

Analysing Amnesty International's 'Israel's Apartheid Against Palestinians' Report

Written by Alexander Loengarov

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ALEXANDER LOENGAROV, FEB 10 2022

Two A-words seem to have reached taboo status in discourse about the Israeli-Palestinian conflict. To many left-leaning observers, *annexation* into Israel of territories held by the country since 1967 has long been anathema, and the fight against it gained much traction after the publication of the "Peace to Prosperity" plan by the previous US administration. The other word is *apartheid*, which has revived commotion since the publication on February 1, 2022 of Amnesty International's report "Israel's Apartheid Against Palestinians". Many commentators, certainly but not only on the right, were furibund at what was seen as yet another accusation of Israel. As is often the case, heightened emotions tend to polarize and obfuscate serene discussions about facts. That's why it is good to go through the global human rights NGO's hefty report (278 pages, 25 pages executive summary) and to have a second look at the situations that are qualified as "apartheid" in it.

While the report clearly defines "Israel" and the "Occupied Palestinian Territories", as well as the international instruments applicable to them (first and foremost UN resolutions and the Oslo Accords), the discussion of the Arab and Palestinian populations lumps together areas under Israeli control before 1967 (Six-Day War) and after it. Certain circumstances may indeed be similar on both sides of the pre-1967 lines and questions concerning relations between Jewish and Arab groups have existed in the territory for longer, yet the legal and administrative structures set up by Israel are fundamentally different in the two areas. This is important because intention plays a role here, also according to the definition of apartheid in international treaties.

As regards Israel, the report presents an overview of Israeli legislation, statements by Jewish-Israeli politicians, and official decisions, in order to sustain the claim of an "intent to oppress and dominate the Palestinian people" (pages 63–72). It is correct that maintaining a Jewish majority in Israel has been an obsession for most Jewish Israelis and that, as a result, the status of Arab Israelis has been a subject of preoccupation and controversy. However, the existence of a Jewish state with a Jewish majority that respects minorities is exactly what was agreed on in the Partition Plan for Palestine, adopted by the UN General Assembly in 1947. Also, as noted in the report (page 63), the Israeli declaration of independence grants "complete equality of social and political rights to all its inhabitants". It is true that the equality principle has never been enshrined in the country's laws and that, in particular, the 2018 Nation-State Law raises questions as to whether equality can be effectively guaranteed if a person's status as a Jew or non-Jew is given prevalence over other matters. Nevertheless, nothing in Israel's laws state that they would apply differently to Jews and Arabs. If that were the case, the intent to establish or maintain a system of racial differentiation could perhaps be proven. But, as long as it is not, it cannot be presumed. It should also be recalled that Arab citizens of Israel possess the political right to vote, and the current Israeli government includes an Arab party.

Moving on from law to facts, it is undeniable that the socio-economic condition of Israel's Arab citizens is less enviable than the one of many Jewish Israelis. In this respect, at least two remarks are necessary to add to the picture. First, Israel's population is not only composed of "Jews" versus "Arabs". The report names the Druze and Circassians, but when talking about social and economic stigma within Israel other communities need to be mentioned, as the Ethiopian Jews, Haredi Jews, and Mizrahi Jews often living in peripheral areas. The picture in which discrimination would only be the result of Jews oppressing Arabs can therefore not be upheld. Second, and deriving from the foregoing, the difficult question arises as to who bears responsibility for the condition of Israel's

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Arab citizens. While situations are diverse and intricate, shared responsibility between Israeli authorities and Israeli Arab citizens is a safe guess. Just one example: in the context of soaring violence and crime rates in Israel's Arab communities, surveys show that murders are more often investigated if the victim is a Jewish Israeli rather than an Arab Israeli, yet it is difficult to establish whether this is due to a lack of interest in law enforcement for Israel's Arabs, to a reluctance in circles of Israeli Arab victims to cooperate with the police, or to both or other factors.

In the eastern parts of Jerusalem, the West Bank, and the Gaza Strip the situations are radically different, both compared to the situation within the pre-1967 line of control and compared amongst them. Palestinian residents of the areas that were incorporated into Jerusalem by Israel in 1967 are indeed politically and legally, not to say socio-economically, between a rock and a hard place. They are subject to Israeli laws and can move freely within Israel, yet hold Israeli residence status rather than citizenship. This residence status can be revoked under certain conditions, and it is generally difficult for these Palestinian residents to obtain Israeli citizenship, the application for which also comes with mixed feelings. On the political level, the Palestinians in question cannot vote in Knesset elections, and Israel has voiced opposition to the latest (attempt at) Palestinian Authority elections in their neighborhoods, something which creates a democratic deficit indeed. The population in question is allowed to vote in municipal elections, yet many refuse to do so as they consider such participation recognition of Israel's rule over them. Without much political and social representation, economic investment in their neighborhoods remains low.

As regards the West Bank, there is indeed legal and physical separation between Israelis and Palestinians, in the form of different legal systems and segregated physical space (roads, access points). In part, this is due to arrangements made in the 1995 Oslo II Accord, that established a repartition of powers between Israel and the Palestinian Authority within intricate territorial divisions. The Oslo Accords themselves were an answer to ongoing clashes and violence and intended for a transitory period only. The current situation is the result of the fact that the "peace process" subsequently stalled and failed, something which has generally been seen (also by former Israeli negotiators) as a shared responsibility. This does not, however, exempt Israel from responsibilities in its policies and day-to-day administration in the West Bank, e.g. regarding protection of Palestinian civilians and their property (from unlawful acts committed by Israelis), guarantees for free movement, possibilities for natural population growth, etc. There is significant disagreement, also within Israel, as to how these responsibilities play out: the future status of the territory is at this point anything but determined, and much variation exists in the degrees to which security concerns are invoked and dealt with.

The Gaza Strip, finally, presents yet another situation. Whereas Israel does not consider itself as the ruler of the Gaza Strip anymore, its control over the territory's borders, airspace, population registry, etc. is indisputable – as are the consequences thereof for the Strip's civilian population. Again, opinions differ as to the necessity of the Israeli measures, as the daily condition of Gaza residents and Israel's security are both invoked and have been proven hard to reconcile so far.

On the whole, Palestinian residents of eastern Jerusalem, the West Bank, and the Gaza Strip are indeed confronted with legal and administrative measures by Israel that often result in different treatment compared to Jewish residents who sometimes live a few kilometers away. Defendants of these measures claim that they are not intended as a system of racial discrimination, but are necessary to guarantee's Israel security.

Indeed, as hinted at above and laid out in Amnesty's report (pages 57–58), intention is a key element in the current discussion. Intent is a constituent element of the crime of apartheid as defined by the 1998 Rome Statute of the International Criminal Court and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA). The latter requires intent to establish domination by one racial group over another, while the former also requires intent to maintain such.

However, in the light of the facts described, it is not clear how the conclusion is reached that Israel as a country is characterized by the intent to establish and certainly maintain a system of racial discrimination, as such would also require a detailed assessment of Israel's motives for the rules and policies it adopts. This of course does not exempt the country from scrutiny over the treatment of the Arab populations it controls, whether the latter are its citizens or not.

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Rather than using a single label for Israel's behavior towards all Arabs under its rule, it may be more accurate to say that the intricateness of the Israeli-Palestinian conflict – i.e. the actions and responsibilities of a series of internal and external actors – has led to an “unstable status quo”: the more time passes, the more the reality on the ground lapses into *de facto* apartheid (a similar idea was voiced by former Israeli foreign minister Tzipi Livni on the day the report was published). The answer to the question whether and when such a situation also legally qualifies as an apartheid regime then typically depends on one's consideration of Israel's overall security concerns and the degree to which one thinks Israel has taken enough steps towards solving the conflict.

Just like other countries, Israel can be expected to be open to scrutiny and criticism of its policies and practices. In the Israeli-Palestinian conflict, Israel is also the stronger party, given the control it exerts between the Mediterranean and the Jordan River. However, the conflict in itself is so entangled that it may be counterproductive to reduce it to a policy summed up in one word. A more comprehensive approach would be to bring together both Palestinian and Israeli aspirations and grievances, and see how they can be dealt with in the framework of more generally valid norms. This would also automatically include accountability for different actors on the Palestinian side: without judging on rights or wrongs, it simply seems to be a fact that developments in the Israeli-Palestinian context mostly obey to the law of action and reaction. Another element to take into account is the large lack of information, among Israelis and Palestinians generally, about the other group's present, past, and outlook for the future. In particular, the average Israeli is not familiar with the living conditions of the average Palestinian. While this unawareness may also be a shared responsibility, slogan-esque accusations risk an effect opposite of redressing the situation, namely a further entrenchment. In this context, it should also be stressed that, despite Israel's strength between the river and the sea, Israelis often see themselves, for reasons of history and regional power play, as the weaker party under threat.

Beyond the specifics of the Israeli-Palestinian situation, Amnesty's report also raises a number of questions concerning the status of international law regarding apartheid. The two legal instruments quoted in the report (Rome Statute and ICSPCA) are both international treaties established within a UN framework, yet are binding on only 123 resp. 109 parties – just over half of the world's potential state parties. Importantly, many countries are party only to one of both treaties. For instance, states in Western Europe, Canada, Brazil, Chile, Japan, South Korea, Australia and New Zealand are party only to the Rome Statute, while many countries in Asia and North Africa, as well as Russia, are party to ICSPCA only. This fact raises issues about the status of the international legal rules in question and the relationship between international law and global politics. (For the sake of completeness: some countries – like Argentina, Tanzania, or Mongolia – are parties to both treaties, while others – e.g. the United States, Israel, or Indonesia – are not party to either). In any case, it needs to be stressed that it is the more recent and more widely shared definition of apartheid that presupposes the intent to not only establish, but also *maintain* racial domination of one group over another.

In sum, the Amnesty report spotlights, as before, Israeli laws and practices that may warrant scrutiny; whether they amount to apartheid in any internationally accepted meaning is a different matter, although the risk of a slide towards *de facto* situations of apartheid is not inconceivable. What is equally worrisome is that the report seems to be part of an international movement to delegitimize Israel as a state *tout court*. The report indeed refers to the BDS movement (page 37), whose supporters, while calling out unacceptable practices, in certain cases appear to campaign for an end to Israel's existence agreed in the UN Partition Plan of 1947. Amnesty claims not to “take a position on international political or legal arrangements that might be adopted to implement [the Jewish and Palestinian peoples'] right [to self-determination]” (page 38), yet in practice its criticism sometimes seems to go so far as to discredit the Jewish state in its mere essence. This is notwithstanding the fact that Amnesty “engages with the reality of the existence of the State of Israel, as well as the mandate for its creation in UN General Assembly Resolution 181 (II)” (page 38). Therefore, while the report is most likely intended as an international call for attention, an effective approach towards solving the conflict with the parties may require finer diplomacy.

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