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Amnesty International and the Apartheid Claim Against Israel

Political and Legal Relevance

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On 1 February 2022, Amnesty International released a comprehensive report claiming that Israel is engaged in apartheid against the Palestinians and is thereby committing a crime against humanity. The Amnesty report is one in a series of publications by Palestinian, Israeli and international human rights organizations that see the threshold to apartheid having been crossed in Israel and/or the Palestinian territories, although it should be noted that opinions about where such crimes are being committed differ from report to report. The EU and its member states should not adopt the apartheid claim without legal scrutiny. At the same time, they should take the grave human rights violations documented in the Amnesty report (and elsewhere) seriously. Under the Geneva Conventions, all signatory states incur direct legal obligations to enforce compliance.

Amnesty International (AI) accuses Israel of having established an apartheid regime on its own territory and in the Palestinian territories under its control. The accusation also takes aim at Israel's policy towards Palestinian refugees, claiming that, for demographic reasons, they are systematically being denied the right of return — a right that is guaranteed under international law.

In making this accusation, AI is explicitly not seeking to draw a comparison between the regime described in the report and the one that prevailed in South Africa in the past. Rather, both AI and other human rights organizations refer to the legal definition of apartheid as codified in the relevant body of international law: the term is

first mentioned in the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 and later defined, in particular, in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1974 and in Article 7 of the Rome Statute of the International Criminal Court of 1998. Essentially, the definition comprises three points:

- The intent of one racial group to maintain domination over another (or others);
- Systematic oppression; and
- Serious violations in the form of inhumane treatment.

Thus, according to the established school of thought, apartheid is not about race or racism in the narrow sense. Rather, racial



discrimination is to be understood in light of the above-mentioned 1965 convention: namely, as discrimination based on race, colour, descent or national or ethnic attributed identity.

Context

In the past, Israeli prime ministers have been among those repeatedly warning that rule over the Palestinians could lead to apartheid – for example, David Ben Gurion in 1967, Itzhak Rabin in 1976, Ehud Barak in 1999 and Ehud Olmert in 2007. While the Amnesty report was dismissed by the current Israeli government as “false, one-sided and anti-Semitic”, it has nonetheless fuelled a pluralistic debate in Israel. Advocates of different positions across the entire spectrum of opinions are having their say. The concept of apartheid is by no means rejected across the board by Jewish Israelis to describe the situation in the country (including even some who do not belong to the post-Zionist minority). And in a representative survey of the Jewish electorate in the US conducted in 2021, 25 per cent of respondents agreed with the statement that Israel is an apartheid state.

The apartheid claim also appears in a whole series of recent reports and position statements, including a report by the UN Economic and Social Commission for Western Asia, which was later withdrawn under pressure from the UN Secretary-General, and other such documents by Palestinian, Israeli and international human rights organizations. Moreover, in 2018, the State of Palestine filed an inter-state communication against Israel under Article 11 of the racial discrimination convention for discriminating against the Palestinian population in the occupied territories, including East Jerusalem, on the ground of national or ethnic origin. After considering the issues of jurisdiction and admissibility, the Committee on the Elimination of Racial Discrimination accepted the complaint in April 2021 and decided to establish an ad hoc Conciliation Commission.

The reports and documents can be roughly divided into three categories:

1. Those that accuse Israel of having established a system of apartheid in the occupied territories, especially in the West Bank, including East Jerusalem (see, for example, Yesh Din, Human Rights Watch, the Policy Working Group and the State of Palestine);
2. Those emphasizing that institutionalized discrimination constituting the crime of apartheid can also be found in Israel (see, for example, B’Tselem); and
3. AI’s approach, which goes beyond a territorial understanding of apartheid to include Israel’s behaviour towards the Palestinian refugees.

What the AI Report Claims

AI argues that since the State of Israel was founded in 1948, its policies, legislation and practices have all been determined by the overriding goal of establishing and maintaining a Jewish demographic majority and maximizing Jewish-Israeli control over land. Successive Israeli governments have knowingly instituted a system of oppression and domination over Palestinians, according to the human rights organization.

The report describes in detail a differentiated system of various types of discrimination and restriction of rights. It argues that this system includes segregation *in the West Bank*, which is characterized by, among other things, two separate legal and administrative systems, one for the Palestinian population and the other for Jewish-Israeli settlers. The report also argues that the system includes restricted access to agricultural land *in the Gaza Strip* and to fishing areas in the region’s coastal waters, which has exacerbated the socioeconomic effects of the Israeli blockade – an act that is in contravention of international law. And the drastic restrictions of the freedom of movement of the Palestinian population of the West Bank and Gaza are seen in the report as part of this system, too.

Moreover, Amnesty argues, the system provides for a privileged national status of the Jewish citizens of Israel that is distinct from citizenship and forms the basis for unequal treatment. The AI report maintains that institutionalized discrimination *in Israel* includes measures such as the confiscation of Palestinian land and property on a large scale (especially in 1948 and the years that followed), ongoing discrimination in land use and a policy of the intentional settlement of Jewish Israelis in the Negev and the Galilee, that is, in areas that originally had a Palestinian majority population.

Ultimately, according to AI, the impact of Israel's population policy *on both sides of the Green Line* is that the Palestinian population is displaced from parts of the Negev, East Jerusalem and the C areas of the West Bank. In addition, the human rights organization says that Palestinians are seen as a demographic threat, which is why, it contends, Palestinian refugees are withheld the internationally guaranteed right of return and Palestinians married to Israeli citizens living in Israel are denied reunification with their spouses.

AI is by no means suggesting that the situation in Israel is the same as that in the occupied Palestinian territories, as is often claimed. However, Amnesty regards the state of affairs in Israel as an integral part of a comprehensive system and as the result of efforts to safeguard the Jewish character of the State of Israel through the establishment and maintenance of a Jewish majority and Jewish control over land. While Amnesty stresses that measures taken by Israel to ensure the security of its citizens are legitimate, it notes that they must be proportionate. In this context, it points out that many discriminatory measures cannot be justified on security grounds — for example, denying seriously ill Palestinians from the Gaza Strip access to medical treatment in Israel or even in the West Bank.

To What Extent Are the Claims Correct?

There are reasons to view Amnesty's report critically. Not least, its ex-post analysis gives the impression that since the founding of the State of Israel, *all* measures to institutionalize the system described above have been taken in a targeted and intentional manner. The conflict dynamics that have repeatedly contributed to the aggravation of the situation and have forestalled — or helped forestall — alternative developments are largely ignored. Nor is enough attention paid to the disputes within Jewish-Israeli majority society and among the political class about dividing the country or to the internal Palestinian rift. At the same time, the focus is narrowed to those rights violations that can be attributed to apartheid. This means that important other rights are not taken into consideration — above all, the right to self-determination, which applies to both peoples.

Nevertheless, it cannot be denied that a one-state reality has emerged on the territory of the former British Mandate of Palestine, the main characteristics of which are:

- Israel's ultimate control of territory, land and maritime borders (with the exception of the border between Gaza and Egypt), coastal waters, airspace, the electromagnetic sphere and natural resources;
- A Palestinian Authority whose competence is limited to internal order and self-administration in the A and B areas of the West Bank and which is dependent on Israeli permits and transfers;
- The fragmentation of Palestinian territory into enclaves isolated from one another, including the blockade of the Gaza Strip and the separation of East Jerusalem from the West Bank, as well as grave restrictions on the freedom of movement of Palestinian residents of the occupied territories; and
- A system in which residents are granted or denied various rights depending on their citizenship, religious-ethnic affiliation (Jewish vs Arab) and place of resi-

dence (Israel, West/East Jerusalem, A, B, C areas of the West Bank or the Gaza Strip).

What is more, the occupation of 1967 – let alone the formal annexation of East Jerusalem – can hardly be classified as temporary after 55 years, not least since the current Israeli government of Naftali Bennett shows no sign whatsoever of wanting to end it and explicitly rejects the implementation of the Palestinians' right to self-determination in a sovereign state. Further, Israeli governments have continued to carry out infrastructure projects and submitted infrastructure plans that betray their intention to ensure permanent Israeli control over the West Bank, including East Jerusalem. And all Israeli governments since 1967 have used incentives to encourage the settlement of Israeli nationals in the occupied Palestinian territories and exploited the local natural resources to the detriment of the Palestinian population.

In fact, there is virtually no disputing that an institutionalized and permanent system of discrimination is to be found on all the territory controlled by Israel. *In the occupied territories*, including East Jerusalem, this goes hand in hand with the systematic oppression of Palestinians as well as inhumane acts. The latter are enumerated and described in the above-mentioned conventions; their wide-spread occurrence has been extensively documented in a large body of reports by UN human rights rapporteurs as well as by Israeli, Palestinian and international human rights organizations: segregation, displacement from strategic areas, administrative detention, torture, disproportionate use of force and the denial by the occupying power of basic rights and freedoms, especially political rights (freedom of expression, freedom of association, freedom of political participation, etc.) and economic rights (including access to land and resources).

Prima facie, Israel is thus committing the crime of apartheid – which is classified as a crime against humanity – *in the occupied territories*. But a definitive legal assessment as to whether the crime of apartheid is being

committed can be made neither here nor on the opinion pages of the press or by the German government. Rather, that judgment must be left to the competent bodies, such as the ad hoc Conciliation Commission and the International Criminal Court.

Conclusions and Recommendations

The AI report is likely to strengthen the apartheid claim in societal debates around the globe. At the same time, owing to the framing of its accusations, there is little chance that the report will bring about the intended change of behaviour in Israel or prompt Israel's friends and allies to step up pressure accordingly. Because even if it does not explicitly deny Israel's right to exist, in the final analysis, it does call into question Israel's understanding of what constitutes a Jewish state.

Nevertheless, efforts to initiate court proceedings in accordance with the principle of universal jurisdiction will probably be made in those states where the legal framework permits. In Germany, for example, genocide, war crimes and crimes against humanity – including the crime of apartheid – can all be prosecuted under the International Criminal Code of 2002, regardless of where and by whom those crimes were committed. It is also likely that the Palestinian leadership and its international supporters will attempt to persuade the International Criminal Court to widen its criminal investigation of crimes committed in the Palestinian territories since 2014 to rule on whether the accusation of apartheid is justified.

The EU and its member states should neither adopt nor dismiss the apartheid claim until it has been carefully examined by the competent bodies. But they should view the AI report as a wake-up call to no longer accept grave human rights violations as normal and to not regard the ongoing occupation as a state of affairs that exists detached from a “democratic Israel”. In any case, the well-documented violations of the

Geneva Conventions incur a direct obligation under international law for the contracting parties to enforce compliance with those treaties. Since breaches of international law and human rights violations committed by Israel, the Palestinian Authority and Hamas are not sanctioned and alleged war criminals not prosecuted, the parties to the conflict are, in effect, being invited to continue breaking the law. The basis for peaceful coexistence can hardly be laid in this way. The enforcement of human rights is not an obstacle to constructive conflict transformation; on the contrary, it is a prerequisite for the viability of any settlement.

In this vein, concrete recommendations can be drawn from the Amnesty report for a rights-based European approach to conflict transformation:

- Support the (ongoing) investigation by the International Criminal Court of alleged crimes under international law in the Palestinian territories both politically and – should proceedings be initiated – in fulfilment of obligations under the Rome Statute by providing legal assistance and, in this context, also support the investigation of the apartheid claim;
 - Provide political support to commissions of inquiry focused on human rights violations in the Israeli-controlled territories (such as the commission formed by the UN Human Rights Council in May 2021) and the ad hoc Conciliation Commission established under the racial discrimination convention within the framework of the inter-state communication brought by Palestine;
 - Urge Israel to cooperate with the UN High Commissioner for Human Rights and the UN human rights rapporteurs;
 - Assist human rights defenders not only financially but also politically when they are up against delegitimization campaigns (this applies, in particular, to the six Palestinian human rights and civil society organizations that Israel designated as terrorist in October 2021); and
- Review military cooperation with Israel (rigorous scrutiny should be applied not only to exports of goods that could lead to a worsening of the human rights situation but also to those forms of cooperation through which Europeans benefit from Israel's experience in the context of occupation).

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