

RESPONSE
NOT AN APARTHEID STATE,
A DEFAMED STATE

Jeremy Rabkin*

I. INTRODUCTION	617
II. A CRIME WITH ONLY ONE LOCUS	619
III. SECURITY MEASURES MUST BE JUDGED IN CONTEXT	623
IV. NOT ALL SEPARATION IS APARTHEID.....	628
V. ISRAELI NATIONALITY IS NOT A “RACE”	632
VI. CONCLUSION	634

I. INTRODUCTION

In his current contribution to this Journal, Prof. Dr. Kai Ambos evaluates whether Israel’s treatment of Palestinians on the West Bank fulfills the elements of the international crime of apartheid, as defined in the Statute of the International Criminal Court. This crime could not, of course, be committed by one or two or even fifty individuals, acting individually. The elements of the crime (as Dr. Ambos indicates) include maintaining an “institutionalized regime” of “systematic oppression” based on race. While the jurisdiction of the ICC only extends to individuals, the charge, then, questions the extent to which Israel’s occupation of the West Bank might be considered an apartheid State.

Dr. Ambos is by no means the first to make this charge. It has commonly appeared in popular media for more than three decades. One of the most curious things about his contribution

* Professor of Law, Antonin Scalia School of Law, George Mason University

here is that it offers no new facts to balance, clarify, or confirm what others have already charged. Nor—despite the Article’s claim to offer a “legal doctrinal inquiry”—does it offer more than superficial, cursory observations regarding relevant provisions in the ICC Statute. The point seems to be simply to establish that a respectable scholar is now prepared to explore the possibility that Israel is perpetrating evil acts—which surely follows from the “apartheid” tag, since that practice is now universally recognized as evil.

This is not the best time to volunteer for such an exercise. On the one hand, friends of Israel are still recoiling from the Hamas attacks of October 7, so monstrous they could only be compared to atrocities committed by Nazi Germany. On the other hand, those who condemn Israel’s actions have moved on from shouting about “apartheid” to denouncing Israel as a perpetrator of “genocide” in Gaza. Dr. Ambos completed the original draft for his Article months before the massacres of October 7. But it was the choice of Dr. Ambos to go forward with publication at this time.

In his subtitle, Dr. Ambos depicts his Article as a “call for a more nuanced approach.” This turns out to mean that he notices some technical complications relating to definitional elements of the crime of apartheid—not at all that he acknowledges anything incongruous or inapplicable in the overall charge. He expresses his conclusions with clinical detachment throughout. Perhaps what he means by “nuance” is that, unlike other writers denouncing Israel, Dr. Ambos waits until nearly half-way through his exposition before offering the suggestion—in an off-hand tone - that Israeli practices are comparable to those of Nazi Germany, only less “efficiently” implemented.¹

Given Dr. Ambos’ status, the article has some interest as a document of the present era. It adds nothing to the

1. “[A] State structure does not necessarily entail a particular organizational efficiency in setting up and maintaining such a regime [of oppression and discrimination]. This may be the case, as for example, with the German National Social State [= National Socialist = Nazi State], but not all States work as smoothly and efficiently in terms of systematic oppression.” Kai Ambos, *Criminal “Apartheid” In The Occupied Palestinian Territory?: A Call for a More Nuanced Approach from the Perspective of International Criminal Law*, 47 *FORDHAM INT’L L.J.* 485, 513 (2024).

persuasiveness of its absurd claims. I thank the editors for this opportunity to put Dr. Ambos' exposition in proper context.

II. A CRIME WITH ONLY ONE LOCUS

As Dr. Ambos indicates, apartheid has been recognized as a crime in international law at least since 1976, when the Convention on Suppression and Punishment of the Crime of Apartheid entered into force.² In 1978, Additional Protocol I to the Geneva Conventions took effect, including a reference to “practices of ‘apartheid’” as a “grave breach” of humanitarian law obligations, when committed in the context of international armed conflict.³ The Rome Statute of the International Criminal Court, which took effect in 2002, also includes a reference to the “crime of apartheid.”⁴

The definitions in these sources are not entirely consistent and there is, as Dr. Ambos acknowledges, almost no caselaw to help clarify the very general phrases in these treaties. Through all the decades since apartheid has been recognized as an international crime, no international tribunal has attempted to prosecute it nor has any national court conducted a full trial on this charge. Dr. Ambos purports to offer a “legal doctrinal” analysis of how this crime might be prosecuted. But he discusses only one potential case—Israel—and then only in regard to what

2. G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid (July 18, 1976). Article III refers to “international criminal responsibility,” *id.* art. III, and Article V holds that those charged with such crime “may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction,” *id.* art. V—which might be taken to authorize or at least invite assertions of universal jurisdiction, allowing third-party States to prosecute alleged perpetrators with no connection to the territory or nationals involved in the crime, if the perpetrator happens to be present in the charging state. Yet no State has ventured to assert jurisdiction for trial of Israeli officials on this ground.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. Under Article 85(4)(c), The International Committee of the Red Cross, among others, interprets the provision to authorize any state to prosecute anyone alleged to have committed such a “grave breach” (in other words, universal jurisdiction). Again, though, no state has ventured to assert jurisdiction for a trial of Israeli officials on this ground.

4. Rome Statute of the International Criminal Court art. 7(2)(h), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

he calls the Occupied Palestinian Territory in the West Bank.

For what he describes as a “legal doctrinal inquiry,” Dr. Ambos displays notably little interest in general “legal doctrinal” questions in this Article. Do national courts have jurisdiction to prosecute the crime under universal jurisdiction? Not his topic.⁵ Do the repeated qualifications in the Rome Statute, limiting the ICC’s jurisdiction to “the most serious crimes,” limit the court’s capacity to judge claims involving disputable or limited practices of discrimination? Dr. Ambos assumes the answer must be no, but does not tarry to explain this incongruous conclusion.⁶ Does the court’s obligation to defer to national courts “unless unwilling or unable genuinely to carry out the investigation” of a crime mean that the relevant national court must define the crime in the same way as the Rome Statute, even if not a party? He does not notice the issue here. Such indifference to relevant legal questions suggests the point of the inquiry here is something far more narrow than standard “legal doctrinal inquiry.”

On the face of it, Israel might seem a particularly hard case for applying this untested crime. After all, it is a Western

5. Dr. Ambos cites German legislation specifying elements of the “apartheid” crime, which seems to have been designed to enable a prosecution under universal jurisdiction. Ambos, *supra* note 1, at 27. He does not bother to analyze restrictions in German law on implementing this jurisdiction (in general), let alone explain why Germany—which frequently hosts top Israeli officials—has not attempted to arrest and try one of them for this “crime.”

6. Ambos, *supra* note 1, at 511 (“[T]here is neither a particular severity or gravity threshold going beyond the similarity criterion nor a restriction following from the context element of crimes against humanity. All that is required is that a few inhumane acts (not all!) are being committed . . .”). Footnote 92 then chides as “incorrect” Israeli sources defining the crime as requiring a “certain degree of severity” and that it be “widespread and systematic” and satisfying the “gravity requirement.” *id.* n.92. This claim is very hard to understand. Article 1 of the ICC Statute indicates the Court’s jurisdiction extends only to “the *most serious* crimes of international concern,” while Article 5 re-emphasizes that jurisdiction “shall be limited to the *most serious* crimes of concern to the international community as a whole” and Article 7 (which contains the provision on “apartheid”) begins with the qualification that “crime against humanity means any of the [subsequently listed offenses] when committed as part of a *widespread and systematic attack* against any civilian population . . .” Dr. Ambos appears to claim that while incidents of “torture” committed by a police force in a European country (as have certainly occurred now and then) would not confer jurisdiction if not “widespread and systematic,” a practice that can be characterized as “apartheid” need not be “widespread” or “grave” or subject to any similar qualifications in the ICC Statute. He gives no explanation for this non-intuitive conclusion.

democracy. It has fiercely contested elections, a raucous free press, a famously independent (not to say, activist) Supreme Court, which claims to uphold basic human rights protections for Palestinians in the disputed territories.⁷ Is it likely that Israel would be the one country in the world most eligible for the charge of “systematic oppression” on the basis of race?

One might think the practice would be more likely to persist and deepen in a totalitarian State, such as China, which imposes particularly brutal suppression on Tibetan and Uighur populations. Or (if one defines “race” as loosely as Dr. Ambos does) one might look at a country with a history of communal strife, like Lebanon, where the Christian-Shia majority restricts third- and fourth generation Palestinian “refugees” (that is, grandchildren and great-grandchildren of original migrants) to special residential areas (“refugee camps”) and restricts their participation in the economy. Or one might look to a Latin American or Pacific island nation where indigenous people have faced restrictions on their participation in social and economic life.

Even a “legal” analysis generally relies on comparisons and precedents to clarify the law. Readers would expect the argument to follow the pattern, “C can be classified as an instance of this crime, because it has these elements in common with D, E and F, which have been accused of this crime, while it is not like A and B, which were absolved of guilt for this crime.” While there are no cases adjudicated by courts, there are certainly claims advanced by advocacy groups. Human Rights Watch, for example, has published reports accusing Chinese officials dealing with the Uighurs and Burmese officials dealing with the Rohingya people of perpetrating the crime of apartheid

7. Oddly, Dr. Ambos notes that the Israel Supreme Court applies “international law” to Palestinians in the occupied territory but also Israeli law—as if international law should not apply to occupied territory or as if international law could supply all the standards required. He does not ever notice that the Jordanian law “displaced” by Israeli authorities was itself a law imposed after seizure of this territory by Jordan in 1948, without international recognition, so at least as much a law of “occupation” as anything imposed by Israel. Technically, Israel does not recognize the West Bank as “occupied” but rather “disputed,” since there was no pre-existing Palestinian State.

(as well as making this charge against Israel).⁸

Dr. Ambos, however, has exclusively chosen Israel for his focus in this Article. The reason might be that other researchers and governments have made this claim about Israel. But are these sufficiently reliable sources to take their findings as the premise for extended legal inquiry?

It is true, of course, that Israel is frequently denounced at the United Nations. It is denounced more than extreme human rights abusers, such as North Korea, Sudan, Myanmar—more, in fact, than all these other nations put together.⁹ An astute analyst would regard this pattern as clear indication of political bias rather than any sort of serious assessment of facts. It likely reflects the eagerness of autocratic governments in countries neighboring Israel (and elsewhere) to deflect popular resentment at their own misrule to the evils of a sinister—and diplomatically isolated—“Zionist entity.”

Other governments in the developing world have found it convenient to go along. Dr. Ambos notes in passing that the government of South Africa lobbied to retain the “crime of apartheid” in the Statue of the International Criminal Court—in 1998—after the practice had been repudiated in South Africa (though not, in fact, prosecuted even there). He does not note that the African National Congress (then in power in South Africa) had been closely aligned for years with the Palestine Liberation Organization. The same ANC government has since brought a claim to the International Court of Justice, charging Israel with genocide.¹⁰

But Dr. Ambos is engaged solely in a “legal doctrinal” inquiry—so such background considerations are not relevant. They might affect the way others view the justice of the claims

8. On Myanmar, see HUM. RTS. WATCH, *WORLD REPORT 2024*, at 441-49 (2024), https://www.hrw.org/sites/default/files/media_2024/01/World%20Report%202024%20LOWRES%20WEBSPREADS_0.pdf [https://perma.cc/AEN7-HS8N].

9. Luke Tress, *UN Condemned Israel More Than All Other countries Combined in 2022*, *TIMES ISRAEL* (Jan. 3, 2023), <https://www.timesofisrael.com/un-condemned-israel-more-than-all-other-countries-combined-in-2022-monitor> [https://perma.cc/XC68-URZN].

10. Kate Bartlett, *South Africa to Bring Landmark Case Against Israel at International Court of Justice*, *NAT'L PUB. RADIO [NPR]* (Jan. 10, 2024, 5:11 PM) <https://www.npr.org/2024/01/10/1224039921/south-africa-to-bring-landmark-case-against-israel-at-international-court-of-jus> [https://perma.cc/Z3C5-2D8G].

but “legal doctrinal inquiry” is, as Dr. Ambos conducts it, something quite else. As he moves through his particular claims, more and more reality is left out.

III. SECURITY MEASURES MUST BE JUDGED IN CONTEXT

As defined in the Rome Statute, the crime of apartheid has three elements. The first is “inhumane acts.” This is vital to the charge. The second element (“a regime of systematic oppression ... by one racial group over any other racial group”) and the third (“the intention of maintaining that regime”) are, as Dr. Ambos indicates, not easy to apply without a good deal of contextual information. It is common to political debate, even in Western democracies, for minority groups to claim they are subject to systemic oppression. What makes the apartheid label carry more charge than such standard protest rhetoric is the initial requirement that it be associated with inhumane acts.

The Rome Statute itself seems to acknowledge that “inhumane” in this context refers to very extreme practices. It defines the relevant “inhumane acts” (in its definition of “the crime of apartheid”) as “similar to those referred to in [the preceding] paragraph”: The list there includes “murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment ... in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution ...; persecution against any identifiable group on political, racial, national, ethnic, cultural religious, gender ... grounds; enforced disappearance of persons.”¹¹

What are the inhumane acts committed by Israel that bear comparison with “extermination” and “enslavement”? Dr. Ambos does not bother to analyze a single concrete example of an Israeli policy, let alone a particular episode of something he regards as a “crime against humanity.” He treats this most crucial element of his case as something that is simply known without demonstration or at least as something that can be assumed to be capable of demonstration. Instead of offering his

11. Rome Statute, *supra* note 4, art. 7(2)(h) (referring to list of crimes in Art. 7, ¶ 1)

own examples, he is content to offer footnotes indicating that various organizations have claimed that Israel is guilty of such crimes. He does not pause to evaluate their evidence, nor even their examples, let alone ask whether they are reliable reporters rather than partisan propagandists.

Even worse, Dr. Ambos never contextualizes these alleged acts of inhumanity. Dr. Ambos focuses his inquiry on what he calls “the Occupied Palestinian Territory” on the West Bank, referring to the territory Israel acquired from Jordan in the Six Day War of 1967. Why that focus? From what he says, one might imagine it is merely a sample, so what is true there might be true elsewhere. And he several times suggests that the Occupied Territory is becoming, more and more, just an extension of Israel, so not all that different, after all.¹² He has, it seems, simply chosen to focus on the West Bank Territory for analytic convenience.

This framing, which focuses on the West Bank, conveniently allows Dr. Ambos to escape any engagement with actual conditions within the State of Israel (within the boundaries of the 1949 armistice lines). In that area, the “apartheid” claim is “absurd,” as US officials dismissively termed it.¹³ Some twenty percent of Israel’s citizens are Arabs, who can live anywhere and move anywhere within the borders of Israel.¹⁴ They have made careers as doctors and lawyers, soldiers and police officers, members of parliament and justices of the Supreme Court.¹⁵

At the same time, this framing allows Dr. Ambos to escape engagement with those most eager to pursue the apartheid claim. In 1975, the UN General Assembly (as Dr. Ambos himself records—in a footnote) voted to denounce Zionism—the

12. Ambos, *supra* note 1, at 492 (“The distinction between the OPT [Occupied Palestinian Territory] . . . is increasingly blurred”); *id.* at 522 (“further blurs the line between Israel and the OPT”).

13. Toi Staff, ‘Absurd: US rejects Amnesty accusation of Israeli apartheid against Palestinians’, *TIMES ISRAEL* (Feb. 1, 2022), <https://www.timesofisrael.com/absurd-us-rejects-amnesty-accusation-of-israeli-apartheid-against-palestinians> [<https://perma.cc/8N2G-4YAQ>].

14. See Kali Robinson, *What to Know About the Arab Citizens of Israel*, COUNCIL ON FOR. RELS., <https://www.cfr.org/backgrounder/what-know-about-arab-citizens-israel#chapter-title-0-4> [<https://perma.cc/39NN-A4LM>] (Oct. 26, 2023).

15. *See id.*

movement that led to the founding of the State of Israel in 1948—as a form of “racism,” without regard to anything happening in territories seized in 1967. Amnesty International applied the term “apartheid” to the whole of Israel (including its original territory) as recently as 2022.¹⁶ Some academic analysts argue the “apartheid” charge should recognize that the State of Israel has been an affront to “egalitarian” norms since its founding in 1948.¹⁷ Dr. Ambos treats such claims as outside his frame of analysis. Perhaps Israel has a right to exist within its 1967 borders. Or perhaps not. He is simply making a “legal doctrinal inquiry” about conditions on the West Bank.

Readers are left to dig through footnotes for so-called support of Dr. Ambos’ claims that Israel has perpetrated acts of inhumanity in the West Bank. The site of the alleged acts of inhumanity is not across an ocean (notwithstanding Dr. Ambos’ bizarre reference to “mainland Israel”¹⁸), nor even across a chain of mountains or a deep jungle. It is a very short drive from major cities in Israel’s original territory. Many Israelis and visitors, including journalists and researchers for human rights advocacy groups, go back and forth between Israel and the West Bank every day. How is it that Israeli voters—and Israeli judges—are so complacent about acts of inhumanity right next door?

He makes no mention of the fact that Israel has repeatedly, since the mid-1990s, offered (in several rounds of negotiations with Palestinian leaders) to return almost all of the West Bank to a sovereign State of Palestine if the latter would agree to permanent peace with Israel.¹⁹ Successive offers, even those

16. See generally AMNESTY INT’L, ISRAEL’S APARTHEID AGAINST PALESTINIANS (2022), <https://www.amnesty.org/en/latest/campaigns/2022/02/israels-system-of-apartheid> [<https://perma.cc/N3QV-VNZ9>].

17. Oren Ben-Dor, *Apartheid and the Question of Origins*, in ISRAEL AND SOUTH AFRICA: THE MANY FACES OF APARTHEID (Ilan Pappé, ed., 2015) (“Any proper response to the egalitarian challenge facing Palestinians would in principle rule out that apartheid Israel could merely be reformed and remain Israel. With the demise of apartheid, South Africa was “replaced”. . . and then could remain South Africa. Existentially speaking, the apartheid nature of the state [in South Africa—unlike in Israel] was not essential.”)

18. Ambos, *supra* note 1, at 522 (“putting the Palestinians in the West Bank on the same footing with the Palestinian citizens of mainland Israel”—a terminology that implies that despite living “on the mainland,” Arabs there are actually nationals of a future Palestinian State.”)

19. See *Israeli-Palestinian Conflict Timeline*, COUNCIL ON FOR. RELS.: CFR EDUCATION, <https://education.cfr.org/learn/timeline/israeli-palestinian-conflict-timeline> [<https://perma.cc/3MSB-ZZF9>] (July 2, 2024).

brokered by President Clinton and then President Bush, have been repeatedly refused by Palestinian leaders. Meanwhile, starting in the mid-1990s, Israel transferred most governing authority over centers of population on the West Bank and all of Gaza to a Palestinian Authority, initially elected by Palestinian voters—though it has declined to hold itself accountable to any new elections since 2005.

One possibility might be for Israel to simply evacuate all territory acquired in the 1967 war, without waiting for Palestinian agreement on terms of peace thereafter. The experiment was tried in Gaza. It quickly fell into the hands of Hamas, a terrorist organization committed to destroying the State of Israel (in all its territory). Hamas tried to make good on this commitment with successive rounds of terror and rocket attacks, culminating in the massacre of some 1,200 Israelis—and some 250 others taken as hostages—on October 7, 2023.

On the West Bank, the governing authority has been willing to engage in negotiations on terms of a possible two-State solution, but its unwillingness to commit to a peace agreement likely reflect its fear of extremist factions like Hamas, which acquired a majority of legislative seats in the 2005 elections and continues to hold a broad following on the West Bank. To compete, the Palestinian Authority has periodically endorsed waves of terror—“intifada”—and pays compensation to families of killed or captured terrorists, as if they had performed a public service.²⁰

Dr. Ambos ignores this context almost entirely. In one particularly obscure passage, he does acknowledge that an occupying force might be concerned “by the need to protect its own population”—but seems to say that such security concerns can never take priority over the obligation to avoid practices of “apartheid.”²¹ Though asserted with great confidence, the claim

20. See Yossi Kuperwasser, *Incentivizing Terrorism: Palestinian Authority Allocations to Terrorists and their Families*, JERUSALEM CTR. FOR SEC. & FOR. AFFS., <https://jcpa.org/paying-salaries-terrorists-contradicts-palestinian-vows-peaceful-intentions> [https://perma.cc/ZB2B-9MHQ] (last visited March 29, 2024).

21. Ambos, *supra* note 1, at 504 (“[T]he commission of the crime of apartheid can never be justified by the law of occupation . . . in a situation of occupation there may even exist a higher risk that a regime of apartheid is established given the (military) coercion exercised by the occupier and the ensuing domination of the local population accompanied by the need to protect its own population.”).

is very hard to follow. During the *intifada* of the early 2000s, terrorists regularly launched lethal attacks on civilians inside Israel, ultimately killing more than 1,000 Israelis—many in “mainland” Israel.²² Dr. Ambos appears to be saying that saving lives in Tel Aviv or Jerusalem was not an adequate excuse for heightened security measures which one might designate as “apartheid.”

One might think that practices intended to protect Israeli citizens would, by definition, not be readily classified as practices “committed *with the intention* of maintaining” a “regime of systematic oppression,” per se. Somehow this basic point is beneath notice in Dr. Ambos’ “legal doctrinal inquiry.” In a later passage, he seems to accept the possibility that “security” might justify some of what Israel has done, but then rushes to the conclusion that it cannot provide an overall justification.²³ He does not distinguish particular practices. He seems to think the rejection of any general “security” defense has already been established, because Amnesty International rejects it, without bothering to notice that the government of Germany (among many others) has rejected this conclusion.²⁴

Any serious assessment of the “inhumane acts” that trigger the “apartheid” designation must try to reckon with the security concerns involved. Many of the terror attacks were perpetrated by so-called “suicide bombers”—who strapped explosive devices to their chests and detonated said explosives at bus stops, in restaurants, and other places where civilians gathered. It is not easy to deter such perpetrators. One device Israel adopted was to pull down the family house of the perpetrators (often inside the occupied territory). Designers of this policy hoped the threat of destroying the home where their families live might

22. RASHID KHALIDI, *THE HUNDRED YEARS WAR ON PALESTINE: A HISTORY OF SETTLER COLONIALISM AND RESISTANCE, 1917-2017*, at 213-16 (2020).

23. Ambos, *supra* note 1, at 523 (“Even if one accepted a kind of security defense in factual terms, it could not legally justify an institutionalized regime amounting to apartheid . . .”).

24. *Germany rejects Amnesty's 'apartheid' label for Israel*, DEUTSCHE WELLE [DW] (Feb. 2, 2022), <https://www.dw.com/en/germany-rejects-amnestys-apartheid-label-for-israel/a-60637149> [<https://perma.cc/24K7-QASD>].

give them second thoughts.²⁵

Dr. Ambos lists this practice as a clear example of “inhumane acts,” committed by Israel.²⁶ Readers might wonder whether this is really so different from forfeiture policies that often force a family to abandon its house—a common penalty (and consequence) in US law, even in dealing with non-violent offenders.²⁷ But here again, Dr. Ambos’ “legal doctrinal inquiry” cannot be detained by such comparisons, which might distract attention from his pre-ordained conclusions regarding Israel’s culpability for committing inhuman acts.

IV. NOT ALL SEPARATION IS APARTHEID

Dr. Ambos is a bit more interested in facts when it comes to the claim that there is pervasive “separation” on the West Bank. Palestinians, he notes, are forbidden from using roads reserved for Israeli citizens. And then Palestinians are subjected to a different legal system.

There is some factual basis for these claims. Certainly, there are distinctions between the way Palestinians and Israelis are treated in the administration of the West Bank. The question should be whether they are justified by considerations other than a desire to flaunt Israel’s dominance over the local

25. See Ron Kampeas, *Why does Israel demolish houses after terrorist attacks?*, WASH. JEWISH WEEK (Feb. 22, 2023), <https://www.washingtonjewishweek.com/why-does-israel-demolish-houses-after-terrorist-attacks> [<https://perma.cc/D3EZ-V36B>].

26. See Ambos, *supra* note 1, at 512. Here he also mentions, “movement restrictions, and deportations of Palestinians,” *id.* which are, of course, standard responses to terrorism in other Western countries, see, e.g., *Terrorist Exclusion List*, U.S. DEPT. OF STATE, <https://www.state.gov/terrorist-exclusion-list> [<https://perma.cc/8SH3-T55K>] (last visited June 21, 2024), so much weight seems to be carried by the example of destroying houses.

27. Asset forfeiture, as practiced in by the federal government and many states in the United States, is controversial because it is not a fine, following conviction for a crime after full due process, but a police measure for which little prior process is required—though it often means seizure of bank accounts, businesses, cars and other things on which people rely. Critics charge the process is subject to great abuse. See, for example, S. POVERTY L. CTR., *CIVIL ASSET FORFEITURE UNFAIR, UNDEMOCRATIC AND UN-AMERICAN* (2017), https://www.splcenter.org/sites/default/files/com_policybrief_civil_asset_forfeiture_web.pdf [<https://perma.cc/FRK4-EW2C>]. Still, even critics have not called it a “crime against humanity.” *Cf. id.*

population. An obvious way to begin analyzing this question is to ask when various restrictions were imposed. And the clear answer is that for a quarter century after Israel acquired the West Bank, both local Palestinians and Israeli citizens were left to travel freely with almost no restrictions. It was in the 1990s, when a terrorist uprising threatened Israeli civilians, that Israel imposed restrictions.²⁸

Dr. Ambos seems to reverse the obvious implications of this chronology. At one point, he refers to “the security situation” (his own skeptical quotation marks) “which, after all, is a consequence of the occupation and the settlement policy.”²⁹ While Israeli occupation and settlement policy has increased tensions between Palestinians and Israelis in recent years, sentiments of antisemitism have existed in this region for millennia, without any established Jewish State. It is a statement of astonishing obtuseness, especially for a professor in his position.³⁰

Nor does it follow that the security measures were clearly disproportionate to the dangers they sought to address. Despite

28. See Joel Greenberg, *Israeli Stabbed to Death in Gaza; Curbs on Palestinians Maintained*, N.Y. TIMES, Apr. 19, 1993, at 6, <https://www.nytimes.com/1993/04/19/world/israeli-stabbed-to-death-in-gaza-curbs-on-palestinians-maintained.html>.

29. Ambos, *supra* note 1, at 523.

30. Arab terror attacks on Jewish civilians were recurring events in the 1920s and 1930s, when Jews exercised no direct authority in Palestine: some 500 Jews were murdered in this way in the late 1930s. See generally Oren Kessler, *PALESTINE 1936* (2023). The presence of Jews was sufficient provocation. The Mufti of Jerusalem, who incited such attacks, subsequently found his way to Berlin, where he advised the Hitler government on recruiting Arabs to Germany’s genocidal war. See *id.* at 31. Yasser Arafat’s Palestine Liberation Organization, which was ultimately taken over the Palestinian Authority on the West Bank (and for a time in Gaza) was founded in 1964, *Palestine Liberation Organization*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Palestine-Liberation-Organization> [https://perma.cc/9WWX-THPQ]—before there were any Israeli “occupation” or “settlements” in the (then Jordanian controlled) West Bank, see *Israeli Settlement*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Israeli-settlement> [https://perma.cc/X7J3-LKD5]. It also worth noting, as UN Secretary General Gutteres lamented a few years ago, antisemitism has appeared in countries with no Jewish population of any kind. See Press Release, Secretary General, *Anti-Semitism Rising Even in Countries with No Jews at All, Secretary-General Tells Event on Power of Education to Counter Racism, Discrimination* U.N. Press Release SG/SM/19252-RD/1022 (Sept. 26, 2018), <https://press.un.org/en/2018/sgsm19252.doc.htm> [https://perma.cc/U5PT-TAP9].

Dr. Ambos' use of the term "road apartheid,"³¹ Israel has not built two entirely distinct road systems on the West Bank—an insane project. Palestinians are excluded from *some* roads, while Israelis are excluded from *some* other roads. Palestinians are excluded from traveling to some places where Israelis live or work for fear of terrorist attacks in such places—as has happened on hundreds of occasions in the past. Israelis are excluded from entering Palestinian controlled towns on the West Bank for fear they might be attacked or held hostage. Hence while Israelis are excluded, non-Israelis are allowed to visit places like Bethlehem or Ramallah (which are under Palestinian control) on the assumption that local "militants" will not be so likely to attack or seize citizens of other nations.

Meanwhile, even on the West Bank, there are places where Palestinians and Israelis still mingle freely, as in factories employing people from both communities and nearby stores and restaurants serving people from both communities.³² South Africa did not make such exceptions to its system of apartheid. It is lamentable that terrorist threats have made such places of shared activity less common than they were in earlier times. But it is a wild leap to conclude that because barriers are not in place everywhere, they have no security justification anywhere. After all, such separation has been seen in many other contexts.

In post-war Germany, for example, US authorities excluded local residents from approaching US military bases and other facilities open to Americans.³³ It was feared Germans might seek to perpetrate violence, as they had recently engaged in relentless killing, even of people who did not threaten them.

31. Ambos, *supra* note 1, at 520 ("The zoning regime has produced a system of separate roads for settlers and Palestinians, labelled as 'road apartheid.'").

32. See, e.g., Elhanan Miller, *At SodaStream, Palestinians hope their bubble won't burst*, *TIMES ISRAEL* (Feb. 3, 2014), <https://www.timesofisrael.com/at-sodastream-palestinians-hope-their-bubble-wont-burst> [<https://perma.cc/BP7V-HTGL>].

33. GILES MACDONOGH, *AFTER THE REICH* 227 (2007) (noting that in Frankfurt, "you needed a special pass even to approach" U.S. military headquarters). In Wiesbaden, compounds for US nationals were "ringed by barbed wire, making them into little fortresses announced by the legend, 'Entry Forbidden to Germans' . . . The Americans bought from their own shops, went to their own schools and spent the evenings in their own clubs." *Id.* at 232.

For similar reasons, there were restrictions on Iraqi nationals approaching US bases (including the political and diplomatic “Green Zone” in Baghdad).³⁴

The same pattern obtains in relation to the charge that Israel operates a dual legal system on the West Bank. Yes, Israeli nationals are subject to the Israeli legal system, even when living or operating in the West Bank, while Palestinians are subject to a different legal system. If Israel applied its regular legal system to the West Bank, Dr. Ambos presumably would denounce that as the beginning of an illegal annexation. In Jerusalem, the neighborhoods under Jordanian control before 1967 are subject to the same law and legal system as the rest of Israel. Dr. Ambos still questions Israeli policy in “occupied East Jerusalem.”

When it comes to other territory on the West Bank, he complains of a two-track legal system. The grounds for this objection remain obscure. It is not unlawful for an occupying power to apply special military law to an occupied territory, rather than apply all of its own domestic law. On the contrary, international law admonishes that the occupying power must not displace the law already present in the occupied territory, when it is not necessary to do so.³⁵ That does not mean that the occupying power cannot apply its own law to its own nationals when they are in such occupied territories.

Here again Dr. Ambos sneers at Israel for practices not so different from those embraced by other countries, even Western States with relatively good records on human rights. For

34. See RAJIV CHANDRASEKARAN, *IMPERIAL LIFE IN THE EMERALD CITY: INSIDE IRAQ'S GREEN ZONE* (2006). The heavily fortified section of Baghdad housing American diplomats, administrators and consultants was so self-contained residents said, “It feels like America.” *Id.* at 24.

35. Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, annex, art. 43 (Oct. 18, 1907) (An occupying power “shall take all measures in his power to restore, and ensure, as far as possible public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”). The Allied occupying powers in Germany began, for example, by repudiating all Nazi measures based on racial or religious discrimination. The refusal of Palestinian leaders to accept any peace agreements has meant the Israeli “occupation” has lasted many decades and experienced episodes of violent “resistance” with which the previous (Jordanian) occupiers did not have to cope. It is fantastical to imagine no changes to pre-existing law would be necessary in these circumstances.

example, US troops in Germany after World War II were not subject to German courts. Nor are they today. The United States has “status of forces agreements” (SOFAs) with almost every country where American troops are stationed, including Germany. These agreements stipulate that US troops—and their civilian dependents—will not be tried by local authorities, but instead will be subject to American legal proceedings, even for crimes committed in the foreign State hosting their bases.³⁶

V. *ISRAELI NATIONALITY IS NOT A “RACE”*

Finally, as Dr. Ambos indicates, the apartheid charge requires a showing that separate arrangements on the West Bank are motivated by “systemic oppression and domination by one racial group over any other racial group.” In fact, the arrangements described in the previous section all rest on nationality—that is, legal status as a citizen of Israel (as opposed to Palestinian residents in the West Bank). The roads on the West Bank reserved for Israeli citizens (or those using cars with Israeli license plates) are open to Muslim, Christian, and Druze citizens of Israel as much as Jewish citizens. Israeli legal provisions and procedures available to Israeli citizens on the West Bank are open to Muslim, Christian or Druze citizens as to Jewish citizens.

Dr. Ambos might respond that instances of discrimination based on nationality is that domination by one racial group over another can exist alongside discrimination based on nationality. However, differences in treatment between Israelis and Palestinians on the West Bank rest exclusively on nationality and not on racial or ethnic distinctions or otherwise.

Even if one focuses on the Jewish population—which is

36. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany and Protocol of Signature, Aug. 3, 1959, 14 U.S.T. 531, 481 U.N.T.S. 262, <https://www.state.gov/NATO-SOFA-Germany-supplement> [<https://perma.cc/FN58-8UBC>].

not the relevant category for the policies in dispute—Jews of Israel do not correspond to any normal usage of the term “race” (except under German law of the Nazi era). Israel has welcomed Jews from diverse backgrounds and from all over the world. Approximately half of Israel’s Jewish population comes from Arab countries (including Morocco, Yemen, Iraq).

Israeli immigration law, it is true, gives preference to “Jews,” allowing them to claim immediate citizenship. Germany, as it happens, long had a similar law regarding immigrants claiming German ancestry: for most of the twentieth Century, they could be immediately enrolled as citizens, whereas all other must go through a long and cumbersome process.³⁷ But unlike the German law, the Israeli law is more about communal affiliation than “racial” descent. A Jewish convert to Christianity is, according to an early decision of the Israel Supreme Court, ineligible for automatic citizenship (as an immigrant)³⁸—even if his ancestry would qualify him as “racially” Jewish (according to whatever criteria Dr. Ambos might apply to determine “race” in this context). On the other hand, someone of no Jewish ancestry whatsoever still qualifies for this immigration preference, if the person goes through a rabbinically certified conversion to Judaism.³⁹ “Conversion” to a different race is not a generally recognized phenomenon.

Dr. Ambos states that the 2018 Nation-State Law, as a

37. See *Fragebogen Staatsangehörigkeit* [Citizenship Questionnaire], GER. MISSION TO UNITED STATES, <https://www.germany.info/blob/1216690/3083a445bdfe5d3fb41b2312000f4c7f/fragebogen-zur-staatsangehoerigkeit-data.pdf> [<https://perma.cc/K4JF-VTG4>] (last visited June 20, 2024); German Citizenship by Descent, SCHLUN & ELSEVEN RECHTSANWÄLTE, <https://se-legal.de/services/immigration-lawyer-germany/german-citizenship-by-descent/?lang=en> [<https://perma.cc/3EF5-CUUC>] (last visited June 20, 2024).

38. For analysis of the “Brother Daniel” case (involving Oswald Rufeisen, denied immediate Israeli citizenship under the “Law of Return” after conversion to Christianity), see Aaron R. Petty, *The Concept of Religion in the Israel Supreme Court*, 26 YALE J. L. & HUMANS. 211 (2014).

39. The Law of Return, Nefesh B’Nefesh, <https://www.nbn.org.il/life-in-israel/government-services/rights-and-benefits/the-law-of-return> [<https://perma.cc/G7MJ-P9F5>] (last visited May 20, 2024).

Basic Law, “elevates Jewish identity and supremacy to a constitutional level.”⁴⁰ It escapes his attention that Palestinian authorities also incorporated religion in their State identity, referring to themselves as the “Islamic State of Palestine.” Israel’s neighbors Egypt, Jordan, Saudi Arabia, also designate themselves in this way, as do many other Muslim countries. Meanwhile, many countries in Latin America designate Roman Catholicism as their official religion. Several countries in Northern Europe designate the monarch as head of the national (Protestant) church. It is only in the case of Israel that Dr. Ambos finds something sinister when a national law acknowledges the nation’s predominant faith.

VI. CONCLUSION

Some advocates for the “liberation of Palestine” believe their goal requires the destruction of the State of Israel. That is the inescapable meaning of the chant, “From the River to the Sea, Palestine will Be Free”—a new Palestine will overwhelm Israel altogether. If Israel is successfully stigmatized as an “apartheid State” (or now, a “genocidal State”), its future will be severely threatened. Dr. Ambos does not necessarily endorse the destruction of Israel. That seems to be altogether outside the scope of his “legal doctrinal inquiry” which is, as he presents it, confined to abstract questions of “law.”

This approach is a regression to an earlier era in German jurisprudence. After the Second World War, a thoughtful German legal scholar asked how it could have happened that German judges allowed themselves to enforce monstrous policies. They did so, he saw, by denying any moral context to

40. Ambos, *supra* note 1, at 520 (“[T]he 2018 Nation-State Law, albeit not directly applicable in the OPT, deserves to be mentioned. For this Law, being a Basic Law, elevates Jewish identity and supremacy to a constitutional level”); *id.* at 543 (“[The] 2018 Nation-State Law . . . may be read as an expression of legislative intent with regard to the constitutionalization of the existing discrimination akin to an apartheid regime.”).

legal reasoning: “as soldiers held that an order is an order, judges accepted that a law is a law.”⁴¹

I believe Fordham has done a service to international law scholarship by putting Dr. Ambos’ “legal doctrinal inquiry” on record—even as others have performed such service by publishing works of German jurisprudence from darker times.⁴²

41. Gustav Radbruch, *Statutory Lawlessness and Super-statutory Law* (1946), reprinted in 26 OXFORD J. LEGAL STUD. 1 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006).

42. Thus, it is a welcome development that the U.S. Holocaust Memorial Museum has provided an English translation of Germany’s 1935 Nuremberg Race Law: *Nuremberg Race Law*, HOLOCAUST ENCYCLOPEDIA <https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws> [https://perma.cc/R3PC-Q43W] (last visited May 20, 2024). For historical background, see the recent book NAZI RACE LAW (John Michalczyk ed., 2018), especially the chapter by O. Kobrynsky, *Defining a Jew*, in NAZI RACE LAW, *supra*, at 35, 35-47.