



OCCUPATION, COLONIALISM, APARTHEID?
A RE-ASSESSMENT OF ISRAEL'S PRACTICES IN THE OPT
UNDER INTERNATIONAL LAW

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— SYMPOSIUM PROCEEDINGS —

Israel's Apartheid Laws and Practices in the OPT

John Reynolds[†]

The predominant question that the HSRC study seeks to address is whether Israel's laws and practices in the Occupied Palestinian Territory (OPT) fit the definition of apartheid under international law. When Professor Dugard raised the issue of apartheid in his 2007 report to the Human Rights Council, the language he used was suggestive rather than categorical; he said that:

Israel's laws and practices in the OPT certainly *resemble aspects* of apartheid ... and *probably* fall within the scope of the [Apartheid Convention].¹

With this, Dugard essentially invited us to conduct a more extensive examination of Israel's practices in the OPT, in order to be able to conclusively establish whether or not the nature of the regime of occupation in place has breached the prohibition of apartheid in international law. To do this, we first needed to determine the meaning of the term apartheid in a strict legal sense—how is it defined by international law? The use of the term is not uncommon in portrayals of Israel's practices against the Palestinians—for its political impact, its emotive connotations, its illustrative qualities—and we have heard Ronnie Kasrils speak about Hendrik Verwoerd himself using it to describe Israel as long ago as 1961, before the word had ever appeared in any international legal convention. Since then, however, it has become a legal term, with a specific meaning in international law, and for some time now a study that analyses Israel's practices through that lens has been conspicuous by its absence.

There are three international legal instruments that primarily inform the definition of apartheid in international law. The International Convention on the Elimination of all forms of Racial Discrimination (ICERD), adopted in 1965, was the first major international treaty to mention apartheid. This convention has been signed and ratified by Israel and is part of the body of international human rights law which Israel is bound to abide by in the occupied territories under its jurisdiction, as well as within Israel itself. ICERD defines racial discrimination, details a long list of rights which all people are entitled to enjoy free from racial discrimination, and prohibits the practice of apartheid as a particularly egregious form of racial discrimination. Beyond that, ICERD does not go any further in defining the practice of apartheid with precision. The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid—which we refer to as the Apartheid Convention—and the more recent Rome Statute of the International Criminal Court provide further clarity on the

¹ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard. UN Doc. A/HRC/4/17, 29 January 2007, para. 61. Emphasis added.

definition of apartheid. The Apartheid Convention provides a list of inhuman acts which amount to apartheid if they are:

committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.

The Rome Statute similarly refers to acts of apartheid in the context of:

an institutionalized regime of systematic oppression and domination by one racial group over any other racial group.

Thus it is clear that the essence of the definition of apartheid is the **systematic, institutionalised, and oppressive** character of the discrimination involved, and the purpose of domination that is entailed. This systematic element is what distinguishes the practice of apartheid from other forms of prohibited discrimination. The question before us is essentially whether Israel has imposed such a system of institutionalised discrimination and domination by one racial group over another in the OPT.

Answering that question necessitates a determination of whether Jews and Palestinians constitute distinct racial groups for the purposes of the definition of apartheid. The situation in Palestine would perhaps not be as clearly defined in terms of 'race' as it was in apartheid South Africa. However, the idea of race has long been shown to be more of a social construct than a scientific category, and international human rights law allows wider scope for the meaning of race than traditional 'black vs. white' parameters. ICERD gives a broad construction to the definition of 'racial' discrimination, as including discrimination based on race, colour, descent, or national or ethnic origin. In addition, the jurisprudence of the International Criminal Tribunals for Rwanda and the former Yugoslavia concluded that no clear scientific or impartial method exists for determining whether any group is a racial group, and that the question rests to a large extent on local perceptions. On this basis, the study had grounds to conclude that Jews and Palestinians are constructed and perceived both by themselves and by external actors as groups distinct from each other, and therefore can be considered as different racial groups for the purposes of the definition of apartheid under international law.

With that established, one can move to the inhuman acts listed in Article 2 of the Apartheid Convention that amount to apartheid if enough of them combine to form a system of institutionalised discrimination and domination. Among the key provisions in relation to Israel's conduct in the West Bank and Gaza Strip:

*Article 2(a) relates to the denial to a member or members of a racial group of the right to life and liberty of person:

In this regard, the HSRC study found that Israel's policies and practices in the OPT include denial of the right to life through such the widespread state-sanctioned extra-judicial killings of Palestinians opposed to the occupation, including targeted killings of political leaders and resistance activists, as well as through routine excessive use of force against civilian demonstrators that often results in death. The denial of liberty of person is similarly widespread, through the torture and ill-treatment of Palestinian detainees as well as arbitrary arrest and detention, including administrative detention imposed without charge or trial.

The study concluded that, as was the case in apartheid South Africa, these measures are implemented primarily to eliminate dissent or resistance to Israel's regime in the OPT. These practices are discriminatory in that they are applied virtually exclusively to Palestinians; with Palestinians also subject to a separate system of military law and courts that impose much harsher standards of evidence and procedure than the Israel civil laws and courts to which Jewish settlers living the OPT are subject.

*Article 2(c) relates to measures calculated to prevent participation in political, social, economic and cultural life and to prevent the full development of a group through the denial of basic human rights and freedoms:

Here, the study found Israel to be denying, to various degrees, a host of relevant human rights to Palestinians in the OPT, including the right to freedom of movement and residence, the right to leave and return to one's country, the right to a nationality, to right to work, the right to form recognised trade unions, the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. Such infringements of human rights do not occur in isolation, but are part of a system that operates to control and dominate Palestinians in the OPT and, again, to suppress any opposition to that domination.

*Article 2(d), which is integral to the meaning of apartheid, relates to the segregation of the population, including by dividing a territory into reserves assigned to one group or the other:

Israel has done so in the OPT through the appropriation of Palestinian land and the designation of certain areas for exclusive Jewish use, with parallel restrictions imposed on Palestinian residence and movement to non-contiguous enclaves throughout the OPT.

* Article 2(f) relates to persecution for opposition to the system of apartheid. Such persecution for opposition to Israeli domination in the OPT can be seen in the targeting of Palestinian parliamentarians, national political leaders, community activists and human rights defenders by arrest, imprisonment, travel bans, as well as the closing down of related organisations by Israel; all within the meaning of Article 2(f).

These are some of the main provisions. Not all of the acts listed in the Apartheid Convention are being committed by Israel in the OPT. Article 2(b), for example, relates to 'the deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part'. It was concluded that although Israeli policies of collective punishment in the OPT that entail grave consequences for life and health are serious violations of international humanitarian and human rights law, they do not meet the threshold required by this provision of *intent* to cause the physical destruction of the Palestinian people.

On this, it's important to bear in mind that the Truth and Reconciliation Commission arrived at a similar conclusion on this provision in relation to apartheid South Africa and found that the South African government did not sustain an intentional policy to destroy the black population.

What is clear from the wording of the Convention and from the South African precedent is that the existence of apartheid does not require all of the acts listed in Article 2 of the Convention to have been practiced. Overall, the HSRC study finds that the majority of those inhuman acts are being committed by Israel in the OPT, and do not occur in random or isolated instances, but as integrated and complementary elements of an institutionalised and oppressive system of Israeli domination and oppression over Palestinians as a group; that is, a system of apartheid.

This finding is based on a review of Israel's law and practices under the definition of apartheid provided by international law, not on the basis of a comparative analysis with apartheid South Africa. There are certainly differences between the system in apartheid South Africa and Israel's regime in the OPT. It is significant, though, that with the input of our South African colleagues, the study found that the two systems can essentially be defined by the same three dominant features, or 'pillars', of apartheid.

In South Africa the first pillar was the division of the population into distinct racial groups through the 1950 Population Registration Act and on that basis the granting of superior rights, privileges and services to the white racial group across a spectrum covering almost all aspects of life. The second pillar of apartheid was the fragmentation of South Africa into

different geographic areas, which were allocated by law to different racial groups. The Pass Laws supported this process by restricting passage by members of any group into the area allocated to other groups, ensuring segregation and the maintenance of white control. This was the basis for the policy of *Grand Apartheid* that provided for the establishment of 'Homelands' or 'Bantustans' into which denationalised black South Africans were transferred and forced to reside, in order to preserve white supremacy over the majority of the territory of South Africa. These apartheid policies were propped up by the third pillar of apartheid, a matrix of draconian 'security' laws and policies that were framed in the context of 'anti-Communism' and 'anti-terrorism', but were widely employed to suppress any opposition to the apartheid regime and to reinforce the system of racial domination, by providing for administrative detention, censorship, banning, torture and extrajudicial killing.

The same three pillars are essentially evident in Israel's practices in the OPT. The first pillar derives from Israeli laws and policies that afford a preferential legal status and material benefits to Jews over non-Jews, stemming originally from the 1950 Law of Return and Israel's citizenship laws. The product of this in the OPT is an institutionalised system that privileges Jewish settlers and discriminates against Palestinians. The disparity in how the two groups are treated by Israel is highlighted through the application of two different legal systems in the OPT: one for Palestinians and one for Jewish settlers.

The second pillar is reflected in Israel's fragmentation of the OPT. The West Bank is dotted with an intricate and well-serviced network of connected Jewish settlements, while for Palestinians the Gaza Strip is isolated and closed off from the rest of the OPT, East Jerusalem has been severed from the rest of the West Bank, and the West Bank itself has been carved up into progressively smaller and more isolated enclaves. The population is divided by a visible web of walls, separate roads, and checkpoints, and an invisible web of permit and ID systems that control movement and residence. And although not intended to be standalone self-governing homelands for different ethnic groups in the way that the Bantustans in South Africa purported to be, the effect is the same in terms of the territorial division, the confining of the subordinate group to restricted areas and the control exercised by the dominant group.

The third pillar that reinforces Israel's system of apartheid in the OPT is its 'security' laws and policies. Like in apartheid South Africa, the extrajudicial killing, torture and ill-treatment, and arbitrary arrest and imprisonment of Palestinians, are all justified by Israel on the pretext of security. The report found that this invocation of 'security' to validate sweeping restrictions on Palestinian rights often masks a true underlying intent to suppress dissent against Israel's system of domination.

Thus, in conclusion, Israel is responsible for violating the legal prohibition of apartheid in the OPT. The implications of this are, to my mind, significant. The Palestinian human rights movement has primarily been defined by reports, initiatives and campaigns addressing various Israeli practices as discrete violations of individual human rights. Looking at the occupation through the lens of apartheid compels us to view the *entire* Israeli regime in the OPT as not only invasive and oppressive but as illegal. As well as a severe form of racial discrimination, apartheid itself amounts to a denial of the right of a people to self-determination and is absolutely prohibited under international law. Israel has legal obligations to cease engaging in such practices, while the international community of States has equally clear legal obligations to ensure that it does so.

[†] John Reynolds is a legal researcher for Al-Haq and a Ph.D candidate at the Irish Centre for Human Rights, National University of Ireland, Galway. John is a co-author of the HSRC report, 'Occupation, Colonialism, Apartheid?: A re-assessment of Israel's practices in the occupied Palestinian territories under international law'.