Apartheid or Systemic Discrimination?

A Connotative Reading of the ICJ's Advisory Opinion

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Apartheid is defined as a crime against humanity associated with a structure of government in which a 'superior' racial group establishes a system that oppresses and dominates an "inferior" one (see Article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid ["Apartheid Convention"] and Article 7.2(h) of the 1998 Rome Statute of the International Criminal Court ["Rome Statute"]). To ensure the maintenance of this oppressive system, multiple "inhuman acts" are perpetrated. However, unlike the crime of apartheid, the *prohibition* of apartheid in international human rights law is not defined in Article 3 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD). This is why scholars like Miles Jackson have argued that the definition of apartheid in Article II of the Apartheid Convention provides the definition of the wrong that binds all States in customary international law, as well as the definition of apartheid in CERD. As we shall see, this was an argument that was also raised by States in the advisory opinion proceedings and by judges in their separate opinions.

Despite the submission of these arguments in the written and oral pleadings, the International Court of Justice (ICJ) avoided an analysis that engaged with the definition of apartheid in customary international law in its 19 July 2024 advisory opinion. The Court merely observed that Israel's legislation and measures that segregate the settler and Palestinian communities in East Jerusalem and the West Bank constitute a breach of Article 3 of CERD, which prohibits all practices of "racial segregation and apartheid". As the ICJ did not define apartheid when it referenced Article 3 of CERD or clarify whether it had made a finding of segregation or apartheid, the reference to Article 3 led to differences of views on the bench. ICJ President Salam and Judge Tladi thought that the reference to Article 3 of CERD amounted to an acceptance that the policies and practices of Israel constitute a breach of the prohibition of apartheid (see Salam, paras 15-17; Tladi, para 41), whereas Judge Iwasawa was of the view that the Court did not qualify Israel's policies as apartheid (para 13). Judge Nolte was of the view that the Court left the matter open (para 8).

A lack of consensus on the Court could explain the failure to provide a definition of apartheid under customary international law. Judge Nolte expressed his concern that should the ICJ have provided a definition, it would have been expected to apply it (Separate Opinion of Judge Nolte, para 8). Reading between the lines, however, it could be argued that the expression "*systemic* discrimination", which the Court referred to in paragraph 223 of the advisory opinion, was used as a synonym for "apartheid", even though it did not link this description to a breach of Article 3 of CERD – for there does not appear to be any substantial difference between apartheid and systemic discrimination. This is because the word "systemic" is associated with crimes against humanity, which, as explained below, is how apartheid is defined as a crime in international law. As ICJ President Salam noted, the magnitude and consistency of Israel's multiple violations of Palestinian human rights over many decades, "are part of an institutionalized regime of systematic oppression"(Declaration of President Salam, para 24).

This contribution explores the significance of the ICJ's reference to "systemic discrimination", which appears to have been used as an alternative description for apartheid, a word laden with multiple meanings. It is noteworthy that the ICJ devoted more space in its opinion to Israel's discriminatory legislation and measures than to any other issue.

The failure to define apartheid

The definition of apartheid as a crime against humanity appears in two widely ratified treaties. The Apartheid Convention has 110 States parties, mostly Global South States. The Rome Statute has 124 States parties, including many States that had not ratified or acceded to the Apartheid Convention. Notably, 167 States have ratified at least one of these treaties.

However, rather than engaging with the definition of apartheid in customary international law, the ICJ decided to exclusively focus on CERD (see Section IV on "Applicable Law", at para 101). By only focusing on CERD, the Court was able to avoid a finding that addressed the definition of apartheid in Article 3, which would have entailed addressing Article II of the Apartheid Convention, which provides a definition.

Although the Apartheid Convention was not expressly mentioned in the request for the advisory opinion, the Convention was raised in argument by two dozen States before the Court (including implicitly by some Western States such as Spain that referenced "a structure of institutionalised discrimination" in its oral pleading at para 17).

Judge Iwasawa expressed the view that the request for the advisory opinion was limited to human rights law, and not international criminal law (para 13). This might explain why the ICJ did not review the Apartheid Convention. Yet, as Gerhard Kemp and I noted in this piece, the Apartheid Convention is a hybrid treaty that combines elements of a human rights treaty with those of a penal treaty. In addition to declaring apartheid a crime against humanity, defining the crime, and providing for individual criminal responsibility in broad terms, the Apartheid Convention established a mechanism for monitoring and reporting on human rights violations.

Notably, the Apartheid Convention is listed a human rights treaty in the UN's treaty collection under Chapter IV, and not as a penal treaty in Chapter XVIII. The Apartheid Convention was drafted in the UN's Third Committee that deals, inter alia, with human rights, the elimination of racism and racial discrimination, and the promotion of the right to self- determination.

The reference to systemic discrimination and apartheid in the advisory opinion

In paragraph 223 of the advisory opinion, the ICJ expressed its view, "that the régime of comprehensive restrictions imposed by Israel on Palestinians in the Occupied Palestinian Territory constitutes systemic discrimination based on, inter alia, race, religion or ethnic origin, in violation of Articles 2, paragraph 1, and 26 of the ICCPR, Article 2, paragraph 2, of the ICESCR, and Article 2 of CERD. 224". Notably not one of these provisions refers to *systemic* discrimination.

In paragraphs 224-229, the ICJ addressed Article 3 of CERD, which "refers to two particularly severe forms of racial discrimination: racial segregation and apartheid" (para 225). The Court explained that "[a]s a result of discriminatory policies and practices such as the imposition of a residence permit system and the use of distinct road networks … Palestinian communities remain physically isolated from each other and separated from the communities of settlers" (para 227). The Court went into some detail to explain how the separation between the settler and Palestinian communities is also juridical due to the partial extension of Israeli law to the West Bank and East Jerusalem creating "distinct legal systems in the Occupied Palestinian Territory" (para 228). The ICJ observed that for decades Israel's legislation and measures have treated Palestinians "differently from settlers in a wide range of fields of individual and social activity in the West Bank and East Jerusalem" (para 228).

Accordingly, the Court concluded that: "Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities. For this reason, the Court considers that Israel's legislation and measures constitute a breach of Article 3 of CERD" (para 229). Although the ICJ did not define apartheid, the policies and practices described by the ICJ are considered constitutive of apartheid systems. As Kai Ambos has argued, "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".

Apartheid as a crime against humanity

Given that the ICJ did not provide a definition of apartheid, understanding what it intended to convey in paragraph 229 is open to conflicting interpretations—as reflected in the diversity of views on the bench.

As is well known, apartheid is a word from the Afrikaans language, which means "to be apart". According to the Oxford Reference definition of apartheid there would not be much difference between apartheid and segregation, since both require separating communities from each other. It would be tautological for Article 3 to refer to the same thing twice. Perhaps for this reason, David Keane suggests that apartheid is a "particularly egregious form of racial segregation". In other words, segregation and apartheid are similar, just that the latter is a more severe form of segregation.

Given the close association between apartheid and segregation in Article 3 of CERD and the lack of a definition of apartheid in that treaty, many States made the argument in their written statements that the ICJ had to look beyond CERD for a legal definition of apartheid that went beyond segregation. They pointed out that apartheid is defined as a crime against humanity in the Apartheid Convention and the Rome Statute whose definitions focus on the systematicity of the crime as an oppressive system in which multiple human rights violations and other crimes against humanity occur. These States, which notably included South Africa and Namibia, argued that the definition of apartheid as a crime against humanity should inform the interpretation of Article 3 of CERD as a supplementary means of interpretation pursuant to Article 32 of the Vienna Convention on the Law of Treaties. Ultimately, the ICJ avoided this argument, but as Judge Nolte observed, addressing both definitions could have helped "to identify the meaning of apartheid under Article 3 of CERD in customary international law" (para 10).

Significantly, there is no other definition of apartheid in international law other than its definition as a crime against humanity. Notably, when CERD was adopted in 1965, with its reference to apartheid in Article 3, apartheid had *already* been condemned as a crime against humanity: see UN General Assembly Resolution 2074(XX) Question of South West Africa, 17 December 1965, para 4 – but it had not yet been defined. This would come later, in Article II of the 1973 Apartheid Convention.

The definition of apartheid as a crime against humanity in both the Apartheid Convention and the Rome Statute is *broader* than its popular meaning, going beyond policies of separation and segregation to include domination and oppression. This was because at the time of the drafting of the Apartheid Convention, in the early 1970s, the apartheid State under the Vorster administration (1966-78) was at its most repressive. You could say the same thing about the current Netanyahu government, the most repressive and violent in Israel's history – to the extent that the UK Home Office recently granted asylum to a Palestinian citizen of Israel on account of increased persecution, apartheid, and systematic discrimination facing Palestinians *inside Israel* since October 2023.

Despite the differences between the definitions of the crime of apartheid in the Apartheid Convention and the Rome Statute (see Ambos), they both comprise three core elements: (i) an institutionalised regime of systematic oppression and domination by one racial group over another racial group or groups; (ii) the commission of several inhumane acts; and (iii) an intention to maintain that regime. These three constituent elements were identified by four of the judges in their separate opinions and declarations: (see Salam, para 20; Nolte, para 11; Brant, para 10; and Tladi, para 38). As Judge Brant noted, the Court could have interpreted Article 3 CERD based on the three elements mentioned above that are common to both Conventions. Judge Brant further noted that these elements also appear in the definition of the crime of apartheid in the International Law Commission's Draft Articles on the Prevention and Punishment of Crimes against Humanity, which Israel has not objected to.

The word "systemic" is particularly associated with crimes against humanity (though the word "systematically" makes a brief appearance in Article 40(2) of the International Law Commission's Articles on State Responsibility to describe what are considered serious breaches of peremptory norms of general international law). The word "systematically" appears in the definition of apartheid in the chapeau to Article II of the Apartheid Convention and the word "systematic" in the chapeau to the definition of crimes against humanity in Article 7 of the Rome Statute and in the definition of apartheid (in Article 7.2(h)). In both cases, "systematically" and "systematic" precede the word "oppression" in their respective definitions of the crime of apartheid. As Ambos has argued, the qualifier "systematic" that appears in the Rome Statute confirms that "some kind of organisation and ultimately a policy is required". Indeed, the furtherance of a state or organizational policy is expressly mentioned in Article 7.2 (a) of the Rome Statute. In the case law of the International Criminal Tribunal for the former Yugoslavia, the reference to "systematic" was interpreted by the Trial Chamber in the Kunarac case, as referring to "the organised nature of the acts of violence and the improbability of their random occurrence". This was impliedly noted by President Salam, when he observed that: "It is evident from the magnitude and consistency of [Israel's] violations that they are not isolated acts but are part of an institutionalized régime of systematic oppression by Israelis, over Palestinians in the occupied territory" (para 24).

To say that Israel *imposes* a "régime of comprehensive restrictions" that leads to "systemic discrimination" (para 223) comes very close to saying that it is committing the first constituent element of the definition of the *crime* against humanity of apartheid identified by four of the ICJ judges: that of an institutionalised regime of systematic oppression and domination. It is almost as though the ICJ opted to describe an apartheid system without qualifying it expressly as such.

Apartheid implies a denial of self-determination

A foundational feature of apartheid in South Africa and South West Africa (Namibia) was the denial of self-determination to the non-white majority. Yet, the ICJ, by considering Israel's discriminatory legislation and measures (Section D, paras. 180-229) separately from the section on self-determination (which appears in Section E of the advisory opinion at paras. 230-243), failed to acknowledge that a central feature of apartheid systems, is the denial of self-determination (through *inter alia*, oppression, colonial domination, and territorial fragmentation). As Judge Brant noted, "un régime de ségrégation raciale ou d'apartheid rend impossible la réalisation du droit du peuple palestinien à l'autodétermination". (Déclaration de M. le Juge Brant), para 12). In this regard, regimes of domination are striking in their similarity to those associated with alien rule and colonization. As Judge Xue observed, after quoting the late Archbishop Desmond Tutu (1931-2021), the veteran anti-apartheid campaigner, the effects of Israel's occupation "have little difference from those under colonial rule, which has been firmly condemned under international law" (para 4).

It is also difficult to conceive of an apartheid system without a policy of enforced demographic change involving policies of demographic engineering, described by Andrea Maria Pelliconi as "a strategy of systematic, authority-sponsored demographic changes aimed at … permanently altering the demographic composition" of a particular area with a view to extending its own sovereignty there. Demographic engineering was a hallmark of the National Party's apartheid policies in South Africa which it applied with brutal effect pursuant to the Group Areas Act. To secure Jewish domination over the Occupied Palestinian Territory (OPT) and the concomitant denial of Palestinian self-determination, well-documented policies altering its demographic composition have been instituted by successive Israeli governments of various ideological persuasions since 1948. These include strict controls – imposed in a discriminatory manner – on, *inter alia*, Palestinian residency and construction,

access to water and natural resources, restrictions on freedom of movement, employment and occupation. Some of these restrictions were described at length in the advisory opinion as they pertain to the post-1967 occupied territories: restrictions on the exploitation of natural resources by Palestinian enterprises in Areas C (para 131); discriminatory legislation (para 136); discriminatory ID card and permit system (paras 165, 193, 195); territorial fragmentation (paras 167, 238); restrictions on freedom of movement (paras 199, 200, 205, 239), and colonial-era legislation justifying the demolition of Palestinian property (para 210).

There is a striking congruence between the ICJ's description of Israel's policies and practices in the paragraphs cited above and the non-exhaustive list of "inhuman acts" in Article II of the Apartheid Convention. The ICJ even referred to the use of disproportionate force against peaceful Palestinian protests in its advisory opinion (para 152), as happened in apartheid South Africa (recall Sharpeville and Soweto), and "the maintenance of a coercive environment against Palestinians" (para 154). In making these findings, the ICJ provided an authoritative factual description of the commission of several inhumane acts thereby satisfying the second element of the definition of the crime against humanity of apartheid. In doing this, the ICJ's findings could have a bearing on the assessment of facts crucial to international criminal investigations whether before domestic courts or the International Criminal Court.

In the words of Judge Tladi, "if we compare the policies of the South African apartheid regime with the practices of Israel in the OPT it is impossible not to come to the conclusion that they are similar" (para 37). And as a Black South African, who grew up in a Bantustan, which he expressly mentions in his opinion, he would know.

Maintaining an apartheid regime

If apartheid simply refers to an egregious form of racial segregation, involving legislative measures that separate Israeli settlers from Palestinian communities in East Jerusalem and the West Bank, as the ICJ reasoned in paragraph 229 of its advisory opinion, then it is clear the prohibition of apartheid in Article 3 of CERD is engaged (which notably, the ad hoc Conciliation Commission under CERD in *Palestine v Israel* failed to find, which Keane described as a "missed opportunity"). But even if we take the view that apartheid is more than an aggravated form of segregation, and involves policies and practices of domination, oppression, and the denial of self-determination, it is equally apparent that the ICJ made an *implicit* apartheid finding going beyond segregation. And it has done so by providing an authoritative and comprehensive factual description of an institutionalised regime of systematic oppression and domination, as well as a series of multiple inhuman acts, thus fulfilling two of the constituent elements of the definition of the crime against humanity of apartheid.

As regarding the third element, that is, evidence of an intention to maintain an apartheid regime, differences of views were expressed on the bench, as Jinan Bistaki noted in her blog post. It seems to me that a State that has constitutionally enshrined the right to self-determination *exclusively* to only one community (the "Jewish people") and denied that right to the indigenous Arab majority, is expressing a clear intention to maintain that discriminatory regime. (In 2018, the same year the Knesset (Israel's legislature) adopted the Nation State Law, the Israeli army admitted that more Palestinians than Jews lived between the Jordan River and the Mediterranean Sea– see here, here and here). Writing in 2018, Tamar Hostovsky Brandes observed that the Nation State Law – a Basic Law – grants the Jewish people "the exclusive right of self-determination", which "will serve as ground for future laws that will allow preferential treatment of Jews". Subsequent events, including the establishment of a new Settlement Administration, a new (civilian) government institution, with powers to run the civilian operations of the Coordinator of Government Activities in the Territories (COGAT) and the Civil Administration, including the power to make new regulations to further discrimination between Israeli settlers and Palestinians, has only affirmed this prognosis.

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