

Essay #1

Working within the United Nations human rights system

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Introduction

On 25 March 2022, I delivered my twelfth and final report to the UN Human Rights Council in Geneva as United Nations Special Rapporteur for human rights in the occupied Palestinian territory. The focus of this last report was on apartheid in the occupied Palestinian territory (OPT), a topic that I never thought I would be addressing when I was first appointed to the mandate in 2016 (more on this later). In my concluding comments to the Council, I stated that:

I would not be here in front of you today delivering a report on how an unrelenting occupation has metastasized into apartheid had the international community taken its own laws seriously 45 and 35 years ago when the Security Council and the General Assembly began to adopt the first of their many resolutions critical of the Israeli occupation. International law is not meant to be an umbrella which folds up at the first hint of rain.

In many ways, that day encapsulated the numerous experiences I had encountered as Special Rapporteur during the previous six years of my mandate: strong endorsements for my findings by regional and international human rights organizations; *pro forma* statements of support by member states at the Council from the developing world; hostility from a handful of private groups whose *raison d'être* is to vigorously defend the Israeli occupation from any criticism, however accurate, however measured; and diplomatic laryngitis by member states from Europe and North America. Throughout my years as Special Rapporteur, I sought to maintain a sharp focus on what I have called the accountability crisis: the yawning gap between the applicable rules of international law and UN resolutions addressing Israel's illegal occupation of Palestine, and the remarkable unwillingness of the international community to enforce any of its own laws and resolutions. And yet, as with my previous calls for meaningful accountability, my meetings during that week in Geneva with diplomatic representatives of Western countries were met with silence and a shrug, their tribute to the framework of international law that, in the Middle East, is closer to power than it is to justice.¹

¹ J. Allain, *International Law in the Middle East* (Routledge, 2004).

At its very best, the United Nations has provided an indispensable forum for the Question of Palestine to be addressed and for the right of Palestinian self-determination to be endorsed and pursued. The highest aspirations of the modern human rights movement and international law have been expressed in the hundreds of resolutions adopted by the General Assembly and the Human Rights Council (and its predecessor) in support of Palestinian rights over the past half century. The General Assembly has repeatedly accepted that the United Nations bears a permanent responsibility for the Question of Palestine until it is resolved in all its aspects.² And the United Nations has devoted meaningful resources, through its offices and agencies located in Jerusalem, Ramallah, Gaza and elsewhere in Palestine and the region, to monitoring the Israeli occupation, funding and managing social development projects, issuing comprehensive human rights reports, acting as a good office and attempting to ensure, with indifferent support from the international community, the well-being of the Palestinian refugees.

But, as I discovered during my experiences as Special Rapporteur, the United Nations is rarely at its very best when it comes to the Question of Palestine. Far more often, the UN has been desperately hobbled by its political inability to act upon its many resolutions to demand that Israel halt its *de jure* and *de facto* annexation of Palestine, end its occupation and clear the path for Palestinian freedom. At the heart of this institutional inertia has been the United States and its zeal to shield Israeli intransigence through its Security Council veto to prevent any meaningful action by the one legislative organ of the United Nations that possesses the power to act decisively against an international outlier.³ For the UN, this inability to effectively press Israel to end the orphaned political status of the Palestinians has acutely stained its reputation and prestige. As Kofi Annan, the former Secretary General of the United Nations, acknowledged in his memoirs, this failure has been, for the UN: "... a deep internal wound as old as the organization itself, given that the Arab-Israeli conflict began at the very inception of the UN – a

² A/RES/76/10 (3 December 2021): "Reaffirming the permanent responsibility of the United Nations with regard to the question of Palestine until it is resolved in all its aspects in accordance with international law and relevant resolutions."

³ Kofi Annan said in this memoirs that: "The United States wielded its veto to protect the Israelis even from reasonable scrutiny and pressure, paralyzing the Council on one of the world's central conflicts." *Interventions* (Penguin, 2012) at 256.

painful and festering sore consequently felt in almost every intergovernmental organ and Secretariat body.”⁴

My appointment as Special Rapporteur

In March 2016, I was unanimously selected as the seventh Special Rapporteur for human rights in the OPT by the United Nations Human Rights Council. My immediate predecessor, Makarim Wibisono, had resigned after less than two years in the mandate, citing Israel’s refusal to allow him entry into the occupied territory as his breaking point.⁵

At the time of my selection, I had been a Canadian law professor for 17 years, teaching and writing in the areas of Canadian labour law, constitutional law and human rights law. I had also been an active labour arbitrator, adjudicating differences between employers and unions. In addition to my professional and academic work in Canadian law, I had a long-standing interest in Israel and Palestine: in the late 1980s, I worked for the United Nations in Jerusalem during the first Palestinian intifada;⁶ I invigilated the 1996 Palestinian elections on behalf of the Canadian government; and I had written a number of articles for academic publications on international law and the Israeli occupation.

Controversy, in the form of allegations generated by several pro-Israel non-governmental organizations which persistently attacked the United Nations and the international human rights movement, arrived within hours of my appointment. Among other sins, these organizations alleged that I had once compared the Israeli settlements to Nazi Germany. I had done nothing of the sort, and the comparison could only be made by taking my writings on the legality of the Israeli settlements entirely out of context.⁷ A quip attributed to Mark Twain is *à propos* to those

⁴ *Ibid*, at 254.

⁵ M. Wibisono, “My resignation as UN human rights rep in occupied Palestinian areas”, *AA New Analysis Desk*, 15 January 2016 (“I am left with a sense of...deep regret that the non-cooperation by Israel with my mandate, as well as other United Nations mandates which it dislikes, signals a continuation of a situation under which Palestinians suffer daily human rights violations under the Israeli occupation.”).

⁶ M. Lynk, “Vignettes of Nablus” (1990), 20:1 *Journal of Palestine Studies* 101.

⁷ M. Lynk, “The Wall and the Settlements”, in *Implementing the ICJ Advisory Opinion* (United Nations, 2005) was a principal focus of these attacks.

circumstances: a lie travels half-way around the world before truth gets a chance to put its pants on.

Nonetheless, conservative members of the Canadian Parliament and the Canadian foreign minister, Stéphane Dion, relying on the unfounded allegations, began tweeting against my selection (although Canada had played no role in either my application or the Council's decision), and questions were asked in the Canadian House of Commons. In response, I gave interviews to the national Canadian media,⁸ unsolicited letters of support on my behalf were sent to the foreign minister by Canadian parliamentarians and law professors and by John Dugard and Richard Falk, and I spoke with the foreign minister's senior staff. In my comments, I pointed out that I would be approaching my work as Special Rapporteur with an open mind, but not with an empty mind. The tempest in the teapot soon evaporated.

But this initial brush with the professional defenders of the Israeli occupation cast a sharp spotlight for me on how well organized this lobby is in North America and Europe. No other serious international human rights crisis generates such a mobilized and impactful pushback. Each time that another report, full of verified facts and unimpeachable legal analysis, is issued by the United Nations or by regional and global human rights organizations addressing Israel's abusive conduct of its occupation, a predictable *sturm und drang* ensues. (Barack Obama, in his presidential memoirs, acknowledged this very point regarding Israel and domestic American politics.)⁹ This has meant that Western diplomats in New York and Geneva, and some senior UN officials, all too often approach the issue with hesitancy, angst and considerable reluctance. As just one illustration: Western states in recent years have supported every accountability mechanism established by the Human Rights Council regarding the conflicts in Belarus, Burundi, Myanmar, Syria, Venezuela and Yemen; yet, when the creation of a Commission of Inquiry to examine the root causes of the Israeli-Palestinian conflict was adopted in May 2021,

⁸ M. Harris, "Dion might owe the UN's new Palestinian expert an apology", *iPolitics*, 29 March 2016; P. Martin & M. Carbert, "UN appointment of Canadian professor creates controversy", *Toronto Globe & Mail*, 30 March 2016; M. Harris, "Vindication for Michael Lynk – and Dion, an elbow in the eye", *iPolitics*, 31 March 2016.

⁹ B. Obama, *A Promised Land* (Crown, 2020), at 633: "...normal policy differences with an Israeli prime minister ...exacted a domestic political cost that simply didn't exist when I dealt with the United Kingdom, Germany, France, Japan, Canada, or any of our other closest allies").

five of the Western members on the Council opposed it, and the other seven abstained on the vote.¹⁰

Working within the United Nations Human Rights System

During my six years working within the United Nations human rights system as Special Rapporteur, I addressed a number of human rights trends in the OPT through my twice-annual reports, as well as through UN press statements, letters and media interviews. My reports – delivered in March of each year to the Human Rights Council in Geneva and in October to the 3rd Committee of the General Assembly in New York – spoke both to conceptual legal issues involving the occupation (the illegality of the occupation, accountability, apartheid, the Israeli settlements, and collective punishment) and to the distressing social and economic features of Palestinian life under Israeli rule (the precarious position of human rights defenders, and the occupier’s violations of the Palestinians’ rights to development, to water and natural resources, and to health).

This occupation has become the best-documented (but, alas, far from the best-reported) conflict in the modern world. Since Israel did not permit me to enter the Palestinian territory, I have been grateful, when writing my own reports and statements, for the high quality reports issued by Palestinian, Israeli and international human rights organizations, by the United Nations, and by some independent institutes. As well, the intrepid journalism and analysis practised by Al-Shabaka, 972+ magazine, *Ha’aretz*, the Foundation for Middle East Peace, the European Council on Foreign Relations and Mondoweiss, among many others, kept me immensely well-informed about events and trends on the ground. Among the mainstream media, I read the *New York Times*, the *Guardian*, *Foreign Affairs* and *Foreign Policy* daily to gauge the establishment perspective, although the depth of their coverage of Israel and the OPT has been declining in recent years.

While I had many encounters within the United Nations system regarding Israel and Palestine, four issues stand out that are worth discussing in some detail.

¹⁰ A/HRC/RES/S-30/1 (28 May 2021) (Adopted 24-9-14).

(i) *The Database on Business Enterprises in the Israeli Settlements*

During the same week that I was selected as Special Rapporteur, the Human Rights Council directed the UN High Commissioner for Human Rights to produce a database of “all business enterprises” engaged in the Israeli settlements in the OPT.¹¹ The purpose of the database was to shine a light on those companies – Israeli and international – whose economic activities and investments were facilitating the growth of the settlements, thereby contributing to their well-documented violations of Palestinian human rights in East Jerusalem and the West Bank.¹² This spotlight was influenced by the 2011 UN Guiding Principles on Business and Human Rights,¹³ which directed all business enterprises to refrain from contributing to human rights abuses arising from conflict. Yet, the vote at the Council on the database displayed the ongoing timidity of the West towards creating even a modest form of accountability regarding the Israeli occupation. The resolution was adopted 32-0, with 15 abstentions: all 11 members of the Council from Europe or elsewhere in the developed world abstained.

The creation of a business activity database focused on a crisis conflict zone with myriad human rights abuses was not new for the United Nations. The Security Council had commissioned a substantive report in 2003 by a panel of experts highlighting 75 international businesses engaged in the illegal exploitation of natural resources in the Democratic Republic of the Congo.¹⁴ The Human Rights Council issued major reports in 2018 and 2019 respecting 59 foreign businesses involved with companies controlled by the security forces in Myanmar which were implicated in mass human rights violations in the country’s western and northern states.¹⁵ But neither of these reports triggered the sustained backlash that the Israeli settlements database provoked: among the over-the-top invectives hurled at it were “blacklist”, “economic terrorism” and “modern antisemitism”. It was none of these things: it had no judicial or remedial powers, it

¹¹ A/HRC/RES/31/36 (24 March 2016).

¹² See the 2013 report of the independent fact-finding mission created by the HRC to investigate the Israeli settlements, which called for the monitoring of business activities in the settlements: A/HRC/22/63. It stated that the impact of the settlements on the rights of the Palestinians was “pervasive and devastating”.

¹³ [guidingprinciplesbusinesshr_en.pdf \(ohchr.org\)](#)

¹⁴ S/2003/1027.

¹⁵ A/HRC/39/CRP.3; A/HRC/42/CRP.3

did not call for a boycott of the settlements (although the Security Council has directed UN member states to distinguish between Israel and the settlements on several occasions)¹⁶ and describing actions to address Israel’s illegal settlements as antisemitic is not only intended to divert attention from the well-established human rights harm being caused to the Palestinians, but it also dishonours the important work to challenge the very real anti-Jewish bigotry that exists in the world.

Three issues regarding the database greatly concerned me as Special Rapporteur. First, the High Commissioner’s Office took almost four years to release the database. Part of the delay can be explained by the obvious concern to develop a rigorous methodology and to triple-check its gathered information respecting what business enterprises were actually operating in the Israeli settlements. But this alone does not explain the inordinate length of time it took for the database to appear. The High Commissioner’s Office – both under Zeid Ra’ad Al Hussein and his successor, Michelle Bachelet – encountered enormous lobbying pressure, led by the United States and Israel, to derail the database from ever seeing the light of day. And, perhaps in reaction to the lobbying pressure, the resources devoted by the High Commissioner’s Office and the Human Rights Council to creating the database were scant and insubstantial in comparison to the importance of the work.¹⁷

My second concern went to the High Commissioners’ conservative approach to the database’s mandate. When it was released in February 2020,¹⁸ it identified 112 businesses involved in the settlements. Of these, 94 were Israeli, and the rest were from the US, the United Kingdom, France, the Netherlands, Thailand and Luxembourg. Among the listed companies were Airbnb, Booking.com and Expedia. But there were also glaring, and inexplicable, omissions. The German-owned Heidelberg Cement company, which operates stone quarries in several Israeli settlements in the West Bank, was missing from the database.¹⁹ As was FIFA, the

¹⁶ UNSC Res. 2334 (23 December 2016 (“Calls upon all States... to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”); UNSC Res. 465 (1 March 1980) (“Calls upon all States not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories”).

¹⁷ The High Commissioner acknowledged the slim resources devoted to the database’s creation in his 2018 interim report: A/HRC/37/39, para. 62.

¹⁸ A/HRC/43/71 (12 February 2020).

¹⁹ [The Israeli Exploitation of Palestinian Natural Resources: Part II – whoprofits](#)

international governing body of football/soccer, which permits its Israeli subsidiary, the Israeli Football Association, to include six teams based in the Israeli settlements, in violation of FIFA's own statute.²⁰ And, probably due to a cautious interpretation of its mandate resolution, there was no mention of the scores of foreign registered pro-Israel charities and not-for-profits who funnel enormous sums of donations annually to the Israeli settlements.²¹

And third, and most concerning, the database has become, since its release in 2020, a virtual dead letter. Although the 2016 Human Rights Council resolution called for the database to be updated annually, no resources were subsequently allocated to it either by the Council or the High Commissioner's Office. In my final meeting with the High Commissioner in March 2022, I urged her to devote the necessary funding and personnel to revitalize the database and honour the 2016 resolution. She explained that, for a variety of technical reasons, it was not possible to do so, a procedural justification that obscures a human rights failure. Although the database was never going to be more than a small step to holding Israel accountable by directing international attention towards the scale of corporate involvement in the settlements, it was nevertheless a highly visible signal that sustained defiance of international law by an acquisitive occupying power would not go unanswered.

(ii) Not Being Admitted into Israel and the OPT

When I first meet the staff at the Office of the High Commissioner for Human Rights in 2016 shortly after my appointment, I was briefed on the many procedures accompanying the mandate. Among the challenges now facing me, one of the greatest was Israel's steadfast refusal to cooperate with the Special Rapporteur mandate and to deny my access to the OPT. This non-cooperation began with Richard Falk's mandate, and continued with his successor, Makarim Wibisono. On several occasions, I met with the High Commissioner or the Deputy High Commissioner in Geneva to urge them to press Israel to allow me access to the OPT. After all,

²⁰ [FIFA will not take action on Israeli settlement teams - Business & Human Rights Resource Centre \(business-humanrights.org\)](https://www.business-humanrights.org/en/latest/news-and-events/press-releases/2022/05/20/fifa-will-not-take-action-on-israeli-settlement-teams/)

²¹ E. Hodges, "Hidden in Plain Sight: US Nonprofits as Drivers of Illegal Israeli Settlements" *Just Security*, 10 June 2022.

UN member states have an obligation to cooperate with all mechanisms of the United Nations.²² The unwillingness of the senior OHCHR leadership to expend any political capital on this request not only hindered my work, but it also reflected the unwillingness of many senior leaders within the UN to challenge Israel's strong sense of exceptionalism.

This institutional timidity has not served the UN's mission to protect and promote human rights well. After Richard Falk was refused entry to the OPT in 2008, without great protest from the UN, Israel went on to deny any cooperation with, and entry into the country for, a variety of special human rights supervisory mechanisms established by the Human Rights Council over the next 13 years. This include the separate panels of experts appointed to investigate the Israeli wars on Gaza in 2008-09 and 2014, the human rights impact of the Israeli settlements in 2013, and the mass shootings at the Gaza frontier against largely unarmed Palestinian civilians in 2018. As well, Israel refused any cooperation with the Commission of Inquiry formed in 2021 to investigate the root causes of the Israeli-Palestinian conflict. The one UN human rights mechanism whose presence Israel has tolerated in the OPT – the OHCHR country office in Palestine, with offices in Ramallah, Gaza, East Jerusalem and Hebron – has also been impacted by this timidity: in 2021, Israel refused to renew the visas for the 12 international UN staff assigned to the country office, and they were forced to leave Palestine and work remotely from their homes abroad. Quiet diplomacy has its place and value but, in these circumstances, it has too often become a justification for the UN's reticence to meaningfully confront Israel's obstructiveness.

My human rights mandate would have been enriched had I been permitted to make annual visits to the OPT. Had I been allowed, I would have spoken with victims of human rights abuses. I would have met with the valiant advocates working for Palestinian, Israeli and international civil society organizations in their home settings. I would have witnessed the demographic transformation of Palestine through the constantly-expanding settlements. And I would have hopefully had the opportunity to exchange views with the Israeli government and military to learn more about their *weltanschauung* and their understanding of the future of the

²² UN General Assembly Resolution 71/96 (6 December 2016), para. 5.

occupation. As it was, I travelled every year (before the pandemic) to Amman, where civil society organizations and UN officials travelled from the OPT to provide me with detailed briefings on the current human rights trends. These visits, together with the excellent reporting on the occupation by civil society, enabled me to write comprehensive reports for the UN, full of detail and analysis, but without the human faces and stories which would have personalized the modern tragedy of Palestine.

(iii) The Trump Plan

In January 2020, the Trump Administration released its Peace to Prosperity Plan,²³ which purported to provide a two-state solution for Israelis and Palestinians that would successfully end the conflict. In the maps which accompanied the Plan, it was clear what a rotten deal was being offered to the Palestinians. No capital in Jerusalem. A moth-eaten statelet in parts of the West Bank with no territorial contiguity, divided and enclosed by Israeli walls, Israeli-only highways and Israeli checkpoints. The continued Israeli blockade of Gaza, only modestly alleviated by an underground tunnel to the West Bank. Tracts of empty sand dunes near the border with Egypt as land compensation to the Palestinians for Israel's annexation of all of its 300 settlements in East Jerusalem and the West Bank. No external border with the world, except for the existing Rafah crossing with Egypt. And no rights-based solution for the millions of Palestinian refugees.

Several days after its release, I issued a public statement through the United Nations rebuking the Plan. In it, I wrote: "What the Trump Plan offers is a one and a half state solution. This Potemkin state – lacking most of the commonly understood attributes of sovereignty beyond the right to fly its flag and issue stamps – would become an entirely new entity in the annals of modern political science."

Among my greatest concerns about the Trump Plan was its trampling upon the cornerstone foundations of international law that had been articulated by the United Nations for decades. The Plan endorsed both the Israeli annexation of Palestinian territory and the legalization of the settlements, making a travesty of the law. I said in the January statement that:

²³ [Peace to Prosperity \(archives.gov\)](#)

This Plan would turn the rules-based international order on its head and would permanently entrench the tragic subjugation of the Palestinians that is already existing on the ground. The abandonment of these legal principles threatens to unravel the long-standing international consensus on the conflict, favouring *realpolitik* over rights, power over justice and conflict management over conflict resolution.

The Trump Plan was heavily criticized by many international figures. The European Union said that the Trump Plan broke with “internationally agreed parameters,”²⁴ while Pope Francis warned about the “danger of inequitable solutions.”²⁵ Nonetheless, Israeli Prime Minister Benjamin Netanyahu declared that his government would proceed to unilaterally annex those parts of the occupied territory granted to it by the Plan in the summer of 2020.

In June 2020, in one of my proudest moments as Special Rapporteur for the OPT, 66 other UN special rapporteurs and human rights experts joined me in a public statement condemning the looming annexation plan. The statement was widely cited in the international media and by civil society organizations for months afterwards. It warned that, given that Israel was claiming permanent security control between the Mediterranean Sea and the Jordan River under the Trump Plan: “...the morning after annexation would be the crystallisation of an already unjust reality: two peoples living in the same space, ruled by the same state, but with profoundly unequal rights. This is a vision of a 21st century apartheid.”

Israel’s *de jure* annexation of parts of the West Bank was subsequently forestalled by American pressure, with even the Trump Administration recognizing that the Plan had gone too far. The substitute was the proclamation of the Abraham Accords in August 2020, with Bahrain, the United Arab Emirates, Morocco and Sudan agreeing to establish diplomatic and trade relations with Israel in exchange for the withdrawal of the Trump Plan. But the Accords, which the Biden Administration subsequently endorsed, did nothing to bring Palestinian self-determination even a millimetre closer. Unsurprisingly, in the two years following the Accord, Israel continued to expand its settlements and deepen its *de facto* annexation of the West Bank, encouraged the efforts of Israeli settlers to remove scores of Palestinian families from their

²⁴ *Reuters*, “EU rejects Trump Middle East peace plan, annexation”, 4 February 2020.

²⁵ Justine Coleman, “Pope Warns of ‘Inequitable Solutions’ after release of Trump Mideast peace plan,” *The Hill*, 23 January 2020.

homes in East Jerusalem and maintained its comprehensive blockade of Gaza. Indeed, part of the Abraham Accord's *quid pro quo* for the recognition of Israel was the Trump Administration's acceptance of Morocco's illegal annexation of most of Western Sahara, a sordid scratch-my-back which united two disreputable belligerent occupiers and their diplomatic patron together.²⁶

(iv) *Apartheid*

When I was appointed as Special Rapporteur in 2016, the thought that I would devote one of my reports on apartheid in the OPT was the furthest thing from my mind. Using the language of apartheid, I thought, would surely only harden diplomatic hearts and close doors. My initial strategy was to focus on international humanitarian law (the laws of war and occupation) and international human rights law in my reports to the United Nations and my relationships with UN member states. For me, this was so self-evidently the obvious approach. After all, virtually every country in the world accepted that Palestine was occupied, the *Fourth Geneva Convention* applied in full, the settlements were profoundly illegal, the Palestinians were entitled to self-determination and Israel's occupation was rife with human rights abuses. We shared a common language. All I had to do, I thought, was to employ this rights-based framework to write clear reports, devise workable policy recommendations and call upon member states to commit themselves, in the words of Martin Luther King's 1968 Mountaintop speech, to be true to what they had said on paper.

As my mandate was ending, I had changed my mind. Two developments explain this *volte-face*. First, I was deeply, if guilelessly, surprised by the utter unwillingness of most member states in the developed world – Europe, North America and Oceania – to accept that the solemn obligations of international law entailed the responsibility to impose accountability on UN member states who persistently disobey international law and UN resolutions. Indeed, Article 25 of the UN Charter states that: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Israel has defied more than 30 Security Council resolutions since the early 1970s demanding that it undo its illegal annexation of East Jerusalem, end its illegal settlements and wind up its

²⁶ [Israeli minister backs Moroccan claims to Western Sahara sovereignty - Al-Monitor: The Pulse of the Middle East](#)

occupation. Yet, Western countries have treated Israel as an important strategic, technological, military and political partner with a democratic framework and ‘shared values’, marred only, perhaps, by a regrettable approach towards the Palestinians. As the intrepid Israeli journalist Gideon Levy has written: “No country is as dependent on the support of the international community as Israel, yet Israel allows itself to defy the world as few dare.”²⁷ With five years under my belt as Special Rapporteur, I began to accept the futility of persuading Western member states to energetically confront Israel through the plentiful tools of international humanitarian and human rights law, even as I continue to believe that these tools remain an important legal foundation for holding Israel to account.

The second reason for my new openness to considering the apartheid framework were the proliferating and indisputable facts on the ground. Albert Camus once wrote that calling things by their wrong name only adds to the afflictions of the world. I came to accept that international humanitarian law could no longer adequately capture the new legal and political reality in the OPT. The Israeli occupation – which is required to be temporary and short-term under international law – has become indistinguishable from annexation and apartheid. When I became Special Rapporteur in 2016, there were 400,000 Israeli settlers in the West Bank, and 220,00 in East Jerusalem. By 2022, at the end of my mandate, the settler population had reached 485,000 and 230,000, respectively. These settlers live outside of Israel’s recognized international borders, yet enjoy full Israeli citizenship rights in Jewish-only communities, while the five million Palestinians among them live under either Israeli military law or under a truncated form of precarious residency rights. Israeli political leaders openly proclaimed that the country’s rule over the Palestinians and their land is permanent and no genuine Palestinian state would emerge,²⁸ with little pushback from the West. When the facts change, so must our minds.

By 2022, the vocabulary for understanding the situation in Israel and the OPT was changing rapidly. Two of my distinguished predecessors – John Dugard and Richard Falk – had

²⁷ Gideon Levy, “Netanyahu’s Right: The Occupation Can Actually Go on Forever,” *Ha’aretz*, September 25, 2016.

²⁸ Prime Minister Benjamin Netanyahu stated in 2018 that the Palestinians could have a “state-minus”, where Israel would maintain security control over all of the Palestinian territory: *Jewish Telegraphic Agency*, 24 October 2018. In 2022, Prime Minister Naftali Bennett said that: “I oppose a Palestinian state, and I am making it impossible to conduct diplomatic negotiations that might lead to a Palestinian state”: *Al-Monitor*, 31 January 2022.

written persuasively about the prevalence of apartheid in the OPT.²⁹ Beginning in 2020, a number of regional and international human rights organizations issued reports concluding that apartheid existed, either in the West Bank (Yesh Din) or in the entire area between the Mediterranean and the Jordan (Al-Haq, Addameer, Al-Mezan, B'Tselem, Human Rights Watch and Amnesty International). As well, some prominent Israeli figures were coming to the same conclusion: as one example, Michael Ben-Yair, a former Attorney-General of Israel, wrote in 2022 that Israel had become: “an apartheid regime... a one state reality, with two different peoples living with unequal rights.”³⁰

In my report, I followed the path of the international human rights community in adopting the legal definition of apartheid laid out in the *International Convention on the Suppression and Punishment of the Crime of Apartheid*³¹ and the *Rome Statute of the International Criminal Court*.³² This meant that my starting analytical point was not whether Israel’s practices in the OPT resembled apartheid South Africa, but whether the evidence of the practices of the Israeli occupation satisfied the three-part legal definition in these two binding international documents. I concluded that the facts on the ground met this legal definition. (See my application of the three-part test in Part II of this book).

My apartheid report received more international media and civil society coverage than any of my previous reports. Much of it was positive. The *New York Times* covered its release,³³ after previously ignoring – to its shame – the comprehensive reports on apartheid issued by Human Rights Watch in 2021 and Amnesty International in early 2022. Following the 2017 Falk/Tilley report on Israeli apartheid prepared for the UN Economic and Social Commission for West Asia which the UN leadership quickly smothered at the instigation of the Trump Administration,³⁴ my report was the second within the UN system devoted to the topic. Although

²⁹ J. Dugard and J. Reynolds, “Apartheid, International Law and the Occupied Palestinian Territory” (2013), 24:3 *EJIL* 867; R. Falk and V. Tilley, *Israeli Practises towards the Palestinian People and the Question of Apartheid* (UN ESCWA, 2017).

³⁰ *thejournal.ie*, 10 February 2022.

³¹ (1973), 1015 UNTS 243, entered into force 18 July 1976. As of 1 February 2022, 110 states ratified the *Convention*.

³² (1998), 2187 UNTS 3, entered into force 1 July 2002. As of 1 February 2022, 123 states had ratified the *Statute*.

³³ P. Kingsley, “UN investigator accuses Israel of apartheid, citing permanence of occupation” *New York Times* (23 March 2022).

³⁴ [UN report on Israeli 'apartheid' | CNN Politics](#)

criticized by the usual suspects, my report was left to stand unscathed, partly because of the autonomy enjoyed by UN Special Procedures within the UN human rights system and partly because of the rapid sea-change in international opinion towards Israel and its systemic discriminatory practices. In one of my many interviews following the release of the report, I said that, if there is a better term in the international vocabulary to describe the situation of two different peoples living in the same political space yet living in sharply segregated communities and having access to vastly different legal and social rights based solely on their ethnicity and nationality, then I would be happy to use that term. Until then, apartheid is the appropriate word.

Conclusion

Wherever I went through the hallways of the United Nations Secretariat Building in New York or the council rooms at the Palais des Nations in Geneva to meet senior leadership, I would encounter a strong sense of fatalism whenever the issue of Israel and Palestine arose. One of the Secretary-Generals that I met said to me in a moment of candor: “How does one ever solve an issue like this? Is there really an answer?” On another occasion, a senior official at the OHCHR offered an impromptu lecture on the philosophy of despair, explaining to me how a cynical world-view actually heightens the search for pathways to address the Israeli occupation. An ambassador in New York from a country which was sitting as a non-permanent member of the Security Council told me that no amount of heroic diplomacy was going to give birth to a real Palestinian state, given the American possessiveness of the file. Accordingly, he added, we should all get used to the fact that conflict-management and criticism without consequences, sprinkled with the ritual references to a future two-state solution, would be the operative framework well into the future.

And yet, within the middle and lower ranks of the OHCHR staff and among UN officers in other agencies which work on the Question of Palestine, I encountered a much more positive and determined outlook towards the future of the struggle. My reports on the frail state of health services in the OPT, the collective punishment of Gaza and the shrinking space for human rights advocates in Israel and Palestine owed much to the diligent professionalism of the UN officers in Ramallah, Jerusalem and Geneva. “You are saying what we wish we could say,” I heard from

them on regular occasions. Witnessing the lived reality on the ground, as those living in the OPT did from their various vantage points, these UN officers – Palestinian, Israeli and international – represent the very best of the UN’s guiding mission: promoting peace, securing human rights, advancing the rule of law and furthering human security for all.