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9 May 2022

The Honourable Navi Pillay, Mr Miloon Kothari, Mr Chris Sidoti  
United Nations: Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and in Israel  
Palais des Nations  
1211 Geneva 10  
Switzerland

Dear Judge Pillay, Mr Kothari, and Mr Sidoti,

I am instructed by the Institute for NGO Research to advise on allegations of apartheid in the Israeli-Palestinian conflict. I am writing to you further to my letter of 22 April 2022, a copy of which is enclosed. To assist with the exercise of your mandate, and in response to your call for submissions, I attached two reports to that letter, published in December 2021 and March 2022, that I co-authored with Anne Herzberg. The reports are titled “False Knowledge as Power: Deconstructing Definitions of Apartheid that Delegitimise the Jewish State,”<sup>1</sup> and “Neo-Orientalism: Deconstructing claims of apartheid in the Palestinian-Israeli conflict.”<sup>2</sup> In “False Knowledge as Power,” Ms Herzberg and I offered a substantiated definition of the crime and inter-State prohibition of apartheid. In “Neo-Orientalism,” we expanded on the legal analysis by assessing whether there are reasonable grounds to believe that apartheid is being committed by Israeli officials in territories under its jurisdiction. The reports followed a contribution on the same topic I made in July 2021 to the international law blog *EJIL Talk!*.<sup>3</sup>

At the end of February 2022, the International Human Rights Clinic at Harvard Law School, with the Addameer Prisoner Support and Human Rights Association, published a Joint Submission to the Commission of Inquiry (“IHRC/Addameer Submission” or “Submission”),

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<sup>1</sup> Joshua Kern and Anne Herzberg, “False Knowledge as Power: Deconstructing Definitions of Apartheid that Delegitimise the Jewish State,” 9 December 2021, available at [https://ngo-monitor.org/pdf/NGOMonitor\\_ApartheidReport\\_2021.pdf](https://ngo-monitor.org/pdf/NGOMonitor_ApartheidReport_2021.pdf) (hereinafter “False Knowledge as Power”).

<sup>2</sup> Joshua Kern and Anne Herzberg, “Neo-Orientalism: Deconstructing claims of apartheid in the Palestinian-Israeli conflict,” 21 March 2022, available at [https://ngo-monitor.org/pdf/NGOMonitor\\_ApartheidReport\\_2022.pdf](https://ngo-monitor.org/pdf/NGOMonitor_ApartheidReport_2022.pdf) (hereinafter “Neo-Orientalism”).

<sup>3</sup> Joshua Kern, “Uncomfortable truths: how HRW errs in its definition of ‘Israeli apartheid’, what is missing, and what are the implications?” *EJIL Talk!*, 7 July 2021 available at <https://www.ejiltalk.org/uncomfortable-truths-how-hrw-errs-in-its-definition-of-israeli-apartheid-what-is-missing-and-what-are-the-implications/> (hereinafter “Uncomfortable Truths”).



alleging Israeli responsibility for apartheid in the West Bank.<sup>4</sup> On 21 March, Michael Lynk (Canada), who then held the mandate as the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, published a report examining the current human rights situation in the West Bank, Gaza Strip and East Jerusalem, and concluded that the situation there “satisfies the prevailing evidentiary standard for the existence of apartheid.”<sup>5</sup>

This letter offers a reply to the contributions provided by IHRC/Addameer and Mr Lynk and critiques the legal classifications and factual analysis which they adopt. It is not, nor does it purport to be, a point-by-point rebuttal of either document; instead, it is thematic in its approach and offers a critique of weaknesses in IHRC’s and Mr Lynk’s legal analysis, methodology, and assessments of the facts. It argues that both IHRC / Addameer and Mr Lynk avoid discussion of core legal and contextual elements, which is material to the errors which result – both in the legal analysis as well as in the factual assessments – and leading them to conclude that Israel and its officials are responsible for apartheid.

## **IHRC/Addameer Joint Submission**

### *Legal classifications*

The IHRC/Addameer submission claims that Israel’s actions in the occupied West Bank are in breach of the inter-State prohibition of apartheid and amount to the crime of apartheid under international law.<sup>6</sup> Like other NGO and UN publications analysed in our reports, it contends that the “dual legal regime” in the West Bank (through which “Jewish Israelis” and Palestinians in the West Bank are said to be subjects of “distinct and unequal sets of legal rights”) underpins its “conclusion that Israel is in breach of the prohibition of apartheid... .”<sup>7</sup> This claim is unsound on both the law and facts.

The submission’s first section, titled “Legal definitions,” purports to analyse the “crime of apartheid.”<sup>8</sup> It contains a significant admission, namely that “Israel’s dual legal regime could arguably be consistent with IHL were it not for its purpose or intent to maintain domination over the Palestinians in violation of the prohibition on apartheid.”<sup>9</sup> This finding narrows the range of issues which, according to IHRC/Addameer, arguably are capable of giving rise to the conclusion that Israel is responsible for establishing and maintaining an apartheid system in the West Bank. According to IHRC/Addameer, it is Israel’s “purpose or intent to maintain domination over the Palestinians” that triggers its responsibility, and the individual responsibility of its officials, rather than the existence of the “dual legal regime” itself. This

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<sup>4</sup> “Apartheid in the Occupied West Bank: A Legal Analysis of Israel’s Actions-Joint Submission to the United Nations Independent International Commission of Inquiry on the Occupied Territory, including East Jerusalem, and Israel,” 28 February 2022 (hereinafter “IHRC/Addameer”).

<sup>5</sup> Michael Lynk, “Report of the Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967,” 21 March 2022, A/HRC/49/87 (hereinafter “Lynk”), para. 55. The report is opaque as to the standard of proof to which it is referring.

<sup>6</sup> IHRC/Addameer, p.1

<sup>7</sup> Id., p.2. See also p.8 -22.

<sup>8</sup> Id., p.2.

<sup>9</sup> Id., n.19.



approach is notable because, as demonstrated below, the submission then fails to undertake any rigorous analysis of Israeli intentions in the factual analysis which follows.

### *Definition of apartheid*

Like Amnesty and Human Rights Watch, the IHRC/Addameer submission proposes a definition of the “crime against humanity of apartheid” which, it argues, requires: “(i) inhuman acts, (ii) committed with the intent to establish or maintain the domination of one racial group over another, and (iii) in the context of an institutionalized regime of systematic racial discrimination and oppression.” We analysed the problematic nature of this definition in “False Knowledge as Power.”<sup>10</sup> Yet the submission makes no reference to the (disputed and unsettled) status of apartheid as a crime under customary international law,<sup>11</sup> nor does it properly consider implications of the divergent treaty definitions of the crime under the Rome Statute and the Apartheid Convention. Like Human Rights Watch, IHRC/Addameer’s definition omits distinctions which exist between the Rome Statute’s and the Apartheid Convention’s definitions. Firstly, under the Rome Statute, the prosecution must prove the existence (*actus reus*) of a system of domination (in addition to systematic oppression) by one racial group over another. It is not enough simply to prove an intent (*mens rea*) to maintain such a system.<sup>12</sup> Secondly, under the Rome Statute, to constitute a crime against humanity, a person’s criminal acts must have a nexus with a widespread or systematic attack directed against a civilian population, pursuant to a State or organisational policy.<sup>13</sup> Although reference is made to these *chapeau* elements in the footnotes,<sup>14</sup> an analysis of them, or their applicability, is missing from IHRC/Addameer’s contribution.

### *Citation practice*

The submission asserts that Additional Protocol I to the Geneva Conventions is “widely regarded as customary international law,”<sup>15</sup> in addition to noting that that “[p]ractices of apartheid committed in the context of an armed conflict also amount to a grave breach of [Additional Protocol I].”<sup>16</sup> However, it fails to mention that the proposition that the entirety of Additional Protocol I constitutes customary international law is disputed by numerous States, and has arguably been doubted by the ICJ.<sup>17</sup> In support of its claim, the submission cites to

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<sup>10</sup> Kern and Herzberg, “False Knowledge as Power”, p.20-52.

<sup>11</sup> See Kern and Herzberg, “False Knowledge as Power”, pp.24-7 (arguing that there is no consensus whether apartheid exists as a crime against humanity under customary international law; questioning whether there is sufficiency of State practice and *opinio juris* to establish the criminalisation of apartheid as a crime against humanity under customary international law.) See also John Dugard and John Reynolds, “Apartheid, International Law, and the Occupied Palestinian Territory,” *European Journal of International Law*, Volume 24, Issue 3, August 2013 (hereinafter “Dugard and Reynolds”), p. 883 (drawing a distinction between the prohibition of apartheid (directed at States) and the crime of apartheid (directed at individuals), and suggesting that whereas the prohibition had established itself as a rule of customary international law, the crime of apartheid was moving towards customary status but may not have acquired that status yet.

<sup>12</sup> See also Kern, “Uncomfortable Truths”.

<sup>13</sup> Rome Statute, Article 7. See also Kern and Herzberg, “False Knowledge as Power”, p.28.

<sup>14</sup> IHRC/Addameer, n.9.

<sup>15</sup> See also IHRC/Addameer, n.20 (“while Israel is not a State Party to Protocol I Additional to the Geneva Conventions, the Protocol is largely seen as customary international law and is thus binding on Israel”).

<sup>16</sup> IHRC/Addameer, p.2-3.

<sup>17</sup> See, e.g. Protection of the environment in relation to armed conflicts, International Law Commission, Seventy third session, Geneva, 18 April 3 June and 4 July 5 August 2022, 17 January 2022, A/CN.4/749 (see comments



Henckaerts and Doswald-Beck's commentary on the rule of customary international law (prohibiting adverse distinction in the treatment of civilians and persons *hors de combat*).<sup>18</sup> Yet the criminalisation of apartheid as a grave breach of Additional Protocol I is a separate matter from the prohibition of unlawful discrimination under the law armed of conflict, and the latter (as a rule of international humanitarian law ("IHL")) cannot simply be transposed into the former; to do so would violate the basic principle of fairness in international criminal law that the definition of a crime cannot be extended by analogy.<sup>19</sup>

In a similar manner, the IHRC/Addameer submission asserts that while "Israel is not a State Party to the Apartheid Convention or the Rome Statute, its actions in the Occupied Palestinian Territories subject it to the relevant treaties, because Palestine has signed these treaties."<sup>20</sup> In support of this claim, IHRC/Addameer cite to the February 2021 Majority Decision of Pre-Trial Chamber I of the International Criminal Court ("ICC"), and assert that the Pre-Trial Chamber "confirmed the ICC's jurisdiction over war crimes and crimes against humanity allegedly committed in the Occupied Palestinian Territory."<sup>21</sup> It is correct that the Majority of Pre-Trial Chamber I found that since the UN General Assembly had resolved that Palestine was a "non-member observer state" at the UN, it had the capacity to accede to the Rome Statute. As it had done so, it was a State Party to the Rome Statute; and, as it was a State party, it was *ipso facto* a State for the purposes of satisfying the territorial pre-condition to the exercise of jurisdiction of the ICC.<sup>22</sup> However, IHRC/Addameer fail to acknowledge both that the Majority specifically emphasised the Decision's narrow scope (limiting its applicability to the context of establishing, for the purposes of the Rome Statute, whether there was a sufficient jurisdictional basis for the ICC Prosecutor to open an investigation),<sup>23</sup> and that Presiding Judge's Kovács delivered a 154 page dissent in which he disputed that Palestine was a State for the purposes of determining the territorial jurisdiction of the ICC, as well as with respect to the territorial scope of Court's jurisdiction.<sup>24</sup>

### *Factual analysis*

Part II purports to analyse the facts and the "dual legal regime" in the West Bank. We recall that the submission accepted that the "dual legal regime" could "arguably be consistent with

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and observations of, *inter alia*, Canada, Israel, UK, and USA, stating that the prohibition of reprisals contained in Article 55(2) of Additional Protocol I does not reflect customary international law). See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p.226, 8 July 1996, para. 31 (where the Advisory Opinion noted, while referring to Article 55, and also to Article 35(3) of Additional Protocol 1, that "[t]hese are powerful constraints for all the States having subscribed to these provisions").

<sup>18</sup> See IHRC/Addameer, n.8 citing Henckaerts, Jean-Marie and Doswald-Beck, Louise, "Rule 88," Customary International Humanitarian Law, ICRC, 2005.

<sup>19</sup> See, e.g., Rome Statute, Article 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy").

<sup>20</sup> IHRC/Addameer, n.11.

<sup>21</sup> *Id.*, n.11.

<sup>22</sup> Anne Bayefsky, Introductory Note to "Situation in Palestine" (Int'l Crime. Ct. Pre-Trial Chamber), 7 May 2021, International Legal Materials Vol 60 (2021), 1038-1041.

<sup>23</sup> See Situation in the State of Palestine, ICC-01/18-143 (Majority), ICC-01/18-143-Anx1, Decision on 'the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine,' Pre-Trial Chamber I, International Criminal Court, 5 February 2021 (hereinafter "PTC I Majority"), para. 129.

<sup>24</sup> Situation in the State of Palestine, ICC-01/18-143-Anx1 (Partly Dissenting Opinion of Judge Péter Kovács), Decision on 'the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine,' Pre-Trial Chamber I, International Criminal Court (hereinafter "Kovács"), 5 February 2021.

IHL were it not for its purpose or intent to maintain domination over the Palestinians in violation of the prohibition on apartheid.”<sup>25</sup> It can therefore be presumed that its critique of the “bifurcated system of citizenship and a dual regime of legal rights” in the West Bank, which since 1967 has granted “superior citizenship and legal status to Jewish Israeli settlers over Palestinians,” centres on the intent reflected by these legal arrangements, rather than the fact of them *per se*. The submission, however, simply goes on to record examples of the “dual legal regime” in practice (in criminal justice policies concerning “terrorism” suspects/“political prisoners”, the practice of proscription of “terrorist organisations”/“human rights organisations”, policies addressing (or allegedly failing to address) acts of violence committed by Jews against Palestinians, and the practice of the Israeli Supreme Court). Yet, the submission fails to undertake any proper analysis of Israeli intent, or the purpose of policies and practices, beyond the bald assertion that “[n]otwithstanding Israel’s legitimate security interests,” which are not analysed, “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.”<sup>26</sup> As demonstrated in “Neo-Orientalism”, this is not enough to sustain a charge of apartheid, as it does not begin to prove (rather than simply assert or claim) how or why Israeli policies are intended to establish or maintain a system of racial supremacy.

### *Missing context*

For IHRC/Addameer, “facts” are left to speak for themselves, outside of context. Thus, the fact that between “2010-2019, an average of 5,500 Palestinians were detained each year by Israeli military authorities on suspicion of committing various ‘security offenses’” is cited as proof of the crime,<sup>27</sup> yet IHRC/Addameer provide no analysis of the nature of the threat to Israeli security presented by terrorism emanating from the West Bank. Palestinian “political prisoners” are argued to be deprived of “their most basic right to a fair trial” absent analysis of the Israeli security dilemma that gives rise to the use of military justice and administrative detention procedures, the applicability of Article 66 of the Fourth Geneva Convention (contemplating committal of accused to its properly constituted, non-political military courts),<sup>28</sup> or the methodology employed for the submission’s designation of a detainee as a “political prisoner” (as opposed to an ordinary criminal suspect or accused).<sup>29</sup>

The submission criticises Israel in turn for proscription of six NGOs as terrorist organisations allegedly without “any evidence to support” the claim or to justify such measures. The proscriptions are said to have been rejected by EU governments.<sup>30</sup> Yet the submission fails to

<sup>25</sup> IHRC/Addameer, n.19

<sup>26</sup> IHRC/Addameer, p.21. In support of its claim, the submission relies on Clive Baldwin’s blog post in reply to my post on the legal definition of the crime of apartheid on *EJIL Talk!*, and to Professor Miles Jackson’s 2021 legal opinion on the interplay between the law of apartheid and the law of belligerent occupation. The submission does not engage in a factual assessment of Israeli *mens rea* beyond asserting that 2018’s Nation-State Law, and 2020’s (aborted) plan by the previous Israeli government to exercise Israeli sovereignty in the Jordan Valley, in conjunction with settlement construction, “compels the conclusion that Israel’s actions are done with an intent to establish and maintain Jewish Israeli dominance over Palestinians in the occupied West Bank.”

<sup>27</sup> IHRC/Addameer, p.10.

<sup>28</sup> Fourth Geneva Convention, Article 66. See also Anne Herzberg, *Lex Generalis Derogat Legi Speciali: IHL in Human Rights Regulation of Military Courts Operating in Situations of Armed Conflict*, (2021) 54 *Israel Law Review* 84.

<sup>29</sup> IHRC/Addameer, p.11.

<sup>30</sup> *Id.*, p.16.



mention the Dutch government's and EU Commission's reviews of and freezing of funding to the same organisations.<sup>31</sup> IHRC/Addameer undertakes no analysis of the merits (or demerits) of Israeli allegations of linkages between certain Palestinian NGOs and the Popular Front for the Liberation of Palestine (PFLP).<sup>32</sup>

IHRC/Addameer present acts of violence committed by Israeli Jews against Palestinians in the West Bank in a similar contextual vacuum. No information is provided as to how terms are defined. It is unknown, for example, whether acts performed in self-defence or in defence of property are classified as settler violence.<sup>33</sup> Although information from official Israeli sources concerning rates of prosecution of those responsible for acts of violence is lacking – leaving Israel open to criticism in this regard – it is not the case that those responsible are not

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<sup>31</sup> Letter from FM Hoekstra to Dutch President, 29 April 2022, available at [https://www.tweedekamer.nl/kamerstukken/brieven\\_regering/detail?id=2022Z08539&did=2022D17353](https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2022Z08539&did=2022D17353) (“Prior to [the vote for a UNHRC resolution on “Israeli Accountability,”], the Netherlands issued a declaration of reservation in which a reservation was made regarding the section on the terrorist designation of Palestinian NGOs. The Netherlands has not yet reached a conclusion on the information on the basis of which the Israeli decision was taken with regard to the six NGOs”); Letter from Permanent Representation of the Kingdom of the Netherlands to the United Nations Office and other International Organizations in Geneva to the Office of the High Commissioner for Human Rights, 31 January 2022 available at <https://unwatch.org/wp-content/uploads/2022/02/Response-of-the-Government-of-the-Netherlands-to-the-UN-experts.pdf>; “Netherlands cancels €2.2 million contract with Palestinian NGO,” *Jerusalem Post*, 26 January 2022, available at <https://www.jpost.com/diaspora/article-694575>; European Parliamentary question, “EU funding to the Union of Agricultural Work Committees (UAWC),” 25 January 2022, available at [https://www.europarl.europa.eu/doceo/document/E-9-2022-000307\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2022-000307_EN.html); Al Haq, “Statement Al-Haq about funding suspension imposed by the European Commission,” 21 January 2022. In January 2022, the Dutch government announced that it would cancel funding to the Union of Agricultural Work Committees (UAWC), one of the designated entities. This followed an 18-month investigation that revealed at least 34 UAWC employees from 2007 to the present were also PFLP-linked. The Dutch government’s July 2020 decision to commission the external investigation was prompted by the arrest of two senior UAWC officials for allegedly orchestrating an August 2019 bombing that murdered an Israeli teenager, Rina Schnerb. Likewise, in January, Al-Haq – a Palestinian NGO cited uncritically by Lynk, and one of those designated by Israel over alleged connections to the PFLP– revealed that the EU froze its funding in May 2021 after reviewing information provided by the Israeli government linking the NGO to the PFLP. Similarly, Israeli media reported in February that, following a meeting between Israeli Foreign Minister Yair Lapid and German Foreign Minister Annalena Baerbock, “the German and Israeli foreign ministries will jointly consider ways to continue funding projects in the territories without the money going to six Palestinian organizations that Israel outlawed as terrorist groups.” Michael Lynk’s Final Fiction, NGO Monitor 22 March 2022, <https://www.ngo-monitor.org/reports/michael-lynks-final-fiction/>.

<sup>32</sup> See e.g. PFLP Ties of Six Newly Designated Terror NGOs, NGO Monitor, 28 October 2021 available at <https://www.ngo-monitor.org/reports/pflp-ties-six-newly-designated-terror-ngos/>.

<sup>33</sup> What is clear, however, is that IHRC/Addameer make no reference to racially or religiously aggravated acts of violence or harassment committed by Palestinians against Israeli Jews in the West Bank. See, e.g. Remarks of Tor Wennesland, Special Coordinator For The Middle East Peace Process, Briefing to the Security Council on the Situation in the Middle East, 23 February 2022, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/Security%20Council%20briefing%20on%20the%20situation%20in%20the%20Middle%20East%2C%20including%20the%20Palestinian%20question%20%28as%20delivered%20by%20SC%20Wennesland%29%2C%2023%20February%202022.pdf> (“Israeli settlers or other civilians perpetrated 55 attacks against Palestinians resulting in 18 injuries and/or damage to Palestinian property” while “Palestinians perpetrated 108 attacks against Israeli civilians” in “clashes, shooting, stabbing and ramming attacks, the throwing of stones and Molotov cocktails, and other incidents”). See also Remarks of Tor Wennesland, Special Coordinator For The Middle East Peace Process, Briefing to the Security Council on the Situation in the Middle East, 22 March 2022, available at [https://unsco.unmissions.org/sites/default/files/security\\_council\\_briefing\\_-\\_22\\_march\\_2022\\_2334.pdf](https://unsco.unmissions.org/sites/default/files/security_council_briefing_-_22_march_2022_2334.pdf) (“Israeli settlers or other civilians perpetrated 144 attacks against Palestinians” while “Palestinians perpetrated 277 attacks against Israeli civilians”).



investigated or prosecuted.<sup>34</sup> Given the lack of transparency as to how statistics are compiled by organisations such as B'Tselem and Yesh Din, and concerning the definition of terms, it is open to question the basis upon which IHRC/Addameer conclude that “Israeli authorities routinely fail to adequately prevent, investigate, and prosecute acts of violence committed by Jewish Israeli settlers against Palestinian individuals and property.”<sup>35</sup>

### **Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967**

Michael Lynk’s report, published on 21 March 2022, picks up where IHRC/Addameer leave off.<sup>36</sup> “When the facts change,” Mr Lynk asserts, “so must our minds.”<sup>37</sup> The change of circumstances that Mr Lynk contends marks a “significant deterioration” in the situation of Palestinian human rights comprises incidents of settler violence (and its treatment, or alleged tolerance, by the Israeli authorities),<sup>38</sup> and actions taken by the Israeli authorities in proscribing Palestinian NGOs as terrorist organisations.<sup>39</sup>

#### *A change in circumstances?*

Like IHRC/Addameer, Mr Lynk relies on B'Tselem and Yesh Din as sources for his report’s information on settler violence.<sup>40</sup> We have considered some of their problematic aspects in the previous section. Mr Lynk undertakes no analysis of his own of Israeli allegations of linkages between certain Palestinian NGOs and the PFLP but simply dismisses them as unsubstantiated, whilst affording no margin of appreciation to the State.<sup>41</sup> To then conclude that these “developments” constitute a change in circumstances warranting a paradigm shift from an analysis grounded in IHL (specifically the law of occupation) to the crime of apartheid appears, then, to reflect an apparent predetermination of the question of Israeli responsibility more than it reflects novel factual circumstances warranting a change of mind. Indeed, scrutiny of Mr Lynk’s previous statements and reporting demonstrates that there is little to suggest that he genuinely considers that the facts on the ground have changed to such an extent that they warrant such a paradigm shift.<sup>42</sup>

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<sup>34</sup> See <https://www.srugim.co.il/521483-מחיר-תג-שתכנון-צעירים-שני-נגד-אישום-כתב> (relating to an indictment dating from December 2020 for a “price tag” attack); <https://news.walla.co.il/item/3474511> (20 month imprisonment for an Israeli who carried out a “price tag” in a Palestinian village); <https://www.ynet.co.il/articles/0.7340.L-5724616.00.html> (Supreme Court labels attacks as “[t]errorist acts within the framework of a terrorist organization,” with Justice Mazuz adding, “[t]he actions constitute a danger to public peace and a desire to impose extreme positions on the general public through violence and intimidation”). <https://www.haaretz.co.il/news/law/.premium-1.10734429> (Gantz signs an administrative detention order for a Jewish Israeli citizen, second in a month (11.04.2022): “The order, which will be valid for three months, is given to a settler resident of Yitzhar who recently finished serving a year in prison for attacking Palestinians in the village of Sarta while he was a minor”).

<sup>35</sup> IHRC/Addameer, p.17.

<sup>36</sup> Indeed, Mr Lynk’s report relies on the IHRC/Addameer submission and recycles its errors on the law. See Lynk, n.53.

<sup>37</sup> Id., para. 12.

<sup>38</sup> Id., paras 7-8.

<sup>39</sup> Id., paras. 10-11.

<sup>40</sup> Id., n.1, 2, 3. Note 2 is a report authored by Lynk himself which references Yesh Din.

<sup>41</sup> Lynk, para. 10.

<sup>42</sup> See, e.g., A/72/556.

On the law, Mr Lynk conflates the inter-State prohibition of apartheid, which has attained the status of a peremptory norm of international law, with the crime against humanity of apartheid, whose status as a norm of customary international law remains unsettled. He states correctly that the “*prohibition* against apartheid has become well-established through both customary and conventional international law” and “is regarded today as a *jus cogens* norm, a peremptory norm of international law for which no derogation is allowed” (emphasis added).<sup>43</sup> The sleight of hand – where analysis of the inter-State *prohibition* of apartheid is substituted out for analysis of *crime* of apartheid – occurs in the next sentence, where Mr Lynk asserts that “[e]levating apartheid to the most serious of *crimes* in international law places it in the same category as war crimes, wars of aggression, territorial annexation, genocide, slavery, torture and crimes against humanity” (emphasis added).<sup>44</sup> Now that the discussion has shifted to analysis of apartheid as a “crime against humanity,” Mr Lynk concludes that “as a *jus cogens* norm, this gives rise to obligations *erga omnes*, creating a legal duty on all states to cooperate in order to end the violation.”<sup>45</sup> Yet, it is unclear in this sentence whether it is the inter-State prohibition, or the crime of apartheid, that Mr Lynk is referring to as giving rise to *erga omnes* obligations.

### *Legal definitions*

Unsurprisingly, Mr Lynk’s conflation of the inter-State prohibition of apartheid with apartheid as a crime against humanity results in the definitional problems observed in other NGO reporting, which also result from the same error. This is because Mr Lynk, like IHRC/Addameer, fails properly to consider the implications of the divergent treaty definitions. Instead, he (like IHRC/Addameer) produces a single definition of the crime that is grounded in neither convention.<sup>46</sup>

### *Factual analysis*

Turning to the facts, Mr Lynk does provide additional clarity as to the nature of the allegation that Israel intends to maintain the dominance of Israeli Jews over Palestinians through the means of establishing Jewish settlements in the West Bank. He contends that settlement construction is “meant to demographically engineer an unlawful sovereignty claim through the annexation of the occupied territory while simultaneously thwarting the Palestinians’ right to self-determination.”<sup>47</sup> For Mr Lynk, this reflects Israel’s position as a “covetous alien power,” engaged in a “fever-dream of settler colonialism” which has in his view, inevitably, immiserated “the indigenous people” and triggered “their perpetual rebellion.”<sup>48</sup> Palestinian terrorism is legitimised as “inevitable resistance.”<sup>49</sup> Israel’s “refusal to accept the international community’s direction” with respect to the legal status of the area, according to Mr Lynk, “is not a [sic] honest difference over the interpretation of international law, but the obfuscation of

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<sup>43</sup> Lynk, para. 24.

<sup>44</sup> Id., para. 24.

<sup>45</sup> Id., para. 24.

<sup>46</sup> Id., para. 35.

<sup>47</sup> Lynk, para. 39. See also para. 51 (“Israel’s intention in building the settlements was never primarily about security or increasing the incentive of neighbouring Arab states to negotiate a final peace agreement, but to ensure that it retained as much of the land as possible”).

<sup>48</sup> Id., para. 40.

<sup>49</sup> Id., para. 57.



an acquisitive occupier determined to maintain permanent control over the land and its indigenous population.”<sup>50</sup> For Mr Lynk, “Israel’s intention in building the settlements was never primarily about security or increasing the incentive of neighbouring Arab states to negotiate a final peace agreement, but to ensure that it retained as much of the land as possible.”<sup>51</sup> As a result, Mr Lynk argues, Israel has chosen to “double-down with increasingly more sophisticated and harsher methods of population control as the inevitable consequence of entrenching permanent alien rule over a people profoundly opposed to their disenfranchisement and destitution.”<sup>52</sup>

Putting the emotive rhetoric Mr Lynk channels in these passages to one side, which might be viewed as positioning the Jewish people as an “alien” body in the Middle East, separate and distinct from the Land of Israel’s / Palestine’s indigenous people, these allegations do beg questions. Mr Lynk, as the UN’s rapporteur on human rights in the West Bank and Gaza, should appreciate that all human beings are entitled to enjoyment of their human rights, without discrimination, including (so-called) Israeli “settlers.” Mr Lynk pays no regard to Israel’s responsibility to protect its nationals, irrespective of whether their (or their parents’ or grandparents’) presence in the West Bank arose unlawfully (which, in any event, cannot be presumed, but must be assessed on a case-by-case basis). Mr Lynk’s reporting fails to acknowledge that Israel is also bound by different obligations with respect to treatment of its nationals when compared with its treatment of the Palestinian population of the West Bank, who are protected persons under the law of occupation.<sup>53</sup>

Instead of grounding his analysis in an assessment of contrasting rights and obligations, and subjective (Israeli) perceptions of those rights and obligations as reflecting intent (*mens rea*),<sup>54</sup> Mr Lynk instead reaches for a discourse which others the Jewish Israeli presence in the land and presumes bad faith. Instead of recognising the complexity of questions concerning the legal status of the West Bank, Gaza, and East Jerusalem,<sup>55</sup> and granting a margin of appreciation to the State, he reduces the Israeli position to an obstinate “refusal to accept the international community’s direction.”<sup>56</sup>

Mr Lynk alleges that a “central strategy of Israeli rule has been the strategic fragmentation of the Palestinian territory into separate areas of population control, with Gaza, the West Bank and East Jerusalem physically divided from one another,” to divide and rule Palestinians,<sup>57</sup> yet his reporting disregards Arab policies of rejection directed towards the Jewish State prior to and since the establishment of Israel. Palestinian fragmentation is not simply the result of Israeli policy. The territorial and political division of the Palestinian people results from the history of the Arab-Israeli conflict, including Arab rejection of the 1947 UN Partition Plan, Jordanian and Egyptian control over the West Bank and Gaza respectively, Israeli sovereignty over Israel “proper”, the Oslo agreements, and Palestinian political splits. Together, these factors have

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<sup>50</sup> Id., para. 51.

<sup>51</sup> Id., para. 51.

<sup>52</sup> Id., para. 40.

<sup>53</sup> See, e.g., Kern and Herzberg, “False Knowledge as Power,” p.37-47.

<sup>54</sup> See, e.g., Kern and Herzberg, “Neo-Orientalism,” p.85-93.

<sup>55</sup> See Kovács, paras. 101, 102, 282, 323 (“It is a truly extraordinary, unique and complex situation, as it was rightly qualified in the Request”).

<sup>56</sup> Lynk, para. 51.

<sup>57</sup> Lynk, para. 46.



contributed to the *status quo*. With respect to Gaza, Mr Lynk identifies Israel’s “apparent strategy” to be “the indefinite warehousing of an unwanted population of two million Palestinians,”<sup>58</sup> yet his analysis of the situation fails even to refer to the fact that Hamas, an internationally proscribed terrorist organisation committed to the elimination of Israel, administers Gaza’s territory from which it presents a real and significant risk to Israel.

This willingness, on the part of a UN rapporteur on human rights, to disregard not only the human rights of one group residing in an area covered by his mandate, whilst (without undertaking any analysis of it) dismissing Israeli intentions with respect to the area, as stated by jurists ranging from Judge Theodor Meron through to the current Legal Advisers of Israel’s Ministry of Foreign Affairs,<sup>59</sup> as reflecting bad faith has – perhaps understandably – given rise to a counter-perception that it is Mr Lynk himself who has failed to exercise his own mandate in good faith.<sup>60</sup>

### **Request for meeting**

I understand that the Commission is scheduled to present to the Human Rights Council in June 2022 and stand ready to assist your deliberations in advance of that presentation. As mentioned in my letter of 22 April, I should be grateful for the opportunity to answer any questions you may have which arise from your review of our reports and this letter, and to discuss with you any of the issues raised herein. I accordingly take this opportunity to reiterate my request on 22 April for a meeting with you to discuss these matters.

Anne Herzberg and I are available to meet via Zoom or MS Teams. Between 23 May and 10 June, I am also available to meet in person or online via Zoom or MS Teams.

I should be grateful if your offices are kindly able to confirm receipt of this letter.

Many thanks indeed.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Joshua Kern".

Joshua Kern

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<sup>58</sup> Id., para. 49.

<sup>59</sup> See Kern and Herzberg, “Neo-Orientalism,” p.86-91.

<sup>60</sup> See Special Rapporteur on Israel: The UN’s Weakest Lynk, NGO Monitor, 29 January 2019 available at <https://www.ngo-monitor.org/reports/special-rapporteur-human-rights-palestinian-territory/>.



Encl.

By email to:

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