Conventions, as well as the advisory opinion on the legal consequences of the construction of the Wall, rendered by the International Court of Justice on 9 July 2004.

102. The prolonged Israeli occupation, as well as systematic and widespread violations of its legal obligations as an occupying Power, have resulted in a situation whereby the occupying Power employs a set of policies that include demographic engineering, displacement of the Palestinian population through a variety of policies and practices with the aim of replacing them with Israeli Jewish citizens, in violation of CERD.

103. The differential treatment of Israeli Jews and Palestinians in the OPT squarely falls within the CERD's definition of racial discrimination. Art.1 CERD makes it clear that racial discrimination is not limited to a distinctive treatment based on race alone, but also extends to "colour, descent or national or ethnic origin".

104. The CERD Committee itself has already established the existence of "two groups"⁸¹ living in the Occupied Palestinian Territory that give rise to the application of different laws, policies and practices for Palestinians on the one hand, and for Israeli Jews on the other hand.

105. Thus, in determining the existence of a separate dual system for two separate groups, the CERD Committee confirmed the existence of differential treatment, prohibited by, and falling within the meaning of racial discrimination in, CERD.⁸²

106. While the various aspects of this complaint under CERD all relate to violations of protected rights that are based on and constitute racial discrimination, it is important not to lose sight of the context and purpose through which Israel's discriminatory policies are being implemented. Israel employs an intricate set of policies and practices that are not devised to stand alone, but rather are meticulously calculated to culminate to the desired aim of creating and maintaining a Jewish demographic majority in the entirety of historic Palestine⁸³ by displacing and replacing Palestinians. In the occupied

⁸¹ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/14-16 (9 March 2012), p.6, para.24

⁸² United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/13 (14 June 2007), pp. 8-9, paras. 32 and 35.

⁸³ The current state of Israel plus the OPT.

State of Palestine⁸⁴ specifically, this is mainly done through the settlement regime. Since the beginning of the occupation in 1967, some 250 distinct settlements have been established in the OPT, including East Jerusalem.⁸⁵

107. As a direct result of the implementation of discriminatory policies, Israeli settlements continue to expand at an exponential rate, with a 26 per cent increase of construction of new settlements from 2014 to 2015 in the West Bank alone.⁸⁶ This incessant and ever increasing land grab clearly brings down the façade of occupation to reveal Israel's true colonial intentions.

108. Not only is the purpose of the settlement regime discriminatory in itself; it is further maintained by a system of discriminatory measures imposed to the severe ongoing detriment of the Palestinian people and in violation of its fundamental rights. These colonizing measures include, *inter alia*, the construction and expansion of the Annexation Wall, the confiscation of large areas of Palestinian land under unlawful and false pretexts, the forced

⁸⁴ Based on the pre-1967 borders.

⁸⁵ United Nations, Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63 (7 February 2013), para. 28. This figure includes the 100 so-called “outposts” established in the OPT. The term “outposts”, which describes Israeli settlements that have been established “unofficially” and are considered illegal even under Israeli national legislation, will be used where relevant, bearing in mind that no difference exists in international law between “settlements” and “outposts” or any other structure erected for the implantation of settlers in the OPT. See also, B’Tselem, *Statistics on Settlements and Settler Population* (updated 11 May 2015), available at: <http://www.btselem.org/settlements/statistics>.

⁸⁶ United Nations, Office for the Coordination of Humanitarian Affairs, ‘*Fragmented Lives – Settlements: A Key Driver of Humanitarian Vulnerability*’ (13 June 2016), available at: <http://www.ochaopt.org/content/2015-overview-settlements-key-driver-humanitarian-vulnerability>.

eviction of Palestinian civilians from their homes, the destruction of Palestinian homes and structures used for livelihood, the illegal appropriation of land, as well as the facilitation of the transfer of hundreds of thousands of Israeli citizens, estimated to amount to 700.000 to 800.000, to the OPT, and the illegal exploitation of Palestine's natural resources.

109. The impact of Israel's settlement regime on the Palestinian people is immense and far-reaching. The myriad of policies associated with the colonial settlement regime severely deprive Palestinians of their fundamental rights including, *inter alia*, their basic rights to self-determination;⁸⁷ human dignity; freedom of movement; property and livelihood; access to justice, to education and other basic services; freedom of worship; family life and privacy; security; and freedom from discrimination and inhuman treatment.

110. What makes Israel's continued settlement policies and practices so egregious is that it continues to act this way, despite the peremptory prohibition of colonization under international law, and in defiance of the international

⁸⁷ The UN-commissioned International Fact-Finding Mission on Israeli Settlements in the Occupied Palestinian Territory affirmed that, "the establishment of the settlements in the West Bank, including East Jerusalem (...) is a mesh of construction and infrastructure leading to a creeping annexation that prevents the establishment of a contiguous and viable Palestinian State and undermines the right of the Palestinian people to self-determination.", United Nations, Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory*, including East Jerusalem, UN Doc A/HRC/22/63 (7 February 2013), para 101.

community's repeated and adamant condemnation of its conduct.⁸⁸ Over the last fifty years, the UN Security Council,⁸⁹ General Assembly⁹⁰ and the

⁸⁸ United Nations, General Assembly, *'Declaration on the Granting of Independence to Colonial Countries and Peoples'*, UN Doc. A/RES/1514(XV) (14 December 1960).

⁸⁹ See for example, UNSC, Resolutions finding Israel in violation of international law: UN Docs. S/RES/[242](#) (1967) (“Affirms that the fulfilment of [UN] Charter principles requires the establishment of a just and lasting peace in the Middle East which should include...[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict...”); [446](#) (1979); [452](#) (1979) (“[P]olicy of Israel in establishing settlements...constitutes a violation of the Fourth Geneva Convention”); [465](#) (1980) (“[M]easures taken by Israel to change the ...demographic composition ...of the Palestinian territories... constitute a flagrant violation of the Fourth Geneva Convention”); [476](#) (1980); [478](#) (1980) (“Affirms that the enactment of the “basic law” [on Jerusalem] constitutes a violation of international law”); [2334](#) (2016) (“Condemning all measures aimed at altering the demographic composition, character and status of the Palestinian...Reaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law...”).

⁹⁰ See for example, UNGA, Resolutions finding Israel in violation of international law: **1967**: UN Docs. A/RES/[2253](#); **1971**: [2851](#); **1972**: [3005](#) (“[T]he establishment of Israeli settlements in the occupied territories and the moving into the occupied territories of an alien population, contrary to the provisions of the Geneva Convention.”); **1973**: [3092](#); **1974**: [3240](#) (“Expresses the gravest concern at the continued and persistent disregard by Israel of the Geneva Convention...”); **1975**: [3525](#) (“Deplores the continued and persistent violation by Israel of the Geneva Conventions...”); **1976**: [31/106](#); **1977**: [32/91](#); **1978**: [33/113](#); **1979**: [34/90](#) (“Deplores the continued and persistent violation by Israel of the Geneva Conventions relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and other applicable international instruments, and condemns in particular those violations which that Convention designates as ‘grave breaches’ ...”); **1980**: [35/122](#), [35/207](#) (“Deeply concerned that the Arab and Palestinian territories occupied since June 1967, including Jerusalem, still remain under illegal Israeli occupation”); **1981**: [36/147](#); **1982**: [37/88](#) (“Determines that all such measures and actions taken by Israel in the Palestinian ...territories ..., including Jerusalem, are in violation of the relevant provisions of the Geneva Convention”); **1983**: [38/79](#); [38/166](#); **1984**: [39/95](#); **1985**: [40/201](#); **1986**: [41/63](#); **1987**: [42/160](#), [42/190](#); **1988**: [43/58](#); **1989**: [44/48](#)(Israel’s actions constitute grave breaches of Geneva Convention). **1990**: [45/74](#); [45/130](#); **1991**: [46/47](#); [46/82](#); [46/162](#); [46/199](#); **1992**: [47/70](#); **1993**: [48/41](#); **1994**: [49/36](#); **1995**: [50/29](#); **1996**: [51/135](#); [51/132](#); [51/133](#); **1997**: [51/223](#); [52/67](#); [52/65](#); **1998**: [ES-10/5](#) [Emergency Session]; [53/37](#) (“Determines that the decision of Israel to impose its laws, jurisdiction and administration on the Holy City of Jerusalem is illegal and therefore null and void and has no validity whatsoever”); [53/56](#); [53/57](#); **1999**: [ES-10/6](#) [Emergency Session]; [54/37](#); [54/76](#); [54/78](#); [54/79](#). **2000**: [ES-10/7](#); [55/130](#); [55/132](#); [55/134](#); **2001**: [55/61](#); [55/62](#); [ES-10/9](#) [Emergency Session] (“Recalling relevant provisions of the Rome Statute of the International Criminal Court, Reaffirming the position of the international community on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, as illegal and as an obstacle to peace, Expressing its concern at Israeli actions taken recently against the Orient House and other Palestinian institutions in Occupied East Jerusalem as well as other illegal Israeli actions aimed at altering the status of the city and its demographic composition”); **2002**: [ES-10/L.9/Rev.1](#) (*Gravely concerned in particular at the reports of grave breaches of international humanitarian law committed in the Jenin refugee camp and other Palestinian cities by the Israeli occupying forces*); [57/127](#); **2003**: [58/96](#); **2004**: [59/123](#); [59/121](#); **2005**: [60/108](#); [60/106](#); **2006**: [ES-10/16](#); [61/118](#); **2007**: [62/84](#); [62/109](#); **2008**: [63/98](#); **2009**: [64/91](#); [64/94](#). **2010**: [65/17](#) (“Expressing its grave concern also, in particular, about the continuation by Israel, the occupying Power, of illegal settlement activities”); [65/102](#) (“Expresses grave concern about the critical situation in the Occupied Palestinian Territory, including East Jerusalem, particularly in the Gaza Strip, as a result of unlawful Israeli practices and measures...”); [65/103](#); [65/104](#) (“Affirming that the transfer by the occupying Power of parts of its own civilian population into the territory it occupies constitutes a breach of the Fourth Geneva Convention and relevant provisions of customary law, including those codified in Additional Protocol I to the four Geneva Conventions”); and [65/179](#). **2011**: [66/18](#), [66/76](#) (“Convinced that occupation itself represents a gross and grave violation of human rights”); [66/225](#); [66/77](#); [66/78](#) (Affirming transfer of Jewish Israeli citizens into occupied territory is a breach of the Fourth Geneva Convention and customary international law); [66/79](#) (“Gravely concerned by reports regarding serious human rights violations and grave breaches of international humanitarian law committed during the military operations in the Gaza Strip between December 2008 and

Human Rights Council⁹¹ have passed numerous resolutions recognizing that Israeli settlements on Occupied Palestinian Territory, as well as the Israeli treatment of the Palestinian people, are in violation of international law. Additionally, several UN fact-finding commissions have found credible and reliable evidence that soundly corroborate the conclusion that these Israeli violations of international law have been committed by Israeli forces and officials in the State of Palestine.⁹²

January 2009”). **2012:** [67/24](#); [67/118](#) (“*Convinced* that occupation itself represents a gross and grave violation of human rights); [67/119](#); [67/121](#) (“*Expressing grave concern* about the continuing systematic violation of the human rights of the Palestinian people by Israel”); [67/229](#) (“*Expressing its grave concern* about the extensive destruction by Israel, the occupying Power, of agricultural land and orchards in the Occupied Palestinian Territory, including the uprooting of a vast number of fruit-bearing trees and the destruction of farms and greenhouses, and the grave environmental and economic impact in this regard”). **2013:** [68/16](#); [68/80](#) (“*Gravely concerned in particular* by reports regarding serious human rights violations and grave breaches of international humanitarian law committed during the military operations in the Gaza Strip between December 2008 and January 2009”); [68/81](#); [68/82](#) (“*Affirming* that the transfer by the occupying Power of parts of its own civilian population into the territory it occupies constitutes a breach of the Fourth Geneva Convention and relevant provisions of customary law, including those codified in Additional Protocol I to the four Geneva Conventions”); [68/83](#) (“*Expressing grave concern* about the continuing systematic violation of the human rights of the Palestinian people by Israel, the occupying Power”). **2014:** [69/90](#); [69/91](#); [69/92](#) (“*Aware* that Israeli settlement activities involve, inter alia, the transfer of nationals of the occupying Power into the occupied territories, the confiscation of land, the forced transfer of Palestinian civilians... that are contrary to international law”); [69/93](#). **2015:** [70/87](#) (“*Expressing grave concern* about tensions, instability and violence in the Occupied Palestinian Territory, including East Jerusalem, due to the illegal policies and practices of Israel...”); [70/88](#); [70/90](#). **2016:** [71/95](#); [71/96](#); [71/97](#); [71/98](#).

⁹¹ See, United Nations Information System on the Question of Palestine website for resolutions from the Human Rights Council (and Commission on Human Rights).

⁹² See for example, United Nations, Human Rights in Palestine and other Occupied Arab Territories: *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, [UN Doc. A/HRC/12/48](#) (25 September 2009); *Report of the Secretary-General on the Progress Made in the Implementation of the Recommendations of the Fact-Finding Mission on the Gaza Conflict*, UN Doc. [A/HRC/21/33](#), (21 September 2012); *Report of the Secretary-General on the Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. [A/HRC/24/30](#) (22 August 2013); *Implementation of the Recommendations Contained in the Report of the Independent Fact-finding Mission - Report of the United Nations High Commissioner for Human Rights*, UN Doc. [A/HRC/28/43](#), (12 January 2014); *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan - Report of the Secretary-General* [UN Doc. A/HRC/25/38](#), (12 February 2014); *Report of the United Nations High Commissioner for Human Rights, Addendum on the Human Rights Situation in the Occupied Palestinian Territory between 12 June and 26 August 2014, including the Escalation in Hostilities Between the State of Israel and Palestinian Armed Groups in Gaza*, UN Doc. [A/HRC/28/80/Add.1](#), (26 December 2014); *Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. [A/HRC/28/45](#) (5 March 2015); *Israeli Settlements in the Occupied Palestinian Territory - Report of the Secretary-General*, UN Doc. [A/HRC/28/44](#) (9 March 2015); *Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Security Council Resolution S-21/1*, UN Doc. [A/HRC/ 29/52](#) (24 June 2015) and *Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict*, UN Doc. [A/HRC/29/CRP.4](#) (24 June 2015); *Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High*

111. The State of Palestine is comprised of one territory, fragmented only by the diverse policies applied by the occupying Power.⁹³ It ought to be noted that an important part of this complaint brought by the State of Palestine under Arts. 11-13 CERD against Israel for its violations of CERD concerns the situation in the West Bank and in East Jerusalem. This is due, in particular, to the illegal presence of a large number of Israeli nationals in those parts of the territory of the State of Palestine, which makes the discriminatory nature of Israel's policies even more blatant. The complaint also encompasses, however, violations of CERD *vis-à-vis* the Palestinian population living in the Gaza Strip.

112. While certain aspects of those violations, when it comes specifically to the Gaza Strip, are addressed in more detail in the respective substantive part of the complaint, it ought to be generally noted that the definition of racial discrimination in Art. 1 CERD is not limited to discriminatory distinctions as such, *i.e.* to comparative treatment between different races, as defined by CERD, which are present on the same territory. Rather, Art. 1 CERD also

Commissioner and the Secretary-General, UN Doc. [A/HRC/31/44](#), 20 January 2016; *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem - Report of the Secretary-General*, UN Doc. [A/71/364](#) (30 August 2016).

⁹³ An outdated denomination Area A, B and C is often used to refer to areas of the State of Palestine's territory maintained illegally under Israeli military and civil control. While such a reference could be made for practical reasons, it must not be interpreted as approving or legitimizing any distinction in status between these areas and the rest of the occupied State of Palestine and aims solely at factually reflecting the level Israeli control over these areas.

encompasses forms of exclusion and restriction. This is brought out by the very text of Art. 1 CERD which *inter alia* provides:

“In this Convention [*i.e.* CERD], the term ‘racial discrimination’ shall mean any (...) *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.”⁹⁴

113. Indeed, the categories of prohibited acts listed in Art. 1 CERD were meant to cover all types of acts based on racial motivation.⁹⁵ This was further confirmed by the CERD Committee, which, in its General Recommendation No. 32, stated that it is “[t]he principle of enjoyment of human rights on an equal footing” which is “integral to the Convention’s prohibition of discrimination.”⁹⁶

114. While racial discrimination in the form of *de jure* discrimination might thus be more apparent throughout the West Bank, including East Jerusalem, due to the application of two different legal systems in one territory on the basis

⁹⁴ Emphasis added.

⁹⁵ N. Lerner, *Group Rights and Discrimination in International Law* (1991), p. 48 – 49.

⁹⁶ United Nations, Committee on the Elimination of Racial Discrimination, *General Recommendation 32 (Meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination)*, UN Doc. CERD/C/GC/32 (24 September 2009), para. 7.

of race, Israel is also exercising racial discrimination *vis-à-vis* the Palestinian population in the Gaza Strip, where such discrimination exists in the form of exclusion and restriction, as defined in Art. 1 CERD.

115. Discrimination against Palestinians in the Gaza Strip is confirmed by the CERD Committee's own practice when dealing with Israel's State reports. *Inter alia*, after noting Israel's "blockade on the import of construction materials into the Gaza Strip (Articles 2, 3 and 5 of the Convention),"⁹⁷ which until today continues to be applied by Israel *vis-à-vis* Gaza, the CERD Committee established that the Israeli blockade of Gaza constitutes a violation of CERD. In its 2012 Concluding Observations it thus stated that:

"(...) [t]he State party [*i.e.* Israel] should (...) rescind its blockade policy and urgently allow all construction materials necessary for rebuilding homes and civilian infrastructures into the Gaza Strip so as to ensure respect for Palestinians' right to housing, education, health, water and sanitation *in compliance with the Convention*."⁹⁸

116. The CERD Committee itself has thus recognized the discriminatory nature of the blockade of Gaza, which amounts to violations of Arts. 2, 3 and 5

⁹⁷ United Nations, Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/ISR/CO/14-16 (9 March 2012), para. 26.

⁹⁸ *Ibid*; emphasis added.

CERD, including the right to movement, given that Palestinians living in Gaza are not in a position to travel to other parts of Palestine (nor indeed *vice versa*) without obtaining special permission from Israel, which are only granted in exceptional basis, if at all.

117. Accordingly, the fact that Israel's discriminatory policies targeting the Palestinian population living in the West Bank, including East Jerusalem, are set out in detail in the complaint, ought not to be misunderstood, or misconstrued, as any form of acknowledgment, by Palestine, that in other parts of the OPT, namely Gaza, such discrimination does not exist at least to the same extent, albeit in the form of exclusion, as defined in Art. 1 CERD.

B. Irrelevance of simultaneous applicability of international humanitarian law

118. Although the OPT constitutes an occupied territory within the meaning of both, The Hague Regulations on Land Warfare (as having codified customary law on the matter), as well as the 4th Geneva Convention, the applicability of CERD is not barred by the simultaneous applicability of rules of international humanitarian law.

119. As the ICJ has frequently stated, human rights treaties do continue to apply even in time of armed conflict.⁹⁹ As the Court put it already in its Nuclear Weapons advisory opinion with regard to the ICCPR, which considerations apply *mutatis mutandis* also to CERD:

“The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. (...) The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”¹⁰⁰

120. Specifically, with regard to the OPT, the ICJ confirmed and reiterated this view in its Advisory Opinion dealing with the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* when stating that

⁹⁹ ICJ, Case Concerning the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 1996, pp. 226 *et seq.* (240), para. 25; ICJ, Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et seq.* (177), para. 105; ICJ, Case Concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination (*Georgia v. Russian Federation*), Order on provisional measures, ICJ Rep. 2008, pp. 353 *et seq.* (387), para. 112.

¹⁰⁰ ICJ, Case Concerning the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 1996, pp. 226 *et seq.* (240), para. 25.

“(…) the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”¹⁰¹

121. Having said this, the Court then continued to consider violations, by Israel, of the guarantees contained in the ICCPR, the ICESCR, as well as the Right of the Child, thus taking it for granted that the applicability of those treaties was not barred by virtue of rules of international humanitarian law constituting *lex specialis*.

122. Explicitly with regard to CERD, the ICJ confirmed in the Georgian-Russian case that the guarantee of CERD may even apply in the context of an armed

¹⁰¹ ICJ, Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et seq.* (177), para. 105.

conflict. The Court stated in its order on provisional measures in the said case:

“Whereas, in the view of the Court, the Parties disagree with regard to the applicability of Articles 2 and 5 CERD in the context of the events in South Ossetia and Abkhazia; (...) whereas, moreover, the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, *even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law.*”¹⁰²

123. Specifically concerning the prohibition of (racial) discrimination as forming part of international humanitarian law, it is worth noting in particular Art. 27 para. 3 4th Geneva Convention, which *inter alia* provides that

“(...) all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race (...)”.

124. Art. 27 para. 3 4th Geneva Convention thus only prohibits discrimination among various groups of protected persons. This prohibition is however not

¹⁰² ICJ, Case Concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination (*Georgia v. Russian Federation*), Order on provisional measures, ICJ Rep. 2008, pp. 353 *et seq.* (387), para. 112; emphasis added.

applicable when it comes to alleged discriminatory practices between the local Palestinian population on the one hand, and Israeli citizens having been transferred into the OPT (*i.e.* Israeli settlers) on the other, the latter not being protected persons within the meaning of the 4th Geneva Convention.

125. Accordingly, international humanitarian law does not, by the same token, contain a *lex specialis* that would bar the applicability of otherwise applicable human rights norms protecting against discrimination.

IV. Violations of Art. 5 CERD

A. Non-exhaustive character of Art. 5 CERD

126. Art. 1 CERD defines racial discrimination in broad terms as “*any* distinction, exclusion, restriction or preference”¹⁰³. It accordingly encompasses measures that

“(…) impair (…) 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.*”¹⁰⁴

¹⁰³ Emphasis added.

¹⁰⁴ Emphasis added.

127. This broad, non-exhaustive, character of prohibited measures covered by CERD is further confirmed, if ever there was need, by the equally authentic French text of Art. 1 CERD which in the same vein refers to

“(…) *toute* distinction, exclusion, restriction ou préférence fondée sur la race, la couleur, l'ascendance ou l'origine nationale ou ethnique”

leading to discrimination in *any* field of public life (“ou dans *tout autre* domaine de la vie publique” in the French text)

128. This open-ended character of CERD is also reflected in, and confirmed by, Art. 5 CERD itself. As a matter of fact, the list of rights to which the prohibition of racial discrimination contained in Art. 5 CERD applies, is *not* exhaustive. This is brought out, first and foremost, by the very text of the chapeau of Art. 5 CERD.

129. For one, according to the chapeau of Art. 5 CERD, States Parties undertake to prohibit and to eliminate racial discrimination “*in all its forms*” (“*sous toutes ses formes*”), *i.e.* regardless how, and in which fields, it is being implemented.

130. Besides, the very same chapeau obliges States parties to prohibit and to eliminate racial discrimination

“(…) *notably* in the enjoyment of the following rights”

and in the French text:

“*notamment* dans la jouissance des droits suivants”.

131. This deliberate use of the term ‘*notably*’ respectively ‘*notamment*’, rather than simply “in the enjoyment of the following rights” confirms the non-exhaustive character of the list of rights falling within the scope of application of Art. 5 CERD.

132. This non-exhaustive character of Art. 5 CERD has also been confirmed by the CERD Committee itself. As a matter of fact, the CERD Committee stated in its General Recommendation No. 20 in unequivocal terms that

“(…) the rights and freedoms mentioned in article 5 [CERD] do not constitute an exhaustive list.”¹⁰⁵

¹⁰⁵ United Nations, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 20, The guarantee of human rights free from racial discrimination*, UN Doc. A/51/18 (8 March 1996), annex VIII at 124 (1996), para. 1.

133. The Committee then referenced the rights and freedoms deriving from the Charter of the United Nations, the Universal Declaration of Human Rights and the Human Rights Covenants. Given that the Committee views the CERD as a ‘living instrument’,¹⁰⁶ Art. 5 CERD remains non-exhaustive.

134. Hence, in the past, the CERD Committee has, *inter alia*, stressed the rights of refugees and displaced persons under Art. 5 CERD;¹⁰⁷ it has addressed the gender dimension of racial discrimination,¹⁰⁸ and especially stressed indigenous women’s rights under Art. 5 CERD¹⁰⁹ – all rights not specifically mentioned in Art. 5 CERD.

135. Art. 5 CERD further distinguishes political rights (Art. 5 lit. c CERD), other civil rights (Art. 5 lit. d CERD), and economic, social and cultural rights (Art. 5 lit. e CERD). All these rights are then followed by a non-exhaustive list of examples, which non-exhaustive character is again confirmed by the clear wording ‘in particular’ respectively ‘notamment’.

¹⁰⁶ United Nations, Committee on the Elimination of Racial Discrimination, *General recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, UN Doc. CERD/C/GC/32 (24 September 2009), para. 5.

¹⁰⁷ United Nations, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 22, Art. 5 and refugees and displaced persons* (16 August 1996), UN Doc. A/51/18, annex VII at 126 (1996).

¹⁰⁸ United Nations, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 25, Gender related dimensions of racial discrimination* (20 March 2000), UN Doc. A/55/18, annex V at 152 (2000), para. 1.

¹⁰⁹ United Nations, Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/CAN/CO/18 (25 May 2007), paras. 15, 20.

136. Accordingly, and on the whole, Art. 5 CERD covers all fields of life, and generally prohibits racial discrimination. As will be subsequently shown, Israel, however, violates a broad range of rights protected by Art. 5 CERD of the Palestinian population subject to the jurisdiction of the occupying power.

B. Equal treatment before tribunals (Art. 5 lit. a CERD)

137. Art 5 lit. a CERD provides:

“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice; (...)”

1. Factual background

138. Two racial groups live in the West Bank including East Jerusalem: approximately 2.700 million Palestinians and more than 765,000 Jewish

settlers. As law is essentially territorial, all inhabitants of the West Bank should be governed by the same law. In practice, this is however not the case when it comes to the OPT. Rather, Jewish settlers are governed by Israeli domestic law which, as confirmed by the United Nations

“(...) has resulted in institutionalized discrimination against Palestinians in the Occupied Palestinian Territory to the benefit of Jewish settlers.”¹¹⁰

139. This assessment is nowhere more true than in respect of the criminal justice system operating in the West Bank. Although the principles of non-discrimination and equality before the law require that all persons living in the same territory should be governed by the same criminal justice system, should be subject to the same criminal code, and should be tried by the same courts, different rules apply to Palestinians on the one hand, and Jews on the other, and different courts are used for criminal trials for those two groups.¹¹¹

¹¹⁰ United Nations, Human Rights Council, *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (15 September 2009), para. 206.

¹¹¹ See generally on this subject, L. Hajjar, *Courting Conflict: The Israeli Military System in the West Bank and Gaza* (2005); K. Cavanaugh, “The Israeli Military Court System in the West Bank and Gaza”, in: *12 Journal of Conflict and Security Law* (2007), p. 197; S. Weill, “Reframing the Legality of the Israeli Military Courts in the West Bank: Military Occupation or Apartheid?”, in: A. Baker and A. Matar (eds.) *Threat. Palestinian Prisoners in Israel* (2011), pp. 136-148; Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (2007); V. Tilley (ed.), *Beyond Occupation: Apartheid, Colonialism & International Law in the Occupied Palestinian Territories* (2012), pp. 72-78.

140. If a Jewish settler commits a crime in the West Bank, which to state the obvious is beyond the sovereignty of Israel, he or she will not be tried in the West Bank, but rather in Israel, before an Israeli civil court, in accordance with Israeli law, and will be accorded all the due process of law safeguards Israeli law affords to criminal defendants.

141. A Palestinian, on the other hand, committing a crime in the West Bank will be tried by an Israeli military court,¹¹² composed of military judges, under a system which accords no respect to the procedural safeguards recognized by international law and credible legal systems. Thus, on the same territory, two racial groups are subjected to very different systems of criminal law, one that accords with international standards and the other that does not.

142. The same holds true for the treatment of Israeli and Palestinian suspects in East Jerusalem. While on its face and in theory, Israeli law applies to all persons living in East Jerusalem on equal terms, in practice many discriminatory ways of applying the law to Palestinians in a detrimental way are reported and documented each year, constituting a violation of CERD by Israel.

¹¹² Israeli military courts operate in Salem, near Jenin in the Northern West Bank, and Ofer, near Ramallah. Both courts are inside Israeli military bases.

a. Israeli military court system in the OPT

143. As an occupying power, Israel exercises effective control over the territory of the State of Palestine.¹¹³ This especially means that Israel arrests, interrogates, prosecutes, sentences and detains Palestinians that are alleged to pose a security threat to Israel. However, those Palestinians are not dealt with by the general criminal codes of Israel, but by a special regime applied in the OPT – and applied *vis-à-vis* Palestinians only.

144. The Israeli military court system has been established in Gaza and the West Bank following the belligerent occupation of the area in 1967.¹¹⁴ After officially withdrawing from Gaza, today two military courts of first instance operate in the West Bank inside Israeli military bases, namely the Ofer Military Court near Ramallah and the Salem Military Court near Jenin,¹¹⁵ as well as a Military Court of Appeal, also situated in Ofer.¹¹⁶ The judges and prosecutors in the Israeli military court system are all military personnel, often lacking a judicial training and practice.¹¹⁷

¹¹³ R. Shammas, “In Practice: Interview with Attorney Saher Francis on her Experiences in Representing Palestinians before the Israeli Military Courts”, in: 5 *Adalah's Review* (2009), pp. 55-63 (55).

¹¹⁴ Proclamation Concerning the Takeover of Administration by the IDF (No. 1), 5727-1967 and Proclamation Concerning Administrative and Judiciary Procedures (West Bank Area) (No. 2), 5727-1967; Proclamation Concerning the Entry into Force of the Order Concerning Security Provisions (West Bank Area) (No. 3), 5727-1967; Order Concerning Security Provisions, 5727-1967; and Order Concerning the Establishment of Military Courts (West Bank Area) (No. 3), 5727-1967.

¹¹⁵ R. Shammas, *supra* note 113.

¹¹⁶ S. Weill, “The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories”, in: 89 *International Review of the Red Cross* (2007), No. 866, pp. 395-419 (402).

¹¹⁷ Addameer Prisoner Support and Human Rights Association (Addameer), *Presumed Guilty: Failures of the Israeli Military Court System - An International Law Perspective* (2009), pp. 7-8.

145. Israel also operates 22 detention and interrogation centres in the OPT, as well as in Israel.¹¹⁸

146. It is only on the surface, and at first glance, that the laws applying in the OPT do not discriminate between Palestinians and Israelis living in the OPT, as the applicability of the Military Orders is based on the territory of the OPT. In practice, however, Israelis are charged in civil courts in Israel applying Israeli law, while Palestinians are tried in military courts applying military as well as Jordanian law, thereby treating Israelis and Palestinians differently and in fact discriminating against Palestinians. This is based on a personal and extraterritorial application of Israeli law to Israeli offenders.¹¹⁹ According to a study by the Association for Civil Rights in Israel (ACRI):

“Ostensibly, the application of military law to the West Bank area is territorial and applies to all residents of the area, including its Israeli residents. But (...) the application of Israeli criminal law [is extended] on a personal basis to the Israeli residents in the West Bank.”¹²⁰

¹¹⁸ R. Shammass, *supra* note 113.

¹¹⁹ Association for Civil Rights in Israel (ACRI), *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank* (2014), p. 16; referring to Defence Regulation (Judea and Samaria – Adjudication of Offenses and Legal Assistance), 5727-1967 and Law for Extending the Validity of the Defence Regulations (Judea and Samaria – Adjudication of Offenses and Legal Assistance), 5772-2012.

¹²⁰ *Ibid.*, p. 32.

147. Thus, while the military laws appear as to not discriminate between Palestinians and Israelis in the OPT, by extending the applicability of Israeli law on a personal basis, *i.e.* on the basis of racial grounds, a discriminatory legal regime is operated.¹²¹ It was expressly stated by an Israeli judge that any Israeli carries with him or her Israeli law when he or she enters the West Bank.¹²² What might at first appear as a mere characterization of what law applies to Israelis in the West Bank is, with a view to the human beings living in the OPT, a discriminatory application of the military laws operated *vis-à-vis* the Palestinians only.¹²³

148. As a matter of fact, Israelis are not tried before military courts in the OPT even when the act was committed in a place within in the OPT, but are charged and tried in Israeli courts, even if both the Israeli citizen and the Palestinian committed the exact same crime, in the exact same spot in the OPT.¹²⁴

¹²¹ O. Ben-Naftali, A. M. Gross, and K. Michaeli, “Illegal Occupation: Framing the Occupied Palestinian Territory”, in: 23 *Berkeley Journal of International Law* (2005), pp. 551-614 (584).

¹²² *Tsoba v. State of Israel*, HCJ 831/80, 36(2) PD 169, 174 (1982).

¹²³ See on the different ways of application of Israeli law to Israelis living in the OPT in general O. Ben Naftali, A. M. Gross, and K. Michaeli, “Illegal Occupation: Framing the Occupied Palestinian Territory”, in: 23 *Berkeley Journal of International Law* (2005), pp. 584 *et seq.*

¹²⁴ ACRI (2014), *supra* note 119, p. 33.

b. Israeli criminal law applying in the West Bank

149. The relevant Israeli law governing military justice in the West Bank is contained in Security Provisions Order No. 378, replacing military proclamations on this subject of 1967. This law recognizes the principle of territoriality and provides that the military courts in the West Bank have jurisdiction over all persons who commit crimes in the West Bank regardless of their nationality or racial group. Although Jewish settlers in theory are thus subject to this law, in practice they have been exempted from the military courts of the West Bank by the Extension of Emergency Regulations Law (Judea and Samaria and Gaza – Adjudication of Offences and Legal Aid) of 1977.¹²⁵

150. This law provides Israeli courts with jurisdiction “according to the law in force in Israel” over an Israeli who committed a crime in the West Bank if the acts in question would have constituted an offense had they occurred in territory under the jurisdiction of Israeli courts. To prevent the extension of Israeli law to Palestinians it provides that this law does not apply to residents of the West Bank who are not Israelis (Section 2).

151. According to the Israeli High Court of Justice

¹²⁵ Replacing an earlier law to the same effect of 1967.

“(…) [t]he aim of these Regulations was to apply the same law to Israelis, wherever they committed the offence, in Israel or in the [West Bank], according to the personal principle – as if Israeli citizens carry Israeli law with them when they enter the [West Bank].”¹²⁶

152. These laws appear to confer concurrent jurisdiction on both, military courts in the West Bank and Israeli courts over offenses committed by Israelis in the OPT. Initially, military courts indeed exercised jurisdiction over Israelis in the OPT,¹²⁷ but ever since 1979, coincidentally the same time Israel became bound by CERD, Jewish settlers have no longer been tried before military courts as a matter of policy, a policy applied by the Attorney-General and approved by the Israeli High Court.¹²⁸

153. Residents of the West Bank, who are not Israeli citizens, but who are entitled to immigrate to Israel in terms of the 1950 Israeli Law of Return – that is Jews from abroad – are also exempted from trial before military courts.

154. The discriminatory, solely race-based nature of this differentiation is emphasized by the fact that Palestinians carrying Israeli IDs (especially those

¹²⁶ *Tsoba v. State of Israel*, 36(2) HCJ 831/80, PD 169, 174 (1982).

¹²⁷ *Levy v. General in Chief*, HCJ 21 PD 2 (1967); *Arnon v. Attorney-General* HCJ 507/72 (1979), 9 Israel Yearbook of Human Rights, p. 334.

¹²⁸ *David v. State of Israel*, HCJ 163/82 37 PD 622 (1983).

from East Jerusalem) who commit offenses in the OPT are nevertheless tried there by Israeli military courts. Attempts by such persons to be tried before Israel civil courts have failed.¹²⁹

155. Clearly this practice discriminates against Palestinians. In *Military Prosecutor v Anbaniiss*, Judge Menachem Liberman expressed his concern about this discrimination which “smacks of racism” and declared that

“(...) it is time to re-examine the criteria for bringing people before military courts, so that all those who commit offences are subject to equal treatment.”¹³⁰

156. According to *Dr Sharon Weill*, the absence of rules of priority to regulate the concurrency of jurisdiction of military courts and Israeli civil courts

“(...) facilitates the practice of racial policy, serving the goal of separating jurisdiction without legislating explicit discriminatory laws.”¹³¹

¹²⁹ *Zrari v. Israeli Police*, HCJ 6743/97, unpublished 1997 (reported by S. Weill, *supra* note 116); *The Israeli Police v. Nabulsi*, 7SJM (1990) pp. 189 *et seq.* (398).

¹³⁰ Ofer Military Court, 4333/08 (21 September 2008).

¹³¹ S. Weill, *supra* note 111, p. 141.

2. Israel's obligations under CERD to equal treatment before tribunals and all other organs administering justice

157. When Israel became a party to CERD it undertook the obligation to treat equally before its tribunals and all other organs administering justice persons under its jurisdiction. This obligation becomes especially apparent and distinguishes discriminatory from non-discriminatory legal systems when it comes to the equal treatment of all persons before the law and legal proceedings. In fact, justice and racial discrimination are two antipodes that can never be reconciled. The criminal legal system applied and enforced by Israel in the OPT discriminates between Palestinians and Israelis living in the OPT, both *de jure* as well as *de facto*, in manifold ways and thereby violates Art. 5 lit. a CERD.

a. CERD obliges its parties to equality before the law and equal treatment before tribunals

158. Equality before the law lies at the core of Art. 5 CERD. Art. 5 lit. a CERD guarantees the right for

“(...) everyone who seeks justice before a competent organ not to be discriminated against because of racist motivation”.¹³²

¹³² N. Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination – A Commentary* (1970), p. 59.

159. It is in this regard where Israel's discriminatory system becomes most apparent with two entirely different legal systems operating in the OPT.¹³³ This is not only true for the military court system in general, but also when it comes to the treatment of Palestinians during all phases of criminal proceedings in comparison to Israeli offenders in particular.

160. In its practice so far, the CERD Committee has, time and again, stressed the importance of an impartial justice system because:

“(...) when racial or ethnic discrimination does exist in the administration and functioning of the system of justice, it constitutes a particularly serious violation of the rule of law, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect.”¹³⁴

161. As stressed by the CERD Committee, a legal system free from discrimination is central for a number of other related human rights, *i.e.* the

¹³³ See also the work ACRI, *supra* note 119, *passim*.

¹³⁴ United Nations, Committee on the Elimination of Racial Discrimination, *General recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, Sixty-fifth session (2005), p. 1.

rule of law, the principle of equality before the law, fair trial and the right to an independent and impartial trial.¹³⁵ All those rights constitute core aspects of the universal human rights system to which Israel is a party. Henceforth, a legal system treating differently individuals on the basis of any of the grounds of Art. 1 CERD,¹³⁶ especially with regard to the criminal justice system, violates human rights in general, and CERD in particular.¹³⁷

162. Not even on its face is the Israeli legal system non-discriminatory. Yet, it is especially in its application that it shows clear evidence of racial discrimination against Palestinians. Furthermore, as Art. 5 lit. a CERD is explicitly concerned with the treatment before tribunals, the treatment of Palestinians in the military court system constitutes a violation of that obligation.

b. The discriminatory legal regime applied by Israel in the OPT is not permitted under international humanitarian law

163. While generally the establishment of military courts is permitted under certain circumstances according to applicable norms of international

¹³⁵ See, e.g. Art. 2 CRC, Art. 5 CRPD, Art. 7 CMW, Art. 2 ICESCR, and Arts. 14, 26 ICCPR.

¹³⁶ See on this aspect *supra* III A 2.

¹³⁷ United Nations, Committee on the Elimination of Racial Discrimination, *General recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, Sixty-fifth session (2005), general para. 12.

humanitarian law, Israel cannot rely on these grounds with regard to its military court system operating in the OPT.

164. It is especially the particular situation in the OPT, as constituting a long-term occupation, that clearly argues against the allowance of military courts after, by now, almost 50 years of occupation. In any case, international humanitarian law could never justify the discriminatory treatment of Palestinians before military courts in comparison to Israelis committing the same crime in the same occupied territory somewhere in the OPT.

aa. Israel cannot rely on the general possibility of military courts in occupied territories according to international humanitarian law

165. In case of a belligerent occupation, the basic rule is that the occupying power is obliged to uphold the legal system pre-existing before its occupation.¹³⁸ Exceptionally, Arts. 64 *et seq.* 4th Geneva Convention provides for rules on penal legislation, including the setting-up of military courts.¹³⁹ Hence, as an exception to the rule, it must be narrowly defined and applied at the first place.

¹³⁸ Art. 43 Hague Regulation and Art. 64 4th Geneva Convention; so-called ‘conservationist principle’, V. Koutroulis, “The application of international humanitarian law and international human rights law in situations of prolonged occupation: only a matter of time?”, in: 94 *International Review of the Red Cross* (2012), No. 885, pp. 165-207 (167).

¹³⁹ General on this point: Y. Dinstein, *The International Law of Belligerent Occupation* (2009), p. 110; available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=9DA4ED335D627B-BFC12563CD0042CB83>.

166. What is more is that, although Israel is a party to the 4th Geneva Convention,¹⁴⁰ it should be stressed that it never accepted the *de jure* applicability of the 4th Geneva Convention when it comes to the OPT, and the ensuing *obligations*, such as *e.g.* the one under Art. 49 para. 6 4th Geneva Convention, to the situation in the OPT.¹⁴¹ Thus, Israel is by the same token estopped to now claim *rights* under the 4th Geneva Convention, which, in its own perspective, does not even apply *de jure* to the OPT. It is for this reason alone already, that Israel may not rely on any of its provisions, because it would be to its advantage in the respective circumstance, be it only allegedly, allowing deviation from Israel's human rights obligation arising under CERD.

167. In any case, even if it were otherwise, Israel may not rely on Art. 66 4th Geneva Convention in a situation of prolonged belligerent occupation of the OPT, which by now has lasted for almost 50 years.

¹⁴⁰ Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=IL&nv=4.

¹⁴¹ D. Kretzmer, "The law of belligerent occupation in the Supreme Court of Israel", in: 94 *International Review of the Red Cross* (2012), No. 885, pp. 207-236 (209); still only *de facto* acceptance.

bb. The prolonged situation of belligerent occupation requires terminating the military court system

168. In general, occupation ‘is considered as being a temporary state of affairs’¹⁴² and has even by the Israeli Supreme Court itself been described as ‘inherently temporary’.¹⁴³ Despite the lack of a definition of temporary or prolonged, it can safely be assumed that the now more than 50 year long lasting occupation of Palestine falls under the latter category.¹⁴⁴

169. At the very least, although international humanitarian law might still apply even in times of prolonged occupation, the nature of its application changes.¹⁴⁵ As a matter of fact, what might be proper in a short-term occupation becomes improper in a long-term occupation.

170. This is the case with regard to the military court system imposed on Palestinians. After more than 50 years of occupation, in which Israel has in several regards itself claimed to be able to exercise ‘normal state authority’ when it comes to Israelis citizens having been illegally transferred to the OPT, the upholding of the military court system is improper.

¹⁴² V. Koutroulis, *supra* note 138, pp. 165-207 (166).

¹⁴³ *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04, judgment of 30 June 2004, para. 27; *Mara'abe et al. v. The Prime Minister of Israel et al.* HCJ 7957/04, judgment of 15 September 2005, para. 22 (with further references to Israeli case law).

¹⁴⁴ Already 13 years after the occupation described as such by the Security Council, UN Doc. S/RES/471 (5 June 1980), p. 2, para. 6; UN Doc. S/RES/476 (30 June 1980), p. 1, para. 1 (and several other Resolutions and documents; V. Koutroulis, *supra* note 138, pp. 165-207 (fn. 27, 28, 29).

¹⁴⁵ See more on this point V. Koutroulis, *supra* note 138, pp. 165-207 (172); even if the rule does allow for such adjustment, p. 184.

171. Israel cannot exercise ‘normal’ state authority when it comes to issuing tax laws, while at the same time relying on the permission to establish military courts due to the exceptional circumstances of being an occupying power to the detriment of alleged Palestinian offenders in the OPT regarding criminal proceedings.¹⁴⁶

172. The argument is further supported by the fact that Israel applies Israeli laws to the territory of the OPT,¹⁴⁷ thereby itself indicating that it does not regard the West Bank to be solely an occupied territory. Apart from the illegality of this extension of jurisdiction, it further renders any argument of Israel as to the effect that the occupation allows the discriminatory military court system void.

cc. Art. 66 4th Geneva Convention cannot justify the discriminatory treatment between Palestinians and Israelis within the OPT

173. Even if international humanitarian law was in general applicable to the situation in the OPT, and even if Israel could eventually rely on the permission to establish military courts in the OPT, international

¹⁴⁶ According to the Supreme Court of Israel the prolonged occupation “(...) imposes a duty on Israel to ensure normal life (...)”, *Yesh Din v. The Commander of the Israeli Forces in the West Bank*, H CJ 2164/09, judgment of 26 December 2011, p. 16, para. 10.

¹⁴⁷ See on this point *supra* para. 147 (151), *infra* para. 193.

humanitarian law could never justify both the *de jure* and *de facto* discriminatory elements of its military court system.

174. As already stressed above, human rights remain applicable even in case of a situation where humanitarian law applies.¹⁴⁸ Thus, the application of international humanitarian law and human rights law is not a situation of either or, but rather one that requires careful consideration of the respective circumstances in order to arrive at the conclusion whether indeed international humanitarian law overrides human rights guarantees.¹⁴⁹

175. International humanitarian law does not permit the discriminatory treatment of the population in the occupied territory in comparison to its own citizens with regard to the legal system applicable in the occupied territory. It cannot justify discrimination or the violation of principles such as fair trial and due process.

176. Accordingly, distinctions in the judicial system based on one of the grounds referred to in Art. 1 CERD violate the respective State party's obligation to equal treatment that cannot be overridden on the basis of a *lex specialis* argument by international humanitarian law.

¹⁴⁸ See *supra* III B

¹⁴⁹ ICJ, Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et seq.* (177), para. 105.

177. Even if one were to assume, be it only *arguendo* that it were otherwise, the conditions of Art. 66 4th Geneva Convention are not fulfilled.

dd. In any case, the preconditions of Art. 66 4th Geneva Convention are not met

178. The 4th Geneva Convention Relative to the Protection of Civilians in Time of War allows the occupying power to enact laws to enable it to fulfil its obligations under the Convention,

“(…) to maintain the orderly government of the territory, and to ensure the security of the Occupying Power.”

179. According to Art. 66 4th Geneva Convention:

“(…) the Occupying Power may hand over the accused to its properly constituted, *non-political military courts*, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.”¹⁵⁰

¹⁵⁰ Emphasis added.

180. According to the ICRC's authoritative commentary on Art. 66 4th Geneva Convention

“(…) [t]he military courts must be “non-political”. This clause forbids certain practices resorted to during the Second World War when the judicial machinery was sometimes used as an instrument of political or racial persecution.”

181. This means that military tribunals

“(…) must respect the same requirements of independence and impartiality as civilian tribunals.”¹⁵¹

182. Israel's military courts system established in the OPT however fails substantially to comply with the requirements of the 4th Geneva Convention.

183. *First*, the military law over which the courts have jurisdiction extends to subjects unrelated to the principal reason for the establishment of such courts, namely the security of the occupying power, and include traffic violations, unauthorized building, tax evasion and other minor offenses that

¹⁵¹ J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law, Vol. I (Rules)*, International Committee of the Red Cross (2005), p. 356.

could more properly be dealt with by the ordinary courts of the occupied territory.

184. Moreover, if crimes such as traffic offenses are to be tried by military courts, there is no reason why Jewish settlers should not be tried similarly by such courts for non-security related crimes of this nature.

185. *Second*, Israel's military court system fails to comply with international standards regarding due process of law (the recognized principles governing the administration of justice) to be found in the jurisprudence of international humanitarian law and international human rights law.¹⁵²

186. Israeli military courts in the OPT are presided over by serving army officers with none or little judicial training or experience, who wear military uniforms in court. Their partiality and bias has been demonstrated by their conduct, judgments and sentences.

187. Prosecutors are Israeli soldiers in regular or reserve service, often without any legal training. Palestinian defendants are not brought promptly before a court,

¹⁵² That international human rights conventions, such as the International Covenant for Civil and Political Rights of 1966 apply in the OPT was confirmed by the International Court of Justice in: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et. seq.* (180-181), paras. 111-113.

are detained longer without being brought before a judge and are prohibited from meeting with an attorney than Israeli accused are.¹⁵³

188. The rules of procedure and evidence are designed to secure convictions rather than to ensure a fair trial. The principle that an accused person should be promptly informed of the charges against him in a language he understands is ignored. A Palestinian defendant and his lawyer will be informed of the charges he faces only at the first hearing, after the indictment has already been filed with the military court. They are required to respond immediately with no time to study evidence. Indictments and all documents in the military courts are in Hebrew only, a language in most instances not understood by either accused or his counsel. Counsel frequently has difficulty in consulting adequately with his client before the trial as the accused is held in custody in Israel and his lawyer is denied access. This means that in practice lawyers often consult with their client very briefly just before the start of the trial.¹⁵⁴ The trial itself fails to follow proper procedures. There is no presumption of innocence. The procedures followed do not ensure that the burden of proof lies on the prosecution to establish guilt, thus shifting the burden of proof to the defence. Military courts accept a dubious single confession or incriminating statement as sufficient evidence to establish a *prima facie* case. Complaints of torture or

¹⁵³ See in more detail *infra* IV C 3 and D 3, 4.

¹⁵⁴ Yesh Din (2007), *supra* note 111, pp. 100-125.

abuse during interrogation are largely ignored. There is seldom adequate examination and cross-examination in most trials.¹⁵⁵

189. Plea bargaining is rife in military courts as accused persons know that even if they might be acquitted if tried, they are likely to spend more time in prison awaiting trial than the length of the likely sentence. This is because accused persons are remanded in custody for lengthy periods of time. Consequently, the prosecution is seldom required to go through a full trial which means that an arrest effectively means a conviction. Over 95 % of the convictions before military courts are obtained by plea bargains.¹⁵⁶ Most proceedings last less than five minutes. In 2006, acquittals were obtained in 0,29 % of cases in military courts.¹⁵⁷ The procedures differ fundamentally from those employed in courts in Israel.

190. What is more is that the requirement of the 4th Geneva Convention that military courts should not be political and be used as an instrument of political or racial persecution is not observed. Most of those brought before military courts are charged with political actions opposed to the occupation. Trials before the military courts are *par excellence* political trials.

¹⁵⁵ Yesh Din (2007), *ibid.*, p. 119; in 2006 full evidentiary trials involving examination and cross-examination occurred in only 1.42 % of the cases conducted in military courts.

¹⁵⁶ Yesh Din (2007), *ibid.*, p. 120; Hajjar, *supra* note 111, p. 3.

¹⁵⁷ Yesh Din (2007), *ibid.*, p. 13.

3. Discriminatory treatment of Palestinians in the pre-trial phase: jurisdiction, preparation of trial and bail-out

191. Due to the fact that Israelis are never tried before military courts, the discriminatory treatment extends to all phases of criminal proceedings against an alleged Palestinian offender in comparison to an Israeli offender.

a. Israeli settlers residing in the OPT are not tried before military courts although they fall under Order 1651 (2009)

192. There are two options for subjecting Israelis in the OPT to Israel's laws and not to the general law applicable in the OPT.

193. *First*, Israeli law is applied *ad personam* to Israelis, including the Basic Laws,¹⁵⁸ even if they live and undertake criminal acts in the OPT. *Second*, on occasion, parts of Israeli law are applied territorially to contexts in the OPT due to the involvement of Israeli citizens.

194. While the reasoning is ambiguous and inexplicit, the outcome is rather clear, namely that Israeli settlers on the one hand, due to their citizenship being Israeli, and Palestinians on the other hand, as being non-Israeli citizens, are

¹⁵⁸ *Regional Council Gaza Beach v. The Knesset*, HCJ 1661/05, paras. 78-80 (unpublished); See, A. M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?", in: 18 *European Journal of International Law* (2007), pp. 1-35 (12); O. Ben-Naftali, A. M. Gross, and K. Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", in: 3 *Berkeley Journal of International Law* (2005), pp. 551-614 (585).

treated differently. While alleged Palestinian offenders are tried before military courts, Israelis are tried in Israel according to the civil laws of Israel. This impression is increased by the fact that the few Israelis that were actually tried before military courts were “Arab citizens or residents of Israel”,¹⁵⁹ thereby furthering the impression that a distinction takes place along ethnic and racial lines.

195. The CERD Committee in its 2012 concluding observations therefore stated:

“The Committee is extremely concerned at the consequences of policies and practices which amount to *de facto* segregation, such as the implementation by the State party in the Occupied Palestinian Territory of two entirely separate legal systems and sets of institutions for Jewish communities grouped in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand. (...) The Committee is extremely concerned at the existence of two sets of laws, for Palestinians on the one hand and Jewish settlers on the other hand who reside in the same territory, namely the West Bank, including East Jerusalem, and are not subject to the same justice system (criminal as well as civil matters).”¹⁶⁰

¹⁵⁹ See, AA 1121/11 *Muhammad Raghdat v. The Military Prosecution* (31 January 2011); AA (Judea and Samaria) 3166/06 *Omar Alkam v. The Military Prosecutor* (15 September 2006), see ACRI (2014), *supra* note 119, p. 37.

¹⁶⁰ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations* UN Doc. CERD/C/ISR/CO/14-16 (3 April 2012), paras. 24 and 27.

196. As will be shown in the following sections, this different treatment discriminates against Palestinians in almost all aspects of pre-trial, trial and court sentencing phase in comparison to Israeli offenders.

b. Palestinians are prevented from meeting with an attorney longer than Israelis

197. Following discriminatory detention practices, Palestinians can be held considerably longer in detainment before given the opportunity to meet with an attorney. While in the case of Israeli detainees the maximum period of time is 48 hours, for Palestinians the same period is 96 hours.¹⁶¹

198. For both Israeli and Palestinian this time period can be extended in case of security offenses. Yet, while the maximum extension period is 21 days for Israeli offenders, in case of a Palestinian offender it can be extended to up to 30 days. The president or the deputy president of the military court can even extend it for another 30 days for Palestinians, while the same option does not exist with regard to Israelis.¹⁶² Thus, while the period for Israelis is a maximum of 23 days, it is 64 days for Palestinians, constituting a *de jure*

¹⁶¹ Art. 34 Detentions Law and Art. 56 lit. e Order Concerning Security Provisions, ACRI (2014), *supra* note 119, p. 54.

¹⁶² ACRI (2014), *supra* note 119, p. 54; Arts. 34 and 35 Detentions Law and Arts. 58-59 Order Concerning Security Provisions.

discriminatory treatment of Palestinian detainees in comparison to Israeli detainees.

199. Additionally, there also exists a *de facto* discrimination as Palestinians are regularly detained in incarceration facilities in the State of Israel.¹⁶³ Yet, the geographic location of the incarceration facilities prevent Palestinian attorneys from meeting their clients. Palestinian attorneys from the OPT are often not permitted to enter Israel or their permission is delayed. Thus, offenders may not be able to meet with an attorney in due course. Obviously, Israeli offenders being held in incarceration facilities in Israel do not face similar obstacles.

c. Obstruction of representation by Palestinian attorneys by incarceration of Palestinians in Israel

200. The fact of delayed meeting with the attorney does not only lead to a prolonged isolation but also obstructs the proper representation of Palestinian offenders in military court proceedings. Often, Palestinian attorneys cannot effectively meet and represent their clients. A petition to the High Court of Israel against the practice of incarceration in Israel was

¹⁶³ At least the detention centres in Ashkelon, Kishon, Moskobiyyeh and Petah Tikva are inside Israel; Addameer (2009) *supra* note 117, p. 6.

rejected, thereby missing the opportunity to rectify the discrimination in this regard.¹⁶⁴

201. Due to the obstacles faced to meet with the client, attorneys are not in a position to meet with their clients regularly, to discuss the case and to develop an agreed line of defence, violating the right to prepare an effective defence.¹⁶⁵ This not only violates due process rights and questions the proceedings with regard to the rule of law, but also discriminates against Palestinian offenders when compared to Israeli offenders that can prepare their cases properly.

d. Period before being brought before a judge

202. A Palestinian accused may be detained for eight days without being brought before a judge; for up to 188 days before being charged with an offense; and for up to two years between being charged and brought to trial.¹⁶⁶ By comparison, Israelis, under the Israeli civil system, may be detained for a

¹⁶⁴ Yesh Din, *Volunteers for Human Rights v. Commander of IDF Forces in the West Bank*, HCJ 2690/09 (26 December 2011), published in *OPIL*, available at: <http://opil.ouplaw.com/view/10.1093/law:ildc/1820il11.case.1/law-ildc-1820il11?rskey=XwNerM&result=3&prd=OPIL>.

¹⁶⁵ Addameer (2009), *supra* note 117, p. 14; Art. 72 4th Geneva Convention; Arts. 99 and 105 3rd Geneva Convention; Art. 14 para. 3 lit. b ICCPR; Art. 6 para. 3 lit. c European Convention for the Protection of Human Rights and Fundamental Freedoms (CETS), entered into force 3 September 1953; *Golder v. The United Kingdom* (ECtHR 1975). The lawyer provided must be competent. *Artico v. Italy* (ECtHR 1980).

¹⁶⁶ Adameer, East Jerusalem Prisoners, December 2017, available at: <http://www.addameer.org/content/east-jerusalem-prisoners>.

maximum of 4 days before going before a judge, and may be held in custody without being charged for up to 64 days.¹⁶⁷

e. Discriminatory usage of Hebrew in the trial due to inadequate translation of documents into Arabic

203. Basic rights are not granted to Palestinians charged in military courts. First and foremost, not all documents are translated into Arabic, thereby not only violating standards for a fair process, but more importantly in this context, discriminate between Israeli and Palestinians. In Israeli courts all documents are produced in Hebrew, allowing Israeli alleged offenders to understand and communicate with the court in their mother tongue. In comparison, documents are not or only partially translated in Arabic in military courts, often by untrained personnel,¹⁶⁸ thereby disabling the alleged offender to properly and fully understand the charges brought against him or her and to entirely follow the proceedings.

204. In most cases, the alleged offender signs a statement in Hebrew that he is not able to read, thereby not fully grasping the record of his testimony. The proceedings are also not held or properly translated into Arabic, making it

¹⁶⁷Adameer, East Jerusalem Prisoners, December 2017, available at: <http://www.addameer.org/content/east-jerusalem-prisoners>.

¹⁶⁸ Often Israeli soldiers and not legally trained persons or official translators, see Yesh Din (2007), *supra* note 111, pp. 20-21.

almost impossible to have fair proceedings and to defend oneself.¹⁶⁹ This aspect was even acknowledged by the Supreme Court of Israel:

“When we are sitting in justice, from time to time we encounter cases in which the defendants do not fully understand what is being claimed and stated during the hearing (...) due to the inadequate interpretation or lack thereof. In this state of affairs, there is almost no real significance to the defendant’s presence in the hearing, and in my opinion it is an infringement of the rights of defendants that cannot be accepted.”¹⁷⁰

205. Failure to conduct trials in a language that the accused understands violates both international humanitarian law contained in Art. 71 4th Geneva Convention and human rights law.¹⁷¹ Moreover it has a particular discriminatory element if it is compared with the treatment of Israeli offenders in Israeli courts.¹⁷²

¹⁶⁹ ACRI (2014), *supra* note 119, p. 58.

¹⁷⁰ CrA 8974/07, Lin v. State of Israel, para. 3 of the judgment of Justice Yoram Danziger (3 November 2010), see ACRI (2014), *supra* note 119, fn. 109.

¹⁷¹ Art. 14 para. 3 lit. a, lit. f ICCPR.

¹⁷² Palestinians often waive their right in order not to prolong the trial, see Y. Ronen, “Blind in Their Own Cause: the Military Courts in the West Bank” 2 *CJICL* (2013), pp. 738-762 (757).

4. Discriminatory treatment of Palestinians regarding substantive law and sentencing

206. The discrimination of Palestinian offenders continues with regard to substantive law and sentencing, including the actual practice to not release Palestinians prior to the end of the sentence.

a. Difference in the definition of offenses treats Palestinian and Israeli offenders unequally

207. Two kinds of discriminatory treatment require to be distinguished: *First*, certain offenses are only found in Military Orders applied against Palestinians. *Second*, the definition and sentencing discriminate against Palestinians even with regard to similar offenses.

208. With regard to the *first* aspect, there are certain offenses such as stone-throwing, membership in a group committing illegal acts, violating an appearance order, violating curfew or illegal presence in Israel that are only found in Military orders.¹⁷³ These offenses are based on the argument that they may threaten the security of Israel and are broadly categorized as “disturbance of public order”.¹⁷⁴ Accordingly, those acts do not even

¹⁷³ Addameer (2009), *supra* note 117, p. 9.

¹⁷⁴ ACRI (2014), *supra* note 119, p. 88.

constitute a crime when committed by Israelis. For those offenses, the minimum sentence is five-year imprisonment.¹⁷⁵

209. On the *second* aspect, when offenses appear in both Israeli law and Military orders, their definitions are often different and all too often to the detriment of Palestinian offenders.¹⁷⁶ Especially, the offenses under the respective military order for Palestinians are usually vaguely worded and broadly-defined.¹⁷⁷

b. Penalty policy and maximum sentences discriminate against Palestinian offenders

210. The discrimination against Palestinians also extends to the maximum sentences regarding certain crimes. The Military Court of Appeal expressly recognized these differences, *e.g.* with regard to the offense of manslaughter:

“It is no secret that the military legislator saw fit to establish higher maximum penalties than those accepted in Israel. Hence, we find that while in Israel a maximum penalty of twenty-year imprisonment has

¹⁷⁵ ACRI (2014), *supra* note 119, p. 61.

¹⁷⁶ *Ibid.*

¹⁷⁷ Addameer (2009), *supra* note 117, p. 13.

been established for the offense of manslaughter, in the Area the maximum penalty is a life sentence.”¹⁷⁸

211. A number of penalties regarding other offenses reveal the same structure.

For murder or even the attempt, Palestinians can be sentenced to the death penalty, while according to the Israeli Penal law the maximum penalty is “life sentence” or a maximum of 22 years for an attempted murder.¹⁷⁹ Other examples include the offense of “assault”¹⁸⁰ or weapon-related offenses.¹⁸¹

212. Thus, when an Israeli attempts to commit the crime of murder in the West Bank, the maximum sentence is 22 years, while for a Palestinian the same attempt could be sentenced with the death penalty. Often, Palestinians are indeed convicted with the maximum sentence, not it is not so for Israeli offenders.¹⁸²

213. Fully aware that the military courts offer no prospect of a just trial most accused persons engage in plea bargaining to reduce the length of sentence to be served.

¹⁷⁸ Appeal (Judea and Samaria), 99/79 *Shasma v. Military Prosecutor* (29 September 2005), see ACRI (2014) *supra* note 119, p. 61, note 110.

¹⁷⁹ Art. 209 lit. a Order Concerning Security Provisions and Arts. 300 and 305 Penal Law.

¹⁸⁰ Art. 211 lit. a Order Concerning Security Provisions maximum of 5 or 7 years and 10 years for assaulting a soldier (Art. 215 lit. b); Arts. 379 and 389 Penal Law foresees a maximum of 2 or 3 years for Israeli offenders.

¹⁸¹ Art. 230 Order Concerning Security Provisions provides for maximum of life sentence for possessing, carrying or manufacturing a weapon for Palestinians; Art. 144 Penal Law 7, 10 or 15 years respectively.

¹⁸² Addameer (2009), *supra* note 117, p. 20.

c. Palestinians do not, similarly to Israeli offenders, have the chance to be released prior to their end of sentence

214. Where a matter does go to full trial, conviction is almost inevitable. In 2006 acquittals were obtained in 0.29 % of the 9,123 cases heard before military courts.¹⁸³ This system of ‘sausage-machine’ justice, in which 99 % of those arrested are convicted,¹⁸⁴ resembling that of South Africa’s notorious Pass Courts, has resulted in a massive number of convictions. Since the start of the occupation in 1967 over 1,000,000 Palestinians have been imprisoned by the Israeli occupying forces, including tens of thousands of women and children. In February 2018 alone, the total number of prisoners amounted to 6119, of which 61 were women; additionally, there were 450 persons held in administrative detention.¹⁸⁵

215. Palestinians charged with a crime before a military court hardly ever obtain an acquittal and are convicted in 90 % of the cases, challenging the fundamental presumption of innocence.¹⁸⁶ Often the judgment is based on a confession obtained in investigations that are not in line with international

¹⁸³ Yesh Din (2007), *supra* note 111, p. 13.

¹⁸⁴ See N. Sheizaf, “Conviction Rate for Palestinians in Israeli Military Court: 99.74 %”, 972 (29 November 2011), available at: <https://972mag.com/conviction-rate-for-palestinians-in-israels-military-courts-99-74-percent/28579/>.

¹⁸⁵ See for the current statistics: <http://www.addameer.org/statistics>.

¹⁸⁶ Yesh Din (2007), *supra* note 111, p. 17.

law. Furthermore, their right to call witnesses is impaired as their cases are usually concluded without full evidentiary trials.¹⁸⁷

216. Once Palestinians received their sentence, they are detained in one of the prisons in Israel, in direct violation of Art. 76 4th Geneva Convention. Again, once detained in Israel they have little chance to meet with their attorney or their family and relatives.¹⁸⁸

217. According to the Israeli Penal law, a prisoner can be released after he or she served half of his or her term. For Palestinian prior release is only possible after two-thirds have been served.¹⁸⁹ In any case, this possibility is hardly ever applied with regard to Palestinian prisoners.

C. Discriminatory legal system with regard to under-aged Palestinian offenders

218. Palestinian minor suspects and offenders are subjected to military juvenile courts established in the OPT. The system differs in some aspects from the military justice system for adults,¹⁹⁰ but discriminates against Palestinian minors when compared to Israeli minor suspects and offenders that are tried

¹⁸⁷ *Ibid.*, pp. 18-19.

¹⁸⁸ *Ibid.*, p. 8.

¹⁸⁹ *Ibid.*, p. 20.

¹⁹⁰ See, *supra* para. 143 *et seq.*

before Israeli civilian courts. As the legal rules and regulations provide for different standards in the treatment of Palestinian minors in comparison to Israeli minors, even any punctual *ad hoc* application of the spirit of the Israeli Youth Law by military judges in the OPT cannot cure the inherently discriminatory legal system upheld by Israel.

1. Palestinian juveniles are subjected to military juvenile courts

219. Hundreds of Palestinian children are arrested, blindfolded and tied by Israeli soldiers each year.¹⁹¹ Later they are interrogated and questioned without a lawyer or parent being present, or without being informed of their right to silence.¹⁹² Usually, the interrogations are not recorded making it impossible to get a clear picture of the situation when the child was questioned.¹⁹³ They are often not permitted to use a telephone to contact either their families or an attorney.¹⁹⁴ The arrest all too often takes place at night, which is at least in the frequent practice with which it occurs in the OPT, not possible with regard to Israeli under-aged suspects and offenders.¹⁹⁵ The arrests are often followed by solitary confinement, oftentimes for several days,¹⁹⁶ and not seldom by mistreatment of children held in custody by Israel.¹⁹⁷

¹⁹¹ UNICEF, *Children in Israeli Military Detention, Observations and Recommendations* (2013), p. 9.

¹⁹² Defence for Children International/Palestine Section (2013), p. 3.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*, p. 4.

¹⁹⁵ *Ibid.*, p. 6.

¹⁹⁶ *Ibid.*, p. 10.

¹⁹⁷ *Ibid.*, pp. 8, 10.

220. Before 2009 minor offenders were adjudged in the military courts established in the OPT for adult offenders.¹⁹⁸ In the wake of increasing international criticism,¹⁹⁹ Israel undertook the step to establish military juvenile courts for under-aged offenders.²⁰⁰ A military juvenile court is a military court of first instance with either a single juvenile judge or a panel of three judges of which the presiding judge is a juvenile judge.

221. A ‘juvenile judge’ will have “received appropriate training to serve as juvenile judge”.²⁰¹ The respective order does not, however, define what particular training qualifies a military judge to become a juvenile judge. The appeal of a juvenile case is heard in front of the general Military Court of Appeal.

222. The military juvenile courts are competent to hear cases of juveniles, young adults and minor suspects. According to the military law applied in the OPT a child is defined as a person under the age of twelve.²⁰² A juvenile is “a person of the age of twelve and older yet under the age of fourteen” (12 to 14).²⁰³ A young adult is a person “fourteen years of age and older, yet under

¹⁹⁸ See, *supra* para. 214.

¹⁹⁹ See especially, United Nations, Committee on the Rights of the Child, UN Doc. CRC/C/15/Add.195 (9 October 2002), para. 20.

²⁰⁰ First established by Military Order 1644, incorporated by Order Regarding Security Provisions (Consolidated Version) (Judea and Samaria) No. 1651, 5770-2009, (hereinafter Military Order 1651) (Art. G) and permanently established by Military Order 1727 issued on 29 September 2013.

²⁰¹ Military Order 1651, Art. 5, Section 137.

²⁰² Military Order 1651, Chapter A, General Provisions, Definitions, “child”.

²⁰³ Military Order 1651, Chapter A, General Provisions, Definitions, “juvenile”.

the age of sixteen” (14-16)²⁰⁴. A minor is a person under the age of 18 (16-18).²⁰⁵ The military juvenile court will hear all cases of persons under the age of 18. Any child, *i.e.* a person under age of 12 will not be held criminally responsible and will not be charged, arrested or prosecuted.²⁰⁶

223. The rules governing Palestinian minor offenders are not found in a single instrument. Rather in different military orders,²⁰⁷ rules on minors can be found and render an understanding on the rights and obligations of Palestinian minors difficult. Subsequently and additionally, Jordanian law is applicable.

224. In comparison, Israeli offenders that are under-aged are tried before juvenile civilian courts in Israel and receive different treatment from the moment of arrest until the appearance before a judge and when being sentenced to serve a prison term, as laid out in the comprehensive single code of the Israeli Youth (Trial Punishment and Modes of Treatment) Law.²⁰⁸

²⁰⁴ Military Order 1651, Chapter A, General Provisions, Definitions, “young adult”.

²⁰⁵ Military Order 1651, Art. 6, Section 136.

²⁰⁶ Military Order 1651, Art. 191.

²⁰⁷ See *e.g.* Military Order 1644; 1651; 1676; 1745; 1754.

²⁰⁸ Youth Law 5731-1971; see especially Amendment No. 14 for considerable changes.

2. Any selective *ad hoc* application of the spirit of the Israeli Youth Law by an individual military judge does not cure the differences in the respective laws

225. The differences in the treatment of Palestinian and Israeli under-aged suspects and offenders did not go unnoticed by individual considerate military judges that serve in the Israeli military court system. In that regard, especially the president of the Military Court of Appeals noted:

“Notwithstanding the fact that the provisions of Amendment No. 14 the Youth Law do not apply in the Area [namely the OPT], we cannot ignore the spirit and the principles upon which they are founded, of protecting the rights of a minor, even if he is suspected of committing offenses, and granting a dominant weight to the supreme principle of the best interest of the minor in the proposed bill. Ultimately, a minor is a minor is a minor, whether he lives in a place where Israeli law fully applies or whether he lives in another place, to which Israeli law indeed does not fully apply, but it is subject to the effective influence of the Israeli justice system.”²⁰⁹

226. The statement reveals the problematic differential treatment of Palestinian minors in comparison to Israeli minors by virtue of the applicable military

²⁰⁹ Detention Appeal (Judea and Samaria) 2912/09 *Military Prosecution v. Nashmi Abu Rahma* (31 August 2009), cited from ACRI (2014), *supra* note 119, p. 66.

orders on the one hand and the Israeli Youth Law on the other. However, any spontaneous alignment in the treatment of Palestinians minors with that of Israelis based on the personal conviction of an individual judge may not be seen as a general rectification of the discriminatory legal rules establishing different standards of treatment for Israeli and Palestinian minors. Rather, it even further “undermines the legal certainty of the suspects and defendants”.²¹⁰ In sum, different legal standards remain and constitute an almost obvious violation of CERD.

3. Discriminatory treatment of Palestinians in comparison to Israeli under-aged takes place in all phases of criminal proceedings

a. Discriminatory definition with regard to the age of majority

227. Palestinians under the age of 18 are charged before a military juvenile court.

A minor, defined in Order 1651²¹¹ as a person under the age of 16, is now according to Military Order 1676 a person under the age of 18.²¹² It should be noted, however, that with regard to other aspects, a person between the age of 16 and 18 is treated as an adult, as the definition of “a minor” concerns the section of the jurisdiction of military juvenile courts only.²¹³

Thus, minors of the age of 16 and 17 are by the law, with regard to aspects

²¹⁰ See for a comprehensive analysis of the difference in the legal systems upheld by Israel in the OPT and Israel respectively: ACRI (2014), *supra* note 119, p. 66.

²¹¹ Military Order 1651, Arts. 6, 136.

²¹² Military Order 1676, Amendment to Art. 136.

²¹³ ACRI (2014), *supra* note 119, p. 67.

other than the question whether the person will be tried in front of the general military court or the military juvenile court, such as arrest, detention and interrogation, treated just like adults.²¹⁴

228. In contrast, under Israeli law any person under the age of 18 is consistently not treated like an adult. The application of the Youth Law extends to minors in all aspects, if an Israeli offender is under the age of 18.²¹⁵

229. This inconsistency in the definition becomes decisive *e.g.* with regard to sentencing of a Palestinian minor. Provision 168 of Military Order 1651 makes reference to juveniles and young adults, *i.e.* persons between the age of 12 and 16 and not to minors, *i.e.* persons between 16 and 18.²¹⁶ Hence, persons between the age of 16 and 18 do not fall into the scope of this provision which requires the juvenile judge to particularly consider the age of the person as being under the age of majority. In consequence, the restrictions to imprisonment *e.g.* not apply to a young Palestinian offender between the age of 16 and 18.²¹⁷

230. In sharp contrast, the Israeli Youth Law with its entirely different legal code for persons under the age of 18, does not run risk to treat under-aged as

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ Military Order 1651, Art. 168.

²¹⁷ Military Order 1651, Art. 168 (B) and (C).

adults and thus treats Israeli offenders under the age of 18 years better than Palestinians of the same age. Hence, Israel discriminates against Palestinians with its inconsistency in requiring different treatment for offenders under the age of 18.

b. Discriminatory treatment during arrest and detention

231. Palestinian minors are also arrested and interrogated at times and in a manner discriminatory in comparison to Israeli minor offenders.

232. Quite often, Palestinian minor suspects and offenders are arrested during night-time. Regularly, Israeli forces conduct the abduction after midnight and before sunrise, leading to stress, fear and psychological consequences not only for the parents and the entire family, but especially for the abducted minor who often suffers from mental distress and posttraumatic disorders.²¹⁸

233. For that very reason, under Israeli law the preconditions for arresting a child at night are very strict.²¹⁹ As a general rule under the Israeli Youth Law, an

²¹⁸ B'Tselem, *No minor matter – Violation of the Rights of Palestinian Minors Arrested by Israel on Suspicion of Stone Throwing* (2011), p. 43.

²¹⁹ ACRI (2014), *supra* note 119, p. 68.

arrest shall not take place during night-time.²²⁰ It is only allowed as a means of last resort and under exceptional circumstances.²²¹ In comparison, the military orders governing arrests also with regard to Palestinian minors do not contain a similar prohibition of arrests at night-time. As a matter of fact, arrests of Palestinian children, juveniles and minors often take place at night, even though the accusation concerns an act that was committed a few days or even weeks ago, strongly indicating that no case of immediate action was indeed required.²²²

234. Under Israeli Youth Law, during interrogations and only with a few exceptions, a parent or relative of the minor must be present every time.²²³

Interrogations of Israeli minors shall never take place at night which is defined as 8p.m. to 7a.m. for juveniles and 10p.m. to 7a.m. for persons over the age of 14 years.²²⁴ Similarly strict regulations with regard to the presence of parents of Palestinian minors are not exercised by Israeli officials and nightly interrogations following the arrest of the under-aged Palestinian at night are common.²²⁵

²²⁰ Art. 4 (a) (7) Police Ordinance (“Police conduct regarding Minors”): “Arrests will be made during the day, unless a postponement of the arrest might obstruct the investigation. Permission to arrest a minor at night can only be granted by the police’s Chief of the Youth Department or a Youth Officer or the Chief of Investigation”.

²²¹ Art. 10 Israeli Youth Law; see ACRI (2014), *supra* note 119, p. 68.

²²² ACRI, *Violations of the “Youth Law” (Adjudication, Punishment and Methods of Treatment) – 1971 by the Israeli Police in East Jerusalem* (2001), para. 8.

²²³ B’Tselem (2011), *supra* note 218, p. 12.

²²⁴ Except if the penalty for the crime is more than three years or parents and minor consent; B’Tselem (2011), *supra* note 218, p. 12.

²²⁵ ACRI (2001), *supra* note 222, para. 13.

235. Even though Palestinian minors might be given the right to contact an attorney, no contact details are provided making it unlikely that the minor is in fact in a position to name an attorney.²²⁶ In contrast, under the Israeli Youth Law the interrogator is obliged to contact a defence attorney, either the defendant's attorney or the public defender's office, prior to the interrogation of the minor suspect.²²⁷

236. When Palestinian minor suspects are held in custody in Israel, Palestinian parents cannot reach their children while in detention in Israel.²²⁸ The practice of deporting Palestinian children outside of the OPT and holding them detained in Israel does not only constitute a violation of Art. 76 4th Geneva Convention, but amounts also to a discrimination as it results in Palestinian parents being often unable to visit their detained children due to the complication of obtaining a permit to leave the West Bank. This amounts to a discrimination in comparison to detained Israeli children and minors that may receive family visits as their parents do not have to acquire a permit to leave their house and are thus in a position to see their children in the detention facility.

²²⁶ Military Order 1651, Section 53 lit. (B).

²²⁷ ACRI (2014), *supra* note 119, p. 69, reference to Art. 9i(b) Israeli Youth Law.

²²⁸ ACRI (2014), *supra* note 119, p. 69.

237. Furthermore, in comparison to Israeli minor offenders, Palestinian minors are usually not granted the option for bail and they remain in custody until the end of the process.²²⁹ In contrast, in cases involving Israeli suspects under the age of majority, the minor is regularly allowed to be set free on bail until the proceeding begins.²³⁰

238. Moreover, the maximum remand periods are longer for Palestinian minors in comparison to Israeli minors. The initial period until a suspect has to be brought before a judge under the Israeli Youth Law is 12 hours for minors between 12 and 14 years of age, and 24 hours in case of a minor over the age 14 years with the possibility to double the length of this period in exceptional circumstances.²³¹ In case of Palestinians of the same age the period is twice as long and can be extended up to 6 or 8 days in case the accused is over the age of 16.²³² However, even longer time periods are possible in case of security offenses, a category that does not exist with regard to Israeli accused minors.²³³

²²⁹ Defence for Children International/Palestine Section (2013), p. 4.

²³⁰ Israel Police treatment of juveniles during the period of disengagement (2005), Directive B 1, available at: <http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Israel%20Police%20treatment%20of%20juveniles%20during%20the%20period%20of%20disengagement%2015-Aug-2005.aspx>.

²³¹ ACRI (2014), *supra* note 119, p. 69.

²³² ACRI (2014), *supra* note 119, p. 70.

²³³ ACRI (2014), *supra* note 119, p. 70.

239. Similar observations can also be made with regard to other timeframes. The first period of investigation that can be extended by judicial order is 10 days in case of Israelis and 15 days in case of Palestinian accused.²³⁴

240. The same observation can be made with regard to remand that is not possible for minors under the age of 14 and shall not exceed 6 months for Israelis over the age of 14, with the possibility for extension by the Supreme Court for 45 days each time. Palestinians over the age of 12 can be held in remand for one year and the Court of Appeals may extend the time period for 6 months upon each request.²³⁵

c. Discriminatory treatment during criminal proceedings and violation of due process rights of minors

241. While for Israeli minor offenders, juvenile judges and courts are competent for all questions related to the proceedings, only the principal proceeding for Palestinian offenders is to take place before military juvenile courts. Other hearings, *e.g.* concerning arrest or release, can also be held before regular military courts.²³⁶ Generally, the military juvenile courts are not

²³⁴ ACRI (2014), *supra* note 119, pp. 70-71.

²³⁵ ACRI (2014), *supra* note 119, p. 71.

²³⁶ Art. G, Section 138 lit. b explicitly states: “The provision of this subsection will not apply to proceedings of arrest and release under Article C of this order”.

sufficiently separated from the military courts for adults, as actually both use the same facilities.²³⁷

242. Furthermore, the privacy of Palestinians minors is inadequately protected and in fact not as well protected as the privacy of Israeli minors. This is due to the fact that according to the Israeli Youth Law, proceedings in which Israeli minors are charged are to be held in camera and it is prohibited to publish their names.²³⁸ In comparison, such general obligation to hold criminal proceedings in camera when Palestinian minors are charged cannot be found in any military order governing proceedings of military juvenile courts.²³⁹ Rather it must be specifically ordered by the military court.²⁴⁰

d. Discriminatory treatment of sentencing of juvenile Palestinians

243. Also with regard to sentencing, Palestinian minors are discriminated in comparison to Israeli minors. The Israeli Youth Law provides for different modes of punishment in order for the judge to apply different methods aiming at rehabilitation of the under-aged criminal.²⁴¹ Even when the Israeli Youth Court finds the minor to have committed the crime, the judge may

²³⁷ UNICEF, *Children in Israeli Military Detention, Observations and Recommendations* (2013), p. 6; Defence for Children International/Palestine Section (2013), p. 4.

²³⁸ ACRI (2014), *supra* note 119, p. 72.

²³⁹ ACRI (2014), *supra* note 119, p. 73.

²⁴⁰ Military Order 1651, Art. D, Section 88 lit. b.

²⁴¹ ACRI (2014), *supra* note 119, p. 73.

order different modes including exemption from punishment after a review of the case was undertaken.²⁴² Judges make use of this opportunity as data provides that of the Israeli minor offenders around 59,7 % of those found guilty were “adjudicated without a conviction”; only 20,6 % served a prison term and 19,7 % were sentenced to other punishments.²⁴³

244. Quite to the contrary, the conviction rate for Palestinian minors amounts to nearly 100 %.²⁴⁴ In fact, between 500 and 700 children are prosecuted by Israeli courts each year.²⁴⁵ With regard to Palestinian offenders, the military juvenile court judge only has the possibility to convict or acquit the minor. In comparison to Israeli Youth judges, no alternative measures of punishment are available to juvenile military judges under the military orders.²⁴⁶

245. The offense of stone throwing poses a particular risk of discrimination against Palestinian minors. Under military orders applicable for Palestinians, throwing objects covers an entire section and particularly severe penalties are posed upon stone throwing.²⁴⁷ It is up to 10 years for throwing an object

²⁴² ACRI (2014), *supra* note 119, p. 73.

²⁴³ ACRI (2014), *supra* note 119, p. 73; statistic from Israel Police (2010).

²⁴⁴ B’Tselem (2011), *supra* note 218, p. 16; ACRI (2014), *supra* note 119, p. 74.

²⁴⁵ Available at: http://www.europarl.europa.eu/meetdocs/2014_2019/documents/dpal/dv/4d_dci-p_new_israeli/4d_dci-p_new_israelien.pdf.

²⁴⁶ ACRI (2014), *supra* note 119, p. 74.

²⁴⁷ B’Tselem (2011), *supra* note 218, p. 6.

at a person, property or a traffic route even without intent to cause injury and up to 20 years for throwing an object at a moving vehicle.²⁴⁸ Most importantly, throwing objects is considered as a serious offense and a security offense leading to a number of restrictions of rights of the suspected offender.²⁴⁹ *Inter alia*, a change in the applicable rules of procedure allows the arrest of the suspect in case of stone throwing until the end of proceedings.²⁵⁰ Numerous Palestinian minors are arrested and imprisoned for the offense of stone throwing each year,²⁵¹ a violation of their rights often on a thin base of evidence against the particular juvenile or minor under suspicion. Often they plead guilty in order to escape imprisonment.²⁵²

246. Furthermore, Palestinian juveniles, namely persons between the age of 12 and 14 can be sentenced to a prison term of up to 6 months. Recently, the Knesset passed a law according to which children between the age of 12 and 14 may be sentenced to a prison term for ‘serious violent crimes’ such as murder or manslaughter under the Israeli Youth law.²⁵³ However, it is suspected that this law will be applied mostly against Palestinian young

²⁴⁸ Military Order 1651, Section 212.

²⁴⁹ Section 259 of Military Order 1651 on „security offense”.

²⁵⁰ ACRI, *Arrested Childhood: The Ramifications of Israel’s New Strict Policy toward Minors - Suspected of Involvement in Stone Throwing, Security Offenses, and Disturbances* (2016), p. 12.

²⁵¹ See Enforcement Policy in the Offense of Stone Throwing, State Prosecutor’s Office Guidelines 2.19., 5770-2009; Publication of Decision 1776 of the 33rd Government Strengthening Enforcement in Offenses of Stone Throwing (2014), updated 2015; Enactment of the Penal Code (Amendment No. 119), 5775-2015; see for a short description of the contents of these acts ACRI, *supra* note 250, p. 7.

²⁵² ACRI (2016), *supra* note 250, p. 12.

²⁵³ Available at: http://www.europarl.europa.eu/meetdocs/2014_2019/documents/dpal/dv/4d_dci-p_new_israeli/4d_dci-p_new_israelien.pdf.

offenders, leading to discriminatory application of the law against especially in East Jerusalem.²⁵⁴ Young Palestinian adults between the age of 14 and 16 may be sentenced to a prison term of up to one year or even more when the crime was an offense punishable with five years or more.²⁵⁵

e. Discriminatory treatment of minors in East Jerusalem

247. The discriminatory treatment of Palestinian minors in comparison to Israeli minors becomes especially apparent with regard to East Jerusalem.²⁵⁶ On its face, Israel applies the Israeli Youth Law to East Jerusalem that it, in blatant violation of international law, considers forming part of Israel. However, despite the guarantees provided for in the Israeli Youth Law that require a better treatment of minor suspects and offenders, the law is not fully applied with respect to Palestinian minors in East Jerusalem.

248. The guarantees to protect children and minors and to ensure their well-being are often ignored or incompletely applied in situations of suspects and offenders from East Jerusalem.²⁵⁷ Numerous reports point to the fact that minor suspects and offenders are often abducted at night-time, their parents are not allowed to be present for the interrogation and no attorney is

²⁵⁴ Available at: http://www.europarl.europa.eu/meetdocs/2014_2019/documents/dpal/dv/4d_dci-p_new_israeli/4d_dci-p_new_israelien.pdf and e) below.

²⁵⁵ ACRI (2014), *supra* note 119, p. 74.

²⁵⁶ ACRI (2016), *supra* note 250, *passim*.

²⁵⁷ ACRI (2016), *supra* note 250, p. 9.

contacted for the Palestinian minor, although, as has been laid out above, this is required by the Israeli Youth Law.²⁵⁸ Similar practices are not reported with regard to Israeli minors.

D. Administrative detention

249. As previously mentioned, CERD recognizes “the right to equal treatment before (...) all (...) organs administering justice” under its Art. 5 lit. a, and further obliges all States parties to ensure that no public authorities engage in acts or practices of racial discrimination under Art. 2 para. 1 lit. a CERD. An organ or public authority administering justice that engages in acts or practices of racial discrimination therefore violates the above provisions of CERD.

1. Applicable rules of international law

250. Detention without trial by administrative order rather than judicial decision violates the right to a fair trial and to due process of law enshrined in Art. 9 ICCPR, which the ICJ has found to also apply in the OPT.²⁵⁹ Consequently, it is permitted by international law in limited circumstances only, for example “in time of public emergency which threatens the life of the nation” under Art. 4 ICCPR.

²⁵⁸ See for more details ACRI (2001), *supra* note 222, *passim*; ACRI (2016), *supra* note 250, *passim*.

²⁵⁹ *Ibid.*, paras. 102-111.

251. The 4th Geneva Convention allows the occupying power to intern persons only if the security of the occupying power “makes it absolutely necessary”²⁶⁰ or if it “considers it necessary for imperative reasons of security”.²⁶¹ The ICRC Commentary stresses that this provision does not permit the taking of collective measures since “each case must be decided separately.”²⁶²

252. The administration of a system seen to be offensive to international law in a racially discriminatory manner results in an aggravated form of racial discrimination.

2. Legal background

253. Different legal regimes govern the administrative detention of Israelis in Israel, Israeli settlers in the OPT and Palestinians in the West Bank. Israeli law provides for the detention of persons in Israel (and Jewish settlers in the OPT) by administrative order in the Emergency Powers (Detention) Law of 1979 (replacing the administrative detention provisions in the Defence (Emergency) Regulations of 1945 enacted by the British during the Mandate period). This law allows the Minister of ‘Defence’ (sometimes only after a

²⁶⁰ Art. 42 4th Geneva Convention.

²⁶¹ Art. 78 4th Geneva Convention.

²⁶² J. Pictet (ed.), *Commentary IV Geneva Convention, International Committee of the Red Cross* (1958), p. 367.

cabinet decision)²⁶³ to order the detention of a person for up to six months if he has “reasonable cause” to believe that reasons of state security require such detention. This order may be renewed. A detainee must be brought before a judge within 48 hours. The detention order must be reviewed every three months.

254. The administrative detention of Palestinians in the West Bank in turn is governed by Military Order 1651 of 2010²⁶⁴ (replacing previous orders on this subject) which empowers military commanders in the West Bank to detain a person for a maximum period of six months when they believe that such detention is necessary in the interests of “the security of the region or public security”. Military commanders may extend the detention order for an additional period of up to six months. Such orders may be extended repeatedly as the order does not set a limit on the cumulative period of detention. Within eight days the detainee must be brought before a military judge who may approve the order, cancel it or shorten the period of detention. The judge’s decision may be appealed to the Military Court of Appeals. Previously the order required review every three months but this was abolished in 2002. Hearings are *in camera* and the judge is not bound by

²⁶³ On 2 August 2015 the Israeli cabinet approved the administrative detention of settlers suspected of being responsible for the killing of the Dawabsheh family in Duma. See M. Zonszein, “Israel to detain Jewish terror suspects without trial”, *The Guardian* (2 August 2015).

²⁶⁴ Military Order 1651, Arts. 284-294. See further, Addameer Prisoner Support and Human Rights Association, *Administrative Detention in the Occupied Palestinian Territory. A Legal Analysis* (4th ed. 2016).

the normal rules of evidence. Evidence may be admitted without being disclosed to the detainee. In effect this means that the detainee must guess what is in the security file in order to defend himself.²⁶⁵ The detainee and the military prosecutor may appeal against the decision of the Military Court of Appeals to the High Court of Justice (Supreme Court).

3. Discrimination in the implementation of administrative detention

255. There are several differences between the laws governing administrative detention of Israeli citizens (including settlers) and Palestinians in the West Bank. Such differences relate to the person authorized to order the detention, the period before which a detainee must be brought before a judge, the court that considers the detention and the automatic review of the detention within three months. Both legal regimes offend normal principles of justice in that they authorize detention without trial for a substantial period. The implementation of administrative detention in respect of Palestinians and Israeli settlers in the OPT, however, discriminates against Palestinians. This is clear from the number of persons detained, the reasons for the detentions, the treatment of detainees, the length of detentions, the conditions under which persons are detained and the review of detention orders by the courts.

²⁶⁵ See S. Krebs, "Lifting the Veil of Secrecy: Judicial Review of Administrative Detention in the Israeli Supreme Court" (2012) 45 *Vanderbilt Journal of Transnational Law* 639, pp. 661, 683-686.

256. Despite the Israeli allegations that Palestinians pose threat to security, Israel, the occupying power, has created through its colonial and prolonged occupation an environment where settler violence thrives without any accountability. As a matter of fact, Jewish settlers have engaged in very frequent violations and acts of violence against Palestinians, their property and their institutions. Mosques, churches and private homes have been fire-bombed, civilians attacked and killed, olive groves destroyed and farmers homes and agricultural land damaged by Jewish settlers.²⁶⁶ Administrative detention has been used very sparingly against settlers. In large measure this is because the occupying forces fraternize with the settlers and deliberately refuse to enforce the law against them.²⁶⁷

a. Statistics of detention

257. Statistics show a great discrepancy in the use of administrative detention against Palestinians and settlers, a discrepancy which gives rise to the inference of discrimination. Israel used administrative detention against Palestinians from the start of the occupation in 1967. By 1970, Israel had detained 1,131 Palestinians and detentions continued throughout the

²⁶⁶ See on this aspect also *infra* para. 573.

²⁶⁷ Breaking the Silence, *The High Command. Settler Influence on IDF Conduct in the West Bank* (2017), particularly at pp. 15-21.

decade.²⁶⁸ The number of detentions dropped in the 1980s but during the First Intifada from 1986 to 1991 the number of Palestinians subjected to administrative detention rose sharply. In November 1989, 1,794 Palestinians were held in detention.²⁶⁹ During the 1990s the number of detentions dropped, but soared again during the Second Intifada. From December 2000 to January 2003 the number of Palestinians subjected to administrative detention rose from less than 100 to over 1,000.²⁷⁰ Between 2004 and 2006, 8,150 administrative detention orders were issued by military commanders in the OPT.²⁷¹ For the past decade detentions have fluctuated between 200-300 per year to 800 per year. In July 2016, 750 Palestinians were in detention of whom two were women and eight were minors.²⁷²

258. By contrast, very few Jewish settlers have been detained administratively. In its report *Statistics on Administrative Detention*, B'Tselem states that:

“over the years, nine Israeli citizens residing in settlements in the West Bank have been administratively detained for periods of up to six months”.²⁷³

²⁶⁸ E. Playfair, *Administrative Detention in the Occupied West Bank* (1986), p. 4.

²⁶⁹ S. Krebs, *supra* note 265, p. 654.

²⁷⁰ B'Tselem, *Statistics on Administrative Detention* (updated 2017), available at: www.btselem.org/english/Administrative_Detention/Statistics.asp.

²⁷¹ Yesh Din (2007), *supra* note 111, p. 54.

²⁷² Addameer (2016), *supra* note 264, p. 10.

²⁷³ B'Tselem, *supra* note 270.

259. This gross disparity in the number of Palestinians and the number of settlers detained is not only an indication of discrimination in the implementation of the system. It also suggests that the individual circumstances of Palestinian detainees are not as carefully considered as those of settler detainees, and that administrative detention is used as a form of collective punishment under the pretence of emergency.²⁷⁴

b. Reasons for detention

260. Settlers are detained for the most serious crimes only, such as the fire-bombing of a Palestinian home and the killing of the Dawabsheh family in the West Bank town of Duma in July 2015. On the other hand, the test of danger to public security is interpreted broadly in the case of Palestinians. They are often detained for acts of peaceful protest, such as carrying a Palestinian flag or participating in a demonstration.²⁷⁵ Administrative detention is frequently used to circumvent criminal proceedings when the prosecutor does not have sufficient evidence to charge a person or when he does not wish to reveal the nature of the evidence collected. Administrative detention is used as an instrument against political opponents. This is illustrated by the detention of members of the Palestinian Legislative Council associated with Hamas.²⁷⁶

²⁷⁴ Addameer (2016), *supra* note 264, p. 9.

²⁷⁵ *Ibid.*, p. 3.

²⁷⁶ *Ibid.*, p. 7.

c. Treatment of detainees

261. Frequently, Palestinian prisoners are subjected to ill-treatment, such as isolation, solitary confinement, deliberate medical negligence, denial of family visits and access to education, as well as torture and inhuman treatment. Administrative detainees are not excepted.²⁷⁷ Unlike settler detainees, whose detention is closely followed in the media,²⁷⁸ they are not protected by Israeli public opinion against inhuman treatment. That the torture of administrative detainees is a matter for concern is shown by the call upon Israel by the CAT Committee in its Concluding Observations of 2016 to

“urgently take the measures necessary to end the practice of administrative detention and ensure that all persons who are currently held in administrative detention are afforded all basic legal safeguards.”²⁷⁹

²⁷⁷ *Ibid.*, pp. 3, 12, 26-27.

²⁷⁸ This is illustrated by the criticism of the methods of interrogation employed against those suspected of the killing of the Dawabsheh family in Duma. See N. Barnea, “Bennett at odds with Bayit Yehudi over Duma arson investigation”, *YnetNews* (26 December 2015).

²⁷⁹ United Nations, Committee against Torture, UN Doc. CAT/C/ISR/CO/5 (3 June 2016).

d. Length of detentions

262. Palestinian detainees are detained for longer periods of time than settlers.

The detention of Jewish settlers is seldom renewed²⁸⁰ while the six months period of detention is routinely extended in the case of Palestinians, often resulting in two to three years detention without trial. Some detainees have been held as long as eight years and one detainee, *Mazen Natsheh*, was cumulatively held for ten and a half years between 1994 and 2013.²⁸¹

e. Conditions of detention

263. Jewish settlers under administrative detention are held in the general sections of prisons in Israel and are allowed to receive family visits, food, clothing and books. Palestinian prisoners, on the other hand, are held in the security sections of prisons or detention centres in Israel. This means that they are unable to be visited by family or their lawyers who are routinely denied permits to enter Israel and this results in them not receiving food, clothing or books from their families.²⁸²

²⁸⁰ Addameer (2009), *supra* note 117, p. 22.

²⁸¹ Addameer (2009), *supra* note 117, p. 22.

²⁸² Addameer (2009), *supra* note 117, pp. 23-24, 27-28.

f. Review of detention orders by the courts

264. Detention orders are based on ‘classified’ information which is not disclosed to the detainee. This makes the review process particularly important. The detention of Jewish settlers is carried out by a district court in Israel applying normal standards of review, including the requirement that the review take place within 48 hours. A detention order must be reviewed after three months. In 2005, an Israeli court went so far as to order that compensation be paid to a settler, *Noam Federman*, for unlawful arrest and detention.²⁸³

265. The detention of Palestinians takes a very different course.²⁸⁴ Their detention is reviewed within eight days by a military judge, who in practice seldom investigates the veracity of the evidence, in proceedings conducted in Hebrew. There is no provision for a review after three months but the detainee has a right of appeal to the Military Court of Appeals, and from there to the Supreme Court.

266. The Israeli Supreme Court strictly reviews appeals against detention orders from Jewish citizens, including settlers.²⁸⁵ It has not, however, applied such a strict standard to the detention of Palestinians. In the first decade of the

²⁸³ Haaretz, *State to Pay NIS 100,000 to Right-wing Activist Federman* (12 October 2005), available at: <https://www.haaretz.com/1.4877749>.

²⁸⁴ See, V. Tilley (ed.), *Beyond Occupation. Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (2012), pp. 143-144.

²⁸⁵ D. Kretzmer, *The Occupation of Justice. The Supreme Court of Israel and the Occupied Territories*, p. 130.

present century the Supreme Court reviewed 322 cases involving the administrative detention of Palestinians. Not a single case resulted in a release.²⁸⁶ These statistics, together with a careful study of the decisions of the Israeli Supreme Court, have led an Israeli scholar, *Shiri Krebs*, to conclude that the Supreme Court exercises a stricter review of Jewish detainees than of Palestinians from the OPT and that:

“the Court systematically avoids issuing release orders, and demonstrates minimal intervention with regard to the assessment of secret evidence.”²⁸⁷

267. She adds that:

“(...) unfortunately, detention proceedings become an ‘assembly line’ in which ‘enemies’, ‘terrorists’ or just ‘others’ are constantly losing one of their most basic and valued human assets: their freedom.”²⁸⁸

268. The discriminatory nature of administrative detention led the CERD Committee in its 2012 Concluding Observations to urge Israel

²⁸⁶ S. Krebs, *supra* note 265, pp. 672, 681, 688; See too, M. Sfar, *The Wall and the Gate. Israel, Palestine and the Legal Battle for Human Rights*, Metropolitan Books, New York (2018), pp. 280-293.

²⁸⁷ *Ibid.*, pp. 692, 695.

²⁸⁸ *Ibid.*, p. 696.

“(…) to end its current practice of administrative detention, which is discriminatory and constitutes arbitrary detention under international law.”²⁸⁹

269. Ever since however, the situation has not improved but, to the contrary the discriminatory practice has further intensified and has become further entrenched.

E. Freedom of movement

258. CERD expressly prohibits discrimination in respect of freedom of movement in Art. 5 lit. d (i). There is, however, serious discrimination between settlers and Palestinians in the exercise of this right in the OPT.

1. Settlers

259. Israeli settlers in the West Bank move without restriction between settlements in the West Bank and East Jerusalem, and between Israel and settlements in the West Bank and East Jerusalem. No restraints are placed on their freedom of movement as they drive to work, schools, universities, hospitals and friends in the West Bank and East Jerusalem. There is no restraint on the movement of settlers within the ‘seam zone’ – the area

²⁸⁹ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/14-16 (3 April 2012).

between the Separation Wall in Palestine and the Green Line – whereas Palestinians are subject to severe restrictions on their movement within this area.

260. Separate, special roads are available to settlers to facilitate this freedom.

These roads bypass Palestinian areas and are designed to allow settlers to move freely without impediment. These roads are not reserved for exclusive use by settlers and non-Palestinians by means of notices proclaiming this reservation. Palestinians are simply expected to know that the roads are off-limits to them. Failure to observe this reservation will result in arrest and confiscation of the vehicle. Road segregation is enforced by checkpoints and road blocks denying access to the settlers' road. This is illustrated in particular by the case of Route 443, a major trunk road that passes through the West Bank. Before 2009 the road was barred from use by Palestinians by military order, but in that year the Israeli Supreme Court annulled this order and in theory the road was opened for use by Palestinians. In practice, however, the road is closed to Palestinians by check points and road blocks which prevent access to the road from Palestinian areas (as opposed to settlements). At present a bypass road for the exclusive use of settlers and Israelis is planned to link the settlement of Ma'ale Adumim and Jerusalem.

261. Some roads are strictly reserved for settlers. Other roads, which provide the only access to Palestinian villages, may be used by Palestinians who have obtained a permit for this purpose. The Israeli occupying forces are able to distinguish Palestinian vehicles from those of Israeli settlers by the different colour of their registration plates: yellow for Israelis, green for Palestinians. Different registration plates are required by military decree.²⁹⁰

262. The nature of road discrimination is well illustrated by an experience of *Shulamit Aloni*, Minister of Education in the Israeli cabinet from 1992-1993 and a prominent peace activist:

“On one occasion I witnessed an encounter between a Palestinian driver and a soldier on a settler’s road who was taking down details before confiscating the vehicle and sending its driver away. ‘Why?’ I asked the soldier. ‘It’s an order – this is a Jews only road’, he replied. I inquired as to where the sign was indicating this fact and instructing Palestinian drivers not to enter it. His reply was nothing short of amazing. ‘It is his responsibility to know it, and besides, what do you want us to do, put up a sign here and let some anti-Semitic reporter or

²⁹⁰ Military Order 1251 (18 August 1988).

journalist take a photo so that he can show the world that apartheid exists here?’²⁹¹

2. Palestinians

263. The movement of Palestinians within the West Bank and to East Jerusalem is restricted by the forces of the occupying power, employing physical obstacles and bureaucratic procedures to achieve this purpose. These restrictions on free movement seriously violate the right to education, health care, work, family life and to an adequate standard of living. In addition, they stifle the economic growth of Palestine, fragment the territory and undermine the right of self-determination of the Palestinian people.

a. Bureaucratic procedures: permits

264. All Palestinians are required to carry identity cards, issued by the Ministry of the Interior of the State of Palestine subject to the oversight of Israel. Such ID cards are used to facilitate a permit system reminiscent of apartheid South Africa’s notorious Pass laws.²⁹² A significant difference between the two systems is that, unlike the apartheid regime in which the procedures for obtaining passes were clear and the categories of passes were limited, the

²⁹¹ S. Aloni, “Indeed there is apartheid in Israel”, *Middle East Service* (10 January 2007) (translation of Hebrew original published in: *Yediot Aharonot*, 31 December 2006).

²⁹² See, J. Dugard, *Human Rights and the South African Legal Order* (1978), pp. 71-78.

Israeli regime is characterized by complication and obfuscation. Permits are required for every facet of life such as employment, training, studying, working, moving house, receiving medical treatment, visiting a sick relative etc. Requirements for permits, the procedures to be followed for obtaining permits and the criteria for granting permits are often unpublished, and when published they are published in Hebrew and not translated into Arabic.²⁹³ This system allows the occupying power to control and limit the movement of Palestinians within the OPT, including entering East Jerusalem and Israel.

265. Movement within the West Bank is most seriously curtailed in the vicinity of the Wall. This Wall, known as the “Annexation and Separation Wall” or “Apartheid Wall”, which is still under construction,²⁹⁴ has been declared to be illegal by the International Court of Justice in its 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.²⁹⁵ More than 80 % of this Wall, allegedly being built for security purposes²⁹⁶ between Israel and Palestine, runs through the West Bank. The

²⁹³ Gisha – Legal Center for Freedom of Movement, *Procedures and Policies* (2015), available at: www.gisha.org/legal/procedures-and-protocols.

²⁹⁴ About 60 % has been completed, while a further 10 % is currently under construction.

²⁹⁵ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, p. 136. See further on the Wall, M.Sfard, *The Wall and the Gate. Israel, Palestine and the Legal Battle for Human Rights*, Metropolitan Book, New York, 2018, pp.256-334.

²⁹⁶ The pretence that the wall is being built for security reasons has largely been abandoned. Today it is recognized by Israeli leaders that the principal purpose of the wall is to incorporate settlements into Israel. It is therefore more correctly described as a political wall rather than a security wall.

land between the Green Line – the accepted boundary between Israel and Palestine- and the Wall inside Palestine is known as the “seam zone”.

266. Many settlements are situated within the seam zone. No restrictions are placed on the movement of Israelis and tourists within this zone and no permits are required for their movement within the zone.

267. There are also twelve Palestinian villages within the seam zone. Moreover, many Palestinian farmers resident in villages along the eastern side of the Wall own and farm land within this zone. Palestinians are, however, denied free access to the seam zone. Access is regulated by a vigorous permit system.²⁹⁷ In the first place, Palestinians resident in villages within the seam zone require permits to reside in their own homes and to farm their own lands. Secondly, farmers resident outside the seam zone with land in the seam zone, require permits to farm their own land. Thirdly, Palestinian wishing to visit the seam zone to do business there or to visit family and friends require permits. Strict control is maintained over the zone by means of gates within the Wall that open at irregular and limited times.

²⁹⁷ See, HaMoked Centre for Defence of the Individual, *The Permit Regime. Human Rights Violations in the West Bank Area Known as the Seam Zone* (March 2013), available at: http://www.hamoked.org/files/2013/1157660_eng.pdf.

268. Permits are not easily obtained. There are different kinds of permits for different categories of persons wishing to enter the zone; the requirements for completion of the form are in Hebrew and frequently change; and they are limited to short periods. Permits are routinely refused – in 2013 HaMoked reported that 30 % had been refused.²⁹⁸

269. This blatantly discriminatory system seriously interferes with the lives of some 10,000 Palestinians living in the seam zone and several thousand more who are dependent on farms within the seam zone. The severe restriction on movement within the seam zone has resulted in a process of internal displacement of Palestinians from the seam zone and the loss of livelihood for Palestinian farmers with lands within the zone.

270. Palestinians from the West Bank require a special permit to enter East Jerusalem and Israel. They may enter Jerusalem through only four checkpoints. This has resulted in the isolation of East Jerusalem, traditionally the cultural and economic centre of Palestine.

271. Palestinians residing in East Jerusalem are required to hold ID cards issued by Israel, granting bearers the status of permanent resident. These ID cards are revoked if the occupying power determines that Jerusalem has ceased to

²⁹⁸ *Ibid*; See further, M Sfar, *The Wall and the Gate*, above not 295, pp.263-268.

Ibid.

be the “centre of life” of the bearer. Palestinians who travel abroad for substantial periods risk losing this residence status. So do residents of East Jerusalem who relocate to nearby Palestinian neighbourhoods because of housing shortages in East Jerusalem. Between 1967 and 2013 some 14,000 residents of Jerusalem had their residency rights revoked, resulting in a loss of social benefits, including health insurance.²⁹⁹

272. At the end of 2015 over 57,000 Palestinians from the West Bank held permits to work in Israel and over 25,000 had permits to work on settlements. Such permits are, however, often arbitrarily revoked. Sometimes this is done as collective punishment for an alleged attack on Israelis.

273. Travel abroad for Palestinians is not a right but a privilege. Special permits are required and these permits are frequently arbitrarily rescinded.

b. Check points and physical obstacles

274. Checkpoints constitute the most severe restriction on the movement of Palestinians. Members of the occupying forces, who staff checkpoints, carefully check the identity of Palestinians wishing to cross and scrutinize

²⁹⁹ See, Ir Amim, *Displaced in their Own City; the Impact of Israeli Policy in East Jerusalem on the Palestinian Neighbourhoods of the City beyond the Separation Barrier* (June 2015), pp. 17-18, available at: http://www.ir-amim.org.il/sites/default/files/akurim_ENG_for%20web_0.pdf.

their permits. Vehicles and bags are inspected and there are long delays. Qalandia checkpoint, the main crossing from the West Bank to East Jerusalem is notoriously slow and pedestrians may take up to 90 minutes to cross during peak hours.³⁰⁰ Inevitably those conferred with this power often abuse their power and engage in intimidating and humiliating conduct. In response, an Israeli NGO, known as Machsom Watch, comprising Israeli women, seeks to monitor such conduct and to restrain the aggressive behaviour of soldiers.

275. In the period November 2014 to November 2015, the Office of the United Nations High Commissioner for Human Rights identified 85 fixed checkpoints in the West Bank. Nine of these were on the Green Line while all the others were located within the West Bank.³⁰¹ In addition, hundreds of ‘flying’ checkpoints (temporary checkpoints set up for a limited time in an unpredictable place) were erected each month on roads throughout the West Bank. Many checkpoints are erected in the vicinity of settlements in order to ensure the quality of life and free movement of settlers.

276. In the H2 area of Hebron, where approximately 6,000 Palestinians live near settlements, the movement of vehicles and pedestrians has been severely

³⁰⁰ *Ibid* pp. 48-50.

³⁰¹ United Nations, Human Rights Council, Report of the Secretary-General, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/31/44 (20 January 2016), p. 7.

restricted by 19 checkpoints. In 2015, 16 checkpoints were erected in East Jerusalem.³⁰²

277. Movement is also severely limited by hundreds of physical obstacles and barriers that include unmanned roadblocks, earth mounds, gates and trenches. In many instances these obstacles make it impossible for vehicles to cross highways to continue journey on the other side of the road. In such cases Palestinians are obliged to leave their vehicles, cross the road on foot and take a taxi from the other side of the road.

c. East Jerusalem

278. These obstacles have also been erected in East Jerusalem. In 2015, there were 20 roadblocks and earth mounds blocking the entry into and the exit from the main Palestinian residential areas, curtailing the movement of approximately 138,000 residents to work, school and medical treatment.³⁰³

d. Jordan Valley

279. The Jordan Valley is subject to rigorous restrictions on freedom of movement.³⁰⁴ 87 % of the Jordan Valley is designated as Area C. But 94 %

³⁰² *Ibid* pp. 5, 7.

³⁰³ *Ibid.*, p. 7.

³⁰⁴ See, United Nations, Office for the Coordination of Humanitarian Affairs occupied Palestinian territory, *Humanitarian Fact-Sheet on the Jordan Valley and Dead Sea Area* (February 2012), available at: https://www.ochaopt.org/documents/ocha_opt_jordan_valley_factsheet_february_2012_english.pdf.

of this area is off limits to Palestinians as it is set aside for military purposes (56 %), settlements (15 %) and nature reserves (20 %). Entrance to and exit from the Jordan Valley is controlled by checkpoints, of which the two most notable are Tayasir and Hamra. These restrictions make it difficult for Palestinians to access places of work, markets, schools and hospitals. Settlers face no such restraints on their travel in the Jordan valley.

280. Checkpoints and physical road obstructions have serious consequences for Palestinians. Hundreds of thousands of Palestinians are required to wait for hours at checkpoints or to make long detours that result in journeys sometimes as long as five times longer than the direct route. The fact that so many of these restrictions apply only to movement within the West Bank itself indicates that the purpose of the restrictions is not security but the convenience of settlers and the humiliation of the Palestinian people.

F. Freedom to leave and return

281. Art. 5 lit. d (ii) CERD guarantees “the right to leave any country, including one’s own, and to return to one’s country.” This provision echoes Art. 13 of the Universal Declaration of Human Rights and is confirmed by Art. 12 paras. 2 and 4 ICCPR. This right is guaranteed in regional human rights conventions and other instruments. The Human Rights Committee in its *General Comment* on Art. 12 ICCPR has interpreted the right to return to

one's country as being available not only to citizens of a country but also to those with special ties to the country. This right is therefore available to residents of territories whose rule has been transferred to a foreign country of which they are not citizens.³⁰⁵ The right to return to one's country is not affected by the succession of states.

282. According to the International Law Commission's Draft Articles on *Nationality of Natural Persons in Relation to the Succession of States* a successor state shall take all necessary measures to allow persons "who because of events connected with the succession of states, were forced to leave their habitual residence on its territory to return thereto."³⁰⁶

283. The most fundamental invasion of this right by Israel is to be found in its treatment of the Right of Return which presents probably the most glaring example of Israel's discrimination on grounds of race. Under the Israeli Law of Return of 1950³⁰⁷ every Jew has the right to enter Israel, live there and become an Israeli citizen. In 1970 this Right of Return was extended to apply to any person with a Jewish grandparent and to non-Jews married to a Jew.³⁰⁸ Conversely, Palestinians resident in Palestine who were forced to flee their homes in 1948 and 1967 as a result of Israel's military action have no right

³⁰⁵ United Nations, Human Rights Committee, General Comment 27, Art. 12 (Freedom of Movement) CCPR/C/21/Rev1, Add.9 (1999), para. 20.

³⁰⁶ Art. 14 para. 2, *Year Book of International Law Commission* (51st Session, 1999), Vol II, Pt 2, p. 21.

³⁰⁷ Law 5710-1950.

³⁰⁸ Law 5730-1970.

of return to their homes. Approximately 750,000 Palestinians fled in the 1948 conflict and some 400,000 in the 1967 war. Today this community has grown to a refugee community of some 5 million, living mainly in refugee camps in the West Bank and Gaza, and Syria, Lebanon and Jordan. In 1948, the General Assembly resolved in Resolution 194 that Palestinians had the right of return. Israel rejects this and has consistently refused to allow Palestinians to return to their homes. Israel's Citizenship Law of 1952 makes this clear as it allows only Palestinians who lived continuously in Israel from 1948 to 1952 to acquire Israeli citizenship and to remain in Israel.³⁰⁹ The refusal of the right of return to Palestinians is today one of the foundations of the State of Israel and perhaps the most bitterly contested issue between Palestinians and Israelis.

284. The present complaint is not concerned with the right of Palestinians to return to their homes in Israel, but with a comparison of the right to leave and return to the territory of occupied Palestine – that is, East Jerusalem, the West Bank and Gaza - by Jewish settlers and Palestinians. It will be shown that while no restraints are placed on the right of settlers in this respect, serious restrictions are placed on the right of Palestinians to leave and return to East Jerusalem, the West Bank and Gaza. While settlers enjoy full freedom to leave and to return to their homes in the Occupied

³⁰⁹ Law 5712-1952.

Palestinian Territory, Palestinians are subjected to so many discriminatory rules and practices by Israel that it can legitimately be said that “Palestinians are legally treated as ‘foreigners’ in their homeland”.³¹⁰

285. Israeli citizens are free to leave and to return to Israel. Israeli citizenship is acquired by birth, the right of return, residence and naturalization.³¹¹ All Israel citizens are entitled to an Israeli passport. Those who have acquired citizenship by means of the right of return (*Aliyah*) may obtain a passport after one year. Passports are valid for ten years. Jewish settlers in occupied Palestine are Israeli citizens entitled to Israeli passports. They may thus freely leave and return to their homes in the settlements of occupied Palestine.

286. There are important differences between Palestinians living in the West Bank and Gaza, and Palestinian residents of East Jerusalem in respect of the right to leave and return to one’s home. In the years following the 1967 war West Bankers and Gazans were treated in substantially the same way, but since Hamas took control of Gaza in 2007 sharp differences have emerged. One thing that all Palestinians from occupied Palestine share, however, is the restrictive control exercised by Israel in respect of their travel abroad.

³¹⁰ D. Buttu, *Fractured Lives. Restrictions on Residency Rights and Family Reunification in Occupied Palestine*, Norwegian Refugee Council (December 2015), executive summary.

³¹¹ Citizenship Law 1952, Compilation of Israel’s Laws, No. 95 (1952), p. 146.

1. West Bank and Gaza

287. The foundation of Israel's control over the Palestinian people in the West Bank and Gaza is the population register. In 1967, following the Six-Day War, Israel carried out a census of all residents of the West Bank and Gaza, after declaring these areas to be 'closed military areas' in respect of which both entry and exit required the approval of the military commander.³¹² This census formed the basis for the Israeli population register for the West Bank and Gaza. Palestinian so registered were issued with ID cards which gave permanent residence rights in the West Bank and Gaza. This register did not include some 400,000 Palestinians displaced by the 1967 war and nor did it include Palestinians working or studying abroad at the time of the census or their children. They remain in a state of limbo.

288. During the period 1967 to 1994 Israel forced a quarter of a million Palestinians to leave the West Bank and Gaza by revoking their residency rights.³¹³ After the Interim Agreement of 1994 Israel appeared to lose the right to revoke residency rights as it transferred control of the population register to the Palestinian Authority.³¹⁴ In fact this did not occur. Israel

³¹² Order of Area Closure (Gaza Strip and North Sinai) (No. 1) (1967) (issued on 8 June 1967); Order regarding Closed Areas (West Bank Area) (No. 34) (1967) (issued on 8 July 1967).

³¹³ HaMoked, *Ceased Residency*, available at: <http://www.hamoked.org/Document.aspx?dID=Updates1175>.

³¹⁴ Interim Agreement, Annex III, Appendix I, Art. 28 (1).

retained overall control of the population register and hence the power to control the travel of Palestinians.³¹⁵

289. The Palestinian Authority acquired the right to issue passports after 1995, but Israel, through its control of the population register, retained the right to veto the issue of a passport. That Israel retains control of the issue of passports is demonstrated by the fact that passports carry the ID number of the ID card issued by the Israeli Civil Administration. To obtain a passport an applicant must present both a birth certificate and the ID of the population register.

a. West Bank

290. Israel illegally maintains complete control of the Palestinian borders, it controls all entry and exit to the West Bank and Gaza strip, and requires Palestinians seeking to travel abroad to present a passport.

291. Residents of the West Bank may travel abroad and return home on their Palestinian passports that their issuing is linked to Israeli-controlled population registry. Israel seldom grants permission to a Palestinian passport holder to use Ben Gurion airport. Instead Palestinian passport holders must

³¹⁵ Interim Agreement, Annex III, Appendix I, Art. 28 (10) (b) and Art. 28 (11).

leave to Jordan via the Allenby Bridge, since it is the only route by which West Bank Palestinians can travel abroad.

292. According to the Palestinian Crossings and Borders Department, 1133 Palestinians were banned from travel through the Allenby Bridge in 2012, 824 in 2013, a noticeable increase of 4269 in 2014, and 2007 in 2015.

b. Gaza

293. Since 2007, when Hamas took control of Gaza, travel has become difficult, almost impossible. Gazans who travel abroad require both a permit from Israel to leave and an entry permit from Jordan to cross the Allenby Bridge. Israel has been banning residents of Gaza to leave through Erez crossing, except in emergency cases, such as for medical treatment or, sometimes, study abroad. Emergency permits are, however, sparingly issued. Permits for medical treatment are often delayed, sometimes with tragic consequences; and students with scholarships to study abroad are often denied an exit permit.

2. East Jerusalem

294. After 1967 Israel treated Jerusalem as a united city and placed it under common civil administration, which meant that East Jerusalem was treated

differently from the West Bank and Gaza. This was confirmed when Israel purported to have *de jure* annexed East Jerusalem in 1980.³¹⁶ East Jerusalemites were given the choice of becoming Israeli citizens, but as this involves swearing an oath of loyalty to Israel most Palestinians have refused to exercise this choice.

295. Palestinians residing in East Jerusalem, numbering over 300,000, were issued with ID cards after 1967 to indicate that they had permanent residency. Although permanent residency carried with it certain rights relating to social benefits, particularly medical insurance, it did not confer citizenship with its attendant right to vote in national elections in Israel. Nor did it give a right to an Israeli passport. Instead Palestinians are issued with a *laissez passer* (travel document), which is valid for one year only, and contains entry visa approved by the Israeli Ministry of Interior for any out-of-country travel. East Jerusalemites with a *laissez passer* may leave from Ben Gurion airport. East Jerusalemites with a Jordanian passport must leave via the Allenby Bridge and require an exit permit for this purpose. When such persons return they require an entry permit and their permanent residence ID.

296. An East Jerusalemite with permanent residency loses that right if the Israeli Minister of the Interior determines that his or her “centre of life” has moved

³¹⁶ Basic Law: Jerusalem Capital of Israel (3 July 1980), 5740-1980.

from Israel. This happens where (1) such a person has lived more than 7 years in foreign country; or (2) has received permanent residency status of a foreign country; or (3) has become a citizen of a foreign country.³¹⁷

Residency may be terminated in terms of the Entry into Israel Law of 1952.

297. Since 1995 the West Bank and Gaza have been treated as foreign countries for the purpose of permanent residence in Jerusalem.³¹⁸ This means that a permanent resident of East Jerusalem resident in a suburb of East Jerusalem, such as Al Ram or Al Ezariyyah, that has been separated from Jerusalem by the Wall will lose his or her permanent residence in East Jerusalem.

298. Israel has revoked the permanent residence rights of thousands of East Jerusalemites.³¹⁹ In 2000 the revocation power was modified by Natan Sharansky, the Minister of the Interior when he stated that persons who did not acquire the permanent residence or citizenship of another country while abroad would not have their permanent residency revoked if they retained a “proper connection” with Israel. This policy statement has not, however, been translated into law. Since then residency rights have become revocable if a person engages in hostile political activity.

³¹⁷ Art. 11 lit. c and 11A Entry into Israel Law and regulations issued thereunder, 5734-1974; Israeli Collection of Regulations No. 3201 (18 July 1974), p. 1517. See too *Mubarak Awad v Prime Minister of Israel*, HCJ 282/88, 1988 42(2) PD 424, judgment of 5 June 1988. See too U. Halabi, *Chapter One. The Legal Status of the Population of East Jerusalem since 1967 and the Implications of Annexation on their Civil and Social Rights* (2009).

³¹⁸ By means of an amendment to Art. 11 lit. c Entry into Israel Law (*supra* note 316).

³¹⁹ D. Buttu, *supra* note 310, p. 39. As of 2014, 14,416 permanent residence permits had been revoked.

299. The right of Palestinians living in the West Bank, Gaza and East Jerusalem to leave their country and to return to it is governed by a complex system of Israeli law and administrative discretion. In effect this right is subject to the whim of Israel. Settlers, on the other hand, are free to leave and return to their homes in settlements in occupied Palestine without restriction.

G. Discrimination as to the right to marriage and choice of spouse

300. When Israel became a party to CERD, it undertook the obligation to ensure there would be no discrimination between or against any group in the enjoyment of a wide range of rights. Among the civil rights listed in the Convention which state parties must guarantee to everyone under their jurisdiction without distinction as to race, colour, or national or ethnic origin, Art. 5 lit. d (iv) explicitly includes ‘the right to marriage and choice of spouse’.

301. The right of Palestinians to marriage and free choice of spouse is severely curtailed by Israeli law and policy. Israel’s citizenship and residency laws, in particular, are the foundation of an administrative system which separates and bars (re)unification for large numbers of Palestinian spouses and families, based on their residency status. This particularly targets Palestinian couples in which one partner is a citizen of Israel or a resident of occupied

East Jerusalem, and the other resides (elsewhere) in the West Bank or in the Gaza Strip. A legislative ban on family unification has been upheld by the Israeli Supreme Court. The impact of Israel's closure and blockade of Gaza on family life and marriage rights has also been particularly severe.³²⁰

302. This family unification policy is entirely discriminatory in its operation, with no such restrictions placed on Jewish couples, regardless of whether they residents of Israel or settlers in the OPT, and regardless of whether they are citizens of Israel or non-citizens entitled to claim citizenship by virtue of their Jewish ancestry/nationality.

303. The Committee has repeatedly expressed its concern over 'the maintenance of discriminatory laws' in this area, such as the Citizenship and Entry into Israel Law (Temporary Order) 2003, which 'suspends the possibility, with certain rare exceptions, of family reunification between an Israeli citizen and a person residing in the West Bank, including East Jerusalem, or the Gaza Strip, thus greatly affecting family ties and the right to marriage and choice of spouse.'³²¹ The Committee has urged Israel, to no avail, 'to revoke the Citizenship and Entry into Israel Law (Temporary provision) and to

³²⁰ See, B'Tselem & HaMoked, *So Near and Yet So Far: Implications of Israeli-imposed Seclusion of Gaza Strip on Palestinians' Right to Family Life* (January 2014).

³²¹ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel*, UN Doc. CERD/C/ISR/CO/14-16 (3 April 2012), para. 18.

facilitate family reunification of all citizens irrespective of their ethnicity or national or other origin.³²²

304. In addition, while Israeli law does not explicitly prohibit “mixed” marriages among members of various racial groups in the OPT, such marriages are obstructed in practice by legal, policy and administrative barriers.

1. Family unification in international law

305. Under customary international law, a state is generally permitted to deny non-citizens entry to its territory, or to place conditions on their entry. When a foreigner is married to a citizen or a resident of the state, however, then the state cannot arbitrarily interfere with their right to maintain a family life together. While a specific right to family unification is not expressly stated in international treaties, there is consensus that people are entitled to state protection of their rights to a shared family life, and that this may also involve the imposition of positive duties on the state. The importance of family rights, family unification and the family as a fundamental group unit of society is comprehensively recognised in international human rights law.³²³

³²² *Ibid.*

³²³ In, for example, Art. 16 para. 3 Universal Declaration of Human Rights; Art. 10 para. 1 ICESCR, and CMW.

306. The right to marriage and choice of spouse is listed in CERD as a civil right.

The ICCPR clearly outlines the importance of family rights.

Art. 2 para. 3 ICCPR states that:

“(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State;

(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.”

In addition to the state’s obligation to protect the family unit, Art. 17 of the Covenant directs states not to arbitrarily or illegally interfere with the privacy, family, or home of a person.

The laws of occupation require states to respect the rights of the family in occupied territory. Art. 27 of the 4th Geneva Convention states that:

“Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.”

The requirement that ‘family life must be respected as far as possible’ has been established as a norm of customary international humanitarian law.³²⁴ Israel accepts such customary norms as applicable to its actions in the OPT.³²⁵

2. Family unification for Palestinians within the OPT, excluding East Jerusalem

307. In the immediate aftermath of the Six-Day War in June 1967, Israeli military orders were passed which declared the territories occupied during the war as closed military zones, making entry and exit subject to the permission of the Regional Military Commander. The effect of these orders was that an estimated 325,000 Palestinians³²⁶ who had fled the fighting or who were outside the West Bank and Gaza at the time of the end of the Six-Day War were excluded from returning, causing severe disruption to their family lives.

308. Three months after this occupation of the West Bank, including East Jerusalem, and the Gaza Strip in June of 1967, Israel conducted a census of the Palestinian population in these areas. Further military orders were then promulgated which supplemented the closed military zone orders, and made

³²⁴ J.-M. Hankerts and L. Doswald-Beck, *Customary International Humanitarian Law - Volume 1: Rules* (2005), p. 379.

³²⁵ D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), p. 31.

³²⁶ Al-Haq, *Occasional Paper No. 8: The Right to Unite* (1990), p. 3.

the possession of an Israeli-issued identity card a condition for permanent residency in the OPT.³²⁷

309. Shortly after the census, the Israeli authorities instituted a “family unification” process that was to allow Palestinians registered in the census to apply for the return of family members who, as a result of the military orders, had lost their residency in the OPT. From 1967 to 2000, Israel implemented a rigid review process of family unification applications in the OPT. The process involved lengthy and expensive bureaucratic procedures, was lacking in transparency and accountability, and was repeatedly changed to match perceived political or policy imperatives. In 2000, the outbreak of the second *intifada* was invoked as a grounds for Israel to cease operating even this flawed family unification process.

310. Between 1967 and 1972, only first degree relatives who became refugees following the war, excluding males aged 16-60, were allowed to return. Of some 140,000 requests for family unification during those five years, only a third of the applications were approved.³²⁸ From 1973 onwards, when even more stringent criteria were imposed, until 1983, when the policy was re-evaluated and further restricted, approximately 1,000 applications were approved per year, while some 150,000 remained pending. The increased

³²⁷ *Ibid.*

³²⁸ *Ibid.*, p. 4.

restrictions reduced successful applications from 1984 onwards to a few hundred a year. The reason given for the change in the process was that ‘over the years, the type of requests for family unification changed significantly, and deviated from the original objectives of the said policy, dealing instead with families that had been created after the war.’³²⁹

311. In 2000, Israel froze the family unification process within the OPT entirely.

By 2007, more than 120,000 applications for family unification in the West Bank (excluding East Jerusalem) and Gaza Strip were still pending.³³⁰

312. Due to the significant obstacles to achieving family unification and the lengthy procedures involved, many families were forced to rely upon repeatedly obtaining short-term visitor permits to stay temporarily in the OPT with their families. These permits were subject to a capricious bureaucracy similar to, or sometimes as part of, the family unification process. However, the grant of these permits was also frozen in 2000. In effect, Palestinians living in the OPT and wishing to form a family where one spouse is not resident of the OPT must forgo the unity of their family or forgo living in his or her homeland. This operates as a significant

³²⁹ B’Tselem & HaMoked, *Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories* (2006), p. 9, quoting the Response of the State Attorney's Office of 18 November 1992, *Sarhan et al. v. Commander of IDF Forces in Judea and Samaria et al* HCJ 4494/91, Section 6.

³³⁰ B’Tselem, *Human Rights in the Occupied Territories* (2007), Annual Report, p. 37.

psychological deterrent and practical obstruction which adversely impacts on the right of Palestinians to freely choose and marry their partner.

313. A policy that deliberately aims to stifle the formation and unity of Palestinian families within the OPT through the systematic denial of the rights to freedom of residence and to return to their country therefore clearly contributes to a discriminatory violation of Palestinian family and marriage rights. Israel's policies in the OPT, far from providing families with the protection and assistance required by international human rights law, in fact prevents specific families from living together and hinders or prevents unification of Palestinian families.

314. As a general principle of international law, any restriction imposed on a person's rights should be proportionate to the end sought. Considering the importance of the rights involved and the existence of alternative means to achieve the designated end, such as in-depth security investigations of each individual applicant, it is clear that the absolute ban on family unification contravenes international humanitarian and human rights law.

315. An interpretation that Israel's ban on family reunification serves the purpose of establishing and maintaining racial domination in the OPT is supported by the fact that no such restrictions are placed on Jewish families wishing to

reside (in breach of international law) in the OPT. Instead, Israel's efforts to restrict the ability of Palestinians to unify and form families in the OPT have been paralleled by concerted efforts to transfer Israeli individuals and families into the OPT. This illegal transfer has been achieved primarily through substantial government investment in settlement infrastructure and the provision of numerous incentives to encourage Jewish individuals and families to move to the unlawful settlements. As such, Israel's practices and policy regarding family unification contravene international human rights law in that they are clearly discriminatory and form part of an overall system that dominates and subjugates the Palestinian population.

3. Family unification between Palestinian citizens of Israel (or residents of East Jerusalem) and Palestinians from the OPT

316. As East Jerusalem is part of the OPT, its Palestinian residents are part of the occupied population classified as 'protected persons' under international humanitarian law. They are not treated as such – nor in the same bracket as the Palestinian population of rest of the OPT – under the Israeli legal system, however. After Israel's purported annexation of East Jerusalem, Palestinians living in East Jerusalem were granted permanent residency status and thus, as with Palestinian citizens of Israel, Israeli civil laws apply in their case.

317. East Jerusalem residents who marry a Palestinian spouse from elsewhere in the OPT and wish to live with their spouses in East Jerusalem have to apply to the Israeli Ministry of Interior for family unification. Between June 1967 and May 2002, the Ministry of Interior did approve family unification requests and allowed such couples to live in East Jerusalem, albeit often after many years of stalling and bureaucratic delays. Between 1993 and 2002, an estimated 100,000-140,000 residents of the OPT gained status to reside in East Jerusalem and Israel as a result of the family unification process.³³¹

318. In May 2002, the Israeli government's Ministry of the Interior issued Decision No. 1813, which froze the processing of all family unification applications by citizens of Israel and residents of East Jerusalem involving Palestinian spouses from the OPT. Statements by government officials made it clear that the freeze was due to the government's fear that Palestinians were achieving a 'creeping right of return' through the family unification process.³³² The freeze has had grave effects, as Palestinian residents of Israel or East Jerusalem whose spouses were from the OPT (excluding East Jerusalem) have either had to leave home in order to live with their spouses, or to take the risk of living in Israel or East Jerusalem with a spouse who does not have legal status. Unlike Palestinians who have Israeli citizenship, East Jerusalem residents who decide to move to the OPT

³³¹ B'Tselem, *Forbidden Families: Family Unification and Child Registration in East Jerusalem* (2006), p. 15.

³³² *Ibid.*, p. 18.

to live with their partner risk losing their permanent residency status on the basis of Israel's requirement that Palestinians must continuously demonstrate that their "centre of life" is in Jerusalem for them to retain their residency status.³³³

319. Tens of thousands of Palestinian families have been by affected by the ban on family unification since it was instituted in 2002.³³⁴ In 2004, for example, it was estimated that the ban affected between 16,000 and 24,000 families.³³⁵

320. On 31 July 2003, the Knesset amended existing legislation, the Citizenship and Entry into Israel Law, by passing a "temporary" order that extended and entrenched the Interior Ministry's 2002 freeze on family unification applications involving Palestinian spouses from the OPT. The new Citizenship and Entry into Israel Law (Temporary Order) 2003 exclusively targeted Palestinian residents of the OPT, leaving the general policy for residency and citizenship status for all other foreign spouses unchanged, including settlers living in the OPT.

³³³ Regulation 11 lit. c of the Entry to Israel Regulation – 1974.

³³⁴ See, *Abu Assad et al. v. The Prime Minister of Israel et al.*, HCJ 4608/02; Amnesty International, *Torn Apart: Families Split by Discriminatory Policies* (2004); B'Tselem & HaMoked (2006), *supra* note 329.

³³⁵ United Nations, Office for the Coordination of Humanitarian Affairs, *The Humanitarian Impact of the West Bank Barrier on Palestinian Communities* (June 2007), Update #7, pp. 4, 23.

321. In response to this enactment, in early August 2003, several Palestinian and Israeli human rights organisations submitted a request for urgent action to the CERD Committee. The Committee confirmed that it

“(…) is concerned about Israel’s Temporary Suspension Order of May 2002, enacted into law as the Nationality and Entry into Israel Law (Temporary Order) on 31 July 2003, which suspends, for a renewable one-year period, the possibility of family reunification, subject to limited and discretionary exceptions, in cases of marriage between an Israeli citizen and a person residing in the West Bank or Gaza. The Committee notes with concern that the Suspension Order of May 2002 has already adversely affected many families and marriages.

The Nationality and Entry into Israel Law (Temporary Order) of 31 July 2003 raises serious issues under the International Convention on the Elimination of All Forms of Racial Discrimination. The State party should revoke this law and reconsider its policy with a view to facilitating family unification on a non-discriminatory basis. It should provide detailed information on this issue in its next periodic report.”³³⁶

322. That same month, in August 2003, Adalah filed a petition to the Supreme Court challenging the constitutionality of the Citizenship and Entry into

³³⁶ Decisions adopted by the Committee at its sixty-third session, Decision 2 (63): Israel, 1599th meeting (14 August 2003).

Israel Law (Temporary Order). Adalah put forward the view that the ‘law constitutes one of the most extreme measures in a series of governmental actions aimed at undermining the rights of Palestinian citizens of Israel, as well as Palestinians from the OPT.’³³⁷ The petition also emphasised that the age and gender-related stipulations contained in 2005 amendments to the law – which allowed for temporary visit permits from the OPT but imposed a blanket ban on applications from all Palestinian men under 35 and all Palestinian women under 25, severely impacting on marriage and family rights – were arbitrarily decided upon and unsupported by any factual evidence. Before the court, Israel justified Government Decision No. 1813 and the subsequent law by arguing that Palestinians who had been granted status by Israel through family unification were increasingly involved in assisting “terror” organisations. Israel referred to 25 individuals (out of more than 100,000 status-receivers prior to 2002) allegedly involved in “terror”, but did not provide full details of these cases to the court. Even if reliable, this figure constitutes a relatively tiny number of people; the Government Decision and the law upon which it is based are disproportionate.

323. In 2006, the Supreme Court (sitting as the High Court of Justice) rejected the Adalah petition (and six other related petitions joined to it by the court)

³³⁷ Adalah, “Adalah Case Review: The Israeli Supreme Court’s Decision in the Citizenship and Family Unification Law Case”, 91 *Adalah Newsletter* (March 2012).

in a 6-5 decision.³³⁸ The minority opinion of the five dissenting judges found the law to be disproportionate and unconstitutional, as it precludes the possibility of conducting specific and individual checks on a case-by-case basis and instead negates basic rights in a collective and sweeping manner. The majority of the court, however, approved the law as proportionate. In doing so, according to Adalah

“the Supreme Court effectively approved the most racist legislation in the State of Israel; legislation which bars the unification of families on the basis of national belonging: Arab-Palestinian.”³³⁹

324. The CERD Committee in its 2007 review of Israel found that:

“(...) such restriction targeting a particular national or ethnic group in general is not compatible with the Convention, in particular the obligation of the State party to guarantee to everyone equality before the law.”³⁴⁰

and further

³³⁸ *Adalah et al. v. Minister of Interior et al.*, HCJ 7052/03, judgment of 14 May 2006.

³³⁹ *Ibid.*; Adalah, *6-5 Majority of Supreme Court Approves Most Racist Law in State of Israel* (14 May 2006). Drawing a comparison, Adalah added that, “In 1980, during Apartheid, a Court in South Africa refused to approve orders similar to the Nationality and Entry into Israel Law, because they contradicted the right to a family”.

³⁴⁰ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel*, UN Doc. CERD/C/ISR/CO/13 (14 June 2007), para. 20.

“(...) note[d] with concern that the Citizenship and Entry into Israel Law (Temporary Order) of 31 May 2003 suspends the possibility of granting Israeli citizenship and residence permits in Israel, including through family reunification, to residents of the Occupied Palestinian Territories, except in limited and discretionary exceptions. Such measures have a disproportionate impact on Arab Israeli citizens wishing to be reunited with their families in Israel. While noting the State party’s legitimate objective of guaranteeing the safety of its citizens, the Committee is concerned that these “temporary” measures have systematically been renewed, and have been expanded to citizens of ‘enemy States’.”³⁴¹

325. The Committee thus recommended that Israel

“(...) revoke the Citizenship and Entry into Israel Law (Temporary Order), and reconsider its policy with a view to facilitating family reunification on a non-discriminatory basis.”³⁴²

³⁴¹ *Ibid.*

³⁴² *Ibid.*

326. Instead, however, in March 2007 the Knesset passed an amendment to the law (which maintains the ban on family unification where one spouse is a Palestinian from the OPT) which extended the ban to family unification where one spouse is a resident or citizen of Syria, Lebanon, Syria, Iran or Iraq – states all defined by Israeli law as “enemy states” – and/or an individual defined by the Israeli security forces as residing in an area from threats to Israeli security may emanate.

327. Adalah (along with other human rights organisations and members of the Knesset) filed a petition to the Supreme Court in May 2007, challenging this 2007 amendment on the basis that it constitutes racial discrimination in barring certain individuals from family unification solely on the basis of their nationality.³⁴³ It also prevents Palestinian citizens of Israel from having contact with their families elsewhere in the Arab region or among the Palestinian people, in violation of international law.³⁴⁴

328. In its 2012 decision on the case, the Supreme Court again ruled that the law is a proportionate and legitimate infringement of Arab-Palestinian rights; that any violation of constitutional rights meets the requirements of the limitation clause.³⁴⁵

³⁴³ *Adalah v. The Minister of Interior, et al.*, HCJ 830/07, petition filed 31 May 2007, p. 15.

³⁴⁴ *Ibid.*, p. 25.

³⁴⁵ *Adalah v. The Minister of Interior, et al.*, HCJ 830/07, judgment of 11 January 2012.

329. In its 2012 review of Israel, the CERD Committee addressed this ruling directly: ‘The Committee is particularly concerned at the recent decision of the High Court of Justice, which confirmed its constitutionality’.³⁴⁶ This concern was expressed in the context of the Committee’s broader criticism of Israel’s discriminatory legislative policy in this area, which suspends the possibility of family reunification and significantly hinders family ties and the right to marriage and choice of spouse.

330. The Nationality and Entry into Israel Law (Temporary Order) 2003 and its 2007 amendment were also the basis for a 2008 government resolution declaring that all applications for family unification involving residents of the Gaza Strip would be denied, regardless of the individual circumstances.³⁴⁷ According to Israeli human rights organisation HaMoked:

“The resolution rested on the Law’s expanded clauses that allow the Ministry of Interior to reject family unification applications due to a possible security threat attributed to the OPT spouses themselves or their relatives, or the simple fact that they live in an area where dangerous activity is taking place. However, while the amended Law

³⁴⁶ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel*, UN Doc. CERD/C/ISR/CO/14-16 (3 April 2012), para. 18.

³⁴⁷ Government Resolution No. 3598, Citizenship and Entry into Israel Law (Temporary Order) (2003) – Validity Extension (15 June 2008).

stipulates in what circumstances the Minister of Interior may determine that a single individual is dangerous, the government resolution stipulates a blanket prohibition on family unification with Gaza residents, instructing the minister to flatly reject all applications for Gazans, simply because they live in ‘an area in which activity is being carried out which is liable to endanger the security of the State of Israel and its citizens.’”

331. Moreover, the government resolution takes the notion that a person’s place of residence is enough to pronounce that person a security threat and applies it to individuals who are registered as Gaza residents regardless of where they actually live.³⁴⁸

332. In June 2013, HaMoked submitted a petition to the High Court of Justice asking the Court to strike Resolution 3598, on the basis that the blanket ban it applied to the residents of Gaza contradicted basic constitutional principles and went well beyond what was authorised even by Clause 3 lit. d of the Citizenship and Entry into Israel Law (Temporary Order) 2003. The petition argued that the resolution unreasonably and disproportionately violated basic rights – primarily the right to family life – with no legal basis,

³⁴⁸ HaMoked, *Temporary Order?: Life in East Jerusalem under the Shadow of the Citizenship and Entry into Israel Law* (September 2014), p. 29.

and as such should be repealed. In June 2015, the Court dismissed the petition.³⁴⁹ The judgment ruled that in the circumstances of ongoing hostilities involving occupied Gaza, ‘family unification applications may be dismissed out of hand strictly based on the applicant’s place of residence.’³⁵⁰ This blanket ban clearly applies in a discriminatory and punitive manner against a particular segment of the occupied population.

333. Although the Citizenship and Entry into Israel Law (Temporary Order) was originally defined as “temporary” in 2003, it remains in force and has been renewed and extended by parliament more than 15 times since – most recently in June 2017.³⁵¹ The discriminatory manner in which the family unification regime is administered is underlined by the decisive ongoing segregation between Jewish-Israelis and Arab-Palestinians in terms of which Ministry of Interior office in Jerusalem they can respectively submit applications to.³⁵²

334. These institutionalised separations and legalised restrictions prevent Palestinians from realising their rights to family life, impacts upon marriage rights and free choice of spouse, and forms part of an Israeli regime of

³⁴⁹ *Hadri et al. v. Prime Minister et al.*, HCJ 4047/13, judgment of 14 June 2015.

³⁵⁰ HaMoked, *The HCJ rejected HaMoked's petition against Government Resolution 3598: the judgment closes the door on family unification between Israelis and Gaza Strip residents* (15 June 2015).

³⁵¹ Palestine News Network, *Israel extends ban on reunification of Palestinian families*, 15 June 2017, available at: <http://english.pnn.ps/2017/06/15/israel-extends-ban-on-reunification-of-palestinian-families/>.

³⁵² *Adalah et al. v. Minister of Interior et al.*, HCJ 7052/03, judgment of 14 May 2006.

discrimination that systematically privileges Jewish-Israelis over Arab-Palestinians. In the view of the UN Secretary-General:

“The almost-total denial by Israel of family reunification for Palestinian or Palestinian-Israeli families and the lack of consideration for individual circumstances violate the right to family life and the prohibition of discrimination, since it makes an arbitrary distinction between mixed families involving Palestinians and other foreign nationals and carries undertones of ethnic prejudice.”³⁵³

4. Restrictions on mixed marriages

335. While Israel does not explicitly prohibit mixed marriages among members of various racial groups in the OPT (or within Israel), mixed marriages are discouraged in practice by the absence of civil marriage in Israeli law and obstructed by movement and residency restrictions, as well as bureaucratic barriers.

336. Israel’s Family Courts Law of 1995 provides that religious courts – Rabbinical courts for Jews; Muslim, Christian and Druze courts for Arabs –

³⁵³ United Nations, Human Rights Council, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem: Report by the Secretary-General*, UN Doc. A/HRC/31/44 (20 January 2016), para. 73.

have exclusive jurisdiction on matters of marriage and divorce.³⁵⁴ This arrangement creates hardships for couples from different religious (or non-religious) groups who wish to get married, leaving them only with the option of getting married abroad. While these marriages are legally recognised in Israel and can be registered with the Ministry of the Interior, the Rabbinate does not recognise marriages when one of the partners is not Jewish.³⁵⁵

337. With this legal framework applying to Israeli settlers in the OPT, it operates in practice to restrict the possibility of a “mixed” marriage between an Israeli and a Palestinian in the OPT. Given the authority of religious institutions, such a marriage can only take place outside of Israeli jurisdiction. Even if able to register their marriage with the Israeli Ministry of the Interior, the couple is not allowed by law to live together in Israel or East Jerusalem, as the Citizenship and Entry into Israel Law precludes the Palestinian spouse from having any status that would allow them to live in Israel or East Jerusalem for the purposes of family unification. The couple will also face both practical and legal obstacles preventing them from living together in the OPT. The Jewish-Israeli spouse is *de jure* barred from entering or living in the Gaza Strip or Area A of the West Bank. The Palestinian spouse is *de facto* barred from living in a Jewish-Israeli settlement due to the restrictions

³⁵⁴ Family Courts Law of 1995, section 3(B1).

³⁵⁵ G. Kariv, *Religion and State and the Israel Elections* (Israel Religious Action Centre, March 2006); G. Kariv, *Civil Marriage Abroad* (Israel Religious Action Centre, November 2006); S. Miller, “Knesset Votes Down Civil Marriage Bill”, *The Times of Israel* (24 February 2016).

on access and residence under the West Bank permit system and the procedures of the various settlement councils, Jewish agencies and religious institutions that operate the settlements.

338. The cumulative effect of these juridical and administrative obstacles is that mixed marriages between Jewish-Israelis and Palestinians in the OPT are rendered almost impossible in practice, thereby entrenching the division of the population and discriminating along racial lines.

H. Freedom of religion

339. Art. 5 lit. d (vii) CERD provides for protection from racial discrimination in the exercise of one's right to freedom of thought, conscience and religion.

1. Factual background

340. The OPT is home to important religious sites for a diversity of faiths that draw pilgrims and worshippers from around the world. Access to places of worship for Palestinian Christians and Muslims is restricted, however, by Israeli occupation authorities. This is done through the imposition of physical and bureaucratic movement restrictions, which have been intensified by Israel since the 1990s in the context of its fragmentation and closure policies.

341. Because of this complex and restrictive system, hundreds of thousands of Palestinians – Muslims and Christians – have regularly been impeded from worshipping at sites that are among the most significant to their faiths in the world, particularly in Jerusalem. Palestinians are routinely prevented from attending religious services at the Al-Aqsa mosque and the Church of the Holy Sepulchre in occupied East Jerusalem. These sites have gradually been isolated from the rest of the Occupied Palestinian Territory. The Al-Aqsa mosque is considered the third holiest site in the world by Muslims, yet Palestinian Muslims living in the surrounding areas are widely denied the possibility of visiting the Al-Haram al-Sharif/ compound and praying in the Al-Aqsa mosque there. As such, an integral part of their religious practice is infringed upon.

342. The movement of Palestinians seeking to exercise their religious rights is also restricted elsewhere in the occupied territory. They are widely prevented by Israeli restrictions from accessing the Ibrahimi mosque and Tomb of the Patriarchs in Hebron, as well as the Church of the Nativity in Bethlehem.

2. Discriminatory treatment of Palestinians affecting the freedom of religion

343. Rights to freedom of belief and worship are regularly adversely impacted

when Palestinian applicants do not receive travel permits from Israeli occupying authorities for the celebration of religious festivals, marriages or funeral ceremonies with the family members who live in different parts of the OPT. The closure regime causes particular difficulties during the holy month of Ramadan. Due to long queues at checkpoints and increased restrictions on movement, many Palestinian Muslims are often disrupted from observing their prayers and breaking their fast at their chosen mosque. Age restrictions are also routinely imposed by the Israel on Palestinian access to the Al-Haram al-Sharif compound in East Jerusalem. During Ramadan, often only Palestinians over the age of 45 are allowed entrance for prayers, and sometimes only Palestinian residents of the immediate vicinity of the old city over the age of 50 are permitted entry.

344. The inability of Palestinians living in the Gaza Strip to exercise their right to worship is particularly severe. When Israel designated Gaza as a “hostile entity” in 2007, the Israeli Ministry of Internal Security adopted a new policy regarding the movement of persons from Gaza Strip. According to this, no one from Gaza would be permitted to travel from Gaza to East Jerusalem and other parts of the West Bank, with the possible exception of very limited categories of people who are eligible to apply for a travel permit. Generally, only particular categories of Palestinian Christians have been allowed to apply, and even at that permits are often denied.

345. Palestinian human rights organisations have, through legal complaint procedures, attempted to enforce the right of Palestinian Christians to travel from Gaza to the West Bank for religious purposes where their travel permit applications had been rejected. In 2010, for example, the Legal Unit of the Palestinian Centre for Human Rights filed 28 complaints related to the denial of travel permits to Christians seeking to travel to the West Bank, including East Jerusalem, to worship during religious holidays. 18 of those complaints received a negative reply, while the other ten received no response and the holiday period passed without the applicants being able to travel.³⁵⁶

346. In August 2012, the Israeli Supreme Court upheld a Beersheva District Court ruling which approved a policy allowing Christians from Gaza to apply for access to holy sites in the West Bank during their religious holidays, but denying any such possibility to Muslim Palestinians from Gaza. Six female Palestinians over the age of 40 had taken the case, arguing that their freedom of worship had been violated when they were denied permission to pray at the Al-Aqsa mosque in East Jerusalem during a Muslim holiday. The Supreme Court ruled that religious belief can be used as a valid criterion in considering requests from Palestinians in Gaza to travel to East Jerusalem

³⁵⁶ Palestinian Centre for Human Rights, *Violations of the Right to Freedom of Worship for Palestinians in the Gaza Strip*, Briefing Note (November 2012).

to worship, and found that “Israel’s obligations are limited to permitting travel in exceptional humanitarian cases.”³⁵⁷

347. The discriminatory nature of Israeli policy is clear when viewed in the context of the state’s promotion and protection of the exercise of religious rights for Jewish settlers in the OPT. On Jewish holidays such as Yom Kippur, for example, access to East Jerusalem is typically entirely blocked off to Palestinians from other parts of the West Bank and all checkpoints are closed to them, in order to facilitate settlers coming from around the West Bank to East Jerusalem.³⁵⁸

348. With regard to such discrimination against Palestinians, based on grounds of both religion and ethnic/national origin combined, relevant UN special procedures have emphasised that ‘the identity of many minorities, or even large groups of people, is defined by both racial and religious aspects’ and that as a result ‘many instances of discrimination are aggravated by the effects of multiple identities.’³⁵⁹ The Human Rights Committee has also emphasised that any restrictions on liberty of movement based on distinctions of religion amount to a clear violation of international human

³⁵⁷ *Kishawi v. Ministry of Interior*, AdmPet 11268-02-11 (7 August 2012).

³⁵⁸ Cf. United Nations, Office for the Coordination of Humanitarian Affairs, *The Humanitarian Monitor* No. 17 (September 2007), p. 11.

³⁵⁹ United Nations, General Assembly *Racial discrimination and religious discrimination: identification and measures: Study prepared by A. Amor, Special Rapporteur on religious intolerance*, UN Doc. A/CONF.189/PC.1/7 (13 April 2000), para. 6.

rights law.³⁶⁰

349. In addition to this, the principle of proportionality requires that any restrictive measures must be appropriate to achieve a necessary protective function, must be as unobtrusive as possible, and must be proportionate to the interest to be protected. The conclusion of the most recent Israel/OPT country report of the Special Rapporteur on freedom of religion or belief was that

“[t]he various restrictions imposed on the access of Palestinians to religious sites (...) appear to be disproportionate to their aim as well as discriminatory and arbitrary in their application.”³⁶¹

350. The Special Rapporteur also raised significant concerns regarding the preservation and protection of Muslim and Christian religious sites. Israeli law and policy purports to aim to safeguard and preserve all sacred places. However, all 136 places which had been designated as holy sites with regulations for their protection are Jewish sites. The Special Rapporteur warns of the

³⁶⁰ United Nations, Human Rights Committee, *General Comment 27: Freedom of Movement (Art. 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999), para. 18.

³⁶¹ United Nations, Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief, A. Jahangir: Mission to Israel and the Occupied Palestinian Territory*, UN Doc. A/HRC/10/8/Add.2 (12 January 2009), para. 33.

“discriminatory effects for the preservation of non-Jewish places and related budgetary allocations since the determination of holy sites also provides state funding to institutions which protect the sanctity of these places and preserve them from damage.”³⁶²

351. The CERD Committee has previously raised its concerns, pursuant to Art. 5 lit. d (vii) CERD, over threats to the protection and preservation of religious sites in the OPT arising from excavation works conducted by Israel beneath and around the Al-Aqsa mosque in East Jerusalem:

“The Committee is concerned about the excavations beneath and around Al-Aqsa Mosque and the possible irreparable damage these may cause to the mosque. (Articles 5 (d) (vii) and (e) (vi), and 7 of the Convention).

While stressing that the Al-Aqsa Mosque is an important cultural and religious site for people living in the Occupied Palestinian Territories, the Committee urges the State party to ensure that the excavations in no way endanger the mosque and impede access to it.”³⁶³

352. Through the combination of pervasive restrictions on access to places of

³⁶² *Ibid.*, para. 37.

³⁶³ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding observations*, UN Doc. CERD/C/ISR/CO/13 (14 June 2007), para. 36.

worship for Palestinians and the subjugation of Christian and Muslim holy sites in the cultural-religious hierarchy – as well through more recent targeted measures such as the move to limit calls to prayer from mosques³⁶⁴ – Israel continues to discriminate against Palestinian rights to freedom of religion, in breach of Art. 5 lit. d (vii) CERD.

I. Discriminatory land distribution and planning regime

353. Land distribution as well as the planning regime applied by Israel, particularly in the West Bank, and especially in Area C, discriminates between Israelis and Palestinians. It results in detrimental effects with regard to a number of other rights, especially the right to property, as well as the right to housing, but given the non-exhaustive character of the list of rights contained in Art. 5 CERD, it by itself constitutes a violation of Israel's obligations arising under CERD.

354. The planning and permit regime applicable in areas in which Israel exercises control is inherently linked to the Israeli settlement policy and favours Israeli settlements in a discriminatory manner to the detriment of the Palestinian population. Such interlinkages between the transfer of parts of the Israeli population into the OPT on the one hand, and the discriminatory planning

³⁶⁴ Draft legislation in the form of the *Bill Forbidding the use of Public Address Systems in Houses of Worship* was approved by the Israeli Ministerial Committee for Legislation in November 2016.

regime on the other relate for one to the general pattern of land distribution benefitting the Israeli settlements. and relate to the privileges settlers enjoy when it comes to the applicable planning regime leading by the same token to severe planning restrictions for Palestinians villages. Finally, this discriminatory policy is also inherent in the applicable planning procedure and in the enforcement of planning decisions against Palestinians when compared with the parallel treatment of Israeli settlers when it comes to the same issues.

1. Land distribution

355. Israeli law is applied in such a way as to privilege Jewish Israeli settlers over Palestinian residents when it comes to land distribution. The general disparity regarding exclusive Jewish access to land relates similarly to parts of the occupied territory that are declared or treated as so-called ‘state land’ by Israel. The 1950 Absentee’s Property Law allows for the incorporation of ‘state land’ anywhere ‘in which the law of the State of Israel applies’,³⁶⁵ which since 1967 has included occupied Palestinian territory. Substantial tracts of the West Bank have been declared ‘state land’ by Israel and closed to Palestinian use for the construction of Israeli settlements, military outposts, and nature reserves. This places much of the territory beyond the access of Palestinians, even where prior claims to ownership exist. Through

³⁶⁵ Art. 1 lit. I Absentee’s Property Law 5710-1950 (1950).

reforms to and manipulation of existing land law in the OPT, combined with military orders, Israel has ensured *de facto* and *de jure* possession of the majority of Palestinian lands.

356. At the commencement of the occupation in 1967, the Israeli government immediately implemented new requirements for land registration.³⁶⁶ Public inspection of land registers was forbidden, and any land transaction required permission from the newly endowed registrar of lands.³⁶⁷ Jewish purchase of Palestinian lands was later facilitated through military orders.³⁶⁸ Only Israelis were empowered to validate signatures through this process, which avoided informing the land registry, and thus public knowledge, about the sale of land.³⁶⁹ Local Palestinian courts had no jurisdiction over unregistered West Bank lands.³⁷⁰

357. One of the legal mechanisms introduced with the occupation to seize Palestinian lands in support of the Israeli settlement drive was the transplantation of the 1950 Absentee Property Law which, in conjunction with Military Order No. 58,³⁷¹ was deployed to characterise an absentee as

³⁶⁶ Military Order No. 291, Order Concerning Settlement of Disputes over Land and Water (19 December 1968).

³⁶⁷ Military Order No. 25, Order Concerning Transactions in Property (18 June 1967).

³⁶⁸ Military Order No. 811, Order Concerning Amendment to Law of Immovable Property (23 November 1979). This Order was then amended by Military Order No. 847, Order Concerning Amendment to Law of Immovable Property (1 June 1980).

³⁶⁹ B'Tselem, *Land Grab: Israel's Settlement Policy in the West Bank* (May 2002), p. 63.

³⁷⁰ Centre on Housing Rights and Evictions (COHRE) & BADIL Resource Centre for Palestinian Residency and Refugee Rights, *Ruling Palestine: A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine* (May 2005), p. 100.

³⁷¹ Military Order No. 58, Order Concerning Absentee Property (Private Property) (23 July 1967).

anyone outside of the territory during the 1967 conflict. Such lands could be seized by the Custodian (acting as part of the Lands Administration in West Jerusalem), who is then permitted to transfer such properties to the Development Authority, which included members of the Jewish National Fund.³⁷² This mechanism was rendered essentially immune from review by virtue of Art. 5 of the Military Order No. 58, which states that:

“Any transaction carried out in good faith between the custodian of absentee property and any other person concerning property which the custodian believed when he entered into the transaction to be absentee property, will not be void and will continue to be valid even if it is subsequently proved that the property was not at the time absentee property.”

358. This provision effectively allowed an Israeli acting in ‘good faith’ to override all existing Palestinian claims to land. 430,000 *dunums*, along with 11,000 buildings, were seized under this provision in the first few years of the occupation, facilitating their later categorisation as ‘state’ land’.³⁷³

359. From 1968 onwards, Israeli military commanders also began issuing orders

³⁷² R. Shehadeh, *The Law of the Land: Settlements and Land Issues under Israeli Military Occupation* (1993), pp. 61-63.

³⁷³ B’Tselem (2002), *supra* note 369, p. 59.

for the requisition of private Palestinian land in the West Bank on military grounds, claiming that this was a temporary exceptional measure necessitated by essential and urgent military needs.³⁷⁴ Over the following ten years, tens of thousands of *dunums* of private Palestinian land were expropriated, the majority of which were in fact intended for the establishment of settlements. In 1979, Israeli Defence Minister Ezer Weizman declared that some 61,000 *dunums* had been seized for military needs since 1967, with more than 40,000 *dunums* of private Palestinian land given to the establishment of Israeli settlements.³⁷⁵

360. Formal blueprints aimed at more permanently dividing the West Bank into Jewish and Palestinian zones began to emerge around this time. In 1978, the Jewish Agency – a parastatal Jewish-national organization charged with the development and management of national assets – formally declared the West Bank to be a permanent part of ‘Eretz Israel’. Its sister organization, the World Zionist Organization, presented a ‘Master Plan for the Development of Settlement in Judea and Samaria, 1979–1983’.³⁷⁶ This plan outlined the case for the establishment of Jewish settlements in the territory in order to ensure permanent Jewish Israeli control of the land, and was

³⁷⁴ *Ibid.* p. 48.

³⁷⁵ United Nations, Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63 (7 February 2013), p. 29.

³⁷⁶ World Zionist Organization, *Master Plan for the Development of Settlement in Judea and Samaria 1979–1983* (October 1978), available as an annex to UN Doc. A/34/605-S/13582 (22 October 1979).

adopted by the Likud government at the time.

361. The operation of the Jewish-national institutions in partnership with government ministries as authorized agencies of the state illuminates the racially contingent nature of Israel's land and planning policies. The role of the World Zionist Organization includes the planning, funding, and construction of West Bank settlements for exclusively Jewish ownership and use. In order to obtain the land necessary for such settlement construction and expansion, Israel has extensively appropriated land in the West Bank.

362. The World Zionist Organization's follow-up plan regarding implementation of its 1978 settlement master plan, presented in 1980 and adopted by the Israeli government in January 1981, set out clear motives and strategies for land appropriation in the occupied territory:

“In light of the current negotiations on the future of Judea and Samaria, it will now become necessary for us to conduct a race against time. During this period, everything will be mainly determined by the facts we establish in these territories and less by any other considerations. (...) Therefore, the state-owned lands and the uncultivated barren lands in Judea and Samaria ought to be seized right away, with the purpose of settling the areas between and around the centres occupied by the

minorities so as to reduce to the minimum the danger of an additional Arab state being established in these territories. Being cut off by Jewish settlements the minority population will find it difficult to form a territorial and political continuity.”³⁷⁷

363. The agenda of securing Jewish Israeli settlement and property development was designed to invalidate Palestinian land ownership for the broader purpose of negating political claims to land and territory.

364. This has continued to consistently inform Israeli occupation policy. More than 40 % of the land mass of the West Bank has been appropriated to make way for Israeli settlement infrastructure and is entirely closed to Palestinian use.³⁷⁸ The separate road networks connecting the settlement blocs to each other and to Israel create an extensive grid that in many places cannot be crossed by Palestinians.³⁷⁹ This leaves Palestinian access to much of the rest of the land – let alone ownership – effectively prohibited.

365. Since 2002, large areas of ‘state land’ and Palestinian private land have been illegally seized and/or destroyed for Israel’s construction of the Wall

³⁷⁷ World Zionist Organization, *Settlement in Judea and Samaria – Strategy, Policy and Plans* (September 1980), available as an annex to United Nations, General Assembly, *Letter dated 19 June 1981 from the Acting Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People to the Secretary-General*, UN Doc. A/36/341-S/14566 (19 June 1981).

³⁷⁸ United Nations, Office for the Coordination of Humanitarian Affairs, *The Humanitarian Impact on Palestinians of Israeli Settlements And Other Infrastructure in the West Bank* (July 2007).

³⁷⁹ See supra IV E Freedom of Movement.

through the West Bank. Although these measures were presented as “temporary”, the International Court of Justice recognised that the substantial alteration to land and property produces facts on the ground possessing long-term legal significance.³⁸⁰ It has long been clear that security merely served as a pretence for the construction of the Wall. As a major exercise in both social engineering and territorial fragmentation, the Wall was held to be contrary to international law by the International Court of Justice in 2004.³⁸¹ Its primary purpose is the annexation of land in the West Bank and East Jerusalem that accommodates Jewish settlements. The Wall resulted in the unlawful seizure of 10.2 % of West Bank land, as well as effectively fragmenting the territory into a number of dismembered cantons and sub-cantons.³⁸²

366. The above policies mean that since 1967 only 8,600 *dunums* (2,125 hectares) of ‘state land’ have been allocated to Palestinians, *i.e.* only less than 1 % of the overall ‘state land’ of Area C. At the same time, the ‘Israeli Civilian Administration (ICA)’, which forms part of the Israeli military administration of the OPT, has in turn allocated more than 50 % of such ‘state land’ located in Area C to Israelis. For one, approximately 400,000

³⁸⁰ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et seq.* (184), para. 121.

³⁸¹ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et seq.*

³⁸² United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/62/275 (17 August 2007), para. 28.

dunums (i.e. 31 % of all ‘state land’ located in Area C) have been granted to the World Zionist Organization, which develops Israeli settlements. At the same time about 103,000 *dunums* (i.e. 8 % of the overall ‘state land’ located in Area C) have been ‘granted’ to Israeli companies and to Israeli local and regional councils. Finally, about 160,000 *dunums* (i.e. 12 %) have been allocated to government ministries and Israeli utility companies.³⁸³

367. Prior to the Israeli occupation of the West Bank in 1967, less than 10 % of the overall territory of the West Bank constituted so-called ‘state land’.³⁸⁴ In contrast thereto, already as of 2009, Israel claimed 1/3 of the whole territory of the West Bank to either constitute ‘state land’, or was at least referred to by Israel as so-called ‘survey land’, i.e. land over which Israel is claiming title.³⁸⁵

368. What is relevant for purposes of the current complaint brought under CERD is that it is the proclaimed policy of Israel that such areas, despite of obviously being subject to the sovereignty of the State of Palestine under international law, Israel merely being the occupying power thereof, shall *not* be included in outline plans for Palestinian communities in any way.³⁸⁶

³⁸³ ACRI, State Land in the West Bank, available at: <http://www.acri.org.il/he/?p=2463> [Hebrew].

³⁸⁴ Norwegian Refugee Council, Study *A Guide to Housing, Land and Property Law in Area C of the West Bank* (February 2012), pp. 58-59.

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.*

However, Israel as the occupying power, has ordered that such ‘state land’ may be used exclusively for military purposes, or for Israeli settlements and neighbouring so-called ‘security areas’.³⁸⁷

2. Israeli planning policies in Area C of the West Bank

a. Factual background of the Israeli planning regime

369. The planning regime applicable in Area C of the Occupied Palestinian Territory is subject to complete Israeli control. Accordingly, any planning or building activities by Palestinian nationals residing in that part of the territory of the State of Palestine require the prior permission of the occupying power.

370. Due to the fact that, as demonstrated, the vast majority of land located in Area C has been declared ‘state land’ by Israel, any planning by Palestinian villages is accordingly in almost all cases *ab initio* limited to occur on privately-owned Palestinian land. Put otherwise, neither the local Palestinian population, nor indeed Palestinian villages as such, nor finally the State of Palestine (as being the sovereign in the area, Israel merely being the occupying power), may make use of 1/3 of its own territory for planning purposes. At the same time, Israeli settlements are provided with such ‘state

³⁸⁷ *Ibid.*

land' (*i.e.* parts of the territory of the State of Palestine) for planning and building purposes, even if, on several occasions, Israeli settlements have even been set up on privately-owned Palestinian land.³⁸⁸

371. In order to be granted a right to build Palestinian villages located in Area C require so-called master plans, also referred to as 'Outline Plans' to be approved by the ICA. In order to be approved (if at all) by the ICA, such plans must then abide by parameters that stand in sharp contrast to planning standards that are applicable when it comes to Israeli settlements despite the fact that such settlements are located in the close vicinity of Palestinian villages. Those planning parameters, applied by the ICA as far as Palestinian villages are concerned, confirm the inherently discriminatory character of the planning regime imposed by Israel.

372. In particular, the boundaries of master plans in Area C, in order to be eventually accepted by the occupying power (if at all), are normally to be based on an aerial picture of the built-up areas of the respective pre-existing Palestinian village.³⁸⁹ The boundaries of such plans are then to be closely drawn according to those pre-existing built-up areas. As a consequence, there is normally no space left for any development of those Palestinian

³⁸⁸ See *e.g.* for the case of Amona P. Beaumont, "Israel Votes to Authorise Illegal Settler Homes in Palestine", *The Guardian* (5 December 2016).

³⁸⁹ Norwegian Refugee Council, *supra* note 384, p. 64.

villages in line with their demographic needs, *i.e.* in line with the natural increase in the size of their respective populations. As a matter of fact, not infrequently such master plans (if approved at all) not infrequently even cut through pre-existing built-up areas.³⁹⁰

373. This Israeli planning policy, as just outlined, stands in glaring contrast to the one applicable to Israeli settlements located in the very same geographical area. Those Israeli settlements are provided with ample lots of land with no pre-existing buildings or boundaries for further planning. Accordingly, the building activities of Israeli settlements are by far not limited to the same extent, as are those of Palestinian villages and communities.

374. Besides, the average housing density Israel perceives as being ‘acceptable’ for the local Palestinian population is significantly, and sometimes by far, higher, than the construction density provided for in master plans approved with regard to Israeli settlements.³⁹¹ This means that Palestinians living in Area C are provided with significantly smaller amounts of land per person for planning purposes when compared with Israeli citizens living in settlements without any rational reason underlying such discriminatory

³⁹⁰ *Spatial Planning in Area C of the Israeli occupied West Bank of the Palestinian territory*, Report of an International Advisory Board (Mai 2015), p. 25, available at: <https://unhabitat.org/spatial-planning-in-area-c-of-the-israeli-occupied-west-bank-of-the-palestinian-territory/>.

³⁹¹ Norwegian Refugee Council, *supra* note 384, p. 66.

treatment. It is telling that Israel itself has admitted that such high density building rates, which are unreasonable as far as rural communities are concerned, are impractical, and may thus not be even fully usable.³⁹²

b. Discriminatory nature of Israel's substantive planning regime

375. The legislative and institutional separation between the planning systems for Israeli settlers on the one hand, and the Palestinian population living in Area C on the other, furthers a planning policy which encourages construction in Israeli settlements, while at the same time *de facto* freezing construction in Palestinian communities.

376. As shown, very detailed and modern plans are developed for the vast majority of Israeli settlements in the West Bank. This encourages further development, expansion, as well as leads to the issuance of building permits for Israeli settlers while at the same time the construction in most Palestinian villages is constrained due to the 'freezing' of the planning situation decades ago.³⁹³

377. As a matter of fact, the entire area that plans have approved for legal construction by Palestinians amounts to only 18,000 *dunums*, *i.e.* less than

³⁹² *Ibid.*

³⁹³ ACRI (2014), *supra* note 119, p. 99.

1 % of Area C,³⁹⁴ much of which are already built-up areas. Thus, Palestinians have normally no real option to build in a legal manner even on their own private-owned land. In contrast thereto, for more than 1/4 of the land of Area C planning for Israeli settlements has been approved.³⁹⁵

378. It is striking that ever since 2009, the ICA has not deposited *any* new plan concerning a Palestinian village, other than plans that have amended already pre-existing plans.³⁹⁶ While Palestinian villages prepared nine plans, and deposited them with the ICA for its approval, only two were finally approved. In sharp contrast thereto, dozens of outline plans have been deposited and approved for settlements throughout Area C, such as, to name but a few, *inter alia* Eli, Ofra, Itamar, Sansana, Nofei Prat and the Bruchin outpost.³⁹⁷ During the very same time, 8,746 constructions were approved for Israelis in settlements³⁹⁸ with an ever increasing tendency.

c. Discriminatory nature of Israel's planning procedure

379. Apart from the *substantive* discrimination involved in the planning regime applicable in Area C of the West Bank, as described above, the distinct

³⁹⁴ "The Failure and Neglect of Planning in Area C 1972-2013" [Hebrew], *Rabbis for Human Rights*, slide 3.

³⁹⁵ *Ibid.*, slides 4 and 5.

³⁹⁶ ACRI (2014), *supra* note 119, p. 99-100.

³⁹⁷ The planning procedure comprises three stages: depositing the plan for public review and submission of objections; approving the plan for validation; and publishing the plan for validation.

³⁹⁸ According to the figures of the Central Bureau of Statistics quoted in: C. Levinson, "A Ten-Year Record in Construction Commencements in the Territories; 123 % Jump Compared to 2012" [Hebrew], *Haaretz* (3 March 2014).

planning *procedures*, as applied by Israel to Palestinian villages on the one hand, and Israeli settlements in the West Bank on the other, amount to yet another violation of Art. 5 CERD.

380. Where Israel exercises control, two separate planning systems do apply, one for Israeli settlements and one for Palestinian communities. As to Israeli settlers, they do enjoy significant representation of their interests in different planning committees, and are full partners in the planning procedures as they pertain to them, including the issuing of building permits and the supervision of construction.

381. In contrast thereto, Palestinians are completely excluded from the planning system and exercise no influence whatsoever over the outline plans for their places of residence. This situation was created through gradual military legislation, which significantly altered the previously applicable Jordanian Planning Law that had previously applied in the West Bank before its belligerent occupation by Israel.

382. Moreover, a significant number, if not all, of the plans for the various (illegal) Israeli settlements are either directly prepared by the Israeli government itself, *i.e.* the (Israeli) Housing and Construction Ministry, or by bodies that are provided with significant funding by the Israeli government, such as the

World Zionist Organization's Settlement Division.³⁹⁹ In contrast thereto, no such funding whatsoever is provided by Israel for Palestinian communities in order to enable them to provide for their planning needs.

383. This inherently discriminatory practice is exclusively based on the ethnic composition of the respective population, rather than on either financial or planning needs of the respective population. This discriminatory policy, leaving aside the substantive limitations already demonstrated above, further curtails the ability of the Palestinian communities to develop outline plans. As a consequence, Palestinians are simply often not even in a position to apply for building permits needed to develop the economic and social life of their communities.

384. Soon after the occupation of the West Bank by Israel, Military Order 418 '*Order Concerning the Law for Planning Cities, Villages and Buildings*' was adopted, fundamentally changing the previous applicable planning and building regime.

385. First, the so-called District (Planning) Committees (in which the local population was previously represented) were dissolved and became part of the Higher Planning Council. This accordingly set aside the participation of

³⁹⁹ *Ibid.*

the Palestinian population in the planning process, as it had existed prior to 1967, the Higher Planning Council only be staffed by representatives of the Occupying Power.⁴⁰⁰ It is currently composed of seven representatives of the ICA, a representative of the Israeli Ministry of Defence and the Legal Advisor for 'Judea and Samaria' (*i.e.* the West Bank part of the occupied Palestinian territory).

386. Second, ever since the enactment of Military Order 418, village councils can no longer act as local planning committees. As an alternative, Military Order 418 provided that the planning committees responsible for Palestinian villages and cities located would henceforth include only representatives of the occupying power.

387. What is more is that an amendment to Military Order 418 in 1975 authorized the High Planning Council to establish subcommittees and to delegate its powers to them.⁴⁰¹ It was on this basis that the High Planning Council founded the 'Settlement Subcommittee' in which Israeli settlers are represented, and authorized it to decide on the depositing of outline plans and detailed plans for Israeli settlements (and for such settlements only) and to eventually also validate these plans. Accordingly, the Israeli settlers are full partners in the planning procedures as far as 'their' respective settlement

⁴⁰⁰ ACRI (2014), *supra* note 119, p. 95.

⁴⁰¹ Art. 7a City Planning Order.

is concerned. Moreover, it is the various Israeli settlements themselves that are responsible for issuing building permits and supervising the construction in such settlements.

388. By contrast, as mentioned, the local Palestinian population lacks any form of representation in the High Planning Council. Even in the Local Planning and Licensing Subcommittee, which is responsible for authorizing construction in Palestinian communities, and is also responsible for approving plans for Palestinian villages, there is no representation provided for Palestinians.⁴⁰²

389. As shown, (Israeli) Military Order 418 cancelled the Local Planning Committees in Palestinian villages. At the same time, however, in 1975, Military Order 418 was amended,⁴⁰³ and it was determined that the area commander may appoint “special local planning committees” for a defined area and to grant them the authorities afforded to local and regional planning committees.⁴⁰⁴ The area commander’s power to appoint special local planning committees does not, however, apply to city and village councils to which all Palestinian communities belong. Therefore, special planning

⁴⁰² N. Shalev and A. Cohen-Lifshitz, BIMKOM – Planners for Planning Rights, *The Prohibited Zone Israeli planning policy in the Palestinian villages in Area C* (June 2008), available at: <http://bimkom.org/eng/wp-content/uploads/ProhibitedZone.pdf>, pp. 39-45.

⁴⁰³ Amendment No. 2 (Military Order 604).

⁴⁰⁴ Art. 2a City Planning Order.

committees can only be established, in effect, for Israeli settlements.⁴⁰⁵ Based on this provision, the military administration defined the Jewish local councils in the West Bank as special local planning committees (“Special Planning Committees), which are authorized to submit detailed and local outline plans to the High Planning Council and to issue building permits to their residents.⁴⁰⁶

390. It is particularly relevant that the local and regional councils of the settlements, consisting of *elected representatives* of the respective Israeli settlers, are appointed as Special Planning Committees and are therefore in a position to formulate plans and issue building permits. Put otherwise, the populations of the various Israeli settlements in the West Bank are fully involved in the planning process as far as ‘their’ respective settlement is concerned.

391. As demonstrated, and in contrast thereto, (Israeli) Military Order No. 418 had set aside the option of appointing Palestinian Village Councils as Local Planning Committees. Accordingly, representatives of the local Palestinian population do not play any role whatsoever anymore in the planning for their respective communities.

⁴⁰⁵ Israeli municipalities in the West Bank, such as Ariel and Ma'aleAdumim, are also municipally defined as a ‘local council’.

⁴⁰⁶ See as to further details on this question Norwegian Refugee Council Study, *supra* note 389, pp. 57-58.

392. This sharp contrast confirms that, apart from the illegality of the Israeli settlements under international law *per se*, there is no rational reason why the Palestinian population in the Occupied Palestinian Territory (unlike the Israeli settlers), is excluded from taking an active part in the planning process. It follows that, apart from the substantive planning parameters, the planning procedure, as applied in Area C of the West Bank by Israel, too, constitutes racial discrimination within the meaning of Art. 5 CERD.

3. Discriminatory enforcement of planning and building decisions

393. Under Military Order 418, the ICA, through its Inspection Subcommittee, is responsible for the enforcement of planning decisions in the West Bank in relation to both, Israeli settlers and Palestinians. An analysis of enforcement data from the last three decades indicates, however, that the ICA's Inspection Subcommittee implements a by far more stringent enforcement policy towards the Palestinian population, as compared to Israeli settlers, both in terms of the number of demolition orders issued for illegal construction and in terms of the execution of these orders, *i.e.* the extent of the demolitions in practice.

394. What is more is that Military Order 418 grants powers of enforcement when it comes to construction in Israeli settlements to the respective local committees that operate in the framework of the local councils of Israeli

settlements, *i.e.* to the Israeli settlements themselves. Put otherwise, the Israeli settlements, unlike obviously Palestinian communities, which do not possess a local planning council ever since the adoption of Military Order 418, are in a position to supervise their ‘own’ violations of existing planning and building regulations. This adds yet another additional layer of discrimination.

395. According to information available, when a detailed plan is in force, the Inspection Subcommittee has also been granted the possibility to not supervise communities, which is almost exclusively the case with regard to Israeli settlements located in Area C. As a matter of fact, the ICA’s Inspection Subcommittee *de facto*

“ceased to supervise Israeli settlements in Judea and Samaria altogether (...).”⁴⁰⁷

396. This has led to an intense discrimination also when it comes to the enforcement of planning decisions depending on whether such violations are being committed by members of the local Palestinian population, or rather by Israeli settlers. According to official figures, between 1996 and 2000 alone, 3,449 cases were opened following building without a permit in

⁴⁰⁷ Atty. Talia Sasson, *Opinion (Interim) Concerning Unauthorized Outposts* [Hebrew](2005), pp. 37-38, reproduced [English] in ACRI (2014), *supra* note 119, p. 102.

settlements, but only in 3 % of them (*i.e.* in only 107 cases) enforcement measures were taken.⁴⁰⁸

397. Between the years 1987-2013, 12,570 demolition orders were issued for Palestinian structures, and 6,309 for Israeli illegal construction. In practice, however, 2,445 Palestinian structures were demolished (approximately 20 % of all illegal construction), compared to only 524 Israeli structures (approximately only 8 % of all illegal construction). Put otherwise, the extent of enforcement toward Palestinians is 2.5 times higher than the extent of enforcement toward Israelis living in Israeli settlements,⁴⁰⁹ despite those settlements being illegal *per se* under international law at the first place.

398. The very fact that Israel's planning policy in Area C, as analysed above, is discriminatory in nature has been confirmed by various treaty bodies under the ICCPR, the ICSECR, as well as most notably by the CERD Committee itself.

399. *Inter alia*, when dealing with the 4th Periodic State Report of Israel, the Human Rights Committee considered the question as to whether the different planning regimes as they apply, on the one hand, to the Israeli

⁴⁰⁸ B'Tselem, *By Hook and by Crook: Israeli Settlement Policy in the West Bank* (July 2010), p. 26.

⁴⁰⁹ "The Failure and Neglect of Planning" (*supra* note 394), slides 6 and 8. The information in this presentation is based on an analysis of GIS layers of illegal construction, which were obtained following freedom of information requests filed to the Civil Administration by the organization.

settlements located in Area C of the West Bank, and, on the other, to Palestinian villages also located in Area C, are in line with the *prohibition of discrimination* contained in Art. 26 ICCPR.

400. Art. 26 ICCPR, which is *mutatis mutandis* identical to CERD, *inter alia* provides that contracting parties of the ICCPR are under an obligation to

“prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, (...) religion, (...) national or social origin, property, birth or other status.”

401. In was in most unequivocal terms that the Human Rights Committee found the two divergent regimes *not* to be in line with Art. 26 ICCPR when stating that:

“(...) [t]he [Human Rights] Committee is (...) concerned about the discriminatory zoning and planning regime regulating the construction of housing and structures by Palestinians in Area C of the West Bank (...) that makes it almost impossible for them [*i.e.* members of the indigenous local Palestinian population] to obtain building permits,

while facilitating the State party's [*i.e.* Israel's] settlements in the Occupied Palestinian Territory (OPT)".⁴¹⁰

402. The Human Rights Committee accordingly called upon Israel to

“(...) remove discriminatory provisions from relevant planning and zoning legislation [and to] (...) ensure the participation of Palestinians in the planning and zoning process (...)”⁴¹¹.

403. According to the UN Special Rapporteur on human rights in the occupied Palestinian territories:

“(...) [Israel] has also created a comprehensive planning regime to facilitate the confiscation of West Bank land and the expansion of the Israeli settlements. The planning regime excludes any Palestinian participation or substantive regard for their interests. The consequences are that, in Area C, Palestinians have less than 1 % of the land for construction.”⁴¹²

⁴¹⁰ United Nations, Human Rights Committee, *Concluding observations on the 4th periodic report of Israel*, UN Doc. CCPR/C/ISR/CO/4 (21 November 2014), pp. 3-4, para. 9; emphasis added.

⁴¹¹ *Ibid.*, p. 4.

⁴¹² *Ibid.*

404. In a similar vein, the Committee on Economic, Social and Cultural Rights in its 2011 concluding observations on Israel's 3rd periodic report of on the implementation of the ICESCR⁴¹³ recommended, in order for Israel to bring its land planning policy *vis-à-vis* Area C in line with the ICESCR, to

“(...) ensure that the development of special outline plans (...) preceded by consultations with affected Palestinian communities.”⁴¹⁴

405. Finally, the CERD Committee itself in its 2012 Concluding Observations stated:

“The [CERD] Committee is concerned at the adverse tendency of preferential treatment for the expansion of Israeli settlements, through the use of ‘state land’ allocated for settlements, the provision of infrastructure such as roads and water systems, high approval rates for planning permits and the establishment of Special Planning Committees consisting of settlers for consultative decision-making processes. (...) In light of its previous concluding observations (CERD/C/ISR/CO/13, para. 35) and considering that the current Israeli planning and zoning policy in the West Bank, including East

⁴¹³ United Nations, Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Concluding observations*, UN Doc. E/C.12/ISR/3 (10 July 2010).

⁴¹⁴ *Ibid.*, para. 26.

Jerusalem, seriously breaches a range of fundamental rights under the Convention, the Committee urges the State party to reconsider the entire policy in order to guarantee Palestinian and Bedouin rights to property, access to land, access to housing and access to natural resources (especially water resources). The Committee also recommends that any planning and zoning policy be implemented in consultation with the populations directly affected by those measures.”⁴¹⁵

406. Hence, there can be no doubt that Israel’s planning policy, as applied in the West Bank, establishing two completely different sets of planning regime applying, on the one hand, to the indigenous Palestinian population, and, on the other, to Israeli nationals that have transferred to the area in violation of applicable rules of international humanitarian law, constitutes a manifest violation of CERD, and namely its Art. 5.

J. Right to property

407. Control of land and ownership of property is central to Israel’s occupation of Palestinian territory. In the Israeli legal system generally, the premise of Israel as a Jewish state operates as the foundation for discriminatory land

⁴¹⁵ United Nations, Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Art. 9 of the Convention, Concluding observations*, UN Doc. CERD/C/ISR/CO/14-16 (9 March 2012), para. 25; emphasis added.

and property policy. Notably, for instance, Basic Law: Israel Lands (1960) provides that ownership of real property ('land, houses, buildings and anything permanently fixed to land') held by the state of Israel, the Development Authority, and the Jewish National Fund 'shall not be transferred either by sale or any other manner' but is to be held in perpetuity for the benefit of the Jewish people. According to government sources, '93 % of the land in Israel is in the public domain; that is, either property of the state, the Jewish National Fund or the Development Authority',⁴¹⁶ and thus cannot be leased or bought by non-Jews, even non-Jewish citizens of Israel.

408. Israeli confiscation and seizure of Palestinian land regularly infringes upon Palestinian property rights. Israeli human rights organisation B'Tselem have documented this concerted land grab and explained the legal-bureaucratic system that Israel created to appropriate and control land for the establishment and expansion of settlements:

"Because some of these lands were privately or collectively owned by Palestinians, and the settlements were illegal from their inception, a significant proportion of the seizures of land infringed the Palestinians'

⁴¹⁶ Israel Land Administration, *General Information*, available at: www.mmi.gov.il/Envelope/indexeng.asp?page=/static/eng/f_general.html.

right to property”.⁴¹⁷

409. Israel has capitalised on the administrative division of the West Bank into Areas A, B and C to entrench this policy. While the vast majority of West Bank Palestinians live in Areas A and B, almost all the land reserves required for developing their communities remain in Area C, including lands that used to be within the municipal jurisdiction of their communities, some of them in private Palestinian ownership. Tens of thousands of hectares of land have been seized from Palestinians and allocated to settlements. Significant portions of these lands have been declared ‘state land’ for exclusive Jewish-Israeli ownership and use. Any Palestinian use of this land is subject to Israeli approval, which is only granted in extremely rare situations.⁴¹⁸

410. Throughout Area C of the West Bank, Israel has unilaterally assigned 70 % of all land for its settlements and their related infrastructure and military and security networks, all of which is off-limits to Palestinian ownership and development.⁴¹⁹

411. The Jordan Valley, comprising approximately 30 % of the West Bank and containing its most fertile land and important water sources, is a particularly

⁴¹⁷ B’Tselem (2002), *supra* note 369, p. 43.

⁴¹⁸ B’Tselem, *Reality check: almost fifty years of occupation* (5 June 2016).

⁴¹⁹ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/71/554 (19 October 2016), para. 52.

glaring embodiment of the expropriation of land by the settler state for the purposes of territorial fragmentation and the creation of segregated cantons. Under military legislation passed at the outset of the occupation in 1967, much of the Jordan Valley was closed to Palestinian access, ownership and development.

412. In the wake of five decades of settlement construction and confiscation of further land, Israel has maintained full control of almost 80 % of the Jordan Valley.⁴²⁰ 15 % of the territory is under the direct control of Jewish settlements (enjoyed by just 9,500 Jewish settlers in 37 settlements), with more than 40 % designated as ‘closed military zones’ and over 20 % as ‘nature reserves’ which are closed to Palestinian ownership, residence or movement, but which often form the basis for settlement expansion.⁴²¹ This is combined with concerted policies of home demolition, forced displacement, administrative and physical impediments to movements. Such contemporary “facts on the ground” correspond neatly with the ‘Allon Plan’,⁴²² which set out a blueprint for Israeli annexation of the Jordan Valley at the outset of its occupation in 1967.

⁴²⁰ United Nations, Office for the Coordination of Humanitarian Affairs, *West Bank Movement and Access Update* (August 2011), p. 22.

⁴²¹ *Ibid.*; see further B’Tselem, *Dispossession and Exploitation: Israel’s Policy in the Jordan Valley and Northern Dead Sea* (May 2011).

⁴²² Drafted by Deputy Prime Minister Yigal Allon shortly after the Six-Day War in 1967.

413. Although the Israeli Supreme Court has reviewed and in some cases prohibited the requisition of private Palestinian land where the state failed to show an overriding military necessity,⁴²³ it refused to hear disputes over ownership status.⁴²⁴

414. Thus, for Palestinians whose private land holdings has been categorised by Israel as “public”, the only recourse is to military-appointed administrative tribunals tasked to advise the military commander. The burden of proof in such cases rested on Palestinian owners, who were required to show indisputable title through formal Jordanian title deeds⁴²⁵ in costly and complicated proceedings conducted mostly in Hebrew. Given the military tribunals’ strict requirements about modes of land use, these formalities proved too onerous for many land owners, who then saw their “state” lands turned over to settlement construction. A 2006 study by Peace Now showed that Palestinians privately own nearly 40 % of the land on which Israeli settlements were built at that point, rising to up to 86.4 % in the case of settlement blocks to the west of the Wall such as Ma’ale Adumim.⁴²⁶

415. This pattern has continued. In February 2009, details emerged of the Baruch

⁴²³ *Dweikat v. Government of Israel*, HCJ 390/79, judgment of 22 October 1979 (the *ElonMoreh* case).

⁴²⁴ I. Lustick, “Israel and the West Bank after *ElonMoreh*: The Mechanics of De Facto Annexation”, in: 35:4 *Middle East Journal* (1981), pp. 557, 568.

⁴²⁵ Under the Jordanian Land Settlement Law of 1953.

⁴²⁶ Peace Now, *Breaking the Law in the West Bank – One Violation Leads to Another: Israeli Settlement Building on Private Palestinian Property* (October 2006).

Spiegel “secret database” of Israeli settlements in the OPT, a project developed by the Israeli Ministry of Defence. As recounted in the 2013 report of the UN’s Independent International Fact-Finding Mission on the implications of Israeli settlements on the rights of the Palestinians, ‘the database provides details on location and population size of the settlements; status of ownership of the land including details on over 30 settlements that were to some extent built on private Palestinian land; construction violating planning regimes and building permit requirements; details on authorisation agreements between the State and those building settlements.’⁴²⁷ Israel continues to use declarations of ‘state land’ to negate the right of Palestinians to maintain or establish ownership of property in the OPT.⁴²⁸

416. In February 2017, the Israeli parliament voted to approve the Validation Law, legislation which explicitly allows the state to expropriate private Palestinian lands in the West Bank for the purposes of settlement construction. Under this law, settlements built on private Palestinian land in the OPT can be validated – “legalized” and “regularized” – via retroactive expropriation, planning, and zoning regulations. The law has been subject to widespread international condemnation which echoed the analysis of Adalah:

⁴²⁷ United Nations, Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63 (7 February 2013), p. 36.

⁴²⁸ B’Tselem, *Under the Guise of Legality: Israel’s Declarations of State Land in the West Bank* (February 2012).

“This sweeping and dangerous law permits the expropriation of vast tracts of private Palestinian land, giving absolute preference to the political interests of Israel as an occupying power and to Israeli settlers living in the OPT. It violates the property rights both of resident and refugee Palestinians.”⁴²⁹

417. In sum, Israel violates the right to property as guaranteed by Art. 5 lit. d (v) CERD.

K. Right to housing (Art. 5 lit. e (iii) CERD)

418. The structural discrimination between Jewish Israeli settlers and Palestinians in the OPT when it comes to access to land and property is elaborated in detail above.⁴³⁰ This by consequence directly and adversely infringes upon the housing rights of Palestinians, while expanding those of settlers in violation of Art. 5 lit. e (iii) CERD.

419. Periodic Israel incursions into bombardments of the Gaza Strip, coupled with the blockade imposed on Gaza and the restrictions Israel places on building supplies entering the territory, entail mass violations of the right to

⁴²⁹ Adalah, *Knesset approves law that lets Israel expropriate vast tracts of private Palestinian land* (6 February 2017).

⁴³⁰ See *supra* IV B.

housing. The CERD Committee has issued strong conclusions in this respect as to ‘the dramatic and disproportionate impact of the Israel Defence Forces’ blockade and military operations on Palestinians’ right to housing and basic services in the Gaza Strip’.⁴³¹ In January 2009, during Operation Cast Lead, Israeli air and ground forces carried out wide-scale house demolitions. According to UN figures, they completely destroyed 3,354 Palestinian houses during the operation, and partially destroyed or damaged 11,112.⁴³² This was in stark breach of Israel’s obligation to respect the right to housing, violating the rights of tens of thousands of Palestinians. Israel’s 2014 bombardment of Gaza also involved violations of Palestinian housing rights on a mass scale. More than two years after the bombardment, 65,000 of the Palestinians whose homes were destroyed remained displaced and still do not have reconstructed homes.⁴³³

420. Israel’s long-standing policy of demolishing Palestinian homes throughout the OPT is also tantamount to systematic discrimination and violation of Palestinians’ right to housing. Since the occupation began in 1967, it is estimated that the Israeli authorities and military forces have demolished

⁴³¹ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding observations: Israel*, UN Doc. CERD/C/ISR/CO/14-16 (9 March 2012), para. 26.

⁴³² United Nations, Human Rights Council, *Report of the UN Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (15 September 2009), para. 67.

⁴³³ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/71/554 (19 October 2016), para. 45.

more than 48,000 Palestinian homes and housing structures.⁴³⁴ The Committee has been clear in its criticism of ‘the disproportionate targeting of Palestinians in house demolitions’ by Israel.⁴³⁵ Occupation policy has encompassed two primary categories of demolitions: ‘punitive’ demolitions, and ‘administrative’ demolitions.

1. ‘Punitive’ house demolitions

421. It has been common practice for much of the duration of the occupation since 1967 for Israeli forces to demolish or seal the houses of Palestinians as punishment for offenses committed and often even when merely suspected of having committed an offense. This measure has never been used against Jewish Israeli citizens or settlers who committed acts of terror and murder, even where they have exceeded the gravity of those for which Palestinian houses are often demolished.⁴³⁶

422. The demolition of the houses of those Palestinians who have or are suspected of having been involved in acts prejudicial to Israeli state security is executed under Regulation 119(1) of the Defence (Emergency)

⁴³⁴ Israeli Committee Against House Demolitions figures, available at: <http://icahd.org/get-the-facts/> and based on field monitoring and information collected from the Israeli Ministry of Interior, the Jerusalem Municipality, the Civil Administration, UN bodies and agencies, Palestinian, Israeli and international human rights groups.

⁴³⁵ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/13 (9 March 2007), para. 35.

⁴³⁶ B’Tselem, *Through No Fault of Their Own: Punitive House Demolitions during the al-Aqsa Intifada* (November 2004), citing some of those responsible for notorious attacks – such as Baruch Goldstein and Shajar Dvir Zelig – whose homes or relatives’ homes were never demolished by the state.

Regulations 1945. These draconian emergency regulations, enacted by the British government during its League of Nations Mandate rule over Palestine, were retained and incorporated into the legal system of the new state by Israel 1948. They were subsequently channelled into the military legal system in the occupied territories in 1967 and continue to operate as the constitutional underpinning of some of the Israeli military's most entrenched restrictions of Palestinian rights.

423. A 'punitive' demolition by its nature impacts upon the housing rights not only of the individuals being 'punished', but of family members or housemates who live with them. Further, the mechanism has been applied expansively by Israel such that demolitions have also routinely targeted the houses of family members and relatives which were not even the homes of the accused individuals themselves. In both of these senses, punitive house demolitions amount *prima facie* to collective punishment. As noted by the Special Rapporteur on human rights in the OPT, such practices 'deprive entire families of a place to live, based on the alleged actions of one individual. (...) Punitive demolitions, the purpose of which is to harm the family members of someone suspected of a crime, are in clear violation of the basic tenets of international law.'⁴³⁷

⁴³⁷ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/71/554 (19 October 2016), paras. 25, 27.

424. Between 1967 and 2004, Israel completely demolished at least 2,464 Palestinian homes as ‘punishment’, and sealed or partially demolished many more.⁴³⁸ Beyond retributive punishment for past actions, an additional rationale for the policy expressed by the Israeli authorities was one of deterrence against future actions, on the basis that destroying the homes and property of the families of Palestinians responsible for or suspected of involvement in attacks would deter others from carrying out such attacks. Many home demolitions were also carried out on the basis of broadly deployed ‘military necessity’.⁴³⁹

425. A petition by human rights organisations asking the Israeli Supreme Court to define the legal scope of this ‘absolute military necessity’ was dismissed as irrelevant by the Court.⁴⁴⁰ The Supreme Court also ruled separately that while those subject to home demolition orders should normally be allowed to appeal, demolitions could in fact be carried out without advance notice or due process if there was a risk this might hinder the success of the demolition.⁴⁴¹ This provided ‘a virtual green light for demolitions to go

⁴³⁸ B’Tselem (2004), *supra* note 436; For documented examples of widespread punitive demolitions, see, Human Rights Watch, *Razing Rafah: Mass Home Demolitions in the Gaza Strip* (October 2004).

⁴³⁹ For documented examples of mass demolitions on this basis *cf.* Human Rights Watch, *supra* note 438.

⁴⁴⁰ *Adalah et.al. v. IDF Major General, Central Command, Moshe Kaplinski, et.al.*, HCJ4969/04, judgment of 13 July 2005.

⁴⁴¹ *Gussin v. Commander of IDF Forces*, HCJ 4219/02 judgment of 6 August 2002.

forward without the possibility of appeal for those affected. This is what happens in most cases.’⁴⁴²

426. In 2005, an Israeli military commission charged with reviewing the efficacy and legality of punitive house demolition policy found no solid proof of effective deterrence, indicated that the harm caused by demolitions may in fact lead to an opposite effect, and found the lawfulness of the policy to be questionable. On the basis of the commission’s recommendations, then Minister of ‘Defence’, Shaul Mofaz instructed the state’s military and security forces to cease the use of home demolition as a punitive measure cease.

427. Some exceptions were made to this decision, however, with demolitions and sealing of homes carried out in East Jerusalem in 2009, for example. There were also demolitions of houses by Israeli ground troops in the Gaza Strip in early 2009 during Operation Case Lead, with statements by Israeli leaders to the effect that the destruction of civilian objects would be justified as a response to rocket attacks (“destroy 100 homes for every rocket fired”),⁴⁴³ indicating that home demolitions were seen as a valid form of reprisals.

⁴⁴² Amnesty International, *Under the Rubble: House Demolition and Destruction of Land and Property* (May 2004), p. 32.

⁴⁴³ United Nations, Human Rights Council, *Report of the UN Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (15 September 2009), para. 67.

428. In July 2014, the Israeli government decided to resume the practice of punitive home demolitions, following which the number of demolitions began a steady rise.⁴⁴⁴ The Human Rights Committee called on the state of Israeli to immediately halt this policy of punitive demolitions on the basis that it is incompatible with its obligations under the International Covenant on Civil and Political Rights.⁴⁴⁵

429. Instead, from October 2015, Israel's government took a decision to ramp up the use of house demolitions as punishment for the families of Palestinians who perpetrated attacks against Israelis, or who are suspected of perpetrating or aiding such attacks. In the six months that followed, Israeli forces demolished or sealed 37 Palestinian apartments, more than a third of which were not issued their own demolition orders and were destroyed simply due to their proximity to apartments that were identified for demolition. In the context of this 'large-scale punitive action', 149 Palestinians (including 65 children) lost their homes and have had their basic housing rights violated.⁴⁴⁶ Since October 2015, and up until April 2018, a

⁴⁴⁴ United Nations, Office of the High Commissioner for Human Rights, *Punitive demolitions destroy more than homes in occupied Palestinian territory* (28 December 2015).

⁴⁴⁵ United Nations, Human Rights Committee, *Concluding observations on the 4th periodic report of Israel*, UN Doc. CCPR/C/ISR/CO/4 (21 November 2014), para. 9.

⁴⁴⁶ B'Tselem, *Massive collective punishment: homes of 149 Palestinians suspected of no wrongdoing demolished since Oct. 2015; hundreds more under threat* (21 April 2016), for most statistics see http://www.btselem.org/punitive_demolitions/statistics.

total of 57 structures were punitively demolished, affecting 322 Palestinians, including 136 children.⁴⁴⁷

430. Following the governmental decision to resume punitive demolitions in 2014, eight human rights organisations in Israel petitioned the Supreme Court to challenge the military's renewed policy of punitive demolitions. A three-justice panel of the Court unanimously rejected the petition, however.⁴⁴⁸ The Court effectively reiterated its earlier jurisprudence that Regulation 119 of the Defence (Emergency) Regulations trumps any international legal protections of housing or prohibitions of collective punishment. The judgment also rejected the claim that punitive demolitions necessarily amounts to collective punishment.

431. Commentary on the case notes that 'the state acknowledged that demolitions targeted innocent family members. The court does not explain why such demolitions are not collective punishment.'⁴⁴⁹ The court also dismissed, without coherent reasoning, the argument that since only the homes of Palestinians suspected or convicted of attacks are demolished, and not those of Jews involved in comparable conduct, the policy is applied in a

⁴⁴⁷ OCHA, Data on West Bank demolitions, October 2015- March 2018, available at: <http://data.ochaopt.org/dbs/demolition/demolition/index.aspx>.

⁴⁴⁸ *HaMoked et al. v. Minister of Defence et al.*, HCJ 8091/14, judgment of 31 December 2014.

⁴⁴⁹ Y. Ronen & J. Telman, "The Israeli Supreme Court and House Demolitions in the West Bank", in: *Jurist* (27 January 2015).

discriminatory manner.⁴⁵⁰ As such, widespread military violations of the right to housing of Palestinians are sanctioned by the Israeli judicial system.

2. ‘Administrative’ house demolitions

432. While punitive demolitions attract much attention and deserved criticism, the vast majority of home demolitions carried out by Israeli occupation authorities are those framed as ‘administrative’ demolitions. Such demolitions typically rely on the fact that Palestinians often have no choice but to build without Israel-issued permits. Those permits are extremely difficult for Palestinians to obtain. Costly application fees, very lengthy processes and high likelihood of rejection combine to form ‘a discriminatory permit regime that makes it nearly impossible for Palestinians to “legally” build.’⁴⁵¹

433. According to the Special Rapporteur on the right to adequate housing:

“[t]he policies adopted by Israeli authorities severely restrict Palestinians from building legally through various means. Among others, Israel has not provided Palestinians with the necessary planning framework to ensure that their basic housing and infrastructure needs

⁴⁵⁰ *Ibid.*

⁴⁵¹ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/71/554 (19 October 2016), para. 35.

are met. (...) The number of permits issued is grossly inadequate to housing needs leading many Palestinians to build without obtaining a permit. As a result, numerous Palestinians' homes or extensions to these are considered illegal so that the inhabitants are subjected to eviction orders and the demolition of their houses. Currently tens of thousands of Palestinians are estimated to be at risk of their homes being demolished due to unregulated building. The mere threat of demolition has a profound impact on families and particularly on children, psychological and otherwise."⁴⁵²

434. Permit and administrative detention policy relates predominantly to Area C of the West Bank – which comprises the major territorial component of the OPT and where Israel retains full administrative control – and to East Jerusalem. The Israeli authorities rarely permit residential construction intended to benefit Palestinians, who are effectively prevented from building outside already over-crowded built-up areas: between 2000 and 2007, for example, the Israeli authorities rejected more than 94 % of Palestinian building permit requests in Area C.⁴⁵³ EU Ambassador to Israel Lars Faaborg-Andersen has noted that between 2009 to 2013 only 34 building

⁴⁵² United Nations, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, R. Rolnik, *Preliminary remarks on the mission to Israel and the Occupied Palestinian Territory – 30 January to 12 February 2012* (12 February 2012).

⁴⁵³ Human Rights Watch, *Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories* (December 2010), p. 11.

permits were granted to Palestinians by Israel from a total of 2,000 applications; in 2014 only one building permit was granted, and in 2015 none at all.⁴⁵⁴

435. During that period, by contrast, permitted Israeli construction in the West Bank has continued at a rate of approximately 1,500 new homes per year.⁴⁵⁵ The Special Rapporteur on the right to adequate housing has highlighted the deeply discriminatory nature of Israeli policy in respect of housing. She reported on ‘discriminatory planning, limited access to public services, evictions and house demolition’ in East Jerusalem, where ‘[m]unicipal planning procedures appear to disproportionately restrict the expansion and consolidation of Palestinian neighbourhoods in the city, while Israeli settlements have proliferated.’⁴⁵⁶ According to the Special Rapporteur, Israel’s demographic engineering programme in Jerusalem, implemented through planning and house demolition as ‘a stated aim of official municipal planning documents, is discriminatory and thus violates human rights law.’⁴⁵⁷

⁴⁵⁴ Y. Berger, “EU Slams Israel’s Destruction of Palestinian Homes in West Bank’s Area C”, *Ha’aretz* (28 July 2016); D. Lieber, “UN: Israel “systematically” emptying Area C of Palestinians”, *The Times of Israel* (28 July 2016).

⁴⁵⁵ *Ibid.*

⁴⁵⁶ United Nations, Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik: Mission to Israel and the Occupied Palestinian Territory*, UN Doc. A/HRC/22/46/Add.1 (24 December 2012), para. 50.

⁴⁵⁷ *Ibid.*, para. 51.

436. In the broader territorial context, the Special Rapporteur was strongly critical of the ‘development model that systematically excludes, discriminates against and displaces minorities in Israel and which has been replicated in the occupied territory since 1967’.⁴⁵⁸ She made it clear that “the Israeli planning, development and land system violates the right to adequate housing (...) of Palestinians under Israeli control.”⁴⁵⁹ The CERD Committee itself has arrived at similar conclusions, finding that “the current Israeli planning and zoning policy in the West Bank, including East Jerusalem, seriously breaches a range of fundamental rights under the Convention”, including the right to housing.⁴⁶⁰

437. Given the entrenched nature of this discrimination and the pervasive violations of Palestinian housing rights, UN OCHA has described the situation in the West Bank as putting many Palestinian families and communities

“at risk of forcible transfer because Israeli practices have created a coercive environment that puts pressure on them to move, mainly

⁴⁵⁸ *Ibid.*, para. 96.

⁴⁵⁹ *Ibid.*, para. 100.

⁴⁶⁰ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding observations*, UN Doc. CERD/C/ISR/CO/14–16 (9 March 2012), para. 25.

through the unavailability of building permits, which are almost impossible to acquire.”⁴⁶¹

438. The restrictions on permits and the extensive demolitions carried out by the Israeli forces form part of a broader policy aimed at displacement and direct or indirect forcible transfer of Palestinians. Many of the demolitions in recent years have been carried out in isolated and vulnerable communities in the Jordan Valley, the South Hebron Hills, and in the east of Jerusalem. Combined with Israeli restrictions on services, settler violence and military encroachments, the home demolition policy

“generates a coercive environment and places these vulnerable communities at risk of forcible transfer.”⁴⁶²

439. This has been paralleled by proliferations in the construction of new settler housing in the occupied territory. In 2016, for example, there was:

“(…) a significant increase in settlement-related activity, including more government authorization of new buildings, retroactive authorization of construction considered illegal even under Israeli domestic law,

⁴⁶¹ United Nations, Office for the Coordination of Humanitarian Affairs, “*At risk of forcible transfer*”, *Monthly Humanitarian Bulletin* (May 2016).

⁴⁶² United Nations, Office for the Coordination of Humanitarian Affairs, *Humanitarian Bulletin: occupied Palestinian territory* (January 2017), p. 3.

demolition of the homes of Palestinians and the continuation of discriminatory planning practices and policies that make it extremely difficult for Palestinians to build. Such policies and practices are particularly prevalent in Area C and East Jerusalem, to such an extent that the Office for the Coordination of Humanitarian Affairs has referred to the situation as a ‘coercive environment that undermines a Palestinian physical presence and exacerbates the risk of individual and mass forcible transfers’.”⁴⁶³

440. In the first half of 2016, Israeli forces carried out ‘administrative’ destruction of 168 Palestinian housing units in the West Bank, including East Jerusalem.⁴⁶⁴ This left a total of 740 Palestinians (including 384 children) homeless and denied their basic rights to shelter and housing.⁴⁶⁵ The United Nations Special Coordinator for the Middle East Peace Process Nickolay Mladenov noted that demolitions by Israeli occupation forces during 2016 had proceeded at “three times the weekly average for 2015. These actions run directly counter to the idea of peace.”⁴⁶⁶

⁴⁶³ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/71/554 (19 October 2016), para. 33, quoting Office for the Coordination of Humanitarian Affairs, *Fragmented lives: humanitarian overview 2015*.

⁴⁶⁴ B’Tselem, *Israel demolished more Palestinian homes in West Bank in first half of 2016 than in all of 2015* (27 July 2016).

⁴⁶⁵ *Ibid.*

⁴⁶⁶ N. Mladenov, *Security Council briefing on the situation in the Middle East* (18 February 2016).

441. By the end of 2016, UN OCHA reported that a total of nearly 1,100 Palestinian housing structures in the West Bank were demolished or seized by Israeli authorities over the course of the year; the highest number of demolitions recorded since 2009, and double that of 2015.⁴⁶⁷ In addition, new data obtained from the Israeli Civil Administration showed that

“(…) by the end of 2016 there were approximately 12,500 final demolition orders outstanding against Palestinian-owned structures across Area C. (…) The orders have no expiry date and can be implemented at any time.”⁴⁶⁸

442. Statistics in early 2017 showed that the rate of demolitions was accelerating further again, with the number of homes destroyed recorded at ‘more than 50 % higher than the monthly average in 2016.’⁴⁶⁹ In February 2017, the Israel’s Civil Administration in the West Bank issued demolition orders for an entire Palestinian Bedouin village close to the expanding settlement of Ma’ale Adumim. Under the orders every housing structure in the village of Khan al-Ahmar was to be demolished.⁴⁷⁰ This is indicative of the

⁴⁶⁷ United Nations, Office for the Coordination of Humanitarian Affairs, *Humanitarian Bulletin: occupied Palestinian territory* (January 2017), pp. 1-4.

⁴⁶⁸ *Ibid.*, citing data obtained by BIMKOM, Planners for Planning Rights, *from the Israeli Civil Administration on the basis of the Israeli Freedom of information Act*.

⁴⁶⁹ *Ibid.*, p. 3.

⁴⁷⁰ Y. Berger, “In Rare Move, Israel Orders Demolition of Entire West Bank Bedouin Village”, *Ha’aretz* (20 February 2017).

systematically discriminatory nature of Israel's violation of Palestinians' right to housing.

443. A total of 423 structures were demolished in 2017, affecting 7,285 Palestinians, including 2,707 children. A further 96 structures were demolished in the first quarter of 2018. 471

444. In sum, Israel discriminates Palestinians with regard to the right to housing and thereby violates its obligations under Art. 5 lit. d (v) CERD.

L. Right to natural resources

445. Israel also impairs access and usage of natural resources for Palestinians thereby discriminating against Palestinians. Although not particularly listed in Art. 5 CERD access to natural resources is vital for any community in terms of economic and developmental aspects. Hence and due to the infinite list of Art. 5 CERD⁴⁷² Israel violates its obligations under CERD.

⁴⁷¹ OCHA, Data on West Bank demolitions, October 2015- March 2018, available at: <http://data.ochaopt.org/dbs/demolition/demolition/index.aspx>

⁴⁷² See *supra* IV.

1. General issues

446. Large parts of the occupied State of Palestine's occurrences of mineral resources are located within Area C and territorial waters⁴⁷³ adjacent thereto.

The economically most relevant share thereof could, technically and economically feasibly, be extracted in and on the coastline of the Dead Sea as well as in mines and quarries. However, for decades the State of Palestine did not and still does not benefit from these promising assets desperately needed for its economic development.

447. Instead, the State of Israel's unlawful occupation policy comprises the discriminatory barring of access to Palestinians to said mineral resources including mines and quarries. This policy includes a complex combination of instruments not limited to the following: barriers for Palestinians only are imposed physically by, *inter alia*, restrictions of movement and, to this end, operation of roadblocks and checkpoints at Route 90 crucial for access to the Dead Sea, *de jure* by, *inter alia*, non-issuance of exploiting permits to Palestinians and, *de facto* by, *inter alia*, unlawful interference such as harassment by arbitrary seizure of operational equipment.

⁴⁷³ This term is derived from UNCLOS. However, it is unclear whether the Dead Sea is an enclosed sea in the sense of Art. 122 UNCLOS and this instrument applies or whether – despite its name – it rather is an enclosed lake and the instrument does not apply. The State of Palestine formally reserves its right to make a determination on the matter later, should the need arise. Either way, the principle of equidistance as part of customary international law determines the international boundaries in the Dead Sea, within which littoral States exercise full sovereign rights.

448. Since both this policy and its implementation are exclusively directed against those belonging to the indigenous Palestinian population as opposed to Jewish Israeli nationals and thus based upon racial discrimination against Palestinians, the State of Israel, State party to CERD, thereby violates its duties and obligations under Art. 5 CERD.

2. Factual background

449. The Dead Sea – around two thirds of the eastern coastline and around one third of the total surface of 605 km² of which constitute part of the State of Palestine’s territory – contains, among other minerals, a large share of the global bromine occurrences as well as substantial amounts of potash as well as silt, sand, magnesium and mud. Ashore on the OPT, quarries allow for exploitation of, among others, marble and gravel.

450. According to the World Bank’s conservative estimate,⁴⁷⁴ exploitation of these – as of now unused or illegally misused by the occupier – natural resources has an annual potential in incremental value added to the Palestinian national economy of some USD 642 million from potash, some USD 276 million from bromine and magnesium and some USD 241 million

⁴⁷⁴ World Bank, *West Bank and Gaza: Area C and the Future of the Palestinian Economy*, Rep. No. AUS2922 (2013), pp. 13-15, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/16686/AUS29220REPLAC0EVISION0January02014.pdf>.

from stone mining and quarrying. Exploitation of these minerals alone could make for a total of 11 % of the State of Palestine's GDP.

3. Nature of access and usage restrictions

451. Since 1967, members of the indigenous Palestinians population have had limited access to mineral resources within the OPT as the occupier has imposed far-reaching restrictions to their detriment. Hence, Palestinians cannot benefit from usage thereof. Israeli and foreign companies holding permits to do so have operated quarries since the mid-1970s⁴⁷⁵ and exploited Dead Sea minerals whilst Palestinians were barred from doing the same ever since the occupation had begun.⁴⁷⁶

452. In 1995 however, Israel gave up – on paper – its previous resistance and accepted the obligation to transfer powers and responsibilities relating to Area C quarries and mines to the State of Palestine within a period of 18 months after inauguration of the therein agreed-upon “Palestinian Council” as stipulated in the Interim Agreement.⁴⁷⁷ However, nothing has been agreed upon relative to maritime resources, which thus stayed – even on paper – where they had been: Under *de facto* control of Israel.

⁴⁷⁵ B'Tselem, *High Court sanctions looting: Israeli quarries in the West Bank* (2012), available at: http://www.btselem.org/settlements/20120116_hcj_ruling_on_quarries_in_wb.

⁴⁷⁶ Only initially and before 1994, some quarrying permits were issued to Palestinians alike. See Human Rights Watch, *Israel: Quarry Shutdown Harms Palestinians* (2016), available at: <https://www.hrw.org/news/2016/04/21/israel-quarry-shutdown-harms-palestinians>.

⁴⁷⁷ Art. 12 lit. A para. 2 and Art. 31 para. 2 Appendix 1 Annex III Interim Agreement (1995).

453. Subsequently, in violation of said agreement, Israel did not comply with its obligation stated therein and never gave up its illegal policy of barring Palestinian from access while granting it to its own nationals' and foreigners' companies. To state the obvious, there is no law providing for this discriminatory policy of access and usage restrictions implemented by the Israeli occupying forces to the detriment of the indigenous Palestinian population only. On the contrary, it is a complex interplay of physical, legal and *de facto* barriers concerted or, to the least, condoned by the State of Israel that prevents Palestinians from access to and usage of the State of Palestine's natural resources.

454. Physical access barriers imposed by the occupying forces include inaccessible illegal Israeli settlements as such – some of which are built on land declared as Israel's 'state land', closed military zone or natural reserve – , expropriated land⁴⁷⁸ as well as roadblocks and checkpoints – both permanent and 'flying' – as for instance at the northern part of access route 90 to the Dead Sea. At the latter, on the basis of discriminatory access controls⁴⁷⁹ the indigenous Palestinian population – as opposed to the Jewish

⁴⁷⁸ Al-Haq, *Pillage of the Dead Sea: Israel's Unlawful Exploitation of Natural Resources in the Occupied Palestinian Territory* (2012), p. 14, with further references, available at: http://www.alhaq.org/publications/publications-index?task=callelement&format=raw&item_id=104&element=304e4493-dc32-44fa-8c5b-57c4d7b529c1&method=download.

⁴⁷⁹ *Ibid.*, pp. 18-19.

Israeli population – is systematically excluded from physically reaching potential Dead Sea minerals exploitation sites and some Area C quarries alike.⁴⁸⁰ Whereas few quarries are – despite far-reaching illegal restrictions of movement – accessible in theory, *i.e.*, on an irregular basis and under huge efforts, the Dead Sea’s coastline remains completely inaccessible for economic exploitation to the indigenous Palestinian population.

455. Legal obstacles for Palestinian access to and usage of said natural resources caused by Israel’s policy and its implementation most strikingly consist of systematic discriminatory non-issuances of extraction permits. No Palestinian individual or legal person has been issued a permit for operation of quarries within Area C at least since 1994,⁴⁸¹ or for operation of extraction sites for maritime minerals since 1967. Hence, under the illegal Israeli occupying regime, Palestinians can under no circumstances obtain necessary permits in order to run one of the few quarries within physical reach – as the occupying forces illegally requiring these permits would put it – ‘legally’. Contrarily and as opposed to Palestinians, Israeli and foreign companies, some of them owned or co-owned by illegal Israeli settlements, have been granted such permits: eleven such Israeli-administered quarries operate in

⁴⁸⁰ Whereas in some cases, Palestinians are allowed to pass checkpoints, in the vast majority of cases they are refused to do so. At any rate, no permanent and reliable access is granted. see, Al-Haq, *supra* note 478.

⁴⁸¹ Human Rights Watch, *supra* note 476.

order to safeguard supply for 25 % of Israeli and illegal settlement construction industry.⁴⁸²

456. As a consequence of this racially discriminatory policy, Palestinians were and are indirectly forced to operate quarries without obtaining said illegally required permits from the Israeli Civil Administration. As a consequence, such quarries have been and keep being shut down since 1994.⁴⁸³ In addition, whenever the Israeli occupying forces shut down Palestinian quarries, the Israeli Civil Administration not only levies heavy fines, but also retroactive royalties and extraction fees from those Palestinians who were – for lack of alternatives – operating quarries without permit.⁴⁸⁴

457. Time and again, when Israeli occupying forces shut down quarries for allegedly constituting safety and environment hazards or otherwise suspend operations, they arbitrarily confiscate operational equipment.⁴⁸⁵ Harassments at quarry shutdowns by application of excessive forms of assaults, humiliations and intimidations as applied – to put one of many examples – in the concerted shutdowns in Beit Fajar quarrying area on

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*, with exemplary reference to a letter from the Israeli Civil Administration, available at: https://www.hrw.org/sites/default/files/supporting_resources/civil_administrations_response_to_hrw_final.english.pdf.

21 March 2016 are directed against Palestinians only.⁴⁸⁶ Subsequent to shutdowns, it is not until said fines, royalties and extraction fees are paid that equipment is being returned – if at all – on condition that operations are terminated as in accordance with the aforementioned policy of discriminatory non-issuance of permits to Palestinians.⁴⁸⁷

458. Needless to say, these systematic discriminatory methods cause substantial economic insecurity and instability for the Palestinian national economy. This by itself not being the focus of the present interstate complaint against Israel, illustrates the economic dimension of everyday systematic discriminations against the indigenous Palestinian population significantly impeding economic development within the OPT.

4. Discriminatory Israeli policies regarding access to and usage of minerals in a violation of Israel's obligations under Art. 5 CERD

459. As already previously discussed above⁴⁸⁸ and stated in the Committee's General Recommendation No. 20 of 1996, the list of rights the non-discriminatory enjoyment of which must be prohibited and eliminated under

⁴⁸⁶ B'Tselem, *Military effectively shutting down Palestinian quarries in Beit Fajjar to aid de facto annexation of area* (2016), available at:

http://www.btselem.org/planning_and_building/20160421_military_shuts_down_palestinian_quarries;
Human Rights Watch, *supra* note 438.

⁴⁸⁷ Human Rights Watch, *supra* note 438.

⁴⁸⁸ See *supra* IV. A.

Art. 5 CERD by States party is not exhaustive.⁴⁸⁹ On the contrary, Art. 5 CERD expressly stipulates to enumerate the most notable rights only, among others. In addition, even though Art. 5 CERD does not expressly address States party's policies regarding access to and usage of minerals, such policy's implementation based on a certain population belonging to one or more of the prohibited groups violates Art. 5 CERD by the same token. Hence, given the CERD's object and purpose, Art. 5 CERD is to be construed as listing a 'floor of rights' rather than a 'ceiling'.⁴⁹⁰ Consequently, Art. 5 CERD assumes the pre-existence of rights the non-discriminatory enjoyment of which is guaranteed by States party.⁴⁹¹

460. Israel's policies on access to and use of mineral resources described above do not merely amount to discriminatory denials of Palestinians' freedom of movement. Going much beyond, these patterns constitute a blatant racial discrimination within the meaning of Art. 1 para. 1 CERD when it comes to the enjoyment of the Palestinian people's right to permanent sovereignty of natural wealth and resources and thus, eventually, of the Palestinian people's right to self-determination.

⁴⁸⁹ United Nations, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 20, The guarantee of human rights free from racial discrimination*, UN Doc. A/51/18 (8 March 1996), annex VIII at 124 (1996), para. 1.

⁴⁹⁰ P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination – A Commentary* (2016), pp. 393-394.

⁴⁹¹ *Ibid.*

461. While it is the Palestinian people holding the right to self-determination, its exercise is expressed by the very existence of the State of Palestine, which again holds the right to permanent sovereignty of natural wealth and resources. The latter flows from the former and constitutes one dimension thereof. This interrelation has been recognized by the United Nations General Assembly in its Resolution 1803⁴⁹² reflective of customary international law on this matter. This right has furthermore subsequently been acknowledged as pre-existing within Art. 47 ICCPR as well as Art. 25 ICESCR, which have referred to it as the ‘inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources’. Therefore, the State of Palestine has standing to invoke said violation of the Palestinian people’s right.

462. The fact that enjoyment of said right is, if there was any doubt, comprised by the scope of Art. 5 CERD can be deduced from the Committee’s own Concluding Observations. In its most recent 2012 Concluding Observations the Committee has urged Israel to give up its discriminatory policy seriously breaching ‘a range of fundamental rights’ including its illegal denial of access

⁴⁹² United Nations, General Assembly Resolution 1803 (XVII), *Permanent sovereignty over natural resources* (14 December 1962). See also United Nations, General Assembly Resolution 1314 (XIII), *Recommendations concerning international respect for the right of peoples and nations to self-determination* (12 December 1958); United Nations, General Assembly Resolution 1515 (XV), *Concerted action for economic development of economically less developed countries* (15 December 1960).

to the State of Palestine's natural resources for Palestinians only.⁴⁹³ Reference is then made to access to 'especially water resources'. However, this reference aims at illustrating the outrageous scope of breaches of – not the least – the present Convention without limiting this observation's reach to the access to water only. To state the obvious, water is the most basic and essential natural resource for all human beings as acknowledged by the United Nations General Assembly's resolution on the human right to water,⁴⁹⁴ reflective of customary international law on the matter.

463. This being said, the observation's wording does not expressly exclude other natural resources from its scope. Whether maritime or in quarries ashore, minerals are evidently crucial for a nation's all-embracing socio-economic development, which may again constitute a basis of human life in wealth and dignity. Minerals are thus, on a more abstract national level, just as crucial a natural resource and fall within the ambit of said observation. Hence, the Committee's observation itself applies and thus confirms the discriminatory denial of access to minerals to qualify as potential violation of Art. 5 CERD.

464. The Committee's observations all the more support this party's argument in that the Committee itself has, in light of the development of its Concluding

⁴⁹³ United Nations, Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Art. 9 of the Convention, Concluding observations*, UN Doc. CERD/C/ISR/CO/14-16 (9 March 2012), para. 25.

⁴⁹⁴ United Nations, General Assembly Resolution 64/292, *The human right to water and sanitation* (3 August 2010).

Observations, implicitly clarified discriminatory denial of access not only to water but also to other natural resources may be tantamount to a breach of the Convention. Whereas in its 2007 Concluding Observations, the Committee referred to the discriminatory ‘access to water resources’⁴⁹⁵ alone, its aforementioned 2012 Concluding Observations’ wording reveals a comprehensive critique of Israel’s discriminatory denial of access to *a priori* all natural resources and only refers to water resources as an example thereto.⁴⁹⁶ Accordingly, one can deduce that the Committee itself considers, comprehensively, discriminatory denial of access to natural resources to fall squarely within the scope of potential violations of Art. 5 CERD.

465. To put it differently, in order to comply with the Convention, Israel must grant use of and access to mineral resources – in particular but not limited to those in the Dead Sea – including quarries, without racial discrimination. For failure to grant this right to the indigenous Palestinian population or companies owned or run by its members respectively, Israel violates its obligation under Art. 5 CERD.

⁴⁹⁵ United Nations, Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Art. 9 of the Convention, Concluding observations*, UN Doc. CERD/C/ISR/CO/13 (14 June 2007), para. 35.

⁴⁹⁶ United Nations, Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Art. 9 of the Convention, Concluding observations*, UN Doc. CERD/C/ISR/CO/14-16 (9 March 2012), para. 25.

5. Security or environmental concerns do not justify the discrimination

466. Contrary to the Israeli Civil Administration's assertions, alleged security or environmental reasons for which permits requested by Palestinians are denied constitute mere pretexts and are purely made-up in order to cover the racial discrimination behind the Israeli issuance of permits policy. Due to the fact that at the same time, Israeli or foreign companies are granted permits for the very same activities, there is no plausible reason for which Palestinians alone are being denied permits other than racial discrimination.

6. Rule of usufruct does not justify the discrimination

467. Irrespective of said racial discriminations, Israel has no right to access and exploit the Palestinian people's natural resources for the sole purpose of serving its own economic benefit. Although the law of belligerent occupation does permit an occupying power to administer the occupied State including its public property, this right entitles the occupying State to do so only if and to the extent it observes the rule of usufruct as laid down in Art. 55 of the 1907 Hague Regulations⁴⁹⁷ reflective of customary international law. The idea behind the rule of usufruct however is in stark contrast to Israel's policy. Whilst this rule permits exploitation of the occupied State's public property's 'fruits' only – *i.e.* renewable, as opposed

⁴⁹⁷ While Art. 55 Hague Regulations (1907) and its customary international law equivalent is applicable on land only, Art. 88 Oxford Manual (1913) on the Laws of Naval War – on its part reflective of customary international law – declares the law of war on land applicable. Thus, the same goes for territorial waters.

to finite, resources –, minerals are the prime example for non-renewable resources. To put it differently, they are the tree itself rather than its fruit. Furthermore, the law of belligerent occupation demands, as stated in Art. 43 of the 1907 Hague Regulations reflective of customary international law, the occupier “take all the measures in his power to restore, and ensure, as far as possible, *l’ordre et la vie publique*”.⁴⁹⁸

468. Now given that some 94 % of minerals irreversibly exploited throughout Area C by Israelis holding Israeli permits are sold to Israel⁴⁹⁹ and the greater part of the remaining 6 % assumingly remains within Israeli settlements illegal under international law, it is evident that Israel’s exploitation policy on minerals – urgently needed for, *e.g.*, construction works within the OPT or to generate export revenue – neither is in accordance with the rule of usufruct nor with the duty to restore and ensure the *vie publique*.⁵⁰⁰

⁴⁹⁸ The sole authoritative text being in French, this norm’s English translation is misleading. While in the French version, the occupier shall take all the measures in his power to restore, and ensure, as far as possible, “*l’ordre et la vie publique*” the English translation puts “*public order and safety*”. See, M. Longobardo, “The Palestinian Right to Exploit the Dead Sea Coastline for Tourism”, 59 *GYIL* (2015), pp. 327-328. Restoring or ensuring safety, thus, neither is a valid excuse for Israel’s discriminatory non-issuance of permits to Palestinians nor does it justify its illegal attribution of royalties and extraction fees.

⁴⁹⁹ Y. Ronen, in: M. N. Schmitt/L. Arimatsu/T. McCormack (eds.) 13 *Yearbook of International Humanitarian Law* (2010), p. 521; Human Rights Watch, *Occupation, Inc. How Settlement Businesses Contribute to Israel’s Violations of Palestinian Rights* (2016), available at: <https://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian>.

⁵⁰⁰ Longobardo points out Arts. 55 and 56 4th Geneva Convention (1949) to be instructive on the minimum threshold of what “*vie publique*” refers to. See, M. Longobardo, *supra* note 498.

469. This is all the more striking when considering the fact that the Israeli Civil Administration, despite collecting royalties and extraction fees and despite its mandate, does not spend revenues generated from these very royalties and fees on the betterment of living conditions of Palestinians – as part of the *vie publique*– within the OPT. Instead, it rather hands them over to the Israeli national budget.⁵⁰¹ Whether or not this behaviour amounts to the war crime of pillage – for constituting a definite exploitation of the occupied State’s wealth exclusively serving the occupying power’s own economic benefit and prohibited under international humanitarian law –⁵⁰² can remain undecided for not being a question arising under the present Convention itself. However, for being neither in accordance with the rule of usufruct, nor with the duty to restore and ensure the *vie publique*, Israel’s violation of Art. 5 CERD may not constitute a legitimate discrimination as permitted under the law of belligerent occupation.

470. What is more, one could make the argument that the exceptionally long-lasting occupation requires an exceptionally wide interpretation of the law of belligerent occupation originally designed for short-term temporary cases of occupation. On the contrary however, as the law of belligerent occupation primarily aims at protecting and maintaining normal life of the

⁵⁰¹ Y Ronen, in: M.N. Schmitt/L. Arimatsu/T. McCormack (eds.), 13 *Yearbook of International Humanitarian Law* (2010), p. 521.

⁵⁰² See, e.g., Art. 28 Hague Regulations (1907); Art. 33 para. 2 4th Geneva Convention (1949). Both reflect international customary law on this matter.

civilian population within occupied territories and since, despite the long duration, the standard to maintain the *status quo ante* of the occupied territories exercising the role of an administrator persists, the occupying power's rights are to be construed just as wide or restrictive as in any other case. Whether short or long-term, the same legal framework applies to either case of belligerent occupation⁵⁰³ and thus, the occupying power remains bound to the rule of usufruct and must not engage in acts of pillaging of the occupied territories' natural wealth.

7. No waiver of right to permanent sovereignty over natural resources

471. As far as the argument is made that by concluding the Oslo accords and agreeing to establishing Area C, the PA had voluntarily and unilaterally conceded to the Israeli occupying forces the Palestinian people's right to permanent sovereignty over natural wealth and resources including but not limited to the use of and access to minerals, reference is made to the right of self-determination – from where it is deduced – and its nature being a norm of *jus cogens*. Since the right to self-determination amounts to a peremptory norm of international law, pursuant to Art. 53 VCLT any treaty conflicting with said norm is void to the extent it does so.

⁵⁰³ A. Cassese, "Powers and Duties of an Occupant in Relation to Land and Natural Resources", in: E. Playfair (ed.), *International Law and the Administration of Occupied Territories* (1992), pp. 419-420.

472. Thus, from concluding the Oslo Accords alone, no waiver of Palestinian rights can be deduced. In the same vein, Israel is not entitled to engage in acts otherwise prohibited under the law of belligerent occupation.

473. Israel's policy on discriminatory denial of access to and usage of the State of Palestine's mineral resources in the Dead Sea and ashore in Area C to the detriment of Palestinians violates, in light of the fundamentally different regime applied to Israeli or foreign nationals shown above, Art. 5 CERD.

M. Right to water

474. As already shown above, Art. 5 CERD contains a non-exhaustive list of rights protected under the Convention.⁵⁰⁴

475. More specifically, Art. 5 lit. e (iv) CERD guarantees economic and social rights. This includes *in particular* the right to public health, medical care and social security, but accordingly also encompasses the prohibition of racial discrimination, when it comes to other economic and social rights not specifically mentioned in Art. 5 lit. f (iv) CERD.

⁵⁰⁴ See *supra*. IV A.

476. That the right to water indeed constitutes an economic and social right, and also forms part of the right of everyone to an adequate standard of living, is clear from the ICESCR, Art. 11 of which recognizes

“(...) the right of everyone to an adequate *standard of living* for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”.⁵⁰⁵

477. General Comment No. 15 of the Committee on Economic, Social and Cultural Rights of 20 January 2003 in turn confirms that

“(...) [t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”⁵⁰⁶

478. As a matter of fact, the Committee on Economic, Social and Cultural Rights in its General Comment No. 15 has specifically stated that States ought to refrain from

⁵⁰⁵ Emphasis added.

⁵⁰⁶ The Right to Water (Arts. 11 and 12 ICESCR), United Nations, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2002/11 (20 January 2003), para. 3.

“(...) engaging in any practice or activity that denies or limits equal access to adequate water”.⁵⁰⁷

479. Accordingly, to allocate disproportionately more water to Israeli settlers in the OPT than to the local Palestinian population, and to place obstacles in the way of access to water on Palestinians, but not on Israeli settlers, constitutes discrimination within the meaning of Art. 1 CERD and accordingly violates Art. 5 lit. e (iv) CERD.

480. Such disproportionate allocation of water constitutes racial discrimination within the meaning of Art. 1 CERD because it distinguishes between Israeli settlers on the one hand, and Palestinians on the other, places restrictions on the access to water of Palestinians that are not imposed on Israeli settlers, and shows a preference for Israeli settlers in the allocation of water.

481. Such *discriminatory* allocation of water allocation of water in a discriminatory manner then results, as will be shown, in the allocation of *insufficient* water to Palestinians which impairs the public health of Palestinians, with serious consequences for their medical care and social security.

⁵⁰⁷ *Ibid.*, para. 21.

1. Factual background: principal sources of water for the OPT and Israel and water usages

482. On the whole, the Palestinian population living in the OPT, consisting of approximately 4,816,503 persons, have access to only 13 % of the Mountain Aquifer's resources and have access to 25 % only of the Coastal Aquifer, and have no access to surface water. Consequently, they have access to 10 % only of all available water in the region. 90 % is retained by Israel⁵⁰⁸ with its population of approximately 8.5 million persons.

483. Even more importantly, leaving aside the situation in East Jerusalem, the more than 500,000 Israeli settlers that have been transferred to the West Bank in violation of international law, have access to 90 % of the available water resources, as compared to 10 % water for the 2,935,368 Palestinians living in the West Bank.⁵⁰⁹ Accordingly, while the average usage of water by Israeli settlements amounts to 300 litres per day per inhabitant, Palestinians in the West Bank only use to 70 litres of water per day per inhabitant, well below the daily 100 litres per capita recommended by the World Health Organization (WHO).⁵¹⁰ In the most vulnerable communities in Area C,

⁵⁰⁸ See E. Koek, *Water For One People Only: Discriminatory Access and "Water Apartheid" in the OPT* (2013), p. 31.

⁵⁰⁹ Ewash OPT, *Water and Sanitation in Palestine* (2016).

⁵¹⁰ Amnesty International, *Troubled Waters – Palestinians Denied Fair Access to Water* (2009), p. 3.

which are not connected to the water network, the average water consumption even drops down to 20 litres of water per day per inhabitant.⁵¹¹

484. In the Gaza Strip in turn, the local Palestinian population has only access to 60-70 litres of water per day and inhabitant.⁵¹²

2. Principal sources of water

485. The principal water sources of the OPT and Israel are the Jordan River, the Mountain Aquifer and the Coastal Aquifer.⁵¹³

a. Jordan River

486. The Upper Jordan River flows south into Lake Tiberias (in Israel), which provides the largest fresh water storage capacity along the Jordan River. It then drains into the Lower Jordan River, which flows further south through the Jordan Valley to its terminus in the Dead Sea. Although the Jordan River south of the border of Palestine with Israel constitutes the eastern border of Palestine with Jordan, Israel has since 1967, when it occupied the West Bank, denied Palestinians physical access to the riverbanks, and has also denied

⁵¹¹ *Ibid.*

⁵¹² United Nations, Office for the Coordination of Humanitarian Affairs, *OPT, 120,000 people across Gaza disconnected from the water network due to unrepaired war damage* (2015).

⁵¹³ See generally E. Koek, *supra* note 508.

access to an equitable and reasonable share of the water resources of the River Jordan.

487. While only 37 % of the surface catchment area of the Jordan River Basin is located in Israel, Israel exploits about 50 % of this shared water resource.⁵¹⁴ In particular, Israel diverts a major part of the upstream flow of the Jordan River through its National Water Carrier (NWC), a pipeline that runs from Lake Tiberias to the Israeli coastal towns of Haifa and Tel Aviv. This satisfies about one third of Israel's total water use.⁵¹⁵ This diversion of the flow upstream has not only deprived Palestinians of a crucial source of water, but has also contributed to the significant and continuous drop in the Dead Sea's water levels.

b. Mountain Aquifer

488. The Mountain Aquifer extends across both sides of the Green Line and is therefore shared between Israel and Palestine. It is the largest water resource in the region and provides the highest quality of groundwater. Approximately 80 % of the water that annually recharges the Aquifer comes from the West Bank, *i.e.* from Palestine.

⁵¹⁴ D. Phillips, S. Atill, S. McCaffrey and J. Murray, "The Jordan River Basin: 2 Potential Future Allocations to the Co-Riparians" *Water International* (2007), p. 49.

⁵¹⁵ *Ibid.*, p. 55.

489. The Mountain Aquifer is divided into three basins: the Western Aquifer, the North Eastern Aquifer and the Eastern Aquifer. Already the majority of the water of the Western and North Eastern aquifers originates from the West Bank, while the Eastern Aquifer basin lies even almost entirely within the West Bank with no significant inflows or outflows from Israel.

490. It is nevertheless Israel, as the occupying power, that exercises full control over the recharge areas of the three basins of the Mountain Aquifer located in the West Bank and extracts some 87 % of the water from the Mountain Aquifer system annually for its own use,⁵¹⁶ *i.e.* for the use of Israeli settlements located in the OPT. In fact, the mountain Aquifer provides about a quarter of the water used by Israel, including its settlements in the West Bank.⁵¹⁷

c. Coastal Aquifer

491. The Coastal Aquifer is located under the coastal plain of Israel, the Gaza Strip and the Sinai Peninsula. The approximately 1.6 million Palestinians

⁵¹⁶ United Nations, General Assembly, *Report of the Human Rights Council Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the OPT*, UN Doc. A/HRC/22/63 (7 February 2013).

⁵¹⁷ European Parliament, *Water in the Israeli-Palestinian conflict* (January 2016), available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573916/EPRS_BRI\(2016\)573916_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573916/EPRS_BRI(2016)573916_EN.pdf).

living in the Gaza Strip are exclusively dependent on water from the southern end of the Coastal Aquifer.

492. The Gaza Strip enjoys only one quarter of total extractions from the Coastal Aquifer⁵¹⁸ while the remainder is extracted by Israel. Over-extraction of the Coastal Aquifer and pollution have resulted in the increasing deterioration of the water quality in the Gaza Strip. By now, groundwater levels in the aquifer have fallen below sea level and saline water and sewage have infiltrated the aquifer, rendering over 90 % of the water it supplies unfit for human consumption.

3. Control over the water resources of the OPT

493. After 1967 Israel brought the water resources of the OPT under military control.⁵¹⁹ In 1982, however, ownership of all West Bank water supply systems was transferred to the Israeli water company Mekorot, of which the State of Israel owns 50 %. Following the adoption of the Oslo Accords in 1993, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II) was adopted which deals with the joint management,

⁵¹⁸ C. Messerschmid, "Water in Gaza – Problems and Prospects", in: M. Larudee (ed.), *Gaza – Palestine: Out of the Margins*, (2011), pp. 141, 176.

⁵¹⁹ S. McCaffrey, *The Law of International Watercourses*, 2nd ed. (2007), p. 320.

by Israel and the Palestinian Authority, of the groundwater resources of the Mountain Aquifer in the West Bank.⁵²⁰

494. In contrast thereto, the shared Jordan River and the Coastal Aquifer are subject to unilateral Israeli management without any Palestinian inputs or agreed limits of extraction. Oslo II empowers the Palestinian Water Authority to supply water to the Palestinian population in Areas A and B only. As most of the water resources are however located in Area C of the OPT, over which Israel exercises full control, Israel has exclusive control over most Palestinian water resources.

495. Although Oslo II appears to make access to water more equitable, it has in fact served to consolidate Israeli control over water in the OPT. This is done in a number of ways.

496. *First*, Oslo II ensured that the existing sharing of water resources at that time would continue, in terms of which Israel consumed 87 % of the water of the underground Aquifers of the West Bank and Palestinians 13 %. Palestinians remain purchasers of water and are confronted with discriminatory pricing which favours Israeli settlers, who benefit from highly subsidized rates.⁵²¹

⁵²⁰ Art. 40 Annex III, Protocol Concerning Civil Affairs.

⁵²¹ J. Selby, "Dressing up Domination as Cooperation: the Case of Israeli-Palestinian Water Relations", 29 *Review of International Studies* (2003), p. 135.

497. *Second*, Oslo II establishes a Joint Water Committee (JWC) which exercises control over the management of the water resources of the West Bank. Its mandate includes the granting of permits for drilling new wells, increases in the extraction of water from wells and setting extraction quotas. Comprised of equal numbers of Israelis and Palestinians, decisions of the JWC should be made by consensus. This system does, however, allow either side to veto any proposal, including alterations to the *status quo ante*. Israel has used this veto to effectively block Palestinian proposals for wells. In exercising this veto Israel has blocked all applications for Palestinian production wells in the Western Aquifer basin, while agreeing to most applications that draw from the small Eastern Aquifer basin.

498. Moreover, Israel has made approval of urgently needed Palestinian water projects conditional upon the approval of water projects that benefit settlers.⁵²² Even when Palestinians exercise their veto right in the JWC, Israel simply ignores this and proceeds with water projects that serve settlements.⁵²³ In the result, water allocations continue disproportionately to favour Israeli settlements while stunting Palestinian agriculture.⁵²⁴

⁵²² *Ibid.*, p. 135.

⁵²³ M. Zeitoun, "The Conflict vs Cooperation Paradox: Fighting over or Sharing of Palestinian Israeli Groundwater?" 32 *Water International* (2007), pp. 105-120.

⁵²⁴ J. Selby, "Dressing up Domination as Cooperation: the Case of Israeli-Palestinian Water Relations" 29 *Review of International Studies* (2003), p. 124.

499. *Third*, although the Palestinian Water Authority has technical authority over the West Bank wells, ultimate supply and allocation resides with the Israeli Civil Administration representing the occupying power. As a matter of fact, military orders enacted before Oslo allow the Israeli military authorities to veto even projects approved by the JWC.⁵²⁵

4. Discriminatory water allocation between Israel and the OPT

500. Israel consumes a grossly disproportionate share of the water resources of both the Jordan River and the three aquifers of the region for its own use.

501. This unequal sharing of water between Israel proper and the OPT, *i.e.* Palestine, falls within the scope of CERD and constitutes a violation of Art. 5 CERD.

502. For one, it is clear that this distribution scheme, forcibly imposed by Israel as the occupying power, is in violation of international law in this respect.

503. Art. 4 of the International Law Commission's 2008 'Draft Articles on the Law of Transboundary Aquifers'⁵²⁶, which Israel accepts has "gained the

⁵²⁵ E. Koek, *Water for One People Only. Discriminatory Access and 'Water-Apartheid'* (2013), p. 43.

⁵²⁶ Draft articles on the Law of Transboundary Aquifers, available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/8_5_2008.pdf.

recognition of states,”⁵²⁷ provides that States shall utilize transboundary aquifers in accordance with the “principle of equitable and reasonable utilization” in a manner “consistent with the equitable and reasonable accrual of benefits there from to the aquifer states concerned”.⁵²⁸

504. A similar provision appears in Art. 5 of the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, which provides in its para. 2 that:

“(…) [w]atercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.”

and which was assumed to form part of customary international law by the International Court of Justice in its judgment in the Case Concerning the Gabčíkovo-Nagymoros Project (Hungary/Slovakia).⁵²⁹

505. Besides, such denial, by the occupying power, of the use of its own local water resources by the population of the occupied territory in favour of the

⁵²⁷ United Nations, International Law Commission, *Shared Natural Resources: Comments and Observations by Governments on the Draft Articles on the Law of Transboundary Aquifers*, UN Doc. A/CN.4/595 (26 March 2008) p. 24, para. 103.

⁵²⁸ United Nations, International Law Commission, *Report*, UN Doc. A/63/10, Supplement No. 10 (2008) p. 21.

⁵²⁹ ICJ, Case Concerning the Gabčíkovo-Nagymoros Project (*Hungary/Slovakia*), judgment of 25 September 1997, ICJ Rep. 1997, pp. 7 *et seq.* (56), para. 85.

population of the occupying State, i.e. Israel, also constitutes a violation of applicable norms of international humanitarian law.

506. What is more is that the unequal use of both, the water of the Jordan River and, in particular, the Western Aquifer, by Israel is combined with an extremely restrictive permit regime imposed by Israel as the occupying power, as already described above.⁵³⁰

507. For one, the local Palestinian population, local Palestinian water providers, as well as Palestine as such, cannot make *any* use of water from the Jordan River neither for human consumption, nor for agricultural usages.

508. Besides, the local population is also hindered from using an equitable share of the water from the local aquifers. This has the effect that the local population either does not have sufficient access to water at all, or is obliged to buy water from the Israeli provider Mekorot, which to a large extent uses water from the Mountain Aquifer, the by far major part of which should be made available for Palestine under general rules of international law, outlined above, in the first place.

⁵³⁰ See, *supra* para. 482 *et seq.*

509. This Israeli policy has the effect that, compared with the Israeli population, the Palestinian population in the West Bank has only a very limited access to water resources, which in turn limits their living standard, and indeed even their health in time of droughts. The fact that this policy is race-driven, and hence constitutes a violation of Art. 5 CERD, rather than constituting a regular inter-State water resource conflict, is further confirmed by the fact that Israelis living in the same area, *i.e.* Israeli settlers, have much more access to water resources which not only equals the quantities available in Israel itself, but also – by far – exceeds what the local Palestinian population receives.

5. Discrimination *within* the OPT: West Bank

510. Within the West Bank itself, Israel further discriminates between settlers and Palestinians in the allocation of water. In addition to the unequal structural allocation of water described above which discriminates between Palestinians and Israelis located in both, Israel itself and the settlements, Israel resorts to a number of additional measures designed to discriminate against Palestinians in favour of settlers or which have the effect of discriminating in this way.

511. For one, Israel prevents the construction and maintenance of Palestinian water infrastructure in the West Bank. This has been achieved through the

exercise of its veto in the JWC and by the systematic refusal of permits for the construction or rehabilitation of water infrastructure by the Israeli Civil Administration in Area C, comprising 59 % of the West Bank. Even small-scale projects, such as the digging of wells or the construction of rainwater collection cisterns, require a permit by the occupying power, which is routinely refused.

512. Conversely, there are practically no restraints on the construction of water projects for settlements. To provide but one example of many, in the Jordan Valley Mekorot and Mehadrin, an Israeli agro-industrial company, have been allowed to drill deeply, which has led to Palestinian springs drying up. As a result, 80 % of water resources in the Jordan Valley are consumed by Israel or settlers.⁵³¹

513. At the same time, Palestinian water projects constructed without a permit are routinely destroyed by the occupying power.⁵³² Even water projects funded by foreign governments, as well as by the European Union, as part of their humanitarian aid for lack of the occupying power guaranteeing the well-being of the population of the occupied territory as required by

⁵³¹ See, the Report of the Independent International Fact-Finding Mission on the Implication of Settlements, *supra* note 427, paras. 81-82.

⁵³² The Independent International Fact-Finding Mission on the Implication of Settlements found that the destruction of water infrastructure in 2012 had doubled compared to 2011. See *Ibid.*, para. 88; See also, E. Koek *supra* note 508, pp. 59-67.

international humanitarian law,⁵³³ are destroyed. The same applies to *e.g.* cisterns constructed by Palestinian communities to provide water for livestock, crops and domestic use, which are similarly demolished on a regular basis by the occupying power.

514. To provide yet another example, it suffices to refer to Sousiya in the South Hebron Hills. It is not connected to a water network and there are no nearby filling points. However, since 2001 Israel has demolished 12 cisterns and issued demolition orders for 20 others. This compels residents to purchase expensive tankered water with the consequence that many households spend one-third of their income every year on water.⁵³⁴ Needless to say, water projects constructed by settlers are not destroyed. To aggravate matters, many water springs in the West Bank have been taken over by settlers.⁵³⁵

515. The discriminatory nature of the Israeli water policy within the West Bank is also brought out by measures taken by Mekorot, the Israeli water provider. *Inter alia*, during the summer of 2016 Mekorot cut off the water supplies of Palestinians in order to meet the needs of settlements. In June 2016, for instance, Mekorot reduced the water supply of thirteen Palestinian

⁵³³ 4th Geneva Convention, Section III.

⁵³⁴ See, E. Koek, *supra* note 508, p. 67.

⁵³⁵ *Ibid.*, p. 67; Independent International Fact-Finding Mission on Settlements, para. 87.

communities for several weeks in the Salfit, Nablus and Jenin Governates by 50-70 %, which forced some 60,000 people living in these areas to use expensive tankered water to meet their domestic needs.⁵³⁶ At the very same time, Israeli settlements, located in the very same region such as *e.g.* Ariel, have not seen any such cuts in their water supply despite the fact that the daily use of water by Israelis living in settlements by far exceeds the usages by Palestinians.⁵³⁷

516. The construction of the Separation Wall, found to be illegal and in violation of international law by the International Court of Justice in 2004,⁵³⁸ has further created so-called ‘Seam Zones’, areas of agricultural land between the Wall and the Green Line, to which Palestinians have access by permit only, if at all, and where construction activities by Palestinians including the drilling of wells, the building of cisterns or the building of water pipelines, are *per se* excluded. As a matter of fact, some 70 % of the Western Aquifer recharge area is located in these ‘Seam Zones’. This has accordingly closed off the access of Palestinians to 95 % their own water resources.

⁵³⁶ United Nations, Office for the Coordination of Humanitarian Affairs, *Protection of Civilians Weekly Report* (21-27 June 2016).

⁵³⁷ B'tselem, *Undeniable discrimination in the amount of water allocated to Israelis and Palestinians* (12 February 2014).

⁵³⁸ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et seq.* (189-191), para. 133.

517. The experiences of the community of al-Hadidiyya and the village of al Aqabain the Jordan Valley illustrate the inherently discriminatory manner in which Palestinians are treated by Israel when it comes to water allocation.

518. Al Hadidiyya is a community in the Governate of Toubas that is located only about 150 meters from the Israeli settlement of Roi. Over the years, as a result of restrictions on water, the community of about 100 families has dwindled to a mere 14 families. There is pressure on the community to move completely and the strategy employed by the settlement of Roi, backed by the Israeli military authorities, is to deprive the community of water. In 2012 Abdul Rahim Hussein Bisharat, a resident of al-Hadidiyya, swore an affidavit in which he declared:

“Water pipelines that transmit water to Israeli settlements in the areas surrounding al-Hadidiyya are near our houses, but we are not allowed to access a single drop of water they transport. In 1980, the Israeli occupying authorities constructed a water well about 20 meters from the centre of al-Hadidiyya. Water is pumped from the well to the settlement of Roi about 150 metres west of our village (...) The well is surrounded by a barbed wire fence and monitored by surveillance cameras. Water transmission pipelines are installed across Palestinian houses. They pass in front of our own eyes and underneath our feet to

settlements. At the same time we are forced to purchase water at exorbitant rates from remote areas, because the Israeli occupying authorities do not recognize our presence in our land (...) Settlers have seized our water and yet they are more entitled to it in the eyes of the occupying authorities.”⁵³⁹

519. Al Aqaba in turn is a village of about 300 residents that is located in the northern Jordan Valley. In 2011 Sami Sadeq Sbeih, a resident of al-Aqaba in the Governate of Toubas swore an affidavit in which he declared:

“There is no water network or even a water cistern in the village. The Israeli occupying authorities do not allow the village residents to construct a water network. At the same time Israeli water pipelines [Mekorot pipelines] which supply water to Israeli settlements are installed in the vicinity of the village. The Israeli authorities do not allow the village residents to construct any artesian wells. Home owners in the village are therefore forced to purchase water from tank trucks some distance away at great expense. Village residents are not allowed to be supplied with water through Mekorot and they are compelled to purchase water at great expense. As a result of these restrictions on

⁵³⁹ Al-Haq affidavit No. 7163/2012 (23 February 2012), reproduced in E. Koek, *supra* note 508, p. 53.

water, a large number of farmers and shepherds have had to abandon their jobs, as they are unable to provide water for their animals.”⁵⁴⁰

520. Israel’s policies and practices in the West Bank reveal a pattern of discrimination in which Palestinians are systematically disadvantaged. Permits are refused for the construction of wells, cisterns and water infrastructure, projects of this kind constructed without a permit are destroyed, water is cut off in the summer months by Mekorot and access to water resources has been prevented by the construction of the Wall. Over 300.000 Palestinians live in over 100 communities that are not connected to a running water network.⁵⁴¹ As a result they are compelled to rely on harvesting rainwater and water purchased from expensive, privately owned water tankers, which, besides, are often hindered from reaching their destination by checkpoints and roadblocks.⁵⁴² Furthermore, some 50.000 Palestinians in 151 communities live on less than 20 litres per capita per day (lpcd) which is the minimum amount recommended by the WHO for “short-term survival” in emergency and disaster situations.⁵⁴³

⁵⁴⁰ Al-Haq affidavit No. 6371/2011 (31 May 2011), reproduced by E. Koek, *supra* note 508, p. 56.

⁵⁴¹ United Nations, Office for the Coordination of Humanitarian Affairs, *How Dispossession Happens. The Humanitarian impact of the Take-over of Palestinian Springs by Israeli Settlers* (2012) p. 13; United Nations, General Assembly, *Report of the Special Committee to Investigate Israeli practices affecting the Human Rights of the Palestinian People and other Arabs of Occupied Palestinian Territories*, UN Doc. A/61/500/Add. 1 (8 June 2007), section 30.

⁵⁴² C. Bertini, Personal Humanitarian Envoy to the UN Secretary-General, *OPT Mission Report* (August 2002), section 45.

⁵⁴³ E. Koek, *supra* note 508, p. 55.

521. Conversely, the settlements and settlers are more than adequately supplied with water. All settlements in the West Bank are connected to a running water network. Mekorot supplies copious water to settlements for both domestic use and agricultural use from groundwater resources beneath the West Bank. Water is used for high-intensive and specialized agricultural products which are largely exported.⁵⁴⁴ During the summer months when water supplies are low, Mekorot diverts water from Palestinian users to meet the needs of settlers. According to the United Nations Human Rights Council Independent International Fact-Finding Mission on the Implications of Settlements:

“Settlements benefit from enough water to run farms and orchards and for swimming pools and spas, while Palestinians often struggle to satisfy their minimum water requirements.”⁵⁴⁵

522. As a result of Israel’s water policies and practices in the West Bank, the total amount of water available for domestic consumption by 2.6 million Palestinians in 2010 was 98 million cubic meters (mcm). In comparison some 500,000 settlers consume 150 mcm annually for domestic use. Water consumption by Palestinians in the West Bank is on average 73 litres per

⁵⁴⁴ C. Messerschmid, *What price cooperation? – Hydro-Hegemony in shared Israeli-Palestinian groundwater resources* (2007), Paper presented at International Conference on Sustainable Development of Water in Palestine (2007), pp. 347-364.

⁵⁴⁵ *Supra* note 427, para. 85.

capita per day compared with 369 litres per capita per day by settlers in the West Bank. This means that 500.000 settlers consume approximately six times the amount of water used by the Palestinian population of 2.6 million.⁵⁴⁶

523. Accordingly, the Israeli water policy, as applied to the local Palestinian population living in the West Bank on the one hand, and to the Israeli settlers living in the very same area on the other hand, constitutes a blatant violation of Art. 5 lit. e (iv) CERD. This has already been confirmed by the CERD Committee itself which in its Concluding Observations as to Israel's 13th State report under CERD stated that

“(…) [t]he Committee (…) is concerned, in particular, by information about unequal distribution of water resources to the detriment of Palestinians (…)”⁵⁴⁷

and then called upon Israel to

“(…) ensure equal access to water resources to all without any discrimination.”⁵⁴⁸

⁵⁴⁶ See, E. Koek, *supra* note 508, pp. 50-51.

⁵⁴⁷ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/13 (14 June 2007), p. 9, para. 35.

⁵⁴⁸ *Ibid.*

524. In the same vein, the latest Concluding Observations by the CERD Committee concerning Israel reiterated the Committee's position on the matter when stating that

“(...) [t]he Committee is appalled at the hermetic character of the two groups [*i.e.* Israeli settlers and the indigenous Palestinian population living in the West Bank], who live on the same territory but do not enjoy (...) equal access to (...) water resources.”⁵⁴⁹

It was in light of this finding that the CERD Committee then

“(...) urge[d] the State party [*i.e.* Israel] to reconsider the entire policy in order to guarantee Palestinian (...) access (...) to natural resources (especially water resources).”⁵⁵⁰

6. Discrimination vis-à-vis the Palestinian population of East Jerusalem

525. After 1967 Israel connected the waterworks of East Jerusalem and West Jerusalem. In theory there is no distinction between the supply of water to Palestinians in East Jerusalem and to Israelis in settlements in East Jerusalem

⁵⁴⁹ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/14-16 (12 April 2012), p. 6, para. 24.

⁵⁵⁰ *Ibid.*, p. 7, para. 25.

or in West Jerusalem. In practice, however, Palestinians are treated unequally. While drinkable running water is taken for granted in Jewish settlements in East Jerusalem, Palestinian neighbourhoods are subjected to severe water shortages. This is due to a number of factors, such as population growth and the failure of the water company, Hagihon, to effect repairs to dilapidated pipes and to install new connections. It is clear, however, that less concern is shown for the water needs of Palestinian East Jerusalemites than for those of Jewish settlers in East Jerusalem. This is particularly true of the refugee camp of Shuafat. Although there is no structural discrimination in the allocation of water in East Jerusalem, discrimination nevertheless exists.

7. Discrimination vis-à-vis the Palestinian population of Gaza

526. The water situation in Gaza is dire. Less than 10 % of the population of Gaza has access to safe drinking water compared with 90 % in the West Bank.⁵⁵¹ This is the result of a number of factors: population growth; over pumping and contamination of groundwater; and Israel's actions.

⁵⁵¹ World Bank, *Water situation alarming in Gaza* (22 November 2016). Fanack, relying on the Palestinian Water Authority, puts the figure at less than 4 %. See Fanack, *Why is There a Water Crisis in Gaza?* (21 November 2016), available at: <https://water.fanack.com/specials/gaza-water-crisis/why-water-crisis-in-gaza/>, p. 8.

527. Gaza relies almost entirely on water supplies from the Coastal Aquifer.⁵⁵²

The increased demand resulting from population growth has led to over pumping of the groundwater from the Coastal Aquifer, which has allowed saline water to seep into the aquifer from the Mediterranean Sea. This has caused chlorine concentration. To aggravate the situation, the groundwater from the Coastal Aquifer has been polluted by raw sewage and untreated wastewater, resulting in nitrate concentration. These factors have led to the contamination of Gaza's groundwater supply.⁵⁵³

528. Since 2008, Gaza has been subjected to three major Israeli military offensives: 'Operation Cast Lead', 2008-9, 'Pillar of Defence', 2012 and 'Operation Protective Edge', 2014. These offensives have resulted in extensive damage to Gaza's water infrastructure. Operation Protective Edge alone caused \$34 million damages to Gaza's water infrastructure, destroying or damaging 20-30 % of water and sewage networks, 30-50 % of water storage tanks and reservoirs and 220 agricultural wells.⁵⁵⁴

529. Israel has imposed a blockade on Gaza since 2007 which has prevented the import of building materials for the construction of Gaza's water

⁵⁵² See, above para. 491 *et seq.*

⁵⁵³ See, *supra* note 551, pp. 2-9.

⁵⁵⁴ *Ibid.*, pp. 10-11.

infrastructure and of other items required to maintain and operate water and sewage systems.⁵⁵⁵

530. Israel is responsible for the present situation in Gaza. Gaza remains an occupied territory and in terms of international humanitarian law Israel has humanitarian obligations to the territory and its people, which include ensuring that the people of Gaza have an adequate supply of safe water.⁵⁵⁶ Israel therefore has a responsibility to repair the infrastructure of Gaza's water supply. To fail to fulfil this obligation and to persist in maintaining an economic blockade of Gaza that prevents the people of Gaza from taking steps to repair the infrastructure of its water supply themselves is a dereliction of duty that attracts the attention of international humanitarian law.

531. It is difficult to assess Israel's water obligations in terms of CERD. In 2005 Israel withdrew its settler community from Gaza which makes it impossible to compare the treatment of Palestinians in Gaza with the treatment of a Jewish community in the same territory, as it is in the West Bank. Of course it remains possible to compare the supply of water to Gazans with Israelis in Israel and to conclude that the great discrepancy in the supply of water to Israelis and the people of an Israeli-occupied territory amounts to gross

⁵⁵⁵ *Ibid.*, p. 10.

⁵⁵⁶ See Y. Dinstein, *The International Law of Belligerent Occupation* (2009), pp. 276-280.

discrimination. This is not, however, the standard of comparison that has been employed elsewhere in this application. For this reason, it is wiser to view failure of Israel to ensure an adequate supply of water to the people of Gaza through the prism of the criminal sanctions imposed by international humanitarian law.

N. Social and economic rights: labour, education and health

532. In addition to the range of civil rights specifically referred to in Art. 5 lit. d CERD, the Convention also applies the principle of non-discrimination in the area of other economic, social and cultural rights, namely with regard to labour, education and health.

1. Labour rights

533. When Israel became a party to the Convention, it undertook the obligation to ensure that there would be no discrimination between or against any group in the enjoyment of labour rights. Specifically, Art. 5 lit. e (i) requires that '[t]he rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration' shall be

enjoyed by all persons living under Israel's jurisdiction, free from racial discrimination.⁵⁵⁷

534. The significance of those labour rights was subsequently reinforced, and their content elaborated, in Arts. 6 and 7 of the International Covenant on Economic, Social and Cultural Rights. The International Convention on the Suppression and Punishment of the Crime of Apartheid further condemns any legislative measures and other measures calculated to deny the right to work to members of a particular racial group.

a. Labour rights in the OPT

535. The right to work for Palestinians in the OPT has been impacted upon greatly by restrictions on labour imposed by Israel's occupation and by damage imposed by Israeli policies on the Palestinian economy as a whole – including direct physical damage to Palestinian land, resources and property by Israeli military forces. Among the main factors that continue to depress the Palestinian economy in the OPT are the restrictions on Palestinian mobility, on Palestinian labour flow into East Jerusalem and Israel, and on the imports and exports of goods.

⁵⁵⁷ It is noted that Art. 5 lit. e (ii) is also relevant to the field of labour rights in prohibiting discrimination in the state's vindication of the right to form and join trade unions. That provision is not a primary focus of argument in this complaint, though it is noted that serious concerns have been raised over the discriminatory effects of Israeli policy on the trade union rights of Palestinians in the OPT.

536. In 1967 before the Six-Day War, agriculture in the West Bank and Gaza accounted for 37 % of GDP, while industry and construction accounted for 13 %.⁵⁵⁸ Since 1967, the Palestinian economy has been transformed into a wage sector highly dependent on the Israeli economy and on foreign aid. Between 1967 and 2000, jobs inside Israel became increasingly important to Palestinian labourers, and Palestinians became core workers in Israel's construction industry both within Israel and in the OPT. During the early years of the occupation, Israeli policy was to encourage Palestinian labourers from the OPT to work in Israel and to promote the flow of goods in both directions between Israel and the OPT. These measures exposed the local Palestinian economy to market forces that resulted in high differences in wage levels and economic structures between Israel and the OPT.

537. Israel also limited trade from the OPT with Jordan and has not allowed significant public investments in the OPT other than those exclusively serving Jewish settlements.⁵⁵⁹ The closures imposed by Israel in the context of the first intifada from 1987 forced many Palestinian labourers to return to agriculture in the OPT, but punitive Israeli policies also inside the OPT – such as closing the checkpoints to Palestinian workers and employing

⁵⁵⁸ B. V. Arkadie. "The Impact of the Israeli Occupation on the Economies of the West Bank and Gaza", (6 No. 2) *Journal of Palestine Studies* (1977), pp. 104-105.

⁵⁵⁹ *Ibid.*

foreign workers instead of Palestinians – resulted in a major loss of jobs and reduced wages.

538. After the Oslo Accords were signed in the early 1990s, aid and investment poured into the OPT and the Palestinian economy entered a period of rapid growth, with real GDP rising to \$4,512 million by 1999.⁵⁶⁰ In 2000, however, with the beginning of the second Intifada, Israel instituted a strict closure policy and GDP fell to \$3,557 million.⁵⁶¹ The economy in the OPT was severely affected by Israeli restrictions on exports and movement. By 2003, 47 % of Palestinians lived below the poverty line of \$2 per day and as many as 600,000 Palestinians could not afford basic needs such as food, clothing and shelter.⁵⁶²

539. Following the restrictions imposed on Palestinian workers, Israel has sought out cheap foreign migrant labour from countries in Asia and Eastern Europe as a replacement.⁵⁶³ Palestinian unemployment rates, which were at about 10 % in 2000, peaked at over 35 % between 2002 and 2003.⁵⁶⁴ GDP continued to fall and by 2012, the unemployment rate in Gaza was 45.5 %, while the

⁵⁶⁰ World Bank, *West Bank and Gaza: Economic Developments and Prospects* (March 2008).

⁵⁶¹ *Ibid.*

⁵⁶² World Bank, *Palestinian Economy Remains Stagnant after Four Years of Intifada* (November 2004).

⁵⁶³ International Federation for Human Rights & Euro-Mediterranean Human Rights Network, *Migrant Workers in Israel: A contemporary form of slavery* (June 2003), p. 6.

⁵⁶⁴ Trading Economics & Palestinian Central Bureau of Statistics, *Palestine Unemployment Rate*, available at: www.tradingeconomics.com/palestine/unemployment-rate.

proportion of the population there living below the poverty line there was 79.4 %.⁵⁶⁵ The unemployment rate across the OPT has remained somewhere between 20 % and 30 %, and in October 2016 was at 28.4 %.⁵⁶⁶

540. Thus, under Israel's effective control of the economy in the OPT, access to jobs and livelihood, as well as conditions and rights in work, have continued to worsen for Palestinians. As the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967⁵⁶⁷ sets out:

(a) The Palestinian economy has not advanced. In 2014, Palestinian real gross domestic product (GDP) per capita was at virtually the same level as it was in 1999, with Gaza's real GDP per capita standing at only 71 % of its 1999 level;⁵⁶⁸

(b) Unemployment is growing as a social scourge. In 2016, it stood at 27 % in the Occupied Palestinian Territory, compared to 12 % in 1999; in Gaza, the unemployment crisis is particularly acute, where it has reached 42 %,

⁵⁶⁵ UNDP, *Fast Facts: The Gaza Strip – Facts, Figures and UNDP's Response to the Ongoing Crisis* (November 2012).

⁵⁶⁶ Trading Economics & Palestinian Central Bureau of Statistics, *Palestine Unemployment Rate*, available at: www.tradingeconomics.com/palestine/unemployment-rate.

⁵⁶⁷ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/71/554 (19 October 2016), para. 43.

⁵⁶⁸ In 2014, real GDP per capita income in the Occupied Palestinian Territory (West Bank and Gaza, not including East Jerusalem) stood at \$1,737. In 1999, it stood at \$1,723. In 2014, Gaza's real GDP per capita income was \$971, compared to \$1,372 in 1999. All figures are in constant 2004 United States dollars; current (nominal) GDP per capita figures are higher. See data published by the Palestinian Central Bureau of Statistics, available at: www.pcbs.gov.ps/Portals/_Rainbow/Documents/e-napcapitacon-1994-2014.htm.

with 58 % of its youth (aged between 15 and 29) without work, among the highest rates in the world;⁵⁶⁹

(c) Poverty has been increasing among Palestinians since 2012, with 26 % of the population now deemed to be poor, and 13 % estimated to suffer from extreme poverty.⁵⁷⁰ Food insecurity is endemic: an estimated 2.4 million people in the West Bank and Gaza (57 % of the population) are projected to require some form of humanitarian assistance in 2016;⁵⁷¹

(d) The industrial, agricultural and natural resource sectors are steadily shrinking in economic significance and employment size, owing to, *inter alia*: Israeli restrictions on market access; low confidence among potential investors because of political uncertainty; the significant loss of arable land to the Occupying Power; lack of effective economic planning powers; limited Palestinian control over important natural resources (water, land, stone quarrying, and oil and gas reserves); and the limited access to fishing

⁵⁶⁹ World Bank, *Economic monitoring report to the ad hoc liaison committee* (September 2016).

⁵⁷⁰ United Nations, Educational, Scientific and Cultural Organization (UNESCO), *country programming document for Palestine* (2014-2017).

⁵⁷¹ United Nations, Office for the Coordination of Humanitarian Affairs, *Humanitarian dashboard: 2nd quarter 2016* (18 August 2016). Available at: www.ochaopt.org/content/humanitarian-dashboard-2nd-quarter-2016. UNRWA reported in March 2016 that 70 % of the total refugee population in Gaza, over 930,000 people, were dependent on food assistance, dramatically up from 10 % in 2000. Available at: www.unrwa.org/newsroom/emergency-reports/gaza-situation-report-137.

resources.⁵⁷² The economy has become deindustrialized and its ability to export has been undercut by the decline of the agriculture and manufacturing sectors;⁵⁷³

(e) The Occupied Palestinian Territory continues to be a captive trading market for Israel, as it has been throughout the occupation: in recent years, about 85 % of Palestinian exports have gone to Israel, and it received 70 % of its imports from Israel. The restrictions and imbalance in the trading relationship contributed to maintaining a chronic trade deficit in the Palestinian economy of \$5.2 billion in 2015, some 41 % of GDP;⁵⁷⁴

(f) Symptomatic of the Palestinian Government's precarious economic management powers are the substantial fiscal leakages that the Palestinian Government and the Palestinian economy suffer under the current revenue-sharing and collection agreements with Israel. These arrangements are estimated by the World Bank and the United Nations Conference on Trade and Development (UNCTAD) to cost the

⁵⁷² See United Nations, Conference on Trade and Development, *Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory*, UN Doc. UNCTAD/APP/2016/1 (1 September 2016). The World Bank acknowledged in 2015 that “the competitiveness of the Palestinian economy has been progressively eroding since the signing of the Oslo accords, in particular its industry and agriculture”. See World Bank, *Economic monitoring report to the ad hoc liaison committee* (September 2015).

⁵⁷³ World Bank, *Economic monitoring report to the ad hoc liaison committee* (September 2016).

⁵⁷⁴ See, UNCTAD Report *supra* note 572; All amounts are in United States dollars.

Palestinian economy at least \$640 million annually (amounting to 5 % of GDP);⁵⁷⁵

(g) UNCTAD has estimated that, without the occupation, the economy of the Occupied Palestinian Territory could double its GDP, with significant reductions not only in the unemployment and poverty levels, but also in the chronic trade and budget deficits.⁵⁷⁶

b. Impact of movement restrictions on Palestinian labour rights

541. The pervasive nature of the physical restrictions and permit regimes by which Israel limits Palestinian movement has been outlined above (section III., E, VI). As a result of the spike in Israeli security measures following the outbreak for the second intifada, the number of physical obstacles to Palestinian movement in the West Bank increased significantly. Through the imposition of checkpoints, the construction of the Wall, particular restrictions on movement in the seam zone, and difficulties for Palestinians in obtaining permits, there have been continued infringements of the rights of Palestinians in the OPT to free choice of employment and to access their workplace. Farmers are especially prevented from just and favourable conditions of work with access to their farmland blocked. One study by

⁵⁷⁵ See World Bank, *Economic monitoring report to the ad hoc liaison committee* (April 2016); and UNCTAD Report *supra* note 572.

⁵⁷⁶ See, UNCTAD Report *supra* note 572.

OCHA found that more than half of the communities surveyed in the West Bank did not have direct, regular access to their own land:

“Restrictive gate openings and permit allocations are already having a negative impact on agricultural practices and on rural livelihoods. Many farmers cultivate their land infrequently or not at all, or have changed to lower maintenance and lower yield crops. The longer term consequences for these communities are uncertain, as they lose contact with the land on which they depend both for their present livelihood and for their future survival (...) [In the closed area between the Wall and the Green Line] some 70 percent of the almond trees have now died because of lack of regular maintenance.”⁵⁷⁷

542. The World Bank estimated that the Wall cost the Palestinian economy 2-3 % of GDP annually.⁵⁷⁸ The permit system that accompanies the Wall but applies more broadly to restrict Palestinian movement throughout the West Bank⁵⁷⁹ is reminiscent of the Pass Laws in apartheid South Africa which made it impracticable for black South Africans to work in certain white areas of the country. Similarly, difficulties in obtaining the necessary permits have compelled many Palestinians to attempt to enter East

⁵⁷⁷ United Nations, Office for the Coordination of Humanitarian Affairs, *Three Years Later: The Humanitarian Impact of the Wall since the International Court of Justice Opinion* (9 July 2007).

⁵⁷⁸ World Bank, *West Bank and Gaza Investment Climate Assessment* (March 2007).

⁵⁷⁹ See *supra* on the impairment of freedom of movement, *supra* IV E.

Jerusalem or Israel illegally in search of work, thus fuelling disregard for labour laws and exposing these workers to arrest, detention and heavy fines.

543. More than half of the land in the West Bank is entirely inaccessible to Palestinians due to settlements, road blocks, closed military zones, ‘nature reserves’, buffer zones and other restrictions on access. The system of roads in the West Bank is also designed to restrict movement between cities and villages. Many of the main roads are limited to cars with Israeli license plates and as a result Palestinians need to take long, circuitous routes through multiple checkpoints to travel to neighbouring areas. The World Bank has highlighted the negative impact of this on Palestinian labour rights:

“Unsurprisingly, these restrictions make the movement of people and goods more expensive, inefficient and unpredictable and therefore have a particularly chilling effect on economic activity. Beyond the personal hardship, an economy cannot run effectively if there is significant uncertainty about the ability of workers to reach their jobs, of goods reaching their markets, and of entrepreneurs being present to manage their place of business.”⁵⁸⁰

⁵⁸⁰ World Bank Technical Team, *Movement and Access Restrictions in the West Bank: Uncertainty and Inefficiency in the Palestinian Economy* (9 May 2007).

544. Israel has also severely suppressed the Gaza fishing industry by restricting how far from the coast the fishermen can fish. The Oslo Accords provided that Gaza's fishing communities could travel 20 nautical miles from the coast in the exercise of their livelihood, but this has not been enforced in their favour. In the 1990s, Israel allowed them to travel 12 nautical miles off shore and were hauling in around 3,000 tons of fish a year. From 2000 onwards, the Israeli military began to implement a *de facto* limit of between three and six nautical miles from shore, by force. By 2008, Gaza's fisheries were hauling in less than 500 tons a year,⁵⁸¹ and from January 2009 a limit of six nautical miles on the maritime zone for Palestinians was formally imposed. Gazan fishermen have been effectively prevented from accessing 85 % of the maritime areas they were entitled to access under the Oslo agreements.⁵⁸² As a result, by 2010 nearly 90 % of the fishermen were categorised either as poor (with a monthly income of between \$100-190) or very poor (earning less than \$100 per month).⁵⁸³

545. Palestinian fishermen are regularly targeted by Israeli army while they are at work. In 2010, two fishermen were shot and killed and three others were wounded.⁵⁸⁴ 50 arbitrary arrests and attacks on fisherman, including two

⁵⁸¹ Palestinian Center for Human Rights, *Narratives Under Siege (3): Rafah Fishermen's Syndicate* (7 February 2008).

⁵⁸² United Nations, Office for the Coordination of Humanitarian Affairs & UN World Food Programme: *Special Focus 'Between a Fence and a Hard Place'* (August 2010), p. 5.

⁵⁸³ ICRC, *Gaza Closure: Not Another Year*, News Release (14 June 2010).

⁵⁸⁴ Al-Haq, *Shifting Paradigms – the enforcement of the buffer zone in the Gaza strip* (June 2011), p. 11.

killings, were recorded in 2012.⁵⁸⁵ In the first half of 2016 a further escalation of Israeli attacks against Palestinian fisherman was documented, including: ‘almost daily shootings; confiscating their equipment and fishing vessels; and prohibiting the entry of new boat engines and fibreglass to build boats into the Strip. These measures, along with the nine-year long closure, severely impact the nearly 4,000 fishermen in the Gaza Strip. Since the beginning of 2016, Israel arrested at least 65 fishermen and confiscated 17 boats. There have also been 55 incidents of the IOF [Israeli occupation forces] shooting at fishing vessels, which has caused the injury of six fishermen.’⁵⁸⁶

546. The six-mile limit remains in force, while Palestinian fishermen assert that a 12-mile fishing zone is the minimum required for them to access the fish stocks – qualitatively and quantitatively – to be able to earn just and favourable remuneration for their work.⁵⁸⁷ In the context of both agriculture and fisheries in the OPT, Israeli ‘restrictions have stunted the capacity of those two sectors to generate economic growth and employment.’⁵⁸⁸

547. None of the above restrictions on movement and the transportation of goods apply to Jewish-Israeli settlers living in the OPT, who have free access

⁵⁸⁵ Al-Haq, *Field Report, Monitoring and Documentation Department* (January-June 2012); Al-Haq, *Field Report, Monitoring and Documentation Department* (July-December 2012).

⁵⁸⁶ Al-Haq, *Israel's Systematic Attacks against Palestinian Fishermen* (31 May 2016).

⁵⁸⁷ M. Othman, “Gaza fishermen not permitted beyond 6-mile zone any time soon”, *Al-Monitor* (18 November 2016).

⁵⁸⁸ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/71/554 (19 October 2016), para. 47.

to all goods and uninhibited freedom of movement between the West Bank and Israel related to their work, trade, and social networks. The CERD Committee has previously emphasised that it ‘is deeply concerned that the severe restrictions on the freedom of movement in the Occupied Palestinian Territories, targeting a particular national or ethnic group, especially through the Wall, checkpoints, restricted roads and permit system, have created hardship and have had a highly detrimental impact on the enjoyment of human rights by Palestinians, in particular their rights to ... work’.⁵⁸⁹

c. Restrictions on access to jobs in East Jerusalem and Israel

548. 146,000 Palestinians were employed in Israel in 2000: 116,000 from the West Bank (including East Jerusalem) and 30,000 from Gaza.⁵⁹⁰ By 2006, this figure had decreased to 60,700 – almost all from the West Bank and nearly half of whom held a Jerusalem ID card or a foreign passport.⁵⁹¹ After the Hamas victory in the Palestinian Legislative Council elections in 2006, labour flows reduced even further, and the World Bank noted that even before the election Israeli government ‘policy was to reduce to zero the number of permit-holding workers by the end of 2007.’⁵⁹² This reduction to

⁵⁸⁹ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/13 (14 June 2007), para. 34.

⁵⁹⁰ World Bank, *West Bank and Gaza Update* (September 2006), p. 12, available at: <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/UpdateSept06Eng.pdf>.

⁵⁹¹ *Ibid.*

⁵⁹² World Bank, *West Bank and Gaza: Economic Update and Potential Outlook* (15 March 2006), p. 2.

zero has not happened, but as noted previously, at the end of 2015 only 57,000 Palestinians from the West Bank held permits to work in Israel, such permits continue to be often arbitrarily revoked, and certain categories of Palestinians from the OPT (men who are under 24 or unmarried, for example) are excluded entirely from eligibility for work permits.

549. The Committee on Economic, Social and Cultural Rights has expressed concern about the restrictions placed on Palestinian workers from accessing work in East Jerusalem and Israel. It expressly stated that it

“(...) continues to be gravely concerned about the deplorable living conditions of the Palestinians in the occupied territories, who – as a result of the continuing occupation and subsequent measures of closures, extended curfews, roadblocks and security checkpoints – suffer from impingement of their enjoyment of economic, social and cultural rights enshrined in the Covenant, in particular access to work, land, water, health care, education and food. The Committee also expresses concern about the rate of unemployment in the occupied territories, which is over 50 % as a result of the closures which have prevented Palestinians from working in Israel. (...)”

The Committee further recommends that the State party ensure that workers living in the occupied territories are permitted to continue to work in Israel.⁵⁹³

550. Within the OPT, the Palestinian workers most affected by Israel's closure policy is the sector of the labour force working in East Jerusalem but living elsewhere in the West Bank. East Jerusalem is an integral part of the West Bank and was for decades its economic centre. With the tightening of restrictions after the outbreak of the second intifada and the subsequent construction of the Wall, Palestinians living elsewhere in the West Bank need permits to work in East Jerusalem, which in practice are very difficult to obtain. Certain sectors have been particularly impacted by the restrictions from working in East Jerusalem: many teachers in Palestinian schools in Jerusalem can no longer teach and many doctors and nurses working in hospitals in Jerusalem have been forced to leave their positions. According to UN estimates, 95 % of Palestinians from elsewhere in the West Bank and 77 % from East Jerusalem itself have had difficulties reaching their workplace,⁵⁹⁴ while by 2011 51.2 % of East Jerusalem households with West Bank IDs reported that the main earner had been forced to change their place of work due to the Wall.⁵⁹⁵

⁵⁹³ United Nations, Committee on Economic, Social and Cultural Rights, *Concluding Observations*, UN Doc. E/C.12/1/Add.90 (23 April 2003), paras. 19, 20, 36.

⁵⁹⁴ UNISPAL, *The Separation Wall in Jerusalem: Economic Consequences* (28 February 2007).

⁵⁹⁵ United Nations, Office for the Coordination of Humanitarian Affairs, *Barrier Update* (June 2011), p. 16.

d. Restrictions on imports and exports

551. Palestinian unemployment in the OPT is also fostered by Israeli restrictions on imports and exports of primary products. Industries that depend on the flow of goods have experienced an increase in transportation costs, resulting in a reduction in efficiency and earnings. Agriculture, fishing and forestry currently generate a significant share of Palestinian exports and these sectors are directly affected by difficulties in export and the restrictions on free movement of goods. The World Bank has noted that such restrictions on trade 'have fragmented Palestinian economic space, raised the cost of doing business and eliminated the predictability needed to conduct business.'⁵⁹⁶

552. The blockade on Gaza severely restricts imports and exports in that part of the Palestinian territory, as noted by the Special Rapporteur on human rights in the Palestinian territory.⁵⁹⁷

553. The World Bank, after noting the grim levels of unemployment and poverty, stated that the approximately 70 % of Palestinians who work in the shrunken private sector in Gaza earn an average monthly salary of \$174, less than the legal minimum wage of around \$400. While Israel has recently allowed a

⁵⁹⁶ World Bank, *Four Years – Intifada, Closures and Palestinian Economic Crisis: An Assessment* (October 2004).

⁵⁹⁷ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/71/554 (19 October 2016), para. 46.

limited amount of goods produced in Gaza to be traded to the West Bank and Israel, exports from Gaza are at only 11 % of their level before the 2007 blockade was imposed. The World Bank found that Gaza's GDP between 2007 and 2012 would have been 51 % higher had it not been for the combined effects of the blockade and armed conflict. The economy is now dependent for about 90 % of its GDP on expenditures by the Palestinian Government, the United Nations and other external remittances and donor projects.⁵⁹⁸

554. In the rest of the OPT, Palestinians still have no access to external markets through their own airports or sea ports while no Palestinian development or investment can take place in Area C, which represents 60 % of the West Bank's territory. The Wall has had a particularly adverse impact on the traditionally strong trade links between the West Bank and East Jerusalem.⁵⁹⁹ A regular delivery schedule is impossible for traders, while goods are also often damaged during inspection and waiting periods. Many purchasers have ceased their contracts with Palestinian suppliers as a result of this unreliability.⁶⁰⁰ With an ongoing dependence on Israel as a source of import and an outlet for exports, Israeli closure policies and the undercutting of

⁵⁹⁸ World Bank, economic monitoring reports to the *ad hoc* liaison committee (May 2015, September 2015 and April 2016).

⁵⁹⁹ IMF, *Macroeconomic and Fiscal Framework for the West Bank and Gaza* (21 September 2010).

⁶⁰⁰ B'Tselem, *Gaza Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan* (March 2005).

Palestinian production with lower-cost imports into the OPT from Israel have ensured that the Palestinian trade deficit has continued to deteriorate.

555. The United Nations Conference on Trade and Development points out that:

“Part, but not all, of the trade between the oPt and Israel could be mutually beneficial but its involuntary and unequal nature has rendered Palestinian economic development subservient to Israeli economic and political imperatives, often masked under ‘security requirements’.”⁶⁰¹

556. The impact of these restrictions on the Palestinian population is most evident in the spikes in unemployment and the lack of work opportunities for younger Palestinians in particular. Many sectors that rely on the movement of goods have been adversely impacted by increased costs and inefficiency due to unpredictable delivery schedules, resulting in major job losses. As a result of Israel’s policies, both the West Bank and the Gaza Strip have become increasingly dependent on foreign aid. Israeli restrictions on the Palestinian right to work serve to prevent full participation in the economic life of the OPT and to hinder Palestinian development.

⁶⁰¹ UNCTAD, *Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the occupied Palestinian territory* (September 2010).

e. Discriminatory labour law: The ‘Jordan Valley Regulation’

557. Approximately 25,000 Palestinians have permits to work for Israeli employers in or connected to West Bank settlements (and more are employed without permits), typically in construction, agriculture and the service sector. An Israeli Supreme Court decision in 2007 held that Palestinians employed by Israeli businesses in settlements should be entitled to the protections of Israeli labour law, unless otherwise stated in their contracts.⁶⁰² In a similar vein, a Jerusalem Labour Court decided in 2013 that West Bank Palestinians employed in industrial zones in settlements in the OPT are entitled to the minimum wage and certain benefits provided by Israeli law (in this case 10 Palestinian workers from the West Bank in the Mishor Adumim industrial zone of the Ma’aleh Adumim settlement).⁶⁰³

558. Israeli employers have been able to bypass these rulings in practice without great difficulty, however.⁶⁰⁴ And on 2 August 2016, Israeli Justice Minister Ayelet Shaked promulgated a new regulation “that could effectively close the country’s labour courts to Palestinian workers from the West Bank”.⁶⁰⁵ The regulation requires ‘non-Israeli residents’ to deposit financial guarantees

⁶⁰² *Kav LaOved* [Workers’ Hotline] *and others v. Givat Zeev Local Council and others*, HCJ 5666/03, judgment of 19 September 2007.

⁶⁰³ H. Bior, “Palestinians Employed in West Bank Settlements Entitled to Israeli Wages and Benefits, Court Rules”, *Ha’aretz* (23 June 2013).

⁶⁰⁴ See, A. Paz-Fuchs & Y. Ronen, “Integrated or Segregated? Israeli-Palestinian Employment Relations in the Settlements”, in M. Allegra, A. Handel and E. Maggor (eds.), *Normalizing Occupation: The Politics of Everyday Life in the West Bank Settlements* (2017).

⁶⁰⁵ “Israel Pushing Palestinian Workers Out of Court, No Labor Rights for Workers”, *The Nakba Files* (8 August 2016).

as a pre-condition for filing any claims against their employers in Israel's labour courts. The regulation ostensibly creates a form of legal segregation between Israeli and "foreign" workers – creating separate standards for both – but in essence targets Palestinians with West Bank IDs rather than migrant workers from outside Israel/Palestine: This is because the regulation exempts citizens of countries that have signed the 1954 Hague Convention on Civil Procedure (such as Romania, a major supplier of labour to Israel) and also waives the surety requirement if plaintiffs have assets in Israel from which defendants could recover legal fees if they prevail — likely a reference to bank accounts in the country held by many foreign workers. This regulation in effect permits the further exploitation of Palestinian workers, as it makes the pursuit of any claims against Israeli employees too expensive to pursue in court.⁶⁰⁶

559. The differing and discriminatory treatment of a Palestinian worker as against the Jewish-Israeli worker whom she might be working side by side in the same workplace is clear. It also appears that the passing of the regulation 'usurps the legislature's role and unreasonably eliminates judicial discretion only in order to obstruct access to court for foreign workers, especially Palestinians.'⁶⁰⁷ Reports indicated that the Justice Minister's decision to issue the regulation was motivated by a desire to target Palestinian workers, who

⁶⁰⁶ *Ibid.*

⁶⁰⁷ S. Zaher, "New Measures to Segregate Palestinian Workers", *The Nakba Files* (19 September 2016).

the Minister believes have an undue tendency to petition Israeli labour courts in pursuit of rights in work.⁶⁰⁸

560. A petition to the Israeli Supreme Court has been filed in response to the regulation by Adalah, the Workers' Hotline and the Association for Civil Rights in Israel. The petitioning organisations note the regulation as a politicised attack by the Justice Minister against a backdrop of 'a negligible number of routine lawsuits filed by Palestinian agricultural labourers in Jordan Valley settlements in response to violations of their labour rights by Israeli employers.'⁶⁰⁹ In the petition, they argued that the regulation 'constitutes a discriminatory, dangerous and arrogant rule which has resulted from pressure by employers who wish to continue to violate – unhindered – the rights of their weak employees.'⁶¹⁰ Such attacks on a particular category of Palestinian worker in the OPT are symptomatic of the occupation's broader logics of separation and discrimination.

2. Education

561. Today, access to education in Palestine is severely affected by the aforementioned discriminatory policies of, in particular, attacks on schools

⁶⁰⁸ Adalah, *Human rights groups file Israeli Supreme Court petition against 'Jordan Valley Regulation' restricting migrants and Palestinian workers' rights* (25 September 2016).

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

from Israeli occupation forces and settlers, home and school demolitions, restriction of movement, and the widespread detention of children.

562. Israeli attacks on Palestinian educational facilities are an integral element of Israel's discriminatory policies, with severe implications on education. As the UN Secretary-General described in his 2015 report on Children in Armed Conflict: in the West Bank,

“attacks on schools and protected personnel, and a pervasive environment of violence, harassment and intimidation, continued to have an impact on children's access to education.”⁶¹¹

563. Within the context of 808 education related violations,⁶¹² affecting over half a million children,⁶¹³ the rate of attacks were 30 times higher in 2014 compared to 2010, going from 24 to 671.

564. Restrictions on movement also have had a major impact on education throughout the OPT. School children living in Area C and in East Jerusalem

⁶¹¹ Report of the UN Secretary General on Children and Armed Conflict, A/70/836-S/2016/360, 20 April 2016, para. 76, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/111/19/PDF/N1611119.pdf?OpenElement>.

⁶¹² According to OCHA, education-related violations as per the MRM include: attacks against schools, military use of schools, attacks on related protected persons in relation to schools, interferences with access to education and threats of attacks against protected persons in relation to schools.

⁶¹³ OCHA, 2016 Humanitarian Needs Overview, November 2015, p. 27, available at: https://www.ochaopt.org/documents/hno_december29_final.pdf.

in the vicinity of settlements are required to pass through checkpoints to reach school. Body and bag searches are frequent and both school children and teachers are often subject to harassment by Israeli soldiers. In some areas they are also intimidated and attacked by settlers. Harassment and assaults by soldiers and settlers is particularly bad in the H2 area of Hebron.

565. Delays caused by obstacles of this kind and the intimidatory actions of soldiers and settlers impede education. Higher education in East Jerusalem and the West Bank likewise suffers from delays of students at checkpoints. Such restrictions are even more pronounced in Gaza. Since 2007 students from Gaza have been prohibited from studying in the West Bank. In addition, permits to study abroad on scholarships are regularly denied.

566. In East Jerusalem, discrimination is made apparent by the disproportionate allocation of funds, which has resulted in a 'a shortage of classrooms and striking discrepancies in resources allotted to Palestinian versus Jewish Israeli citizens.'⁶¹⁴

567. The discriminatory policy of widespread and arbitrary detention of children severely impedes access to education due, in particular, to the frequent disruptions through arrest operations, detentions obstructing the child from

⁶¹⁴ ACRI, Right to Education, <https://www.acri.org.il/en/category/east-jerusalem/right-to-education/>

attending school and the very limited provisions made for the education of Palestinian child detainees. Education is only provided in two prisons, in unsuitable environments, with restrictions on what subjects can be taught.⁶¹⁵

3. Health

568. The accessibility and quality of health care in the OPT are seriously affected by the restrictions placed on the movement of patients, doctors and medical staff.⁶¹⁶ Hospitals of the Ministry of Health of the State of Palestine have limited capacity which means that patients frequently require referral for specialized treatment outside their areas of residence.

569. This is particularly true of Gaza where there are few oncologists and cardiac surgeons. Patients from the West Bank or Gaza requiring treatment in East Jerusalem, Israel or abroad must obtain a permit for this purpose. Permits are frequently refused for “security reasons”, particularly in respect of patients from Gaza. The procedure for obtaining permits is complicated and between 15 and 30 % of applications are refused. To aggravate matters Israeli security forces frequently interrogate patients and on occasion arrest them. Within the West Bank and East Jerusalem checkpoints often hamper access to life-saving treatment.

⁶¹⁵Addameer, Imprisonment of Children, February 2016, available at: http://www.addameer.org/the_prisoners/children.

⁶¹⁶ WHO, *Right to health: Crossing Barriers to Access Health in the Occupied Palestinian Territory 2014-2015* (2016), available at: http://applications.emro.who.int/dsaf/EMROPUB_2016_EN_19231.pdf.

V. Art. 2 CERD

570. Art. 2 para. 1 CERD provides that all states parties condemn racial discrimination and undertake to eliminate racial discrimination in all its forms by taking immediate and appropriate action. In pursuance of this obligation, State parties are required to under Art. 2 para. 1 lit. d CERD to

“(...) prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”.

571. Israel has violated this obligation by failing to bring to an end the racial discrimination inherent in the law and practice of the regime of occupation, racial segregation, colonialism and apartheid that prevails in the OPT. This failure is fully examined in the section on apartheid, This section deals with the manner in which some Jewish settlers have exploited the racial superiority of Jews over Palestinians allowed by the dual legal system applying in the OPT which accords greater rights to Jews⁶¹⁷ and the partial conduct of the occupation forces in favour of Jews. This takes the form of aggressive racial discrimination consisting of acts of violence, intimidation

⁶¹⁷ See, J. Dugard and J. Reynolds, “Apartheid, International Law, and the Occupied Palestinian Territory” in: (24) *European Journal of International Law*, (2013), pp. 867 *et seq.* (904-911).

and humiliation by Jewish settlers against Palestinians in the West Bank, including East Jerusalem. It is this aggravated form of racial discrimination, loosely described as “settler violence,” that is examined in this section.

572. There are over 765,000 settlers, living in some 250 settlements and “outposts” in the West Bank, including East Jerusalem.⁶¹⁸ Although settlements are recognized by the Israeli government and “outposts” are officially unrecognized, there is nothing to distinguish these two categories of settlements under international law.⁶¹⁹ Both categories are illegal. Hence, the Security Council in Resolution 2334 of 23 December 2016⁶²⁰ and the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁶²¹ draw no distinction between settlements and outposts in condemning all settlements as contrary to international law. Broadly, settlers are divided into three groups: those who view settlements as providing a high quality of suburban life, and occupy settlements in East Jerusalem or near to Jerusalem and Tel Aviv; ultra-orthodox settlers, who live in settlements close to the Green Line; and settlers motivated by religious and political ideologies who live

⁶¹⁸ United Nations, Human Rights Council *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63 (7 February 2013), para. 28.

⁶¹⁹ *Ibid.*, para. 26.

⁶²⁰ UNSC, Res. 2334 (2016), para. 1 reaffirms that Israeli settlements in the Occupied Palestinian Territory “have no legal validity” and constitute “a flagrant violation under international law.” ; See, too, United Nations, Security Council Resolutions 452 (20 July 1979) and 245 (25 January 1968).

⁶²¹ ICJ, Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, pp. 136 *et. seq.* (120-121), para. 120.

mainly in settlements in central West Bank in close proximity to Palestinian towns or villages.

573. Some settlers, particularly those motivated by religious and political ideologies, engage in anti-social behaviour, often taking the form of violence, against Palestinians. On occasion, such acts are random acts of racist violence. On other occasions, this action is a response to Palestinian acts or to the acts of the occupation forces perceived to be harmful to the settle enterprise, known as “price tagging”.⁶²² Sometimes it appears to be action taken by radical organized vigilant settler groups. The aggressive conduct of Civilian Security Coordinators (CSCs), civilian guards employed by some settlements to protect settlements, also falls within the category of settler violence. Settler violence is most pronounced in Hebron where 500-600 settlers live among 167,000 Palestinians. There are almost daily acts of physical violence and property damage in this city.

574. The racist nature of settler violence is evidenced in word and deed. The slogans “death to Arabs,” “Muhammad is a pig” and “Muhammad is dead” are but examples of settler language and graffiti. The annual Jerusalem Day march, celebrating the reunification of Jerusalem in 1967, passes through the

⁶²² See B’Tselem, *Background on Settler Violence*, available at: http://www.btselem.org/settler_violence.

Muslim Quarter accompanied by such chants and acts of vandalism.⁶²³ Palestinians are beaten for entering a settlement on the ground that “this is a Jewish neighbourhood.”⁶²⁴ The theft of Palestinian olive trees has been justified by rabbis, including former chief Rabbi Mordechai Eliyahu, on the ground that the land of Palestine belongs to Jews and therefore trees on this land may be taken by Jews.⁶²⁵ At a wedding following the murder of the Dawabsheh family in Duma in 2015, guests rejoiced and stabbed a photo of 18 month old Ali who had died in the arson attack on his family.⁶²⁶ In the old city of Hebron garbage and faeces are dropped from the upper floors of Jewish settler homes on to Palestinians in the streets of the city below.

575. Settler violence and intimidation take many forms. In July 2015 the Dawabsheh home in the village of Duma in the West Bank was firebombed by masked attackers, killing 18 month old Ali and his parents and critically injuring a four year old child.⁶²⁷ Other attacks include shooting, violent

⁶²³ T. Pileggi and E. Miller “NGOs petition High Court to change Jerusalem Day march route”, *The Times of Israel* (5 May 2015).

⁶²⁴ United Nations, Human Rights Council, *Report of the Secretary General on Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem and the Occupied Syrian Golan*, UN Doc. A/HRC/28/44 (9 March 2015), para. 44.

⁶²⁵ C. Rubenberg, *The Palestinians: In Search of a Just Peace* (2003), p. 385.

⁶²⁶ P. Beaumont, “Israeli PM condemns video of Jewish extremists celebrating toddler’s death”, *The Guardian* (24 December 2015); “Clip shows far-right wedding-goers celebrating Duma killings” *The Times of Israel* (23 December 2015).

⁶²⁷ “Palestinian infant killed in apparent Jewish terror attack”, *The Times of Israel* (31 July 2015); K. Shuttleworth and M. Zonszein “Palestinian child dead in suspected Jewish extremist arson attack on home”, *The Guardian* (31 July 2015).

assault, stoning, arson, attacks on animals and vandalism of trees.⁶²⁸ Mosques and churches are set on fire; water wells are contaminated; roadways are blocked. Olive trees that are greatly treasured by Palestinians are a frequent target of settler violence. Since 1967, over 800,000 olive trees have been damaged or destroyed.⁶²⁹ In 2014 alone, 8,482 trees owned by Palestinians – mainly olive trees – were damaged or destroyed.⁶³⁰ Children are often attacked by settlers on their way to school. Escorts are sometimes provided by the occupying forces to protect children but in practice such escorts are erratic.⁶³¹

576. Israel has made half-hearted attempts to curb settler violence. It has established a Nationalistic Crimes Unit to investigate settler crimes and it has even resorted to placing settler suspects in some serious cases in administrative detention. But these measures have done little to overcome the impunity enjoyed by settlers. According to a Report of the Secretary General to the Human Rights Council, the work of the Nationalistic Crimes

⁶²⁸ Yesh Din, *November 2014 Data Sheet: Law Enforcement on Israeli Citizens in the West Bank – 2014 Data* (12 November 2014), available at: <http://www.yesh-din.org/en/november-2014-data-sheet-law-enforcement-on-israeli-citizens-in-the-west-bank-2014-data/>.

⁶²⁹ See, P. O'Malley, *The Two-State Delusion. Israel and Palestine – A Tale of Two Narratives* (2015), pp. 213-214.

⁶³⁰ United Nations, Human Rights Council, UN Doc. A/HRC/28/44 (10 February 2015), *supra* note 624, paras. 35-36.

⁶³¹ United Nations, Human Rights Council, *Report of the Secretary General on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan*, UN Doc. A/HRC/31/43 (20 January 2016), para. 53; United Nations, Human Rights Council, *Report of the Secretary General on Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem and the Occupied Syrian Golan*, UN Doc. A/HRC/25/38 (12 February 2014), para. 36.

Unit has “not yet translated into significant improvements in the performance of law enforcement where victims are Palestinians.”⁶³² Occupying forces still make little attempt to prevent or to prosecute settler crimes.⁶³³ The following information provided by the Israeli human rights NGO, Yesh Din confirms this.⁶³⁴ Between 2005 and 2014 only 7.4 % of investigation files led to indictments of Israeli civilians suspected of attacking Palestinians and their property. 85 % of the files were closed due to the failure of the police to investigate properly. Of the 246 investigation files opened by the police between 2005 and 2014, 226 were closed on grounds of investigative failure. According to Yesh Din investigations were characterized by negligence and an absence of professionalism. In 2011, an OCHA factsheet stated that:

“(...) [o]ver 90 per cent of monitored complaints regarding settler violence filed by Palestinians with the Israeli police in recent years have been closed without indictment”⁶³⁵

⁶³² United Nations, Human Rights Council, *Report of the Secretary General on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan*, UN Doc. A/HRC/31/43 (20 January 2016), para. 41.

⁶³³ See, United Nations, Human Rights Council, *Report of the UN Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (25 September 2009), para. 85.

⁶³⁴ Yesh Din, *supra* note 628.

⁶³⁵ United Nations, Office for the Coordination of Humanitarian Affairs, Factsheet *Israeli Settler Violence in the West Bank* (November 2011), available at: https://www.ochaopt.org/documents/ocha_opt_settler_violence_factsheet_October_2011_english.pdf.

and have created an environment in which settlers can act with impunity.⁶³⁶ In its Concluding Observations of 2012, the CERD Committee acknowledged that information showed that 90 % of Israeli police investigations into settler related violence between 2005 and 2010 were closed without prosecution.⁶³⁷ According to another Israeli human rights NGO, B'Tselem, whereas Israeli police display great efficiency in prosecuting Palestinians who have harmed Israelis, they “implement an undeclared policy of forgiveness, compromise and leniency in punishment” when Israelis harm Palestinians.⁶³⁸ To aggravate matters serious bureaucratic obstacles are placed in the way of Palestinians wishing to make a complaint.⁶³⁹

577. Not only is there evidence of failure to curb settler violence on the part of the Israeli authorities, but, in addition, there is evidence of collusion on the part of the occupying forces. On many occasions these forces have stood idly by observing settler violence without making any attempt to stop it.⁶⁴⁰ There is also evidence of collaboration between the occupying forces and the settlement employed Civilian Security Coordinators in their harassment

⁶³⁶ J. Hider, “Israel turning blind eye to settler’s attacks on Palestinians”, *The Guardian* (21 March 2012).

⁶³⁷ United Nations, Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/ISR/CO/14-16 (3 April 2012), para. 28.

⁶³⁸ B’Tselem, *Authorities’ handling of complaints regarding settler violence* (23 January 2013), available at: http://www.btselem.org/settler_violence/law_enforcement.

⁶³⁹ *Ibid.*

⁶⁴⁰ United Nations, Human Rights Council, UN Doc. A/HRC/28/44 (10 February 2015), *supra* note 624, para. 48.

of Palestinians living on the perimeters of settlements with the aim of forcing them to leave in order to allow settlement expansion.⁶⁴¹

578. Palestinian police are forbidden from investigating acts of violence by settlers in the West Bank. This reduces friction between settlers and the Palestinian authorities.⁶⁴² Settlers are immune from punitive measures employed against Palestinians. Whereas the homes of Palestinians who have engaged in violent acts against settlers are demolished no such action occurs in the case of Israelis who have used violence against Palestinians. A plea for such action to be taken by the mother of Abu Khdeir, a sixteen year old Palestinian, abducted from his home in East Jerusalem and burnt to death by Israeli settlers, was simply ignored by the Israeli authorities.⁶⁴³

579. The number of hate crimes committed by settlers is on the rise.⁶⁴⁴ Impunity, the new political rhetoric emanating from Israel's most right-wing government ever and the increase in racist language and acts are a potent cocktail for incitement to further settler violence. In this environment there

⁶⁴¹ E. Mulder, "Israel's other army expanding settlements", *Aljazeera.com* (26 December 2016), available at: <https://www.aljazeera.com/news/2016/10/israel-army-expanding-illegal-settlements-161012071618171.html>.

⁶⁴² D. Byman, *A High Price: The Triumphs and Failures of Israeli Counterterrorism* (2011), p. 292.

⁶⁴³ D. Estrin, "Mohammed Abu Khdeir Murder: Mother speaks out after Israeli men arrested for 'nationalistic' killing", *The Independent* (6 July 2014).

⁶⁴⁴ United Nations, Human Rights Council, *Report of the Secretary General on Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and the Occupied Syrian Golan*, UN Doc. A/HRC/31/43 (20 January 2016), para. 9.

is little likelihood that Israel will take steps to honour the obligation it has undertaken in Art. 2 para. 1 lit. d CERD.

VI. Art. 3 CERD

A. Background and context

580. The Preamble of CERD expresses alarm at the “manifestation 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.” In Art. 3 CERD

“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.”

Significantly CERD does not confine the “policies” and “practices” of apartheid to the policies and practices of Southern Africa or South Africa.

581. The CERD Committee likewise is of the opinion that apartheid is not confined to the policies and practices of South Africa. In its Concluding Observations of 2012 the Committee expressed its concern over *de facto*

segregation in the Occupied Palestinian Territory resulting from Israel's implementation of

“two entirely separate legal systems and sets of institutions for Jewish communities grouped in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand.”

The Committee declared that it was

“(…) particularly appalled at the hermetic character of the separation of the two groups, who live on the same territory but do not enjoy equal use of roads and infrastructure or equal access to basic services and water resources.”

The Committee then drew Israel's attention

“to its general recommendation 19 (1995) concerning the prevention, prohibition and eradication of all policies and practices of racial discrimination and apartheid”

and urged Israel to take immediate measures to prohibit and eradicate such policies and practices in the OPT

“which violate the provisions of Article 3 of the Convention.”⁶⁴⁵

582. The CERD Committee has recognized that Israel’s segregationist policies and practices in the OPT may be seen as apartheid and has provided a handful of examples of Israel’s discriminatory practices that support this finding and that violate Art. 3 CERD. This complaint will examine the implications of this finding. First, it will examine the evolution of the prohibition on apartheid in international law. Second, it will address the question whether the prohibition on apartheid extends beyond Southern Africa. Third, it will consider the manner in which Art. 3 CERD is to be interpreted.

1. Evolution of the prohibition on apartheid in international law

583. In 1948 the National Party, representing the white minority, came to power in South Africa on the political platform of apartheid which entailed systematic and institutionalized discrimination against the black majority.

⁶⁴⁵ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO 14-16 (9 March 2012), para. 24.

Both law and practice in South Africa provided for the systematic domination and oppression of the black majority by the white minority.⁶⁴⁶

584. The United Nations adopted numerous resolutions condemning apartheid.

The first multilateral convention to condemn apartheid was the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. However, neither the Preamble nor Art. 3 CERD (described above in paragraph 1) define the term apartheid. In 1968 the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was adopted, which described apartheid as a species of crimes against humanity,⁶⁴⁷ but likewise made no attempt to define apartheid. In 1971 the International Court of Justice in its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*⁶⁴⁸ found that apartheid as applied in Namibia violated Arts. 55 and 56 of the UN Charter by enforcing restrictions and violating human rights on grounds of race. But, again, no attempt was made to define apartheid. Additional Protocol I to the Geneva Conventions of 1977 includes the crime of apartheid as a “grave breach” of the Protocol but fails

⁶⁴⁶ See generally on the legal edifice of apartheid, J. Dugard, *Human Rights and the South African Legal Order* (1978). See, too, D. Welsh, *The Rise and Fall of Apartheid* (2009).

⁶⁴⁷ Preamble and Art. 1 lit. b (26 November 1968), 754 UNTS 73, entered into force 11 November 1970.

⁶⁴⁸ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep. 1971, pp. 16 *et seq.* (56-57), paras. 128-131.

to define apartheid. The International Law Commission in its *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* declares that the prohibition on apartheid is a peremptory norm, a norm of *jus cogens*, but provides no definition of apartheid.⁶⁴⁹

585. The first and only comprehensive definition of apartheid appears in the 1973 Convention on the Punishment and Suppression of the Crime of Apartheid (Apartheid Convention),⁶⁵⁰ which in its Preamble recalls the prohibition on apartheid in CERD. This Convention goes beyond the prohibition on apartheid in CERD and declares apartheid to be a crime against humanity, subject to universal jurisdiction. States parties are obliged to adopt legislative measures to suppress and punish the crime of apartheid. Art. 2 identifies a long list of inhuman acts that constitute apartheid. These acts include murder, torture, arbitrary arrest, denial of the right to participate in the political, social and cultural life of a country, denial of basic human rights and freedoms, such as the right to education, to freedom of movement, association and speech, the prohibition of mixed marriages, the division of the population along racial lines by the creation of separate reserves and the persecution of persons for opposing apartheid. To qualify as apartheid these acts must have been “committed for the purpose of establishing and

⁶⁴⁹ International Law Commission, Report of the Commission to the General Assembly on the work of its fifty-third session, in: *Yearbook of the International Law Commission, Vol. II, Part 2* (2001), p. 112.

⁶⁵⁰ 1015 UNTS 243, entered into force on 18 July 1976.

maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”⁶⁵¹

586. The Rome Statute of the International Criminal Court (1998) includes the crime of apartheid among its list of crimes against humanity. According to Art. 7 of the Rome Statute the crime of apartheid means inhumane acts, such as murder, extermination, enslavement, deportation or forcible transfer, arbitrary imprisonment, torture, rape, persecution of any racial group or enforced disappearance, “committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group and committed with the intention of maintaining that regime.” Although this definition is substantially the same as that of the Apartheid Convention, the latter convention has a more comprehensive definition of apartheid and for this reason provides the best definition for the purposes of interpreting Art. 3 CERD.

2. Prohibition on apartheid is not confined to Southern Africa

587. The Prohibition on apartheid is not confined to South Africa, Namibia (South West Africa), and Rhodesia. This view cannot be reconciled with the language of the Apartheid Convention which describes apartheid as

⁶⁵¹ Art. 2 Apartheid Convention.

comprising policies of racial segregation and discrimination *similar* to those practiced in Southern Africa,⁶⁵² indicating that apartheid is not confined to this region. The *travaux préparatoires* support such an interpretation.⁶⁵³ The inclusion of apartheid as a crime against humanity in the Rome Statute adopted well after the end of apartheid in South Africa is clear evidence that the crime is not confined to Southern Africa. That this is the case is shown by the 2012 Concluding Observations of the CERD Committee referred to in paragraph 581 which makes it clear that apartheid is still a scourge despite its disappearance from South Africa.

3. Interpretation of Art. 3 CERD

588. There are two options for the interpretation of Art. 3 CERD in the context of Israel's occupation of Palestine. First, the empirical, and second the legal. An empirical interpretation would require a comparison of the policies and practices of apartheid as applied in South Africa and those of Israel in the OPT. If there was a substantially close resemblance between the two it might be said that Israel was responsible for applying apartheid in the OPT in violation of Art. 3 CERD. A legal interpretation, on the other hand, would require an examination of Israel's policies and practices in the OPT in the context of the Apartheid Convention, as endorsed by the Rome Statute. This

⁶⁵² Art. 2 Apartheid Convention.

⁶⁵³ See J. Dugard and J. Reynolds, *supra* note 617, pp. 884-885.

would involve an examination of Israel's policies and practices against the definition of apartheid in these conventions to see whether they meet the criteria laid down for the crime of apartheid.

589. An empirical approach would undoubtedly reveal substantial similarities between apartheid as applied in South Africa and Israel's occupation of the OPT. Apartheid, the policy pursued by the white minority regime in South Africa in order to oppress and dominate the black majority, was characterized by three features: discrimination, repression and territorial fragmentation.⁶⁵⁴ Discriminatory laws governed personal relations, ownership of land, freedom of movement, employment, and access to public facilities and provided for separate but unequal education, health care, social services and residential areas. Laws enacted by Parliament and openly displayed on the statute book provided for racial discrimination in all walks of life. Notices in public buildings, hotels, restaurants, theatres and parks declared that they were reserved for exclusive white use. Repressive laws were enacted to suppress political opposition. These laws prohibited political organizations opposed to apartheid, placed great restrictions on freedom of speech and the press, allowed the security police to detain persons indefinitely for the purpose of interrogation (and, in practice, torture) and criminalized opposition to apartheid. In pursuance of the policy

⁶⁵⁴ See further, J. Dugard, *Human Rights and the South African Legal Order* (1978).

of apartheid, the regime established separate reserves, known as Bantustans, within which black South African might exercise political rights and govern themselves. This resulted in the territorial fragmentation of South Africa as each of the ten African tribes was allocated a particular territory for the purpose of separate development.

590. Israel's occupation of the OPT is likewise characterized by racial discrimination, repression and territorial fragmentation. Discriminatory military decrees and practices seriously restrict freedom of movement (checkpoints, curfews), access to land (as in the "seam zone" created by the Wall) and building permission. There are separate but unequal schools, hospitals and public amenities for Palestinians, compared with those of the Jewish settlers. Repressive laws prohibit freedom of political association, assembly and speech and provide for house demolitions, detention (and, in practice, torture) and political imprisonment. The illegal annexation of East Jerusalem, the blockade of Gaza, the construction of the Wall and settlements, and the creation of military zones, have resulted in the territorial fragmentation of the Palestinian territory. In short, an empirical approach leads inexorably to the conclusion that Israel's occupation of the OPT closely resembles that of apartheid in South Africa.

591. Despite the close similarities between apartheid in South Africa and Israel's policies and practices in the OPT, there are important differences which have led Israeli apologists to dispute such a comparison.⁶⁵⁵ Three important differences raised by Israeli apologists are the temporary nature of the occupation, the composition of the population and Israel's legal order. The first argument is that Israel does not claim to be sovereign over Palestine. It is merely a temporary belligerent occupier which will leave the territory intact when a peace settlement is reached. The answer to this is that Israel has been in occupation of Palestine for fifty years, has purported to have *de jure* annexed East Jerusalem and *de facto* annexed large parts of Area C by means of the establishment of settlements, the Wall and military zones, and refuses to enter into settlement talks in good faith. In short the occupation is not temporary and Israel shows no sign of leaving the OPT intact to the Palestinian people. The second major difference relates to the different size and character of the two populations. The white population of South Africa during the apartheid era numbered some 4 million while there were about 22 million blacks, compared with a Palestinian population of over 4 million and a settler population of over 700,000. Another distinguishing feature was that the overwhelming majority of South Africans, black and white, were Christians whereas settlers are Jews and Palestinians are mainly Muslim and Christian. Third, it is argued that Israel's segregation practices are not as

⁶⁵⁵ See, B. Pogrud. *Drawing Fire. Investigating the Accusations of Apartheid in Israel* (2014).

humiliating as those of South Africa as they do not set aside separate amenities with signs for exclusive Jewish use and occupation. This too is an unsatisfactory explanation. Whereas South Africa's segregation laws were clearly and visibly proclaimed Israel's are shrouded in mystery, hidden in obscure and unpublished military decrees. Thus there are separate roads for Jewish settlers and Palestinians but no sign indicates this. Palestinians are simply expected to know that some roads are reserved for exclusive settler use. Settler amenities such as restaurants, hotels, clinics, schools, universities and parks are all in securely separated settlements, protected by security guards, which need no notice to indicate that they are reserved for exclusive Jewish use. Security guards ensure that no Palestinians enter settlements areas.

592. This is not the place to debate the question of which system of apartheid was or is worse, that of Israel in Palestine or the apartheid regime in South Africa. Both had/have their own discriminatory and repressive features. However, it must be stressed that South African apartheid was part of a policy of separate development which the apartheid regime portrayed as self-determination. Separate areas or Bantustans were set aside for the development of black South Africans and in order to make these Bantustans politically and economically viable the apartheid regime spent vast sums of money on the infrastructure of these Bantustans. This included the

establishment of hospitals, schools, universities, industrial sites etc. In the common areas of South Africa, the apartheid regime also established separate hospitals, schools, universities etc. There was therefore an altruistic side which involved providing facilities and material assistance to blacks by the apartheid regime which is totally lacking in the case of Israel in Palestine. The infrastructure and separate hospitals, clinics, schools and universities are funded by foreign donors and not by Israel.

593. These differences make it unwise to adopt an empirical approach to the interpretation of Art. 3 CERD. A factual comparison of apartheid in South Africa and Palestine provides evidence of close resemblance but the differences make such a method of interpretation impressionistic, case-driven and unreliable. It is therefore much wiser to measure apartheid in the OPT against the yardstick of the comprehensive definition contained in the Convention on the Suppression and Punishment of the Crime of Apartheid, as repeated in shorter form in the Rome Statute. This provides an objective, clear and legal description of the principal elements and characteristics of apartheid against which to measure and judge the question whether Israel applies apartheid in the OPT.

B. Legal regime in West-Bank as apartheid

1. Introduction

594. Based on the prohibition of racial segregation and apartheid in Art. 3 CERD – with Art. 2 of the Apartheid Convention as a primary interpretive tool for the content of the international legal definition of apartheid – it will be set out below that Israeli law and practice in the OPT is in breach of Art. 3 CERD. This is done with reference to the purpose for which acts of apartheid are practiced according to the definition of apartheid and its associated list of ‘inhuman acts’. For such inhuman acts to amount to apartheid they must be committed systematically, for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group or groups. It is therefore necessary to first clarify that Jewish-Israeli and Arab-Palestinians in the OPT constitute distinct ‘racial groups’ for the purposes of the definition of apartheid under CERD. It will then be shown that prohibited inhuman acts are being perpetrated against one racial group, and that this is done in the context of an institutionalised system of segregation and domination.

2. Racial groups

595. The two predominant populations groups in the OPT are not as clearly defined in terms of traditional social constructions of “race” as was the case

under apartheid in southern Africa. CERD does, however, give broad understanding to the meaning of ‘racial’ in the context of ‘racial discrimination’. A wide-ranging spectrum of group categories is encompassed in the prohibition of discrimination, with Art. 1 para. 1 CERD listing race among several other group identities that can amount to a basis for racial discrimination:

“(…) 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.”

596. The Convention can thus be interpreted as including descent or national or ethnic origin within the meaning of the term ‘racial’; categories that Jewish Israelis and Arab Palestinians may be classified by, even if not clearly discernible under the more ambiguous indicators of race or colour.

597. The preamble to the Apartheid Convention invokes CERD and holds apartheid as including ‘similar policies and practices of racial segregation and discrimination as practised in southern Africa’. This reference provides

grounds to interpret the definition of apartheid laid out in the Apartheid Convention as applying to a system of institutionalised domination and oppression by one racial group over another in the broad sense conveyed by CERD. On this basis, a “racial group” in the context of apartheid need not be limited to a narrow construction of race.

598.No uniform or universal criteria exist for distinguishing different group identities from one another, with the labels often interchangeable and subject to political manipulation and cultural variations.⁶⁵⁶ For the purposes of applying the definition of apartheid in international law, therefore, assessment must be made of whether Jews and Palestinians comprise distinct racial groups in their localised relation to one another, in the broad sense of the term under international law. Here the interpretation of racial groups as developed in international law is sufficiently broad to understand Jewish Israelis and Palestinian Arabs in OPT as distinct groups. The two groups are constructed and perceived both by themselves and by external actors as stable and permanent groups distinct from each other, and therefore can be considered as different racial groups for the purposes of the definition of apartheid.⁶⁵⁷

⁶⁵⁶ This was borne out by South Africa’s experience in implementing its race classification laws. Great hardships resulted from classifying people of mixed descent. In many instances, members of the same family were classified as belonging to different racial groups.

⁶⁵⁷ See further, J. Dugard and J. Reynolds, *supra* note 617, pp. 885-891.

3. Commission of inhuman acts

599. The extent of the racially discriminatory violations of Palestinian rights can be seen in the analysis above of Israeli policy in the OPT under Art. 5 CERD. The cumulative effect of such consistent and wide-ranging violations is such that they not only amount to individual breaches of rights, but are sufficiently extensive and wide-ranging as to amount to a form of systematic domination within the meaning of apartheid. In the context of Art. 2 of the Apartheid Convention, many of these violations take the form of “inhuman acts” of apartheid. The evidence suggests that Israel is responsible for committing inhuman acts within the meaning of Art. 2 lit. a, c, d, and f of the Apartheid Convention.

600. Art. 2 lit. a relates to the denial to a member or members of a racial group of the right to life and liberty of person. Israel's policies and practices in the West Bank include denial of the right to life through state-sanctioned extra-judicial killings of Palestinians opposed to the occupation, including the targeting of political leaders and militants at times when they were not participating in hostilities, the killing of innocent bystanders as “collateral damage” in the context of such attacks, as well as killings regularly committed in the course of military incursions, arrest raids and disproportionate uses of force against civilian demonstrators. The denial of liberty of person is similarly prevalent in the mass arrests and detention of

Palestinians since 1967. The overwhelming majority of those detained from the OPT are Palestinians. According to the Israel Prison Service, from a total 9,498 security prisoners incarcerated by Israel in 2006, for example, only 12 were Jewish Israelis.⁶⁵⁸ Arbitrary arrest and detention, including “administrative detention” imposed without charge or trial, has been a prominent feature of occupation policy imposed against Palestinians.⁶⁵⁹

601. Art. 2 lit. c of the Apartheid Convention is a broad clause defining as acts of apartheid any measures calculated to prevent a racial group from participating in the political, social, economic, and cultural life of the country and the deliberate creation of conditions preventing the full development of the group, in particular through the denial of basic human rights and freedoms. The provision cites nine such rights and freedoms the denial of which would adversely affect the participation and full development of the subjugated group, encompassing civil and political rights as well as elements relevant to the group’s socio-economic and cultural development. The analysis presented above in respect of Art. 5 CERD indicates that Israel persistently denies to Palestinians in the OPT: the right to freedom of movement; the right to freedom of residence; the right to leave and return to their country; the right to a nationality; the right to work; trade unions

⁶⁵⁸ Letter from the Israel Prison Service to Adalah, *The Legal Center for Arab Minority Rights in Israel* (6 November 2006).

⁶⁵⁹ By way of example, over 50,000 Palestinians were arrested during the height of the first *intifada* between December 1987 and December 1989, of whom more than 10,000 were placed under administrative detention: Al-Haq, *A Nation Under Siege* (1990), p. 285.

tights; the right to education; the right to freedom of opinion and expression; the right to freedom of peaceful assembly and association. The breadth and consistency of such infringements suggest that they do not occur in isolation, but are part of a system that operates to control and dominate Palestinians in the occupied territory and to suppress any opposition to that domination.

602. The 2009 report of the UN Fact Finding Mission on the Gaza Conflict is supportive of a finding of apartheid in the OPT in respect of Art. 2 lit. a and lit. c of the Apartheid Convention. Without explicit recourse to the language of apartheid, the Report invokes evidence of ‘discrimination and differential treatment’ between Palestinians and Israeli Jews in fields including: treatment by judicial authorities; land use, housing, and access to natural resources; citizenship, residence, and family unification; access to food and water supplies; the use of force against demonstrators; freedom of movement; access to health, education, and social services; and freedom of association.⁶⁶⁰ It asserts conclusions of systematic discrimination against the Palestinians, and the potential commission of the related crime against humanity of persecution:

⁶⁶⁰ United Nations, Human Rights Council, *Report of the UN Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (15 September 2009), paras. 113, 206, 208, 938, 1427, 1577, 1579, and 1616 respectively.

“The systematic discrimination, both in law and in practice, against Palestinians, in legislation (including the existence of an entirely separate legal and court system which offers systematically worse conditions compared with that applicable to Israelis), and practice during arrest, detention, trial and sentence compared with Israeli citizens is contrary to Art. 2 ICCPR and potentially in violation of the prohibition on persecution as a crime against humanity.”⁶⁶¹

603. Art. 2 lit. d of the Apartheid Convention prohibits measures designed to divide the population along racial lines. Such segregation can be understood as a central underpinning feature of an apartheid system, and evokes the “grand apartheid” element of the South African regime’s policy, particularly through its reference to the creation of separate reserves and ghettos for the members of a particular racial group. Policies pursued by successive Israeli governments over the course of the occupation and particularly since the late 1970s, culminating in the construction of the Wall since 2002 and the blockade of Gaza since 2007, have divided the OPT into a series of non-contiguous enclaves or “reserves” into which Palestinians are effectively confined. The OPT’s economic and cultural hub, East Jerusalem, has also been starkly affected, with Palestinians there largely segregated from the Jewish-Israeli population of the city and isolated from the rest of the OPT

⁶⁶¹ *Ibid.*, para. 1534.

through residence and movement restrictions that further the explicit project of “Judaizing” the city and incorporating it fully into Israel.⁶⁶² Palestinian residents of East Jerusalem – while subjected to Israeli jurisdiction, law, and taxation – have traditionally been excluded from citizenship entitlements and deprived of basic services. They are further targeted for exclusion from residence in the city through the revocation of IDs, the imposition of an unduly onerous “centre of life” test (which is not applied equally to Jewish settlers in East Jerusalem) and the redrawing of the city’s municipal boundaries in order to strip Palestinians living on the eastern side of the Wall of their Jerusalem residence status. Such discriminatory bureaucratic realignments can be understood in the context of Israeli “master plans” detailing visions of a “Greater Jewish Jerusalem” in which the Palestinian segment of the city’s population is further reduced.

604. Art. 2 lit. f of the Apartheid Convention relates to the persecution of organizations and persons who oppose a prevailing system of apartheid. Persecution in this context entails the deprivation of fundamental rights and freedoms. While deprivation of rights in some cases may amount to a legitimate act in defence of state security, regimes of racial domination are typically exemplified by illegitimate acts of repression that go beyond what

⁶⁶² Upon concluding a 2-week visit to Israel and the OPT in February 2012, R. Rolnik, UN Special Rapporteur on the right to adequate housing, highlighted Israel’s ‘implementation of a strategy of Judaization and control of the territory’ in Palestinian neighborhoods of East Jerusalem and other parts of the West Bank, see <http://www.un.org/apps/news/story.asp?NewsID=41211#.WR620sZCS71>.

can be justified by reference to national security. Cases of extra-judicial killings, torture, and mass imprisonment of Palestinians fall into the latter category, as do undue restrictions of freedom of expression and association. The systematic targeting of Palestinian political leaders, community activists, and human rights defenders can be understood as persecution for opposition to Israel's regime of domination in the occupied territory within the meaning of apartheid. Since the last parliamentary elections in the OPT, many members of the Palestinian Legislative Council have spent large periods of time detained or interned in Israeli prisons, with more than a third of all elected parliamentarians imprisoned at certain times.⁶⁶³ The Israeli authorities have closed charitable, educational, and cultural organizations affiliated to banned Palestinian political parties, and regularly impose indefinite travel bans on human rights defenders who speak out against Israel's instruments of occupation. Weekly non-violent protests in the West Bank against the Wall and the discriminatory administration of land and other resources are routinely met with excessive force and mass arrests by the Israeli military. A concerted legislative strategy has been pursued in the Knesset by Benjamin Netanyahu's coalition governments since 2009, seeking to further stifle and punish opposition to Israeli domination over the Palestinians. The primary target of this legislative surge are individuals and organizations challenging state policy *vis-à-vis* the Palestinians.

⁶⁶³ See, Addameer, Arrest of legislative council members, updated December 2017, available at: http://www.addameer.org/the_prisoners/plc_member.

Concerned as they are with protecting the institutions and policies that underpin Israel as a state that privileges Jewish nationals, such measures are relevant to any opposition to its regime of domination over the Palestinians, transcending both geographical and racial lines within Israel/Palestine. In this regard, Jewish Israeli individuals or organizations commemorating the Palestinian *Nakba*, for example, are as susceptible to persecution as Palestinians.⁶⁶⁴ Significantly, Art. 2 lit. f, unlike the other acts of apartheid enumerated in the Convention, does not require that the act be committed against a member or members of the subjugated racial group, but relates to persecution against *any* persons or organizations who oppose the apartheid system in question. This stems from the South African experience where numerous white anti-apartheid activists were banned, detained, or even physically targeted for their political beliefs and actions. Jewish Israelis are routinely arrested for participating in protests against Israeli domination over the Palestinians, and, along with Palestinians, are subject to sanction under measures such as the 2011 Law Preventing Harm to the State of Israel by Means of Boycott.

605. It is clear from the wording of the definition of apartheid and from the South African precedent that the existence of an apartheid regime does not require

⁶⁶⁴ Enacted in March 2011, the Law to amend the 1985 State Budget Law (the '*Nakba Law*') authorizes Israel's Minister of Finance to cut funding or support to any institution that conducts activity contradicting the definition of Israel as a 'Jewish and democratic' state, or that commemorates 'Israel's Independence Day or the day on which the state was established as a day of mourning'.

all of the inhuman acts envisaged in Art. 2 of the Apartheid Convention to be prevalent. An apartheid regime is defined by the commission of such acts in a manner sufficiently extensive to qualify as institutionalised and systematic domination.

4. Institutionalised and systematic discrimination and domination

606. The definition of apartheid provided in Art. 2 of the Apartheid Convention requires that, for the commission of the crime of apartheid, the inhuman acts 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’. The primary impetus of the commission of the practices of the Israeli civil and military authorities in the OPT is to insulate and privilege Jewish settlements and settler infrastructure, and to ensure that Palestinians intrude as little as possible on the lives of the dominant settler group. It is clear that Israel’s acts do not occur in a random and isolated manner but are part of a widespread and oppressive regime that is institutionalised and systematic; that accords separate and unequal treatment to Palestinians.

607. Underpinning Israel’s discriminatory policies against the Palestinians – both within Israel and in the OPT – is a legal system that constructs a notion of ‘Jewish nationality’ and privileges Jewish nationals over non-Jewish groups

under Israeli jurisdiction. Israeli law is somewhat unique in distinguishing between nationality and citizenship, with Israel constituted as the state of the Jewish nation. For purposes of law as well as policy, no ‘Israeli nation’ exists. Israeli Supreme Court jurisprudence confirms that Israel is defined as the state not of the ‘Israeli nation’ but of the ‘Jewish nation’.⁶⁶⁵

608. Thus a two-tiered system of civil status among Israeli citizens is created, with Jewish nationals privileged over non-Jewish citizens. Israeli citizenship is based on four criteria: birth, residence, marriage, and immigration; albeit with exclusions provided in the Law of Citizenship and Entry into Israel barring ‘enemies of the State’ (comprising Palestinians from the OPT as well as nationals of Lebanon, Syria, Jordan, and Iran) from entitlement to Israeli citizenship or residence rights. Non-Jews who hold Israeli citizenship remain subordinated by virtue of the fact that they are not Jewish nationals (a primarily descent-based status reserved for those born to a Jewish mother, with allowance also made for tightly restricted procedures of conversion to Judaism). Jewish nationals, whose exclusive interests are served by parastatal institutions such as the Jewish Agency and the Jewish National Fund,⁶⁶⁶ are

⁶⁶⁵ *George Rafael Tamarin v. State of Israel* (20 January 1972) 26 PD I 197.

⁶⁶⁶ The role of such Jewish national institutions in administering land and exercising governmental functions on behalf of the state has been the subject of consistent concerns raised by UN human rights treaty-monitoring bodies: See, e.g., United Nations, Committee on Economic, Social and Cultural Rights, *Concluding Observations*, UN Doc. E/C.12/1/Add.27 (4 December 1998), para. 11; United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc. CERD/C/ISR/CO/13 (9 March 2007), para. 19.

privity to exclusive access to most of the state's territory and to claim extra-territorial rights and privileges in the OPT.

609. Such material benefits emanate from the 1950 Law of Return, which defines who is a Jew for purposes of the legal system and entitles every Jew to immigrate to Israel (extending, since 1967, to the OPT) under an *oleh* visa. The 1952 Citizenship Law then grants such immigrants the right to gain immediate citizenship, while explicitly excluding those who were residents and citizens of Palestine before the creation of the state of Israel if they were not ‘in Israel, or in an area which became Israeli territory after the establishment of the State, from the day of the establishment of the State [May 1948] to the day of the coming into force of this Law [April 1952]’.⁶⁶⁷ Thus, long-time Palestinian residents who were forcibly displaced during the war of 1948 were legally barred from taking up citizenship in the newly created state and returning to their homes, while others with no prior connection to Israel are entitled to citizenship on the basis of a constructed Jewish nationality. This situation of preferential citizenship is further inscribed in Israel's constitutional system, with a number of the state's Basic Laws codifying Israel as ‘the state of the Jewish people’.⁶⁶⁸

⁶⁶⁷ Art. 3 Citizenship Law 5712-1952.

⁶⁶⁸ See, e.g., Basic Law: Knesset 5718-1958; Basic Law: Human Dignity and Liberty 5752-1992; Basic Law: Freedom of Occupation 5754-1994.

610. The codification of Jewish nationality is equally significant to the situation of the OPT, where Israeli law is channelled in a number of ways to provide Jewish Israeli settlers with comparable privileges over Palestinian residents. In the sphere of land law, the disparity referred to above regarding exclusive Jewish access relates similarly to any land in occupied territory that is declared or treated as ‘state land’ by Israel. The 1951 State Property Law allows for the incorporation of ‘state land’ anywhere ‘in which the law of the State of Israel applies’,⁶⁶⁹ thus encompassing territory occupied by Israel. Large areas of the West Bank have been declared ‘state land’ by Israel and closed to Palestinian use for the construction of Jewish settlements, military outposts, and nature reserves, placing much of the territory under the rubric of an institutional framework designed to administer ‘state land’ for the exclusive benefit of the Jewish people.

611. With exceptions in certain settlements in East Jerusalem, residence in Jewish settlements in the OPT is entirely closed to Palestinians; open only to Israelis or ‘to persons of Jewish descent entitled to Israeli citizenship or residency under Israel’s Law of Return’. The latter category is significant in highlighting the racialized nature of Israel’s colonization and administration of the territories, with even non-Israeli Jews granted privileges over the local Palestinian population. In this way race and nationality are somewhat

⁶⁶⁹ State Property Law 5711-1951.

conflated (or confused), with discrimination present not merely between Israeli citizens and Palestinian non-citizens, but between those defined under Israeli law as Jewish nationals (i.e., those *entitled* to citizenship under the Law of Return) and those who are not. A clear assessment of this was made by the Independent International Fact-Finding Mission charged by the UN Human Rights Council with the task of investigating the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinians throughout the OPT. Its 2013 report examines the distinct legal systems that exist in the OPT for settlers and Palestinians and concludes:

“The legal regime of segregation operating in the Occupied Palestinian Territory has enabled the establishment and the consolidation of the settlements through the creation of a privileged legal space for settlements and settlers. It results in daily violations of a multitude of the human rights of the Palestinians in the Occupied Palestinian Territory, including, incontrovertibly, violating their rights to non-discrimination, equality before the law and equal protection of the law.”⁶⁷⁰

⁶⁷⁰ United Nations, Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63 (7 February 2013), para. 49.

612. The Fact-Finding Mission shows how the settlers have abused their superior legal status by resorting to violence against Palestinians and their property. It notes that the Israeli authorities have allowed these acts of violence to continue with impunity and reaches ‘the clear conclusion that institutionalized discrimination is practiced against the Palestinian people when the issue of violence is addressed.’⁶⁷¹

613. The foundation provided by the concept of Jewish nationality for an institutionalized system of discrimination and domination is evidenced most visibly by this dual legal system in place in the West Bank, where Jewish settlers are subject to an entirely separate body of laws and courts from Palestinian residents. At its most basic, this institutional segregation involves the application of Israeli civilian law and constitutional protection to Jewish settlers, and of a military administration to the occupied Palestinian population. Through a combination of parliamentary and military legislation, the Israeli authorities have created parallel legal systems whereby distinct regimes, premised on a principle of “separate but unequal”, apply to the two groups living in the one territory.

614. The extension of Israeli civil legislation and constitutional rights to Jewish settlers in the OPT occurs on the basis of a blend of territorial and personal

⁶⁷¹ *Ibid.*, para. 107.

grounds. In terms of application on a *territorial* basis, elements of Israeli civil law are incorporated into those military orders that cover the administration of Jewish Israeli settlement municipalities. This involves a process whereby the Israeli Military Commander for the area serves as a conduit for the application of domestic legislation beyond Israeli territory by virtue of military decrees issued in pursuance of a mandate to regulate the management of local and regional Jewish municipal councils in the West Bank.⁶⁷² This allows certain Israeli laws to be extended to Israel's settlements in the West Bank, creating enclaves where the legal and administrative systems differ profoundly from the surrounding territory. This effectively conflates law in the settlements with law inside Israel, erasing the barriers to annexation erected by the Green Line as far as Israeli authority and society are concerned.

615. Much civil and constitutional legislation is also applied extra-territorially on a *personal* basis to Jewish settlers in the OPT, both directly and through secondary legislation promulgated for that purpose. The 1977 Extension of Emergency Regulations Law, for example, allows Israelis suspected of committing criminal offenses in the West Bank to be prosecuted, not by military courts under the military legislative system that applies to

⁶⁷² Military Order No. 783, Order Concerning the Management of Regional Councils (Judea and Samaria) (25 March 1979); Military Order No. 892, Order Concerning the Management of Local Councils (Judea and Samaria) (1 March 1981). The end result of this arrangement is that settlement councils operate with powers and functions that differ significantly from those of local Palestinian municipal councils in the West Bank, but are almost identical to those of the local and regional councils inside Israel.

Palestinians, but by Israeli criminal courts according to Israel's penal code and criminal procedure:

“In addition to the provisions of any law, the court in Israel shall have authority to judge, according to the law in force in Israel, a person located in Israel for his act or omission occurring in the Area [the West Bank], and also an Israeli for his act or omission occurring in the territory of the Palestinian Council, all in case the act or omission would have been an offence, had they occurred within the jurisdiction of the courts in Israel.”⁶⁷³

616. The racialized nature of this personal application of Israeli criminal law is highlighted by section 6 lit. b of the 1984 Addendum to the Law, which extends its application to residents of the West Bank who are not Israeli citizens but who are entitled to immigrate to Israel by virtue of the Law of Return:

“For the purposes of the enactments enumerated in the Schedule, the expression “resident in Israel” or any other expression occurring in those enactments denoting residence, living or having one's abode in Israel shall be regarded as including also a person who lives in a zone

⁶⁷³ The Extension of Power of Emergency Regulations Law (Judea and Samaria and the Gaza Strip – Adjudication of Offences and Legal Aid) (1977), Section 2(a).

[in occupied territory] and is an Israeli national or is entitled to immigrate to Israel under the Law of Return, 5710-1950, and who would come within the scope of such expression if he lived in Israel.”

617. Israeli law as extended to the OPT on a personal basis thus includes all Jews, whether they are Israeli citizens or not. Constitutional rights are also granted on a personal basis to settlers, with the rationale given being the special link between the state and those settlers in areas under the state’s control. Regarding the application of Israeli Basic Laws to settlers claiming compensation for their removal from illegal settlements in the Gaza Strip in 2005, the Supreme Court ruled:

“We are of the opinion that the Basic Laws grant rights to every Israeli settler in the area to be evacuated. This application is personal. It derives from the control of the State of Israel over the area to be evacuated. It is the outcome of the view that the State’s Basic Laws regarding human rights apply to Israelis located outside of the State but in an area under its control by way of belligerent occupation.”⁶⁷⁴

618. The result of the extension of Israeli law into the OPT on a territorial basis through the administration of settlement municipalities and on a personal

⁶⁷⁴ *The Regional Council of Gaza Coast et al. v. The State of Israel et al.*, H CJ 1661/05, judgment of 9 June 2005, para. 80 (the *Gaza Disengagement* case).

basis is that the relevance of the existing local law in the OPT to a Jewish settler is negligible.⁶⁷⁵

619. In contrast to its treatment of Jewish residents of the same territory, the Supreme Court has refused to extend constitutional protections to Palestinians.⁶⁷⁶ Palestinians are instead subject to the personal and territorial application of Israeli military legislation. In the first three months of Israel's occupation in 1967, over 100 pieces of military legislation were enacted in the West Bank and almost as many in the Gaza Strip. Just two days into the short Six-Day War of 1967, Military Proclamation No. 2⁶⁷⁷ vested all legislative, executive, and judicial powers in the Israeli Military Commander. Since then, the military authorities have promulgated over 2,500 military orders altering pre-existing laws, regulating and controlling everything from alcohol taxes⁶⁷⁸ to control of natural resources⁶⁷⁹ to the types of fruit and vegetables that can be grown by Palestinians.⁶⁸⁰

⁶⁷⁵ This has long been acknowledged by Israeli constitutional scholars. See, e.g., A. Rubinstein, "The Changing Status of the Held Territories". 11 *Eyunei Mishpat* (1986) 439.

⁶⁷⁶ See, e.g., *Adalah et al. v. Minister of Interior et al.*, HCJ 7052/03, judgment of 14 May 2006 (the *Family Unification* case); *Adalah v. The Minister of Defence*, HCJ 8276/05, judgment of 12 December 2006 (the *No Compensation Law* case).

⁶⁷⁷ Military Proclamation No. 2, Concerning Regulation and Authority of the Judiciary (7 June 1967).

⁶⁷⁸ Military Order No. 38, Order Concerning Alcoholic Beverages (4 July 1967).

⁶⁷⁹ See, *inter alia*, Military Order No. 92, Order Concerning Jurisdiction Over Water Regulations (15 August 1967).

⁶⁸⁰ See, e.g., Military Order No. 474, Order Concerning Amending the Law for the Preservation of Trees and Plants (26 July 1972); Military Order No. 1039, Order Concerning Control over the Planting of Fruit Trees (5 January 1983), Military Order No. 1147, Order Concerning Supervision over Fruit Trees and Vegetables (30 July 1985).

620. Among the most important security-related military orders are Military Order No. 378 pertaining to criminal offenses and detention,⁶⁸¹ and Military Order No. 1229 allowing for “administrative” detention without charge or trial for prolonged periods.⁶⁸² Under this regime of military law, Palestinians are systematically subject to far longer pre-charge periods of detention and harsher sentences than their Jewish Israeli counterparts arrested on suspicion of committing the same crime in the same territory.⁶⁸³ The military orders are enforced in a military court system that has become ‘an institutional centrepiece of the Israeli state’s apparatus of control over Palestinians in the West Bank and Gaza’.⁶⁸⁴ In addition to the separate laws applied to the two groups, many further discriminatory features of Israel’s occupation apply in practice based on unpublished military regulations or *de facto* military policy, without reference in law. The separate road system in the West Bank, for example, central to its territorial fragmentation and distinctly evocative of the segregation in the OPT, evolved in the planning and construction realm as a prop for broader segregationist policies – without a legislative foundation.

⁶⁸¹ Military Order No. 378, Order Concerning Security Provisions (20 April 1970).

⁶⁸² Military Order No. 1229, Order Concerning Administrative Detention (Provisional Regulations) (17 March 1988). Due to numbering inconsistencies among Israeli military orders, Military Order No. 1229 is alternatively referred to as Military Order No. 1226, depending on whether it was issued individually or in a bound volume by the Israeli authorities.

⁶⁸³ For example, a Palestinian and a Jewish settler arrested on suspicion of the same act of manslaughter in the West Bank are subject to markedly different procedures. The Palestinian may be detained for periods of 8 days (renewable) before being brought before a military judge, and is subject to a maximum sentence of life imprisonment. The Jewish settler cannot be detained for more than 24 hours before being brought before a civilian judge, and is subject to a maximum sentence of 20 years imprisonment. See Sections 51A and 78 of Military Order No. 378, Order Concerning Security Provisions; Section 29(a) of the 1996 Criminal Procedure Law (Enforcement powers – Arrests); and Section 298 of the 1977 Penal Law.

⁶⁸⁴ L. Hajjar, *supra* note 111, p. 2.

621. Overall, the result of the preferential status accorded to Jewish nationals under Israeli law and the application of Israeli civil law to Jewish settlers as contrasted with military law to Palestinians is clear: the institutionalisation of two separate legal systems for two separate racial groups in a manner that underpins a system of segregation and domination by one group over the other.

622. In March 2012, the CERD Committee effectively acknowledged this in taking the step of censuring Israel under the rubric of apartheid and segregation as prohibited by Art. 3 CERD. Having reiterated previous concerns about the general segregation of Jewish and non-Jewish communities under Israeli jurisdiction, the Committee declared itself

“(...) particularly appalled at the hermetic character of the separation”

between Jewish and Palestinian populations in the OPT and urged Israel to prohibit and eradicate policies or practices of racial segregation and apartheid that

“severely and disproportionately affect the Palestinian population”.⁶⁸⁵

⁶⁸⁵ United Nations, Committee on the Elimination of Racial Discrimination, *Concluding observations*, UN Doc. CERD/C/ISR/CO/14–16 (9 March 2012), para. 24.

623. On the basis of the systemic and institutionalized nature of the racial domination that exists, there are indeed strong grounds to conclude that a system of apartheid has developed in the OPT. The implications of such a conclusion are significant. As a ‘composite wrongful act’ of international law, apartheid involves ‘a series of acts or omissions defined in aggregate as wrongful’ and ‘give[s] rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.’⁶⁸⁶ The existence of a regime of apartheid, amounting to an internationally wrongful act, has clear implications under public international law – both for the state of Israel in terms of cessation and reparation, and for third states in terms of the duties of co-operation, and of non-recognition and non-assistance.

VII. Conclusions

A. Summary of findings

1. Admissibility and scope of the complaint

624. The State of Palestine has demonstrated that the interstate complaint brought against Israel is admissible in all respects according to

⁶⁸⁶ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, in: *Yearbook of the International Law Commission, Vol. II, Part 2* (2001), p. 62.

Art. 11- 13 CERD. The CERD Committee/ *ad hoc* Commission is thus in a position to make a finding that it is competent to deal with the inter-state complaint brought by Palestine against Israel under CERD in all of its aspects.

625. Both the State of Israel, as well as the State of Palestine are high contracting parties of CERD since 1979 and 2014 respectively. The status of Palestine being a contracting party of CERD has, apart from the obvious fact of being a State under general international law, been confirmed by the formal request of the CERD Committee to the State of Palestine to submit a state report under CERD.

626. As confirmed by the ICJ, as well as by the CERD Committee itself, and numerous other treaty bodies with regard to other human rights treaties, CERD applies extraterritorially to the occupied Palestine territory requiring the Israel to scrupulously observe its international legal obligations under CERD.

627. Ever since Israel became a high contracting party of CERD it committed itself to abstain from discriminatory treatment as defined in CERD. Hence, the relevant scope *ratione temporis* of this complaint relates to the time period since 1979 when CERD had entered into force for Israel.

628. The scope *ratione loci* of the complaint is currently limited to Israel's legal and factual practice in the Occupied Palestinian Territory, *i.e.* Gaza, the West Bank, as well as East Jerusalem, while not taking into consideration violations of CERD that frequently take place against Palestinians living or working in Israel. The State of Palestine however formally reserves its right to amend the complaint at a later stage in this regard, if necessary, or to bring an additional request.

629. The application of CERD as a human rights treaty is not barred by the eventual parallel applicability of relevant rules of international humanitarian law. As the ICJ has made clear in its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the two legal regimes of human rights and international humanitarian law do not apply exclusively, but rather relate to each other as *lex specialis* rules. However, international humanitarian law does not provide for special rules that would regulate the discriminatory treatment of the indigenous population of Palestine versus Israeli settlers, notably in a situation of prolonged belligerent occupation.

630. As demonstrated, there was no need to exhaust local remedies as any such procedure would not have been feasible given the generalized character of

the discriminatory regime Israel applies in the Occupied Palestinian Territory, or in any case would not have had any chance of seeking the remedies required under CERD.

631. For purposes of these proceedings under Arts. 11-13 CERD it is irrelevant whether Israel intends to cooperate with the CERD Committee/ *ad hoc* Commission, or would even decide to simply not appear before those bodies. Notwithstanding, and in any case, by becoming a State party of CERD, Israel became obliged to fulfil all obligations arising under CERD, including for purpose of these proceedings, to not undermine the work of the CERD Committee and the *ad hoc* Commission, as well as to take part in the financing of the mechanism meant to resolve disputes between two State parties as laid out in Art. 11-13 CERD.

2. Substantive issues

632. The complaint by the State of Palestine, as laid out, is also substantiated given that the *de jure* and *de facto* regime, as applied by Israel in the Occupied Palestinian Territory, blatantly violates CERD in numerous ways, including violations of Arts. 2, 3 and 5 CERD.

a. Violations of Art. 5 CERD

633. The specific rights listed in Art. 5 CERD are not of an exclusive character.

634. The military justice system, applied by Israel in the Occupied Palestinian Territory *vis-à-vis* the indigenous Palestinian population, as compared to the regular system applied *vis-à-vis* Israeli settlers living in the very same territory, not only violates human rights protected by international law as such, but also amounts to a violation of Art. 5 lit. a CERD, which guarantees equal access and equal treatment before the tribunals and all other organs administering justice.

635. This holds in particular true for the practice of so-called administrative detentions and its discriminatory application *vis-à-vis* alleged Palestinian offenders.

636. Besides, the application of the military justice system for Palestinian children and juveniles and the ensuing discriminatory treatment of such alleged offenders, as compared to Israeli juvenile offenders, even if they live in the very same area, constitutes yet another additional violation of Art. 5 lit. a CERD of particular severity.

637. The same holds true for the selective applicability of the death penalty under the Israeli military court system applicable to the indigenous Palestinian population only, whereas Israeli living in Occupied Palestinian Territory are not subject to the very same sanction.

638. Whereas Israeli settlers living in the West Bank can freely travel throughout the Occupied Palestinian Territory, and notably East Jerusalem, as well as may leave Palestine at free will without any hindrance, Palestinian nationals are subject to an elaborate system of checkpoints both within the Occupied Palestinian Territory, but also when trying to leave Palestine including travel to a third country, *i.e.* Jordan, in violation of Art. 5 lit. d (i) CERD.

639. What is more is that Palestinians living in the West Bank wanting to travel to East Jerusalem, *i.e.* to another part of the Occupied Palestinian Territory, they are even subject to an extensive system of permits whereby they are either excluded in a discriminatory manner from exercising their right of freedom of movement *per se*, as guaranteed by Art. 5 lit. d (i) CERD, or such movement is at the very last made dependent on a prior permission by Israel, the occupying power.

640. Palestinian nationals who reside in East Jerusalem, and who decide to either reside in another part of Palestine, *i.e.* in Gaza or in the West Bank, or who

move abroad, lose their status as so-called 'East Jerusalemites' under applicable rules of Israeli law applied in occupied East Jerusalem. This involves a loss of the right, under Israeli law, to return to East Jerusalem and to again abode there in violation of Art. 5 lit. d (ii) CERD.

641. Besides, Palestinians living in Gaza are, except for some exceptional cases, regularly denied their right to leave Palestine in violation of Art. 5 lit. d (ii) CERD.

642. Israel's law and policy on residency status, movement and immigration, as applied to Palestinian nationals, bar both 'mixed' and 'non-mixed' couples and families from (re)unification and thus violate their right to marriage and choice of spouse. This discriminatory practice constitutes a breach of several of Israel's obligations under international law including, but not limited to, Art. 5 lit. d (iv) CERD.

643. While Palestinians living in the West Bank, wishing to exercise their freedom of religion at Al-Haram al-Sharif, need permission by Israel, the occupying power to do so, as outlined above by way of a permit to visit East Jerusalem, Israeli Jews living in the West Bank can travel to East Jerusalem at their free will to exercise their freedom of religion, such discrimination constituting a violation of Art. 5 lit. d (vii) CERD. While Palestinians living in the West

Bank wishing to exercise their freedom of religion at Al-Haram alh-Sharif or the Church of the Holy Sepulchre need permission by Israel to do so, Israeli Jews living in the West Bank can travel to East Jerusalem at their free will to exercise their freedom of religion, such discrimination constituting a violation of Art. 5 lit. d (vii) CERD. The same holds true for discriminatory travel restrictions within the West Bank widely preventing Palestinians from access to Ibrahimi Mosque and the Tomb of the Patriarchs in Hebron, as well as the Church of the Nativity in Bethlehem. By the same token, discriminatory restrictions of movement barring Palestinians from the celebration of religious festivities are in breach of Art. 5 lit. d (vii) CERD. In addition, Israel's policy of non-protection of Muslim and Christian religious sites – as opposed to their Jewish counterparts – violates the said norm.

644. Israel's policy of systematic and discriminatory house demolitions amounts to a violation of Art. 5 lit. e (iii) CERD. Over the years Israel's law and policy resulted in more than 48,000 Palestinian houses destroyed for alleged 'punitive' or 'administrative' reasons, whilst nothing comparable has happened *vis-à-vis* Israelis living in the same area. Said 'punitive' demolitions not only discriminatorily deprive a suspect's entire family of its right to housing, but also discriminatorily infringe upon various norms of international human rights law and international humanitarian law including

the prohibition of collective punishment and the prohibition of reprisals against protected persons. Besides, ‘administrative’ demolitions implement Israel’s discriminatory planning policies and deprive those Palestinians of their right to housing, who, for lack of alternatives, have built their houses contrary to the said policies.

645. What is more, Israel’s discriminatory planning policies applied to the indigenous Palestinian population both in East-Jerusalem and the West-Bank, are in breach of Art. 5 CERD despite planning not expressly being mentioned in this norm’s non-exhaustive list of guaranteed rights. As to East-Jerusalem, Israel aims at achieving a maximum area with a minimum Palestinian population therein, and to this end applies an entirely distinct regulatory regime to Palestinians, for instance when it comes to the amount of (illegally) allocated land per capita, expropriation, construction permits, or housing quality (*i.e.* such as *inter alia* as far height and density of buildings are concerned).

646. The same holds true for Area C of the West-Bank where Israeli policies on urban development, land distribution, construction permits, and housing quality equally rely on discriminatory regulations highly detrimental to Palestinians, whilst distinct and highly preferential regulations apply to Israelis settling in the West-Bank contrary to international law.

647. In violation of Art. 5 lit. d (v) CERD, Israeli law on land ownership and its implementation are discriminatory in that they effectively deprive the indigenous Palestinian population of their right to own land and property alone, as well as in association with others. This is due to Israel's policy, which imposes substantive and comprehensive obstacles preventing vast amounts of land directly or indirectly owned or controlled by the State of Israel within Area C being acquired by, transferred to, registered by or being restituted to Palestinians.

648. Further violations of Israel's obligations under Art. 5 CERD relate to the discriminatory allocation of natural resources, such as fresh water and minerals. As Art. 5 lit. e (iv) CERD shows, Art. 5 CERD relies on an all-encompassing idea of the elimination of racial discrimination and thus equally addresses racial discriminations in the field of economic and social rights. As such, the right to use of and access to natural resources squarely falls within the scope of Art. 5 CERD.

649. Israel exercises control over most Palestinian water resources and infrastructure. At the same time, Israel prohibits Palestinian development of new water sources like wells. Thus, being in a position to exclusively allocate water, Israel grants a disproportionately higher amount of water per capita

per day originating from the Occupied Palestinian Territory—to Israeli settlers living in the West Bank, as well as to Israelis nationals living in Israel than to the indigenous Palestinian population. Such policy of allocating water depending on a group's race is inherently discriminatory and hence amounts to a blatant violation of Art. 5 CERD. In addition, Israel's policy in this respect violates Art. 5 lit. e (iv) CERD in that it causes serious damage to public health of Palestinians.

650. Israel further controls the vast majority of mineral resources to be found in the Dead Sea and ashore within Area C and discriminatorily bars Palestinians from access thereto. In this respect, Israel's policy seriously impairs the Palestinians' economic development. Whilst Israeli and foreign natural and legal persons have access to mining and extraction business, the indigenous Palestinian population does not. This policy deprives the Palestinian people of its right to permanent sovereignty over natural wealth and resources and thus, eventually, the right to self-determination in a discriminatory manner. Although not expressly listed in Art. 5 CERD, this norm's ambit comprises the guarantee of said right's non-discriminatory exercise and thus, Israel's aforementioned policy violates Art. 5 CERD.

b. Violations of Art. 2 CERD

651. As set out in Art. 2 para. 1 lit. d CERD, Israel has an obligation to bring to an end racial discrimination by third persons, groups or organizations by all appropriate means. Contrary to this obligation, Israel applies a two-class legal system in the Occupied Palestinian Territory according greater rights to Israelis combined with non-enforcement of the law *vis-à-vis* Israelis, as opposed to rigid law enforcement *vis-à-vis* Palestinians. By these means, Israel effectively grants impunity for most racist hate crimes committed by Israeli settlers or soldiers against Palestinians. Although Israel ostensibly engages in some attempts to reduce the number of racist hate crimes committed by Israelis, it is far from taking all appropriate means to this end, given the said offenses' serious character and thus violates Art. 2 para. 1 lit. d CERD.

c. Violations of Art. 3 CERD (apartheid)

652. With reference to the two-class legal system applying to Palestinians on the one and Israelis on the other hand affecting vast parts of Palestinians' life in the Occupied Palestinian Territory, the CERD Committee itself has expressed its concern over this policy and practice of *de facto* segregation in 2012. It has found the underlying Israeli policies and practices to amount to a violation of Art. 3 CERD. Moreover, the Committee already then had

noted that said segregationist policies and practices might amount to a situation of apartheid.

653. Racial discrimination, repression and territorial fragmentation are the pillars of Israel's policies in the Occupied Palestinian Territory. Freedom of movement, access to land, right to residence and nationality, freedom of political association, assembly and speech, to only name a few rights, are granted but for Jews. Palestinians only have access to separate and unequal public amenities like schools, hospitals or roads. They are subject to arbitrary arrest and detention (and, in practice, torture), as well as to imprisonment in a discriminatory manner. Illegal Israeli settlements, the attempted annexation of Palestinian territory in violation of international law, the set-up of checkpoints, the creation of 'military zones' and the construction of the Wall in violation of international law beyond the borders of Israel caused a territorial fragmentation of the territory of the State of Palestine. Those policies amount to inhuman acts under the Apartheid Convention, cannot be considered, but as being of a systematic nature, and rely on the purpose of establishing and maintaining domination by one racial group of persons over another. Hence, Israel's occupation regime, as applied in the Occupied Palestinian Territory resembles the apartheid regime as previously applied in the Republic of South Africa.

B. Relief sought

654. As demonstrated above in detail, Israel has set up a long-standing, deeply entrenched and far-reaching system of racial discrimination throughout the whole territory of the occupied State of Palestine, which covers all sectors of the Palestinian people and concerns all aspects of their daily life.

655. In particular, but not limited to, this policy of racial discrimination finds its expression in the discriminatory treatment of the Palestinian population living in the occupied territory of the State of Palestine, as compared to the privileged way Israeli settlers transferred to the territory of Palestine in violation of international humanitarian law, living in both the West Bank and East-Jerusalem, are treated by Israel.

656. This discriminatory policy of Israel is both of a *de jure* and of a *de facto* character. It entails, as shown above, serious and massive violations of Arts. 2, 3 and 5 CERD. In particular, Israel has set up, and continues to exercise, a policy of apartheid in violation not only of Art. 3 CERD, but also of customary law possessing a *jus cogens* character.

657. Given this character of Israel's CERD violations, the only possible remedy to end this continuous and deeply rooted system of racial discrimination is the withdrawing of the Israeli settler population from the occupied territory

of the State of Palestine including East Jerusalem. This is due to the fact that any policy which would be in conformity with CERD, and hence not based on racial discrimination and racial domination, would simply not be compatible with the settlement policy Israel has been pursuing over the last 50 years.

658. Besides, it is only such a withdrawal that would also be in line with applicable general rules of the law on State responsibility. In particular, under Art. 35 ILC Articles on State Responsibility, which have codified customary law on the matter, 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. Accordingly, Israel, having transferred parts of its own population into Palestinian territory in violation of international humanitarian law, and particularly in violation of Art. 49 para. 6 4th Geneva Convention, is under an obligation to withdraw those parts of its population from the territory of the occupied State of Palestine, subject to a negotiated settlement with the State of Palestine. Given this obligation arising under general international law, any solution to be reached under Arts. 11-13 CERD to provide as soon as possible for an end to the continuing Israeli discriminatory policies, must also take into account, and be consistent with, this set of rules of the law of State

responsibility, which govern the relationship between Israel on the one hand, and the State of Palestine on the other.

659. Finally, given the *erga omnes* character of the obligations underlying CERD, as well as the character of CERD as part of the *ordre public international*, the *ad hoc* Commission to be set up under these proceedings, ought also to call upon *third States*, contracting parties of CERD, to be aware of, and to fulfil, their own obligations arising under CERD, as far as the Israeli discriminatory policies are concerned. Accordingly, such third States should be also called upon by the *ad hoc* Commission, to fulfil their obligations under CERD to bring to an end through lawful means the system of racial discrimination set up by Israel, as well as to not recognize as lawful this illegal situation, nor to render aid or assistance in any form in maintaining that situation.

660. Accordingly, the State of Palestine respectfully submits that the *ad hoc* Commission make findings to the effect that:

A. Israel practices a policy of systemized racial discrimination throughout the occupied territory of the State of Palestine amounting to violations of Arts. 2, 3 and 5 CERD;

- B. Israel's policies and practices in the occupied territory of the State of Palestine constitute apartheid within the meaning of Art. 3 CERD;**
- C. Israel is under an obligation to cease these violations of CERD, as well as to provide an assurance and guarantee of non-repetition;**
- D. Israel, in fulfilling this obligation, must dismantle the existing Israeli settlements as a necessary pre-condition for the termination of the system of racial discrimination and apartheid in the occupied territory of the State of Palestine; and,**
- E. Third States must bring to an end through lawful means the system of racial discrimination set up by Israel, and must not recognize as lawful this illegal situation, nor render aid or assistance in any form in maintaining that situation.**

Palestine, 23 April 2018