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Economic and Social Commission for Western Asia (ESCWA)

Israeli Practices towards the Palestinian People and the Question of Apartheid

Palestine and the Israeli Occupation, Issue No. 1



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Executive Summary

This report concludes that Israel has established an apartheid regime that dominates the Palestinian people as a whole. Aware of the seriousness of this allegation, the authors of the report conclude that available evidence establishes beyond a reasonable doubt that Israel is guilty of policies and practices that constitute the crime of apartheid as legally defined in instruments of international law.

The analysis in this report rests on the same body of international human rights law and principles that reject anti-Semitism and other racially discriminatory ideologies, including: the Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948), and the International Convention on the Elimination of All Forms of Racial Discrimination (1965). The report relies for its definition of apartheid primarily on article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973, hereinafter the Apartheid Convention):

The term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to... 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.

Although the term "apartheid" was originally associated with the specific instance of South Africa, it now represents a species of crime against humanity under customary international law and the Rome Statute of the International Criminal Court, according to which:

"The crime of apartheid" means inhumane acts... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group and committed with the intention of maintaining that regime.

Against that background, this report reflects the expert consensus that the prohibition of apartheid is universally applicable and was not rendered moot by the collapse of apartheid in South Africa and South West Africa (Namibia). The legal approach to the matter of apartheid adopted by this report should not be confused with usage of the term in popular discourse as an expression of opprobrium. Seeing apartheid as discrete acts and practices (such as the "apartheid wall"), a phenomenon generated by anonymous structural conditions like capitalism ('economic apartheid'), at private social behaviour on the part of certain racial groups towards others (social racism) may have its place in certain contexts. However, this report anchors its definition of apartheid in international law, which carries with it responsibilities for States, as specified in international instruments.

The choice of evidence is guided by the Apartheid Convention, which sets forth that the crime of apartheid consists of discrete inhuman acts, but that such acts acquire the status of crimes against humanity only if they intentionally serve the core purpose of racial domination. The Rome Statute specifies in its definition the presence of an 'institutionalized regime' serving the 'intention- of racial domination. Since 'purpose' and 'intention' lie at the core of both definitions, this report examines factors ostensibly separate from the Palestinian dimension - especially, the doctrine of Jewish statehood as expressed in law and the design of Israeli State institutions - to establish beyond doubt the presence of such a core purpose.

That the Israeli regime is designed for this core purpose was found to be evident in the body of laws, only some of which are discussed in the report for reasons of scope. One prominent example is land policy. The Israeli Basic Law (Constitution) mandates that land held by the State

of Israel, the Israeli Development Authority or the Jewish National Fund shall not be transferred in any manner, placing its management permanently under their authority. The State Property Law of 1951 provides for the reversion of property (including land) to the State in any area 'in which the law of the State of Israel applies'. The Israel Lands Authority (ILA) manages State land, which accounts for 93 per cent of the land within the internationally recognized borders of Israel and is by law closed to use, development or ownership by non-Jews. Those laws reflect the concept of "public purpose" as expressed in the Basic Law. Such laws may be changed by Knesset vote, but the Basic Law: Knesset prohibits any political party from challenging that public purpose. Effectively, Israeli law renders opposition to racial domination illegal.

Demographic engineering is another area of policy serving the purpose of maintaining Israel as a Jewish State. Most well known is Israeli law conferring on Jews worldwide the right to enter Israel and obtain Israeli citizenship regardless of their countries of origin and whether or not they can show links to Israel-Palestine, while withholding any comparable right from Palestinians, including those with documented ancestral homes in the country. The World Zionist Organization and Jewish Agency are vested with legal authority as agencies of the State of Israel to facilitate Jewish immigration and preferentially serve the interests of Jewish citizens in matters ranging from land use to public development planning and other matters deemed vital to Jewish statehood. Some laws involving demographic engineering are expressed in coded language, such as those that allow Jewish councils to reject applications for residences from Palestinian citizens. Israeli law normally allows spouses of Israeli citizens to relocate to Israel but uniquely prohibits this option in the case of Palestinians from the occupied territory or beyond. On a far larger scale, it is a matter of Israeli policy to reject the return of any Palestinian refugees and exiles (totalling some six million people) to territory under Israeli control.

Two additional attributes of a systematic regime of racial domination must be present to qualify the regime as an instance of apartheid. The first involves the identification of the oppressed persons as belonging to a specific 'racial group'. This report accepts the definition of the International Convention on the Elimination of All Forms of Racial Discrimination of 'racial discrimination' as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". On that basis, this report argues that in the geopolitical context of Palestine, Jews and Palestinians can be considered 'racial groups'. Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination is cited expressly in the Apartheid Convention.

The second attribute is the boundary and character of the group or groups involved. The status of the Palestinians as a people entitled to exercise the right of self-determination has been legally settled, most authoritatively by the International Court of Justice (ICJ) in its 2004 advisory opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. On that basis, the report examines the treatment by Israel of the Palestinian people as a whole, considering the distinct circumstances of geographic and juridical fragmentation of the Palestinian people as a condition imposed by Israel. (Annex II addresses the issue of a proper identification of the 'country' responsible for the denial of Palestinian rights under international law.)

This report finds that the strategic fragmentation of the Palestinian people is the principal method by which Israel imposes an apartheid regime. It first examines how the history of war, partition, de jure and de facto annexation and prolonged occupation in Palestine has led to the

Palestinian people being divided into different geographic regions administered by distinct sets of law. This fragmentation operates to stabilize the Israeli regime of racial domination over the Palestinians and to weaken the will and capacity of the Palestinian people to mount a unified and effective resistance. Different methods are deployed depending on where Palestinians live. This is the core means by which Israel enforces apartheid and at the same time impedes international recognition of how the system works as a complementary whole to comprise an apartheid regime.

Since 1967, Palestinians as a people have lived in what the report refers to as four 'domains', in which the fragments of the Palestinian population are ostensibly treated differently but share in common the racial oppression that results from the apartheid regime. Those domains are:

1. Civil law, with special restrictions, governing Palestinians who live as citizens of Israel;
2. Permanent residency law governing Palestinians living in the city of Jerusalem;
3. Military law governing Palestinians, including those in refugee camps, living since 1967 under conditions of belligerent occupation in the West Bank and Gaza Strip;
4. Policy to preclude the return of Palestinians, whether refugees or exiles, living outside territory under Israel's control.

Domain 1 embraces about 1.7 million Palestinians who are citizens of Israel. For the first 20 years of the country's existence, they lived under martial law and to this day are subjected to oppression on the basis of not being Jewish. That policy of domination manifests itself in inferior services, restrictive zoning laws and limited budget allocations made to Palestinian communities; in restrictions on jobs and professional opportunities; and in the mostly segregated landscape in which Jewish and Palestinian citizens of Israel live. Palestinian political parties can campaign for minor reforms and better budgets, but are legally prohibited by the Basic Law from challenging legislation maintaining the racial regime. The policy is reinforced by the implications of the distinction made in Israel between 'citizenship' (*lezrahut*) and 'nationality' (*le'um*): all Israeli citizens enjoy the former, but only Jews enjoy the latter. 'National' rights in Israeli law signify Jewish-national rights. The struggle of Palestinian citizens of Israel for equality and civil reforms under Israeli law is thus isolated by the regime from that of Palestinians elsewhere.

Domain 2 covers the approximately 300,000 Palestinians who live in East Jerusalem, who experience discrimination in access to education, health care, employment, residency and building rights. They also suffer from expulsions and home demolitions, which serve the Israeli policy of 'demographic balance' in favour of Jewish residents. East Jerusalem Palestinians are classified as permanent residents, which places them in a separate category designed to prevent their demographic and, importantly, electoral weight being added to that of Palestinian citizens in Israel. As permanent residents, they have no legal standing to challenge Israeli law. Moreover, openly identifying with Palestinians in the occupied Palestinian territory politically carries the risk of expulsion to the West Bank and loss of the right even to visit Jerusalem. Thus, the urban epicentre of Palestinian political life is caught inside a legal bubble that curtails its inhabitants' capacity to oppose the apartheid regime lawfully.

Domain 3 is the system of military law imposed on approximately 4.6 million Palestinians who live in the occupied Palestinian territory, 2.7 million of them in the West Bank and 1.9 million in the Gaza Strip. The territory is administered in a manner that fully meets the definition of apartheid under the Apartheid Convention: except for the provision on genocide, every illustrative 'inhuman act' listed in the Convention is routinely and systematically practiced by

Israel in the West Bank. Palestinians are governed by military law, while the approximately 350,000 Jewish settlers are governed by Israeli civil law. The racial character of this situation is further confirmed by the fact that all West Bank Jewish settlers enjoy the protections of Israeli civil law on the basis of being Jewish, whether they are Israeli citizens or not. This dual legal system, problematic in itself, is indicative of an apartheid regime when coupled with the racially discriminatory management of land and development administered by Jewish-national institutions, which are charged with administering "State land" in the interest of the Jewish population. In support of the overall findings of this report, annex I sets out in more detail the policies and practices of Israel in the occupied Palestinian territory that constitute violations of article II of the Apartheid Convention.

Domain 4 refers to the millions of Palestinian refugees and involuntary exiles, most of whom live in neighbouring countries. They are prohibited from returning to their homes in Israel and the occupied Palestinian territory. Israel defends its rejection of the Palestinians' return in frankly racist language: it is alleged that Palestinians constitute a 'demographic threat' and that their return would alter the demographic character of Israel to the point of eliminating it as a Jewish State. The refusal of the right of return plays an essential role in the apartheid regime by ensuring that the Palestinian population in Mandate Palestine does not grow to a point that would threaten Israeli military control of the territory and/or provide the demographic leverage for Palestinian citizens of Israel to demand (and obtain) full democratic rights, thereby eliminating the Jewish character of the State of Israel. Although domain 4 is confined to policies denying Palestinians their right of repatriation under international law, it is treated in this report as integral to the system of oppression and domination of the Palestinian people as a whole, given its crucial role in demographic terms in maintaining the apartheid regime.

This report finds that, taken together, the four domains constitute one comprehensive regime developed for the purpose of ensuring the enduring domination over non-Jews in all land exclusively under Israeli control in whatever category. To some degree, the differences in treatment accorded to Palestinians have been provisionally treated as valid by the United Nations, in the absence of an assessment of whether they constitute a form of apartheid. In the light of this report's findings, this long-standing fragmented international approach may require review.

In the interests of fairness and completeness, the report examines several counterarguments advanced by Israel and supporters of its policies denying the applicability of the Apartheid Convention to the case of Israel-Palestine. They include claims that the determination of Israel to remain a Jewish State is consistent with practices of other States, such as France; Israel does not owe Palestinian non-citizens equal treatment with Jews precisely because they are not citizens; and Israeli treatment of the Palestinians reflects no 'purpose' or 'intent' to dominate, but rather is a temporary state of affairs imposed on Israel by the realities of ongoing conflict and security requirements. The report shows that none of those arguments stands up to examination. A further claim that Israel cannot be considered culpable for crimes of apartheid because Palestinian citizens of Israel have voting rights rests on two errors of legal interpretation: an overly literal comparison with South African apartheid policy and detachment of the question of voting rights from other laws, especially provisions of the Basic Law that prohibit political parties from challenging the Jewish, and hence racial, character of the State.

The report concludes that the weight of the evidence supports beyond a reasonable doubt the proposition that Israel is guilty of imposing an apartheid regime on the Palestinian people, which amounts to the commission of a crime against humanity, the prohibition of which is considered

ius cogens in international customary law. The international community, especially the United Nations and its agencies, and Member States, have a legal obligation to act within the limits of their capabilities to prevent and punish instances of apartheid that are responsibly brought to their attention. More specifically, States have a collective duty: (a) not to recognize an apartheid regime as lawful; (b) not to aid or assist a State in maintaining an apartheid regime; and (c) to cooperate with the United Nations and other States in bringing apartheid regimes to an end. Civil society institutions and individuals also have a moral and political duty to use the instruments at their disposal to raise awareness of this ongoing criminal enterprise, and to exert pressure on Israel in order to persuade it to dismantle apartheid structures in compliance with international law. The report ends with general and specific recommendations to the United Nations, national Governments, and civil society and private actors on actions they should take in view of the finding that Israel maintains a regime of apartheid in its exercise of control over the Palestinian people.

The Inside Story on Our UN Report Calling Israel an Apartheid State

A people cannot be permanently repressed in all these ways without viewing the structure that has emerged as an apartheid regime.

By Richard Falk, The Nation, March 22, 2017

Six months ago, the UN's Economic and Social Commission for West Asia (ESCWA) asked Virginia Tilley and me to write a study examining the applicability of the international criminal law concept of apartheid to Israel's policies and practices toward the Palestinian people. We were glad to accept the assignment, and conceived of our role as engaging in an academic undertaking. ESCWA, one of several UN regional commissions, requested the study as a result of an uncontested motion adopted by its 18 Arab member governments.

Almost within hours of its release on March 15, our report was greeted by what can only be described as hysteria. The US ambassador to the UN, Nikki Haley, denounced it and demanded that the UN repudiate it. The newly elected secretary general, António Guterres, quickly and publicly called for ESCWA to withdraw the report from its website, and when Rima Khalaf, the head of the commission, resisted, Guterres insisted. Rather than comply, Khalaf resigned. Soon thereafter, the report was withdrawn from the commission's website, despite its having been published with a disclaimer noting that it represents the views of its authors and not necessarily that of ESCWA or the UN.

What is striking about this response, which resembles in many respects the US government response to the Goldstone Report (the UN Fact-Finding Mission on the Gaza Conflict of 2008-9), is the degree to which Israel's supporters, in response to criticism, have sought to discredit the messenger rather than address the message.

Tilley, a professor of political science at Southern Illinois University Carbondale, and I, as well as ESCWA, would welcome substantive discussion of and critical feedback on our report, and we had hoped that our analysis and conclusions would provide the basis for dialogue and further consideration of the recommendations appended at the end. ESCWA, for its part, took steps to ensure that the report lived up to scholarly standards, submitting the draft text to three prominent international jurists, who anonymously submitted strong positive appraisals along with some suggestions for revision, which we gratefully incorporated before the final text was released. For government officials and others to dismiss our report as a biased polemic is irresponsible, with respect both to the authority of the UN and to international law.

During my tenure as the UN's Special Rapporteur on human rights in the occupied Palestinian territories (2008-14), I saw how defenders of Israel attempt to discredit critics. My reports in that post often contained sharp criticisms of Israel and other actors, ranging from defiance of international law, unlawful expansion of settlements, excessive use of force, and complicity of international corporations and banks that do business for profit with the settlements. To my surprise, I never received substantive pushback regarding my allegations, but I did have the unpleasant experience of having my words on unrelated issues torn out of context. Among my harshest critics were not only the usual ultra-Zionist NGOs, but also Barack Obama's diplomats at the UN, including Susan Rice and Samantha Power, as well as then-Secretary General Ban Ki-moon. I mention this personal experience only to note that it falls into a longstanding pattern of rebuttal that prefers to smear rather than engage in reasoned debate about important issues of law and justice.

The international crime of apartheid was set forth in the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid. The main elements of the crime consist in deliberate and systematic acts of racial discrimination with the purpose of maintaining unlawful structures of domination by one race over another. Our report also considered whether, in the context of inquiring into the presence of apartheid, it was appropriate to consider Jews and Palestinians as distinct races; we found that there was abundant grounding to do so. As our report shows, “race” in this context is treated as a socially and politically constructed category defining a distinct people. It has no necessary correlation with biogenetic realities, which in this case show an overlap between Jews and Palestinians.

The report also proceeds from the proposition that whether apartheid exists or not depends on the overall treatment of the Palestinian people as a whole. Adopting what we believed to be innovative methodology, we approached this challenge by dividing the Palestinians into four domains that correspond to the manner in which Israel has exercised its authority over the course of many decades, although specific tactics of control have varied through time. In the past, a thorough study by international law scholars found that Israel’s practices in the occupied Palestinian territories are consistent with apartheid. It called attention to the discriminatory treatment of Palestinians, who are subject to military administration as compared to the Jewish settler population, which enjoys the full benefit of the rule of law as it is observed in Israel in relation to Jewish nationals. That study found that such features as “settler-only roads,” dual legal systems, and the draconian separation of the two populations into regions on the basis of race are the hallmark of apartheid. Repressive practices that have made the lives of ordinary Palestinians a daily ordeal are part of this system, as international law establishes that penalizing resistance to apartheid is itself a crime of apartheid.

A second domain investigated in the report involves Palestinians who are residents of Jerusalem. Here the apartheid character of Israeli rule is exhibited in the way the government undermines the security of those Palestinians, manipulating their rights of residence as well as imposing a variety of discriminatory practices, ranging from fiscal measures to the issuance of building permits. The third domain concerns the Palestinian minority living in Israel, perhaps the most problematic component in terms of establishing a definition of apartheid that encompasses the entire Palestinian population. In this category are some 1.7 million citizens of Israel, who are allowed to form political parties and vote in elections. But this minority, which makes up about 20 percent of the overall Israeli population, is prohibited by law from challenging the proclaimed Jewish character of the state and is subject to a wide range of discriminatory nationality laws as well as administrative practices that severely restrict their rights, with effects on land acquisition, property, immigration, family reunification, and marital freedom.

A fourth domain, and the one affecting the largest demographic segment, is made up of Palestinians registered as refugees by UN procedures or living under conditions of involuntary exile. In the background is the non-implementation of UN General Assembly Resolution 194 (1948), which confirms the right of return enjoyed by Palestinians dispossessed or displaced by Israel in 1948. This right of return is declared in General Assembly Resolution 3236 to be an “inalienable right,” which thus presumably incorporates those additional several hundred thousand Palestinians displaced by the 1967 war. As far as is known, no Palestinian displaced since the establishment of Israel in 1948 has been granted the right of return to resume residence.

From the perspective of international law, the crime of apartheid has been detached from its historical origins in South Africa. Neither the 1973 Convention nor the 1998 Rome Statute underlying the International Criminal Court ties apartheid to South Africa, but rather treats its

practice as a stand-alone crime against humanity. Thus, there are important differences between the way apartheid operated in South Africa and the way it is currently being imposed on the Palestinians, but these differences are not relevant to the question of whether it fairly and accurately applies to Israel. One notable difference is that in South Africa the Afrikaner leadership forthrightly proclaimed apartheid as a reflection of its ideological belief in the separation of races, whereas for Israel such a structure of separation on the basis of race is denied and repudiated. There are other differences as well, relating to degrees of labor dependence and the demographic ratio.

Our report concludes that Israel has deliberately fragmented the Palestinian people in relation to these four demographic domains, relying on systematic discrimination, including “inhuman acts,” to maintain its control, while continuing to expand territorially at the expense of the Palestinian people. On the basis of these findings—backed up by detailed presentations of empirical data, including reliance on Israeli official sources—we conclude that the allegation of apartheid as applied to the Palestinian people is well founded.

We realize that our report is the work of academic investigators and is not an authoritative finding by a formal judicial or governmental institution. At this point it has not—contrary to media reports and diplomatic denunciations—even been endorsed or accepted by the UN, or even ESCWA. We do recommend such an endorsement, and we urge the UN, national governments, and civil society to take measures designed to encourage Israel to dismantle its apartheid regime and treat the Palestinian people in accord with the dictates of international law and human rights, as well as elementary morality.

The broader setting associated with our contention that Israel has become an apartheid state draws on the reality that there is no peaceful resolution to the conflict on the diplomatic horizon, and thus no foreseeable prospect for ending the discriminatory regime. This quasi-permanent structure of domination cannot be justified convincingly by reference to Israeli security needs. A people cannot be permanently repressed in these various ways without viewing the structure that has emerged as an apartheid regime. Indeed, part of the reason for not awaiting a more formal assessment of these charges is our sense of urgency in ending a set of arrangements that have for so long been responsible for so much suffering and denial of basic rights, above all the right of self-determination.

It remains our central hope, one shared by ESCWA, that the widespread availability of the report will lead to a clearer understanding of the Palestinian plight and encourage more effective responses by the UN, by governments, and by civil society. Beyond this, it is our continuing wish that people of good will throughout the world, especially within Israel, will work toward a political solution that will finally allow Jews and Palestinians to live together in peace, with justice.

Richard Falk, professor emeritus of international law and practice at Princeton University, is the former United Nations Human Rights Rapporteur in the Occupied Territories and a member of the Nation editorial board. He is the author of many books, including Chaos and Counterrevolution: After the Arab Spring.