South African Institute of Race Relations Memorandum on the Concept of Apartheid

A. What is apartheid?

Background

The South African Institute of Race Relations is a non-governmental research and advocacy body based in Johannesburg, South Africa. Established in 1929, it is probably South Africa's oldest think tank. Its work has always been grounded on an appreciation of the importance of accurate information. We have been close observers of South Africa's socio-political, economic and governance space since our inception. The various editions of our annual *Survey*, produced since the 1940s, is the definitive and a dispassionate account of this history as it unfolded, setting out crucial data and recording details about each year. As our name should indicate, much of our work has focussed on South Africa's race politics and its race-based policies.

The thrust of our work over this period is captured in the following comments from a publication produced in 1979 to mark our 50th anniversary:

'The significance of the founding of the Institute in 1929 was that it was the first national multiracial organisation specifically established to promote interracial goodwill and to conduct investigations bearing upon race relations. The two main objects of the constitution it adopted in 1932 read:

a) To work for peace, goodwill and practical cooperation between the various sections of the populations of South Africa;

b) To initiate, support, assist and encourage investigations that may lead to greater knowledge and understanding of the racial groups and the relations that subsist or should subsist between them.'

Ellen Helman, *The South African Institute of Race Relations, 1929-1979: A Short History*, Johannesburg: South African Institute of Race Relations

Purpose of this Submission

The United Nations' 'Commission of Inquiry to monitor and report on rights violations in Israel, the Gaza Strip and the West Bank' is undertaking an investigation into the conflict in Israel/Palestine, embracing 'all underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity.'

The SAIRR's focus is primarily – though not exclusively – on domestic matters. We have no explicit or binding institutional position on the situation in Israel, Palestine or the Middle East as a whole. However, it is our assumption that part of this investigation will include the accusation that Israel is guilty of 'Apartheid'. This has been a large part of the narrative of South African activists hostile to Israel. It is the intention of this submission to set out what Apartheid was and whether Israel conforms to this categorisation. It is our belief that 'Apartheid' is wielded as a rhetorical weapon with scant regard for what constituted it.

Understanding Apartheid

Apartheid is an Afrikaans word meaning, literally, 'apartness.' The word itself seems first to have been used in a recognisable political form in the 1930s and in Parliament in the early 1940s, introduced as policy by the National Party. Understanding the nature of Apartheid is complicated by the loose use of the word. In South Africa, it is often taken as a rough synonym for the entire governance system prior to the democratic transition. From this perspective, the starting point of Apartheid would be either 1910 (the formation of the Union of South Africa), or – more defensibly – 1948, when the National Party took power.

It is worth noting that a great deal of what came to be defined as 'Apartheid' predated it. Racial segregation and the political dominance of the white community was an assumption of the pre-existing order. Segregation was practiced in most spheres of life. By 1948, most the factors that might have served as the embryos of a non-racial future (such as the participation of African[1] voters on the 'common voters' roll in the then Cape Province) had been removed. The Land Acts of 1913 and 1936 sought to restrict land ownership by African people to reserves (although this might be possible with official permission), and to prevent white people from buying land in the reserves created for Africans.

However, economic factors, notably the industrial expansion of the economy (particularly during the Second World War) was undermining some of the assumptions in which South Africa's political order had been based. One of these was the increasing urbanisation of the African population. In 1946, the then government appointed the Native Laws Commission to investigate the trend. Its report recommended a more liberal approach to African urbanisation, and acceptance of the permanence of an urban African population. It was certainly not advocating an end to segregation or the equality of people of different race groups, but it did hint at a liberalising impulse, which might have had far-reaching consequences in the future.

The National Party's response was to appoint a commission of its own, whose report – the *Report of the Colour-Question Commission* – advanced a contrary view: migration to the cities would need to be curbed, race mixing needed to be halted and Africans encouraged to develop the reserves. It has, not without controversy, been called the 'blueprint' for Apartheid.

Apartheid as a policy itself built on this existing foundation, heightening and deepening them with an expanded legal architecture and bureaucratic machine to enforce them. It was presented as a firm and final solution to the country's 'race problems.' Dr Daniel Malan, who became Prime Minister in 1948 once elaborated on the term, differentiating it from the existing discourse: 'I do not use the term "segregation" because it has been interpreted as fencing off, but rather "Apartheid", which will give the various races the opportunity of uplifting themselves on the basis of what is their own.'

[1] Owing to the historical context, this document uses nomenclature associated with the time, even though the thinking embodied in doing so goes against the non-racial values of the IRR. Thus 'race groups' or 'population groups' refer to the four broad 'racial' or 'colour' categories which were used by the authorities of the time to frame policy. Hence, 'Africans' is used to denote 'black', 'black African', 'indigenous' or 'Bantu' (a word that today has offensive connotations, but was widely used in the past, including in the titles of legislation); 'whites' refers to people of European extraction, who formed what has been called a racial oligarchy in South Africa; 'Coloureds' refers to a heterogenous group those of mixed racial heritage, which was often broken down into sub-groups based on culture or origins; and 'Indians', predominantly those descended from the Indian subcontinent. Smaller groups, such as the country's Chinese community, were treated highly inconsistently, while in some cases, the concept of 'honorary white' was conferred (very sparingly) on categories of people considered valuable to South Africa's interests, but not threatening to its racial order. The most often cited example here would be Japanese people, of whom very few lived in South Africa, but in deference of the importance of the trade and investment relationship between the two countries.

The reality was rather darker. The most salient legal and constitutional measures are listed below, grouped into themes:

Social organisation

The **Population Registration Act of 1950** set out a system for classification of South Africa's people by race and, to an extent, by ethnicity. Each South African would be assigned to one of a number of officially recognised groups. The chief upshot of this was that the population was divided into four chief race groups – white, black African, coloured (of mixed racial heritage, within which a number of sub-groups were recognised) and Indian. The standards for assigning people to these groups (and in reassigning, as sometimes occurred) were often inconsistent and confusing, and might involve a person's appearance, social interactions and 'general acceptance' by other members of the group. This classification would determine the ambit within which one's life was lived, the services to which one had access and so on. Most importantly, with the effective racial hierarchy in place, it meant that membership of the white group conferred not only greater privileges but a far more profound sense of citizenship of the state.

Labour relations

The **Industrial Conciliation Act of 1924** predated the apartheid era. In 1922 white mineworkers went on strike to protest the mine owners' intention to cut costs. They intended to do this by employing lower-earning black workers. A violent strike ensued, which was suppressed by government forces.

Although the miners lost the strike, mine owners and the government realised that trade unions had to be recognised in order to be regulated. The Act provided for the recognition of white trade unions and the establishment of bargaining mechanisms between the parties. Black employees were excluded as they were not included in the definition of 'employee' in the Act.

The **Industrial Conciliation Act of 1956** replaced the previous act. The primary objective of the 1956 Act was to separate the trade union movements along racial lines. It ended recognition of trade unions with white, Coloured and Indian membership. Trade unions with mixed membership had to cater exclusively for one racial group or split up into exclusive racial sections, each under the guidance of a white-controlled executive. The Act benefitted whites additionally because it permitted white job reservation practices.

Residential Segregation

The **Group Areas Act of 1950** (this was repeatedly amended and replaced with a new version in 1957 and then again in 1966) systematised the segregation of urban areas. Previously, although the country's urban areas had been segregated, these measures had often been developed locally or regionally, or on an ad hoc basis and inconsistently. Urbanisation and industrialisation had picked up with Second World War. This act created the framework for compelling people to settle and trade in areas designated for particular races – so-called 'group areas'. To live or trade in an area not designated for one's race was to open oneself up to prosecution. In its implementation, hundreds of thousands of people were forced to relocate, and many saw their livelihoods undermined by the loss of business premises.

The **Natives Laws Amendment Act of 1952** consolidated pre-existing legislation, but in particular specified that unless particular conditions were met (among them birth and established permanent residence, employment or official permission), an African would not be permitted to remain in an urban area for more than 72 hours.

Social interaction

The **Prohibition of Mixed Marriages Act of 1949** was one of the earliest significant pieces of Apartheid legislation. As its name implied, it prohibited marriages between 'Europeans and non-Europeans.' Marriages between people of different races contracted outside the country, and which would not be recognised within it, would be deemed void.

The **Immorality Amendment Act of 1950** extended a prohibition on sexual relations between white people and Africans to relations between 'Europeans and non-Europeans.' In practice this meant that intercourse between white and coloured people became an offence.

The **Reservation of Separate Amenities Act of 1953** protected the legality of segregation of facilities – already a feature of the country's public spaces – and specified that this was permissible even if no facilities were available for other race groups, or the facilities that were available were of an inferior nature.

Citizenship

The **Bantu Authorities Act of 1951** established systems of governance in the territories reserved for Africans. This would be the basis of the emerging 'homeland' system.

The **Promotion of Bantu Self-Government Act of 1959** was intended to encourage the 'gradual development of self-governing Bantu national units' out of the territories reserved for Africans. Each of these 'homelands' would serve as a state for a particular African ethnic group. The first to accept this autonomy was the Transkei in 1963.

The **Natives (Abolition of Passes and Coordination of Documents) Act of 1952** effectively extended the requirement that all adult Africans were required to carry reference books. These have been described as an internal passport and had a long pedigree in South Africa, but at the time of their introduction were mandatory for African men. This added to the mechanisms of control and restrictions on the African population.

The **Black Homeland Citizenship of 1970** assigned black Africans to one of the ten 'homelands'. This was irrespective of whether they actually lived in any of these areas. Attachment to a homeland was determined by race (as it only applied to 'Bantu'), birth in a given 'homeland;' domicile in that territory; language usage and affinity; and 'every other Bantu person in the Republic related to any member of the Bantu population of that area or who has identified himself with any part of such population or who is associated with any part of such population by virtue of his cultural or racial background.'

The Act itself arguably made little immediate difference, but when homelands were accorded independence (Transkei in 1976, Bophuthatswana in 1977, Venda in 1979 and Ciskei in 1981), all those holding the respective 'homeland' citizenships lost their claims on South African citizenship.

Political rights

Following directly from the denial of citizenship, was a long-standing monopoly on state power on the part of the white population. This was so prior to the introduction of Apartheid, and would remain the case until the transition, even when a limited segregated franchise was introduced in 1983. (The so-called Tricameral Parliament provided for separate voters' rolls and chambers for whites, Coloureds

and Indians. Africans were excluded on the grounds that their aspirations were to be exercised in their homelands.)

However, any account of Apartheid legislation would need to note the infringement of political rights that existed at the time of the policy's introduction. This concerns the political representation of Indian and Coloured people, as well as of multi-racial political organisation.

The **Asiatic Law Amendment Act of 1948** repealed provisions for limited envisaged franchise rights for people of Indian descent. (The legislation that this affected had, incidentally, curtailed Indian people's property rights.)

The **Separate Representation of Voters Act of 1951** removed Coloured voters in the Cape Province from the Common Voters' Roll, and placed them on a separate roll which would elect four white representatives. Prior to this, Coloured people in the Cape Province meeting particular qualifications in this part of the country held the right to vote alongside white people and thus to elect representatives to Parliament. This was guaranteed by a clause in the South Africa Act of 1909, which served as the country's then Constitution. The Act was met with resistance in the courts, which was ultimately overcome when the National Party introduced measures allowing Parliament to sit as a court.

The **Separate Representation of Voters Amendment Act of 1968** went on to abolish the franchise rights that Coloured people were accorded under the preceding act. The elected seats they were accorded were abolished and Coloured voters were to vote for a separate body, the Coloured Persons Representative Council, which had very restricted powers.

The **Prohibition of Political Interference Act of 1968** made it illegal to form or operate multi-racial/non-racial political parties. This extended to prohibiting members of one 'population group' from addressing meetings organised and attended by a party representing another such group. The law also sought to ban foreign funding of South African parties. One outcome was that the Liberal Party – a rare (in some senses unique) case of a party with a racially diverse membership in the South Africa of the day[2] – chose to disband rather than comply.

Education

Education had generally hitherto been segregated in South Africa. Education policy for most of the post-1948 period was founded on the assumption of separate – and invariably not equal – provision for the various race groups. State schools were segregated by race into the 1990s.

The **Bantu Education Act of 1953** brought education for African people under the control of the central government, to be managed by a state department. Although enrolment of African schoolchildren rose steadily in the coming decided, Bantu Education was widely regarded as a synonym for poorly funded and inferior quality education. This law was repealed by the **Education and Training Act of 1979**, which maintained the basic structure of segregated education.

The **Extension of University Education Act of 1959** sought to enhance Apartheid principles in higher education. A number of English-language universities enrolled African students, with varying degrees of segregation applied to their studying or living conditions. This act sought to limit the right of universities to do this – students wishing to do so needed written official permission from the relevant Minister

[2] It is worth noting that race still provided an organising principle for many anti-apartheid formations at this time. The banned South African Communist Party was another example of a multi-racial party, but with the African National Congress, the question of allowing membership (and particularly leadership) to those who were not Africans was a hotly contested issue around this time.

– and to establish a set of universities to cater for each of the African ethnic groups; institutions were also established for Indian and Coloured students.

B. International Law on the Claim of Apartheid

The bases for claims of 'Apartheid' as a principle in international law reside within United Nations (UN) Conventions. Conventions are agreements between countries by which the UN establishes rights and which countries are then to support. A convention is not legally binding on being signed by a party; it only becomes legally binding on ratification by a party.

Whereas the inter-State prohibition of apartheid may be viewed as constituting a peremptory norm of international law, as a war crime and crime against humanity it derives its authority from its treaties, rather than from customary international law. (A peremptory norm is a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted.)

The main UN conventions relevant to the concept of Apartheid are set out below.

International Convention for the Elimination of all forms of Racial Discrimination, 1973

Article 3 of the International Convention for the Elimination of all forms of Racial Discrimination (ICERD) states: 'States parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.' (Our underlining)

The ICERD neither defines discrimination nor Apartheid. However, what the ICERD likely meant by 'apartheid' can be discerned from two considerations:

- When it came into force - in 1969 - Apartheid was at its zenith under the National Party in South Africa. The specific inclusion of 'Apartheid' at the time referred to the South African phenomenon. It was a unique phenomenon that went beyond racial segregation, which existed in other places (indeed, the use of the term 'racial segregation' alongside 'apartheid' suggests that they are regarded as two distinct concepts); and
- The reporting guidelines for Article 3 of the ICERD held that the reference to 'Apartheid' was directed exclusively to South Africa, while the anti-segregation norm applied to all other countries.

International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)

The International Convention on the Suppression and Punishment of the Crime of Apartheid (typically referred to as the Apartheid Convention) was adopted by the UN General Assembly 1973 to make it 'possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid'. It came into effect in 1976.

Article I of the Convention stated:

1. The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes

violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.

It went on to define 'the crime of apartheid' as 'similar policies and practices of racial segregation and discrimination as practised in southern Africa', and listed a specific set of policies, which are in summary:

a) Denial of a member of particular racial groups of rights and liberties, through murder, bodily or mental harm, curtailment of freedom, arbitrary arrest and punishment;

b) Imposing degrading living condition on racial groups;

c) Taking measures to prevent racial groups from participating in the political, social, economic and cultural life of the country and the development of their groups;

d) Taking legislative measures to divide the population along racial lines through creating reserves and ghettos, prohibiting marriages between members if different groups or expropriating the 'landed property' of racial groups of their members;

e) Exploiting the labour of particular racial groups, especially through forced labour; and

f) Persecution of organizations and individuals on the ground of their opposition to apartheid.

States parties are to adopt legislative measures to 'suppress, discourage and punish the crime of Apartheid' and makes 'the offence an international crime subject to universal jurisdiction'. The Apartheid Convention was the first formal legal tool provided to UN member states to institute sanctions on South Africa.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

In 1977, Protocol 1 was adopted as an adjunct to the Geneva Conventions of 1949, which forms the core of international humanitarian law by regulating the conduct of armed conflict and seeking to limit its effects.

Protocol 1 criminalised 'practices of Apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination' when committed 'willfully (sic) and in violation of the Conventions or the Protocol.'

Rome Statute of the International Criminal Court, 1998 (Rome Statute)

Article 7 of the Rome Statute lists Apartheid as one of a number of crimes against humanity.[3] It goes on to define the Apartheid as follows: '"The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.'

[3] It states that crimes against humanity occur in respect of the 'following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'

The term ‘institutionalized regime’ in the the Rome Statute is an important change from the definition used in the Apartheid Convention. The latter was rather less specific, referring to ‘policies and practices’, whereas an ‘institutionalised regime’ suggests something rather more comprehensive and long-lasting. (In South Africa, racial segregation was built into almost all state institutions until the 1980s and 1990s.) It also places apartheid in a category apart from ‘generic’ persecution.

Implications

The preceding commentary has sought to set out the key legislative features of Apartheid. Note that this is not intended as a comprehensive list of all such legislation, still less all the legislation that was employed for repressive purposes. It has not engaged in substantive detail with the human cost of these policies, such as the phenomenon of forced removals.

It has also tried to describe the main features of Apartheid under international law, a topic about which a great deal more might also be written.

Cumulatively, what it seeks to do is to define what Apartheid was and to tease out its ordinal characteristics. This is important if Apartheid is to be seen as some sort of conceptual category, it needs to be appropriately defined in relation to what it was. It is entirely insufficient to claim, as some activists in South Africa do, that ‘we know it when we see it.’ One could respond that familiarity with something might incline one, erroneously, to see it in circumstances where it does not exist. For the same reason, we also caution against appeals to authority, that is, reflexively taking the word of respected personalities who claim that Apartheid exists in any other jurisdiction.

Above all, we caution against carelessly invoking the word ‘Apartheid’ as an appeal to emotion. The damage it caused will be with South Africa for generations, and it needs to be remembered for the system that it was.

We would argue that Apartheid was a particular and specific set if policies, implemented in a particular country and political system, in a particular time. Apartheid was unique to South Africa and cannot be generalised or be said to apply elsewhere. It has never been invoked elsewhere as a model, South Africa did not promote it as a model for other countries, and we are not aware of any other state that has attempted to take comparable policy measures. To apply the word Apartheid to a context outside South Africa is, to our mind and to borrow the words of Alan Paton, a ‘prostitution of language.’

That there may be overlaps between Apartheid in South Africa and what has occurred or is occurring in any other place does not suffice to show that ‘Apartheid’ exists there. Such overlaps are unfortunately not uncommon. The classification of populations, for example, was a key feature of Apartheid, and without it, much of the tragedy that followed might have been averted. Yet many countries in the world today maintain records of various characteristics of their population, and link them to particular benefits and entitlements – or the reverse. This may be criticised, and from our point of view, should be. But this alone would not be Apartheid.

In South Africa today, despite having expunged legislated race classification, people are regularly required to list their race on documents, for institutions of state and outside the state in order to comply with legislation which requires “transformation” of societal institutions. Indeed, South Africa’s ‘“transformation”’ agenda is vigorously monitored by state agencies which keep track of data by race (mirroring the four Apartheid-era ‘race groups’) – and have promised to punish firms that fail to move with greater rapidity towards achieving racially-defined outcomes. We at the SAIRR have criticised this on the various grounds. There is clearly a similarity to thinking from the Apartheid-era – but it cannot be described as Apartheid.

Neither would even the targeted persecution of societal groups – racial, ethnic, religious or political – necessarily constitute Apartheid. This is absolutely in no way a defence of such abhorrent policies, which remain sadly common in today's world, including by some states that have sat on the Human Rights Council. They deserve to be condemned as violations of the universal entitlements of all people. But that alone would not make them cases of Apartheid, and to attempt to apply this name will in all probability not only be to misappropriate language, but to obscure the abuses that such victims are facing.

If indeed Apartheid can be regarded as a conceptual category with application beyond South Africa – and we argued that this is not the case – it would need closely to reflect the nature and content of South Africa's experience. As is argued above, abuses and overlaps are insufficient.

We note, however, that Apartheid has found its way into various international legal instruments (as described above). While we have severe reservation about the historical and epistemological validity of this, if Apartheid is to serve as a conceptual category while remaining true to its origins, we would suggest that an 'Apartheid System' would need to meet the following conditions:

- The **fundamental criteria would need to be racial**, in other words, linked somehow to the idea of descent, skin colour, "genetics" and so on. This was the key consideration for Apartheid's policy makers. Culture or ethnicity played a role but were of secondary importance: Apartheid was an outgrowth of Afrikaner nationalism, whose historical antagonist was the British Empire, and had an uneasy relationship with the white Anglophone population. It was revealing that a key consideration in the 1950s was disempowering the Coloured population in the Cape, despite the cultural similarities between that population and white Afrikaners. While Africans were to be split among their ethnic groups, no such division was contemplated among the white people. To be white was generally to be a citizen with a full say – such as it existed, which for the white group was in fact considerable – in governance, irrespective of descent, social standing, home language or religious affiliation. This appears to be recognised in the legal instruments on Apartheid, which explicitly refer to 'race' and 'racial groups'.

- **Segregation would be totalising**. In almost all things, people would be expected to live their lives and pursue their aspirations within their own 'race groups'. This would certainly be the case in matters of residence, education and political expression. For pragmatic reasons, economic life might be partially excluded from this. But Apartheid could not countenance the provision of services in hospital wards or classrooms to people of different groups.

- The **mode of implementation was highly bureaucratic**. Apartheid consolidated much of what existed and gave it a new legal form. Government systems were expanded and enhanced to enforce it. This would correspond with the ideas of 'institutionalized regime of systematic oppression and domination.'

- **Apartheid sought to strike at the very heart of citizenship**. Citizenship can be understood in two ways: one as a term expressing 'nationality' and the other as a term denoting a legitimate claim to participate in the politics of one's country. By seeking a comprehensive denaturalisation of the African population, Apartheid sought not only segregation but its complete removal from society. This would remove the basis for a claim on political participation by the African population in 'white' South Africa. For Coloured and Indian people, South African 'nationality' remained, but citizenship in the sense of political participation was severely restricted.

- This in turn leads to **concerns of political power**. Apartheid ensured that power remained overwhelmingly in the hands of a racially-defined group. While it was prepared to cooperate with representatives of other race groups (as in the case of homeland administrations), this was strictly on the basis of subordination. Even in the 1980s, under the Tricameral Parliament, no

Coloured or Indian voters – let alone Africans – could cast a vote for a seat in the House of Assembly, from which the government would ultimately emerge. They could certainly not take a seat there. It is true that Coloured and Indian representatives were included in the cabinet in the 1980s, but this hardly constituted a challenge to the order. There was no block of African (or 'non-white', to use the offensive term of the time) able to vote representatives into Parliament to have a meaningful say in the country's governance and in their own future. We would argue that it was this – the denial of political participation on the basis of race – more than anything, that defined Apartheid.

C. Does the Apartheid analogy apply to Israel?

Apartheid was *sui generis* and, unless Israel is found to replicate the many and specific elements of Apartheid South Africa, Israel cannot be an apartheid state. In the absence of evidence to that extent, Apartheid as properly defined, does not apply to Israel.

As the ICERD neither defines discrimination nor Apartheid, we do not see how Israel can be defined as an Apartheid state in terms of ICERD. Israel cannot be an Apartheid state just because its detractors "know Apartheid when they see it".

For the reasons stated in this representation the range of criteria in the Apartheid Convention would not be sufficient against Israel to define it as an Apartheid state. For this reason, if it is so labelled, the UN committee could put pressure on Israel to change something it cannot change or can change very little.

Similarly, Israel may be found guilty of 'inhuman and degrading practices' in terms of Protocol I, but the gamut of 'Apartheid practices' could not be found. In any event, contravention of alleged practices would only be relevant in the context of war in terms of the Geneva Convention, if they can be found to any extent.

In terms of the Rome State Israel cannot be the party to the dispute; it can only be applied against individuals and the Commission would find it difficult to do in terms of the way the Israeli state operates both politically and militarily. To single out an individual for said alleged crimes, would be very difficult.

In Israel the religious affiliation of a person at birth is recorded, but no legal disadvantage is conferred on any group as a result. In this respect democratic South Africa today pursues numerous policies and legislation which assume benefits depending on the race of a person as defined de facto with reference back to Apartheid laws. This further distinguishes Israel from Apartheid South Africa.

We cannot ignore the fact that the invocation of Israel as an "Apartheid state" was a key element of the propaganda promoted by the Soviet Union in its battle against America in the Cold War. The Soviet tactic was not about whether Israel was an apartheid state, but more that its characterisation of Israel as an Apartheid state was intended to draw anti-apartheid forces in Africa to demonise Israel to galvanise support against the West. The Soviets used it for the tremendous emotional impact it would elicit, not because it was true. The decades long Soviet campaign, it can probably safely be said, led to the accusation of apartheid becoming the ultimate emotional rallying cry to express opprobrium. Thus, "Apartheid" is and was only a label used for propaganda: Israel is not an apartheid state.

We have said that Apartheid ensured that power remained overwhelmingly in the hands of a racially-defined group. Israel is a democracy in which its citizens vote as equals. In the West Bank the vast majority of inhabitants are Muslim and their governing authority is determined by the ballot, although

not for over a decade. Gaza too is almost entirely Muslim and is governed controversially by the Islamist Hamas under the authority of the Palestinian Authority in the West Bank. Jews are not allowed into either of these Palestinian-governed areas.

D. Why Israel is a democracy

We have set out what comprises apartheid as the South Africa-specific construct that it was, and why Israel does not meet the 'requirements' of apartheid.

We would like to enumerate why Israel is not an apartheid state, but why it is in fact a democracy and what criteria make it so.

Vote

All citizens have the right to vote - Jew, Arab, men, women etc. The last elections were held in 2021. However, the conduct of these elections, even amid the ongoing COVID-19 pandemic, was regarded as fair and successful.

Knesset (parliament)

Both Arab and Jewish parties are represented in the Knesset and currently an Arab party, the Arab Islamist party Ra'am, forms part of the governing coalition. Israel hosts a diverse and competitive multiparty system. The only exclusions from standing are if parties or candidates deny Israel's Jewish character, oppose democracy or incite racism. The government and parliament are free to set and implement policies and laws without undue interference from unelected entities.

Transparency

Israel's laws, political practices, civil society groups, and independent media generally ensure a substantial level of governmental transparency. Recent corruption cases have illustrated some persistent shortcomings. The Freedom of Information Law grants every citizen and resident of Israel the right to receive information from a public authority. However, the law does include blanket exemptions that allow officials to withhold information on the armed forces, intelligence services, the Atomic Energy Agency, and the prison system, potentially enabling the concealment of abuses.

Citizenship

Israeli citizenship is conferred on all without regard to race or ethnicity. The Arabs of East Jerusalem do not have Israeli citizenship because they rejected it, many relying on still being Jordanian passport holders 55 years after Israel captured the city. They regard themselves as citizens of the Palestinian entity. While 'nationality' is recorded and serves as a means of classification – and may rightly be criticised (it is the subject of debate in Israel) – this does not substantively impact on the rights of its citizens before the state, although it has implications for marriage, and for liability for military service.

Freedom of movement & association

Everyone, Arabs and Jews, have freedom of movement and association.

Freedom of speech

The only restrictions pertain to security issues. All media are free to – and do – criticize the government. However, the Government Press Office has occasionally withheld press cards from journalists to restrict them from entering Israel, citing security considerations.

Social welfare

Government social welfare assists those in need irrespective of race or religion. Jews and Arabs receive the same benefits; the only exception is a preferential allowance to yeshiva students (Jewish religious seminary).

Marriage

Marriage and divorce are controlled by the various religious communities, which impose their own restrictions. While this may be criticised, anyone who has been married in a civil ceremony abroad will be recognised in Israel. (As we have noted, legislation introduced in the early years of the Apartheid era specifically attempted to close remove this possibility.)

Health & Welfare

Jews and Arabs are treated alike in hospitals and clinics. They occupy the same wards and are treated by the same doctors and nurses some of whom are Jewish and some Arab. All groups have the same rights to national insurance coverage, pay the same rates and enjoy the same benefits.

Incarceration

Jews and Arabs have equal facilities. The only prisoners kept in separate sections or prisons are security prisoners. The latter are not limited to any racial or ethnic group.

Right to work & associate

There are no restrictions on the right to work or on the right to join trade unions. Protests and demonstrations are widely permitted and typically peaceful. However, some protest activities—such as desecration of the flag of Israel or a friendly country—can attract serious criminal penalties.

Religious freedom

While Israel defines itself as a Jewish state, freedom of religion is largely respected. Christian, Muslim, Druze, and Baha'i communities have jurisdiction over their own members in matters of marriage, divorce, and burial. Israeli authorities have set varying limits on access to the Temple Mount/Haram al-Sharif in East Jerusalem in recent years for security reasons. In 2021, it was reported that Israeli authorities had increasingly allowed Jewish prayer at the site without openly announcing a change in policy. However, the issue of Muslim authorities and worshippers regarding Jews as 'defiling' the area warrants opprobrium.

Schooling & university

There are no legal restrictions and there is free, compulsory education. The religious communities do have their own schools. Universities are open to all.

Military Service

Conscription applies to Jews of both genders, male Druze Arabs and Circassions (indigenous ethnic group native to the north Caucuses). Arab citizens can enlist if they wish to, but it's purely voluntary.

Public facilities

All are open to everyone.

Transport

All are available to everyone.

Language

In 2018 the Knesset Israel passed the Basic Law: Israel – The Nation State of the Jewish People by a vote of 62-55. Since Israel has no written constitution, the Basic Laws sets out the rights of the individual and fundamental principles of the state that are expected to be incorporated into a formal constitution if one is approved. It establishes Hebrew as Israel's official language, and downgrades Arabic to a 'special status'. In practical terms, this does not seem to have a material impact on the use of Arabic.

Legal system

Everyone is equal before the law and anyone can hold a judicial position at any level. The judiciary is independent and regularly rules against the government. The Supreme Court has historically played a crucial role in protecting minority groups and overturning decisions by the government and the parliament when they threaten human rights. The court hears direct petitions from citizens and other individuals in Israel as well as Palestinian residents of the West Bank and Gaza Strip, and the state generally adheres to court rulings.

Conclusion

We recognise that Israel's democracy is not perfect and that abuses do on occasion occur. However, it conforms to the requirements of a democracy envisioned by democratic countries world-wide. In the context of the Middle East the contrast is stark.

The *Democracy Index* is compiled by the Economist Intelligence Unit (EIU), the research division of the Economist Group, a UK-based private company which publishes *The Economist*. It ranks countries out of 10 as full democracies, flawed democracies, hybrid regimes and authoritarian regimes.

As of 2021 Israel is considered a flawed democracy with a score of 7,97. This score is higher than that of the USA, Belgium, Greece, Italy, Portugal, Spain and just below France at 7,99.

Of the 20 Middle Eastern countries Morocco and Tunisia are considered hybrid regimes. The remaining 17 are categorised as authoritarian.

This should not be ignored in the undue criticism aimed at Israel but at no other country in the region.

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