
Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds

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Abstract

I accept the authors' premise in their article entitled 'Apartheid, International Law, and the Occupied Palestinian Territory' that apartheid, as practised in the former South African regime, remains today a crime against the law of nations applicable to states practising a similar regime. The obligation of a state and its officials to refrain from practising any policy of apartheid is considered a jus cogens norm under international law. Whoever practises apartheid bears international criminal responsibility and may be put on trial for committing that crime, either in any state in the world based on universal jurisdiction or before the International Criminal Court. However, the very gravity of the crime requires that accusations of apartheid be made with the greatest caution. The accusation that Israel practises apartheid against the Palestinian population in the West Bank, East Jerusalem, and Gaza is unfounded and based on gross errors. In this article I expand on two of these errors – the failure to differentiate between the norms governing occupied and sovereign territory, and the authors' complete failure to address Israel's policies in the context of an armed conflict characterized by the Palestinians' use of terror. As I show, once the authors' errors are exposed and considered, it is clear that Israel's actions cannot be considered a basis for the crime of apartheid.

1 Introduction

I accept the authors' premise in their article¹ that apartheid, as practised in the former South African regime, remains today a crime against the law of nations applicable

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¹ Dugard and Reynolds, 'Apartheid, International Law, and the Occupied Palestinian Territory', this issue at 867.

to states practising a similar regime. The gravity of the crime is demonstrated by its inclusion in the Rome Statute, which defines apartheid as inhumane acts ‘committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime’.² However, the very gravity of the crime requires that accusations of apartheid be made with the greatest caution. The accusation that Israel practises apartheid against the Palestinian population in the West Bank, East Jerusalem, and Gaza is unfounded and based on gross errors. I will expand on two of these errors – namely, the failure to differentiate between the norms governing occupied and sovereign territory, and the authors’ complete failure to address Israel’s policies in the context of an armed conflict characterized by the Palestinians’ use of terror. As I will show, once the authors’ errors are exposed and considered, it is clear that Israel’s actions cannot be considered a basis for the crime of apartheid.

Due to the brevity of this response, not every argument raised by the authors can be addressed, nor can I follow the outline of that article. Instead, I have chosen to focus on exposing the two fundamental errors of the authors and demonstrate how those errors have led to a misrepresentation and misanalysis which has brought about the wrong legal conclusion that Israel practises apartheid against the Palestinians in the territories.

2 First Error: Comparing Apples and Oranges – Sovereignty and Belligerent Occupation

There is a fundamental error underlying the entire analysis presented by the authors. Apartheid, both in wider usage and specifically in the South African experience, is characterized by the institutionalized racism of a government against the citizens and residents under its sovereign regime. However – and this is a fundamental difference – Israel does not have, nor does it claim, sovereignty over most of the territories beyond its borders which are the focus of the article. Since their conquest following the 1967 war, most of the territories have been held under ‘belligerent occupation’. The term ‘belligerent occupation’ refers to a legal status where, following a war, territory beyond a state’s border remains in its control until a settlement is reached between the belligerent parties. This area is governed by that state’s military forces without any claim of sovereignty. From the outset the occupation is considered temporary and it lasts until the parties’ claims are settled.³

The Hague Regulations and the Fourth Geneva Convention both acknowledge the status of occupation, and apply basic rules to the governance of the territory.⁴

² Art. 7(2)(h), Rome Statute of the International Criminal Court (1998), UN Doc. A/CONF. 183/9, at 37; ILM (1998) 1002; 2187 UNTS 90.

³ Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 49–56; E. Benvenisti, *The International Law of Occupation* (2012), at 4–6.

⁴ Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex; Regs concerning the Laws and Customs of War on Land, 1907, TS 539, Arts 42–56; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).

Recognizing the temporary aspect of occupation, as well as its military nature, belligerent occupation creates a much narrower framework of rights and duties between the occupier and the population in the occupied territories than between a state and its citizens and residents. Traditionally, it was conceived that the rights of the population under belligerent occupation were derived from humanitarian law, and not from human rights law;⁵ recently this conception has changed and in a number of cases human rights law has also been applied to belligerent occupation.⁶

The authors erroneously treat the territories as if they are sovereign Israeli territory and not territory held under belligerent occupation. This mistake is further compounded by the authors' treatment of all the differing territories as if their legal status is the same, and their examples ignore the clear distinctions. These mistakes have led them to apply the wrong legal standards in their analysis. Since it is imperative to have some knowledge of the historical and legal status of these territories, I offer this brief overview.

By the end of the June 1967 war, Israel controlled the following territories: the Golan Heights; East Jerusalem; the Gaza Strip, and the West Bank. The Golan Heights had been Syrian territory; the West Bank, including East Jerusalem, had been under Jordanian rule; while the Gaza Strip had been administered by Egypt since 1948.

Golan Heights: The Golan Heights are not claimed as Palestinian territories and are somewhat incidental to this analysis. It is sufficient to state that Israeli law was extended to the Golan Heights on 14 December 1981.⁷ Residents of the Golan Heights can receive Israeli citizenship, though very few have chosen to do so.⁸

East Jerusalem: On 28 June 1967 Israel brought East Jerusalem under Israeli law.⁹ Subsequently, this status was reaffirmed in Basic Law: Jerusalem Capital of Israel, enacted in 1980.¹⁰ Following a census of the population in East Jerusalem, Israel

⁵ Dinstein, *supra* note 3, at 81–88; Benvenisti, *supra* note 3, at 12.

⁶ Dinstein, *supra* note 3, at 69–71; Benvenisti, *supra* note 3, at 12 and 74–76; Ben-Naftali and Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories', 37 *Israel L Rev* (2003–2004) 17; Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?', 18 *EJIL* (2007) 1; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep. 226, at 240; *Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda* [2005] ICJ Rep 168; *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* [2004] ICJ Rep 136, at para. 106; HCJ 9594/03, *Btselem v. Military Judge Advocate* (2006), at para. 9, available at: www.hamoked.org/Document.aspx?did=7351.

⁷ Golan Heights Law, 1981, 36 Laws of the State of Israel 7. On the legal status of the Golan Heights see Maoz, 'Application of Israeli Law to the Golan Heights is Annexation', 20 *Brook. J Int'l L* (1993) 355; Sheff, 'Application of Israeli Law to the Golan Heights is Not Annexation', 20 *Brook. J Int'l L* (1993) 333.

⁸ HCJ 205/82, *Kanj Abou Tzalach v. Minister of the Interior*, PD [37] 2 718 (1983); Eglash, 'Worried About the Syria War, Golan Heights Residents Seek Israeli Citizenship', *USA Today*, 25 Oct. 2012, available at: www.usatoday.com/story/news/world/2012/10/24/golan-heights-syrians/1651883/.

⁹ The enabling legislation for the extension of Israeli law to East Jerusalem was the Municipalities Ordinance (Amendment No. 6) Law, 1967, 21 Laws of the State of Israel 75.

¹⁰ Basic Law: Jerusalem, Capital of Israel, 1980, 34 Laws of the State of Israel 209. For a survey of the various legal positions on the status of Jerusalem under international law see Lapidot, 'Jerusalem: The Legal and Political Background', 3 *Justice* (1994) 7; Eisner, 'Jerusalem: An Analysis of Legal Claims and Political Realities', 12 *Wisconsin Int'l LJ* (1994) 221, at 238–260; Ketter, 'Note – The Sovereignty of Jerusalem in International Law', 20 *Columbia J Int'l L* (1981) 319, at 330–356.

granted permanent residency status to the residents of East Jerusalem.¹¹ Permanent residents were given the option of receiving Israeli citizenship, but at the time, for political reasons, most chose not to request it, although since many have changed their minds.¹² Despite the extension of Israeli law to East Jerusalem, successive Israeli governments have negotiated over East Jerusalem's future.¹³

Gaza Strip: In 2005 Israel forcibly removed all Israeli civilians and dismantled its military administration in the entire Gaza Strip.¹⁴ This 'disengagement' brought Israel's 38-year-long occupation of the Gaza Strip to an end. Even those arguing that Israel's continued 'closure' of the Gaza Strip amounts to an ongoing occupation must concede that Israel's effective control of Gaza has been lessened to a significant degree.¹⁵ It is also important to note that Egypt shares a border with Gaza, allowing the inhabitants of Gaza to receive all of their needs through Egypt. Despite the disengagement, the conflict between the two sides has not abated. The post-disengagement reality has seen an increase in the firing of indiscriminate rockets and mortars at Israeli cities and towns leading to Israeli military responses.¹⁶ Therefore, Israel's treatment of the population of Gaza today can only be examined through the prism of the laws of armed conflict.¹⁷

The West Bank: Following Israel's 1948 War of Independence, the armistice agreement ending the war set out demarcation lines. Due to the colour used to mark the

¹¹ HCJ 283/69, *Ravidi and Maches v. Military Court, Hebron District*, PD 24(2) 419 (1970); HCJ 282/88, *Mubarak Awad v. Prime Minister of Israel*, PD 42(2) 424 (1988).

¹² NirHasson, '3,374 East Jerusalem residents received full Israeli citizenship in past decade', *Ha'aretz*, 21 Oct. 2012, available at: www.haaretz.com/news/diplomacy-defense/3-374-east-jerusalem-residents-received-full-israeli-citizenship-in-past-decade.premium-1.471189 (last visited 11 Dec. 2012).

¹³ Hirsch, 'The Legal Status of Jerusalem Following the ICJ Advisory Opinion on the Separation Barrier', 38 *Israel L Rev* (2005) 298, at 302; Hoffman, 'Abbas: Olmert Negotiations Would Have Succeeded', *Jerusalem Post*, 14 Oct. 2012.

¹⁴ Disengagement Plan Implementation Law 2005, S.H. 2005 (Laws of the State of Israel) 142; Declaration Regarding End of the Military Administration in the Gaza Strip, 12.09.06, available at: www.hamoked.org.il/items/7931.pdf; Israel Ministry of Foreign Affairs, 'Exit of IDF Forces from the Gaza Strip Completed September 12, 2005', available at: www.mfa.gov.il/MFA/Government/Communiques/2005/Exit+of+IDF+Forces+from+the+Gaza+Strip+completed+12-Sep-2005.htm.

¹⁵ Arguing that Israel is still occupying the Gaza Strip: see Darcy and Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law', 15 *J Conflict and Security L* (2010) 211; arguing that Israel's occupation of Gaza has ended see Bell and Shefi, 'The Mythical post-2005 Israeli Occupation of the Gaza Strip', 16 *Israel Affairs* (2010) 268; T. Ferraro, *ICRC Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory* (2012), at 48; Tzemach, 'What Are the Legal Duties of Israel to the Population in Gaza', 12 *Mishpat Ve'mimshal* (2009) 83; Shany, 'Faraway So Close: The Legal Status of Gaza after Israel's Disengagement', 8 *Yrbk Int'l Humanitarian L* (2005) 369. See also CrimA 6659/06, *Iyyad v. The State of Israel* (2008), available at: http://elyon1.court.gov.il/Files_ENG/06/590/066/n04/06066590.n04.pdf; HCJ 9132/07, *Jaber v. Prime Minister* (2008), available at: http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf.

¹⁶ Since 2001, 'more than 12,800 rockets and mortars, an average of 3 attacks every single day, have landed in Israel'; IDF Blog, 'Rocket attacks on Israel from Gaza', available at: www.idfblog.com/facts-figures/rocket-attacks-toward-israel/; See also B'tselem, 'Rocket and mortar fire into Israel', updated 18 Nov. 2012, available at: www.btselem.org/israeli_civilians/qassam_missiles#data.

¹⁷ See *Jaber*, *supra* note 15, deciding that although Israel does not have effective control, it still has some responsibilities over the Gaza Strip as a consequence of the situation of armed conflict now existing, and the Gaza Strip's dependency on Israel created during the occupation. See also *Iyyad*, *supra* note 15, at para. 11.

demarcation lines, they became known as 'the Green Line'. Though the armistice agreement stated categorically that the demarcation line did not mark the borders of Israel, it *de facto* functioned as such until the 1967 war when Israel acting in self-defence conquered areas between the Green Line and the Jordan river commonly known as the West Bank. Israel's legal position, both internally and internationally has always been that the West Bank is held under the status of belligerent occupation.¹⁸ The belligerent occupation has continued for years. Acknowledging the difference between short and prolonged occupation, the Israeli Supreme Court has significantly increased the weight given to the rights of the local population, 'It is only natural that in short term military occupation, military-security needs reign supreme. However, in long term military occupation, the needs of the local population receive extra validity.'¹⁹

Following the signing of the Oslo accords²⁰ and the subsequent interim agreements, the territory of the West Bank (and the Gaza Strip) was divided into three separate areas of control between Israel and the Palestinian Authority.²¹ Importantly, in large parts of the West Bank, in areas that became known as areas A and B, the Palestinians gained a large amount of control over both civil and criminal matters, including the establishment of their own police forces. In area C Israel retained full effective control. Israel's control of the West Bank in areas A and B was thus significantly narrowed. Despite these developments, the interim agreements state explicitly that 'nothing in this Agreement shall affect the continued authority of the military government and its Civil Administration to exercise their powers and responsibilities with regard to security and public order, as well as with regard to other spheres not transferred'.²²

I will now proceed to demonstrate how the authors' error of failing to differentiate between Israel's sovereignty within the Green Line and its lack of sovereignty in most of the relevant territories has led them to the wrong conclusion that Israel's policies in the territories amount to the crime of apartheid.

3 Examples: Political Rights, Freedom of Movement and Settlements

The authors have produced a long list of violations of Article 2(c) of the Apartheid Convention, which defines acts of apartheid as 'any measures calculated to prevent

¹⁸ See, e.g., HCJ 606/78, *Ayyub v. Minister of Defence*, PD 33(2) 113 (1978), at 131; HCJ 393/82, *Jam'iat Iscan v. Commander of the IDF Forces in the Area of Judea and Samaria*, PD 37(4) 785 (1983), at para. 12; HCJ 351/80, *The Jerusalem District Electric Company v. The Minister of Energy and Infrastructure*, PD 35(2) 673 (1981), at 690; HCJ 1661/05, *The Gaza Coast Regional Council v. The Knesset*, PD 59(2) 481, at para. 3; HCJ 7957/04, *Zaharan Yunis Muhammad Mara'abe v. The Prime Minister of Israel*, PD 60(2) 477 (2005), at para. 22. available at: http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf.

¹⁹ *Jam'iat Iscan*, *supra* note 18, at para. 22.

²⁰ The Israeli-Palestinian Declaration of Principles, 13 Sept. 1993, 32 ILM (1993) 1525.

²¹ Agreement on the Gaza Strip and the Jericho Area, Cairo, 4 May 1994, 33 ILM (1994) 622, and subsequently Interim Agreement on the West Bank and Gaza Strip, 28 Sept. 1995, 36 ILM (1997) 551.

²² Agreement on Preparatory Transfer of Powers and Responsibilities Between Israel and the PLO, 29 Aug. 1994, Art. VI (5). For a general review of the effects of the Oslo Accords on the control of the Occupied Territories see Benvenisti, 'Responsibility for the Protection of Human Rights Under the Interim Israeli-Palestinian Agreements', 28 *Israel L Rev* (1994) 297.

a racial group from participation in the political, social, economic and cultural life of the country'.²³

I shall address some of these rights and explain why the way in which they are implemented under the regime of belligerent occupation, unequivocally is not apartheid.

A *Political Rights*

It is almost an *a priori* observation that political rights suffer under belligerent occupation. Belligerent occupation is by definition the temporary replacement of the normal political order. The army is given control over the area. The military commander functions as the head of all three branches of government: executive, legislative, and judicial. That being so, classical political rights such as the right to protest, the right to assemble, and the right to representation are limited during belligerent occupation.²⁴ The authors, however, ignore the differences between the exercise of political rights under belligerent occupation and the exercise of similar rights in a state's sovereign territory. Accusing Israel of not granting political rights to the population in occupied territories imposes on Israel legal requirements that far exceed the law. *A fortiori*, basing charges of apartheid on such accusations is groundless.

B *Freedom of Movement*

Humanitarian law, which is the basis of belligerent occupation, designates occupied territories as closed military areas, and therefore a person wishing to leave the area requires permission so to do.²⁵

Due to the prolonged nature of the occupation, in the past the norm was to accommodate Palestinian movement in so far as possible.²⁶ Therefore, during periods of relative calm, permission to leave was granted with comparative ease. Serious restrictions on leaving and entering the territories started as attacks against Israeli citizens in the territories and in Israel became more frequent. These restrictions are in accordance with humanitarian law, and even with human rights law which allows the restriction of freedom of movement for security reasons.²⁷

The authors' claim that Israel violates Palestinian rights by not allowing Palestinians to enter and work in Israel reflects the authors' error of not differentiating between the territories and Israel within the Green Line. The territories are not part of Israel,

²³ Convention on the Suppression and Punishment of the Crime of Apartheid (1973), 1015 UNTS 243.

²⁴ Dinstein, *supra* note 3, at 264–266; Benvenisti, *supra* note 3, at 75.

²⁵ Geneva Convention IV, *supra* note 4, Arts 35, 48.

²⁶ E.R. Cohen, *Human Rights in the Israeli Occupied Territories 1967–1982* (1985), at 1–9. See also the opinion of Justice Haim Cohen in HCJ 698/80, *Kawasme v. The Minister of Defence*, PD 35(1) 617 (1980), at 648.

²⁷ International Covenant on Civil and Political Rights (ICCPR), Arts 4(1) and 12(3), 999 UNTS 171; American Convention on Human Rights 1969, Arts 22(3) and 27, in I. Brownlie, *Basic Documents on Human Rights* (1992), at 524; European Convention on Human Rights, Art. 15(1), ETS No. 005; 4th Protocol to the European Convention on Human rights, Art. 2(3), ETS No. 046. See also M. Sassoli and A.A. Bouvier, *How Does Law Protect in War – Cases, Documents and Teaching Material on Contemporary Practice in International Law* (1999), at 154–155.

and therefore entering Israel from the territories is equivalent to entering Israel from a foreign state. It is a basic rule of international law that a sovereign state – in this case Israel – can decide who shall enter its borders. A state's obligation to allow entry into its territory is confined to its own citizens and permanent residents.²⁸ Accordingly, there is neither an obligation upon Israel to allow the residents of the territories to enter Israel nor any duty to provide them with work within its borders.

Despite the limited scope of the right to freedom of movement in occupied territories, it has been accorded broad protection by the Israeli Supreme Court. This protection is evident in the long line of decisions regarding the route of Israel's security fence. Following a wave of terror attacks, Israel commenced building a fence physically to separate the territories from Israel. In numerous cases the Supreme Court has ordered the route of the fence to be changed to ensure the Palestinians' freedom of movement,²⁹ despite the realization that 'this judgment will not make the state's struggle against those rising up against it easier'.³⁰

C Settlements

The question with which we are dealing is not the legality of Israeli settlements in the territories, but whether Israel's policies in the territories are tantamount to apartheid. Accordingly, I will show that, regardless of their legal status, Israel's practice regarding settlements is not a violation of the crime of apartheid.

The authors write extensively about the fact that in some cases there are different laws applicable to Israeli citizens and the Palestinians in the territories. In their analysis this difference reflects Israel's 'racialized nature' and 'underpins system of domination by one over the other'.³¹

Discussions on this topic should begin by clarifying the nature of the difference between applicable legal regimes. To put it simply, the separation is not along racial lines but between Israeli citizens and Palestinians. It is a fact that the same law applies in the territories to an Israeli Arab of any religion and to an Israeli Jew. This alone is sufficient to answer the vast majority of the authors' criticisms concerning the existence of different legal regimes in the territories, and to make it clear that under no definition, including that of the authors, do Israel's practices amount to the commission of the crime of apartheid.

Nonetheless, the difference in law between the two populations needs further explanation. To a large extent the distinction was unavoidable once Israeli citizens began to live in the territories. Israel could not apply Israeli law to the local population, as

²⁸ Sir R. Jennings and a. Watts (eds), *Oppenheim's International Law* (9th edn, 1992), at 940–941; I. Brownlie, *Principles of Public International Law* (6th edn, 1998), at 522–523.

²⁹ HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel*, PD 58(5) 807 (2004); *Zaharan Yunis Muhammad Mara'abe*, *supra* note 18; HCJ 8414/05, *Ahmed Issa Abdallah Yassin, Bil'in Village Council Chairman v. The Government of Israel* (2007), available at: http://elyon1.court.gov.il/Files_ENG/05/140/084/n25/05084140.n25.pdf; HCJ 9593/04, *Morar v. IDF Commander in Judea and Samaria*, PD 61(1) 844 (2006).

³⁰ *Beit Sourik Village Council*, *supra* note 29, at para. 86.

³¹ Dugard and Reynolds, *supra* note 1, text to notes 205–206.

that would have been perceived as annexation. Nor was it feasible for Israeli citizens in the territories, who remained connected to Israeli civil society, to live under a military regime without that regime being seriously modified.

The duality of the laws is due to the ongoing understanding that the territories are held under the temporary regime of belligerent occupation. The temporary nature of the situation is time and again stressed by the Israeli Supreme Court, which emphasizes that the future of the settlements and their residents will be determined by political processes and agreements between the two sides.³² It is clear that the political solution will have to address this problem.

Despite some differences in laws applicable to the populations, it is important to stress that both groups are subject to the same military rule. In a leading Supreme Court decision, the Court upheld the military commander's administrative detention of an Israeli citizen in the territories. The defence's argument, to the effect that since the individual was Israeli he was not subject to the authority of the military commander but only to the laws applicable inside Israel, was categorically rejected. The Court stressed that all those living in the territories, whether Palestinian inhabitants, Israeli citizens, or others, were subject to the same set of rules unless the law specifically differentiated between them.³³

It should be noted that the reality of belligerent occupation has also affected the implementation of rights *vis-à-vis* Israeli citizens living in the occupied territories:

Of course, the scope of the human right of the Israeli living in the area, and the level of protection of the right, are different from the scope of the human right of an Israeli living in Israel and the level of protection of that right. At the foundation of this differentiation lies the fact that the area is not part of the State of Israel. Israeli law does not apply in the area. He who lives in the area lives under the regime of belligerent occupation. Such a regime is inherently temporary.³⁴

A further example concerns the Court's examination of claims for compensation made by Israeli civilians forcibly removed from the Gaza Strip:

In determining the substance of the impingement and the rate of compensation, one must take into consideration the fact that the rights impinged upon are the rights of Israelis in territory under belligerent occupation. The temporariness of the belligerent occupation affects the substance of the right impinged upon, and thus also, automatically, the compensation for the impingement.³⁵

4 Second Error: Ignoring the Context of Terror

It is manifestly clear that apartheid is not just inequality. Apartheid is defined by the Rome Statute as acts 'committed in the context of an institutionalized regime of

³² See *Ayyub*, *supra* note 18, at paras 12, 23, 27; *Jerusalem District Electric Company*, *supra* note 18, at para.13; *Gaza Coast Regional Council*, *supra* note 18, at para. 8; *Zaharan Yunis Muhammad Mara'abe*, *supra* note 18, at paras 15, 22; HCJ 3103/06, *Shlomo Valiro v. The State of Israel* (2011), at paras 47–49, 52–58, available in Hebrew at: <http://elyon1.court.gov.il/files/06/030/031/r13/06031030.r13.pdf>.

³³ HCJ 2612/94, *Avraham Sha'ar v. Commander of IDF Forces in the Region of Judea*, PD 48(3) 675(1994).

³⁴ *Zaharan Yunis Muhammad Mara'abe*, *supra* note 18, at para. 22.

³⁵ *Gaza Coast Regional Council*, *supra* note 18, at 126.

systematic oppression and domination by one racial group over any other racial group or groups and *committed with the intention of maintaining that regime*'.³⁶ Therefore, only acts committed with the intention of oppression and maintaining a repressive regime are indicative of apartheid. As I will demonstrate, Israel's actions, while sometimes repressive, are caused by clear and legitimate security concerns.

I am well aware, and wish to state clearly, that security is not a blank cheque for repression, inequality, or any other violation of human rights. However, the human rights regime allows restrictions and derogations from human rights on grounds of security.³⁷ Creating the exact balance between security and human rights remains an ongoing process. I do not claim that Israel has always reached the proper balance. On the other hand, I do categorically state that Israel's actions are motivated by sincere considerations of security and not the wish to dominate or oppress other racial groups. Former Supreme Court President Dorit Beinisch clearly demonstrated this point when considering the separation of Israeli citizens and Palestinians on a road:

Even if we take into account the fact that absolute segregation of the population groups travelling on the roads is an extreme and undesirable outcome, we must be careful to refrain from definitions that ascribe a connotation of segregation, based on the improper foundations of racist and ethnic discrimination, to the security means enacted for the purpose of protecting travellers on the roads. The comparison drawn by the petitioners between the use of separate roads for security reasons and the apartheid policy and accompanying actions formerly implemented in South Africa, is not a worthy one. The policy of apartheid constituted an especially grave crime and runs counter to the basic principles of Israeli law... It was a policy of racist segregation and discrimination on the basis of race and ethnic origin ... Not every distinction between persons, under all circumstances, necessarily constitutes improper discrimination, and not every improper discrimination is apartheid.³⁸

Israel's security concerns are uniquely complex. Terror attacks have severely compromised normal civilian life. Former Supreme Court President Barak aptly described the attacks against Israel:

Terrorist organizations use a variety of means. These include suicide attacks ('guided human bombs'), car bombs, explosive charges, throwing of Molotov cocktails and hand grenades, shooting attacks, mortar fire, and rocket fire. A number of attempts at attacking strategic targets ('mega-terrorism') have failed.³⁹

Classic wars are those waged between the armies of state A and state B, and are governed by the international law of armed conflict. However, Israel is not being attacked by a state or by an army, nor do the attacks on it comply with humanitarian law:

Together with other means, the Palestinians use guided human bombs. These suicide bombers reach every place that Israelis can be found (within the boundaries of the State of Israel and in the Jewish communities in Judea and Samaria and the Gaza Strip). They sew destruction and spill blood in the cities and towns. The forces fighting against Israel are terrorists: they

³⁶ *Supra* note 2 (emphasis added).

³⁷ *Supra* note 27.

³⁸ H CJ 21 50/07, *Ali Hussein Mahmoud Abu Safiyeh, Beit Sira Village Council Head v. Minister of Defence* (2008) at para. 6, available at: http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf.

³⁹ *Zaharan Yunis Muhammad Mara'abe, supra* note 18, opinion of President Barak at para. A.1.

are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the territories, including inside holy sites; they are supported by part of the civilian population, and by their families and relatives. Palestinians have often used their own population to shield their attacks, as well as hiding their own combatants (legal or otherwise) inside their civilian population.⁴⁰

While the other side openly breaches the laws of war, mainly by not distinguishing between combatants and civilians, Israel makes every attempt to adhere to the letter of the law. This type of war is known as asymmetrical conflict.

Regrettably, terror is not rare in the 21st century, nor is it experienced solely by Israel. The global reach of terror became emphatically evident in the attacks on America on 11 September 2001, and particularly in the horrific destruction of the Twin Towers. However, the unique aspect of Israel's experience with terror relates to the fact that it poses a daily threat to the lives of Israeli civilians throughout the state of Israel.

5 Examples: Targeted Killings, the Security Fence and Administrative Detention

To support their analysis, the authors list a series of 'inhuman acts' allegedly performed by Israel, and enumerated in Article 2(a), (c), (d), and (f) of the Apartheid Convention.⁴¹ These sub-articles include denying a racial group both the right to life and liberty and participation in the political, social, economic, and cultural life of the country as well as dividing the population along racial lines. In this section I address some of these accusations, and highlight how the authors' analysis is flawed due to their omission of the context for Israel's actions.

A Targeted Killings

In the authors' opinion, Israel is worse than South Africa because it uses targeted killings against Palestinians while South Africa did not reach that extreme use of force against the population being subjected to discrimination.⁴² This comparison has little merit as it ignores the clear difference between the two cases. South Africa never faced an armed conflict; thus it acted as a sovereign state confronting an uprising. In such cases, when a state believes that its laws are being infringed, it has an obligation to use its police and not its armed forces. The use of force by the police is significantly more restricted than that allowed to an army during times of conflict.

Israel is not facing an internal political conflict within its sovereign borders such as that faced by South Africa. Israel's Supreme Court explicitly stated that 'since late September 2000, severe combat has been taking place in the areas of Judea and Samaria. *It is not police activity. It is an armed conflict*'.⁴³ Equally, the current situation

⁴⁰ HCJ 7015/02, *Ajuri v. IDF Commander*, PD 56(6) 352 (2002), at 358.

⁴¹ Dugard and Reynolds, *supra* note 1, text to notes 127–180.

⁴² *Ibid.*, text to note 130.

⁴³ *Ajuri*, *supra* note 40, at 358 (emphasis added).

in Gaza, where Israel no longer has effective control and from which rockets and mortars are fired at Israeli civilians, is also one of armed conflict. As previously stated, the ongoing armed conflict between Israel and the Palestinians is of an asymmetric nature.⁴⁴ As is often stated, the laws of war are not easily translated into clear instructions on the proper use of force in such situations.⁴⁵

The Israeli Supreme Court has taken a leading role in exploring the proper application of the laws of war governing the use of force in such complicated cases, and has elaborated on the application of the principle of proportionality. The Court has established a demanding standard that, where possible, even those taking part in terror should be arrested rather than killed. If this is not possible, the Court allows targeted killings to continue under strict guidelines, which are arguably tougher than those applied by other countries using the same methods.⁴⁶

B The Security Fence: Divisions for Security, Not Racial Lines

The authors give numerous examples where Israel is accused of trying to divide the population along racial lines; these include the security fence, the closing of the Gaza Strip, and the closing of roads in the territories to Palestinians.⁴⁷

The question of the motivation for the erection of the security fence was examined in depth by the Israeli Supreme Court. The Court explicitly stated its opinion that the erection and route of the fence were based on considerations of security and not motivated by a desire to annex the territory.⁴⁸ Further, the route of the fence was analysed by the Court in minute detail. The Court approved the route only once it was persuaded that the route was justified by considerations of security. In numerous cases the Court has moved the route of the fence better to protect the human rights of the Palestinians.⁴⁹ While, the International Court of Justice's advisory opinion on the legality of the fence disagrees with the Supreme Court's findings on the security motivation of the fence, it has not gone as far as accusing Israel of apartheid.⁵⁰

It is worth focusing on the authors' accusations that 'Gaza effectively amounts to a besieged Palestinian ghetto' and 'has been effectively severed from the rest of the

⁴⁴ *Supra*, text to note 40.

⁴⁵ On the challenges of applying humanitarian law to asymmetrical conflict see Benvenisti, 'The Law on Asymmetric Warfare' in M.H. Arsanjani, J. Cogan, R. Sloane, and S. Weisser (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2010), available at: <http://ssrn.com/abstract=2123883>; Schmitt, 'Asymmetrical Warfare and International Humanitarian Law', 62 *Air Force L Rev* (2008) 1; Pfanner, 'Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action', 87 *IRRC* (2005) 149.

⁴⁶ HCJ 769/02, *The Public Committee against Torture in Israel v. Government of Israel et al.* (2006), opinion of Justice Barak, at para. 40, available at: http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

⁴⁷ Dugard and Reynolds, *supra* note 1, text to notes 156–171.

⁴⁸ *Beit Sourik Village Council*, *supra* note 29, at 1–6, 27–32.

⁴⁹ *Ibid.*; *Zaharan Yunis Muhammad Mara'abe*, *supra* note 18; HCJ 9593/04, *Morar, Yanun Village Council Head v. IDF Commander in Judaea and Samaria* (2006, not yet reported); HCJ 4289/05, *Bir Naballah Local Council v. Government of Israel* (2006, not yet reported); HCJ 2645/04, *Farres Ibrahim Nasser et al. v. The Prime Minister of Israel et al.* (2007, not yet published).

⁵⁰ *Wall*, *supra* note 6.

occupied territory'.⁵¹ This accusation is another prime example of the authors' choice to ignore reality. Gaza is physically separated from the West Bank, with Israel located between the two entities. Israel has actively to allow the population of Gaza to pass through Israeli territory to reach the West Bank. Since there is an ongoing armed conflict between Israel and the Hamas-led government of Gaza, Israel is under no obligation to allow the free passage of the population of a hostile entity through Israeli territory.⁵² Further, Gaza has a border with Egypt, and therefore it is unclear how the authors assign the blame for Gaza's isolation to Israel alone.

Finally, the authors accuse Israel of practising 'road apartheid', namely preventing the Palestinians from using certain roads in the territories. Confining the use of roads to Israeli citizens (Jews, Christians, and Muslims) has never been motivated by race.⁵³ Israel's Supreme Court, ruling on the legality of the separation, simply stated that 'we must not put the cart before the horse: the terrorist attacks came first, and the closure of the road came later'.⁵⁴ There is no denying a *de facto* separation of the populations, but the motivation is security- and not racism-based.

C Administrative Detention

The authors argue that Israel makes use of administrative detention to 'eliminate dissent or resistance to Israeli rule' and that the racial nature of this practice is evidenced by figures showing that administrative detention is used almost exclusively against Palestinians.⁵⁵

I agree that in times of peace a sovereign state that makes use of administrative detention against a particular group to a disproportionate extent may be engaged in discrimination; however, this is not the case here. The Palestinians *en masse* have employed a strategy of terror against Israeli civilians in the occupied territories and within the Green Line. The widespread use of terror by the Palestinians is the underlying reason for Israel's use of the counter-terrorism device of administrative detention. When Israelis have been suspected of using similarly violent acts, Israel has employed the same device of administrative detention against them.⁵⁶ Given that the

⁵¹ Dugard and Reynolds, *supra* note 1, text to note 156.

⁵² The right to enter a state is one of the two rights in international law that is conferred solely upon citizens and permanent residents (Art. 13(2) of the Universal Declaration of Human Rights, available at: www.un.org/en/documents/udhr/index.shtml; Art. 12(4) of the ICCPR, *supra* note 27). There is no obligation under international law to facilitate the entry of foreigners into a state, this is *a fortiori* the case with regard to the entry of people from enemy states or other entities. See also *supra* note 28.

⁵³ HCJ 3969/06, *Head of Deir Samit Village Council v. Commander of the IDF Forces in the West Bank* (2009), available at: www.hamoked.org/files/2011/1294_eng.pdf; Ali Hussein Mahmoud Abu Safiyeh, *supra* note 38; Dershowitz, 'Countering Challenges to Israel's Legitimacy', in A. Baker (ed.), *Israel's Rights as a Nation-State in International Diplomacy* (2011), at 129, available at: www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?lng=en&id=137166.

⁵⁴ *Supra* note 38, at 53.

⁵⁵ Dugard and Reynolds, *supra* note 1, text to note 150.

⁵⁶ See *Sha'ar*, *supra* note 33; ADP 8788/03, *Federman v. The Minister of Defence*, PD 58(1) 176 (2003); HCJ 5555/05, *Federman v. GOC Central Command*, PD 59(2) 865 (2005); HCJ 4101/10, *Hacohen v. IDF Commander of Judea and Samaria* (2010, not yet reported).

Palestinians have made far more frequent use of the strategy of terror, it is unsurprising that there are far more Palestinians in administrative detention than Israelis. However, Israeli law has tried to balance the wide use of administrative detention with consideration for human rights.⁵⁷

6 Last But Not Least: Notes on Academic Practices

Throughout the article, but specifically towards its end, the authors employ a practice which is problematic in academic discourse. Even though the article limits itself to focusing on Israel's practices in the territories,⁵⁸ significant space is dedicated to Israel's practices inside the Green Line, and to attacking the legitimacy of Israel as a Jewish Homeland.⁵⁹ Even worse, the serious questions the authors raise on these topics are presented in a one-sided manner, despite the availability of substantial legal and political writings on these matters. In this manner, the authors discuss the legitimacy of Israel's Law of Return,⁶⁰ Israel's rules on citizenship,⁶¹ the return of Palestinian refugees into Israel,⁶² and questions relating to Israel's allocation of state lands.⁶³ These are all subjects which fall well outside the scope of the article as defined by the authors themselves. Such heavy and meaningful issues that deal with the major principles underlying the very existence of the state of Israel cannot be presented or discussed as a side note either by them or by me in my response.

In addition, the article attempts to place itself as part of a wider discourse, examining and giving serious weight to the allegation that Israel practises some form of apartheid.⁶⁴ To show how this view has 'gained currency' the authors cite numerous sources: a statement of the former 'UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967',⁶⁵ a study by the Human Sciences Research Council of South Africa,⁶⁶ and the findings of 'The Russell Tribunal

⁵⁷ HCJ 3239/02, *Marab v. IDF Commander in Judaea and Samaria*, PD 57(2) 349 (2002), at paras 19–21, 26, available at: http://elyon1.court.gov.il/Files_ENG/02/390/032/A04/02032390.A04.pdf; CrimA 6659/06, *Anonymous v. The State of Israel* (2008), available at: http://elyon1.court.gov.il/Files_ENG/06/590/066/n04/06066590.n04.htm.

⁵⁸ Dugard and Reynolds, *supra* note 1, text to note 27.

⁵⁹ *Ibid.*, text to notes 124, 182–187.

⁶⁰ *Ibid.*, text to note 185.

⁶¹ *Ibid.*, text to note 187.

⁶² *Ibid.*, text to note 151 (Point III quoted from HRSC study).

⁶³ *Ibid.*, text to note 188. It is impossible not to comment on the authors' glaring mistake in this matter. The authors claim that fully 93% of the land in Israel cannot be bought by non-Jews – even if they are citizens of Israel. Needless to say this is a gross error. The authors cite Israel Basic Law: Israel Lands (1960) as stating that public land 'shall not be transferred either by sale or any other manner', and then add that this land 'is to be held in perpetuity for the benefit of the Jewish people'. The holding in perpetuity for the benefit of the Jewish people is not part of the law, nor is there any similar language that would suggest such an interpretation. The law simply states that the state may not sell public land into private ownership. There is no mention of Jews or any other group.

⁶⁴ Dugard and Reynolds, *supra* note 1, text to notes 16–22.

⁶⁵ *Ibid.*, at note 18.

⁶⁶ *Ibid.*, at note 19.

on Palestine'.⁶⁷ However, in the course of preparing this response, a curious finding emerged. To my surprise I found that in all of these sources, cited as evidence of a larger trend, an instrumental role was played by Professor Dugard, one of the authors of the article to which we are responding. Dugard himself was the former 'UN Special Rapporteur on the human rights situation in the Palestinian territories'.⁶⁸ In addition, the study by the Human Sciences Research Council of South Africa was not only founded on Dugard's comment as Special UN Rapporteur but Dugard also had a consulting role in the study.⁶⁹ Similarly, the very same Dugard was at various times both a jurist and a witness for the Russell Tribunal on Palestine.⁷⁰ One should not present one's own comments, studies, and work as evidence of a wide discourse on the topic.

Apartheid is a grave crime. The obligation of a state and its officials to refrain from practising any policy of apartheid is considered a *jus cogens* norm under international law.⁷¹ Whoever practises apartheid bears international criminal responsibility and may be put on trial for committing that crime, either in any state in the world based on universal jurisdiction or before the International Criminal Court (ICC).⁷² Accordingly, blaming a state for committing the crime of apartheid is a very serious move that should be considered with great caution. I have shown that the authors have not taken all the precautions necessary before accusing Israel of committing the crime of apartheid. They did not address the fact that the relevant territories have been under the regime of belligerent occupation and they totally ignored the fact that on a daily basis Israel is compelled to safeguard its citizens from acts of terrorism committed by the Palestinians in the territories and within the Green Line. The authors' accusation that Israel commits apartheid is groundless.

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John Dugard and John Reynolds have been invited to write a Rejoinder to Professor Zilbershats, which will be posted on EJIL:Talk! at www.ejiltalk.org.

⁶⁷ *Ibid.*, at note 26.

⁶⁸ J. Dugard, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/HRC/4/17, 29 Jan. 2007, Dugard and Reynolds, *supra* note 1, at note 18.

⁶⁹ Human Sciences Research Council, *Occupation, Colonialism, Apartheid? A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law* (2009), at 11; Dugard and Reynolds, *supra* note 1, at note 19.

⁷⁰ www.russelltribunalonpalestine.com/en/about-rtop/jury and Russell Tribunal on Palestine, *Findings of the South Africa Session* (Nov. 2011), at 6, available at: www.russelltribunalonpalestine.com/en/wp-content/uploads/2011/09/RTtoP-Cape-Town-full-findings2.pdf.

⁷¹ See Parker and Neylon, 'Jus Cogens: Compelling the Law of Human Rights', 12 *Hastings Int'l & Comp L Rev* (1989) 411, at 413–414; A. de Hoogh, *Obligations Erga Omnes and International Crimes* (1996), at 53–56, 91; M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), at 182 and 190.

⁷² Art. 7(1)(j), Rome Statute of the International Criminal Court, *supra* note 2.