

BOOK REVIEW

Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine, by J Dugard, Jacana Media, 2018, 312 pp., ISBN 9781431427352

This book by Professor John Dugard is both an autobiography as well as a critical legal history from a well-placed insider. As I have read it, the book's first goal is to explain apartheid as an oppressive and illegitimate system of laws – what I would regard as *lawfare* – and their impact on society, whereas the second goal is to highlight civic, government and international responses to this, drawing on case studies from Namibia, South Africa and Palestine, or what I would regard as various forms of legal mobilisation.¹ Each case study detailed in the book is preceded by a brief history, followed by Dugard's extensive observations, and direct involvement, in each of these countries, as a scholar and as a legal practitioner in South Africa and within the United Nations system.

As judge *ad hoc* of the International Court of Justice, long-time professor of international law and human rights at various universities, and in particular the University of the Witwatersrand and University of Leiden, as well as a former member of the International Law Commission and former UN Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, Dugard has a great deal of expertise to share on this topic.

Particularly useful for students and teachers needing an introduction to this topic, in 2008 Dugard wrote an introductory note that accompanies a file on the procedural history as well as audio-visual resources regarding the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention).² In this note, which is further elaborated in the book, Dugard observes how apartheid was consistently condemned by the United Nations General Assembly from 1952 until 1990, and later by the Security Council (after 1960). Moreover, apartheid became labelled as a crime against humanity following a UN General Assembly Resolution in 1966. The Security Council later endorsed this in 1984 with the Apartheid Convention, and in 1998 the Rome Statute Establishing the International Criminal Court incorporated apartheid in its list of crimes, namely, 'inhuman acts [...] committed in the context of an institutionalised 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'.

As Dugard observes in the book, the legal origins of apartheid refer mainly to South Africa, which was closely tied to the situation in (then) Southwest Africa (now Namibia), a territory occupied for many decades by South Africa. However, Dugard explains that apartheid is not confined to a specific geographical boundary. In recent years, Israel has been described by legal experts and United Nations officials as maintaining an apartheid regime.³ At the time of writing, following a referral from the State of Palestine, the International

¹ J Handmaker 'Researching legal mobilisation and lawfare' (2019) International Institute of Social Studies Working Papers – General Series No 641 <<https://repub.eur.nl/pub/115129>>. See also: <<https://nias.knaw.nl/themegroup/legal-mobilization-analyzing-law-based-advocacy/>>.

² J Dugard 'Introductory note to the Convention on the Suppression and Punishment of the Crime of Apartheid' (2008) United Nations Audiovisual Library of International Law <<https://legal.un.org/avl/ha/cspca/cspca.html>>

³ R Falk & V Tilley 'Palestine and the Israeli operation: Israeli practices towards the Palestinian people and the question of apartheid' (2017) <https://opensiuc.lib.siu.edu/ps_pubs/9/> See also: J Dugard and J Reynolds 'Apartheid, international law and the occupied Palestinian territory' (2013) 24 *European Journal of International Law* 867.

Criminal Court was looking into whether it can legally exercise jurisdiction over alleged crimes committed in the occupied Palestinian territories (OPTs) of East Jerusalem, the West Bank and Gaza, including the crime of apartheid.⁴

1. Namibia

After covering the earliest part of his life and career, Dugard reflects on his role as an academic and legal counsel to members of the Southwest Africa People's Organisation (SWAPO) who faced criminal charges in South Africa (the occupying power) in relation to their resistance to that occupation in the territory now known as Namibia. As a practitioner, matters were challenging enough in relation to a court system institutionally biased and protecting the interests of its dominion. But as a scholar it was not much easier; notwithstanding his unparalleled expertise on the topic, Dugard explains his difficulty in getting articles published in South African law journals.

2. South Africa

The section on South Africa is the most elaborate, encompassing Dugard's extensive scholarly contributions, experience as a legal practitioner and role in various United Nations agencies. As he explains, it was not only important to speak out as a concerned individual, but the work of political parties and movements as well as civil society organisations were crucial in opposing South Africa's apartheid regime. Dugard played a key role in establishing many of these organisations, including the Centre of Applied Legal Studies and Wits Law Clinic at the University of the Witwatersrand, as well as the Legal Resources Centre and Lawyers for Human Rights. Indeed, the *South African Journal on Human Rights* was initially the *Lawyers for Human Rights Bulletin*, which Dugard co-founded, serving as a forum for critical scholarly discussion on South Africa's dismal human rights record.

From the establishment of nominally self-governing Bantustans, racially discriminatory laws, wide-ranging police powers and the death penalty, Dugard comprehensively charts the impact of apartheid laws on South African society from the 1950s until the early 1990s. Moreover, Dugard explains how South Africa's brutal apartheid regime eventually drew the attention of, and involvement from, the international community, which progressively sought to isolate the government, including by way of boycott, divestment and sanctions, until it eventually abandoned (legal) apartheid.

3. Palestine

In Israeli and Palestinian society, Dugard also notes that apartheid has had a significant impact, with numerous local organisations providing legal advice, conducting advocacy and documenting violations. These organisations doing such work include both Israeli and Palestinian human rights organisations such as Adalah, B'tselem, Hamoked, Al-Haq (in the OPT of the West Bank) and Palestinian Centre for Human Rights (in the OPT of Gaza) as well as Amnesty International, Human Rights Watch, the International Commission of Jurists and the International Federation of Human Rights. However, shortly after Dugard's

⁴ The State of Palestine 'Referral by the State of Palestine pursuant to Articles 13(a) and 14 of the Rome Statute' (2018) para 12(vi) 6 <https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf> See also <www.iss-cpi.int/palestine>

book was published, on 19 July 2018, the situation dramatically worsened – and, in the view of various scholars, formalised Israel’s regime of apartheid – when Israel’s parliament enacted the so-called Nation-State Law.⁵

Among various controversial provisions, the Nation-State Law states that: ‘Israel is the historic homeland of the Jewish people’ and that Hebrew is the sole, official language of the country (excluding Arabic as an official language). The Nation-State Law also reinforces a longstanding situation whereby there has never been legal recognition of an Israeli nationality (recognition of 132 different nationalities has been in place, but only Jewish nationality as a form of ‘whiteness’ is fully protected).⁶ The civic responses to the Nation-State Law since it was passed have been considerable. Tens of thousands of Palestinians and Israeli Jews have taken to the streets to protest against its discriminatory character. The Haifa-based organisation Adalah filed a petition to the Israeli Supreme Court, describing the law as having ‘distinct apartheid characteristics’.⁷ These latest critiques of Israel’s discriminatory regime build on decades of scholarship and careful documentation by NGOs, United Nations and other agencies.⁸ There have also been responses from governments, and notably the South African government, which has significantly decreased its diplomatic presence in Israel. Meanwhile, echoing South Africa’s apartheid past, other governments, including Australia, Hungary and the United States have actually strengthened their diplomatic relations with Israel.

At the time of writing this review, Israel was in the process of seeking to annex the Palestinian territory of the West Bank. Among other reactions, this has led to a strongly worded statement, with a clear nod to South Africa, by several prominent United Nations experts, who condemned this move as ‘21st Century Apartheid’ whereby what ‘would be left of the West Bank would be a Palestinian Bantustan, islands of disconnected land completely surrounded by Israel and with no territorial connection to the outside world’.⁹

4. The validity of making comparisons

Dugard’s comparisons between apartheid in South Africa and Palestine are not uncontroversial. Indeed, for legal scholars, including South African Chief Justice Mogoeng Mogoeng, the longstanding impasse between Israel and Palestine can be a deeply emotional issue, whereby one’s religious views prevails over a scholarly discussion and reference to international law.¹⁰

So what ought to be the indicators for making such comparisons?

⁵ H Jabareen and S Bishara ‘The Jewish Nation-State Law’ (2019) 48 *Journal of Palestine Studies* 43; I Pappé ‘The Israeli Nationality Law: A Blueprint for a Twenty-first Century Settler-Colonial State’ 18 *Journal of Holy Land and Palestine Studies* 179.

⁶ N Erakat ‘Whiteness as property in Israel: revival, rehabilitation, and removal’ (2015) 31 *Harvard Journal on Racial and Ethnic Justice* 69.

⁷ Adalah: The Legal Center for Arab Minority Rights in Israel ‘Israeli parliament votes to approve Nation-State Law that enshrines Jewish supremacy over Palestinian citizens’ (19 July 2018) <<https://www.adalah.org/en/content/view/9565>>

⁸ J Quigley ‘Apartheid Outside Africa: The Case of Israel’ (1991) 2 *Indiana International and Comparative Law Review* 221.

⁹ United Nations Human Rights Office of the High Commissioner ‘Israeli annexation of parts of the Palestinian West Bank would break international law – UN experts call on the international community to ensure accountability’ (2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25960&LangID=E>>

¹⁰ M Jansen ‘Chief Justice’s views on Israel are guided by religion, not the Constitution’ (26 June 2020) *Mail&Guardian* <<https://mg.co.za/opinion/2020-06-26-chief-justices-views-on-israel-are-guided-by-religion-not-the-constitution/>>

As Jeffrey Barnes has observed, from a legal and multi-disciplinary standpoint, there are essentially six dimensions of a debate that are relevant when comparing apartheid in different settings. These comprise: (1) international law definitions (and how they apply), (2) what constitutes race, (3) the role of settler-colonialism as a historical force, (4) spatial segregation by race and ethnicity, (5) the relationship between labour and the national project, and (6) various responses at the local level.¹¹

Dugard observes: ‘There are two ways of approaching the question of apartheid in the OPT. The first is empirical, which entails a judgement based on personal observations of the occupation and life in the OPT. The second is legal, which requires an examination of the occupation in the context of [...] (international law)’.¹²

His nearly 300-page volume amply covers the first, fourth and sixth of Barnes’ dimensions, and touches upon several of the others as well. His discussion of international law responses to apartheid in Namibia, South Africa and Palestine is elaborate. He also addresses the extent of spatial segregation by race and ethnicity in relation to educational institutions, roads and other physical and structural dimensions, albeit to varying degrees depending on his acquaintance with each case study. Finally, Dugard elaborates on the many local responses to apartheid in each of the case studies.

Taking the remaining dimensions of Barnes’ framework as a basis for making comparisons, there could, arguably, have been more problematising of what constitutes race, on which there is ample scholarship.¹³ By a similar token, the role and relevance of settler-colonialism in shaping apartheid in each of the case studies could have been elaborated upon, though here too the scholarship is plentiful, including a special issue of the *South African Journal on Human Rights* on ‘Conquest, Constitutionalism and Democratic Contestations’.¹⁴ And finally, the relevance of labour to the national project in sustaining each of these apartheid regimes could have received attention, though again, this has been amply covered in existing scholarship.¹⁵

Significantly, Dugard acknowledges his positionality as a highly educated, privileged white man. He observes how his was a very different perspective compared to that of a person who was actively involved in the anti-apartheid movement that operated underground, in exile and in cooperation with a global movement of activists in the so-called frontline states as well as in South Africa, Europe, North America and other parts of the world. This notwithstanding, Dugard’s role as a scholar, lawyer and – ultimately – a judge has left a lasting legacy, not least through his many students and clients who later became key figures in the movement. One of these was Professor Lungisile Ntsebeza, who explicitly noted Dugard’s support during his inaugural address as recipient of an honorary doctorate at Leiden University in February 2020.¹⁶

¹¹ J Barnes ‘A different apartheid: structural, legal and discursive foundations for comparing South Africa and Israel’ in P Essed, K Farquharson, K Pillay & EJ White (eds) *Relating Worlds of Racism: Dehumanisation, Belonging, and the Normativity of European Whiteness* (2019) 245, 246.

¹² J Dugard *Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine* (2018) 207.

¹³ To name a few: Erakat (note 6 above); P Freire & D Macedo ‘A dialogue: culture, language and race’ (1995) 65 *Harvard Educational Review* 377; G Wekker *White Innocence: Paradoxes of Colonialism and Race* (2016).

¹⁴ This special issue is available at: <https://www.tandfonline.com/toc/rjhr20/34/3>. See also S Grovogui *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (1996); N Shalhoub-Kevorkian ‘Human suffering in colonial contexts: reflections from Palestine’ (2014) 4 *Settler Colonial Studies* 277; and J Reynolds *Empire, Emergency and International Law* (2017).

¹⁵ H Wolpe ‘Capitalism and cheap labour-power in South Africa: from segregation to apartheid’ 1 *Economy and Society* 425; D Posel *The Making of Apartheid, 1948-1961: Conflict and Compromise* (1991); L Farsakh *Palestinian Labour Migration to Israel: Labour, Land and Occupation* (2005); A Kadri and M Macmillen ‘The political economy of Israel’s demand for Palestinian labour’ 19 *Third World Quarterly* 297.

¹⁶ L Ntsebeza ‘Acceptance speech on receiving an honorary doctorate at Leiden University’ (2020) <<https://www.universiteitleiden.nl/binaries/content/assets/algemeen/plechtigheden/dies-2020/dies-acceptance-speech-honorary-doctorate-ntsebeza-2020.pdf>>

For the readers of our journal, most of whom will recognise the role and relevance of (comparative) law in context, this book makes a highly valuable contribution to understanding the role of law in framing, sustaining and ultimately challenging apartheid, both in the historical context of South Africa and Namibia – notwithstanding the social, economic, political and cultural legacies that persist – and in the contemporary manifestations of legal apartheid regarding Israel’s domination of Palestinians.

In sum, this volume provides readers with a unique opportunity to better understand apartheid from the perspective of an insider. Dugard’s book is both a compelling and highly authoritative account of the contested uses of law, both in establishing and maintaining an apartheid regime through lawfare, and ultimately in *confronting* it by way of legal mobilisation.

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