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# ICERD, Apartheid and the Occupied Palestinian Territory (OPT)

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This paper outlines just some of Israel's violations of its obligations as a signatory of the 1965 United Nations 'International Convention on the Elimination of All Forms of Racial Discrimination' (ICERD) and argues that the extent of the discriminatory practice evident in Israel's OPT policy goes far beyond any level that may reasonably be justified by national security concerns. The paper concludes by examining the potential applicability of the term 'apartheid' to Israeli policy in the OPT.

The ICERD 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 in the political, economic, social, cultural or any other field of public life.*"[1]

International law in general and the ICERD specifically have broadened the definition of the term 'racial' so as to protect those groups or communities whose identity is better understood in a sociological rather than a biological sense.[2] This is important in the context of the OPT, in consideration of which the Russell Tribunal concluded in 2012 that *"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."*[3]

The International Court of Justice (ICJ) concluded in a 2004 Advisory Opinion that Israel is obliged to apply all human rights treaties in the OPT,[4] a position echoed by the United Nations High Commissioner For Human Rights (UNHCHR) and the Committee for the Elimination of All Forms of Racial Discrimination (CERD).[5] As a 2010 Human Rights Watch report concluded, *"International law does not require Israel to treat Palestinian residents of the West Bank as though they were Israeli citizens; for example, non-citizens do not have the right to vote. However, the rights of Israeli citizens—including settlers—do not include the right to benefit from discriminatory treatment that violates the rights of Palestinians in Israeli-occupied territory."*[6]

In what follows this paper highlights five major areas in which discriminatory practice is apparent.

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[1] Text of the 'International Convention on the Elimination of All Forms of Racial Discrimination' (ICERD) 1965
[2] Report of the Russell Tribunal on Palestine (January 2012) p3
[3] Ibid. p3
[4] Al-Haq, Addameer Prisoner Support and Human Rights Association, BADIL, Women's Centre for Legal Aid and Counselling, Emergency Water, Sanitation and Hygiene Group, 'Joint Parallel Report' (OPT, January 2012) p7
[5] Ibid. p7-8 – See explanatory footnotes
[6] Human Right Watch – 'Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories' (2010) p 2-3

**Discrimination in the Legal System:**

Article 5 of the ICERD states that *"States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law,"* noting in subsection (a) the right of everyone "*to equal treatment before the tribunals and all other organs administering justice."*[7] The failure of the Israeli government to uphold this principle in the OPT is well documented and widely acknowledged.

In the wake of the June 1967 War, Israel established a series of military courts in the OPT. These courts exert "*extra-territorial jurisdiction over any person, resident or non-resident of the occupied territories, and for any offense."*[8] Whilst Palestinian Arabs are subject to the rulings of this Israeli military court system, Israeli citizens who settle in the OPT fall under a different judicial system, namely that of the Israeli civil courts. As the Palestinian non-governmental organisation BADIL has noted, this civil legal system "*has significantly different facilities, procedures, laws, and penalties, and fares far better against the set of due process rights required under international law."*[9] In its 2007 report on Israel, the CERD concluded that "*the application of different criminal laws (is) leading to prolonged detention and harsher punishments for Palestinians than for Israelis for the same offences."*[10]

It is often asserted that such policy is necessary in order to ensure the security of Israeli citizens. However, international law is explicit in stating that racially discriminatory practices are illegal, even in times of war. A 2012 Joint Parallel Report presented to the CERD by a coalition of NGOs reminds us that "*the principle of non discrimination is non-derogable; even when war or a state of emergency exists, a State may not engage in acts that amount to racial discrimination...All restrictions on human rights must always be proportionate to the aim sought, targeted to that aim and be strictly necessary to achieve that aim."*[11] The existence of dual legal systems and the issuance of harsher punishments to Palestinian Arabs cannot be justified as a legitimate attempt to ensure national security.

**Settler Violence and Discrimination:**

ICERD article 5 (b) outlines "*the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or any other individual group or institution."*[12] The failure of the state to protect Palestinian Arabs from settler attacks and the concomitant failure to bring to justice those responsible demonstrates a systematic refusal on the part of the state of Israel to comply with both article 5 (b) and article 5 (a) discussed in the previous section.

Figures from Israel's population registry show that the number of Jewish settlers in the West Bank (excluding East Jerusalem) grew by more than 15 000 in the twelve months between July 2011 and

[7] ICERD (1965) – Article 5
[8] Schaeffer, E. 'Separate Legal Systems for Jewish-Israeli Settlers and Palestinians in the Occupied Territories' for BADIL Resource Centre (Autumn 2011)
[9] Ibid.
[10] UN CERD, 'Concluding Observations: Israel', 2007, (n2) paragraph 35
[11] Al Haq et al. (2012) p10 referencing UN Human Rights Committee, General Comment No 29, *States of Emergency* (Article 4) (31 August 2001)
[12] ICERD Article 5 (b)

July 2012 to a total of more than 350 000.[13] The growth rate of the settler community has been more than matched by that of the number of annual settler attacks against Palestinian Arabs, which increased by 315% between 2007 and 2011.[14] Settler attacks often result in injury and sometimes death but the most common outcome is damage to property and livelihood. The UN Office for the Coordination of Humanitarian Affairs (UNOCHA) calculated that in 2011, "*nearly 10 000 Palestinian owned trees, primarily olive trees, were uprooted or otherwise vandalised by Israeli settlers.*"[15] Settler attacks peak during the olive harvest, a trend that strongly suggests a deliberate attempt to inflict as much economic damage upon the Palestinian Arab community as possible.[16]

Settler attacks often originate from settlements that are provided for, supported and protected by the state of Israel.[17] Despite the spike in settler attacks over the past decade, the state has done remarkably little to bring to justice those responsible. An investigation by the Israeli human rights NGO Yesh Din reported that, of the 938 files opened by the 'Samaria and Judea District Police' to investigate suspected acts of harm against Palestinians and their property between 2005 and 2013, only 8.5% ended in indictment. The report concluded that, "*84 % of the files in which a final decision has been taken were closed due to police investigation failures. In the vast majority of cases, the investigators failed to locate the offenders or to collect sufficient evidence for prosecution.*"[18]

While prosecution rates among settlers remain low, the number of Palestinians prosecuted by the Israeli military courts system continues to grow. March 2013 saw 238 Palestinian children imprisoned and prosecuted - the highest number since October 2010.[19] Reports leaked in 2011 suggest that the conviction rate of the military courts in the OPT was 99.74%.[20] Although sweeping judgements should not be made without first considering the details of each case, the differential between the conviction rates of Israeli settlers and Palestinian Arabs is alarming, especially when considered alongside the growing rate of settler violence. Organisations that follow the progress of Palestinian legal cases in Israel and the OPT are in no doubt that the discrepancy should be attributed to discriminatory policies. Palestinian Centre for Human Rights (PCHR) argues that Israeli policy has "*resulted in a pervasive climate of impunity, under state complicity, which is in specific violation of Israel's legal obligations, including article 6 of the (ICERD).*"[21]

A report published by a coalition of NGOs in 2012 echoed this sentiment, reporting that "*Israel's legislative and administrative regime in the OPT has effectively shielded settlers from the law and*

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[13] NOTE – this figure excludes the number of settlers in East Jerusalem. Source, http://www.theguardian.com/world/2012/jul/26/jewish-population-west-bank-up

[14] The Jerusalem Fund for Education and Community Development - 'When Settlers Attack' (2012) pi

[15] OCHA-OPT, *Protection of Civilians Weekly Report (21/12/11 to 2/1/12)*

[16] The Jerusalem Fund (2012) pi

[17] Human Rights Watch (2010) p51-52

[18] Yesh Din, 'Law Enforcement on Israeli Civilians in the West Bank' Data Sheet (July 2013) p2

[19] Defence for Children International / Palestine Division, 'Detention Bulletin: March 2013' p1

[20] Levinson, C. – 'Nearly 100% of all Military Court Cases in West Bank end in conviction, Haaretz learns' (29/11/11) - 'http://www.haaretz.com/print-edition/news/nearly-100-of-all-military-court-cases-in-west-bank-end-in-conviction-haaretz-learns-1.398369

[21] Palestine Center for Human Rights (PCHR) 'Submission to the UN Committee on the Elimination of Racial Discrimination' 2012, p17 - Article 6 states that '*States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination…as well as the right to seek from tribunals reparation… or satisfaction for any damage*.'

*facilitated the perpetuation of acts of violence against Palestinians. The current regime has created a climate of impunity in the OPT causing a remarkable increase in settler violence."*[22] Such policy is a gross violation of ICERD obligations.

**Discrimination in political association/expression/demonstrations:**

Recent years have witnessed an increase in the disproportionate use of force by IDF troops in response to non-violent protest by Palestinians in the West Bank. Whilst settlers engage in violent acts with little threat of indictment, Palestinians are sometimes brutally suppressed for engaging in legitimate demonstrations against the illegal occupation of land and the expansion of settlements. This is in direct contradiction of article 5 subsection (d) (viii) and (ix) of the ICERD which obliges States Parties to guarantee '*the right to freedom of opinion and expression'* and '*the right to freedom of peaceful assembly and association."*[23]

The response of the IDF to Palestinian demonstrations against settlement expansion, property seizure and detention of civilians is often disproportionate to any security threat posed. Rubber coated steel bullets, tear gas, and skunk[24] are often used to disperse protesters. Al-Haq has reported 13 protestor deaths at non-violent demonstrations since 2004[25] including that of Mustafa Tamimi, who was killed when a tear gas canister struck him on the head on December 9th 2011.[26] Following Mr Tamimi's death, Frank La Rue (UN Special Rapporteur on the Protection of the Right to Freedom of Opinion and Expression) urged the IDF to respect the Palestinians' right to peaceful assembly and called on Israel to ensure that any force used was "*minimal and proportionate to the threat posed."*[27]

The discriminatory nature in which this policy is applied is undeniable. The manner in which the IDF deploys these tactics against Palestinians whilst appearing to tacitly endorse violent settler activity is deeply troubling.

**Discrimination in access to housing:**

Article 5 (e) (ii) of the ICERD obliges States Parties to guarantee 'the right to housing' in a manner that is not racially discriminatory. In certain areas of the West Bank, namely those where settlement construction is most prevalent, Palestinians face significant obstacles when trying to acquire the documentation required to build legally. As a result these areas are witnessing a growing trend of displacement among Palestinian Arabs, many of whom find themselves forced to relocate to already densely populated areas of the West Bank under Palestinian jurisdiction.[28]

As part of the now defunct Oslo Agreement the West Bank was divided into 3 administrative zones; Areas A, B, and C. Area C, which is under full Israeli civil and military control, makes up approximately 61% of the territory of the West Bank and is home to 150 000 Palestinian Arabs. Israeli policy means that Palestinians are restricted to building on only 30% of the territory of Area

[22] Al Haq et al. (2012) p15
[23] ICERD Article 5 (d) (xiii) and (ix)
[24] Skunk is described as "a foul smelling chemical substance." Al Haq et al. (2012) p16
[25] Ibid. p16
[26] Ibid. p16
[27] Ibid. p16
[28] The Israeli Committee Against Housing Demolition (ICAHD) – 'Israel / Occupied Palestinian Territories Parallel Report to the UN Committee on the Elimination of Racial Discrimination (CERD)' (2012) p12

C.[29] UNISPAL acknowledges that an array of restrictions essentially prevent Palestinians from being able to build on much of even this small area, meaning that in reality Palestinian construction is limited to only 1% of Area C.[30] Those seeking additional housing or infrastructure for growing families or expanding businesses often find themselves, in the words of the Israeli Campaign Against Housing Demolitions' (ICAHD) 2012 report, "*faced with the choice of building irregularly or leaving their communities.*"[31] Those that choose to build illegally risk the demolition of property. UNOCHA estimated that 1100 Palestinians were displaced by housing demolitions in 2011, an 80% increase on the 2010 figure. A further 4200 were affected by the demolition of structures relating to livelihood.[32]

At the same time as Palestinian families in Area C are unable to provide themselves with what is often very basic infrastructure, Israeli authorities regularly authorise the construction of expansive new settlement projects designed to benefit the settler community.[33] The most fertile areas of the OPT such as the Jordan Valley are almost exclusively reserved for Israeli settlements and military installations.

Many have speculated as to the ultimate goal of these policies, although to do so is beyond the remit of this paper. The above statistics should provide sufficient evidence to demonstrate that present Israeli housing and construction policy in Area C is deeply discriminatory against Palestinian Arabs and privileges Jewish Israeli settlers in a way that flagrantly violates the obligations outlined in the ICERD.

**Discrimination in freedom of movement and access to resources:**

Under Article 5 d (i) of the ICERD States Parties are obliged to guarantee "*the right to freedom of movement and residence within the border of the state.*" In direct contravention of this obligation Israel has established "*an extensive network of movement restrictions on Palestinians, including checkpoints, roadblocks, and the separation barrier, in many cases solely or primarily for the benefit of settlers.*"[34] Strict Israeli control of the infrastructure within certain sections of the OPT has limited Palestinian access to water resources whilst ensuring that settlements and military installations are well provided for.

In an attempt to preserve the 'separateness' of Israeli and Palestinian Arab communities in the OPT, the state has overseen the construction of two, largely separate infrastructure networks. In 2009 the Israeli NGO B'Tselem estimated that Palestinian vehicles were completely prohibited from travelling on 105km of West Bank roads with another 180km closed to all Palestinian traffic except ambulances, VIP card holders and certain other permitted vehicles.[35] As Area C is the only territorially contiguous area in the West Bank, the IDF therefore controls infrastructure routes between many Palestinian population centres. The existence of over 500 earth mounds, checkpoints and roadblocks prevents freedom of movement for Palestinians throughout much of the West

[29] For details of these restrictions see UNISPAL's report 'Restricting Space: The Planning Regime Applied By Israel in Area C of the West Bank' (December 2009)
[30] ICAHD (2012) p12
[31] Ibid. p15
[32] Al Haq et al. (2012) p23
[33] See, for example, 'New West Bank Settlement Homes Anger Palestinians' (BBC News, 11/8/13) - http://www.bbc.co.uk/news/world-middle-east-23656904
[34] Human Rights Watch (2010) p14
[35] Ibid. p14

Bank.[36] Israelis on the other hand face limited disruption at checkpoints and often travel on routes entirely free from restrictions. The cumulative effect of this policy is to preserve Palestinians in specific enclaves –separate from the settler communities - from which entry and exit is controlled by the state of Israel.

Area C contains substantial amounts of agricultural land and water resources, access to which is a highly politicised issue. The World Health Organisation recommends an average water consumption of 100 litres per capita daily (lpcd). The average lpcd water consumption for Palestinians in the OPT is just 70. Whereas the Jordan Valley settlements of Beda'ot and Ro'i enjoy more than 400lpcd for household use only, the nearby Palestinian village of al-Haddiya has access to only 22lpcd. NGOs have reported that the roughly 500 000 settlers in East Jerusalem and the West Bank consume approximately six times the amount of water used by the entire Palestinian population of roughly 2.5 million. This discrepancy cannot be explained solely by territorial allocation. Israeli authorities such as the Joint Water Committee (JWC) regularly use their veto to prevent the construction and maintenance of Palestinian infrastructure related to water and sanitation in Area C.[37] Furthermore, a 2012 report by UNOCHA demonstrated the extent to which settler activity in the West Bank has impaired Palestinian access to water springs. Settlers have used acts of intimidation and separation fences to prevent Palestinians gaining access to and using springs, the majority of which are found on land recognised by the Israeli Civil Administration as being privately owned by Palestinians.[38]

**Conclusion: Apartheid in the OPT?**

This paper has presented for consideration five elements of Israeli policy in the OPT that appear to show far reaching racially discriminatory practice. One of the most persistent questions relating to such policy is whether or not it could or should be described as apartheid. Apartheid is a highly politicised term and is most often associated with the subjugation of the black African community in South Africa between 1948 and 1994. However, since the development of the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid (hereafter Apartheid Convention) and the incorporation of this convention into the 1998 Rome Statute of the International Criminal Court, the term has developed a definition that is independent of the South African experience. In other words, what happened in South Africa is *an* example of apartheid, not *the* example against which all other cases should be measured.

Article 7 (1) of the 1998 Rome Statute qualifies apartheid as a crime against humanity. Article 7 (2) (h) 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."*[39] The Apartheid Convention highlights certain inhumane acts which may, if committed with the intention of maintaining a given regime, qualify as apartheid; including *"denial to members of a racial group of the right to life and liberty, by murder, torture or arbitrary arrest or imprisonment; measures calculated to prevent a racial group from full participation in the political, social and cultural life of the country, for instance by the denial*

[36] Ibid. p14
[37] All Statistics from AL Haq et al (2012) p30-2
[38] UNOCHA Report, 'How Dispossession Happens: The Humanitarian Impact of the Takeover of Palestinian Water Springs By Israeli Settlers' (March 2012) p2
[39] Rome Statute of the International Criminal Court - Article 7(2)(h)

*of freedom of movement; measures designed to divide the population along racial lines by the creation of separate reserves for different racial groups; and the persecution of persons for opposing apartheid."*[40] Israel is party to neither the Apartheid Convention nor the Rome Statute but strong arguments are made suggesting that the crime of apartheid should be considered as customary international law (i.e. binding regardless of whether or not it has been formally ratified in domestic law or through international treaties).

Professor Emeritus John Dugard, himself a South African and former UN Special Rapporteur for Human Rights in the OPT, is a prominent advocate of the argument that Israeli OPT policy should be understood as apartheid. Accepting the premise that Palestinian Arabs and Israeli Jews should be considered as different racial groups, he argues that Israeli policy in the OPT is "replete" with the commission of those inhumane acts that qualify as apartheid.[41] *"There is well documented evidence of torture. Arbitrary arrests and detention is evidenced by administrative detention. Check points seriously inhibit freedom of movement...Israel has divided the population along racial lines by fragmenting the territory of Palestine into enclaves by the construction of the Wall (the Separation Barrier) and bypass roads. It has divided Palestine into three distinct zones – Areas A, B, and C...Opponents of the occupation are ruthlessly persecuted by targeted assassinations, torture, administrative detention and house demolitions."*[42] Given that many of these policies are clearly designed to privilege and maintain the domination of the Israeli settler community by *"systematically oppressing"*[43] the Palestinian Arab population, Dugard concludes that the term apartheid is certainly applicable in this instance.

Critics of the apartheid discourse such as Richard J. Goldstone (leader of the 'United Nations Fact Finding Mission on the Gaza Conflict') argue that the use of the word apartheid is an "unfair and inaccurate slander against Israel, calculated to retard rather than advance peace negotiations."[44] Goldstone suggests that whereas South Africa's system of enforced racial separation was designed to permanently subjugate the black South African community for the benefit of the white minority, Israel's decision to agree in concept to the existence of a Palestinian State comprising both the Gaza Strip and "almost all of the West Bank" shows that comparisons with the South African model are misleading. Roadblocks and other such measures, Goldstone argues, are inevitable given Israeli security concerns and will persist until such a time when a peace settlement is reached.[45]

Goldstone's argument appears to rest on two assumptions; first, that the South African example is the yardstick by which other cases should be measured, a position that we have already shown to be legally irrelevant despite its merits as an interesting empirical exercise; second, given Israel's supposedly sincere commitment to a two state solution, the situation in the OPT should not be seen as a permanent state of affairs and certain interim arrangements should be understood as "*necessary*" security measures. This echoes the argument made by the state of Israel itself which argues that its policies do not constitute apartheid and that *"the purpose of the occupation is simply*

[40] Dugard, J. – 'From Oslo to Apartheid: A Natural Progression' (pamphlet) - paraphrasing Article 2 of the International Convention on the suppression and punishment of the crime of apartheid
[41] Dugard (pamphlet)
[42] Ibid.
[43] Ibid.
[44] Goldstone, R. J. – 'Israel and the Apartheid Slander' (New York Times, 31/10/11)
[45] Ibid.

*to maintain law and order pending a peace settlement."*[46] This paper has already demonstrated that international law clearly holds non-discrimination to be a non-derogable obligation, meaning that persistent insecurity or even a state of war cannot be used as justifications for initiating and implementing such policies. Likewise, any attempt to highlight the *permanence* of a discriminatory regime as a pre-requisite for its description as apartheid is disingenuous. Such a stipulation appears neither in the terms of the Apartheid Convention nor the Rome Statute. The 'maintaining' of a regime (as referred to in the Rome Statute[47]) should not be equated with the 'permanence' of a regime.

The Liberal Democrats claim to want "to put the rule of law back at the heart of our (Britain's) foreign policy."[48] In the case of the OPT it is manifestly clear that Israeli policy is in gross violation of the ICERD, seeking as it does to promote the interests and well-being of one racial group at the expense of another. It should be clear that the extent and nature of this violation falls within the purview of apartheid. Attempts to avoid accurately labelling this phenomenon serve only to obscure the reality of the situation and prevent the Palestinian population of the OPT accessing justice. It should be the responsibility of the Liberal Democrats as the party of international law to lead the way in British politics by calling for an end to apartheid in the OPT.

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[46] Speech by John Dugard to the Jerusalem Fund at Palestine Center, 30th March 2009, entitled, 'Hisham B. Sharabi Memorial Lecture: Apartheid and Occupation under International Law' – accessed 19/11/13 - http://www.thejerusalemfund.org/ht/d/ContentDetails/i/5240/pid/223

[47] 1998 Rome Statute 7 (2) (h)

[48] http://www.libdems.org.uk/international_affairs.aspx