

RACIAL DISCRIMINATION AND APARTHEID IN THE ISRAELI-PALESTINIAN CONTEXT

Legal Questions and Answers

I. RACIAL DISCRIMINATION

*** What is racial discrimination under international law?**

The *International Convention on the Elimination of all forms of Racial Discrimination* (1965) defines 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.”

All states party to the Convention are obliged to “engage in no act or practice of racial discrimination” and to take effective measures to end racial discrimination by any persons, group or organisation. Israel is a party to this Convention and is responsible for complying with its provisions in territories under its jurisdiction, including in the Occupied Palestinian Territory (OPT).

*** Does Israel practice racial discrimination against Palestinians?**

Yes. Racial discrimination by Israel against non-Jews is predicated upon the concept of “Jewish nationality.” No “Israeli” nationality exists, and Palestinians (including Palestinian citizens of Israel, Palestinians in the OPT, and Palestinian refugees) are discriminated against on the basis of their Palestinian (i.e. non-Jewish) national origin. In its most recent examination of Israel in 2007, the UN Committee on the Elimination of Racial Discrimination noted discrimination by Israel against Palestinians in numerous spheres, including the right to return/immigrate, family rights, access to housing and education, allocation of land, protection from violence, freedom of movement, the right to work, the right to health, and access to water resources and to religious sites.

Entities which purport to be non-state bodies but essentially act as agents of the Israeli state (the World Zionist Organisation, the Jewish Agency, the Jewish National Fund) have also been responsible for discriminating against Palestinians. In response to their discriminatory policies, the Committee on the Elimination of Racial Discrimination expressed its concern that “these institutions manage land, housing and services exclusively for the Jewish population,” thus discriminating against the Palestinian population.

II. APARTHEID

*** What is Apartheid under international law?**

“Apartheid”, an Afrikaans term for “separation” or “apartness,” is a severe form of racial discrimination synonymous primarily with the institutionalised system of racial segregation and discrimination in South Africa from 1948-1994. International law provides specific definitions for apartheid, which are clearly derived from the

southern African precedent, but are intended to be universal in character and thus not confined to one particular example.

Apartheid goes beyond racial discrimination by requiring the **domination** and systematic **oppression** of one racial group by another. The *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973) defines apartheid as similar policies and practices of racial segregation and discrimination as practised in southern Africa” which 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. The Convention lists numerous ways that this can be done, such as the deliberate **division of the population along racial lines, the prevention of the full development of a racial group and the denial of the rights of members of a racial group** to life and liberty of person, to leave and return to their country, to freedom of movement and residence, etc. Although a significant number of states, including Israel, have not signed the Convention, the prohibition of apartheid is established as a norm of customary international law, and is consequently binding on all states.

Under international law, apartheid constitutes a **crime against humanity**. The *Rome Statute of the International Criminal Court* (1998) defines apartheid as 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.”

*** Are Jewish-Israelis and Palestinians (who are predominantly Muslim and Christian) different racial groups for the purposes of the definition of apartheid?**

Yes, this can be legally argued. Although the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD) expressly mentions a broad number of groupings upon which racial discrimination may be based (race, colour, descent, or national or ethnic origin), the laws prohibiting apartheid only make reference to discrimination and domination by one **racial group** over another. There are two potential legal arguments to counter the suggestion that Jewish-Israelis can only be considered as a religious group and a national group, but not as a single racial group for the purposes of the definition of apartheid. The arguments are as follows:

(1) It can be argued that the prohibition of apartheid should be broadly interpreted in light of ICERD and therefore that apartheid exists where there is domination and systematic oppression by *any* one group (identifiable by colour, descent, nationality, ethnicity or race) against another. ICERD was the first international legal instrument to prohibit the practice of apartheid, the preamble to the Apartheid Convention makes reference to ICERD, and the development of the laws prohibiting apartheid can be construed as being intended to prevent institutionalised domination and systematic oppression by one group over another.

(2) Even if a narrow approach is taken and it is contended that apartheid may only be practised by one racial group against another, there is basis to support the claim that Jewish-Israelis do in fact constitute an identifiable racial group. International law does not define “race,” most likely because it has long been debunked as a scientific category (although it lingers as a political one). As a result, the concepts of “race” and “racial groups” may themselves be broadly interpreted. There is widespread support, not least among Jews, for the idea that Jews constitute a distinct “people” in the ethno-racial sense: that is, a group tracing its origins to a common ancestor or

geographic homeland. That this goes beyond the parameters of a “religious” group to one that could be categorised as “racial” is demonstrated by the importance that Israeli law gives to lineal descent in determining who is entitled to Jewish nationality, as well as by the facts that non-practising Jews are still considered Jews and that a Jewish woman’s children and grandchildren are considered Jews whether they have had any contact with the Jewish religion or not.

*** Do Israel’s practices and policies vis-à-vis the Palestinians constitute apartheid?**

Yes, this can be legally argued. Assuming the aforementioned issues regarding the definition of racial groups are resolved, and with Israel’s discrimination against Palestinians well documented, what remains is to examine whether that discrimination meets the threshold of the Apartheid Convention.

Article II of the Apartheid Convention details a list of “inhuman acts” which, if committed as part of a regime of domination and systematic oppression, amount to the crime of apartheid. Looking at the OPT in particular, almost all of the inhuman acts listed are perpetrated by Israel against the Palestinians in some shape or form. For example:

- murder of members of a racial group [**extrajudicial killing, including targeted assassinations, of Palestinians by the Israeli military**]
- infliction of serious bodily or mental harm upon the members of a racial group, by infringing upon their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment [**torture and inhuman treatment of Palestinians by Israeli military and security forces**]
- arbitrary arrest and illegal imprisonment of the members of a racial group [**administrative detention of Palestinians without charge or trial; subjection of West Bank Palestinians to military law and a military court system where a fair trial is all but impossible, while Jewish-Israelis settlers in the same occupied territory are subject to Israeli civil law and tried in Israeli civil courts**]
- prevention of participation/full development of a racial group by denial of basic human rights [**among others: denial of Palestinian freedom of movement by virtue of physical obstacles and a pervasive permit system reminiscent of South Africa’s “pass laws,” while Jewish-Israelis enjoy their own separate road systems free from restriction; prevention of Palestinian refugees from returning to their homes and places of origin, while Israel’s *Law of Return* (1950) allows for the “return” of any Jew to Israel, and consequently since 1967 to the OPT; discriminatory practices in the facilitation of the rights to freedom of association and assembly, to freedom of expression, to water, to education, to work, etc.]**]
- any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group [**Israeli policies resulting in the creation of isolated Palestinian enclaves geographically divided by Jewish-Israeli settlement blocs and the “Annexation Wall,” and ultimately in the fragmentation of the Palestinian territory in a vein comparable to the South African Bantustan model**]
- the expropriation of landed property belonging to a racial group or to members thereof [**expropriation/appropriation of public and private Palestinian land by Israel for the purpose of constructing Jewish-Israeli settlements, military areas, Israeli-only road networks and the Wall**]

Regarding the commission of these acts by Israel, eminent South African legal scholar and former UN Special Rapporteur on the OPT, Professor John Dugard, has suggested that it is undeniable “that the purpose of such action is to establish and maintain domination by one racial group (Jews) over another racial group (Palestinians) and systematically oppressing them.”

*** What are the legal consequences of a determination of a practice of apartheid by Israel against Palestinians?**

Apartheid constitutes both a crime against humanity, entailing (1) **individual criminal responsibility**, and an internationally wrongful act, entailing (2) **state responsibility** and (3) **third party responsibility**:

- (1) *Individual criminal responsibility*: State agents and members of organisations responsible for the commission of the international crime of apartheid are subject to criminal prosecution, irrespective of their motive, when they commit, participate in, directly incite or inspire, directly abet, encourage or cooperate in the commission of the crime of apartheid. All states are obliged to adopt legislative measures to suppress, discourage and punish the crime of apartheid.

Many of the inhuman acts listed above as manifestations of the crime of apartheid also fit into the category of “grave breaches” of the Fourth Geneva Convention. Grave breaches are defined as the most severe form of war crimes and entail individual responsibility under international criminal law. Agents of the State of Israel are therefore already criminally liable for perpetrating such acts in the OPT. Because of this, the responsibility of individual officers is perhaps not as significant as the implications for Israel if it was to be held responsible as a state for practising apartheid against Palestinians.

- (2) *State responsibility*: A finding of apartheid would lend further weight to the argument that the occupation by Israel of the OPT as a whole is illegal, and that Israel is obliged to withdraw immediately and unconditionally on the basis of its unlawful presence in the OPT (as was found to be the case with South Africa’s presence in Namibia post-1970). Evidence of apartheid could also form the basis for the adoption of collective measures, including economic and diplomatic sanctions, against Israel by the international community against Israel, in order to pressure it into ending its oppressive regime, as was done in relation to apartheid South Africa. In the event that the UN Security Council is unwilling to support such measures, their adoption can be triggered by the General Assembly under Resolution 377, *Uniting for Peace*.

A finding of apartheid would also increase support for civil society campaigns of boycott, sanctions and divestment as a means of holding Israel and its agents responsible for such a wrongful act.

- (3) *Third party responsibility*: Corporate and other non-state actors may also be held responsible under tort law for their knowing complicity in wrongs arising from the practice of apartheid. Earlier this year, victims of South African apartheid, for example, were granted the right by the New York Supreme Court to proceed with a lawsuit (*Khulumani, et al. V. Barclays, et al.*) seeking damages from 23 multinationals (including BP, Credit Suisse, Deutsche Bank, Fujitsu, Shell, Chevron and Daimler-Benz) on the basis that the companies allegedly aided and abetted apartheid by providing specific assistance to South Africa’s military, police and intelligences agencies. The case is currently ongoing.