

Reply to the Harvard International Human Rights Clinic and Addameer’s Joint Submission

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Introduction

On February 28, the International Human Rights Clinic at Harvard Law School (“IHRC”), in collaboration with the organization Addameer (collectively, “Authors”), made a joint submission (“Submission”) to the United Nations (“UN”) Commission of Inquiry established after the May 2021 conflict between Israel and the terrorist organization, Hamas. This brief is written in response to the Submission. It will generally address a number of factual and legal inaccuracies contained in the submission.

The complex conflict between Israel and the Palestinians has had horrific consequences for many in both the Israeli and Palestinian societies. We, the underlined, share the desire to see an end to bloodshed, violence, and hatred. Good faith engagement, based on factual and legal realities, is the surest way towards ending the conflict and creating a just and lasting peace for all parties to the conflict. On the other hand, ignoring and distorting the factual and legal realities only serves to create distance between the parties and make the possibility of a peaceful settlement of the conflict increasingly remote.

It is for this reason that CAMERA and UK Lawyers for Israel are submitting this response. It is our hope that by correcting the record, we may engage in good faith dialogue about the complexities of the conflict.

The following reply will first address the issues identified by the Authors regarding an alleged “intent to dominate,” before then addressing the alleged “inhumane acts” raised in the Submission. It will conclude with a note on the concerning nature of the Harvard International Human Rights Clinic’s partnership with Addameer.

We, the underlined, are in full agreement with the Authors with regard to the severity of the crime of apartheid. For purposes of this response, we will set aside legal questions such as whether the “crime of apartheid” is a part of customary international law or not. Similarly, we will set aside whether or not the *Rome Statute* and the *Apartheid Convention* are applicable to Israel. We will, additionally, set aside any questions of the precise definition of the “crime of apartheid,” whether it is treaty based or, as the Authors argue, is based in customary international law. Instead, this reply will demonstrate that even under the broadest definitions of apartheid, it does not apply to the situation in Israel.¹

Intent to Dominate

Under both the *Rome Statute* and the *Apartheid Convention*, there is a *mens rea* element. Under the former, there must be intent to maintain a regime of systematic oppression and domination by one racial group over another. Under the latter, there must be proof of a purpose of establishing and maintaining domination by one racial group over another systematically oppressing them. The Submission fails under either of these requirements. The evidence presented to suggest there is such intent comes in the form of conclusory statements based on jaundiced interpretations. Meanwhile, crucial context that has significant bearing on the question of intent is left virtually unaddressed, such as the unique and complex security environment and longstanding Palestinian rejectionism of peace offers extended by Israel and others. Moreover, it is unclear how one can settle facts such as the Israeli voluntarily waver of control over vast territory and population in the Oslo Accords, the establishment of the PA and transfer of authorities to it, as well as the disengagement from Gaza. The Authors may wish for a more extensive political solution, including the transfer of additional territory and authorities to the Palestinian leadership, however, they have failed to substantiate any legal wrongdoing by Israel, and certainly failed to establish how this can amount to crimes like apartheid.

“Racial Groups”

In order to find apartheid, an understanding of “racial groups” is necessary. The Authors argued that a subjective approach is appropriate and claimed that in the case of Israel and the Palestinians “a national, ethnical, racial or religious group should be identified by using as criterion the stigmatization of the group, *notably by the perpetrators of the crime*, on the basis of its *perceived* national, ethnical, racial or religious characteristics, as was done in *Blagojevic and Jokic* by the ICTY.” As mentioned above, we will not debate the definition of a “racial

¹ See e.g., Joshua Kern and Anne Herzberg, *False Knowledge as Power: Deconstructing Definitions of Apartheid that Delegitimise the Jewish State*, NGO Monitor, December 2021, https://ngo-monitor.org/pdf/NGOMonitor_ApartheidReport_2021.pdf; Joshua Kern and Anne Herzberg, *Neo-Orientalism: Deconstructing Claims of Apartheid in the Palestinian-Israeli conflict*, NGO Monitor, March 2022, https://ngo-monitor.org/pdf/NGOMonitor_ApartheidReport_2022.pdf.

group." In this case, it is inapplicable to the situation even under the broadest definitions and particularly under the definition suggested by the Authors.

While a full review of demographics is beyond the scope of this response, a brief review is necessary.

Religious Groups

In Israel, approximately 81% of adults are Jewish, 14% are Muslim, 2% are Druze, 2% are Christian, and the remainder belong to other or no religions. The vast majority of those living under Palestinian Authority ("PA") or Hamas's rule are Muslims. There is a small minority of Christian and other groups.

In Israel, Muslims and other minorities have found success in the governing structure of the state. Currently, the political party Ra'am (also known as the United Arab List), the political wing of the southern branch of the Islamic Movement, forms a key part of the ruling coalition of the Israeli government. In February, the Judicial Selection Committee appointed a Muslim Supreme Court justice, Judge Khaled Kabub.²

While disparities exist between Jewish Israelis and Muslim Israelis, "it should be noted that the gap between the immigrant Muslim minority and majority society in Western European countries is greater, in many respects (even for the second and third generations), than its equivalent in Israel."³ The Israeli Supreme Court has explicitly ruled that:

"[t]he principle of equality is binding on all of the country's public bodies... The State's resources, whether land, or money or other resources, belong to all citizens, and all citizens are entitled to enjoy them according to the principle of equality, without discrimination on the grounds of religion, race, sex or any other improper consideration... Discrimination on the basis of religion or national affiliation in the allocation of the country's resources is forbidden even if it is done indirectly, and, *a fortiori*, if it is done directly."⁴

It is worth noting, too, that in Israel a system of state-recognized religious courts is given jurisdiction over areas such as marital issues and religious leadership positions in their respective communities. In addition to the Jewish rabbinic courts, there are Islamic Sharia courts, Druze courts, and Christian courts for the various denominations.

Ethnic & National Groups

The categories of ethnic and national are frequently mixed and combined together, a result in part of the fact that "national" is not well defined in law. Virtually all those living under the PA

² *Muslim man, Mizrahi woman picked to serve as Supreme Court justices, both firsts*, Times of Israel, February 21, 2022, <https://www.timesofisrael.com/muslim-man-mizrahi-woman-picked-to-serve-as-supreme-court-justices-both-firsts/>.

³ Alexander Yakobson & Amnon Rubinstein, *ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS* (Routledge, 2010), p.114.

⁴ *Adallah et al v. Minister of Religious Affairs, et al.*, HCJ 1113/99.

and Hamas are ethnically Arabs. In Israel, the main ethnic minority is the Arabs, who make up approximately 21% of the population.⁵

Many conceive of “national” in this context as Israeli and Palestinian. While organizations like Amnesty International unilaterally declared the Arab citizens of Israel as “Palestinians,” polls generally show that Arabs in Israel generally don’t identify themselves as such. A 2020 poll found that 51% identified as “Israeli-Arab,” 23% identified as “Israeli,” and only 7% identified as “Palestinian.”⁶

As with religion, the Israeli Supreme Court has explicitly held that discrimination on the grounds of national affiliation is prohibited in the allocation of state resources.⁷ As explained by Amnon Rubinstein and Alexander Yakobson, “[w]hen it comes to language, education and culture, the collective rights of Israel’s Arab minority are, as we shall presently see, wide and far-reaching by international standards.”⁸ A notable example of the protection of the Arab minority in Israel is when the Israeli Supreme Court held that “Jewish towns” could not exclude Arabs.⁹ Importantly, it had previously ruled that Jews could be excluded from “Arab towns,” in what could be viewed as a form of affirmative action and the state’s interest in helping Bedouin Arabs settle in towns and villages with access to basic services.¹⁰

While disparities do exist, as they do in any democracy with a sizable minority, it is worth noting that the same 2020 poll also found that, when asked if they felt like a real Israeli, 65% of the Arab citizens of Israel “agreed completely” and 33% “somewhat agreed.” Arab parties freely participate in the Israeli Knesset, subject to the same rules as Jewish parties. There have been Arab members of the Supreme Court, such as Justice Salim Joubran who, in addition to being appointed vice president of the Supreme Court, famously rejected the appeal of former Israeli President Moshe Katsav, resulting in a seven-year prison sentence for the latter.¹¹

Special Situation of the Arab Residents of East Jerusalem

A unique situation exists in the city of Jerusalem. In 1948, when the Jordanian army, alongside several other Arab armies, invaded the nascent State of Israel, it captured the part of Jerusalem generally referred to as “East Jerusalem,” and in the process ethnically cleansed that portion of Jerusalem of all of its Jewish residents. In 1967 Jordan once again joined a war of aggression against the State of Israel, during which the latter successfully fended off the Arab armies and, in the process, took control of the entire city of Jerusalem.

Israel, which viewed the city of Jerusalem as Israeli territory, extended its sovereignty over East Jerusalem. Instead of ethnically cleansing East Jerusalem of its residents, like the Jordanians

⁵ *Population of Israel on the Eve of 2021*, Israel Central Bureau of Statistics, December 31, 2020, <https://www.cbs.gov.il/en/mediarelease/Pages/2020/Population-of-Israel-on-the-Eve-of-2021.aspx>.

⁶ Idan Zonshine, *Only 7% of Israeli Arabs define themselves as ‘Palestinian’*, Jerusalem Post, April 21, 2020, <https://www.jpost.com/arab-israeli-conflict/only-7-percent-of-israeli-arabs-define-themselves-as-palestinian-625285>.

⁷ *Adallah et al v. Minister of Religious Affairs, et al.*, HCJ 1113/99.

⁸ Alexander Yakobson & Amnon Rubinstein, *ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS* (Routledge, 2010), p.114.

⁹ *Ka’adan v. Israel Lands Administration*, HCJ 6698/95.

¹⁰ *Avitan v. Israel Lands Administration*, HCJ 528/88.

¹¹ *Arab judge appointed vice president of Supreme Court*, Times of Israel, June 12, 2017, <https://www.timesofisrael.com/arab-judge-appointed-as-vice-president-of-supreme-court/>.

did 19 years earlier with its Jewish residents, Israel offered Israeli citizenship for the residents on condition they give up their Jordanian citizenship (given that Jordan was an enemy state at the time). Those who did not take Israeli citizenship were able to remain under the status of permanent residents, under which they are able to vote in municipal elections, receive social security compensation, public health fund membership, and given the right to work. In the past, many chose to retain their Jordanian citizenship for a variety of political and practical reasons (e.g., an Israeli passport would have prevented them from being able to travel through much of the Arab world). However, increasing numbers are applying for and receiving Israeli citizenship.

“Jewish Israeli Supremacy”

It is unfortunately necessary to begin by pointing out the tastelessness of the use of the phrase “Jewish Israeli supremacy.” “Jewish supremacy” is a slur frequently wielded by notorious antisemitic figures in the United States, such as the so-called “[Goyim Defense League](#)” and the prominent American white supremacist David Duke, who once wrote “Jewish Supremacism: My Awakening to the Jewish Question.” As articulated by the distinguished Canadian professor Gil Troy, this slur has its roots in Nazi propaganda, such as a Hitler Youth proclamation of “Hitler breaks Jewish supremacy with his movement.”¹² This is not to suggest the Authors intentionally deployed an antisemitic trope. However, it is hoped that the Authors will reflect upon their word choices and corresponding beliefs in the future, particularly in light of the Authors’ decision to also cite a notorious antisemite, Richard Falk.¹³

The Distinctions Are Based on Citizenship, Not Race

The Submission repeatedly, and erroneously, claims or implies that various Israeli laws make racial distinctions, when in fact the distinctions referenced are between Israeli citizens and non-citizens. This is not a trivial point. As mentioned, Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), which the Authors reference repeatedly, explicitly excludes “distinctions, exclusions, restrictions or preferences made...between citizens and non-citizens” from its prohibition against racial discrimination.¹⁴ Even beyond ICERD, it is a common sense understanding that distinctions based on citizenship are not only allowable, but a necessary corollary of our international system of sovereign states.

The repeated claims¹⁵ that certain Israeli laws make a distinction on the basis of whether one is Jewish or not is egregiously and irresponsibly false, and it appears that the Authors know it’s

¹² Gil Troy, ‘Jewish Supremacy’: A Nazi Slur Goes Woke, Newsweek, June 25, 20212, <https://www.newsweek.com/jewish-supremacy-nazi-slur-goes-woke-opinion-1603865>.

¹³ Footnote 31 of the Submission. Falk is known for, among other bigoted acts, [accusing](#) “the organized Jewish community” of being collectively responsible for war crimes” and providing the cover [endorsement](#) for a book that asks whether “Hitler might have been right after all.”

¹⁴ ICERD, art. 1(2).

¹⁵ See, e.g.: “Israel’s control over the occupied West Bank is codified and enforced through a complex legal regime, which extends distinct and unequal sets of legal rights to Jewish Israelis and Palestinians, respectively” (p.2); “This regime functions in purpose and effect to create a two-tiered structure of rights and protections, systematically privileging Jewish Israeli settlers and discriminating against Palestinians” (p.2); “A bifurcated system of citizenship and a dual regime of legal rights has been applied since that time, granting superior citizenship and legal status to Jewish Israeli settlers over Palestinian” (p.8); “While military orders ostensibly apply territorially to all persons in the occupied West Bank, Israeli policy has consistently applied military orders selectively to Palestinians, while extending domestic Israeli law to Jewish Israeli settlers” (p.9).

false. In the same Submission, they contradict their own claim and quietly admit that the distinctions come down to citizenship, while still trying to paint this as a question of “Jewish supremacism”:

“Jewish Israelis who are settled by the State of Israel in the occupied West Bank are afforded full **rights and protections guaranteed to citizens** under domestic Israeli law, regardless of whether they reside within Israeli borders or in settlements within the West Bank **These citizenship rights have not been extended to Palestinians** in the West Bank...”¹⁶ (Emphasis added)

It should immediately be pointed out that attacking Israel for not granting citizenship to Palestinians is the height of absurdity. As Yoram Dinstein has written, “the government of an occupied territory is military *per definitionem*,” and even where a civil administration of some form may be created, it serves “only as a subdivision of the military government, and not as a separate body.”¹⁷ An attempt by Israel to fully apply its sovereignty over the entire West Bank and unilaterally deem Palestinians as citizens of Israel would undoubtedly be deemed by the Authors and many activists as an “illegal annexation,” a violation of “international law,” and as a denial of the right of Palestinians to self-determination. Indeed, if one believes Israel is an “occupying power” over the West Bank, then such an act would be contrary to the Fourth Geneva Convention (“GCIV”), which explicitly provides that unilateral changes such as annexation do not change the status of the territories.¹⁸ Whether this actually is a situation of occupation and such an act of extending sovereignty would be illegal or not is aside from the point. One cannot attack Israel for not annexing and granting citizenship to Palestinians while simultaneously holding a view that such an act would be a flagrant violation.

Regardless, the Authors’ repeated references to “Jewish Israelis” in these contexts serves to dishonestly distract from the lawful distinctions made on the basis of citizenship and falsely imply that “Jewish” has any legal relevance in the contexts raised by the Authors. Jewish or otherwise, all Israeli citizens would be treated the same in the identified contexts. To illustrate, when the Authors claim that “Israeli policy has consistently applied military orders selectively to Palestinians, while extending domestic Israeli law to Jewish Israeli settlers,” they are lying by omission. Domestic Israeli law applies to *all* Israeli citizens, Jewish or otherwise, in the West Bank.¹⁹ There is simply nothing in the relevant laws applying domestic Israeli law to Israeli citizens in the West Bank that says it only applies to Jewish Israelis. As referenced above, equality is enshrined in Israeli law, and the state is not allowed to discriminate against any of its citizens, Arab or otherwise. For example, when it comes to allocating state land, the Israeli

¹⁶ Submission, p.8.

¹⁷ Yoram Dinstein, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION, 2nd Ed. (Cambridge University Press, 2019), p.65.

¹⁸ GCIV, art.47 (“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”).

¹⁹ It’s also worth noting that, as the territories are under military jurisdiction, even Israeli citizens are subject to the jurisdiction of the military commander in the West Bank, too.

Supreme Court has explicitly ruled that there can be no discrimination on the basis of religion or nationality.²⁰

The Nation-State Law

The only law which the Authors reference that has anything to say about Jews is Israel's *Nation-State Law*. Unfortunately, the Authors rely on a repeatedly debunked narrative to twist the actual text and meaning of the law. The Submission claims:

“The explicit objective of ensuring Jewish Israeli character and domination across Israel and the Occupied Palestinian Territories was affirmed in the 2018 Jewish Nation-State Law, which enshrines the character of Israel as an ‘nation-state of the Jewish people’ and constitutionally entrenches the privileging of one group of people over another. The law blurs the line between the ‘State of Israel’ and the ‘land of Israel,’ which is broadly understood to include the Occupied Palestinian Territories, and explicitly states that the exercise of the right to self-determination within the State of Israel is ‘unique to the Jewish people.’”²¹

IHRC and Addameer attempt to circumvent the fact this is an Israeli law, unrelated to the West Bank where Israel has not fully extended Israeli law, jurisdiction, and administration, by claiming the *Nation-State Law* “blurs the line between the ‘State of Israel’ and the ‘land of Israel.’”²² The Authors do not elaborate, but it appears they are referencing the very first sentence of the law, which reads: “The Land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established.”²³ Everywhere else in the law, reference is made exclusively to the State of Israel, not the “land of Israel” (e.g., “The State shall be open for Jewish immigration...”; “The Hebrew calendar is the official calendar of the State”; “The State views the development of Jewish settlement as a national value”). It is thus unclear how this acknowledgement that the State of Israel was established inside the area of the land of Israel blurs the lines between the two.

Furthermore, the Israeli Supreme Court has noted that the *Nation-State Law* is declaratory and has no effect on the rights of any Israeli citizen, and in any event must be interpreted consistently with the principle of equality, which directly contradicts the Submission's assertion that it “privileges” on group over another. As articulated by Chief Justice Hayut in the Supreme Court's July 8, 2021 ruling on the Nation-State Law:

“The Nation-State Basic Law does not violate the state of Israel's nature as a democratic state. It does not give preferential status to the Jewish identity of the state over its democratic identity. It does not detract from the principle of equality's status in our legal system. Its practical implications do not lead to a radical change in Israel's constitutional

²⁰ *Ka'adan v. Israel Lands Administration*, HCJ 6698/95.

²¹ Submission, p.21.

²² Submission, p.21.

²³ *Basic Law: Israel – The Nation State of the Jewish People*, Israeli Knesset, adopted July 19, 2018 (unofficial English translation available at: <https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawNationState.pdf>).

system. It does not contradict international law and it is not intended to apply outside the borders of the state of Israel.”²⁴

The Authors are also not being forthright about the language of the law, which actually reads: “[t]he exercise of the right to *national* self-determination in the State of Israel is unique to the Jewish People” (emphasis added). The omission of the word “national” is significant because it is directly referencing one of the two commonly supported forms of self-determination. External self-determination, also known as national self-determination, which Israel’s *Nation-State Law* is about, deals with the national aspirations of a people to a sovereign state. Internal self-determination, on the other hand, involves the development of a people’s identity, culture, and rights within existing borders.

Of course, while a national group may exercise its right to national self-determination in the form of a nation-state, minority rights must be protected, and they too must be given their right to self-determination in its internal form. Indeed, the Mandate for Palestine provided for this when it expressed its favor for the “establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine...” As with every democracy with a sizable minority, Israel is not perfect, and inequalities and discrimination exist in both the public and private spheres. As Zilbershats has correctly noted, however, “[i]t is manifestly clear that apartheid is not just inequality.”²⁵ Furthermore, as the Israeli Supreme Court has repeatedly asserted, Israel’s Arabs have equal rights under Israeli law. Yakobson and Rubinstein further point out that: “When it comes to language, education and culture, the collective rights of Israel’s Arab minority are...wide and far-reaching by international standards.”²⁶ On the other hand, in addition to threatening the death penalty for selling land to Jews, PA leader Mahmoud Abbas has gone on record to declare that “[i]n a final resolution, we would not see the presence of a single Israeli – civilian or soldier – on our lands.”²⁷

It is important to also note the double standard at play. That Israel is the nation-state of the Jewish people is a completely unremarkable statement. Such nationhood provisions are found in many constitutions, such as Ireland, Finland, Greece, Poland, Slovenia, and Germany.²⁸ In fact, that was what the *Mandate for Palestine*, adopted by the League of Nations and given continued legal effect under the *Charter of the United Nations*, sought to implement, the “establishment in Palestine of a national home for the Jewish people.”²⁹ In 1947, when the Palestinian Arabs rejected the UN Partition Plan, it was a rejection of the creation of

²⁴ *Summary of Israeli Supreme Court Ruling on Nation-State Law*, The International Legal Forum, June 2021, https://www.ilfn.org/files/ugd/3445b6_7eff861f948b48ca8517408081409296.pdf.

²⁵ Yaffa Zilbershats, *Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds*, 24 EJIL 915, 922 (2013).

²⁶ Alexander Yakobson & Amnon Rubinstein, *ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS* (Routledge, 2010), p.119.

²⁷ Noah Browning, *Abbas wants 'not a single Israeli' in future Palestinian state*, Reuters, July 29, 2013, <https://www.reuters.com/article/us-palestinians-israel-abbas/abbas-wants-not-a-single-israeli-in-future-palestinian-state-idUSBRE96T00920130730>.

²⁸ See generally, Alexander Yakobson & Amnon Rubinstein, *ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS* (Routledge, 2010), p.97-140; Eugene Kontorovich, *A Comparative Constitutional Perspective on Israel's Nation-State Law*, 25 *Israel Studies* 137 (Fall 2020).

²⁹ The Palestine Mandate, League of Nations, July 24, 1922, available at https://avalon.law.yale.edu/20th_century/palmanda.asp. See also *Charter of the United Nations*, United Nations, June 26, 1945, available at <https://www.un.org/en/about-us/un-charter/full-text>, Article 80(1).

“independent Arab and Jewish States” in which both the Palestinian Arab and Palestinian Jewry respectively could have exercised their national self-determination in Mandate Palestine.³⁰

In short, the Authors are suggesting that a declaratory law, which recognizes the Jewish people’s right to self-determination in their ancient homeland just like the League of Nations and United Nations did, and which is embodied in language similar to that found in constitutions around the world, is in fact an act of apartheid. While the rights of minorities must be protected, the Authors’ false assertions of distinctions based on being “Jewish Israeli” or not are easily disprovable. Instead, the record demonstrates that Israel, while imperfect, has done a comparatively good job compared to Western democracies in working to integrate Israel’s Arab citizens and reduce the disparities between them and Israel’s Jewish citizens.

Israel’s Security Threats

One of the most significant omissions in the Submission is that of the context of conflict and the security threats faced by Israel. When questions of intent are important for a finding of “apartheid,” the failure to address and acknowledge the security situation is the epitome of the English idiom of ignoring the elephant in the room. The seventy-plus years of multiple invasions by surrounding Arab armies, along with the unending threat of terrorism, is directly relevant to understanding the intent behind many of Israel’s laws and policies. Indeed, even international human rights treaties acknowledge that legitimate security needs can justify restrictions and derogations of human rights law.³¹

While a full recounting of the conflict and the security threats wouldn’t be necessary, it goes without saying that the Authors’ minimalist approach is woefully inadequate, addressing the security situation in just a single sentence:

“Notwithstanding Israel’s legitimate security interests, the scale and sweeping nature of the ongoing suppression of Palestinian rights fails any justifiable balancing test between the protection of human rights and underlying security needs.”

This conclusion is reached without ever applying a balancing test, or even identifying what that balancing test would involve. That Israel’s security measures fail a balancing test is simply stated as fact. Importantly, even assuming Israel’s security measures are disproportionate, going too far in favor of security at the expense of the human rights of Palestinians, this would not, in and of itself, establish the existence of an apartheid regime. Even in the words of the submission itself, such acts must be “committed systematically for the purpose of establishing or maintaining domination by one racial group over another” in order to amount to “apartheid.”³²

Yet nowhere in the submission itself do the Authors even attempt to argue the harm to human rights outweighs legitimate security concerns. The footnote for the quoted sentence goes only to two articles by organizations known to be hostile to Israel, one by Human Rights Watch

³⁰ A/RES/181(II) (adopted on November 29, 1947).

³¹ See, e.g., *International Covenant on Civil and Political Rights*, arts. 4, 12.

³² Submission, p.5 (citing article 2 of the Apartheid Convention).

("HRW")³³ and another by a Swedish non-governmental organization, Diakonia.³⁴ Neither article engages in a balancing test analysis, either. Nor do they even mention the word "**terrorism.**"

In effect, what the Submission is doing is trying to jam a square (the armed conflict) through a circle (a lens of discrimination). At no point is the existence of multiple terrorist organizations with long, bloody histories of attacks directed at civilians mentioned, let alone grappled with by the discrimination lens applied by the Authors. How does the scale of terror infrastructure, the scale of incitement, and the PA mechanisms inciting hatred and terrorism (such as pay-for-slay and others) affect the analysis? Which other means have been tried? Which failed, and why? Who else may be responsible? What have other nations done to successfully (or unsuccessfully) deal with similar degrees of terror threats? All this, and more, missing from the Submission.

It's a woefully inadequate, unserious, and incomplete analysis of the intent behind Israeli policies and laws. It even turns the question around and simply states, in a conclusory fashion, that the security measures are evidence themselves of an "intent to dominate." But, as one Israeli Supreme Court justice wrote in a [case](#) challenging a road closed to Palestinian traffic, "we must not put the cart before the horse: the terrorist attacks came first, and the closure of the road came later."

This is true of security measures like the security barrier. The suicide bombings came first, the security barrier came later. Between the start of the Second Intifada in September 2000 and December 2005, some 25,770 terrorist attacks were carried out, including 147 suicide bombings, killing over 1,000 Israelis.³⁵ This figure does not include many thousands of attacks that were, thankfully, foiled.

In just a single month, March of 2002, among many other attacks, [suicide bombings](#) occurred at a yeshiva in Jerusalem (killing 11), a café in Jerusalem (killing 11), a bus near Afula (killing 7), on King George Street in Jerusalem (killing 3), a Passover seder in Netanya (killing 30), a supermarket in Jerusalem (killing 2), a restaurant in Haifa (killing 16), and even a suicide bombing targeting an emergency medical center in Efrat (wounding 4).

After the month of "Bloody March" 2002, the Israeli government began planning the creation of a "Seamline Area" in April 2002 in order to "prevent the penetration of terrorists from the area of Judea and Samaria into Israel."³⁶ Two months later, on June 23, 2002, the Israeli government decided to build the security fence in the Seamline Area. Israel began construction of the first

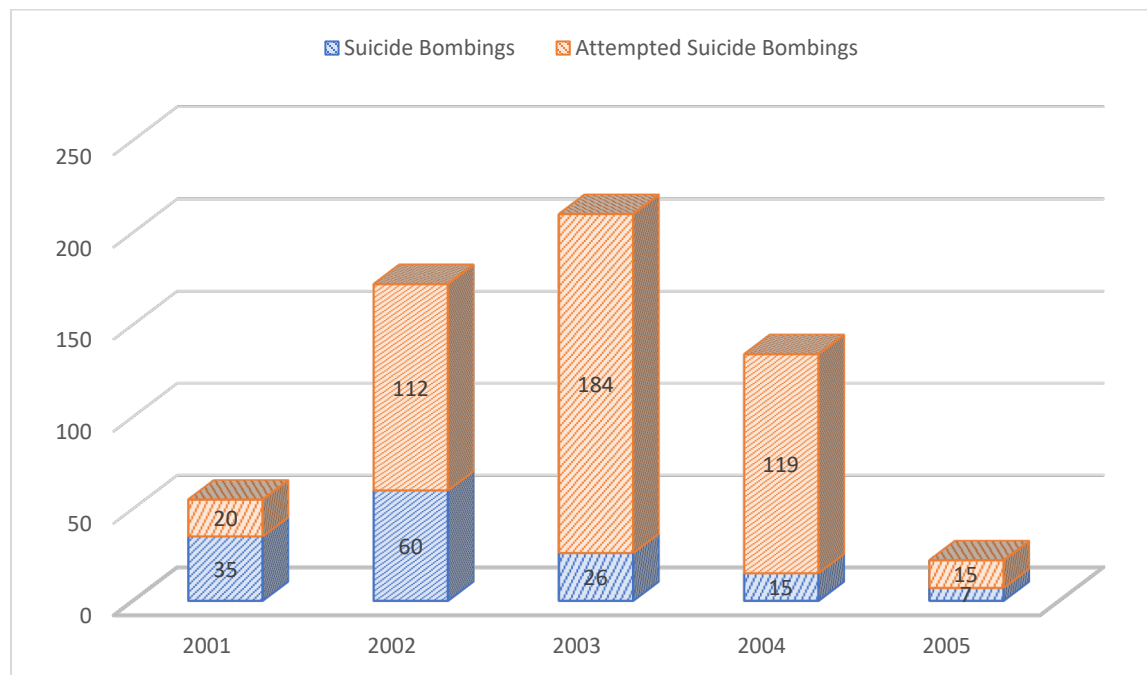
³³ Clive Baldwin, *Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law*, Human Rights Watch, July 9, 2021, <https://www.hrw.org/news/2021/07/09/human-rights-watch-responds-reflections-apartheid-and-persecution-international-law>.

³⁴ Dr. Miles Jackson, *Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law*, Diakonia, <https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/05/expert-opinion-apartheid-and-occupation.pdf>.

³⁵ *Suicide bombing terrorism during the current Israeli-Palestinian confrontation (September 2000 – December 2005)*, Intelligence and Terrorism Information Center, January 1, 2006, https://www.terrorism-info.org.il/Data/pdf/PDF_19279_2.pdf

³⁶ *Beit Sourik Village Council v. Government of Israel*, HCJ 2056/04 (unofficial English translation available at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Beit%20Sourik%20Village%20Council%20v.%20Government%20of%20Israel_0.pdf).

segment of the security barrier in July 2003, which had a dramatic effect in reducing such attacks, as demonstrated by the below graphic charting successfully carried out suicide bombings and foiled suicide bombings.



Source: *Suicide bombing terrorism during the current Israeli-Palestinian confrontation (September 2000 – December 2005)*, Intelligence and Terrorism Information Center, January 1, 2006, https://www.terrorism-info.org.il/Data/pdf/PDF_19279_2.pdf.

It has been argued, such as in the HRW report the Submission repeatedly cites, that instead of it being built for security purposes, the security barrier had the ulterior motive of seeking to carve out territory in the West Bank for future “annexation.” These claims fail to take into account the jurisprudence of the Israeli Supreme Court, which has explicitly ruled that “the military commander cannot order the construction of the separation fence if his reasons are political,” and that “[t]he separation fence cannot be motivated by a desire to ‘annex’ territories to the state of Israel.”³⁷ Instead, the government of Israel had to persuade the Court that the route was based on security considerations, and numerous successful cases brought by or on behalf of Palestinians led to alterations of the course of the security barrier in order to better protect human rights.³⁸ Further exposing the absurdity of ignoring context, the Israeli government simultaneously had to fend off internal criticism by those Israelis who fear the security barrier may one day become a border and cut off many of the Israeli settlements in the West Bank.

³⁷ *Beit Sourik Village Council*, HCJ 2056/04.

³⁸ Yaffa Zilbershats, *Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds*, 24 EJIL 915, 925 (2013) (citing *Zaharan Yunis Muhammad Mara'abe v. The Prime Minister of Israel*, HCJ 7957/04; *Morar, Yanun Village Council Head v. IDF Commander in Judaea and Samaria*, HCJ 9593/04; *Bir Naballah Local Council v. Government of Israel*, HCJ 4289/05; *Farres Ibrahim Nasser v. The Prime Minister of Israel*, HCJ 2645/04).

The same pattern fits for other security measures, such as road closures and checkpoints. As Richard Goldstone, the former South African judge who infamously chaired the UN's "Goldstone Commission" (the report of which he later retracted), wrote: "Road restrictions get more intrusive after violent attacks and are ameliorated when the threat is reduced."³⁹

This all gets to the heart of the matter. As law professor Yaffa Zilbershats wrote: "Israel's security concerns are uniquely complex... Israel is not being attacked by a state or by an army, nor do the attacks on it comply with humanitarian law."⁴⁰

Israel faced continuous terror threats from the day of its inception. From the Palestinian fedayeen attacks in the 1950s, to the hijackings and bombings of the 1960s and 1970s, the attacks from southern Lebanon in the 1980s, the intifadas in the 1990s and 2000s, and repeated barrages of thousands of terror rockets and constant threat of shooting, stabbing, and ramming attacks since then.⁴¹ These threats are made even more complex in light of the presence of Iranian proxies in Lebanon and Syria.

This is not to say that because Israel faces unparalleled security threats it has a free hand to repress human rights. But when an allegation as serious as that of "apartheid" is made, which requires an examination of intent, it is beyond intellectually dishonest to disregard any meaningful analysis of the security threats and how they play into the imposition of various security measures cited as evidence of "apartheid."

Peace Offers and Palestinian Rejectionism

Conflicts, by definition, involve more than one party. By ignoring the reality of conflict, the Authors failed to address another important reality that directly relates to questions of intent: that the Palestinians also have agency and that their words and actions have led to the current context as much as Israel's has.

The problem with the Submission's analysis is that it entirely ignores that Israel has repeatedly worked towards peace agreements, made unilateral gestures, and kept open the possibility for a two-state solution. The Jewish community of Mandate Palestine accepted the UN Partition Plan, while the Palestinian Arab community rejected it.⁴² The State of Israel refrained from annexing the West Bank and Gaza after the 1967 war. Meanwhile, Arab heads of state adopted the "three noes" in Khartoum, pledging "no peace with Israel, no recognition of Israel and no negotiations

³⁹ Richard J. Goldstone, *Israel and the Apartheid Slander*, New York Times, October 31, 2011, <https://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html>.

⁴⁰ Yaffa Zilbershats, *Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds*, 24 EJIL 915, 923 (2013).

⁴¹ See, e.g., *Wave of terror 2015-2021*, Israel Ministry of Foreign Affairs, October 19, 2021, <https://mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/wave-of-terror-october-2015.aspx>; *1948-1967: Major Terror Attacks*, Israel Ministry of Foreign Affairs, <https://embassies.gov.il/MFA/AboutIsrael/Maps/Pages/1948-1967-%20Major%20Terror%20Attacks.aspx>; *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles (Sept 1993)*, Israel Ministry of Foreign Affairs, <https://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Suicide+and+Other+Bombing+Attacks+in+Israel+Si+nce>.

⁴² See, e.g., Benny Morris, *1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR* (Yale University Press, 2008), p.50.

with Israel,”⁴³ which the Palestine Liberation Organization (“PLO”) referenced positively in its statement rejecting UN Security Council *resolution 242 (1967)*.⁴⁴ When, after the Yom Kippur War, Israel and Egypt signed an agreement in 1979, the Sinai Peninsula was returned to Egypt in exchange for peace. PLO leader Yasser Arafat, meanwhile, was declaring: “Let [U.S. President] Carter realize he will pay dearly for his signature” on the Camp David Accords.⁴⁵

When Israel negotiated at Camp David and agreed to a Palestinian state largely tracking 1967 armistice lines, the PLO infamously rejected the deal and launched a years-long wave of terrorism.⁴⁶ Nonetheless, the attempts continued. Israel offered PA leader Mahmoud Abbas an opening proposal that would have given the Palestinians 93.7% of the West Bank, Israeli territory to make up 5.8% of the remainder, and a corridor between Gaza and the West Bank to account for the remaining 0.5%.⁴⁷ Abbas rejected it and refused to discuss it any further or make a counteroffer.⁴⁸ The former chief Palestinian negotiator, Saeb Erekat, has even bragged about these rejections on Al-Jazeera, declaring:

“On July 23, 2000, in his meeting with President Arafat in Camp David, President Clinton said: ‘You will be the first president of a Palestinian state, within the 1967 borders – give or take, considering the land swap – and East Jerusalem will be the capital of the Palestinian state, but we want you, as a religious man, to acknowledge that the Temple of Solomon is located underneath the Haram Al-Sharif.’ Yasser Arafat said to Clinton defiantly: ‘I will not be a traitor. Someone will come to liberate it after 10, 50, or 100 years. Jerusalem will be nothing but the capital of the Palestinian state, and there is nothing underneath or above the Haram Al-Sharif except for Allah.’...

In November 2008...Olmert, who talked today about his proposal to Abu Mazen, offered the 1967 borders, but said: ‘We will take 6.5% of the West Bank, and give in return 5.8% from the 1948 lands, and the 0.7% will constitute the safe passage, and East Jerusalem will be the capital, but there is a problem with the Haram and with what they called the Holy Basin.’ Abu Mazen too answered with defiance, saying: ‘I am not in a marketplace or a bazaar. I came to demarcate the borders of Palestine – the June 4, 1967 borders – without detracting a single inch, and without detracting a single stone from Jerusalem, or

⁴³ *The Khartoum Resolutions*, Israel Ministry of Foreign Affairs,

<https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20khartoum%20resolutions.aspx>.

⁴⁴ “The resolution completely undermines the foundations of the principles announced by the Khartoum Summit conference held after the aggression.” *Statement Issued by the PLO Rejecting UN Resolution 242*, International Documents on Palestine, 1967 (copy available online at <https://israeled.org/wp-content/uploads/2013/01/1967.11.23-PLO-Rejection-UNSC-242.pdf>).

⁴⁵ Harris O. Schoenberg, *A MANDATE FOR TERROR: THE UNITED NATIONS AND THE PLO* (Shapolsky Publishers 1989), p.131.

⁴⁶ Jamie Weinstein, *Yasser Arafat’s widow admits Palestinian terror campaign in 2000 was premeditated*, Daily Caller, 28 Dec. 2012, <http://dailycaller.com/2012/12/28/yasser-arafats-widow-admits-palestinian-terror-campaign-in-2000-was-premeditated/>

⁴⁷ Mark Lavie, *Missed Opportunity: Olmert, Abbas, and Media Bias*, Tablet Magazine, November 23, 2015, <https://www.tabletmag.com/sections/news/articles/missed-opportunity-olmert-abbas-and-media-bias>.

⁴⁸ Mark Lavie, *Missed Opportunity: Olmert, Abbas, and Media Bias*, Tablet Magazine, November 23, 2015, <https://www.tabletmag.com/sections/news/articles/missed-opportunity-olmert-abbas-and-media-bias>.

from the holy Christian and Muslim places. This is why the Palestinian negotiators did not sign...”⁴⁹

Once one acknowledges that Israel offered Palestinians statehood on multiple occasions in the last couple of decades, tracking the internationally supported two-state formula, it becomes difficult to argue that Israel wants to “dominate” the Palestinians. Instead, the picture begins to look more like the rejectionism of Palestinian leadership has led to the current situation in which Israel continues to apply the humanitarian provisions of the laws of occupation pending a final status deal once Palestinian leadership becomes willing to accept the existence of a Jewish state.

It is not necessary to relitigate the entire peace process, but it is highly relevant that Israel has repeatedly engaged its neighbors and the Palestinians, offering and trading land for peace, even while willing to make concessions that were and still are considered very painful to many Israelis, as well as very risky from a security standpoint. Nonetheless, Israel has persisted in accepting the continued application of the Oslo Accords.

Inhumane Acts

Both the *Rome Statute* and the *Apartheid Convention* define “apartheid” as involving “inhumane acts” (or “inhuman acts”). The Submission points to a number of alleged inhumane acts in this regard, such as detentions, criminalization of Palestinian “civil society,” and the alleged failure of Israeli authorities to protect Palestinians from Israeli settler violence. In each of these cases, however, the claims are either unsubstantiated, based on false facts, or are made without reference to important context.

Alleged Failure to Protect Palestinians from Settler Violence

The Submission claims that “Israeli practices of tolerating, and in certain cases, enabling and encouraging violent attacks by Israeli Jewish settlers on Palestinian residents in the West Bank constitute another basis for a finding of an inhumane act...”

Unfortunately, violence in Judea and Samaria is an all too frequent reality. However, from a statistical point of view, violence attacks perpetrated by Palestinians against Israelis far outnumber attacks perpetrated by Israeli settlers against Palestinians. The Submission cites the organization Yesh Din to claim that there were “1,293 reported settler violence cases between 2009-2019.”⁵⁰ Importantly, the Authors are overstating the Yesh Din figures, an organization already known for being hyper-critical of Israel. Those alleged 1,293 cases were committed between **2005** and 2019, not 2009 and 2019.⁵¹

⁴⁹ *Chief Palestinian Negotiator Saeb Erekat: Abu Mazen Rejected the Israeli Proposal in Annapolis Like Arafat Rejected the Camp David 2000 Proposal*, Middle East Media Research Institute, March 27, 2009, <https://www.memri.org/tv/chief-palestinian-negotiator-saeb-erekat-abu-mazen-rejected-israeli-proposal-annapolis-arafat>.

⁵⁰ Submission, p.18.

⁵¹ *Law Enforcement on Israeli Civilians in the West Bank-Yesh Din Figures 2005-2019*, Yesh Din, December 2019, <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/%D7%93%D7%A6%D7%9E%D7%91%D7%A8+2019+%D7%93%D7%A3+%D7%A0%D7%AA%D7%95%D7%A0%D7%99%D7%9D+%D7%97%D7%95%D7%A7/%D7%90%D7%A0%D7%92%D7%9C%D7%99%D7%AA/Law+Enforcement+Data+Sheet+12.2019+ENG.pdf>.

By comparison, according to data from the Israel Defense Forces, by mid-December 2021 there had already been 6,633 attacks against Israelis in Judea and Samaria that year alone, including 61 shootings, 18 stabbings, 1,022 fire bombings, and 5,532 stone throwing attacks.⁵² The comparison gets even more disproportionate when taking into account that only 36% (~465) of those 1,293 cases identified by Yesh Din are classified by them as “violent offenses.” In other words, whereas IDF figures indicate at least 6,633 violent attacks against Israelis in one year, using Yesh Din figures, there are only approximately 33 violent Israeli settler attacks per year on average. Put another way, there are more than 200 times more violent attacks against Israelis in the West Bank than there are against Palestinians, and yet the Authors are arguing the attacks against Palestinians is the problem, and evidences apartheid.

The Submission attempts to portray Israeli forces as lax towards Israeli settler violence. However, according to a January 2022 report on Palestinian attacks by the Research Department of Israel’s Defense & Security Forum (“IDSF”), during the first half of 2020, “only 21% of the stone throwing incidents and 33% of the Molotov cocktail incidents ended with an indictment.” While IHRC and Addameer note that stone throwing is “a crime that is punishable under military law by up to 20 years in prison,” according to IDSF data, the sentences are on average “95% shorter than the duration of the sentences stipulated by law.” Notably, while some attempt to promote a narrative of stone throwing as being harmless, these attacks are often directed at civilians and can cause serious injury and deaths. Throwing a rock aimed at hitting a person, or people in a moving vehicle is hard to explain as anything but intent to cause serious harm or death. Notable examples include a 2011 case an Israeli father and his infant son were killed in a stone throwing incident, as well as a 2019 case in which an Israeli was indicted for manslaughter after the stone throwing death of a Palestinian woman in the West Bank.

Israeli violence towards Palestinians, although a relatively rare occasion as showed even according to the Yesh Din data, is faced with a severe reaction by both Israeli society and Israeli authorities. Any act of violence by an Israeli is condemned largely by the Israeli media, government and vast majority of the public. Israelis are also, when the circumstances justify the measure, being placed under administrative detention. Such an order was just recently signed against a 21-year-old Israeli.⁵³

Under the law of occupation, an occupying power must not tolerate violence by third parties against the inhabitants of an occupied territory.⁵⁴ However, as is the nature of conflict, violence will occur, and efforts to prevent and mitigate such violence will inevitably be imperfect. To suggest that this relatively low frequency of “reported settler violence cases” evidences an inhumane act would be to water down the concept of the crime. Consider, for example, the

⁵² Aryeh Savir, *2021: 6,633 Terror Attacks in Judea and Samaria, An Average of 18 a Day*, TPS, December 29, 2021, <https://tps.co.il/articles/2021-6633-terror-attacks-in-judea-and-samaria-an-average-of-18-a-day/>.

⁵³ Josh Breiner, *Israeli Settler Suspected of Terrorist Activities to Be Placed in Administrative Detention*, March 11, 2022, <https://www.haaretz.com/israel-news/.premium-settler-suspected-of-terrorist-activities-to-be-placed-in-administrative-detention-1.10668707>

⁵⁴ Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION*, 2nd Ed. (Cambridge University Press, 2019), p.102.

gravity requirement at the ICC. In the *Lubanga* arrest warrant decision, the Chamber noted that “the relevant conduct must present particular features which render it especially grave.”⁵⁵

On a basic moral level, too, it is curious why the Authors would place so much emphasis on what amounts, at the most, a few dozen attacks a year by Israeli settlers while failing to address the context of several *thousand* attacks every year against Israelis in the same territory. Israel also has an obligation to protect its own citizens, after all.

Military vs. Civil Administration

A crucial issue, left virtually unaddressed by the Authors, has to do with the actual administration of the territories. While the laws of occupation that Israel voluntarily applies to the West Bank dictate the existence of a military administration over the territories, much of the civil administration, and even some security administration, has devolved to the Palestinian Authority. This is a result of the Oslo Accords⁵⁶ between the State of Israel and the Palestine Liberation Organization, overseen and widely supported by the international community.

Israeli Military Proclamation No. 7,⁵⁷ issued by the Military Commander, saw the transfer of a wide array of powers and responsibilities to the Palestinian Authority pursuant to the Oslo Accords. The agreed-upon Accords created three “areas” in the West Bank, including:

- Area A: Where the Palestinians “will have full responsibility for internal security and public order, as well as full responsibility for civil affairs.”⁵⁸
- Area B: Comprising some 68% of the Palestinian population, Area B is where Palestinians have been granted “full civil authority.” The Palestinians are also charged with maintaining public order, while Israel will have “overriding security authority to safeguard its citizens and to combat terrorism.”⁵⁹
- Area C: Comprising unpopulated areas, areas of strategic importance, and Israeli settlements, Area C is where Israel retains “full responsibility for security and public order.” The Palestinians, however, are granted all those civil responsibilities over themselves that are not related to territory, such as economics, health, and education.⁶⁰

Area C is unique in the sense that it comprises of the areas where Israeli settlers live in (as well as several hundred thousand Palestinians). Certain Israeli laws, which permit personal jurisdiction, are applied to Israeli citizens in Area C. Notably, the same is true for Palestinian law and its application to Palestinians in Area C (with the exceptions relating to territory and security

⁵⁵ *Prosecutor v. Lubanga* (ICC-01/04-01/06-8-US-Corr) Pre-Trial Chamber I, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 (10 February 2006), para.46.

⁵⁶ The “Oslo Accords” refers generally to the set of agreements concluded between 1993 and 2005, including the 1993 Declaration of Principles on Interim Self-Government Arrangements, the 1994 Agreement on the Gaza Strip and Jericho Area, the 1994 Agreement on Preparatory Powers and Responsibilities, the 1995 Interim Agreement on the West Bank and the Gaza Strip, the 1997 Protocol Concerning the Redeployment in Hebron, the 1998 Wye River Memorandum, the 1999 Sharm El-Sheikh Memorandum, and the 2005 Agreed Documents on Movement and Access From and To Gaza.

⁵⁷ *Israeli Military Proclamation Number 7: The Implementation of the Interim Agreement*, November 23, 1995, available at https://hamoked.org/files/2017/1133_eng.pdf.

⁵⁸ *The Israeli-Palestinian Interim Agreement - Main Points*, Israel Ministry of Foreign Affairs, September 28, 1995, <https://www.gov.il/en/Departments/General/the-israeli-palestinian-interim-agreement-main-points>.

⁵⁹ *Id.*

⁶⁰ *Id.*

noted above). Other Israel laws, such as those that require territorial jurisdiction, do not apply since the area it is not officially Israeli territory. Instead, the Military Commander extends laws, or sign warrants, that provide the legal framework for those living in an area that is under full Israeli controlled, but not an official part of the State of Israel. Consequently, the suggestion by the Authors that military orders are applied selectively to Palestinians is simply not true.

Furthermore, as discussed above, these Israeli and military laws apply equally to all Israeli citizens in Area C. Whether the 600 some Arab citizens of Israel residing in Ariel, or the approximately 70 Arab citizens of Israel in Ma'ale Adummim, they are treated exactly the same as their Jewish neighbors.⁶¹

The situation is imperfect, but it is a result of decades of conflict, the mutually agreed to Oslo Accords, and the repeated Palestinian rejection (and failure to provide counteroffers) of offers of statehood for the Palestinians. Until the Palestinians are willing to accept a realistic two-state solution, Israel is effectively obligated to continue its military administration of the territories. The alternative, of course, would be annexation, which would fundamentally contravene the internationally accepted parameters for a final status deal and, for those who view the territories as “occupied,” amount to an unlawful annexation under international law.

A few particular features and realities of the administration of the West Bank, which are addressed by the authors, are detailed below.

Military Courts

The Authors have attempted to paint a picture as though the existence of military courts are themselves evidence of apartheid, falsely implying that they are illegitimate and improper. Under international law and the “occupation” paradigm, Israel is required to “restore, and ensure, as far as possible, public order and safety” in the West Bank (Hague Convention IV respecting the Laws and Customs of War on Land, art. 43). In order to adhere to this requirement, international law provides that Israel establish military courts (GCIV, art. 66).

However, under the Oslo Accords addressed above, Israel retains only limited criminal jurisdiction over the Palestinians in the West Bank. Most criminal offenses, particularly in Areas A and B, come under the jurisdiction of the Palestinian Authority. Only residual offenses, such as those relating to terror-related violence, are handled by the military courts.

The standards employed by Israeli military courts meet and even exceed criminal due process standards in Western democracies, and the procedural rules are very similar to those employed in the Israeli criminal justice system.⁶²

Below are a number of misleading and false statements found in the Submission that about the military court system.

⁶¹ Israel Central Bureau of Statistics, <https://www.cbs.gov.il/en/> (accessed March 30, 2022).

⁶² *Penal Code in the Judea and Samaria Region*, 5th Edition, available at https://www.idf.il/media/30zd1w0v/%D7%90%D7%95%D7%92%D7%93%D7%9F-%D7%94%D7%97%D7%A7%D7%99%D7%A7%D7%94-%D7%94%D7%A4%D7%9C%D7%99%D7%9C%D7%99%D7%AA-%D7%9E%D7%94%D7%93%D7%95%D7%A8%D7%94-%D7%97%D7%9E%D7%99%D7%A9%D7%99%D7%AA_compressed.pdf.

- *Palestinians are tried as adults in Israeli military courts starting at the of age 16, while the Israeli civilian justice system sets the age of majority at 18*

Article 136 of the Penal Code defines a "minor" as a person who has yet to reach the age of 18, the same as in the Israeli justice system. It also provides for juvenile military courts, and details a variety of clauses defining procedures for minors.

- *Military courts consistently fail to provide professionally trained interpreters*

Article 116 determines that the court must appoint a translator to any defendant that doesn't speak Hebrew. The article also states that the parties have a legal right to object to the translator and demand its replacement.

- *Military courts consistently fail to provide... legal documentation attached to the case, including the charges against the defendant.*

Article 116 states that charges against the defendant must be translated to Arabic. The defendant will not plead to charges until after he has been provided with the translation. Any evidence submitted to the court in a language unknown to the defendant will also be translated by the translator.

- *Palestinian detainees and their lawyers are routinely denied access by the courts to key case documents, including evidence used against the detainee.*

Article 86 dictates that the rules of evidence followed by the military courts are the same as those in the Israeli criminal justice system.

Finally, it is also worth noting that while international law does not require the creation of an appeals court, such a court has existed in the West Bank since 1989. Decisions of the Court of First Instance are appealable by right as regards decisions relating to detention, convictions, and sentencing.

Conviction Rates

One of the Submission's claims is that "the annual conviction rate of Palestinians in Israeli military courts has exceeded 99%," which, it is argued, is evidence of inhumane acts.

This is highly misleading. Israeli civilian courts within the "Green Line" also have a conviction rate in excess of 99%.⁶³ In the Israeli justice system, whether civil or military, criminal cases are investigated extensively before charges are laid and only pursued where the prosecution is certain of conviction.

Conviction rates in criminal courts are often high, particularly if the prosecution is efficient and only proceeds with watertight cases, since many defendants plead guilty. Japan has had a conviction rate in excess of 99.8% in recent years.⁶⁴ US Federal Courts had a conviction rate of 83% in 2017-2018⁶⁵ - but only 2% of the cases went to trial. Even in England and Wales, where

⁶³ <https://lawinIsrael.wordpress.com/2013/05/13/why-is-the-conviction-rate-in-criminal-courts-in-israel-so-very-high/>; http://weblaw.haifa.ac.il/he/Faculty/GazalAyal/Publications/Oren_Gazal-Ayal-Acq.pdf

⁶⁴ <http://hokusyo1.moj.go.jp/en/65/nfm/mokuji.html> Part 2, Chapter 3, Section 1, Table 2-3-1-1

⁶⁵ <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>

the Crown Prosecution Service is frequently criticised for incompetence,⁶⁶ the conviction rate is 82.3% in magistrates court and 79.1% in crown courts between 2013 and 2021.⁶⁷

Therefore the allegation that the high conviction rate in Israel's military courts is evidence of inhumane acts is without foundation..

Administrative Detention

The only specific military order given specific attention by the Authors is Military Order no. 1651 ("Order"), which deals in part with administrative detention. In doing so, the Submission lists a number of provisions of the military order, implying they suggest unlawfulness, or are of an inhumane nature. Yet, each of the characteristics of the Order raised are allowed for under Article 78 of GCIV. The rights granted to detainees in this regard even exceed the requirements set in the convention.

In the examples given by the Authors, once again falsehoods or omissions can be found in abundance. Here are a few examples:⁶⁸

- The Authors write: *"Palestinian individual not charged with a crime if the commander has reasonable grounds to believe that the individual 'must be held in detention for reasons to do with regional security or public security.' This detention is not subject to a warrant, and charges do not need to be disclosed to the detainee."*

This is, in fact, the entire point of administrative detention as articulated in Article 78, which enables administrative detention only for "imperative reasons of security." In this vein, the UK Supreme Court noted that "reasons of security" is broader than "the security of the Detaining Power," and thus can be based on "the overall security of the civilian population in the occupied territories."⁶⁹ That the individual is not charged with a crime is also what makes an administrative detention. As noted by Dinstein, "[t]he essence of internment under Article 78 (first paragraph) is that it is an administrative **measure of preventive rather than punitive nature**."⁷⁰ In fact, the Israeli Supreme Court has held that if prosecution is feasible, it has to be preferred to an administrative detention.⁷¹ Nonetheless, under Israeli law, the belief that there is a prospective threat must be "probable cause rather than of a mere possibility of an indeterminate risk."⁷²

⁶⁶ See e.g. <https://www.telegraph.co.uk/news/uknews/crime/7413829/Criminals-escaping-justice-due-to-CPS-flaws-says-judge.html>

⁶⁷ <https://www.statista.com/statistics/1100769/conviction-rate-in-england-and-wales/>

⁶⁸ Military criminal code and proceedings https://www.idf.il/media/30zd1w0v/%D7%90%D7%95%D7%92%D7%93%D7%9F-%D7%94%D7%97%D7%A7%D7%99%D7%A7%D7%94-%D7%94%D7%A4%D7%9C%D7%99%D7%9C%D7%99%D7%AA-%D7%9E%D7%94%D7%93%D7%95%D7%A8%D7%94-%D7%97%D7%9E%D7%99%D7%A9%D7%99%D7%AA_compressed.pdf

⁶⁹ Yoram Dinstein, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION, 2nd Ed. (Cambridge University Press, 2019), p.186 (citing *Al-Waheed et al. v. Ministry of Defense* (UK Supreme Court, 2017), para.58.).

⁷⁰ Yoram Dinstein, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION, 2nd Ed. (Cambridge University Press, 2019), p.187 (emphasis added).

⁷¹ *L. Salame et. al. v. IDF Commander of Judea and Samaria et. al.*, HCJ 5784/03 etc.

⁷² Yoram Dinstein, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION, 2nd Ed. (Cambridge University Press, 2019), p.187.

The authority to issue such a warrant is only allowed in extreme cases and only if absolutely necessary. These decisions are subject to judicial review not only by an appellate court, but also by the Israeli Supreme Court.

- The Authors claim that the Order allows “*the military commander [to] authorize the administrative’ detention, for up to six months.*”

The GCIV requires immediate judicial review within 96 hours of detention, as well as “periodical review, if possible every six months...” and, when the administrative detention is so reviewed by a qualified judge in Israel, the burden is placed on the military to establish that the grounds of the detention are still applicable.⁷³ Where there is insufficient justification, the judge will order the release of the detainee. Extension of the detention is also subject to said review by a qualified judge, who may cancel or shorten the order.

- The Authors write: “*In the course of administrative proceedings to confirm an administrative detention order, military courts may rely exclusively on ‘secret evidence’ that is not made available to the detainee.*”

The entire point of administrative detention is articulated in article 78 of GCIV, which enables administrative detention for “imperative reasons of security.”⁷⁴ That secret evidence would be involved in handling the kind of security threats that would fall under article 78 of GCIV, where criminal prosecution would not be available, is entirely unsurprising. Nonetheless, the evidence under review by the judge must show “probable cause rather than of a mere possibility of an indeterminate risk.”⁷⁵

As articulated above, Israel faces unique and highly complex security challenges. Addressing these challenges inevitably involves trade-offs, something which is recognized even under IHRL. Israel declared a state of emergency while facing these constant threats and effectively derogated from Article 9 of the International Covenant on Civil and Political Rights. Thus, Israel would not necessarily be precluded even under IHRL from the use of administrative detention.

Moreover, the historical use of administrative detention by Israel supports the conclusion that, rather than being used as a tool of everyday domination of a racial group, it is tied to these serious security threats. As detailed by Kretzmer and Ronen:

“By 1971, the number of detainees had dropped to 445. During the 1970s approximately 40 Palestinians were held as administrative detainees every year. During the years 1982-1985 use of administrative detention was suspended; it was resumed in 1985. After the first *intifada* began in December 1987, the measure was used on a massive scale. From December 1990 to October 1991, 1,590 Palestinians were held in administrative detention. Extensive use of the measure continued after the Oslo Accords

⁷³ Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION*, 2nd Ed. (Cambridge University Press, 2019), p.190.

⁷⁴ In this vein, the UK Supreme Court noted that “reasons of security” is broader than “the security of the Detaining Power,” and thus can be based on “the overall security of the civilian population in the occupied territories.” Yoram Dinstein, *The International Law of Belligerent Occupation*, 2nd Ed. (Cambridge University Press, 2019), p.186 (citing *Al-Waheed et al. v. Ministry of Defense* (UK Supreme Court, 2017), para.58.).

⁷⁵ Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION*, 2nd Ed. (Cambridge University Press, 2019), p.187.

were signed. In September 1997 there were 509 Palestinians in administrative detention. Later, this number was radically reduced and by December 2000 only 12 Palestinians were being held as administrative detainees. Following the outbreak of the second *intifada* in September 2000, extensive use was made of the measure again, and at one stage close to 1,000 Palestinians were held in administrative detention. At the end of January 2020, 431 Palestinians were being held in administrative detention.”⁷⁶

This data suggests a pattern of much higher use during periods of more intense violent conflict in the West Bank and Gaza (the *intifadas*) with substantially less use during calmer periods. This challenges the proposition that administrative detention is used with an intent to dominate a racial group.

Political Prisoners

A brief note is necessary in regards to the reference to “Palestinian political prisoners” in the Submission, but which is left unexplained in the text. The footnote for the statement goes to two Addameer reports and an article by another Palestinian organization, Al-Haq. Considering that Addameer is one of the joint authors of the submission, it is appropriate to look at this reference in light of how Addameer understands the concept of a “political prisoner.” A brief review of Addameer’s website shows that they claim there are 4,400 “political prisoners,” a figure which approximates all of the “Palestinian prisoners and detainees” being held by Israel. In short, this suggests that Addameer labels *all* such Palestinian prisoners as “political prisoners” regardless of the particular facts. Aside from showing imprecision in the use of language for political purposes, there is a level of moral obscenity to the statement. This definition of a “political prisoner” would include individuals like Arafat Irfaiya, the man who raped and murdered 19-year-old Ori Ansbacher in 2019,⁷⁷ as well as Hakim and Amjad Awad, who murdered the five members of the Fogel family in 2011, including beheading a 4-month-old infant.⁷⁸ These are not political prisoners. To suggest they are is disgraceful and an outright obscenity.

Detention of Palestinian Legislative Council Members

The Submission cites, as another example of an alleged inhumane act, “Israel’s harassment, arrest, and detention of Palestinian Legislative Council members—eight of whom were currently detained as of February 2022.”

First, some background. The Palestinian Legislative Council (“PLC”) was created under the Oslo Accords as the legislative branch of the PA. The last time an election was held was in 2006, when the terrorist organization Hamas won a majority of the seats (74 of 132). It has not met in regular session since 2007 when Hamas violently took over the Gaza Strip. In short, the PLC “has ceased to function.”⁷⁹ The disfunction of the PLC has nothing to do with the actions of

⁷⁶ David Kretzmer & Yael Ronen, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES*, 2nd ed. (Oxford University Press, 2021), p.327-8.

⁷⁷ *Palestinian pleads guilty to murder, rape of Israeli teen Ori Ansbacher*, Times of Israel, June 7, 2020, <https://www.timesofisrael.com/palestinian-pleads-guilty-to-murder-rape-of-israeli-teen-ori-ansbacher/>.

⁷⁸ Maurice Hirsch, Adv., *Murderers of the Fogel family set to get 50% salary increase from the PA*, Palestinian Media Watch, March 11, 2021, <https://palwatch.org/page/18648>.

⁷⁹ Jim Zanotti, *The Palestinians: Background and U.S. Relations (CRS Report RL34074)*, Congressional Research Service, March 18, 2021, <https://crsreports.congress.gov/product/pdf/RL/RL34074/45>.

the State of Israel, but rather the factional rivalries between Hamas, which controls the PLC, and the PA, which is the internationally recognized Palestinian entity under the Oslo Accords.

The Submission does not specify who are the 8 imprisoned PLC members.⁸⁰ We can presume that among those eight is Marwan Barghouti, a senior terrorist who is serving five life sentences for his role in the murder five Israelis in three terrorist attacks.⁸¹ Another would be Ahmad Sa'adat, the Secretary-General of the U.S.-designated⁸² terrorist organization PFLP.⁸³ There is also the cofounder of the terrorist organization Hamas,⁸⁴ Hassan Yousef.⁸⁵ Other PLC members that have been recently detained, or are currently detained, according to Addameer⁸⁶ include members of the terrorist organization Hamas, some of whom are even personally designated in the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") sanctions list, like: Nasser Abd al-Jawad (designated by OFAC);⁸⁷ Omar Abdul-Razeq;⁸⁸ Mohammad Jamal al-Natsheh (designated by OFAC),⁸⁹ Ahmad Attoun (designated by OFAC),⁹⁰ Mohammed al-Tal

⁸⁰ Though some of the individuals are mentioned on a different point in footnote 69 of the Submission.

⁸¹ *State of Israel vs. Marwan Barghouti: Ruling by Judge Zvi Gurfinkel*, Israel Ministry of Foreign Affairs, December 12, 2002, https://web.archive.org/web/20070402030347/https://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud (archived version dated April 2, 2007).

⁸² *Foreign Terrorist Organizations*, U.S. Department of State, <https://www.state.gov/foreign-terrorist-organizations/> (last visited March 31, 2022).

⁸³ Efrat Weiss, *Israel sentences PFLP leader to 30 years in prison*, Ynet News, December 25, 2008, <https://www.ynetnews.com/articles/0,7340,L-3644555,00.html>.

⁸⁴ *Foreign Terrorist Organizations*, U.S. Department of State, <https://www.state.gov/foreign-terrorist-organizations/> (last visited March 31, 2022).

⁸⁵ Aaron Boxerman, *Senior West Bank Hamas official to be charged with incitement, supporting terror*, Times of Israel, January 2, 2022, <https://www.timesofisrael.com/senior-west-bank-hamas-official-to-be-charged-with-incitement-supporting-terror/>.

⁸⁶ *Detained Palestinian Legislative Council Members*, Addameer, July 25, 2017, <https://www.addameer.org/publications/detained-palestinian-legislative-council-members-0>.

⁸⁷ *Hamas held mass rallies throughout Judea and Samaria to mark the 25th anniversary of its founding*, The Meir Amit Intelligence and Terrorism Information Center, December 18, 2012, <https://www.terrorism-info.org.il/en/20447/>; *Sanctions List Search*, Office of Foreign Assets Control, <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=9696> (last visited March 31, 2022).

⁸⁸ *Palestinian Government Timeline Since January 2006*, MIFTAH, July 5, 2017, <http://www.miftah.org/Display.cfm?DocId=14189&CategoryId=4> (identifying Abdul-Razeq as the Hamas finance minister in the 2006 Hamas dominated cabinet).

⁸⁹ Noam Rotem, *12 Palestinian members of parliament are in Israeli prison*, +972 Magazine, June 6, 2015, <https://www.972mag.com/meet-the-palestinian-lawmakers-being-held-in-israeli-prisons/>; *Sanctions List Search*, Office of Foreign Assets Control, <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=9642> (last visited March 31, 2022).

⁹⁰ Khaled Abu Toameh & Yaakov Lappin, *IDF arrests senior Hamas figures in the West Bank*, Jerusalem Post, February 4, 2013, <https://www.jpost.com/middle-east/idf-arrests-senior-hamas-figures-in-the-west-bank>; *Sanctions List Search*, Office of Foreign Assets Control, <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=9692> (last visited March 31, 2022)..

(designated by OFAC);⁹¹ Azzam Salhab (designated by OFAC);⁹² Mohammed Bader (designated by OFAC);⁹³ and Ibrahim Dahbour (designated by OFAC).⁹⁴

While the details of each of these cases is not readily available in English, the consistent pattern of membership in terrorist organizations, and the fact many of them are even designated under U.S. sanctions lists, raises the highly plausible inference that their detentions is not calculated to deny a “racial group” participation in political life, as prohibited under Article 2(c) of the *Apartheid Convention*, but rather calculated to serve pressing security interests relating to terrorism. This would be a perfectly legitimate interest. One of the few resolutions adopted by the UN Security Council under Chapter VII of the *UN Charter*, resolution 1373 (2001) instructs states to take measures against terrorist organizations. No principle of international law would require Israel to refrain from arresting members of terrorist organizations simply because they also happened to be elected years ago to a dormant legislative body.

Regardless, considering that the PLC has been dormant for 15 years as a result of intra-Palestinian rivalries, Israel’s arrest of a handful of PLC legislators cannot be blamed for any lack of participation in political life when the PLC has shown no signs of life to begin with.

The authors also do not present any evidence that the eight PLC members were arrested on any of the prohibited grounds, nor do they provide any information that would rebut evidence of their membership in terrorist organizations and participation in terrorist acts.

The Designation of Non-Governmental Organizations

The Authors claim as evidence of apartheid that the “suppression of Palestinian freedom of association and assembly has intensified in recent years, and criminalization of ‘unlawful’ associations has recently been extended to six prominent Palestinian civil society organizations.”

As per the claim that the process itself is somehow unlawful or politically driven, this claim is false and unfounded. The process in Israel is long, requires the participation of several different authorities and is subject to both an administrative and judiciary review.⁹⁵

Public Evidence and International Concern

The claim that Israel’s designation of six organizations as terrorist entities last year by Israel has come without “any evidence to support their claim or justify these recent measures”, seems also false.

⁹¹ *Sanctions List Search*, Office of Foreign Assets Control, <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=9676> (last visited March 31, 2022).

⁹² *Sanctions List Search*, Office of Foreign Assets Control, <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=9669> (last visited March 31, 2022).

⁹³ *Sanctions List Search*, Office of Foreign Assets Control, <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=9696> (last visited March 31, 2022).

⁹⁴ *Sanctions List Search*, Office of Foreign Assets Control, <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=9649> (last visited March 31, 2022).

⁹⁵ Designation Procedures, National Bureau for Counter Terror Financing of Israel, <https://nbctf.mod.gov.il/en/Pages/default.aspx>.

Israel did provide evidence, releasing a dossier to a number of foreign governments that summarized evidence indicating certain NGOs were diverting funds to the PFLP.⁹⁶ Nor is Israel the only one to express concerns about these connections. For example, a 1993 USAID report noted that the PFLP had “built a potent institutional foundation,” which, according to the agency, included two of those six NGOs, specifically the Union of Agricultural Work Committees (“UAWC”) and the Union of Palestinian Women’s Committees (“UPWC”). The Netherlands suspended funding for UAWC in 2020 after two of the latter’s staff members were involved in the murder of 17-year-old Rina Schnerb in a PFLP terrorist attack in August 2019.⁹⁷ Subsequently, an investigation by the Dutch government identified 34 UAWC employees who had individual ties with the PFLP, including cases where “[t]hey held both leadership positions with UAWC and positions with the PFLP for an overlapping period of time.”⁹⁸ In 2012, when Addameer attempted to receive accreditation with the UN, its application was deferred after the United States asked them to “clarify its affiliation with the Popular Front for the Organization (sic) of Palestine.”⁹⁹

Evidence has also resulted in a number of high-profile companies terminating services for some of these organizations. In 2018, for example, Visa, Mastercard, and American Express cut off Al-Haq and the UAWC after evidence of their connections to the PFLP was presented to them.¹⁰⁰

While the analysis of this evidence is beyond the scope of this writing, there is also abundant open-source evidence for the connections between these NGOs and the PFLP.¹⁰¹

The Authors have also included, among others, the Health Work Committees (“HWC”), which was designated by Israel in 2015,¹⁰² arguing that the organization is “a key provider of healthcare services.” Evidence the HWC’s being an arm of the PFLP, its corruption and cynical exploitation of donor’s funds can be found in abundance.¹⁰³ Said Abedat, former accountant of the HWC has declared in his police questioning “... the institutions affiliated with the PFLP are interconnected and constitute a lifeline for the organization from an economic and organizational standpoint, that is money laundering and funding of PFLP activities...” Abedat continues “... and

⁹⁶ Adam Kredo & Matthew Foldi, *Document: Here’s Why Israel Designated Six Palestinian Charities as Terror Groups*, Washington Free Beacon, December 6, 2021, <https://freebeacon.com/national-security/document-heres-why-israel-designated-six-palestinian-charities-terror-groups/>.

⁹⁷ Lahav Harkov, *Netherlands defunds Palestinian NGO Israel declared terror organization*, Jerusalem Post, January 5, 2022, <https://www.jpost.com/international/article-691644>.

⁹⁸ *Dutch Government ends donations to UAWC*, UK Lawyers for Israel, January 5, 2022, <https://www.uklfi.com/dutch-government-ends-donations-to-uawc>.

⁹⁹ *Committee on NGOs Recommends Special Consultative Status for 35 Civil Society Organizations, 2 for General Status, Postpones Action on 43 Applicants*, United Nations, January 31, 2012, <https://www.un.org/press/en/2012/ecosoc6493.doc.htm>.

¹⁰⁰ *Credit Card Donations to Terrorist linked NGOs terminated*, UK Lawyers for Israel, May 3, 2018, <https://www.uklfi.com/credit-card-donations-to-terrorist-linked-ngos-terminated>.

¹⁰¹ There is, however, abundant evidence publicly collected by the organization NGO Monitor on each of the organizations. See, e.g., *PFLP Ties of Six Newly Designated Terror NGOs*, NGO Monitor, October 28, 2021, <https://www.ngo-monitor.org/reports/pflp-ties-six-newly-designated-terror-ngos/>.

¹⁰² National Bureau for Counter Terror Financing of Israel, designation lists, <https://nbctf.mod.gov.il/en/designations/Pages/downloads.aspx>

¹⁰³ Adam Kredo & Matthew Foldi, *Document: Here’s Why Israel Designated Six Palestinian Charities as Terror Groups*, Washington Free Beacon, December 6, 2021, <https://freebeacon.com/national-security/document-heres-why-israel-designated-six-palestinian-charities-terror-groups/>.

I carried out the financial affairs at Lajan (the HWC) so they were transferred to the PFLP's organizational activities... I saw the invoices and receipts that were used by the PFLP's activities... I worked in a variety of methods to fund PFLP activities through Lagan Al Amal Al Sahi (HWC).

International Practice

Notwithstanding the abundant public evidence, Israel is under no obligation to make such evidence public and, in fact, has good reasons not to. There are ongoing investigations and court cases,¹⁰⁴ and it is a common practice throughout democracies to keep evidence confidential during such criminal investigations and proceedings.

As pointed out by Matthew Levitt of the Washington Institute for Near East Policy, withholding such evidence from the public “is typical for the evidentiary documents used to support designations in the United States and elsewhere.”¹⁰⁵ In the United Kingdom, the Terrorism Act 2000 and the Terrorism Asset-Freezing Act 2010 enable the government to designate organizations without publicly disclosing the evidence. The same is true for the United States, under which 8 U.S.C. § 1189 enables the State Department to make terrorism designations based on classified information, subject only to a review *ex parte* by courts and a limited number of members of congress.

The act of outlawing a handful of purported “non-governmental organizations” hardly constitutes evidence in and of itself of oppression, let alone apartheid. It is widely known that terrorist organizations often seek to exploit the non-profit sector, and the outlawing of non-profits acting for the benefit of terrorist organizations is a common practice. For example, the Financial Action Task Force has recommendations on combating the financing of terrorism that directly addresses the non-profit sector.¹⁰⁶ Famous cases involving the exploitation of non-profits by the Palestinian terrorist organization Hamas include the U.S. designation of Interpal¹⁰⁷ and the Holy Land Foundation.¹⁰⁸ Just last month, France’s interior minister announced the dissolution of two pro-Palestinian organizations, Collectif Palestine Vaincre and Palestine Action Committee which had incited hatred, violence, and discrimination.¹⁰⁹

¹⁰⁴ Adam Kredo & Matthew Foldi, *Document: Here’s Why Israel Designated Six Palestinian Charities as Terror Groups*, Washington Free Beacon, December 6, 2021, <https://freebeacon.com/national-security/document-heres-why-israel-designated-six-palestinian-charities-terror-groups/>.

¹⁰⁵ Matthew Levitt, *A Blurred Line Between Civil Society and Terrorism: Examining Charges of Palestinian NGOs Funding the PFLP*, Washington Institute for Near East Policy, November 2021, <https://www.washingtoninstitute.org/media/4979?disposition=inline>.

¹⁰⁶ *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*, Financial Action Task Force, updated March 2022, <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

¹⁰⁷ *U.S. Designates Five Charities Funding Hamas and Six Senior Hamas Leaders as Terrorist Entities*, U.S. Department of Treasury, August 22, 2003, <https://www.treasury.gov/press-center/press-releases/pages/js672.aspx>.

¹⁰⁸ *Treasury Freezes Assets of Organization Tied to Hamas*, U.S. Department of Treasury, February 19, 2006, <https://www.treasury.gov/press-center/press-releases/Pages/js4058.aspx>.

¹⁰⁹ *French Interior Minister Dissolves Pro-Palestinian NGOs Advocating Israel’s Destruction*, The Allgemeiner, March 9, 2022, <https://www.algemeiner.com/2022/03/09/french-interior-minister-dissolves-pro-palestinian-ngos-advocating-israels-destruction/>.

As court cases proceed, it is likely more evidence will be made public regarding the connections of organizations like Addameer and the terrorist organization PFLP, in addition to the already available open-source information. Merely asserting that the Israeli decision to outlaw the specific groups was an “inhumane act” not based on evidence, without addressing this context, is political advocacy without legal merit.

Palestinian Freedom of Speech and Association

The Authors are correct to worry about the right of Palestinians to free speech and association. They are, however, tragically mistaken about their analysis of Israeli oppression of these rights and neglect to explore the role played by the PA and Hamas in suppressing such rights. While Israel is, of course, open to legitimate criticism for its policies regarding civil society, the fact of the matter is that among Israel’s fiercest critics are Israeli organizations, Israeli politicians, and countless Palestinian non-governmental organizations. Indeed, some of the sources used in the Submission are based in Israel (e.g., B’Tselem, cited 14 times, and ACRI, cited 5 times). Notwithstanding the designation last year of seven PFLP-linked NGOs, there remain hundreds of Palestinian organizations operating in the West Bank.

For Palestinian NGOs, there is a much greater threat from the Palestinian Authority itself. In 2021, the PA’s Law-by-Decree No. 7/2021 required that NGO work plans “conform” with those of the PA, and even authorized Palestinian officials to transfer funds from NGOs to the PA treasury with little, if any, transparency.¹¹⁰ Earlier laws, such as a 2007 amendment to the PA’s Law No. 1/2000 on Charitable Associations and Civil Society Organizations authorized the PA’s interior minister to take measures against associations “which engage in activities in violation of the law” without defining what are those activities. Shortly after, the PA interior minister dissolved over 100 Palestinian NGOs. Notably, it is the same ministry in charge of security forces that have been notorious in arresting and assaulting Palestinian activists, including Nizar Banat who was killed by PA officers in 2021.¹¹¹

A Note on Comparative Policies

Any honest examination of the facts should have raised concerns about policies of discrimination that exist in the West Bank and Gaza not against Palestinian Arabs, but against Jews. In contrast to Israel, which legally prohibits discrimination on the basis of religion or nationality, the PA threatens the death penalty for anyone who sells land to Jews.¹¹² This policy applies not just to Israeli Jews, but to Jews anywhere in the world. One example which succeeded in getting international attention, thanks to the “perpetrator’s” American citizenship,

¹¹⁰ Dore Feith, *A New Palestinian Authority NGO Decree Might Halt US Aid to the West Bank and Gaza*, The Begin-Sadat Center for Strategic Studies, August 2021, <https://besacenter.org/wp-content/uploads/2021/08/197web.pdf>.

¹¹¹ Bethan McKernan & Quique Kierszenbaum, *Nizar Banat’s death highlights brutality of Palestinian Authority*, The Guardian, August 21, 2021, <https://www.theguardian.com/world/2021/aug/31/nizar-banats-death-highlights-brutality-of-palestinian-authority>.

¹¹² See, e.g., Khaled Abu Toameh, *PA: Death penalty for those who sell land to Jews*, Jerusalem Post, April 1, 2009, <https://www.jpost.com/middle-east/pa-death-penalty-for-those-who-sell-land-to-jews>.

was that of Issam Akel.¹¹³ At the same time, it has been anecdotally noted that there is a trend of Arab Israelis buying up housing units in PA-controlled areas.¹¹⁴

Jews are prohibited from praying at their holiest site, the Temple Mount, and even require security to visit Jewish holy sites in the West Bank. In April, the Jewish holy site of Joseph's Tomb was attacked twice by Palestinian rioters and two Hasidic Jewish men were shot by Palestinians while attempting to reach the Tomb.¹¹⁵

The PA is riddled with openly antisemitic policies and statements. Its education system has repeatedly been criticized for containing antisemitism and incitement. The European Union has in recent years withheld aid to the PA over such concerns.¹¹⁶ Antisemitic hatred is frequently aired on official Palestinian Authority TV, such as videos of young girls referring to Jews as “the world’s dogs” who are “the impure” and “defile Jerusalem.”¹¹⁷ Al Hayat Al-Jadida, the PA daily, gleefully publishes stories about how a Palestinian man named his son “Eichmann,” referencing the infamous Nazi architect of the Holocaust, “to anger Zionism.”¹¹⁸ The PA President, Mahmoud Abbas, himself has railed against Jews who he claims “have no right to defile [holy sites] with their filthy feet” while saluting “every drop of blood spilled for the sake of Jerusalem.”¹¹⁹ A full review of the dangerous levels of antisemitism and incitement coming from PA officials (as well as the various Palestinian factions and organizations) is beyond the scope of this writing, however there are many open source repositories providing the evidence, such as at the websites for Palestinian Media Watch and the Middle East Media Research Institute (MEMRI).

A Note on Harvard’s Partnership with Addameer

Harvard Law School has for decades been a leader in legal studies and research. Its reputation has been well deserved, and typically merits the credibility associated with the name. It is shocking, therefore, to see such an error-laden paper rife with unfounded assumptions and conjectures presented as facts. This is particularly jarring considering that many of the erroneous statements could have been avoided with an appropriate level of research and investigation.

¹¹³ By The Associated Press, *Palestinians Face Death For Selling Land to Jews*, May 6, 1997, <https://www.nytimes.com/1997/05/06/world/palestinians-face-death-for-selling-land-to-jews.html>

¹¹⁴ Tal Schneider, *Lured by cheap prices and luxury digs, Arab Israelis are snapping up West Bank homes*, Times of Israel, February 5, 2022, <https://www.timesofisrael.com/lured-by-cheap-prices-and-luxury-digs-arab-israelis-are-snapping-up-west-bank-homes/>.

¹¹⁵ Tzvi Joffe, *Two Israelis shot in Nablus, Joseph's Tomb vandalized again*, Jerusalem Post, <https://www.jpost.com/breaking-news/article-703812>.

¹¹⁶ Aaron Boxerman, *Almost all European aid to the PA held up as officials discuss reform of textbooks*, Times of Israel, February 24, 2022, <https://www.timesofisrael.com/almost-all-european-aid-to-the-pa-held-up-as-officials-discuss-reform-of-textbooks/>.

¹¹⁷ Nan Jacques Zilberdik, *Girls sing: Jews are “the world’s dogs” and “impure” on PA TV*, Palestinian Media Watch, December 1, 2021, <https://palwatch.org/page/29600>.

¹¹⁸ Nan Jacques Zilberdik, *A kid called Eichmann*, Palestinian Media Watch, June 24, 2021, <https://palwatch.org/page/23963>.

¹¹⁹ *Palestinian President Mahmoud Abbas: Jews “Have No Right to Defile the Al-Aqsa Mosque with Their Filthy Feet”*, Middle East Media Research Institute, September 16, 2015, <https://www.memri.org/tv/palestinian-president-mahmoud-abbas-jews-have-no-right-defile-al-aqsa-mosque-their-filthy-feet>.

It is also particularly unfortunate that the Harvard International Human Rights Clinic chose to partner with the organization Addameer, which has been openly led in part by Khalida Jarrar, a known leader of the U.S.-designated terrorist organization, the Popular Front for the Liberation of Palestine, from 1993-2017.¹²⁰ An organization which: employs Salah Hamouri, who played a key role in planning the attempted assassination of Chief Rabbi Ovadya Yosef in 2005;¹²¹ employed, until at least 2015, Samer Arbid, who was the ringleader of the PFLP terror cell that murdered 17-year-old Rina Schnerb;¹²² was established in part by (the now deceased) PFLP political bureau member Rabah Hassan Muhanna;¹²³ and has on its board members of the PFLP political bureau like Bashir al-Khairi.¹²⁴

An organization which openly claims groups like Hamas and the PFLP have a legitimate “right to resist...by all available means including armed struggle” is beneath an institution like Harvard Law.¹²⁵ It is worth remembering Supreme Court precedence, including that found in *Holder v. Humanitarian Law Project*,¹²⁶ and that the prohibition on providing material support to designated foreign terrorist organizations, such as the PFLP, would “cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization.”¹²⁷ In addition to the abundant open-source evidence of Addameer’s connections with the PFLP, it has been so designated by the State of Israel for “serving[] as an arm of the ‘Popular Front for the Liberation of Palestine’.”¹²⁸

As a law clinic, it is understandable that it would take positions of advocacy on controversial issues. However, of the many legitimate Palestinian organizations which the Harvard

¹²⁰ As either director or deputy director of the board.

¹²¹ Yosef Kuperwasser, *How Denmark, Sweden, the U.N., and the EU Got Suckered Into Funding a Terror Organization*, Tablet Magazine, September 21, 2020, <https://www.tabletmag.com/sections/israel-middle-east/articles/pflp-funding-eu-un>.

¹²² Judah Ari Gross, *West Bank terror bombing suspect in critical condition after interrogation*, Times of Israel, September 29, 2019, <https://www.timesofisrael.com/west-bank-terror-bombing-suspect-in-critical-condition-after-interrogation/>

¹²³ *The Popular Front mourns a member of its political bureau, the national and community "leader, Dr. Rabah Muhanna "Abu Marwan*, Popular Front for the Liberation of Palestine, May 5, 2019, <https://pflp.ps/post/18450/%D8%A7%D9%84%D8%AC%D8%A8%D9%87%D8%A9-%D8%A7%D9%84%D8%B4%D8%B9%D8%A8%D9%8A%D8%A9-%D8%AA%D9%86%D8%B9%D9%8A-%D8%B9%D8%B6%D9%88-%D9%85%D9%83%D8%AA%D8%A8%D9%87%D8%A7-%D8%A7%D9%84%D8%B3%D9%8A%D8%A7%D8%B3%D9%8A-%D8%A7%D9%84%D9%82%D8%A7%D8%A6%D8%AF-%D8%A7%D9%84%D9%88%D8%B7%D9%86%D9%8A-%D9%88%D8%A7%D9%84%D9%85%D8%AC%D8%AA%D9%85%D8%B9%D9%8A-%D8%A7%D9%84>.

¹²⁴ Matthew Levitt, *A Blurred Line Between Civil Society and Terrorism: Examining Charges of Palestinian NGOs Funding the PFLP*, The Washington Institute for Near East Policy, November 2021, <https://www.washingtoninstitute.org/media/4979?disposition=inline>.

¹²⁵ *PNGO CALLS UPON THE INTERNATIONAL COMMUNITY: DON'T USE AID TO UNDERMINE LEGITIMATE PALESTINIAN RESISTANCE*, Addameer, April 5, 2017, <http://www.addameer.org/news/pngo-calls-upon-international-community-don%E2%80%99t-use-aid-undermine-legitimate-palestinian>.

¹²⁶ 130 S.Ct. 2705.

¹²⁷ *Holder*, 130 S.Ct. at 2722.

¹²⁸ *Designation No. 375 of the Minister of Defense in accordance with the Anti-Terrorism Law, 2016*, October 19, 2021, https://nbctf.mod.gov.il/he/Announcements/Documents/Designation%20No.%20375-ADDAMEER_21.11.21.pdf.

International Human Rights Clinic could have collaborated with, it is deeply unfortunate that it chose Addameer.

Conclusion

Even analyzing the claims through the broadest understanding of “apartheid,” the Authors fundamentally fail to establish that Israel is violating the prohibition or committing the crime of apartheid. The Submission is plagued with factual inaccuracies, errors of omission, and consistently fails to address key provisions of international law that directly challenge its legal assertions.

It is our hope that, through this response, a genuine dialogue can be started which is rooted in objective reality and committed to honest discourse about the law and facts.