Apartheid in the Occupied Palestinian Territory?

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The apartheid claim made against Israel because of its policy in the Occupied Palestinian Territory (OPT) – most recently in the ongoing advisory proceedings before the International Court of Justice (ICJ) – cannot be settled with the counter-claim of antisemitism, but calls for an objective, thorough and fact-based legal inquiry. Only such an approach with regard to this and other allegations against Israeli policy will strengthen Israel, understood as a liberal and democratic Rechtsstaat, which guarantees, in line with its 1948 Declaration of Independence, "complete equality" to "all its inhabitants". At the same time, recent developments have once again made clear that a solution to the Palestine question in line with international law is simply existential for the future safe existence of the State of Israel.

Apartheid claim reloaded

In the most recent hearings in the ICJ advisory proceedings on the "Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem", 20 (out of a total of 50 intervening) States as well as three international organizations have invoked the apartheid claim (s. here p. 80 with references in fn. 100), including the apartheid victims South Africa (here, pp. 18-9) and Namibia (here, pp. 14 ff.) as well as the African Union representing 55 African States (here, p. 47). Even if there are no European or "Western" states among these States, it is noteworthy that respected European international lawyers have advocated the apartheid claim on behalf of those States (such as English Professor Philippa Webb for Belize [here, pp. 15-6] and Sir Michael Wood for Jordan [here, p. 63] and – en passant – German Professor Andreas Zimmermann and French Professor Alan Pellet, both for Palestine [see here p. 57 and here p. 97 and passim]). The apartheid claim has, in the meantime, also found its way into the investigation into possible crimes in the "situation of Palestine" before the International Criminal Court (ICC) through a collective referral by five ICC State parties (pursuant to Art. 13(a), 14 ICC Statute), led by South Africa (and supported by Bangladesh, Bolivia and Djibouti and Comoros).

It should be recalled, however, that this claim is much older than the recent debate, triggered by the 2021 reports of Human Rights Watch, Amnesty International and the Israeli NGO B'Tselem, seems to suggest. First claims of this kind can already be found in the publications of some Palestinian intellectuals in the 1960s (see Waxman). In the 1970s, racism and Zionism were given equal status in Resolutions of the UN General Assembly (see e.g. Res. 3151 G (XXVIII) of December 14, 1973). The apartheid claim was then made explicitly for the first time at the World Conference against Racism in 2001 in Durban, South Africa. A draft final declaration

mentioned apartheid in relation to “the ethnic cleansing of the Arab population in historic Palestine” and described “foreign occupation based on settlements” as “a new kind of apartheid”. Yet, this reference disappeared in the final version of the declaration.

Unbiased and nuanced analysis

In any case, the apartheid claim has now again taken center stage in the international legal discourse with the recent ICJ hearings. Yet, this time, the target is Israel and the former apartheid victims South Africa and Namibia are among its main adversaries. At the same time, the apartheid legacy of these two countries provides relevant legal precedent with four ICJ advisory opinions (1950, 1955, 1956, 1971) and a contentious case (Ethiopia v. South Africa, 1960-1966), all concerning the former South West Africa, now Namibia, back then controlled by (apartheid) South Africa as mandatory power.

In legal terms, apartheid essentially describes a specific wrong that encompasses systemic and structural forms of discrimination destroying equality and freedom, within the framework of an institutionalized system of oppression. The modern concept of the international crime of apartheid, building on the definition of Art. II of the 1973 Apartheid Convention but emancipated from its South African precedent, can be found in Article 7 (2)(h) of the ICC Statute (as a crime against humanity) and is defined there by means of ***three (cumulative) elements***: (i) “inhumane acts” “similar” to those mentioned in Article 7 (1) ICC Statute, i.e., ranging from deprivation of liberty to killings; (ii) existence of an “institutionalized regime of systematic oppression and domination of one racial group by another racial group or groups” and (iii) the (specific) “intent of maintaining” that regime.

As outrageous as the apartheid claim may appear from the point of view of the Israeli government, it is in Israel’s own best interest to take it seriously. If it were successful, Israel would face – besides genocide[1)] and war crimes (based on violations of the law of armed conflict, *ius in bello*) – another charge of an international wrongful act and an international crime with similar restraining consequences for third States supporting Israel militarily (see generally here; less restrictively here; on Nicaragua v. Germany see here, here and here). Indeed, apart from domestic legislation prohibiting arms exports in the face of the commission of international crimes (on German law, see here, at 182 ff.; on Dutch law and the recent Hague Appeals Court decision, see here, here, here), the UN Arms Trade Treaty (ATT) – albeit often disregarded by major military powers – would equally apply in an apartheid context given the latter’s characterization as a crime against humanity. Accordingly, a State must not supply arms to a conflict party if this party uses them to commit international crimes (including apartheid as a crime against humanity) and the supplying State “has knowledge” of this use “at the time of authorization” of the arms supply (Article 6(3) ATT). In terms of the law of State responsibility (Article 16 ILC Draft), the supplying State would be complicit “in the commission of an international wrongful act” (i.e. apartheid) if it has the respective knowledge of the commission of this act (for a previous debate on German complicity in war crimes in Yemen

by supplying weapons to Saudi Arabia see e.g. here and here). In addition, anti-apartheid monitoring mechanisms could be reactivated, especially the Apartheid Convention's "Group of Three".

However, can we really speak of apartheid in legal terms with a view to Israeli policies and practices in the OPT, especially the West Bank?[2)] If one undertakes a thorough and careful analysis, applying the above-mentioned three elements of the apartheid crime to the factual situation in the OPT, the answer to this question turns out to be more complex than the hearings before the ICJ and the widespread (international law) discourse suggest. In fact, only one of the intervening States (namely Belize, pp. 15-6) undertook something close of a legal analysis, but apart from too brief and somewhat superficial, it mixed up the specific genocidal with the apartheid intent and ignored the tricky issue of the applicable standard of proof. In a nutshell, the main take-aways from a more thorough analysis may be summarized as follows (for a detailed treatment, see Ambos, Apartheid in Palestine? 2024, pp. 87 ff. and 47 Fordham Int'l L.J., forthcoming 2024):

The existence of the ***first element*** of the apartheid crime is largely undisputed because Israeli occupation policy entails "inhumane acts", e.g. unlawful killings, arbitrary arrests and violations of physical integrity, including torture, and these acts – increasingly occurring in the form of settler violence (for a recent German radio report see here) – are attributable to the State of Israel. The ***second element*** raises, however, significant problems of interpretation. While the existence of an "institutionalized regime of systematic oppression and domination" in the OPT is largely uncontroversial (see e.g. for a good overview of the discriminatory legislation here), the oppression / domination of the local Palestinian population by Israel as the occupying power and by Jewish settlers cannot easily be understood as the oppression of one *racial group* (Palestinians) by another racial group (Israeli Jews). While Israeli discriminatory policies and practices in the OPT have been qualified as "racial discrimination" within the meaning of Article 1 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by the respective Committee (here, para. 24 and here, para. 22-3), the requirement of a racial group oppression is arguably narrower since it presupposes that the respective populations are to be understood as "racial groups", i.e., there must be more than just discrimination of one group by the other (note that Article 7(2)(h) ICC Statute does not even contain the word 'discrimination'). Also, the "racial group" element seems to imply that the Israeli-Palestinian conflict is to be perceived in (purely) racial terms, but what if it is read primarily as a national conflict between Israeli citizens and Palestinian non-citizens (see e.g. here)? While the full controversy cannot be recounted here, ultimately, the existence of a national conflict does not exclude a parallel discrimination with racial ingredients (convincingly here, 851-2), i.e., where the oppressed group is considered as inferior to the dominant group. Such racialised or race-based oppression may ultimately amount to a racial group oppression within the meaning of the apartheid crime. Finally, the ***third element*** of the specific apartheid intent is very difficult to prove, especially if one uses the very high evidentiary threshold of the "only reasonable inference" (for a discussion, see here) required by both the ICJ (here, para. 148) and the International Criminal

Tribunal for the Former Yugoslavia (here, para. 10, 2598 ff., 5669, 5781, 5830) with regard to the crime of genocide.

Anti-Semitism versus Fact-Based Legal Criticism of Israeli Policy

Whatever the result of an impartial examination of the apartheid claim – or, for that matter, the genocide claim brought against Israel by South Africa regarding the ongoing Gaza war –, it cannot be settled with a counter-claim of antisemitism. As recently demonstrated, once again, in the context of an interdisciplinary research project, antisemitism is an extremely diverse and complex phenomenon that can hardly be captured by *one* comprehensive and convincing definition. This explains why three definitions of antisemitism – the one of the International Holocaust Remembrance Alliance (IHRA, 2016) and, in response, those of the so-called Jerusalem Declaration and the Nexus Document (both 2021) – are fighting for recognition, with none of these definitions claiming to be legally or otherwise binding, but only to serve as a basis for a more informed and rational discussion. In particular, the broad and vague IHRA definition, which was accepted as the only binding definition by the German Federal Government already in 2017 and later even expanded, has increasingly met with criticism (see here and here, p. 71 ff.) given its tension with freedom of expression and science. Even Kenneth Stern, one of the authors of the IHRA definition as former antisemitism commissioner of the "American Jewish Committee", has echoed such criticism (here and recently here).

Against this background, one should work with a minimal or core definition, according to which antisemitism represents, in the words of the German Independent Expert Group on Antisemitism, a "collective term" for "all attitudes and behaviors that assume negative characteristics regarding individuals, groups or institutions perceived as Jews due to their affiliation" (here, p. 24).[3)] More succinctly, one can speak of "hostility towards Jews *as* Jews" (here, p. 122), of discrimination, persecution and other oppression of Jews (only) because they are Jews.

At any rate, given the definitional uncertainty and the tension with freedom of expression, the antisemitism claim should not be made lightly. Rather, one must distinguish between antisemitism and legitimate criticism of Israeli government policy – in the sense of a human rights or international law-based criticism of Israel (for further distinctions, see here, pp. 293, 298 ff.). If this criticism is fact-based, in particular focusing on the Israeli policies and practices in the OPT, the Israeli-Palestinian "real conflict" (here, p. 86), it is, *prima facie*,[4)] not antisemitic and thus deserves an unbiased and rational discussion. In contrast, a too broad concept of Israel-related antisemitism runs the risk of ignoring the underlying factors of the existing real conflict (here, p. 108) and, ultimately, encourages the instrumentalization of the antisemitism claim.

Taking Fact-Based Criticism Seriously in Order to Preserve Israel as a Democratic and Liberal *Rechtsstaat*

What is even more important is that only an unbiased and factual analysis of allegations against Israel and its policies will contribute to preserving, in the medium and long term, Israel as a liberal and democratic *Rechtsstaat*. While such an analysis may lead to criticism of Israeli policies (both within Israel and with regard to the OPT), it does not challenge its right of existence and is certainly not about criticism of Jews *as* Jews. Thus, such criticism is not only *non*-antisemitic, but it is, in fact, *pro*-Israel, because it defends Israel understood both as a liberal *Rechtsstaat* and as the home of the Jews. Indeed, for the preservation of *this* State, a solution to the Palestine question in line with international law is absolutely essential. Brian Klug already pointed this out in 2003 (p. 138): “The longer Israel persists in its current policies towards the Palestinians, the more it will be excoriated, not only by anti-Semites but by people of goodwill. Almost no one will take Israel’s part except mainstream Jews.”

The most recent proceedings before the ICJ make it clear how right Klug was even back then. Today, Israel appears increasingly isolated on a global scale, a country captured by “radical messianic” Jewish groups, with a more than 50 years lasting occupation of Palestine aggravated by the ever-expanding settlement project and the current Gaza war. Thus, the true friends of Israel prove more and more to be those who recall its Declaration of Independence of 1948, which spoke of “complete equality” of “all its inhabitants irrespective of religion, race or sex”, of “freedom of religion, conscience, language, education and culture” and made a “faithful” commitment to “the principles of the Charter of the United Nations”. In short, those Jewish voices who, like the Israeli legal scholars Ofra Bloch and Barak Medina (here, p. 308), advocate complete equality and fight for the preservation of a “Jewish and democratic state” deserve our unconditional support. While this call primarily applies to mainland Israel, it goes hand in hand with a just and equal solution of the Palestine question, that is a solution in line with international law on the basis of the 1947 UN partition plan (General Assembly Resolution 181) as further developed in subsequent negotiations affirming the 1967 borders (Security Council Resolutions 242/1967, 338/1973 and more recently, e.g. 2334/2016, para. 3).[5)]

I am grateful for discussions with and comments by various colleagues from Israel and elsewhere.

References

- See regarding genocide also the most recent report of the Special Rapporteur for the OPT of 25 March 2024 and the last order of the ICJ of 28 March 2024 stressing, with a view to the plausible genocide claim, the “further risk of irreparable prejudice” and the “urgency … that such prejudice will be caused

before" a "final decision in the case" (para. 40). Explicit references to the risk of genocide can also be found in the Declarations of President Salam (para. 7, 9-10, 12), Judge Yusuf (especially para. 3 [finding "objective indicia" of genocide], 7 ["indicia of genocidal activity"], 12 ["indicators of genocidal activities … flashing red in Gaza"], Judge Nolte (para. 6 ["plausible risk of a violation of relevant rights under the Genocide Convention"]) and Joint Declaration Judges Xue, Nemer Caldeira Brant, Gómez Robledo and Tladi (para. 6); but see also Separate Opinion (Israeli) Judge ad hoc Barak (para. 6 ["The Court's reasoning today is far removed from the Genocide Convention and based primarily on humanitarian considerations."], 32 ["no indication of an intent"]).

- I note in passing that the apartheid claim is unjustified with regard to mainland Israel although the latter's legal regime is partly applied in the OPT and it entails is a discrimination of Israeli Arabs. At any rate, one should distinguish between the OPT and mainland Israel and Amnesty International's failure to do so has been rightly criticized. In addition, to extend the apartheid claim to Israel proper may be considered as an attack on Israel's right to existence.
- The original German version of the quote of the unabhängiger Expertenkreis Antisemitismus reads: "Sammelbezeichnung für alle Einstellungen und Verhaltensweisen, die den als Juden wahrgenommenen Einzelpersonen, Gruppen oder Institutionen aufgrund dieser Zugehörigkeit negative Eigenschaften unterstellen." (translation K.A.).
- This, of course, does not exclude underlying antisemitic motives of fact- or law-based Israel criticism but such motives are difficult to identify since they belong to the internal sphere of the actor. In addition, even if they existed, the factual or legal basis of the criticism must still be addressed.
- To be sure, the 1947 partition plan has been changed to the detriment of the Palestinians by the armistice (green) line resulting from the 1948 and 1967 wars, see for a comparative map here https://de.wikipedia.org/wiki/Datei:1947-UN-Partition-Plan-1949-Armistice-Comparison.svg. While this expansion of Israeli territory has, arguably, become effective with the above quoted Security Council Resolutions and has ultimately also been recognized by the PLO in the Oslo Accords, it certainly goes too far to extend Israel's legal claim to the West Bank and Jerusalem as a whole arguing (here) that with the end of Ottoman (Turkish) sovereignty (Treaty of Lausanne, Article 16) and the establishment of the UK mandate over Palestine there was a kind of "sovereign-less" territory which could then be claimed (as a whole) by the newly created State of Israel in 1948. In fact, Palestine was a Mandate A territory under the Covenant of the League of Nations and as such "provisionally recognized" as "independent nation" (Article 22[4]). As a consequence, it could not be claimed without further ado and without taking into account the will of its (predominantly Arab) inhabitants (in more detail see here; response here; rejoinder here). For this very reason GA Resolution 181 was necessary to "legalize" the partition of the territory.
