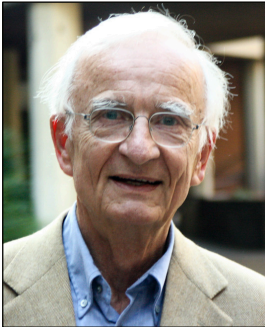


Apartheid and its consequences

International legal assessments of Israel's actions in the Gaza war

by Prof. Norman Paech*



Norman Paech.
(Picture wikidata.org)

(CH-S) Israel is currently under strong suspicion of committing genocide in the Gaza Strip. This is an outrageous suspicion – but one that seems to be growing stronger with each piece of evidence. The Hamburg-based international law expert Professor Norman Paech is

pursuing this line of enquiry, drawing on Israeli scholars of the Holocaust and genocide such as Raz Segal.

Unfortunately, the reporting of the major media houses in the West on the dramatic conditions in the Israeli-occupied territories is scant, relativising or even trivialising. As a result, the West runs the risk of becoming complicit in a humanitarian crime.

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All genocides have a prehistory. This one, too, which demands unspeakable sacrifices daily before our eyes and whose prehistory nobody in government and politics wants to know anything about – at least in Germany. This history is called apartheid.

For decades, the term apartheid was associated with the racist system of the white settlers in South Africa. Even after the victory of the black population with the presidency of *Nelson Mandela* from 1994 and the official abolition of racial segregation, it remained tied to this racist form of rule and oppression in the understanding of international public opinion. Israel and its close allies – mainly the old colonial powers in Europe and the USA – fiercely resisted the adoption of this term to describe Israel's occupation of the Palestinian territories it conquered in 1967.

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Palestinians inspect the remains of destroyed buildings following the Israeli airstrikes in Khan Younis, southern Gaza Strip, 25 October 2024. (Bild KEYSTONE/EPA/HAITHAM IMAD)

Clear legal framework

Apartheid has a clear legal framework that goes beyond its political and moral denunciation. This is based on the 1973 "International Convention on the Suppression and Punishment of the Crime of Apartheid", which came into force in 1976.

"According to it, the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."

The crime of apartheid consists of individual inhumane acts. Although these must be aimed at establishing a "race domination", the essential characteristic of the crime is violence. However, neither the number nor the severity of the acts are sufficient to commit a crime of apartheid. The acts must be committed with the subjective element of a qualified intention and within a specific institutionalised framework. It is significant that most of the old colonial and current NATO states, from the USA to Germany, have not signed or ratified the agreement. They fear that their own citizens and organisations could be subject to prosecution for supporting and favouring apartheid.

Systematic repression

The 1998 Rome Statute of the International Criminal Court largely adopted the definition of the Anti-Apartheid Convention and classified apartheid as a “crime against humanity” in Article 7. In Article 7, paragraph 2, lit. h of the 1998 Rome Statute, it defines the “crime of 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”.

In Israel, we see systematic and institutionalised oppression realised in the doctrine of Jewish statehood. Israeli legislation and the structure of Israeli state and administrative institutions culminate in the Zionist ideology of the Jewish state and the associated exclusion of the Arab population. They are clearly aimed at the “systematic oppression and domination” of Palestinians. The fact that this policy is also based on racism reinforces the character of an apartheid crime but is not a prerequisite for it. Furthermore, the Rome Statute of the International Criminal Court has not been ratified by either Israel or the United States.

The South African system of apartheid, which is still considered the prototype of this form of rule, was based on three pillars: discrimination, territorial division and political repression. It was a system institutionalised by laws that were enforced by legal norms.

The UN General Assembly emphasised the close relationship between the South African and Palestinian cases early on in its resolutions on the right of peoples to self-determination. For example, in its famous Resolution 2649 (XXV) of 30 November 1970, it reaffirmed “the legitimacy of the struggle of peoples under colonial and racist domination to restore their rights by all means at their disposal, recognising the right of peoples to self-determination”.¹

What is particularly noteworthy about this resolution is the statement that peoples can fight for their rights “by all means at their disposal” – the classic formulation for authorising the use of military means to fight. At the same time, the resolution condemned “those governments which withheld the right of self-determination from peoples entitled to it, in particular the peoples of South Africa and Palestine”. In nu-



Palestinians gather at the site of the Al-Qassam Mosque destroyed as a result of an overnight Israeli air strike on Al-Nuseirat refugee camp, in central Gaza Strip, 27 November 2024. (Bild EPA/MOHAMMED SABER)

merous further resolutions, the General Assembly confirmed this close connection between South Africa and Palestine. Although the term “apartheid” was originally identified with the racist segregation policy of the white South African government, it did not become obsolete and redundant when that government was overthrown.

Apartheid institutionalised

In 2008, the *Human Sciences Research Council* (HSRC) put together a team of international lawyers from Europe, Israel, Palestine and South Africa to examine whether Israel was violating the international legal prohibitions on colonialism and apartheid. The study, published in 2012, concluded that there is an institutionalised system of Israeli domination and oppression of Palestinians as a group in the occupied territories – a system of apartheid.²

At its meeting in Cape Town in November 2011, the *Russell Tribunal on Palestine*³ also found that “Israel subjects the Palestinian people to an institutionalised regime of domination that, under international law, amounts to apartheid”. Palestinians in the occupied territories are “subject to a particularly severe form of apartheid”. The Tribunal concludes that “Israel’s domination over the Palestinian people, wherever they live, amounts to a single integrated system of apartheid”.

The various investigations by UN special rapporteurs, as well as the weekly reports of the *United Nations Office for the Coordination of Humanitarian Affairs* (OCHA), present a wealth of evidence documenting the crime of apartheid in the occupied territories, whether in East Jerus-

alem, the West Bank or Gaza. In addition to the almost daily, often deadly assaults and attacks by settlers and the harassment and destruction by the army, there are also repeated cases of state-sanctioned extrajudicial executions of politically active and militant Palestinians.

However, since they are not involved in hostilities and are therefore not protected by international humanitarian law, these acts do not fulfil the elements of the offence under Article 2 of the Anti-Apartheid Convention, although they are criminal offences under national criminal laws. The targeted killing of 179 and injury of 18,739 demonstrators of the so-called "Return March" in the Gaza Strip between March and August 2018 is just one example of this arbitrary practice. It also includes the regular military raids in the occupied territories, which often result in deaths. The police are also responsible for mass abductions and detentions.

The human rights organisation "Addameer" estimates that more than 650,000 people have been arrested since 1967.⁴ This corresponds to about 40 percent of the male population. Torture and ill-treatment are still common practice. Israel has not incorporated the absolute ban on torture in international law into its national law. In 1999, Israel's highest court banned "brutal or inhuman means" when interrogating prisoners, but explicitly allowed them in cases of extreme necessity and for "security" prisoners.⁵

Arbitrary detentions and administrative detentions without charge or trial are among the means used to fight the Palestinian opposition. Israel took over the administrative detention in 1967 from the British, who had used it during their mandate, by means of several military decrees. Such military legislation by a military court system is incompatible with fundamental international standards of jurisdiction under the rule of law. However, it continues to this day to serve the purpose of mass, uncontrolled detention, which may be imposed by a local commander for up to six months without charge or trial and may be extended thereafter.

The high proportion of children in prison results from Military Ordinance Number 132, which allows for punishment under adult criminal law in the occupied territories from the age of twelve, whereas in Israel this is only from the age of 18. According to military ordinance number 378, children can expect ten years in prison for throwing stones at objects such as the wall

built by Israel, and 18 years in prison for throwing stones at a moving car. Children of settlers cannot be tried for the same offences until they are 14 years old, and then only in an Israeli civil court. In June this year, 3,377 Palestinians, 75 of whom were minors, were in administrative detention.⁶

A new law

A law passed by the Knesset a few years ago confirms and solidifies this will to discriminate and exclude. On 19 July 2018, after a long and controversial debate, parliament passed the Basic Law "Israel: the Nation State of the Jewish People" by a narrow majority. It begins with the words: "The Land of Israel is the historic homeland of the Jewish people, in which the State of Israel was established." Not a word about the people the Jewish settlers found there and from whom they took the land.

The law is mainly backed by the national-religious Jewish Home political party, parts of *Benjamin Netanyahu's* conservative Likud party and the secular-nationalist Israel Beitenu party. They were able to push it through despite widespread public opposition from the opposition and civil society, and even from President *Reuven Rivlin*.

Critics and supporters agree that it is probably one of the most important laws ever enacted in Israel. From now on, it is also legally established that the state is Jewish. According to the law, Israel is not the state of all its citizens; it only grants all rights to Jews. In the 1948 Declaration of Independence, it had still been stated: "The State of Israel will devote itself to the development of the welfare of all its inhabitants". Now only the Jewish character of the State of Israel has constitutional status.

John Dugard, a South African law professor who was appointed by the UN Human Rights Council in 2001 as the Special Rapporteur on the situation of human rights in the occupied territories, wrote in his last report to the Human Rights Council in 2007 (§ 63):⁷

"The Occupied Palestinian Territory is of special importance to the future of human rights in the world. Human rights in Palestine have been on the agenda of the United Nations for 60 years; and more particularly for the past 40 years since the occupation of East Jerusalem, the West Bank and the Gaza Strip in 1967. For years the occupation of Palestine and apartheid in South Africa vied for attention from the international community. In 1994, apartheid came to an end

and Palestine became the only developing country in the world under the subjugation of a Western-affiliated regime. Herein lies its significance to the future of human rights. There are other regimes, particularly in the developing world, that suppress human rights, but there is no other case of a Western-affiliated regime that denies self-determination and human rights to a developing people and that has done so for so long.”

When he was replaced in 2009 by his US colleague *Richard A. Falk*, under pressure from Israel, he admitted that,

“I am a South African who lived under apartheid. I do not hesitate to say that Israel’s crimes are infinitely worse than the crimes South Africa committed under its apartheid regime”.⁸

At the beginning of this year, John Dugard represented the South African Republic before the *International Court of Justice* (ICJ) in its lawsuit against Israel for genocide under Article 6 of the Rome Statute. In its decision of 26 January 2024, the Court did not yet rule on the accusation of genocide, but declared it to be “plausible” and referred to further deliberations and a later decision.⁹

War against the population

The horrific reports and images that have been reaching us from the Gaza Strip since 8 October 2023, the more than 42,000 dead, including more than 15,000 children, more than 100,000 injured, the excessive destruction that has turned the narrow coastal strip into an uninhabitable expanse of debris, alone show the characteristics of genocide. But the decisive factor is the subjective element of the offence, as defined in Article 6: “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”. Unfortunately, there can be no doubt about this, as there have been too many unequivocal and radical statements to this effect from politicians, the army and the press.

Regardless of whether Israel’s President Isaac Herzog announced at a press conference on 14 October last year: “It is an entire people who is responsible. This rhetoric about civilians who are supposedly not involved is absolutely untrue [...] and we will fight until we break their backs,”

or Prime Minister Netanyahu as early as 8 October: “We will turn Gaza into an island of ruins,”

or the Israeli army spokesperson, *Daniel Hagari*, on 10 October in *Haaretz*: “We are dropping hundreds of tons of bombs on Gaza. The focus is on destruction, not accuracy,”

or Defence Minister *Yoav Gallant* on television on 9 October: “There will be no electricity,

no food, no fuel, everything is closed. We are fighting against animal people and acting accordingly.”

Or the Israeli army’s Major General *Ghassan Allan*, in a speech on 9 October: “Beasts are treated accordingly, you wanted hell, and you get hell.”

And an Israeli army veteran, *Ezra Yachin*, in a speech to reservists on 13 October: “Exterminate their families, their mothers and children. These animals should no longer be alive.”

Finally, on 9 October, *Tally Gotliv*, a member of the government’s Knesset faction, said in the Israeli parliament: “Jericho rocket! Doomsday weapon. That is my opinion. Powerful rockets should be fired across borders, Gaza should be crushed and razed to the ground. No mercy.”

This collection of openly genocidal statements could be extended to the present day. Who could doubt the subjective fact of “destroying the group in whole or in part”?¹⁰

Raz Segal, an Israeli Holocaust and Genocide scholar at Stockton University in New Jersey, USA, calls this war a “textbook case of genocide”,¹¹ and in October 2023, 800 legal scholars in the USA already considered the total lockdown of the Gaza Strip to be “potentially genocidal” in a joint statement.¹² They agreed with the conclusion of their Israeli colleague:

“Israel’s genocidal assault on Gaza is explicit, open and shameless [...] Israel’s aim is to destroy the Palestinians in Gaza. And those of us who look around the world have abandoned our responsibility [...] to prevent this crime of genocide.”

This responsibility can no longer be met with appeals to respect international humanitarian law or to temporarily open humanitarian corridors and with appeals to release the captured hostages.

Anyone who confines themselves to futile appeals for a ceasefire while at the same time supplying weapons makes themselves complicit in this genocide.

Source: <https://www.jungewelt.de/artikel/486273.gazakrieg-apartheid-und-die-folgen.html>, 23 October 2024 (Reprinted with kind permission of the author and the editor.)

(Translation “Swiss Standpoint”)

¹ Resolution 2648 (XXV). Report of the Committee on the Elimination of Racial Discrimination: https://t1p.de/Resolution_2648

² Cf. Virginia Tilley (Hg.): *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied territories*. New York 2012, p. 107–221

³ Cf. Russel Tribunal on Palestine. November 2011. Findings of the South African Session, Paragraph 5.44 u. 5.45, <https://t1p.de/Russel-Tribunal>

- ⁴ Cf. Addameer: Political Detention, <http://www.addameer.org/detention/background.html>
- ⁵ Cf. The Public Committee Against Torture in Israel vs. The Government of Israel. 1999, H. C. 5100/94, 53 (4) PD81
- ⁶ Cf. B'Tselem: Statistics on Administrative Detention. 2 September 2024, https://www.btselem.org/administrative_detention/statistics
- ⁷ John Dugard: Report of the Special Rapporteur on the situation of the human rights in the Palestinian territories occupied since 1967. 29 January 2007. UN DOC A/HRC/4/17
- ⁸ <https://t1p.de/dugard>
- ⁹ International Court of Justice, Summary of the Order of 26 January 2024, <https://www.icj-cij.org/node/203454>
- ¹⁰ Cf. Francesca Albanese: Anatomy of a genocide, Human Rights Council. 25 March 2024, A/HRC/73
- ¹¹ Cf. Raz Segal: A Textbook Case of Genocide. In: *Jewish Currents*, 13 October 2023, <https://jewishcurrents.org/a-textbook-case-of-genocide>; ders., Settler Antisemitism, Israeli Mass Violence, and the Crisis of Holocaust and Genocide Studies. In: *Journal of Palestine Studies*, 53 (2024). Nr. 2, S. 50–73, <https://doi.org/10.1080/0377919X.2024.2384385>
- ¹² Cf. Jake Johnson: 800+ Legal Scholars Say Israel May Be Perpetrating “Crime of Genocide” in Gaza. *Peace-worker.org*, 18 October 2023