

Speech made by Vinodh Jaichand during the seminar organised by ASF on the on the role of human rights lawyers in Israel and the Palestinian Territories

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## The Crime of Apartheid

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### 1. Introduction

The use of the word "apartheid" has acquired a new currency in colloquial speech and is usually used to denote grave acts based on discriminatory (mostly racial) practices that impugn human dignity.<sup>2</sup> More often than not it is used loosely with a certain pejorative meaning attached that causes the other party to defend itself against the label- usually to illustrate why the label is inaccurate or in appropriate. That defence also will seek to differentiate itself from the actual practice of apartheid in South Africa by indicating how the acts so described were never the same. Daryl J Glaser makes the point that in the following way:

*What is the person saying who says (accusingly) that this or that system is "like apartheid"? The point being made is at least partly a moral one: that a given system is as bad as apartheid. Apartheid serves here, like Nazism, as a kind of "gold standard" of evil against which other evils can be measured.*<sup>3</sup>

He goes on to say that apartheid is not that 'gold standard' but does conclude that Zionism is in many ways is as morally bad as apartheid but that the justification for comparing apartheid becomes self-evident when we view Israel and its occupied territories as a single political entity. My point of departure with this argument is whether this is merely a moral one and not a legal one.

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<sup>2</sup> The World Conference Against Racism, Xenophobia and Related Intolerances, Durban, September 2001 raised a number of these concerns. Benjamin Pogrud in his article "Is Israel the New Apartheid", 2004 (article on file) makes these point very effectively when he traces the history of the two countries. He says that the motive for such statements is more than rhetoric and is largely political so that Israel can be subjected to punitive sanctions by others states as South Africa was. See the Guardian coverage on their website <http://www.guardian.co.uk/unracism/story/0,1099547056,00.html> for some reflections. For some other uses of the word see Global Apartheid by Salih Booker and William Minter which is described it as "an international system of minority rule whose attributes include: differential access to basic human rights; wealth and power structured by race and place; structural racism, embedded in global economic processes, political institutions and cultural assumptions; and the international practice of double standards that assume inferior rights to be appropriate for certain "others", defined by location, origin, race or gender." <http://www.thenation.com/doc/20010709/booker> Bernard Kouchner,, first Special Representative of the Secretary General of the United Nations Interim Mission in Kosovo, described the situation facing the UN in 1999 in Kosovo as " forty years of communism, *ten years of apartheid* and a year of ethnic cleansing" (my emphasis). The terminology of "petit apartheid" was coined by George Abeyie in 2001 to describe contemporary racism with a particular reference to the United States criminal justice system. According to the author, petit apartheid practices make it more likely that the law enforcement agencies will point out Blacks as suspects which in the end results in incarceration. See 29 American Journal of Criminal Law, 333 2001-2002. The terminology of "sexual apartheid" has been defined by Rebecca Cook, The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women, Issue Paper on World Conferences No.5, American Society of International Law, at 3 (1995) as the oppression of individuals, and their exclusion from equal enjoyment of human rights, on the ground that they are women. Sexual apartheid can be more subtle than racial apartheid because the forms of oppression are wov en into the fabric of society.

<sup>3</sup> Glaser, D.J, Zionism and Apartheid: a moral comparison, Ethnic and Racial Studies, Vol. 26, No.3 May 2003 pp. 403-421 at 403

In the time allocated to me I am going firstly, to examine the document that established the crime of apartheid, the International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>4</sup>. Secondly, I will look for the nexus between this Convention and the Rome Statute of the International Criminal Court<sup>5</sup>. Thirdly, I will examine the crime against humanity of apartheid. Fourthly, I will examine briefly the reports of certain human rights treaty bodies to which Israel is a party to look for possible examples of apartheid. Finally I will conclude with some suggestions on what would be some strategies to undertake to invoke this crime.

## **2. The International Convention on the Suppression and Punishment of the Crime of Apartheid**

The Convention on Apartheid was adopted on 30 November 1973 and came into force on 18 July 1976. There are currently 104 states which have ratified this convention. A visible feature of the states parties is the absence of Western countries which believed that apartheid was not a crime or who did not find identification with, what was then considered to be, the onerous provisions. However, some 100 states have ratified the Rome Statute on the International Criminal Court, many of which are Western states and the Rome Statute includes the crimes against humanity of apartheid. I shall return to this later.

Article I states that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of racial segregation and discrimination are crimes violating the principles of international law, in particular the purposes of the UN Charter, and constitutes a serious threat to international peace and security. Article II defines the inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over other racial groups and systematically oppressing them. I will return to the content of this later.

State parties also undertook in the Convention to adopt legislative, judicial and administrative measures to prosecute and punish persons charged with the acts enumerated in article II. Offenders may be tried by a competent tribunal of any state party to the Convention. These provisions created a great deal of controversy, as a result many states were reluctant to become parties to the Convention.<sup>6</sup> But this Convention was the precursor of the current international criminal law containing many features of the new law.

## **3. The Nexus Between the Convention on Apartheid and the Rome Statute**

In 1979, as a result of resolution of the United Nations Commission on Human Rights<sup>7</sup>, the Ad Hoc Working Group of Experts on Southern Africa and the Special Committee Against Apartheid "were to undertake a study on ways and means of ensuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the said Convention."<sup>8</sup>

In the discussion of the location of the crime of apartheid, the writers make it clear that:

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<sup>4</sup> United Nations, Treaty Series, vol. 1015, p. 243

<sup>5</sup> Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 Entry into force: 1 July, in accordance with article 126

<sup>6</sup> Jaichand, V, International Law, South Africa and Racial Discrimination, 29-44 at 38-9 Journal of Legislation, Vol. 15, 1988

<sup>7</sup> G.A. Res. 34/24 ann.134 U.N. GAOR, U.N. Doc. A/34/618 (1979).

<sup>8</sup> Bassiouni, M.C and Derby, D.H, Final Report on the Establishment of an International Criminal Court for the Implementation of the *Apartheid* Convention and other Relevant International Instruments, 9 Hofstra Law Review, 523-592 at 523

[a] *lthough Southern Africa is the chief concern of the Convention and of the Working Group, the discussion of implementation is general. This is not out of a spirit of neutrality. On the contrary, it is out of a concern that apartheid be recognized and dealt with for what it is, regardless of where it occurs. Accordingly, general discussion ensures that implementation measures would be suitable in every context.*<sup>9</sup>

This conclusion is far-sighted because the practice of apartheid in Southern Africa (Zimbabwe, Zambia, Lesotho, Swaziland, Namibia, Mozambique and South Africa) does not officially exist anymore. With the independence of South Africa in 1994, that type of practice ceased. Indeed, this brings the Rome Statute provision of the crime against humanity in Article 7.1(j) into sharper relief. How then did apartheid as a crime against humanity end up in the Rome Statute?

The *travaux préparatoires* on the Rome Statute provides further insight into the origin and location of the crime against humanity of apartheid. In the Preparatory Commission in 1996, under the heading "Treaty-based crimes" and not under "crimes against humanity", some delegations favoured the inclusion of apartheid and other forms of racial discrimination as defined in the relevant conventions.<sup>10</sup> It appears that the terminology does not appear again until the Rome Diplomatic Conference in the summer of 1998 and then as a crime falling under "Crimes against Humanity" in the draft Rome Statute.

In the discussion on the Crimes of Genocide and the Crimes against Humanity on 17 June 1998 Bangladesh and Mexico wanted apartheid to be included. During this discussion, there was a general disagreement as to whether crimes against humanity could occur only in times of war and peace or in international or internal wars. It is also in this context that the initial proposal for the inclusion of the crime of apartheid was made. The delegate from Mexico "considered that crimes against humanity could be committed both in peace and war and did not agree to their being linked with armed conflict. Such crimes should be qualified as "widespread and systematic" and no grounds needed to be spelled out... An exhaustive list was required to satisfy the principle *nullum crimen sine lege*. Moreover, apartheid should have been included in the list.<sup>11</sup> The delegates from Ireland and Bangladesh supported Mexico's proposal to include apartheid.<sup>12</sup>

On 22 June 1998, a proposal submitted by Bangladesh, India, Lesotho, Malawi, Namibia, South Africa, Swaziland, Trinidad and Tobago and the United Republic of Tanzania was made to include in paragraph 1(i) "(i bis) institutionalized racial discrimination, including the practices of apartheid". On the same day a proposal for Article 5 was submitted by Lesotho, Malawi, Namibia, South Africa and the United Republic of Tanzania: under "War Crimes", section D, paragraph (e), at the end of the paragraph insert the words: "as well as the practices of apartheid and other inhumane and degrading practices involving outrage upon personal dignity based on racial discrimination." This was not to be included in the final outcome document.

In the discussion paper of 6 July 1998<sup>13</sup>, the crime of apartheid was defined as follows:

"(d bis)" The crime of apartheid means inhuman acts of a character similar to those referred to in paragraph 1 above, 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 with the intention of maintaining that regime." The final text of the Rome Statute retains similar wording.

#### 4. The Crime Against Humanity of Apartheid

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<sup>9</sup> Bassiouni and Derby, note 8, pp, 525-6

<sup>10</sup> Bassiouni ? 1998 p.394

<sup>11</sup> Bassiouni, 99, Vol. 3

<sup>12</sup> Bassiouni ,102 and 105 respectively, Bassiouni, Vol 3

<sup>13</sup> (A.CONF.183?C/1?L.1)

The crime of apartheid, although already prohibited under international law in the International Convention on the Suppression and Punishment, is listed as a crime against humanity together with ten others in the Rome Statute. As mentioned previously, 46 states which did not ratify this international convention for one reason or another have indeed ratified the Rome Statute which makes a total of 150 states which are of the opinion today that the practice of apartheid is a crime against humanity. The combined effect of both these international instruments stress that this crime is a matter of concern to the international community and has not faded from world opinion since the demise of apartheid in southern Africa. Indeed, any current or recent manifestations of the crime can be prosecuted in Rome. Because of the constraints of time, I will not deal with details of such a prosecution under international criminal law but sketch out the framework in which these prosecutions might be made in the near future.

Article 7.1 (j) of the Rome Statute of the International Criminal Court lists the crime of apartheid as a crime against humanity when **committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack**. An "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack according to Article 7.2 (a).

Article 7.2 (h) states that "the crime of apartheid" means **inhumane acts** of a character similar to those referred to in paragraph 1, **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**.

The Elements of the Crime Against Humanity of Apartheid are the following:

1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.
6. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
7. The perpetrator knew that the conduct was part of or intended the conduct to be a part of a widespread or systematic attack directed against a civilian population.

For us to better understand the definition of the crime of apartheid, the definition contained in Article II of the Convention on the Suppression and Punishment of the Crime of Apartheid contains illustrations and some of the details:

*For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman [as opposed to inhumane in the Rome Statute] acts committed for the purposes of establishing and maintaining domination by one racial group of persons and systematically oppressing them:*

1. *Denial to a member of a racial group or groups of the right to life and liberty of person:*
  - a. *by murder of members of a racial group or groups;*

- b. *by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to cruel, inhuman or degrading treatment or punishment.*
  - c. *by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;*
- 2. *Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part.*
- 3. *Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and return to their country, the right to nationality, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association.*
- 4. *Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof.*
- 5. *Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour.*
- 6. *Persecution of organizations and persons, by depriving them of fundamental rights and freedoms because they oppose apartheid.*

It is my submission that the inhuman [or inhumane] acts listed here do not have to reflect exactly, or mirror, the southern African experience in an allegation of the crime against humanity of apartheid. It is sufficient that the inhumane acts are 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.

## 5. Recent Reports of the UN Treaty Bodies on Israeli Practice

For some evidence of the practice of apartheid in Israel I turn to the some reports of Israel under the UN Human Rights Treaty Bodies.

**The Committee Against Racial Discrimination** in its decision on 18 August 1997 confirmed its view that the Israeli settlements in the Occupied Territories are not only illegal under international law but also constitute an obstacle to peace and enjoyment of human rights by the whole population in the region.<sup>14</sup>

**The Human Rights Committee** in its Concluding Observations of 21 August 2003 stated its concern that Israel does not recognize the application of the International Covenant on Civil and Political Rights in the Occupied Territories. It was concerned about the criteria in the 1952 Law on Citizenship enabling the revocation of Israeli citizenship, especially in application to Arab Israelis. It noted with concern that the percentage of Arab Israelis in the civil service and public sector remained very low and that progress towards improving their participation, especially Arab women, had been low. It also expressed its concern about the Nationality and Entry into Israel Law on 31 July 2003 which suspends, for a renewable period of one year, the possibility of family reunification for Israelis who are married to Palestinians from the Occupied Territories.

According to reports from NGO's this law implicitly discriminates against Palestinian citizens of Israel, who constitute some 20% of the Israeli population, and against Palestinian residents of Jerusalem, for it is they

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<sup>14</sup> Paragraph 2

who usually marry Palestinians from the Occupied Territories. As such, the law formally institutionalizes a form of racial discrimination based on ethnicity or nationality. This contravenes Article 5 (d) (iv) of the Convention on the Elimination of All Forms of Racial Discrimination which guarantees equality before the law and the right to marriage and the choice of spouse.

The concluding observations of the **Committee on Economic, Social and Cultural Rights** on 23 June 2003 indicated concern about the continuing difference in treatment between Jews and non-Jews, in particular the Arab and Bedouin communities, with regard to the enjoyment of economic, social and cultural rights. The "excessive emphasis upon the State as a "Jewish State" encouraged discrimination and accorded a second class status to its non-Jewish citizens.<sup>15</sup>

The Committee was concerned about the status of "Jewish nationality" which was a ground for exclusive preferential treatment for persons of Jewish nationality under the Israeli Law of Return, granting them automatic citizenship and financial government benefits but discriminatory treatment against non-Jews, in part Palestinian refugees.<sup>16</sup>

It was also concerned about the general increase in unemployment, which rose from 6.7% in 1996 to 10.5% in 2002 as well as the significant increase in the non-Jewish sector, 13.5 % in Arab sector and 15% in Bedouin. In the Occupied Territories this rose to over 50% as a result of the closures which have prevented Palestinians from working in Israel.<sup>17</sup> It was also concerned about the "security fence" around the Occupied Territories which limited or impeded access by Palestinians to land and water resources.<sup>18</sup>

In the concluding observations of the Committee on Economic, Social and Cultural Rights requested the State of Israel to provide further information with regard to the realization of economic, social and cultural rights in the Occupied Territories. The Committee deplored the State of Israel's refusal to report on the Occupied Territories and Israel's position that the Covenant did not apply to the "area that are not subject to its sovereign territory and jurisdiction".<sup>19</sup>

**The Committee on the Rights of the Child** in its report on 9 October 2002 made a number of concluding observations. The Committee was concerned that discrimination persisted in the State of Israel and that non-discrimination was not expressly guaranteed in the Constitution. It also expressed its concern about discrimination against girls and women, especially in the context of religious laws, discrimination on religious grounds, inequalities in the enjoyment of economic, social and cultural rights (access to education, health care and social welfare) of Israeli Arabs, Bedouins, Ethiopians and other minorities, children with disabilities and foreign workers and of the rights and freedoms of Palestinian children in the Palestinian in the Occupied Territories.<sup>20</sup> The Committee was also seriously concerned at allegations and complaints of inhuman and degrading practices and of torture and ill-treatment of Palestinian children by police officers during arrest and interrogation and places of detention.<sup>21</sup>

The Committee was concerned at the large gap between the needs and services provided to children with disabilities and the gap between services provided to Jewish and Israeli Arab children.<sup>22</sup> The Committee recommended that the State of Israel strengthen and increase the allocation of resources to ensure that all

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<sup>15</sup> Paragraph 16

<sup>16</sup> Paragraph 18

<sup>17</sup> Paragraph 19

<sup>18</sup> Paragraph 24

<sup>19</sup> Paragraph 11

<sup>20</sup> Paragraph 26

<sup>21</sup> Paragraph 36

<sup>22</sup> Paragraph 42

citizens benefit equally from available health services.<sup>23</sup> It was concerned about the serious deterioration of access to education of children in the Occupied Territories as a result of the measures imposed by the Israeli Defence Force.<sup>24</sup> The Committee expressed concern that the investment in and the quality of education in the Israeli Arab sector is significantly lower than in the Jewish sector.<sup>25</sup>

**The Committee on the Elimination of Discrimination Against Women** on 12 August 1997 expressed its concern about the fact that non-Jewish women had worse living conditions than Jewish women. They received a lower level of education, participated less in the government service and occupied limited decision-making positions.<sup>26</sup> It was also concerned that non-Jewish women enjoyed poorer health resulting in very high maternal and infant mortality rates. There were also fewer employment opportunities for non-Jewish women.<sup>27</sup>

These reports and the conclusions of the various committees certainly provide the basis for a *prima facie* allegation of the crime against humanity of apartheid.

## **6. Conclusion: Some Steps to be taken to Prosecute Israel**

Without exhausting all lines of argument under international criminal law, and keeping in mind that this is largely a hypothetical discussion in which many assumptions are made, what needs to be done next if the State of Israel is likely to be prosecuted for the crime against humanity of apartheid?

Firstly, the State of Palestine<sup>28</sup> may become a party to the Rome Statute under Article 12.3 by a declaration lodged with the Registrar, to accept the jurisdiction of the Court with respect to the crime in question since the Statute entered into force under Article 11. The State Party will refer to the Prosecutor a situation in which one or more crimes appear to have been committed, under Article 14. The Prosecutor will investigate the situation to determine whether one or more persons should be charged with the commission of such crimes. Under Article 15.1, the Prosecutor may herself initiate investigations. Depending on whether there is a reasonable basis to proceed, the Prosecutor will request the Pre-Trial Chamber to authorize an investigation, together with any supporting material collected. The case may well be admissible where the State of Israel, which had jurisdiction over the alleged crimes, is unwilling or unable to genuinely prosecute the crime against humanity of apartheid, in terms of Article 17. The applicable law before the Court would firstly be the Statute, Elements of Crimes and the Rules of Procedure and Evidence. Secondly, applicable treaties, like the Convention on the Suppression and Punishment of the Crime of Apartheid, may be applied. Finally, the general principles of law derived by the Court from national laws of legal systems of the world, including the laws of the States that would normally exercise jurisdiction over the Crime would be applied, all under Article 21.

Article 27 states that the Statute applies to all persons without any distinction based on official capacity. The responsibility of commanders and other superiors is set out in Article 28. The grounds for excluding criminal responsibility include reasonable acts to defend persons and property provided that they are proportionate to the degree of danger. Mere involvement in defensive operations does not exclude criminal responsibility, under Article 31.

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<sup>23</sup> Paragraph 47

<sup>24</sup> Paragraph 52

<sup>25</sup> Paragraph 54

<sup>26</sup> Paragraph 161

<sup>27</sup> Paragraph 162

<sup>28</sup> The international status of Palestine will be under scrutiny if and when the Territory of Palestine acquires statehood because it meets the standard of having a people, a territory and a government

Finally, for our purposes here today, the issue of Universal Jurisdiction may need to be addressed briefly. There was a recent report of an Israeli General who landed in London who was advised not to deplane because he might have been under arrest under the principle of universal jurisdiction.<sup>29</sup> This therefore becomes a real threat to some and an opportunity for others. For the classical form of universal jurisdiction the offender needs to be voluntarily present on the territory of the state which exercises jurisdiction.<sup>30</sup> Under the principle of *aut dedere aut judicare* the state where the person is found either has to prosecute or hand over the accused for prosecution. Thus Universal Jurisdiction presents new possibilities for the prosecution. There has also been a report that the State of Israel has set up a defence fund<sup>31</sup> for such future prosecutions which takes some of our discussion so far out of the realms of mere speculation.

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<sup>29</sup> Document on file with the writer.

<sup>30</sup> El Zeidy, M, Universal Jurisdiction in Absentia: Is it a Legally Valid Option for Repressing Heinous Crimes? (2003) Oxford University Comparative Law Forum

<sup>31</sup> Document on file with the writer.