



Sadaka Second High-level Forum

Israeli Apartheid: Developing Ireland's Strategy

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Session 1: Israeli Apartheid – the International Legal Framework.

Keynote Address

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**Israel's conduct of its occupation of the Palestinian Territory:
A breach of the prohibition against apartheid in international law?**

Chair: Éamonn Meehan, Sadaka.

Thank you very much for that introduction. Thank you to Sadaka for inviting me to speak today. Thank you as well for organising a wonderful programme of events and lectures during this week in Ireland. It's a great pleasure to be here. When I think of European countries who have taken a principled stand, not a lot come to mind, but Ireland is always at the very top of that list.

Indeed, when I presented my report on apartheid this past Friday at the UN Human Rights Council in Geneva, a long number of countries, almost all of them from the developing world, spoke.

The only country from Europe that spoke was Ireland with respect to this, an issue that I have been arguing and lecturing about since I issued a report around 4 years ago.

My argument is that Israel's occupation has now become illegal, under international law.

Ireland, in one of its monthly statements at the Security Council, used the term "illegal occupation". Again, to my knowledge, the first European country to be able to expressly state that.

So, it's an honour to be here with probably two good reasons, one is a very active civil society movement throughout Ireland that has adopted Palestine as a leading cause and secondly, obviously the history of Ireland, the history of Ireland's partition. One of the things I am looking forward to returning to, when my mandate ends at the end of April, is to complete the research and begin the writing of a book on the United Nations and the partition of Palestine in 1947.

And to do that, I have begun to dig deeply into the political science, if you like, of partitions throughout the world. And most of the leading writers and thinkers today on this, no accident, are Irish, led by Professor Brendan O'Leary who teaches now in Pennsylvania. He gave a brilliant lecture last year. The BBC organised a number of lectures with respect to the 100th anniversary of the partition of Palestine and he gave a brilliant lecture where he talked about partitions around the world, and actually said it was the "goodbye kiss" of an empire leaving with its tail between its legs in order to ensure divide and rule.

His insights and the historical insights with respect to Ireland and its partition are going to help inform me as I begin to write this book with respect to the United Nations and the partition in 1947.

Before I begin, I just want to be able to explain a few things.

First, what is a Special Rapporteur? Special Rapporteurs were created, I believe, beginning the 1980s, by the predecessor to the UN Human Rights Council and today there are around, give or take, 55 or 56 Special Rapporteurs who are appointed for 6 year terms as human rights experts by the Human Rights Council in their particular area. Most of the Special Rapporteurs, around 40-45, have a global mandate - the Special Rapporteur on the right to food, the Special Rapporteur on the right to housing, the Special Rapporteur with respect to torture, and there are about a dozen of us who are Special Rapporteurs with specific country or geographic mandates-the Special Rapporteur on human rights in North Korea, on Myanmar, in Cambodia and South Sudan—and myself with respect to the Occupied Palestinian Territory.

So, my mandate, my writ, runs to obviously East Jerusalem, the West Bank and Gaza and no further with respect to this. Most of the Special Rapporteurs are not paid; this is entirely a voluntary position. Most of us, probably because of that, are university professors and many of the university professors are, like me, law professors, with a particular expertise for the area in which they have been appointed.

I can make a confession standing here at the podium; when I took the position 6 years ago, beginning in May 2016, it was explained to me what the role involves-it involves writing two reports annually, one delivered in the Spring to the Human Rights Council, one delivered in the Fall to the Third

Committee of the General Assembly in New York-I never thought I would utter the word “apartheid” let alone want to write a report on apartheid.

I was persuaded and convinced. I persuaded myself that there’s plenty of room within the bounds of international humanitarian law, the Geneva Convention, as well as international human rights law, to be able to say all sorts of things with respect to the occupation and its discontents and it seemed to me, if I was going to be persuasive with diplomats, with political decision makers, I was going to have to soften my language.

But I remember actually one of my predecessors, a name that may be known to you, Richard Falk, said to me when I first met him about a month into my mandate, to be successful (and this is probably true beyond being a Special Rapporteur), to be successful, there are two things you have to keep in mind.

First, you’ve got to be bold, you’ve got to be courageous, you’ve got to be forthright, you’ve got to be able to say things in a way that accurately describe a situation that you’re seeing.

And the second thing that you have to do is to be responsible.

You must know when you say there are X number of checkpoints in the West Bank that impede travel by Palestinians anywhere in the West Bank, you should know how many there are. If you know and are accurate on the small things, you’ll be believed on the big things that you wind up doing and you’ve got to find the right language to be able to say these things as well.

So those are the two thoughts that have guided me throughout the 6 years that I’ve been a Special Rapporteur - to be fearless and to be responsible.

And ultimately, as I began to think a year, a year and a half ago, on how I’m going to begin to apply those two principles, it was inevitable that I was going to turn to the issue of apartheid.

First of all, the reality itself was transforming. As I say in my report, when the facts change, so should your mind.

What was happening in the West Bank was no longer something that was temporary or even indefinite, there was a permanency to it.

The laws of occupation say that there can be no annexation of even a square millimeter by the occupying power, that the occupation must be temporary, it has to be short-term.

The occupying power must act in good faith and obey all UN resolutions and all aspects of international law; and the occupying power has to act in the best interest of the people under occupation.

Those four principles guide any occupation. Those four principles have been blown through many times by Israel and its occupation.

Everything about that occupation was now permanent and there was no need, even for Israeli leaders to disguise it anymore.

Not because they hadn’t been thinking this or planning this for years but, in some ways, the world had given up in respect to this occupation.

Certainly, when I say the world, I mean those political decision-makers and diplomatic decision-makers respecting the occupation. There was an interesting article written about the new Israeli Prime Minister, Naftali Bennett, in mid-September of 2021, after he had been in power for about three or three and a half months, written by a distinguished, middle-of-the-road, political correspondent for the Israeli daily Haaretz newspaper. He said that Naftali Bennett was surprised that of all the calls that he

was getting from world leaders welcoming him onto the international stage and welcoming his ascension to becoming Israeli prime minister, how few of them brought up the issue of the occupation of the Palestinians and those who did bring it up seemed half-hearted when they spoke to him. So, you'll see in some of the slides I'm going to be showing you starting in a minute or so, how open Israeli leaders are, past and present, with respect to what their ambitions are for the Occupied Territory.

So as I turn to this, I am giving you part of my much-longer PowerPoint, I'm skipping over areas with respect to international law under the rubric of humanitarian international law, the laws of war in other words, and international human rights law so, as I began to contemplate, yes there's no way around it, I have to confront the issue of apartheid, I have to write a report on apartheid. In many ways I was doing that right at a time when the entire dialogue of both civil society and among responsible former international leaders were also beginning to use the word apartheid as well.

So here you see a remarkable quote from an op-ed that the former UN Secretary General, Ban Ki Moon wrote, published at the end of June 2021, where he says and let me just quote: "Israel has pursued a policy of incremental, de facto, annexation of the Territories it has occupied since 1967, to the point where the prospect of a two-state solution has all but vanished".

He is telling the truth. I so often encounter people who talk about a two-state solution. Certainly, when I was meeting with diplomats last week in Geneva, with respect to that, they all said that they hoped there was going to be a resumption of a peace process such that a two-state solution would be then realised between Israel and the Palestinians. I think we've blown by the last exit on the ramp towards annexation, and indeed apartheid, with respect to this.

What's more remarkable about Ban Ki Moon is what he goes on to say, namely that what has become clear in recent years is Israel's intent to maintain its structure of domination and oppression of the Palestinian people through indefinite occupation.

This gives a dual legal system he says where regimes imposed on the Palestinian territories by Israel, together with the inhumane and abusive acts that are carried out against Palestinians, have new significance resulting in a situation that arguably constitutes apartheid.

Indeed, I am going to play a lawyer for you for a little while during this session and in my presentation and I am going to present to you what is the standard three-part definition or test for the existence of apartheid in any geographic unit in the world. Ban Ki Moon in that second paragraph has captured all three aspects of that particular test.

Ban Ki Moon wasn't the only distinguished leader and moral figure in the world who has come to the same conclusion. The Reverend Desmond Tutu from South Africa, a Nobel Laureate, said this in 2014 and there are now a growing number of senior Israeli diplomats or civil servants who have said this as well. This is Michael Ben-Yair, who was the Attorney General of Israel, I think between 1993 and 1994, during the last part of the premiership of Israeli Premier Yitzhak Rabin, and he wrote a remarkable article in an Irish publication earlier this month, where he concluded that this is apartheid not simply in the oPt but from the river to the sea.

And of course, as you know, this has been a topic of detailed reports coming from a variety of civil society organisations, Palestinian, Israeli and international organisations over the last two years.

Last month, in a major report that gained a lot of attention both positive and negative, Amnesty International concluded in 280 pages that Israel's rule and occupation has become a systematic and highly institutionalised manner of discrimination amounting to apartheid.

This is also concluded by Al Haq which is probably the first among equals, among the very vibrant Palestinian civil society, who (I believe this was in 2020) issued a report which said that Israel's plans with respect to its segregationist and fragmentary regime of racial discrimination and domination by illegally-transferred in Israeli Jewish settlers over the protected Palestinian population has amounted to apartheid in the Occupied Palestinian Territory.

Indeed, several major Israeli civil society organisations have also come to the same conclusion such as Yesh Din .and, in early 2021 B'Tselem used the term "Jewish supremacy" and said it has advanced differently in every unit, in Israel, East Jerusalem, the West Bank and Gaza, but it all amounts to apartheid from the river to the sea.

So, if I can play professor for a few minutes and give you an overview lesson in respect to what is the definition of apartheid in international law. Obviously, the term comes from South Africa. It was formally instituted by legislation in 1948 in the South African Parliament. It was also applied and spread to other settler colonies in southern Africa including Rhodesia, Namibia, and the Portuguese colonies in Mozambique and Angola and this lasted until it was formally dissolved with the new South Africa in 1994.

I do want to point out to you that the definition of whether apartheid exists in the Occupied Territories, does not depend upon an exact comparison with South Africa. What we're doing is using as our starting point, the three-point definition derived from international law.

There are differences in apartheid as it was practiced in South Africa and the Occupied Palestinian Territory but there are major similarities as well.

I don't intend to spend much more time in dealing with South Africa other than to say this is where I'm coming from. In terms of the international instruments, the treaties and conventions that we look at, to understand what apartheid is in international law, there are three that I'll bring to your attention now.

Our starting point is the International Convention for the Elimination of All Forms of Racial Discrimination (1965) adopted by the UN General Assembly and widely accepted throughout the world. State parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

And then we had a convention specifically devoted to apartheid passed by the General Assembly in 1973 and it defined the crime against humanity of apartheid, and you can read the definition there. This was seen as an extraordinarily important victory by civil society and by those countries, predominantly in the developing world, that wanted to place apartheid at the very top of the international agenda.

It must include inhumane acts, for the purposes of establishing and maintaining domination by one racial group or persons against any other racial group or persons and systematically oppressing them. So, in that there are three aspects of the definition that we saw earlier in the second paragraph from Ban Ki Moon. There must be a series of inhumane acts; they have to be committed for the purpose of establishing and maintaining domination and there has to be systematic oppression of one racial group by another.

And then we come to 1998 and the adoption by the UN General Assembly of the Rome Statute of the International Criminal Court. This came into law four years later in 2002. Presently there are approximately I believe 133 countries that belong to the International Criminal Court, and it defines apartheid as a crime against humanity

The ICC uses a slightly different definition but it probably, if you looked at its DNA, is about 90% like the definition that we find in the 1973 Convention against apartheid. And whatever differences

there are, are secondary. Keep in mind, this was passed in 1998 and became law in 2002 after the end of apartheid in southern Africa in 1994.

So, this is not dependent upon apartheid existing in South Africa. It is a forward-looking document that prohibits apartheid wherever and whenever it may exist. Apartheid isn't simply a chapter in a book on international law or the history of international law.

So, taking these two major Conventions together, the 1973 Convention against apartheid and the 1998 Rome Statute, here is your working definition.

First, there exists an institutionalised regime of systematic racial oppression and discrimination; secondly, it has been established with the intent to maintain the domination of one racial group over another; and thirdly it features inhumane acts committed as an integral part of that regime.

What I want to do now is just take you through the application of the three-part test regarding what is actually going on in the Occupied Palestinian Territory. This is something I think Rania is going to build upon when she speaks to you.

The first and probably the most complex part of the test is the first step, namely an institutionalised regime of systematic racial oppression and discrimination.

The obvious lead point is the separate, two-tier legal and political system that we have in East Jerusalem and the West Bank that assigns full citizen rights, privileges and benefits to the 700,000 Jewish Israeli settlers living in the 300 illegal settlements in East Jerusalem and the West Bank.

As you can see, with respect to their rights, what's interesting to know about this, particularly with respect to the right to vote, is that Israel has very strict laws that say that for an Israeli citizen to be voting in Israeli elections, be they national or municipal elections, they must be physically present in the State of Israel. Therefore, sometimes you read about planeloads of Israeli Jews who may be living in Europe or North America who will fly home in order to be able to vote in elections. They cannot vote or cast absentee votes from where they live in New York or Paris or London. The exception is the 700,000 Israeli Jews who live outside the 1967 boundaries in the Occupied Territory. They have the extra-territorial privileges and rights of an Israeli citizen and therefore, among other things, they have the right to vote in their settlements.

The Israeli Jewish settlers are part of a society which has a European standard of living. In 2020 the World Bank estimated that the GDP per capita of Israeli citizens was US\$44,000. If they need to litigate in the civil courts or they are charged with a criminal offense, they go through the Israeli courts even in the West Bank. They have all the protections of due process and natural justice that are afforded to any Israeli citizen. Obviously, the settlements are segregated. Only Jews can live in these 300 settlements. The occupation is the largest single political enterprise in the history of the Jewish State.

Compare that to the 3 million Palestinians, rightless and stateless, who live in the West Bank and East Jerusalem. They live under a military occupation where they are, on paper, supposedly protected with rights guaranteed under the Geneva Convention, but those rights are rarely ever acknowledged or enforced in practice.

If they run into issues with respect to the Israeli military and are charged with a range of offenses from a traffic offence to security offences, they go through a military court system that does not have the protections of due process and fair trial. Indeed, the conviction rate is well over 99% in the military court system.

The economy is depleted. The World Bank has said that in 2020 the Palestinian GDP per capita was \$3,200 per Palestinian which is 1/13th of Israel's economy. There are several reports from the World

Bank and the United Nations Conference on Trade and Development with respect to the depletion of the Palestinian economy. Last year, the UNCTD issued a report which estimated the financial cost of the Israeli occupation on the Palestinian economy between 2000 and 2019. The report estimated that the Palestinian economy had been deprived or short-changed of US\$57.7 billion during two decades as a cost of the occupation because there is no place that Palestinians in the occupied territory, either in Gaza or in the West Bank, have any border to the outside world apart from the Rafa crossing between Gaza and Egypt. There is no part of the West Bank, of the 169 different islands or enclaves of disconnected land where the 2.7 million Palestinian living in the West Bank have any connection with each other.

You can see, I mention as well, the strategic fragmentation of the Occupied Palestinian Territory. The 360,000 Palestinians living in East Jerusalem are physically cut off from the 2.7 million Palestinian living in the West Bank, by the separation wall. It's very hard for Palestinians in the West Bank to be able to enter Jerusalem. They need special permits to be able to do that. Palestinians living within the West Bank are isolated in 169 separate islands of the Palestinian archipelago. They are divided from each other by over 600 military checkpoints, fences, no-go zones and so on and all of those Palestinians, 3 million plus Palestinians in East Jerusalem and the West Bank are also divided and separated from the 2 million Palestinians living in Gaza.

Gaza receives far too little attention in the modern world. Former British Prime Minister David Cameron called Gaza an "open air prison". The Gazans, the Palestinians in Gaza, are barricaded; they have been under a comprehensive blockade by Israel imposed in 2007, now 15 years old, on land, sea and air. Every few months, I am invited to speak to a group of young Palestinians living in Gaza, all of whom are university educated, many of whom have a love of poetry, literature and other forms of creative arts. When I asked them the last time I spoke with them, of the probably 35 or so who were on a Zoom call, how many of them had ever been outside of Gaza, I think there were 3 out of the 35. That is maybe an uncomprehensive figure if you spread that throughout the entire population. Most of them have lived their entire lives barricaded in this area, probably the size of the island of Manhattan.

The water in Gaza is contaminated. There is a coastal aquifer underneath Gaza. 97% of the drinking water coming from that is contaminated with either sewage or with seawater and therefore most Palestinians are dependent upon very expensive water being produced by a desalination plant in Gaza.

The healthcare system has been collapsing. Trained doctors and nurses are leaving because they can't support their family on what they earn in Gaza, and they are leaving to go to Egypt or the Gulf States in order to be able to work. So, you have a healthcare system that can only deliver primary healthcare and even that with significant shortages. There are extraordinary restrictions on what kind of healthcare equipment can come into Gaza. Certainly, with respect to cancer patients, there is neither adequate diagnostic or treatment equipment so most Gazans with serious health problems, that require a specialist, are required to get military travel permits through the military to travel to hospitals in East Jerusalem or the West Bank and, of those, more than half are refused. There is either a direct refusal or there's no answer coming back from the Israeli military. The World Bank has said in its most recent report that Gaza has 50% unemployment and 60% poverty and 80% of Palestinians in Gaza depend upon some form of international aid in order to be able to survive. The 50% unemployment rate, the World Bank says, is the highest unemployment rate in any economic unit that the World Bank monitors anywhere in the world.

So that I think satisfies the first test, with respect to domination.

The second is the intent to maintain domination of one racial group over another.

There is a broad Israeli consensus from the centre to the right among Israeli politicians and political parties that Israel is going to keep East Jerusalem, and formally annex part of the West Bank but maintain security control over all the West Bank whether there's a peace agreement or not.

Naftali Bennett said in January 2022: “I oppose a Palestinian state and I am making it impossible to conduct diplomatic negotiations that might lead to a Palestinian state”. Former prime minister, Benjamin Netanyahu, had said in 2019: “A Palestinian State will endanger our existence. I will not divide Jerusalem. I will not evacuate any settlement and I will make sure that we control the territory west of the Jordan in any final arrangement, in respect to this”. The current foreign minister, Yair Lapid, who’s designated to become Israeli Premier later this year said in 2016: “My principle says maximum Jews on maximum land with maximum security and with minimum Palestinians”.

The other major piece of evidence that I’ll put to you today with respect to satisfying the second part of the test is the basic law, the Nation-state law, that was adopted by the Knesset in 2018 and that was upheld on a judicial challenge by the Israeli Supreme Court last year. Article 7 says that the State views the development of Jewish settlements as a national value and shall act to encourage and promote their establishment and strengthening. This particular provision is relied upon by Israeli State lawyers in the many different cases that come to the Israeli Supreme Court with respect to the legitimacy of certain decisions concerning Israeli settlements. This establishes both in law and in political practice that Jewish settlements have a quasi-constitutional status anywhere in Israel and in the territories that it winds up occupying.

The third and last part of the test has to do with inhumane acts committed as an integral part of the regime.

I’ve given a list there (in the PowerPoint). Rania will speak more to this, but my point here is that these are not accidental or incidental aspects of Israeli rule in the Occupied Territories. They in fact are integral parts of the Israeli Knesset, the Israeli military and are supported by rulings coming from the Israeli judicial system as well so they are well-integrated into policy with respect to this.

So, it is my conclusion that Israel does practice apartheid in the Occupied Palestinian Territory. If I can just quote to you from the last paragraph of my report. I say: “In the Occupied Territories, it does not have some of the same features as practiced in South Africa.

In particular, much of what the world had come to call petite (petty) apartheid is not present in the Occupied Palestinian Territory but on the other hand, there are pitiless features of Israel’s apartness rule in the Occupied Palestinian Territory that were not practiced in southern Africa such as segregated highways, high walls and extensive checkpoints, a barricaded population, missile strikes and tank shelling of a civilian population and the abandonment of Palestinian social welfare to the international community.. With the eyes of the international community wide open, Israel has imposed upon Palestine an apartheid reality in a post-apartheid world”.

And in closing, if I can just say this, I am often asked after every report that I wind up writing; they say, “Michael you know you’ve written this disheartening, thoroughly persuasive but very dark and gloomy report. I just feel like cutting my wrists they’ll tell me, and you’ve given us no hope at all”. If I can say two things in respect to that in my closing remarks, you know, first, the imposition of an oppressive rule that’s gone from occupation to annexation to apartheid is a rule that’s been created by human beings and equally it can be dismantled by human beings who are motivated by a higher calling with respect to the quality of human rights. That’s my optimism and I had better say that that optimism comes from the heroic work of Palestinian, Israeli and international human rights organisations because they live with this reality on a much closer basis than I ever have.

But the other thing that comes to me as optimism is something I want to quote to you from one of my favourite poems and I suspect many of you in this room will know it. It is an excerpt ‘from a poem whose author I’m sure you know. The title of it is The Cure at Troy’ and it says: “History says don’t hope on this side of the grave but then once in a lifetime the longed-for tidal wave of justice can rise up, and hope and history rhyme.” I bear those words of Seamus Heaney in my heart. I love being able

to quote that and excerpts like this and there seems to be no more appropriate place to be able to say this than in Ireland and in Dublin.

Thank you very much.