A Discussion of the UN Report on "Israeli Practices Regarding the Palestinians and the Question of Apartheid"

Virginia Tilley

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In March 2017, the UN Economic and Social Commission on West Asia (ESCWA) released a report—Israeli Practices Regarding the Palestinian People and the Question of Apartheid, hereafter "the Report"—coauthored by Richard Falk and myself, which found that Israel's practices toward the Palestinian people fit international legal definitions of an apartheid regime. The Report drew a firestorm of controversy, as might be expected, but its implications for the conflict have actually remained largely unexplored, in that we did not really address the "so what" question pertinent to all social science findings. In the Report's conclusion, we detailed the legal obligations specified in relevant international legal instruments, which establish that, upon confirming a case of apartheid, all UN member states must act to end and punish this crime against humanity. Otherwise we withheld comment, partly because we believed that further implications were best debated by the protagonists. We were also keenly aware that our findings were still only the work of two independent scholars and required confirmation by the International Criminal Court or the International Court of Justice before the Report's implications are explored seriously.

The "so what" question therefore requires some fleshing out. This must be a wider conversation but some initial thoughts can be identified here. Of course, any serious breach of human rights law is consequential in itself, the more so regarding apartheid as a crime against humanity, but in this case what does the inflammatory "a-word" signify? Does it imply that diplomatic approaches to the conflict should change? Or does it amount only to differently labelling the same practices that Israel has used for decades? At one extreme, finding that Israel is practicing apartheid could signify nothing more than a new rhetorical stick with which to whack Israel's practices (as Israel's defenders charge). At the other extreme, the term could be taken to "delegitimize" (Israel's term) Israel's formation as a Jewish state. Yet neither of these might amount to anything more than polemics.

My own view—which overlaps with, but also differs from, that of my esteemed coauthor—is that identifying Israel as an "apartheid state" alters how the entire conflict should be understood, and by extension how that conflict could be resolved. Understanding it as a case of apartheid does not necessarily prescribe a one-state rather than a two-state solution. But by identifying the true legal character of Israel's policies to remain a Jewish state as an apartheid regime —at least, as Israel has pursued that mission so far—casts a two-state solution that sustains Jewish statehood as actually sustaining that regime.

In political science, the importance of defining a conflict to guiding its resolution is well recognized. It has been described by some authors as a meta-conflict (meaning the "conflict about the conflict)." The Israeli-Palestinian conflict is already infamous for remaining paralyzed in a meta-conflict between the Palestinian view of it (settler-colonial

invasion) and the Zionist view ("return," "redemption" of the land). Not only the protagonists but scholars and other third parties, pulled by their predispositions to one model or the other, may find the entire debate entangled by this definitional clash. Yet moving to see Israel's resulting system of governance as a form of apartheid represents a paradigmatic change for both views: that is, a paradigm shift in the sense drawn from work by Thomas Kuhn. In his description, such a shift is an incremental process in which established theory confronts increasingly stark anomalies, forcing its adherents (with much hesitation and resistance) slowly to abandon a flawed model for one that better explains what is happening on the ground. For many people, understanding Israel-Palestine as a case of apartheid is likely to be a particularly painful shift as the implications become clear.

In these summary remarks, I share my preliminary thoughts on the implications of this paradigm shift to an apartheid model.

The Legitimacy of Jewish Statehood

First, and perhaps most obviously, finding that Israel is structured as an apartheid regime impugns the legitimacy of Jewish statehood (for this reason, it has triggered especially urgent denials by Israel's government and hasbara networks). Because definitions of apartheid in international law specify that practices must serve the purpose of racial domination in order to constitute the crime of apartheid, our study first had to determine that Israel's identity as a "Jewish state" is no mere ideological stance but is fundamental to the state's juridical design as well as its domestic and foreign policies. Evidence readily confirmed this. "Racial" domination is codified in several of Israel's Basic Laws; it is practiced through Jewish-national institutions that administer the state's resources and occupied territory in ways that favor Jews; and it is defended by Israel's advocates as essential to the survival and well-being of the Jewish people. That Israel is self-defined as a Jewish state, and remains committed to being one, is indeed the least controversial aspect of the apartheid question.

Still, Israel's advocates have strongly denied that Israeli laws and policies are racially discriminatory or even unusual. The core defense of policies such as differential rights to citizenship and special privileges assigned only to Jews is that Israel's formulation as a Jewish state is consistent with practices in all states, reflecting the right of all peoples to self-determination. In this view, Israel is not different from Germany or France, which (Israel's defenders argue) similarly express the self-determination of the "French" or "German" peoples. Criticizing Israel for doing the same therefore constitutes exceptional and prejudicial treatment, strongly suggesting (in the apparent absence of any other reason) an anti-Semitic motive.

Until recently, I had assumed this argument to be disingenuous on Israel's part. Israel is clearly distinguished from countries such as France and Germany in differentiating legally between Israeli citizenship and Jewish nationality, a

distinction that these other states do not make. As discussed in much greater detail in the Report and in the preceding work, Beyond Occupation, according to Israel's Basic Law as well as popular Jewish national ideology, Israel is the state of the Jewish people. It is not the state of any "Israeli" people, an identity that has no standing in Israeli law. The state's function in expressing Jewish self-determination is zealously guarded by laws including Basic Law: Knesset, which prohibits any political party from campaigning on a platform that negates "the existence of the State of Israel as a Jewish and democratic state." By contrast, states such as France and Germany grant full privileges and equal juridical standing to all citizens as full and equal members of the "French" nation. Certainly neither state conceives of a separate national identity for portions of its citizens. This difference being so clear, Israel's claiming otherwise was transparently incorrect as well as unpersuasive.

My assumption of disingenuousness now appears to have been mistaken. In recent years, Israel has lobbied successfully for the European Union, United Kingdom, and United States to include in their definitions of anti-Semitism, "Applying double standards by requiring of [Israel] behavior not expected or demanded of any other democratic nation." Elevating this claim of prejudicial treatment from polemics to codified law suggests that Israeli jurists actually believe it to be legally defensible. In other words, Israeli jurists and politicians seem to have succumbed to their own (always specious) argument.

Aside from the problem of fact noted above (it is simply not true), the trouble for Israel is that insisting on being treated like all other states actually opens Israel to the charges of human rights abuses that its defenders seek to obviate. These prominently include laws prohibiting the discriminatory practices that Israel must pursue in order to remain a Jewish state. All states are prohibited from practicing racial discrimination, whether "racial" is understood as "race, colour, descent, or national or ethnic origin" just as all states are prohibited from practicing apartheid, which is a crime against humanity. The only way Israel could arguably be exempt from these jus cogens laws is by claiming some special status deriving from unique experiences, such as the Holocaust or the longer history of vicious anti-Semitism from which Jews suffered mostly in Europe, which exempt Israel from human rights standards otherwise held to be universal.

It is precisely by not treating Israel with double standards that a charge of apartheid becomes applicable to Israel. Whether or not a state is a signatory to the Apartheid Convention (Israel is not), it is bound to comply with the prohibition of apartheid because that prohibition has obtained the status of common law. The right to self-determination does not extend to violating the basic human rights of others. Given its history, Israel might develop legal protections that allow Israel to serve as a safe haven for Jews facing discrimination elsewhere, but it cannot lawfully develop laws that

systematically privilege Jews over other racial groups within the state.

And here we arrive at a "so what" discovery: finding that Israel's composition as a "Jewish state" is unlawful and constitutes an apartheid regime delegitimizes the two-state solution. As discussed earlier, an authoritative finding of the crime of apartheid signifies that the offending state, and all states, must act to end that crime. This obligation cannot be met by sustaining an apartheid regime within some reduced geographic zone where the impact on individuals from subordinated groups is the same, just numerically smaller.

This finding leads us to a political conclusion that impacts the current search for a resolution of the Palestinian-Israeli conflict on the basis of a two-state solution. Since the only rationale for two states in the cramped territory of Mandate Palestine is to preserve apartheid in one of them (that is, Israel as Jewish state, in its present institutional configuration as a system of domination over Palestinians), a two-state solution makes no sense. As in the case of the struggle against apartheid in South Africa, allowing Jewish supremacy in some smaller portion of historical Palestine does not make separation a just solution for the conflict.

Virginia Tilley is a Professor of Political Science at Southern Illinois University-Carbondale. This article formed the basis of her presentation at the ACW event on June 6, 2017 titled "What Next for Palestine and the Palestinians?"