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Israel and the Crimes Against Humanity of Apartheid and Persecution

[This extract from 'A Threshold Crossed', the report published in April by Human Rights Watch, examines the concepts of 'crimes against humanity', 'apartheid' and 'persecution', and explains how they may be applied to the policies and practices of the State of Israel.]

International criminal law has developed two crimes against humanity for situations of systematic discrimination and repression: apartheid and persecution. Crimes against humanity stand among the most odious crimes in international law.

The international community has over the years detached the term apartheid from its original South African context, developed a universal legal prohibition against its practice, and recognized it as a crime against humanity with definitions provided in the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid ('Apartheid Convention') and the 1998 Rome Statute of the International Criminal Court (ICC).

The crime against humanity of persecution, also set out in the Rome Statute, the intentional and severe deprivation of fundamental rights on racial, ethnic, and other grounds, grew out of the post-World War II trials and constitutes one of the most serious international crimes, of the same gravity as apartheid.

The State of Palestine is a state party to both the Rome Statute and the Apartheid Convention. In February 2021, the ICC ruled that it has jurisdiction over serious international crimes committed in the entirety of the OPT, including East Jerusalem, which would include the crimes against humanity of apartheid or persecution committed in that territory. In March 2021, the ICC Office of Prosecutor announced the opening of a formal investigation into the situation in Palestine.

The term apartheid has increasingly been used in relation to Israel and the OPT, but usually in a descriptive or comparative, non-legal sense, and often to warn that the situation is heading in the wrong direction. In particular, Israeli, Palestinian, US, and European officials, prominent media commentators, and others have asserted that, if Israel's policies and practices towards Palestinians continued along the same trajectory, the situation, at least in the West Bank, would become tantamount to apartheid. Some have claimed that the current reality amounts to apartheid. Few, however, have conducted a detailed legal analysis based on the international crimes of apartheid or persecution.

Definitions of Apartheid and Persecution

The prohibition of institutionalized discrimination, especially on grounds of race or ethnicity, constitutes one of the fundamental elements of international law. Most states have agreed to treat the worst forms of such discrimination, that is, persecution and apartheid, as crimes against humanity, and have given the ICC the power to prosecute these crimes when national authorities are unable or unwilling to pursue them. Crimes against humanity consist of specific criminal acts committed as part of a widespread or systematic attack, or acts committed pursuant to a state or organizational policy, directed against a civilian population.

The Apartheid Convention defines the crime against humanity of apartheid as 'inhumane 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.' The Rome Statute of the ICC adopts a similar definition: '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.' The Rome Statute does not further define what constitutes an 'institutionalized regime'.

The crime of apartheid under the Apartheid Convention and Rome Statute consists of three primary elements: an intent to maintain a system of domination by one racial group over another; systematic oppression by one racial group over another; and one or more inhumane acts, as defined, carried out on a widespread or systematic basis pursuant to those policies.

Among the inhumane acts identified in either the Convention or the Rome Statute are 'forcible transfer', 'expropriation of landed property', 'creation of separate reserves and ghettos', and denial of the 'the right to leave and to return to their country, [and] the right to a nationality'.

The Rome Statute identifies the crime against humanity of persecution as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity', including on racial, national, or ethnic grounds. Customary international law identifies the crime of persecution as consisting of two primary elements: (1) severe abuses of fundamental rights committed on a widespread or systematic basis, and (2) with discriminatory intent.

Few courts have heard cases involving the crime of persecution and none the crime of apartheid, resulting in a lack of case law around the meanings of key terms in their definitions. As described in the report, international criminal courts have over the last two decades evaluated group identity based on the context and construction by local actors, as opposed to earlier approaches focused on hereditary physical traits. In international human rights law, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), race and racial discrimination have been broadly interpreted to include distinctions based on descent, and national or ethnic origin, among other categories.

Application to Israel's Policies towards Palestinians

Two primary groups live today in Israel and the OPT: Jewish Israelis and Palestinians. One primary sovereign, the Israeli government, rules over them.

Intent to Maintain Domination

A stated aim of the Israeli government is to ensure that Jewish Israelis maintain domination across Israel and the OPT. The Knesset in 2018 passed a law with constitutional status affirming Israel as the 'nation-state of the Jewish people', declaring that within that territory, the right to self-determination 'is unique to the Jewish people', and establishing 'Jewish settlement' as a national value. To sustain Jewish Israeli control, Israeli authorities have adopted policies aimed at mitigating what they have openly described as a demographic 'threat' that Palestinians pose. Those policies include limiting the population and political power of Palestinians, granting the right to vote only to Palestinians who live within the borders of Israel as they existed from 1948 to June 1967, and limiting the ability of Palestinians to move to Israel from the OPT and from anywhere else to Israel or the OPT. Other steps are taken to ensure Jewish domination, including a state policy of 'separation' of Palestinians between the West Bank and Gaza, which prevents the movement of people and goods within the OPT, and 'Judaization' of areas with significant Palestinian populations, including Jerusalem as well as the Galilee and the Negev in Israel. This policy, which aims to maximize Jewish Israeli control over land, concentrates the majority of Palestinians who live outside Israel's major, predominantly Jewish cities into dense, under-served enclaves and restricts their access to land and housing, while nurturing the growth of nearby Jewish communities.

Systematic Oppression and Institutional Discrimination

To implement the goal of domination, the Israeli government institutionally discriminates against Palestinians. The intensity of that discrimination varies according to different rules established by the Israeli government in Israel, on the one hand, and different parts of the OPT, on the other, where the most severe form takes place.

In the OPT, which Israel has recognized as a single territory encompassing the West Bank and Gaza, Israeli authorities treat Palestinians separately and unequally as compared to Jewish Israeli settlers. In the occupied West Bank, Israel subjects Palestinians to draconian military law and enforces segregation, largely prohibiting Palestinians from entering settlements. In the besieged Gaza Strip, Israel imposes a generalized closure, sharply restricting the movement of people and goods—policies that Gaza's other neighbour, Egypt, often does little to alleviate. In annexed East Jerusalem, which Israel considers part of its sovereign territory but remains occupied territory under international law, Israel provides the vast majority of the hundreds of thousands of Palestinians living there with a legal status that weakens their residency rights by conditioning them on the individual's connections to the city, among other factors. This level of discrimination amounts to systematic oppression.

In Israel, which the vast majority of nations consider being the area defined by its pre-1967 borders, the two-tiered-citizenship structure and bifurcation of nationality and citizenship result in Palestinian citizens having a status inferior to Jewish citizens by law. While Palestinians in Israel, unlike those in the OPT, have the right to vote and stand for Israeli elections, these rights do not empower them to overcome the institutional discrimination they face from the same Israeli government, including widespread restrictions on accessing land confiscated from them, home demolitions, and effective prohibitions on family reunification.

The fragmentation of the Palestinian population, in part deliberately engineered through Israeli restrictions on movement and residency, furthers the goal of domination and helps obscure the reality of the same Israeli government repressing the same Palestinian population group, to varying degrees in different areas, for the benefit of the same Jewish Israeli dominant group.

Inhumane Acts and Other Abuses of Fundamental Rights

Pursuant to these policies, Israeli authorities have carried out a range of inhumane acts in the OPT. Those include sweeping restrictions on the movement of 4.7 million Palestinians there; the confiscation of much of their land; the imposition of harsh conditions, including categorical denial of building permits in large parts of the West Bank, which has led thousands of Palestinians to leave their homes under conditions that amount to forcible transfer; the denial of residency rights to hundreds of thousands of Palestinians and their relatives, largely for being abroad when the occupation began in 1967, or for long periods during the first few decades of the occupation, or as a result of the effective freeze on family reunification over the last two decades; and the suspension of basic civil rights, such as freedom of assembly and association, depriving Palestinians of the opportunity to have a voice in a wide range of affairs that most affect their daily lives and futures. Many of these abuses, including categorical denials of building permits, mass residency revocations or restrictions, and large-scale land confiscations, have no legitimate security justifications; others, such as the extent of restrictions on movement and civil rights, fail any reasonable balancing test between security concerns and the severity of the underlying rights abuse.

Since the founding of the state of Israel, the government also has systematically discriminated against and violated the rights of Palestinians inside the state's pre-1967 borders, including by refusing to allow Palestinians access to the millions of dunams of land (1000 dunams equals 100 hectares, about 250 acres or 1 square kilometer) that were confiscated from them. In one region—the Negev—these policies make it virtually impossible for tens of thousands of Palestinians to live lawfully in the communities they have lived in for decades. In addition, Israeli authorities refuse to permit the more than 700,000 Palestinians who fled or were expelled in 1948, and their descendants, to return to Israel or the OPT, and impose blanket restrictions on legal residency, which block many Palestinian spouses and families from living together in Israel.