



For Palestine
Essays from the Tom Hurndall
Memorial Lecture Group

Edited by Ian Parker



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Front cover image by Tom Hurndall, Figure in front of tank at Rafah, Gaza (April 2003).

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9. Israeli Apartheid: A Matter of Law

Daniel Machover

Israel's rule over the Palestinian people may be characterised as a regime of apartheid, with its individual actions constituting crimes of apartheid. I was one of the legal advisers to the Russell Tribunal On Palestine (RTOP or 'Russell Tribunal') which convened on six occasions, not all of which I was able to assist with (from March 2010 to September 2014) (<http://www.russelltribunalonpalestine.com/en/index.html>).

The third session was held in Cape Town in November 2011 and what I will set out below is an updated summary of the RTOP's findings — available in full but not updated via this link: <http://www.russelltribunalonpalestine.com/en/sessions/south-africa/south-africa-session-%E2%80%9494-full-findings>. The Tribunal made findings with regard to Israel's policies and practices vis-à-vis the Palestinian people with reference to the international legal prohibition of apartheid under the following headings: The definition and status of apartheid under international law; Application of the definition of apartheid to Israeli policies; and practices vis-à-vis the Palestinian people.

Definition and Status of Apartheid under International Law

Apartheid is the Afrikaans word for 'separateness' or 'separate development' that was used to designate the official state policy of racial discrimination implemented in South Africa between 1948 and 1994. Indeed, 'apartheid' came to be prohibited by international law because

of the experience of apartheid in southern Africa, which had its own unique attributes.

However, the legal definition of apartheid applies to any situation anywhere in the world where the following three core elements exist: (i) that two distinct racial groups can be identified; (ii) that 'inhuman acts' are committed against the subordinate group; and (iii) that such acts are committed systematically in the context of an institutionalised regime of domination by one group over the other. Apartheid acquired that specific legal meaning in international law by virtue of treaties enacted from the 1960s onwards. The crime of apartheid involves individual inhuman acts committed in the context of the abovementioned institutionalised regime.

The legal definition of apartheid is based primarily on the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid (the 'Apartheid Convention') as the most comprehensive articulation of the meaning of apartheid under international law, but also draws on the International Convention for the Elimination of all forms of Racial Discrimination (ICERD) and the Rome Statute of the International Criminal Court (ICC).

Adopted in 1965, ICERD was the first international legal instrument that expressly prohibited apartheid, with Article 3 specifying the obligation of States parties to the Convention to oppose such a regime: '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'. However, ICERD did not provide a precise definition of apartheid. The Apartheid Convention was adopted in 1973 in order to make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid. The Apartheid Convention refers directly to Article 3 of ICERD in its preamble and is intended to complement the requirements of Article 3 of ICERD. Article 1 of the Apartheid Convention builds on earlier resolutions of the UN General Assembly by declaring apartheid to be a crime against humanity. Notably, Israel voted with the majority in favour of that resolution. As a result, the Convention obliges 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.

Article 2 of the Apartheid Convention provides a clear definition of what constitutes apartheid for the purposes of international law. It defines apartheid as '*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 goes on to enumerate a list of such inhuman acts. The formulation used in Article 7(2)(h) of the Rome Statute of the International Criminal Court, adopted in 1998, is very similar, defining apartheid as inhumane acts 'committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group and committed with the intention of maintaining that regime'.

The three core elements of the definition of apartheid are addressed below: i.e. the requirement of two distinct racial groups; the commission of acts listed as 'inhuman acts' of apartheid; and the institutionalised nature of the domination.

The definition of apartheid requires domination by one racial group over another, thus requiring two distinct racial groups. The Apartheid Convention itself does not define a racial group. ICERD, however, gives a broad construction to the meaning of the term 'racial', with racial discrimination including discrimination based on race, colour, descent, or national or ethnic origin. The meaning of a racial group for the purposes of ICERD is therefore established as a broad and practical one. In essence, it means an identifiable group. If a group identifies itself as such, and is identified as such by others, for example through discriminatory practices, then it comes under the protection of the Convention.

The concept of 'race' has long been shown as a social construct, not a biological category. International human rights law recognises a wider scope for the meaning of race than traditional 'black vs. white' parameters, and the UN Committee on the Elimination of all forms of Racial Discrimination has included groups that would not be considered 'races' in that traditional sense, including caste groups in South Asia, non-citizen groups such as migrant workers, and nomadic peoples. As testimony to the Russell Tribunal by experts on the question of race in international law has shown, the determination of a racial group under

international law is ultimately not a scientific question, but a practical one.

Article 2 of the Apartheid Convention and Article 7(2)(j) of the Rome Statute both refer to inhuman acts that may constitute apartheid when committed in a context of racial domination, while Article 5 of ICERD enumerates a list of rights which must be guaranteed to all humans free from racial discrimination. The Russell Tribunal drew principally on Article 2 of the Apartheid Convention as the primary guiding framework regarding the definition of apartheid.

The following 'inhuman acts' are established in Article 2 as constitutive of apartheid:

For the purpose of the present Convention, the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, 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:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
 - (i) By murder of members of a racial group or groups;
 - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
 - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the

right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

- (d) 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 or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

The language of the Apartheid Convention indicates that this list is *illustrative rather than exhaustive*, and that not each and every inhuman act described is necessary for a regime of apartheid to exist. A broader potential range of policies is implied by the qualifier of *similar policies and practices ... as practiced in southern Africa* (emphasis added). The 'shall include...' wording suggests that not all practices cited in Article 2 are required for a positive finding of apartheid. That a narrower range of policies could constitute a case of apartheid is demonstrated by the history of apartheid South Africa, where, for example, Article 2(b) regarding the intended *physical destruction* of a group was not applicable. South Africa's Truth and Reconciliation Commission concluded in this regard that the apartheid regime did not sustain an intentional policy to physically destroy the black population. Such conclusions on individual practices do not preclude an overall finding of a comprehensive system that has not only the effect but the purpose of maintaining racial domination by one racial group over the other.

From both the Apartheid Convention and Rome Statute formulations, it is clear that the essence of the definition of apartheid is the systematic and institutionalised character of the discrimination involved. This systematic element distinguishes the practice of apartheid from other forms of prohibited discrimination. Thus, for the inhuman acts listed above to constitute a regime of apartheid, it is not enough that they occur in random or isolated instances. They must be sufficiently widespread, integrated and complementary to be described as systematic. Such

acts must also be sufficiently rooted in law, public policy and formal institutions to be described as institutionalised.

The prohibition of apartheid is established as part of customary international law (meaning that even states that are not party to the conventions prohibiting apartheid are still bound to uphold the prohibition) and as a norm of *jus cogens* (the most fundamental category of international legal rules, from which no derogation is ever permitted). It is also a universal prohibition, which although formulated in response to the situation in southern Africa was always intended to apply beyond southern Africa.

Application of the definition of Apartheid to Israeli Policies and Practices vis-à-vis the Palestinian People

It is now possible to consider whether Israeli policies and practices affecting the Palestinian population may be characterised as apartheid within the meaning of international law, with reference to the core elements of the definition of apartheid as outlined above.

Palestinians identify themselves as a group of people who share a common origin, history and culture, as well as social and political structures and networks that have ensured a continuing bond despite forced displacement and fragmentation. The entire Palestinian people is a single group, regardless of current geographic location or constructed legal status. All Palestinians — refugees in exile; those under military occupation in the West Bank (including Jerusalem) and Gaza Strip; those who have remained in the territory that is now Israel identify themselves as indigenous to Palestine, where they lived and held citizenship until the end of the British Mandate in 1948. They are considered a single people entitled to collective self-determination.

Under Israeli law and policy, group membership is an official category imposed and monitored by the state, not simply a voluntary identity. Israeli Jews are a group unified by law, sharing the same legal status wherever they reside, while Palestinian Arabs are a separate group, subdivided into citizens, occupied residents (whose residence rights may be lost if they leave the territory in which they live), and refugees who do not have the right to return to any part of historic Palestine.

No such restrictions apply to Jews: in fact, those who are not citizens already can acquire Israeli citizenship automatically by relocating to Israel or the Occupied Palestinian Territory. The law that enables this, Israel's 1950 Law of Return, codifies the descent-based aspect of Jewish identity. Palestinians who hold Israeli citizenship are not defined in the same legal category as Jewish citizens, who enjoy the further privileges of 'Jewish nationality'. The Jewish nation considers itself a distinct group with a unique claim as the historical indigenous people of Palestine. (N.B. This has been highlighted and embedded in law with the passage in July 2018 of the Nation State Law.)

The existence of 'racial groups' is fundamental to the question of apartheid. The situation in Israel/Palestine is not defined in terms of traditional conceptions of 'race' as it was in apartheid South Africa. On the basis of expert evidence heard during the Cape Town session, the Tribunal concluded that international law gives a broad meaning to the term 'racial' as including elements of ethnic and national origin, and therefore that the definition of 'racial group' is a sociological question, not a biological one. Perceptions (including self-perceptions and external perceptions) of Israeli Jewish identity and Palestinian identity illustrate that Israeli Jews and Palestinian Arabs can readily be defined as distinct racial groups for the purposes of international law. From the evidence received, it was clear to the RTOP jury that two distinct, identifiable groups exist in a very practical sense and that the legal definition of 'racial group' applies to all circumstances in which the Israeli authorities have jurisdiction over Palestinians.

The Russell Tribunal's application of the constitutive acts of apartheid to Israel's practices followed the headings and structure of Article 2 of the Apartheid Convention as detailed above. Individual inhuman acts committed in the context of such a system are defined by international law as crimes of apartheid. The RTOP heard abundant evidence in its Cape Town session of practices that constitute the 'inhuman acts' set out below perpetrated against the Palestinian people by the Israeli authorities.

Denial to a member or members of a racial group or groups the right to life and liberty of person: By murder of members of a racial group or groups

The RTOP received evidence of widespread deprivation of Palestinian life through military operations and incursions, a formal policy of ‘targeted killings’, and the use of lethal force against demonstrations.

Examples of large-scale Israeli military operations in which Palestinian civilians have been targeted and disproportionately killed include Operation ‘Defensive Shield’ (2002), Operation ‘Determined Path’ (2002), Operation ‘Rainbow’ (2004), Operation ‘Summer Rains’ (2006), Operation ‘Autumn Clouds’ (2006), Operation ‘Hot Winter’ (2008), and Operation ‘Cast Lead’ (2008–2009).

The use of lethal force against Palestinian demonstrations is a frequent factor of life in villages such as Bil’in and Ni’lin.

Ongoing daily military incursions that involve low but consistent Palestinian casualty figures. The Israeli human rights group B’Tselem keeps a tally of fatalities from 29 September 2000 in three periods: before Operation Cast Lead; during Operation Cast Lead; and since Operation Case Lead, which indicates that Israeli security forces have killed close to 10,000 Palestinians living in Gaza and the West Bank.¹

Palestinians living within Israel have also been a target of lethal force as when 13 peaceful protestors were killed by Israeli police in October 2000.

Through an official state policy of *targeted killings* — which constitute extrajudicial executions — the Israeli military targets Palestinian activists and members of armed groups, with the aim of suffocating any possible resistance to Israel’s rule. These killings affect not only the *targets*, but large numbers of civilians including family members and civilians. Hundreds of Palestinian civilian fatalities have resulted from air strikes and targeted killing operations by Israeli commandos.

By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment

The Russell Tribunal heard evidence of the substantial history and continuing practices of torture and ill-treatment of Palestinian prisoners

1 This total is at October 2021, see <https://www.btselem.org/statistics/fatalities/before-cast-lead/by-date-of-event> and <https://www.btselem.org/statistics/fatalities/during-cast-lead/by-date-of-event>.

in Israeli prisons. Incarcerated Palestinians are categorised as *security prisoners* and subject to a specific regime of interrogation by the Israeli Security Agency, which often uses methods that amount to ill-treatment and torture.

Jewish-Israeli prisoners, regardless of their crimes, are generally not categorised as security prisoners and are not subject to analogous interrogation or ill-treatment.

The Russell Tribunal also noted forms of cruel, inhuman and degrading treatment through: movement restrictions that subject Palestinians to humiliation by Israeli soldiers and Palestinian women being forced to give birth at checkpoints; house demolitions as a form of inhuman and degrading treatment with severe psychological consequences for men, women and children.

The RTOP therefore found that Palestinians are subjected to torture and ill-treatment in the context of widespread deprivation of liberty through policies of arbitrary arrest and administrative detention without charge. The Russell Tribunal found that such measures frequently go beyond what is reasonably justified by security concerns and amount to a form of domination over the Palestinians as a group.

Palestinians in the occupied territories are routinely subject to arbitrary arrest and detention (including lengthy periods of pre-trial detention without access to legal assistance) and fall under the jurisdiction of a military court system that falls far short of international standards for fair trial. An entirely different legal system applies to Israeli Jews, who are subject to Israeli civil law and civil courts, with significantly enhanced procedural and substantive rights from arrest through to sentencing.

Israel's widespread practice of administrative detention without charge or trial, involves detention periods of up to six months at a time which can be, and often are, renewed and prolonged indefinitely, affecting Palestinian adults and minors, whereas not applied to Israeli Jews.

The Russell Tribunal considered that, although Israeli policies of blockade and collective punishment in the Gaza Strip in particular and consequent restrictions on vital supplies of food and medicine entail grave consequences for Palestinian life and health, they do not meet

the threshold required by this provision of intent to cause the physical destruction of the Palestinian people.

Instead, living conditions imposed are calculated to cause the displacement of the Palestinian in whole or in part from Israeli jurisdiction.

The entire Israeli legal system establishes an enormous gap between Israeli Jews and Palestinian Arabs, with legislation typically designed to favour Israeli Jews and keep Palestinian Arabs in a situation of inferiority. This can be clearly seen through certain illustrative examples.

Several Israeli laws prevent Palestinian refugees from returning and recovering their land, thus violating their right to enter and leave the country, freedom of movement and residency and the right to a nationality. In Israel, the unequal distribution of resources for education and cultural activities for Palestinians, restrictions on family reunification for spouses with residence permits on different sides of the Green Line and the lack of representation in the civil service are violations of rights that feed in to Israel's prevention of Palestinian development and participation in political and social life.

Palestinians who work in Israel have enormous difficulties in joining Israeli trade unions or forming their own trade unions in Israel. Further rights violations preventing Palestinian development and political participation include privileges afforded to Jews in the sphere of land ownership, house demolitions and building restrictions; as well as pervasive restrictions on the freedom of opinion and expression through the closure of organisations, prohibition on public gatherings and demonstrations and media censorship by the Israeli authorities.

In summary, Palestinians are subjected to systematic human rights violations that preclude their development and prevent the Palestinians as a group from participating in political, economic, social and cultural life.

Palestinian refugees who remain displaced are also victims of apartheid by virtue of the ongoing denial of their right to return to their homes, as well as by laws that remove their property and citizenship rights. Policies of forced population transfer remain widespread, particularly in the Occupied Palestinian Territory. Civil and political rights of Palestinians including rights to movement, residence, freedom of expression and association are severely curtailed. Palestinian

socio-economic rights are also adversely affected by discriminatory Israeli policies in the spheres of education, health and housing.

The Israeli Jewish and Palestinian populations are separated and allocated different physical spaces, with varying levels and quality of infrastructure, services and access to resources.

In Israel, Palestinians live in crowded spaces, often unable and unauthorised to refurbish or construct houses, living in villages that are sometimes not even officially recognised. Israeli Jews occupy larger expanses of land, guaranteed by Jewish national or government-managed agencies (Jewish National Fund, Israel Land Administration), which ensure that 93% of the land is reserved for exclusive Jewish use.

The landscape of the West Bank is dominated by exclusively Israeli Jewish settlements and their associated regime of separate roads, security buffer zones, checkpoints and the Wall which interrupt the contiguity of the territory, and ensure that Palestinian communities are confined to isolated enclaves. Israeli settlers enjoy the protection of the authorities and military, with their own laws and preferential access to scarce resources such as water, to the detriment of the Palestinian population. Palestinians are prohibited from entering settlements (unless with special permission, such as for workers), military zones and 'natural reserves', meaning that almost half of the West Bank territory is closed to its Palestinian population. These settlements are linked by roads for the exclusive use of Israeli Jews. Palestinian movement restricted and access to farmland is restricted by a pervasive permit system. Regarding access to beaches, for example, in Israel's defence it is commonly stated that Israel does not segregate such access, in the way that South Africa designated certain beaches for whites and certain beaches for blacks or non-Europeans. Significantly, the Russell Tribunal heard evidence describing how Palestinian access even to beaches along the Palestinian shore of the Dead Sea is prohibited by Israeli regulations.

The expropriation of Palestinian property in general has continued since the creation of the State of Israel, and is underpinned by a series of laws and Military Orders that have stripped Palestinians of much of their land.

Accordingly, the evidence has made it plain to the RTOP that since 1948 the Israeli authorities have pursued concerted policies of colonisation

and appropriation of Palestinian land. Israel has through its laws and practices divided the Israeli Jewish and Palestinian populations and allocated them different physical spaces, with varying levels and quality of infrastructure, services and access to resources. The end result is wholesale territorial fragmentation and a series of separate reserves and enclaves, with the two groups largely segregated. The Russell Tribunal heard evidence to the effect that such a policy is formally described in Israel as *hafrada*, Hebrew for 'separation'.

Although Israel has no exploitation system of labour of the Palestinian population, its policies have restructured the Palestinian workforce by suppressing Palestinian industry, establishing restrictions on exports and other measures that have increased the Occupied Palestinian Territory's dependence on Israel and — now more than ever before — on international aid. Until the mid-1980s, Israel intensively used Palestinian labour for work connected to agriculture and construction, with appalling employment conditions and without any of the benefits enjoyed by Israeli Jewish workers. But since 1993, the number of Palestinian workers in Israel has plummeted from over 100,000 to just a few hundred. And since the construction of the Wall, there are hardly any Palestinian workers employed in Israel. Since Hamas won the January 2006 elections in the Gaza Strip, no workers from this area whatsoever have access to Israel.

Israel persecutes and imposes restrictions on those who oppose the regime of segregation, who condemn human rights violations or who criticise the actions of the Israeli military. It also suppresses demonstrations in the Occupied Palestinian Territory, both by organisations and individuals, against the Wall or the discriminatory administration of land, water and infrastructure. Such persecution (and it must be noted here that persecution of dissent in this context of the victimisation of those opposing discriminatory practices is different from 'the crime of persecution') manifests itself through the closure of organisations, travel bans and arbitrary detention of political and human rights activists and related restrictions on freedom of expression and thought.

A Systematic and Institutionalised Regime of Racial Domination

The inhuman acts listed above do not occur in random or isolated instances. They are sufficiently widespread, integrated and complementary to be described as systematic. They are also sufficiently rooted in law, public policy and formal institutions to be described as institutionalised.

In the Israeli legal system, preferential status is afforded to Jews over non-Jews through its laws on citizenship and Jewish nationality, the latter of which has created a group privileged in most spheres of public life, including residency rights, land ownership, urban planning, access to services and social, economic and cultural rights (see list of legislation and proposed legislation in the annex to these findings). The Russell Tribunal heard expert evidence detailing the relationship between the State of Israel and the quasi-state Jewish national institutions (the Jewish Agency, World Zionist Organisation, and Jewish National Fund) that embed and formalise many of the material privileges granted exclusively to Israeli Jews. Regarding the West Bank, the Tribunal highlighted the institutionalised separation and discrimination revealed by the existence of two entirely separate legal systems: Palestinians are subject to military law enforced by military courts that fall far short of international fair trial standards; Israeli Jews living in illegal settlements are subject to Israeli civil law and a civil court system. The result is a vastly different procedure and sentence for the same crime, committed in the same jurisdiction, by members of a different group. An apparatus of administrative control implemented through pervasive permit systems and bureaucratic restrictions adversely affects Palestinians throughout the territories under Israeli control. In contrast to the explicit and readily available South African apartheid legislation, the Russell Tribunal drew attention to the obscurity and inaccessibility of many laws, military orders and regulations that underpin Israel's institutionalised regime of domination.

Conclusions

Israel subjects the Palestinian people to an institutionalised regime of domination amounting to apartheid as defined under international law. This discriminatory regime manifests in varying intensity and forms against different categories of Palestinians depending on their location.

The Palestinians living under colonial military rule in the Occupied Palestinian Territory are subject to a particularly aggravated form of apartheid. Palestinian citizens of Israel, while entitled to vote, are not part of the Jewish nation as defined by Israeli law and are therefore excluded from the benefits of Jewish nationality and subject to systematic discrimination across the broad spectrum of recognised human rights. Irrespective of such differences, the Russell Tribunal therefore concluded that Israel's rule over the Palestinian people, wherever they reside, collectively amounts to a single integrated regime of apartheid.²



Fig. 12 Tom Hurndall, A hand gesture from an Israeli APC at the Rafah border, April 2003. All rights reserved.

2 In the ten years since the November 2011 Cape Town session of the RTOP, the analysis presented here has been widely accepted by leading human rights groups in the region and internationally — by way of example see: <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution> and http://www.btselem.org/publications/fulltext/202101_this_is_apartheid.