

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



United Nations
Beirut, 2017

© 2017 United Nations

All rights reserved worldwide

Photocopies and reproductions of excerpts are allowed with proper credits.

All queries on rights and licenses, including subsidiary rights, should be addressed to the United Nations Economic and Social Commission for Western Asia (ESCWA), e-mail: publications-escwa@un.org.

The findings, interpretations and conclusions expressed in this publication are those of the authors and do not necessarily reflect the views of the United Nations or its officials or Member States.

The designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Links contained in this publication are provided for the convenience of the reader and are correct at the time of issue. The United Nations takes no responsibility for the continued accuracy of that information or for the content of any external website.

References have, wherever possible, been verified.

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

United Nations publication issued by ESCWA, United Nations House, Riad El Solh Square, P.O. Box: 11-8575, Beirut, Lebanon.

Website: www.unescwa.org.

Acknowledgements

This report was commissioned by the Economic and Social Commission for Western Asia (ESCWA) from authors Mr. Richard Falk and Ms. Virginia Tilley.

Richard Falk (LLB, Yale University; SJD, Harvard University) is currently Research Fellow, Orfalea Center of Global and International Studies, University of California at Santa Barbara, and Albert G. Milbank Professor of International Law and Practice Emeritus at Princeton University. From 2008 through 2014, he served as United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. He is author or editor of some 60 books and hundreds of articles on international human rights law, Middle East politics, environmental justice, and other fields concerning human rights and international relations.

Virginia Tilley (MA and PhD, University of Wisconsin-Madison, and MA in Contemporary Arab Studies, Georgetown University) is Professor of Political Science at Southern Illinois University. From 2006 to 2011, she served as Chief Research Specialist in the Human Sciences Research Council of South Africa and from 2007 to 2010 led the Council's Middle East Project, which undertook a two-year study of apartheid in the occupied Palestinian territories. In addition to many articles on the politics and ideologies of the conflict in Israel-Palestine, she is author of *The One-State Solution* (University of Michigan Press and Manchester University Press, 2005) and editor of *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (Pluto Press, 2012).

This report benefited from the general guidance of Mr. Tarik Alami, Director of the Emerging and Conflict-Related Issues (ECRI) Division at ESCWA. Mr. Rabi' Bashour (ECRI) coordinated the report, contributed to defining its scope and provided editorial comments, planning and data. Ms. Leila Choueiri provided substantive and editorial inputs. Ms. Rita Jarous (ECRI), Mr. Sami Salloum and Mr. Rafat Soboh (ECRI), provided editorial comments and information, as well as technical assistance. Mr. Damien Simonis (ESCWA, Conference Services Section) edited the report.

Appreciation is extended to the blind reviewers for their valuable input.

We also acknowledge the authors of and contributors to *Occupation, Colonialism, Apartheid? A Reassessment of Israel's Practices in the Occupied Palestinian Territories under International Law*, whose work informed this report (see annex I) and was published in 2012 as *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*.

Preface

The authors of this report, examining whether Israel has established an apartheid regime that oppresses and dominates the Palestinian people as a whole, fully appreciate the sensitivity of the question.¹ Even broaching the issue has been denounced by spokespersons of the Israeli Government and many of its supporters as anti-Semitism in a new guise. In 2016, Israel successfully lobbied for the inclusion of criticism of Israel in laws against anti-Semitism in Europe and the United States of America, and background documents to those legal instruments list the apartheid charge as one example of attempts aimed at “destroying Israel’s image and isolating it as a pariah State”.²

The authors reject the accusation of anti-Semitism in the strongest terms. First, the question of whether the State of Israel is constituted as an apartheid regime springs from the same body of international human rights law and principles that rejects anti-Semitism: that is, the prohibition of racial discrimination. No State is immune from the norms and rules enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination, which must be applied impartially. The prohibition of apartheid, which, as a crime against humanity, can admit no exceptions, flows from the Convention. Strengthening that body of international law can only benefit all groups that have historically endured discrimination, domination and persecution, including Jews.

¹ This report was prepared in response to a request made by member States of the United Nations Economic and Social Commission for Western Asia (ESCWA) at the first meeting of its Executive Committee, held in Amman on 8 and 9 June 2015. Preliminary findings of the report were presented to the twenty-ninth session of ESCWA, held in Doha from 13 to 15 December 2016. As a result, member States passed resolution 326 (XXIX) of 15 December 2016, in which they requested that the secretariat “publish widely the results of the study”.

² Coordinating Forum for Countering Antisemitism (CFCA): FAQ: the campaign to defame Israel. Available from <http://antisemitism.org.il/eng/FAQ:%20The%20campaign%20to%20defame%20Israel>. The CFCA is an Israeli Government “national forum”. “The new anti-Semitism” has become the term used to equate criticism of Israeli racial policies with anti-Semitism, especially where such criticism extends to proposing that the ethnic premise of Jewish statehood is illegitimate, because it violates international human rights law. The European Union Parliament Working Group on Antisemitism has accordingly included in its working definition of anti-Semitism the following example: “Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of the State of Israel is a racist endeavour” (see www.antisem.eu/projects/eumc-working-definition-of-antisemitism). In 2016, the United States passed the Anti-Semitism Awareness Act, in which the definition of anti-Semitism is that set forth by the Special Envoy to Monitor and Combat Anti-Semitism of the Department of State in a fact sheet of 8 June 2010. Examples of anti-Semitism listed therein include: “Denying the Jewish people their right to self-determination, and denying Israel the right to exist.” (Available from <https://2009-2017.state.gov/documents/organization/156684.pdf>).

Secondly, the situation in Israel-Palestine constitutes an unmet obligation of the organized international community to resolve a conflict partially generated by its own actions. That obligation dates formally to 1922, when the League of Nations established the British Mandate for Palestine as a territory eminently ready for independence as an inclusive secular State, yet incorporated into the Mandate the core pledge of the Balfour Declaration to support the “Jewish people” in their efforts to establish in Palestine a “Jewish national home”.³ Later United Nations Security Council and General Assembly resolutions attempted to resolve the conflict generated by that arrangement, yet could not prevent related proposals, such as partition, from being overtaken by events on the ground. If this attention to the case of Israel by the United Nations appears exceptional, therefore, it is only because no comparable linkage exists between United Nations actions and any other prolonged denial to a people of their right of self-determination.

Thirdly, the policies, practices and measures applied by Israel to enforce a system of racial discrimination threaten regional peace and security. United Nations resolutions have long recognized that danger and called for resolution of the conflict so as to restore and maintain peace and stability in the region.

To assert that the policies and practices of a sovereign State amount to apartheid constitutes a grave charge. A study aimed at making such a determination should be undertaken and submitted for consideration only when supporting evidence clearly exceeds reasonable doubt. The authors of this report believe that evidence for suspecting that a system of apartheid has been imposed on the Palestinian people meets such a demanding criterion. Given the protracted suffering of the Palestinian people, it would be irresponsible not to present the evidence and legal arguments regarding whether Israel has established an apartheid regime that oppresses the Palestinian people as a whole, and not to make recommendations for appropriate further action by international and civil society actors.

In sum, this study was motivated by the desire to promote compliance with international human rights law, uphold and strengthen international criminal law, and ensure that the collective responsibilities of the United Nations and its Member States with regard to crimes against humanity are fulfilled. More concretely, it aims to see the core commitments of the international community to upholding international law applied to the case of the Palestinian people, in defence of its rights under international law, including the right of self-determination.

³ The Council of the League of Nations, League of Nations Mandate for Palestine, December 1922, article 2. Available from www.mandateforpalestine.org/the-mandate.html.

Contents

	<i>Page</i>
Acknowledgements	iii
Preface	v
Executive Summary	1
Introduction	9
 1. The Legal Context: Short History of the Prohibition of Apartheid	 11
Alternative definitions of apartheid	12
 2. Testing for an Apartheid Regime in Israel-Palestine	 27
A. The political geography of apartheid	27
B. Israel as a racial State	30
C. Apartheid through fragmentation	37
D. Counter-arguments	48
 3. Conclusions and Recommendations	 51
A. Conclusions	51
B. Recommendations	52
 Annexes	
I. Findings of the 2009 HSRC Report	57
II. Which Country?	63

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 or groups 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”), or 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 residence 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” (*ezrahut*) 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 counter-arguments 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 *jus 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.