‘Apartheid’ is not sufficient: an interview with UN Human Rights Commissioner Miloon Kothari

UN Human Rights Commissioner Miloon Kothari explains why Apartheid is not enough to explain the root causes of the Palestinian crisis.

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Joe Biden’s trip to Israel, occupied Palestine and Saudi Arabia has come and gone.

Citing “hostilities with Hamas over eleven days in May 2021,” the Jerusalem Declaration proclaimed by Biden and Israeli Prime Minister Yair Lapid reaffirmed Washington’s commitment to provide nuclear-armed Israel with $1 billion for missile defense (on top of the 3.8 billion it already gets), and to help Israel build “high energy laser weapons systems” to defend itself against Iran and its “terrorist proxies.”

The Jerusalem Declaration’s mention of the May 2021 conflict – in which more than 250 Gazans were killed, 66 of them children, and thousands of Palestinians were injured – was noteworthy. In that attack’s wake, the UN Human Rights Council (HRC) set up a Commission of Inquiry to identify the “root causes” of the eleven-day bout of violence.

This past June 7 – as Biden and Lapid’s Jerusalem Declaration was likely being drafted – the Commission presented its first report to the UN Human Rights Council. Judging from the contents of that report, unconditional US support for Israel promises to become more complicated.

Its full name is a mouthful, but speaks volumes. According to the “Independent International Commission of Inquiry (COI) on the Occupied Palestinian Territory, including East Jerusalem, and Israel”, “Israel” is effectively a single state from the river to the sea–an apartheid state, apparently, but where settler-colonialism is a more foundational problem.

Navanethem (Navi) Pillay, a South African jurist with highly impressive credentials (see below), chairs the Commission, alongside Australian human rights consultant Chris Sidoti and Indian human rights scholar/activist and housing rights advocate Miloon Kothari.

In the wake of the Commission’s first report, Mondoweiss spoke with Miloon Kothari. His views were both candid and cutting.

A mandate on root causes

Unlike past UN commissions of inquiry on the Middle East “conflict,” the mandate of the Pillay Commission is neither time-limited, subject to annual renewal, nor restricted to examining the conflict that led to its formation. Rather, it was told to take its time, and to examine the “underlying root causes of recurrent tensions.”

And, in contrast with past commissions and Special Rapporteurs on the occupied Palestinian territories (OPT), the Commission has been tasked with examining the situation in both the OPT and Israel “proper” (“Israel itself,” in the words of the Commission’s June report).

“So essentially, we are looking at the human rights situation from the river to the sea,” Kothari told Mondoweiss. “There are similarities inside and outside Green Line, so linkages must be made.”

The Pillay Commission’s June report stresses these linkages.

“Impunity is feeding increased resentment among the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and in Israel… The continuing occupation of the Occupied Palestinian Territory, including East Jerusalem, the 15-year blockade of Gaza and longstanding discrimination within Israel are all intrinsically linked, and cannot be looked at in isolation.” [emphasis added].

Miloon Kothari elaborates.

“What has transpired in the occupied territories since ’67 is something that had already been happening inside the Green Line since ’48 – the levels of discrimination; the different laws; the dispossession of Palestinian-Israelis,” Kothari told Mondoweiss. “So, I think it’s important to make that distinction, but then also to draw the parallels.”

Easier said then done. Israel won’t let the Pillay Commission enter the “Jewish state,” and Egypt won’t let it enter Gaza (so far). So, Commissioners have met with Palestinians and Israelis in Amman and Europe. A delegation of thirty Jewish-Israeli academics, journalists and former diplomats met with the Commission in Geneva.

“They generally agreed with us; they generally encouraged us to continue,” says Kothari.

The Israeli ambassador did not respond to a request for a meeting in Geneva, says Kothari.

“If they feel they have a story to tell, they should let us in and tell us their perspective on the whole situation,” Kothari told Mondoweiss. “So, we’re hoping. We keep trying. We’ll keep trying. And we’re hoping they’ll allow us in at some point.”

A permanent occupation

Among the most forthright observations in the Pillay Commission’s first report (limited, at this stage, to reviewing past findings by UN commissions and Special Rapporteurs) was the apparent permanence of Israel’s occupation.

“The Commission notes the strength of prima facie credible evidence available that convincingly indicates that Israel has no intention of ending the occupation, has clear policies for ensuring complete control over the Occupied Palestinian Territory, and is acting to alter the demography through the maintenance of a repressive environment for Palestinians and a favourable environment for Israeli settlers,” the report states.

As former UN Special Rapporteur Michael Lynk pointed out, “permanent” belligerent occupation is an oxymoron under international law. Miloon Kothari goes further.

“It’s been illegal from the beginning,” Kothari told Mondoweiss.

“I would go as far as to raise the question of why [Israel is] even a member of the United Nations. Because … the Israeli government does not respect its own obligations as a UN member state. They, in fact, consistently, either directly or through the United States, try to undermine UN mechanisms.”

And, Kothari and his fellow commissioners suggest, Israel practices the high crime of apartheid.

Citing observations by the UN Committee on Civil and Political rights, the Pillay Commission noted the “three-tiered system of [Israeli] laws affording different civil status, rights and legal protection for Jewish Israeli citizens, Palestinian citizens of Israel and Palestinian residents of East Jerusalem.”

Furthermore, the Commission points out in its initial report, “Israel applies a substantial part of its domestic laws to Israeli settlers in the West Bank, while Palestinians are subject to Israeli military law.”

Limits to Apartheid

But the Pillay Commission isn’t prepared to step out on the apartheid limb–yet.

“Apartheid is a useful paradigm/framework to understand the situation but not sufficient,” Kothari told Mondoweiss.

“We need to figure in settler-colonialism, general issues of discrimination, occupation and other dynamics to get a fuller picture of the root causes of the current crisis…ending ‘apartheid’ will not end the crisis of occupation for the Palestinian peoples … the issue of self-determination requires many other changes.”

But the Pillay Commission “will get to the apartheid question, at some point in the future, because we will be looking at discrimination in general, from the River to the Sea,” Kothari says.

As it does, the commission is gathering forensic data, for submission to the International Criminal Court and International Court of Justice.

“Our work is to collect a repository of all the evidence that we gather, and then, at a particular time, hand it over to the judicial bodies that can take action,” says Kothari.

Documenting dispossession

The Pillay Commission’s secretariat has research and legal expertise at its disposal, says Kothari, and is in communication with the ICC. Kothari and his fellow Commissioners visited the ICC in June, where they met with Deputy Prosecutor Nazhat Shameem Khan (no relation to Chief Prosecutor Karim Khan) and her team.

As it gathers legal evidence for future court cases, the Pillay Commission also plans to seek “third party accountability” from the “high contracting parties” of the 4th Geneva Convention. Article 1 of Geneva IV requires them to “respect and ensure respect for the convention in all circumstances.”

Among the issues the Pillay Commission will take up with third parties such as the US, Canada and EU — arms transfers to Israel, and the engagement of their corporations in Israel’s seemingly permanent occupation and flagrantly illegal settlement enterprise.

“We are hoping to convince these countries to go beyond ideology; to go beyond just a blind faith in whatever Israel does,” says Kothari.

And the Pillay Commission has road trips in mind, to Lebanon, Jordan, Egypt, Syria and North America, to speak with members of the Palestinian diaspora.

“There are refugees that have, historically, been dispossessed from the occupied territories,” Miloon Kothari told Mondoweiss.

To document their dispossession, the Pillay Commission will use geospatial data that “very clearly shows … the extent to which the occupation has been solidified in the West Bank, and the damage that has been done by, for example, the blockade on Gaza.”

The Pillay Commission report will present these and other findings in its second report to the UN General Assembly in the third week of October, 2022.

Political pressure

Commission members plan to spend two weeks in the US, holding university round tables and meeting with members of Congress – those who agree to meet with them.

Kothari draws Mondoweiss‘ attention to the COI (Commission of Inquiry) Elimination Act. Sponsored by 73 Republicans and 15 Democrats (including Henry Cuellar, Josh Gottheimer and Ritchie Torres), House Resolution 7223 calls for a twenty-five percent reduction in US allocations to the Human Rights Council, apparently corresponding to the Pillay Commission’s work.

Nothing angers Israel’s allies more than the Commission’s South African chairperson. From the moment of its founding, Navi Pillay has been the object of vitriolic attack.

Pillay’s credentials are impressive. The first woman to launch a law practice in her home province of Natal, representing imprisoned anti-apartheid activists on Robben Island, Pillay was appointed to the South African High Court, then to the International Criminal Tribunal for Rwanda. Pillay currently serves on the International Court of Justice, on the International Commission Against the Death Penalty, and on the Advisory Council of the International Nuremberg Principles Academy. She’s also the chair of the quasi-judicial Inquiry into Detention in the Democratic People’s Republic of Korea.

Pillay’s credentials don’t sway her opponents – in the US or Canada. B’Nai Brith Canada (BBC) lobbied the Canadian government to get Pillay sacked, and was advised to speak directly with Canadian ambassador Bob Rae (so it claimed).

“At [Ambassador] Rae’s suggestion,” BBC reported, it also “enlisted the aid of Canada’s mission in Geneva.”

Asked if BBC had indeed asked Canada’s mission in Geneva to get Ms. Pillay sacked, Global Affairs Canada “politely” told this writer that they had “nothing to add.”

In the wake of the Pillay Commission’s June 7 report – the barn door wide open and the horses gone – Canada joined the US and twenty other countries in condemning the Commission’s work. Their letter to the Human Rights Council expressed “deep concern” over the “open-ended” mandate of the Commission, with “no sunset clause, end date, or clear limitations.”

“No one is above scrutiny,” the letter stressed. “We must work to counter impunity and promote accountability on a basis of consistent and universally applied standards.”

However, the letter went on, “We believe the nature of the COI … is further demonstration of long-standing, disproportionate attention given to Israel in the Council … We continue to believe that this long-standing disproportionate scrutiny should end, and that the Council should address all human rights concerns, regardless of country, in an even-handed manner.”

Miloon Kothari agrees that ‘the Council should address all human rights concerns, regardless of country, in an even-handed manner’, but dismisses the “duplicity” and “double standards” embodied in the rest of the letter.

“When it comes to Ukraine, international law becomes very, very important,” he told Mondoweiss. “And they are pushing ahead, and pointing out all the violations done by Russia. But the same violations of occupation and dispossession done by Israel do not receive the same treatment.”