



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

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— SYMPOSIUM PROCEEDINGS —

Apartheid under International Law

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The report seeks to address the question posed by Professor John Dugard, then Special Rapporteur on the human rights situation in the Palestinian territories occupied by Israel, in January 2007:

Israel is clearly in military occupation of the OPT. At the same time, elements of the occupation constitute forms of colonialism and of apartheid, which are contrary to international law. What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the Occupying Power and third States?

The report, accordingly, addresses the questions of whether apartheid and colonialism are occurring in the OPT, including East Jerusalem, since the beginning of the military occupation in 1967.

In seeking to do so, the drafters were required to consider a number of significant legal and factual/empirical issues and for this panel, which considers the findings of the report regarding apartheid, I wish to look at a number of questions of international law which arose and which the report addresses, before we turn to the factual considerations:

- How is apartheid defined in international law, and what is the nature of the international rules on apartheid?
- Can there be an application of the norm prohibiting apartheid outside of South Africa, given that it had been devised with that situation in mind?
- Can the norm prohibiting apartheid be applied to Israel, given that it is not a party to the two treaties which provide the most detailed definition of apartheid, the 1973 Apartheid Convention and the 1998 Rome Statute of the International Criminal Court, and can it be applied to territories over which Israel does not exercise sovereignty, namely the Occupied Palestinian Territories, including East Jerusalem?
- Is Israel the occupant of the Occupied Palestinian Territories, and if so, what are the extent of its obligations under international law? The question of the application of human rights treaties in times of armed conflict

International law regarding apartheid

Apartheid can be considered to be an aggravated form of *racial discrimination* - a State-sanctioned regime of law and institutions that have 'the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons

and systematically oppressing them'. It involves a systematic and institutionalized form of discrimination.

In terms of international law, non-discrimination is at the heart of international human rights law since the adoption of the UN Charter and the Universal Declaration of Human Rights. The Charter requires UN Member States to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' and Article 2 of the Universal Declaration of Human Rights (1948) sets forth the rights and freedoms for all 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

The first specific reference to apartheid in positive international law came in 1965 with the adoption of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), a more concerted attempt by the international community to address racial discrimination, including the particular practice of apartheid. ICERD is a multilateral human rights treaty, signed by over 170 States, including Israel, that seeks to eliminate all forms and manifestations of racial discrimination and, as its chapeau states, 'build an international community free from all forms of racial segregation and racial discrimination'. Its preamble affirms that parties to the Convention are '[a]larmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, *such as policies of apartheid, segregation or separation.*'

Article 3 of ICERD sets out that:

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

The specific prohibition of apartheid in ICERD as a egregious form of racial discrimination was included in the treaty because at that time 'was the official policy of a State Member of the United Nations'.¹ From the report's perspective, the Article confirms the unlawful nature of apartheid, but it does not define the practice with precision. For this purpose, we can turn to two subsequent treaties: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid and the 1988 Rome Statute of the ICC.

The Apartheid Convention and the Rome Statute have developed the prohibition of apartheid in two ways: they elaborate the definition of apartheid and deems apartheid to be a crime against humanity. The Apartheid Convention was adopted shortly after ICERD to provide a universal instrument that would make 'it possible to take more effective measures at the international and national level with a view to the suppression and punishment of the crime of apartheid'. Intended to complement the requirements of Article 3 of ICERD, the Apartheid Convention declares that apartheid is a crime against humanity and provides a definition of that crime in Article 2. It states that

'the term 'crime of apartheid' which shall include similar policies and practices of racial segregation and discrimination as practised in southern African, shall apply to the following inhuman acts 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', and cites six categories of 'inhuman acts'. The categories include illustrative list of inhuman acts:

¹ (The Convention on the Elimination of Discrimination Against Women emphasises that 'the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women'.)

- denial of the right to life and liberty of the person;
- measures calculated to prevent a racial group from participation in the political, social, economic and cultural life of the country and to prevent full development of a group through the denial of basic human rights and freedoms;
- division of the population along racial lines
- exploitation of labour
- persecution of organisations and groups opposing apartheid

It consequently imposes obligations on States parties to adopt legislative measures to suppress, discourage and punish the crime of apartheid and makes the offence an international crime which is subject to universal jurisdiction.

The Rome Statute criminalises certain inhumane acts committed in the context of, and to maintain, ‘an institutionalized regime of systematic oppression and domination by one racial group over any other racial group.’ Both focus on the *systematic, institutionalised, and oppressive* character of the discrimination involved and the purpose of domination that is entailed. Apartheid is also designated as an international crime in Additional Protocol I to the 1949 Geneva Conventions.

A word on State responsibility and individual criminal responsibility

The study focuses on the responsibility of the State of Israel and does not consider the criminal responsibility of individuals, something which would require an additional set of considerations. The provisions of these three treaties were employed to develop a working definition of apartheid for the purpose of considering Israel’s State responsibility for practices that offend against the norm prohibiting apartheid.

The Customary Status of the Prohibition

Although the majority of States accept the prohibition in ICERD (and general rules against discrimination in various other treaties), fewer have ratified the Apartheid Convention, given the heightened political disagreement at the time it was created (107 States are parties to the Apartheid Convention). That said a majority of States (168) have ratified Additional Protocol I to the Geneva Conventions of 1949, and an ever increasing number of States, currently standing at 108, have become parties to the Rome Statute of the International Criminal Court. There is no demonstrable hostility to the apartheid provisions by non-States parties to the treaties, and several non-parties to the Apartheid Convention have ratified the latter instruments (for example, the United Kingdom and South Africa). The movement of the international crime of apartheid towards customary international law reinforces the fact that the prohibition itself is clearly a rule of customary law.

Peremptory norm of international law

The rules of international law prohibiting apartheid (and colonialism) can also be considered peremptory in nature: that is, they are rules ‘accepted and recognised by the international community of States as a whole as [rules] from which no derogation is permitted’. The International Law Commission noted the widespread agreement that the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid constitute peremptory norms.

These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among governments as to the peremptory character of these prohibitions...

A peremptory or *jus cogens* norm entails obligations by a state owed to the international community as a whole (obligations *erga omnes*) and all States have a legal interest in the ensuring that such norms are not violated.

Application of the norm prohibiting apartheid to the OPT

Although the Apartheid Convention was drafted in light of the experience in *Southern Africa*, the drafters intended for the treaty to be of universal application. Article 2 of the Convention mentions ‘*similar policies and practices ... as practiced in southern Africa*’. Practices in South Africa are not the test or benchmark for a finding of apartheid elsewhere, as the principal instrument which provides this test lies in the terms of the Apartheid Convention itself. This interpretation of apartheid is supported by the Committee on the Elimination of Racial Discrimination, which observed in General Comment 19, paragraph 1:

The Committee on the Elimination of Racial Discrimination calls the attention of States parties to the wording of article 3, by which States parties undertake to prevent, prohibit and eradicate all practices of racial segregation and apartheid in territories under their jurisdiction. The reference to apartheid may have been directed exclusively to South Africa, but the article as adopted prohibits all forms of racial segregation in all countries.

The prevailing view of international legal scholars is that while the Convention was drafted specifically with southern Africa in mind, it is clearly universal in character and not confined to the practice of apartheid as seen in southern Africa. During the drafting of the Apartheid Convention, state representatives admitted that its terms could apply beyond the geographical limits of southern Africa. In the words of the Cypriot delegate: “When drafting and adopting such an international convention, it must be remembered that it would become part of the body of international law and might last beyond the time when *apartheid* was being practiced in South Africa.’ The extension of the norm beyond South Africa is reinforced by the inclusion of apartheid in the Rome Statute, at the time at which the apartheid regime was being dismantled in South Africa.

The final legal question concerns whether Israel can be said to be bound by the prohibition of apartheid under international law *vis-à-vis* the Occupied Palestinian Territories.

- Is Israel the occupant of the Occupied Palestinian Territories?

Since 1967, there have been repeated claims by Israel that it is not occupying the OPT, and more recently with the so-called disengagement from Gaza. The report proceeds on the basis the West Bank and Gaza remain occupied relying *inter alia* on the multitude of UN General Assembly and Security Council resolutions to that effect, as well as decisions of the International Court of Justice, and even domestic jurisprudence which has insisted on the law of belligerent occupation. Israel exercises jurisdiction over the OPT but does not possess sovereignty - Israel must abide by the relevant rules of the law of armed conflict—principally the provisions of the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949—in its administration of the territories.

The law of armed conflict is supplemented by relevant international human rights law which also applies in occupied territory – and the prohibition of apartheid can be said to fall into that body of law, although it is also designated a crime under one of the principal treaties of IHL - API.

Some States, such as the United States and Israel, still adhere to the traditional view that human rights law and international humanitarian law are mutually exclusive because of their conditions for application and the sphere of protection they afford.

Very simply, the traditional argument was that while human rights law applies during peace time, international humanitarian law alone applies once an armed conflict exists. Human rights law was also seen as applying within the national territory of a given State, whereas international humanitarian law was seen as applying extra-territorially as it regulated what States could do outside their own territory in wartime. Moreover, human rights law was seen as comprising a body of obligations that citizens could claim from their own government, whereas international humanitarian law was seen as principally imposing obligations on governments in their treatment of non-nationals—that is, concerning a different destination of obligation.

In recent decades, this traditional view has become inaccurate and inadequate. This is because human rights were recognised to be owed to non-nationals who are within a State's territory and therefore subject to its jurisdiction, while international humanitarian law also regulates the conduct of hostilities in a non-international armed conflict (as common Article 3 to the four Geneva Conventions of 1949 and 1977 Additional Protocol II attest). Moreover, as the International Committee of the Red Cross' study of customary international humanitarian law demonstrates, regulation of different types of conflict has converged, as many of the customary rules applicable in international armed conflicts are equally applicable in non-international conflicts.

Developments in scholarship and jurisprudence: In the *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, the Court reaffirmed:

the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict... In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law

To conclude, Israel's rejection of the applicability of human rights law in the OPT has been authoritatively rejected by the International Court of Justice and by the wider international community. Israel cannot claim that human rights law, including the prohibition of apartheid, is irrelevant to its administration of the OPT. While international humanitarian law, and in particular the law of belligerent occupation, provides the primary legal framework to assess the legality of the conduct of that occupation, this does not preclude the application of other rules of international law, such as human rights law. Indeed, international humanitarian law itself mandates that its application must consider relevant norms in other areas of international law, including the prohibitions on apartheid and colonialism.

Israel is bound by customary international law, and peremptory norms of international law

Although not a signatory of the Apartheid Convention or Rome Statute, Israel is a party to ICERD and has itself accepted its obligation to respect customary international law, a position which is affirmed by the Supreme Court. It has been shown that the prohibition of apartheid is a rule of customary international law and of *jus cogens*, and thus clearly binding on Israel in those territories where it exercises jurisdiction. The question remains then as to whether Israeli practices in the OPT are contrary to the prohibition of apartheid in international law.

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