

**1st Global Conference on Dimensions, Repercussions of Israeli Apartheid  
and the Means to Combat it**

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**Update to the ESCWA Report of 15 March 2017  
“Legal Inquiry into Israel as an Apartheid State”**

**Introduction:**

**Updating the ESCWA Report, ‘Israeli  
Practices Toward the Palestinian People and the Question of Apartheid,’**

Richard Falk & Virginia Tilley

**Part I:**

**The Necessary Shift: From Ending the Occupation to Ending Apartheid**

Richard Falk

**Part II:**

**Reimagining Palestine:  
Implications of the ESCWA Report for a Paradigm Shift**

Virginia Tilley

**Introduction:**

**Updating the ESCWA Report:  
Israeli Practices Toward the Palestinian People and the Question of Apartheid,’**

In presenting this ‘update’ to our ESCWA Report on Israeli apartheid, we wish first to stress again the original motivations for undertaking it. When it was released on 15 March 2017, mainstream advocacy of a just peace in Palestine was still emphasizing a two-state solution, suggested by the Oslo Framework, to be achieved through diplomatic agreement between the parties. The UN Social and Economic Commission of West Asia (ESCWA) was concerned that such negotiations would be fruitless, and a stable peace impossible, if Israel was committed to apartheid policies in order to achieve its political aims. Most considerations of apartheid in Palestine had been limited to Israeli practices in the occupied Palestinian territories (OPT), especially the dual legal regime in the West Bank that flagrantly discriminated between Israeli settlers and Palestinian residents and refugees. But if Israel had constituted its entire

governance regime to impose a system of apartheid on the Palestinian people *as a whole*, then ending the occupation—the core of the two-state approach—would not bring peace. At best it would bring a temporary ceasefire, which, when broken, would produce only new cycles of violence and fresh rounds of bitter recriminations. ESCWA was therefore concerned to know whether Israel was practicing apartheid regarding the Palestinian people *as a whole*.

In undertaking this commission, we fully shared ESCWA's concerns. Yet to investigate whether apartheid structures also existed in relation to the Palestinian minority in Israel and Palestinian refugees in neighboring countries, we faced, as researchers, both a *conceptual* and a *policy* challenge. We needed a framework for analysis and we needed to ensure that a finding of apartheid beyond the conditions of occupation was factually and legally sound: that is, amply supported by empirical evidence and legal reasoning. In this effort, we enjoyed complete independence: ESCWA exerted no influence on our process of researching, writing and revising the Report. On the basis of our findings, it was our firm conclusion that Israel was guilty of perpetrating the international crime of apartheid, not regarding Palestinians living under occupation but all Palestinians, including those in refugee camps and those living as a minority in Israel.

We accordingly concluded that a preliminary requirement for any genuine peace process is for Israel to make a credible commitment to end apartheid. Although conditions have changed since 2017 in some respects, we believe this finding is more relevant than ever. For this reason, we welcome this conference for bringing us together as the first step in fashioning and disseminating a new international narrative on peace with justice for both Palestinians and Israelis.

### The Report's Reception at the United Nations

We also welcome this conference for amending the troubled international silence that followed the Report's release on 15 March 2017. We had hoped for a serious discussion of whether we had made the scholarly case that Israel's policies and practices with regard to the Palestinian people were appropriately identified with the crime of apartheid. Instead, almost immediately the Report was ferociously attacked at the United Nations and we were vilified as its authors. The main protagonists of the attacking forces, US Ambassador to the United Nations Nikki Haley and Israeli Ambassador to the United Nations Dani Danon, aimed their fire at the UN for associating itself with what it characterized as fanatical and hateful accusations deliberately seeking to discredit 'the only democracy in the Middle East.' This inflammatory pushback, not only against the Report but the institutions of the UN itself, was coupled with an imperious demand that the UN Secretary General repudiate and withdraw the Report, effectively instructing this elected official, the world's highest civil servant, to place this independent research study on some UN version of the once infamous 'papal index.'

To our regret, the recently elected Secretary General, Antonio Guterres, complied with this demand, at least on the surface and to satisfy outward appearances. The proper course would have been the disclaimer that the views and positions adopted in the Report were those of the

authors and did not necessarily reflect the outlook of the United Nations and that it was up to readers to accept or reject its assessments. Such a stance would have acknowledged the concerns of objecting UN Member States, while upholding freedom of expression and the independence of the United Nations when it came to information gathering and legal analysis on controversial questions bearing on human rights and matters of peace and security. Instead, the Secretary General ordered the Report removed from the ESCWA website, and through a spokesperson affirmed that its contents did not reflect his personal views, although his office made not the slightest prior effort to assess the quality and assessments of the Report and cited no substantive flaws. Thus the UN at its highest level reinforced the view that *law*, even when pertaining a matter of fundamental human rights, is subordinate to *politics*, and in this instance to *geopolitics*.

Yet we were heartened, while at the same time saddened, that Rima Khalaf, then director of ESCWA, refused to carry out the unseemly command issued by Gutteres. Rather than be dismissed from her post, she chose to submit a memorable letter setting forth her principled reasons for resigning. [See Khalaf letter] As far as we are aware, other countries—including including those whose governments are sympathetic with the Palestinian national struggle and favor a UN that is not the servant of geopolitics—unfortunately remained silent during the debate. We would observe that, rather than insisting that the Report was biased, Ambassador Haley should have denounced this silence of Member States during its debate, which was indeed far worthier of a tongue-lashing.

In fact, the Report had included a disclaimer that should have neutralized this criticism: first, that it never purported to be an official UN document and should not be taken to reflect the views of the Organization or even ESCWA. Those who mounted their campaign against it entirely ignored this disclaimer, as they ignored the substance of our study. It seemed that the mere word 'apartheid' alone was enough to inflame supporters of Israel and give rise to wildly inappropriate claims that even an empirically documented accusation of apartheid should be dismissed without consideration as an anti-Semitic slur.

A second disclaimer was that the Report is only an academic study, unable to make any claim to be *legally authoritative*. It could claim in good faith to be an honest and diligent effort to compare the evidence of Israeli policies and practices with international criminal law regarding the apartheid allegations. It could also point out the need for more authoritative assessment by duly constituted international institutions. For example, the UN General Assembly might request the International Court of Justice for an Advisory Opinion or recommend that the International Criminal Court (ICC) launch an investigation as to whether a prosecution should be initiated (under the authority of Article 7h of the Statute of the ICC, which identifies apartheid as a crime against humanity). Short of such steps, the Report was only an advisory document, suggesting the need for them.

The only point of substantive criticism was one we found entirely unsound: the incorrect insistence that apartheid as attributed to Israel must conform to practices in South Africa's apartheid regime. As the Report pointed out, the consensus expert view is that the crime of

apartheid is defined by the Convention on the Suppression and Punishment of the Crime of Apartheid, which was drafted explicitly to provide a universal instrument for identifying apartheid wherever it may arise. The South African racial regime did provide the descriptive word *apartheid*, but the essence of this crime is established in the Apartheid Convention: an oppressive system of governance designed to achieve and maintain domination of one racial group by another. Another challenge was that the Palestinian and Jewish peoples are not 'races' and so could not be engaged in a crime involving 'racial' domination. Our reading of international human rights law convinced us that definitions of apartheid in the Apartheid Convention and the Rome Statute embrace cases where the groups were defined by 'ethnic or national origin' and so fit the definition of 'race' for purposes of the Convention. Still, the South African case was instructive in one way. As a comparative case, it highlighted the *prior* need to dismantle apartheid in order to achieve a just peace based on the fully realized equality of all people in dignity and rights. We had hoped that the United Nations would debate and act on this fundamental question. Its failure to do so has, sadly, confirmed for us that the UN remains too weak to resist cynical geopolitical manipulations.

This failure of the UN has helped us understand that the only effective response to concerns about Israeli apartheid will result from civil society activism and supportive initiatives by governments that take UN Charter norms seriously. The Charter provides an authoritative guide to action. It deserves to be implemented in ways that govern state behavior and not simply provide a few dominant powers with the institutional leverage through which to play geopolitical power games.

### The Role of Civil Society

Despite the firestorm at the UN that diverted attention from the Report's substantive findings and recommendations, all was not lost from our standpoint. For one thing, as far as we know, the Report has never been formally repudiated by ESCWA or indeed by any UN organ, beyond the symbolic step its removal from the ESCWA website. For another, although it was removed from the ESCWA website, the Report was requested more often than any prior ESCWA publication in the few days it was available. It continues to be widely accessed from online sites and has been translated into Arabic, French and Italian. It is indeed ironic that, if it had not been for this highly publicized and politicized attack, the Report would probably have received only a fraction of this attention and suffered the fate of many important UN reports, languishing unread on library shelves. We can therefore be thankful to Nikki Haley for her unpaid services as our publicity agent, although it is doubtful that we would ever again solicit such help. We also note the reported unanimous acceptance of the Report's recommendations by the ESCWA member states.

The controversy around the Report also generated an ongoing debate outside the UN about whether or not 'apartheid' was an appropriate legal term, not just for Palestinians living under occupation since 1967 but for Palestinians as a whole. This represents an important step toward clarifying the true nature of the Palestine problem. We believe that no prior peace

diplomacy can be described as 'genuine' precisely because it avoided these difficult questions of the relevance of the structure of oppression by which Israel has since its origin subordinated the Palestinian people *as a whole*, that is extending oppression based on race beyond the occupation to the city of Jerusalem, the refugee camps and exile communities, and to the 20% minority living in Israel. Our contention is that this structural issue must be resolved *before* peace can ever be established between these two peoples.

Our main conclusion, with respect to reactions to our report and developments since March 2017, is that the allegations with respect to apartheid have been confirmed and in some respects strengthened. At intergovernmental levels and at the UN, the anachronistic two-state consensus continues to hold sway. In this sense, civil society is ahead of global diplomacy. There is much work to be done to ensure that Israeli policies and practices are perceived through the prism of apartheid and enable a better-grounded process toward a truly just peace. We believe this conference is an excellent step in this direction.

The two essays that follow develop different perspectives on the implications of the ESCWA conclusion that Israel has established an apartheid state to sustain control over the Palestinian people while seeking to complete the Zionist Project of recovering 'the promised land' of Israel according to biblical entitlement and effective control rather than by a political compromise that at this stage only be achieved by a single unified Palestine with equal rights for all. To explain the reasoning behind such a conclusion, Falk's essay explains the failures of the two-state, partition approach by reference to Zionist aspirations and obstacles posed by apartheid structures. It refrains from drawing inferences as to the proper way forward beyond its rejection of the two-state approach as superseded by facts on the ground, although it argues for a shift of focus from intergovernmental diplomacy to civil society anti-apartheid activism. Tilley's essay reaches similar conclusions, considering how the Oslo process and its implicit aim of a two-state solution was stymied by an ideology of racial domination that inspires Israel to annex the West Bank, yet was never properly confronted by Oslo diplomacy. Her paper argues that only a unified secular state that does not privilege any ethnicity can produce a sustainable peace and that adopting such an approach is alone capable of breaking the diplomatic impasse.

## PART I:

## The Necessary Shift: From Ending the Occupation to Ending Apartheid

Richard Falk

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### Preliminary Note

This paper seeks to draw conclusions on the basis of the ESCWA Report's central finding that the policies and practices used by Israel to exercise control over the Palestinian people constitute apartheid under international criminal law. Its purpose is to show why perceiving the conflict through the prism of occupation rather than apartheid blocks all efforts to achieve a sustainable and just peace while giving Israel time needed to turn the occupation into a full-fledged annexation. The fierce opposition to acknowledging Israeli apartheid has been effective at the intergovernmental level. The effectiveness of this opposition has shifted the focus of resistance to Israeli moves toward an imposed solution from traditional diplomacy to civil society activism, as typified by the BDS Campaign. This shift has led Israel and its allies, in turn, to mobilize forces around the world to discredit BDS by contending that it is an unacceptable anti-Semitic initiative, supposedly a prime instance of 'new anti-Semitism.' These and other developments have created a new set of conditions since the March 2017 issuance of the ESCWA Report pertaining to the search for a Palestine/Israel peace with justice that is responsive to the rights of both Palestinians and Jews. My effort is to consider the present situation from the perspective of reinforcing a critical reliance on the apartheid paradigm in academic, policy, and activist settings with some attention to intervening developments between 2017 and the present. In my view this is the only way forward.

### Points of Departure

The ESCWA Report reaches two essential conclusions: first, that Israel is guilty of the crime of apartheid as a result of having deliberately established a distinctive structure of apartheid that is imposed on the Palestinian people *as a whole*; secondly, that the preferred, and likely necessary and principal path to a sustainable peace for both Israelis and Palestinians involves ending apartheid rather than merely ending the occupation of the West Bank, East Jerusalem, and the Gaza Strip.<sup>i</sup> The focus adopted here will be on the second of these conclusions, which will seek to explain why an anti-apartheid discourse is to be greatly preferred to an anti-occupation discourse in identifying the conditions that must be altered if the rights of both peoples are to be eventually accommodated.<sup>ii</sup> The main fallacy of the occupation approach is its lack of responsiveness to these conditions by its unstated assumption that the conflict is predominantly about sharing the territory of historic Palestine (as specified by either the mandate or Ottoman borders) rather than about the collective wellbeing and dignity of persons

destined to live together on the basis of equality, and in an equitable and sustainable form of their own free choosing.<sup>iii</sup>

The most significant political implication of the ESCWA Report finding that according to international law, Israel is guilty of imposing and maintaining a criminal structure of apartheid on the Palestinian people, is its challenge to mainstream analysis of the conflict and how to end it.<sup>iv</sup> Over the years many commentators, including prominent Israelis, have warned that unless Palestinians are somehow removed from Israel or a separate Palestinian state is established, there is a serious *danger* that Israel will become an apartheid state.<sup>v</sup> In contrast, the ESCWA Report concludes that the Palestinian people have long been and are now being systematically victimized by apartheid structures that began to be relied upon almost from day Israel declared its political independence. If such a contention is accepted as valid, then according to international criminal law Israel development was organically associated with commission of a crime against humanity.<sup>vi</sup>

With this perspective in mind, it becomes evident that the occupation discourse is unresponsive and misleading with respect to the deepest obstacles to peace, as well as having been detrimental for years to the Palestinians if measured by such human rights abuses as house demolitions, property loss, personal insecurity, and settlement construction.<sup>vii</sup> This assertion does not deny that Israeli political behavior and Zionist ideology over the decades also discloses a series of acknowledged and unacknowledged territorial ambitions that are an implicit repudiation of the international consensus, including that of the Arab Initiative of 2002, the positions adopted by the Palestinian Authority (PA) and the Palestinian Liberation Organization (PLO), and the outcome of the struggle still being advocated by some centrist Israeli politicians, including the former prime minister, Ehud Barak.<sup>viii</sup> It is often hard to tell whether it is naïveté or bad faith that holds on to this two-state image of a solution despite the hard and soft facts that contradict its viability?

The contrary argument being put forward here is that even if these territorial issues were to be overcome, which is almost impossible to envisage at this point due to the cumulative impact of Israeli settlements and related encroachments on the territorial domain set aside for a Palestinian state, as well as Israel's diplomatic stance and Zionist dominant consensus, it would still not provide a sufficient foundation to underpin a genuine peace process that encompassed the circumstances of the Palestinians internationally displaced and internally victimized over the decades by the establishment of the Jewish state of Israel. Its normative unacceptability is always evident by the degree to which genuine advocates of two states always insist that there be no right of return to Israel given to Palestinian refugees or exiles.

Although the South African apartheid is not in any way a template for Israeli apartheid, there is one extremely relevant insight to be derived from the South African experience of making the transition to constitutional democracy. The prospects for racial peace in South Africa only became viable and credible when Nelson Mandela, some years after his release from prison was able to persuade South African political leaders to accept the political demands of the anti-apartheid movement to dismantle the apartheid regime based on racial discrimination and

subjugation, although rationalized as a system of ‘separate development’ sensitive to racial differences.<sup>ix</sup> Similarly, in relation to the situation bearing on establishing peace between Israelis and Palestinians, a precondition for meaningful diplomatic negotiations would be a clear signal of an Israeli readiness to negotiate the abandonment of the present apartheid structure, and *on that basis*, to reach a comprehensive agreement of mutual accommodation based on the true equality of the parties.<sup>x</sup> Unlike South Africa, Israel has never officially acknowledged its adoption of an apartheid structure of control, but on the contrary offers a variety of security rationalizations along with ideological insistence on regarding itself as ‘a Jewish state.’ Its distinctive patterns of justification for statehood proceed primarily by way of biblical entitlement, but also through the outcome of armed struggle and effective control. In addition, until very recently, Israel has claimed to govern in a manner that was entirely non-discriminatory toward the Palestinians and other ethnicities, proclaiming itself the only democratic state in the Middle East. Israel argued that it was not different from other ethnic majority states that accorded certain benefits to Jews. Although the structures of control in both South Africa and Israel are premised on racial domination, the accompanying ideologies and demographic conditions were quite different.<sup>xi</sup>

One final preliminary observation, so long as Israeli apartheid exists, an end to the occupation cannot occur by physically withdrawing security forces from currently occupied territory. This conclusion can be better appreciated by recalling the implementation of the Sharon disengagement plan for Gaza operationalized in 2005, which Israel claimed ever since as *ending* the occupation of Gaza, and as a result, freeing Israel from any obligations as the occupying power under international law.<sup>xii</sup> Despite the physical withdrawal of Israel military and political personnel, the dismantling of Israeli settlements in Gaza, the removal of Israeli settlers, and the formal Israeli insistence that Gaza was no longer occupied, and hence no longer subject to international humanitarian law, the realities, legalities, and UN assessment of the situation in Gaza suggest a continuation of occupation understood as ‘effective control.’ This is not because the territory remains occupied in a physical sense, but because as part of the Palestinian daily reality experienced by the Palestinian people, Gaza remains subject to the structures of Israeli control, with only a change in the modalities of police and military deployment by Israeli forces. That is, instead of an internal Israeli security presence, the borders, airspace, and sea access were placed under strict Israeli control and since 2007 a blockade was imposed. This renovated form of occupation was reinforced by periodic massive attacks undertaken at the discretion of Israel, bringing widespread destruction and trauma to the entrapped civilian population of Gaza. From the perspective of international law, the UN, and a consensus of governments, Gaza remains ‘occupied,’ and actually more oppressively than it was before the ‘disengagement’ plan was put into effect by unilateral fiat, and for the sake of Israeli self-interest—lessening the economic and political burdens of direct physical control that included protection of Israeli unlawful settlers but also preparing the desired Israeli future that did not envision the territorial incorporation of Gaza by way of annexation. Israel hoped to remove Gaza from its sovereign control for demographic reasons (that is, maintaining a clear Jewish majority in an expanded Israeli polity), and in recognition that the Gaza Strip was an impoverished area that was not part of the promised land in the manner of the West Bank and Jerusalem. The discovery of natural gas reserves off the Gaza coast did give Israel an economic incentive to



retain some kind of control over developments, and could somewhat alter Israeli one-state calculations.

A simple thought experiment can further clarify this central contention: Even if Israel entirely withdrew from the West Bank to the 1967 borders and removed all settlers and settlements, the West Bank, as a geographic component of the overall circumstances of the Palestinian people, would remain subject to the realities of 'occupation' because of the annexed status of Jerusalem, the refugees and exiles, and the discriminated Palestinian minority in Israel.<sup>xiii</sup> In other words, even after any Israeli withdrawal from the West Bank, East Jerusalem, and Gaza, Israel would still be denying the basic rights of a large proportion of the Palestinian people so as to sustain the Zionist insistence that Israel is the state of the Jewish people. This observation holds without taking account of Israel's extravagant one-sided security demands, which almost certainly be as encroaching as turned out to be the case in the context of the withdrawal from Gaza.

In effect, Israel needs to relinquish present patterns of oppressive control by abandoning the politics of fragmentation and its related claims of a privileged unified status for Jews if conditions and expectations of equality between the two peoples are ever to be realized. Without this commitment to equality of the two peoples, including on matters of security, it is impossible to initiate a genuine peace process dedicated to a diplomacy of accommodation.<sup>xiv</sup> And if such circumstances persist, Israel would continue to depend on demographic fragmentation and oppressive control to achieve security in the face of Palestinian refusals to accept such a status quo, and thus engaged in a variety of forms of resistance.

The remainder of this paper will further analyze the mystifying persistence of the occupation discourse in light of its gross inadequacy as a basis for peaceful coexistence between Palestinians and Israelis. While rejecting the occupation approach, the paper sets forth the rationale for adopting the apartheid discourse as an improved way to approach the present stage of unresolved national struggle between the two dominant ethnicities.<sup>xv</sup> The main purpose of this inquiry is to demonstrate why the apartheid discourse is both more descriptively precise in relation to the existing situation and is a contribution to peaceful resolution, and quite the opposite of what is alleged by Israel and the United States, to wit, an unwarranted manifestation of UN hostility to Israel and the Jewish people.<sup>xvi</sup>

Such an analysis will admittedly not get very far unless it is sensitive to the history of the national struggles of these two peoples, including their relevant collective memories of victimization (especially, Holocaust and *nakba*) and to the varying geopolitical and changing normative factors that have by stages led to the present set of circumstances. Some degree of inter-temporal understanding and adjustment is required so as to appreciate that what seemed legitimate and wildly aspirational (given the tiny Jewish minority then living in Palestine) in 1917 when the Balfour Declaration was issued. This drastically changed by 1947. What occurred in the 1948 War redefined what kind of territorial allocation between Jews and Arabs would be accepted as reasonable by the international community as embodied in the UN. Of course, as stressed here, more difficult by far than the complexity of a territorial division of Palestine are

the humanitarian issues surrounding the respective rights of return granted Jews and Palestinians, particularly the denial of rights to Palestinians, displaced and dispossessed in 1948, and subsequently, and their descendants.<sup>xvii</sup> The unlimited right of diaspora Jews to return to Palestine also, in effect, allowed asymmetric ethnic standards applicable to immigration to alter the demographic balance and cultural/religious orientation of Palestine.

### The Occupation Discourse: British Mandate, Peel Commission, UN Partition Plan

For an appreciation of the context of the apartheid discourse, it is necessary to review briefly how the issues of peacemaking have been increasingly focused on and limited by ending the occupation. Such a perspective marginalizes several key Palestinian non-territorial grievances. It also allows the label of occupation to obscure Israeli de facto annexationist policies and related encroaching initiatives pursued by Israel in the West Bank and East Jerusalem since 1967. As a result, 'occupation' has become an increasingly deceptive misnomer even for those Palestinian territories occupied in 1967. I have come to believe that one major explanation of this wrong way of thinking about resolving the conflict arises from a failure to understand the nature of the form of Zionist thought that attained control of the Zionist Project, and the apparent tactical reluctance to be transparent about Zionist objectives so as to advance step by step to what was possible at a given time.

For more than 70 years there has been an international consensus to the effect that the only way to bring peace to Israelis and Palestinians is to take account of their antagonistic aspirations by dividing the two peoples into two distinct ethnically oriented polities, and apportioning the territory in the Ottoman period that became Palestine in the course of the colonial arrangements agreed upon at Versailles after World War I. It is easy to understand why this consensus proved diplomatically attractive, although its internal contours and boundaries remained vague and variously construed. For several decades it was widely believed that the two-state approach was the only solution that could be made potentially acceptable to both parties, and yet it has always contained a series of flaws that have been obscured from public view over the years by the Zionist management and manipulation of the dominant narrative of the conflict, what is sometimes referred to as 'discourse control,' or more argumentatively, *hasbara*. Although the two-state solution seemed widely endorsed at an inter-governmental level ever since 1967, including its embrace by pre-Trump American political leaders and liberal Zionists, its actual character was never clearly defined, nor did it ever have truly convincing support from Israeli leaders. There were many versions of a two-state approach, including some ideas that so limited Palestinian sovereignty by demanding permanent Palestinian demilitarization and exclusive Israeli border control as to make the idea non-negotiable.

Perhaps the primary flaw of two-statism relates to the dominant Zionist vision that is animated by historical, ideological, religious, ethnic, and nationalist claims that are radically at odds with prevalent interpretations of the territorial contours of the two-state consensus<sup>xviii</sup>. The secondary flaw is that the power disparities from the outset between the two sides has allowed Israel to achieve the partial fulfillment of its grandiose territorial and security ambitions by a

series of unilateral initiatives that have the side effect of proportionately diminishing Palestinian prospects. In other words, the failure over the decades to actualize the partition consensus along demographically equitable lines has produced a situations beneficial to Israel, detrimental to Palestine.<sup>xix</sup>

The third serious flaw is the degree to which even the formal representatives of the Palestinian people, especially Yasir Arafat, accepted the two-state approach to negotiating a solution, although not with the clear support of the Palestinian people. It is not evident whether this acceptance of a partition solution was reflective of the ambition by Arafat and others to be realistic as to what was obtainable or was more reflective of their ambitions to have a state of their own, no matter how lacking in sovereignty equality with Israel. This low threshold of expectations on the Palestinian side was complemented by Israeli high expectations as believing that the Palestinian state should be contained and controllable, and quite possibly never come into being if opportunities emerged to enable Israel to incorporate the entire 'promised land,' that is, the West Bank. It was a sign of Palestinian weakness, and possibly diplomatic incompetence, to fail to insist that the territorial status quo before the 1967 War be substantially restored, including either the internationalization or joint governance of Jerusalem.<sup>xx</sup> The adverse consequences for the Palestinian people arising from this willingness of the Palestinian Authority and PLO to compromise about the implementation of territorial withdrawal were greatly aggravated by the Palestinian seeming willingness to minimize their demands with respect to non-territorial Palestinian grievances, including refugees, security arrangements, and discriminatory laws affecting the Palestinian minority living in Israel.<sup>xxi</sup> It is somewhat ironic that the available evidence seems to suggest that despite the apparent willingness of the PLO leadership to settle for a paltry version of an independent state, that it was Israel that created conditions via annexations and settlements that made even versions of the two-state solution weighted in Israel's favor increasingly non-negotiable. I suspect that scholarly research will validate this view that prevailing Israeli and Zionist leadership never really envisioned a full-fledged Palestinian state coming into being while it was the Palestinian leadership that was quite prepared to give up its objections to the partition of historic Palestine. In effect, it was the Israelis who pretended to accept the partition vision of the future while in reality it was the Palestinian political leadership that basically hinged their future to some kind of partition agreement that provided a semblance of independent governance and a modest territorial base.

This dynamic reflects the complex interplay over time of history, power, and discourse. With regard to history the narrative of post-Ottoman Palestine is entwined with British colonial ambitions, which were initially and partly thwarted after World War I by an American-led push for ethnic self-determination as an alternative sequel to Ottoman governance. But the European colonial powers while not strong enough to acquire formal colonies in the Middle East still retained enough political leverage to gain control of the Arab elites and communities previously under Ottoman control, including Palestine.<sup>xxii</sup> The compromise reached in the West, endorsed by the League of Nations, was the Mandates System in which a mandatory power administered a territory on behalf of the organized international community, but did so with a vague and unenforceable obligation to prepare a supposedly dependent people for eventual

political independence. The British had earlier made its 1917 official pledge of support to the Zionist Movement in the form of the Balfour Declaration stating that Britain would look with favor on the establishment of a Jewish homeland in Palestine. Although the Balfour Declaration was an arrogant colonial gesture it was a rather odd expression of the colonial mentality. At the same time, its extraterritorial commitment to help a European political project reach its goals in a non-Western society was not incompatible with existing international law or the moral compass guiding the behavior of the European colonial powers a century ago. Colonial prerogatives were increasingly being challenged in the West by Wilsonian and Leninist approaches to self-determination after World War I.<sup>xxiii</sup> These developments were reinforced in the non-West by various emergent nationalisms dedicated to bringing colonial rule to an end.<sup>xxiv</sup> In fact, the mention in the Balfour Declaration of protecting the rights and upholding the security of non-Jewish communities in Palestine, although seemingly absurd in retrospect, did lend the Balfour Declaration an appearance of a responsible and an even enlightened Western effort to balance opposing interests of Jews and Arabs, although the whole Balfour initiative was tinged with a patronizing racism so characteristic of the British approach to the non-white peoples living under its colonial dominion.<sup>xxv</sup>

What ensued during the mandate period followed traditional British colonial divide and rule policy, which at the outset strongly, although unevenly, encouraged Jewish immigration with the idea of reshaping the demographic balance within Palestine, while disingenuously reassuring the Arabs that their indigenous rights would not be compromised.<sup>xxvi</sup> The Zionist movement resorted to all sorts of opportunistic tactics to enlarge the Jewish presence in Palestine, a dynamic greatly facilitated by the rise of Nazism, culminating in the Holocaust. In the course of this process the state building agenda was increasingly pursued and acknowledged by Zionist activism, including recourse to anti-British terrorism and even anti-colonial rhetoric being politically expressed by making Palestine ungovernable by the British.<sup>xxvii</sup> This Zionist shift from connecting their basic claim to a rightful presence in Palestine with the Balfour Declaration, which meant a reliance on the governmental backing of the British Empire, to the outright quest for a sovereign Jewish state resulted in a fundamental ideological shift in tactics and political identity. It led the Zionist movement to pursue these goals diplomatically by persuasive means while at the same time launching one of the most effective terrorist campaigns designed to dislodge a foreign occupier so as to fulfill settler goals.<sup>xxviii</sup> In addition to the objective of inducing a British exit from Palestine it was also necessary to pursue the related underlying goal of a Jewish state organized along liberal democratic lines that could not be realized without uprooting and permanently dispossessing as much of the native majority population as possible.<sup>xxix</sup> Put bluntly, to be reliably Jewish and yet democratic meant that Jews could not risk becoming a minority in whatever state was established, and given differential fertility rates, this also required a substantial Jewish majority that would assure Jewish political control for the indefinite future.

In response to this radical nationalist challenge mounted by Zionism Britain responded in their typical manner, appointing royal commissions and issuing white papers. The interpretation of shifting British intentions and complex controversies is part of the back story to the emergence of the partition idea, which did not always hold sway among the administrators of the mandate.

A British commission headed by Lord Earl Peel, appointed to sort out the problems of Palestine being encountered in the course of governing distant and divided peoples of mutually hostile disposition in circumstances that were assuming the character of armed resistance. It was in the report of the royal commission in 1937 that the usual British colonial exit strategy was put forward as a recommendation to the international community in the form of partition, a solution earlier implemented with negative results in Ireland and subsequently, in India and elsewhere with overwhelmingly negative results.<sup>xxx</sup> Ever since the Peel Commission report, there was a widely shared and geopolitically dominant view that the only long-term solution for Palestine with any hope of success was to allow the Zionist movement to establish a Jewish state in part of Palestine, while giving the Palestinians a second state on a portion of the territory, and ideally, somehow addressing the future of Jerusalem as if it could be treated as an internationalized enclave, distinct and separate from the political arrangements of the two peoples.<sup>xxxi</sup>

Without dwelling on the details of this proposal, it rested on the proposition that the two peoples could be separated in an acceptable way, overlooking three inconvenient obstacles that particularly produced negative effects for the Palestinian population: (1) the governments of independent Arab states in the Middle East were opposed to any partition of Palestine that removed any part of the territory from Arab sovereign control as a sequel to the administration of the territory by Britain, which had served as the mandatory power since the 1923, and were unconditionally opposed to any termination of Muslim administration of the city of Jerusalem; (2) the awkward fact, that at the end of World War II the non-Jewish population of Palestine, despite accelerated Jewish immigration, still amounted to a substantial majority in the territory allocated to Israel for its state. It was this demographic reality that set the stage for the coercive dispossession of at least an estimated 700,000 Palestinians in the course of the 1948 War, regarded by the Zionist leadership at the time as an absolute precondition for combining the political, ethnic, and religious goals of establishing a Jewish secular state with the legitimating ideological goal of becoming an established constitutional democracy.<sup>xxxii</sup> Several Israeli authors have expressed regrets about the resulting tragedy endured by the Palestinians while at the same time some have contended that such a humanly cruel process was historically justifiable, even *indispensable*, if the Zionist project was to be successfully realized in the face of anticipated resistance.<sup>xxxiii</sup> Even if these regrets were to a degree genuine, which has been contested, this kind of rationalization amorally subordinates, and essentially disregards Palestinians rights and wellbeing. The justifications for legitimating the establishment of Israel in view of this ethnic cleansing of a substantial fraction of the Palestinian people reflected a vicious expression of Western perceptions of entitlement that could be appropriately identified as 'late Orientalism.'<sup>xxxiv</sup> Of course, with the rise of Hitler the sanctuary side of the Zionist Project exerted a powerful ethical impact on world opinion, and probably accounted for the rapid and uncritical acceptance of Israel as a member of the United Nations soon after its proclamation of statehood.

(3) Although the norm of self-determination had not yet been definitively accepted as a right of peoples under international law, it was certainly part of the moral and political atmosphere after 1945. As such, an internationally prescribed solution for Palestine that manifestly ignored

the wishes of the majority resident population for a unified polity, and proceeded against the consensus of regional governments, seemed to represent an anachronistic imposition of Western hegemonic priorities in the form of settler colonialism that was actualized with the blessings of public opinion in the West, UN authority, and the Soviet and American centers of geopolitical influence. Despite these considerations the acceptance of Israel into the community of sovereign states from the outset lacked the most important dimension of legitimacy in the post-colonial era, the consent of the people living within the boundaries of the country.<sup>xxxv</sup> It also seemed to go against the grain of emergent international human rights law, which was premised on the equality of individuals regardless of ethnic and religious identity. This was always difficult to reconcile with the overriding Zionist commitment to establish a Jewish state, however much it rested on a constitutional foundation, that was being constituted in a distinct society long inhabited by a substantial non-Jewish majority.<sup>xxxvi</sup>

Of course, it is further notable that the allocation of territories proposed in General Assembly Resolution 181 to implement partition departed significantly from the provisional ceasefire and armistice borders agreed upon in 1948. Rather than the pre-war 55% of Palestine given to the Zionist leadership of the Jewish Agency for the purpose of establishing Israel, already disproportionately large relative to the size of the Jewish population, the 1948 War ended with Zionists in control of 78% of the territory delimited as Palestine during the Mandate period, which was accepted as the new territorial baseline with little dissent. This enlargement of Israel meant that the country was significantly bigger than were the geographic dimensions of the territory set aside for Israel in the partition resolution. It is true that those earlier borders were never formally accepted as permanent by Israel, and certainly were significantly less than the Zionist Project was determined to achieve. These boundaries were nevertheless relied upon as the *political* baseline for subsequent two-state diplomacy, although their delimitation varied through time to reflect de facto realities tilting always in an Israeli direction.<sup>xxxvii</sup>

This two-state diplomacy has been based on the realities that emerged after the 1967 War in which Israel's armed forces prevailed over several neighboring Arab countries, including Jordan, Syria, and Egypt, that had been in administrative control of the West Bank, East Jerusalem, and Gaza, as well as previously exercising sovereign rights in the Golan Heights and the Sinai Peninsula. For once the UN Security Council was in agreement, unanimously setting forth its image of a peaceful future for Palestine in Security Council Resolution 242, as reinforced by SC Resolution 338, although Israel's legal experts have tried to neutralize the call for withdrawal, which was the core of the Security Council consensus, by offering very legalistic readings of its language, especially the requirement that before an Israeli withdrawal became mandatory the unresolved issues pertaining to permanent boundaries and refugees must be satisfactorily settled by negotiation.<sup>xxxviii</sup> These resolutions were clearly calling upon Israel to withdraw from the Palestinian territories (including East Jerusalem) occupied during the war, leaving aside occupied Golan and Sinai. If disagreements emerged with respect to boundaries it was expected that the parties would rely on some international negotiating process by which to reach agreement on the location of permanent borders, as well as finding solutions for the issue of refugees, and any other disputed question such as Jerusalem, water, and later, security and settlements.<sup>xxxix</sup> In retrospect, we can reasonably conclude, on the basis of Israeli behavior,

that withdrawal from the West Bank was not seriously contemplated as otherwise encouraging the settler movement to go forward on such a large scale would make little sense. Also, the prospect for an agreement on the return of the refugees seemed never in the cards as this would have intensified Zionist anxieties about the demographic balance. And Jerusalem seemed outside the scope of negotiable issues, given Israel's annexation move and contention that the city would serve as the eternal capital of the Jewish state, thus ignoring not only fervent Muslim claims but those of Christianity, as well.

It is against this background that 'ending the occupation' became the sole somewhat realistic focus of those who sought to end the conflict by way of political compromise, but it always meant different things to the two sides and at different times, and was more sincerely accepted by Palestinian leadership than by its Israeli counterparts. It was contentious and uncertain whether the public political posture adopted by the parties was tactical rather than a genuine expression of a permanent willingness to compromise along the rough outlines of the abstract international two-state consensus, which if actualized would have shown the divergent views of how the land and rights were to be distributed. It is possible, also, that some Palestinian leaders regarded partition as a stepping stone to a subsequent movement to unify and liberate Palestine from what was widely regarded as settler colonial rule.

For Palestinians, there was the anxiety that real, unacknowledged goals of Zionism was to take over, sooner or later, all of historic Palestine as supposedly biblically delimited, and that Israel despite giving its ambivalent public credence to the two-state template, was determined to proceed by way of de facto incremental annexation to gain sufficient control over West Bank and East Jerusalem as to satisfy its territorial ambitions and to render the establishment of a viable, independent, and sovereign Palestinian state implausible and unpalatable even to territorially minded Palestinian leaders.

For Jews, there was a complementary anxiety, often manipulated by Zionist forces, to the effect that Palestinian normalization was a sinister tactical move, a mere stepping stone to an overall master plan to drive the Jews into the sea, which naturally evokes memories of the Holocaust, and fosters a mentality that associated Israeli security with the permanent subjugation of the Palestinian people and maximum control of borders, neighbors, and internal political activity. In effect, Israel's security took precedence, and its strategic requirements were such as to make Israel as strong as possible regardless of moral, political, and legal arguments to the contrary. In this regard, history and the cynicism of Israel's recent political leadership, combine to project a continuous threat of Israel's annihilation, justifying a preemptive militarist posture of clear-cut superiority toward perceived enemies, most recently Iran.<sup>x1</sup> What is confusing is the overlap between two genuine Israeli arguments: territorial expansion in response to security considerations and territorial expansion as the biblical entitlement bestowed by the cultural belief in a predestined return to 'the promised land.'

Despite these concerns and suspicions, all sides, including the international community and the Palestinians, devoted their diplomatic energies to ending or at least mitigating the 'occupation,' marginalizing the grievances and claims of those Palestinians being subjugated as a result of

their refugee and exile status or due to living as a discriminated minority in Israel or under siege in Gaza.<sup>xii</sup> As argued throughout, the true reality of the relations between Jews and Palestinians as a coherent whole is better disclosed through the more encompassing discourse of ‘apartheid,’ which is legally, politically, and morally more descriptive of unfolding hierarchical and exploitative realities and alone relevant to future peacemaking than is the discourse of ‘occupation.’ This contention does need to take some account of the changing normative (law, morality) and practical (political) setting within which global policy on the Israeli/Palestinian is perceived and evolves. The central argument of this analysis is that the apartheid optic for viewing the conflict and its resolution now possesses the potential to contribute to prospects for instituting an effective and equitable problem-solving process that will be needed if a sustainable peace is ever to be realized.

To develop this argument that contravenes the continuing inter-governmental consensus on reaching a diplomatic solution, it will be necessary to pay close attention to the descriptive, normative, and political issues at stake. Only on such a basis will it become possible to work out the most effective framework for analysis, policymaking, resistance and solidarity, civil society, historical agency, and eventually, diplomacy.<sup>xiii</sup> Implicit here is the view that to start with diplomacy while apartheid remains intact, unchallenged, and internationally ignored will inevitably lead to frustration, recrimination, and failure. The recognition and dismantling of Israeli apartheid is set forth as a precondition for all modalities by which these two peoples can live together within the confines of Ottoman Palestine.<sup>xiiii</sup>

In summary, it should be noted that asserting the reality of Israeli apartheid as an obstacle to peace is currently completely rejected by Israel and all governments in Europe and North America as these political actors adamantly refuse to acknowledge the existence of Israeli apartheid, regarding the allegation as a provocation rather than as a reality to be addressed. Even the PLO and Palestinian Authority have so far refrained from resting their claims on a demand for the dissolution of Israeli apartheid structures of control. In this respect, it would be important for international institutions and religious and human rights NGOs to investigate the allegations of the ESCWA Report to assess whether the weight of evidence support the apartheid conclusions reached. In the meantime, the apartheid approach to critique and solution is gaining far wider acceptance throughout global civil society, a development lent credibility by Israel itself, especially by the adoption in 2018. of the Basic Law: Israel as the Nation-State of the Jewish People. Arguably, the Trump presidency and a favorable balance of regional forces in the Middle East has emboldened Israeli leadership and public opinion to be more forthright about these final stages of the Zionist Project.

### The Relevance of History: International Law, Normative Logics, and Political Realism

Although rarely discussed, the flow of history over the course of the prior century during which the Jewish and Palestinian national narratives evolved, has an important bearing on what is *reasonable* and *equitable* in the present global setting. With these concerns in mind there is a need to consider international law, international morality, and geopolitics from an inter-



temporal perspective as providing the background for this tendency to continue to uphold the occupation paradigm long after it has lost functional and normative relevance. This 'zombie' tendency to affirm what is outmoded not only contributes to a misleading understanding of the true nature of Palestinian grievances, but also gives credence to a false image of sustainable peace, a falsity that Palestinians have themselves been partly responsible for embracing.

Such a critical discussion prepares the way for an analysis of why from the perspective of achieving sustainable peace it is exceedingly important to recognize Israeli responsibility for reliance on apartheid regime *as applied to the Palestinian people as a whole*. This recognition needs to be coupled with an understanding of the particular character of Israeli apartheid in its most comprehensive and variegated applications to the Palestinian people. It is also relevant to grasp the accompanying contention that framing the current phase of the struggle by reference to occupation is triply delusional. First it is delusional if a sustainable peace is the real goal of international efforts. Secondly, it is also delusional in a highly manipulative sense if the undisclosed purpose is to allow the evolving one-state status quo to become gradually accepted as a 'solution' from the perspective of Israel and its international supporters with Palestinian opposition gradually being disregarded as 'a lost cause.' And finally, it is delusional to believe that it was ever clearly accepted as a Zionist game plan, except to gain time by taking part in negotiations, which suspended all international efforts to exert pressure on Israel for its violation of Palestinian rights.

Achieving this understanding of Israeli apartheid is challenging as it differs in its methodology from the most prominent antecedent case, South African apartheid. The most important difference may be that South Africa did not disguise its racially oriented structures of control, but tried to rationalize the separate development of races on the basis of differing bio-genetic traits. A secondary difference was the degree to which the fragmentation of the African majority does not resemble the Israeli coercive efforts to ensure Jewish demographic majorities by creating conditions that encouraged Palestinians to leave the country. Such measures were seen to be necessary to safeguard claims to Israeli legitimacy based on principles of democratic governance, Arguably in South Africa the establishment of *bantustans* based on tribal identities could be interpreted as a move to strengthen apartheid by resorting to a politics of fragmentation, although there was never any pretense of enfranchising black South Africans as citizens of South Africa regardless of their education, property holdings, and length of residency.

International law is the only basis on which to resolve disputed self-determination claims in a relatively *objective* manner on an international level, but it is itself not altogether acceptable as a mechanism. There are a number of grounds on which to challenge the authoritativeness of international legal criteria as applied to the Israel/Palestine competing national narratives. For the Israelis, the guidelines used to validate their claim of self-determination never stressed the wishes of the majority resident population, Zionist claims were based on deep historical roots, cultural traditions, religious significance, and as a response to the unprecedented survival pressures exerted on the Jewish people due to recent circumstances of extreme anti-Semitism

in Europe. Emphasis was not placed on international law as it bore on such question in a period of delegitimizing colonial entitlements.

For the Palestinians, the UN and international law seemed to give a quasi-legal status to the Balfour Declaration, and thus confused the contention that Israeli settlement and emerging efforts to achieve statehood for the Jewish people in Palestine amounted to a reestablishment of colonial rule. The uncertainty associated with the application of the right of self-determination up through the early post-1945 years facilitated the colonialist diplomacy of Britain, abetted by the paternalistic and Orientalist approaches embedded in the mandate system and in the partition proposal of GA Resolution 181. Such an evolution created a web of uncertainties as to the de facto and de jure allocation of rights under international law in situations of divided polities and gross disparities in bargaining power.<sup>xiv</sup> The Palestinian leadership failed to develop and assert a strong and coherent narrative rooted in a progressive interpretation of international law supporting their basis claim of self-determination in Palestine as a single state.

What may be more consequential and problematic is the legalistic style of interpreting the obligations of international law, especially as seen from a Western perspective. In practice this has meant that a political actor with diplomatic status is not legally required to submit claims against it to some kind international adjudicative or arbitral process absent its consent. The UN Charter does encourage the peaceful settlement of disputes in a vague provision, but makes no effort to compel implementation even if a situation remains unresolved over the course of decades. It also gives the Security Council the authority to impose a mandatory procedure on a party that would require resolution of a dispute by reference to international law, but has rarely done so, and in most instances one or more permanent member could use its veto to preserve the sovereign rights of a state fearing an unfavorable international law outcome to refuse peaceful settlement procedures.<sup>xiv</sup> In this crucial regard, it is impossible to comprehend Israel's ability to withstand international pressures for a just solution to the struggle without taking into account the custodial geopolitical role played by the United States, which was reinforced by widespread European guilt about its failure to do more during the Nazi period to protect Jews against a genocidal onslaught.

Even supposing that the two sides would agree to abide by an international law resolution of the dispute, there would be no assurance that the legal rationale set forth would be adequately reflected in the decision. Courts and other dispute settlement bodies are often influenced by an unspoken deference to the geopolitical and ideological realities of the situation or to the existence of moral sympathies with one or the other party. Especially if the more powerful side in conflict situations is confronted by an adverse finding by an international body based on international law, it will almost certainly refuse compliance, which return the situation to a political space where relative military capabilities often prove decisive.

As already suggested, there were competing normative logics at work from the outset of this struggle to control post-Ottoman Palestine. In the foreground was the normative logic of colonialism, which gave an aura of normalcy to the issuance of Balfour Declaration and even to

the Sykes-Picot agreement to transfer Ottoman imperial possessions in the Middle East to Britain and France.<sup>xlvi</sup> This normative logic, further legitimated by practice, benefitted Zionist aspirations to the extent that it lent authority to the claim that a Jewish Homeland could be legitimately established in Palestine, and that Jews should enjoy the benefit of preferential immigration arrangements, an approach that became controversial even for the British while administering the mandate in the 1930s. Zionists consistently stressed the long association of Jews with the land of Palestine over the course of millennia, and the significance of this holy land for Jewish religious traditions worldwide. Such a normative logic had great resonance for Jews throughout the world, especially religious and ethnically oriented Jews, although diaspora Jews were split in their assessments, especially prior to the Holocaust and somewhat even until after the Israeli victory in the 1967 War.<sup>xlvii</sup>

After World War II, the global Zionist movement was very active within the English-speaking world in shaping the Western public opinion by glorifying 'brand Israel' and creating an image of the Palestinians as backward and violent, 'a dirty Arab,' undermining Israeli security by resort to terrorism.<sup>xlviii</sup> In effect, Western public opinion formed a parallel normative logic in addressing the struggle over the future of Palestine that overcame, by and large, the anti-colonialist normative logic that dominated non-Western public and elite attitudes, although never completely on most other analogous issues.<sup>xlix</sup>

As the battle around the findings of the Goldstone Report or the ESCWA Report demonstrate, the normative tug of war on legitimacy issues continues, with the pro-Palestinian side trying to strengthen its support worldwide by presenting the international law foundations of its grievances and claims, and the pro-Israeli side fighting back by delegitimizing these efforts, usually not by producing substantive counter-arguments under international law, but increasingly by mobilizing Zionist groups to contend that criticism of Israel is the 'new anti-Semitism,' a campaign currently concentrated on discrediting and criminalizing the nonviolent civil society BDS campaign.<sup>!</sup>

There are several related issues at play. The interplay of normative logics allows opposite sides to each proclaim to their respective constituencies the moral superiority of their claims of rights even though they contradict one another. World order is supposed to privilege international law as the final arbiter of such conflicts, but international law can be marginalized or even overcome by effective contrary political action, successful uses of force, and geopolitical interference. These pushbacks have hampered any Palestinian ability to create leverage on the basis of its potentially strong international arguments. These limitations have been made more significant due to Zionist influence over the public discourse and media treatment, and by their own passivity with respect to making use of international law and international institutions. It must be admitted, in any event, that international law cannot give authoritative answers to competing self-determination claims that have become politically and morally entrenched over time in ways that contravene legal norms. Such an evolution sets up tensions between the realism of accepting facts as they are and the legalism of conceiving of abstract rights as if detached from power variables and political and historical contexts.

Israel's most fundamental normative weakness arises from the fact that its foundational legitimacy rests on settler colonialist patterns of immigration and subsequent dispossession and subjugation of the resident population, as well as partition directive decreed from above that ignored the popular will of the resident population. Such dispossession and subjugation have been invalidated by the anti-colonial and anti-racist turn of international law in the 1950s, 1960s, and 1970s. A complementary source of Israeli international weakness arises from its core reliance on a theory of religious entitlement to underpin its national and statehood claims. Such a normative rationalization for a self-determination claim is not recognized as valid or politically acceptable in contemporary international law. In the post-colonial world national and statehood claims must attain their validity, if at all, by reference to the doctrine of self-determination put forward by geographically resident populations. Here also international law as applied to Israel/Palestine is ambiguous and complicated for several reasons. Chief among these are inter-temporal issues. The Jewish people had no acceptable claim to self-determination in 1917, a clouded claim in 1947 and 1967, but a solid claim as of 2017 due to the buildup of a substantial demographic presence and long-term residence, as well as effective control, geopolitical support, and the absence of a home country (as, for instance, the French minority in Algeria following the Algerian War(1962) could at least retreat to France).<sup>li</sup> The Jewish claim to identity as 'a people,' the foundation of its non-territorial structure of ethnic entitlement, including the right of a Jew anywhere to immigrate to Israel, a so-called right of return, is of course an elaborate, yet powerful, fiction. It situates Israeli exceptionalism as to claim and status as there is no home country, and thus no country that offers an alternative homeland.

Israel's current strengths as a self-determination and statehood claimant arise from its demographic majority behind the green line, military success, political and economic development, technological sophistication, and geopolitical leverage, as well as the intangible benefits of multinational support from diaspora Jewry and the Zionist movement well organized in the West.<sup>lii</sup> This combination of hard and soft power assets has given Israel the upper hand internationally, and has drastically disappointed even the most moderate Palestinian expectations and demands. In other words, if political realism is the orientation toward international problem-solving, since 1967 Israel's de facto control over and development of occupied Palestine has had law-generating effects. Israel's non-compliance with widely endorsed UN resolutions and decisions has weakened the authority of international law and the UN more generally, while being useful benchmarks validating Palestinian resistance and global solidarity initiatives.<sup>liii</sup> These effects were reinforced by Israel's stature in international society, its skillful diplomacy, and participation in international institutions. More than any other member of the UN, Israel has criticized the Organization in the most drastic language, while at the same time pulling every lever of influence to gain positions of influence within the UN and its various organs, exerting special pressures to minimize criticism and censure of its policies and practices.

Such an understanding partly explains the salience of 'ending the occupation' as the primary term of reference for relevant peacemaking efforts. Israel, despite its morally and legally questionable origins, has effectively established itself as a sovereign state on the territory

granted by the UN partition proposal as augmented by the additional territory seized in the 1948 War, which seemed to render the partition resolution (GA Res. 181) as obsolete. The territory beyond the green line that demarcated the division of Palestine at the start of the 1967 War has generally been treated at the global level as 'occupied,' and thus still regarded as the locus of future Palestinian sovereignty.<sup>liv</sup> It was against this background that SC Res. 242 was able to gain unanimous support even in the midst of the Cold War, although the wording of the resolution makes no mention of a Palestinian state or even of a Palestinian right of self-determination. The occupation puzzle for Israel was how to expand territorially beyond the green line without crossing two international red lines. The first insisting that the territory occupied in 1967 be permanently set aside until the establishment of a Palestinian state no matter how long the process takes. The second is the authoritative legal norm that territory obtained by the use of force could not be retained. As we shall see, Israel solved the puzzle by accepting the language of temporary occupation while engaging in a series of behavioral initiatives that extended the effective scope of territorial Israel, making complete withdrawal seem impractical, even unreasonable.

#### Flaws in the Occupation Discourse as a Basis for Sustainable Peace

The Limits of Security Council Resolution 242. If indeed the conflict between Israelis and Palestinians as ripened by the 1967 occupation could be reduced to the allocation of territorial claims between the two parties, then SC Res. 242 could be credibly regarded as a pragmatic peacemaking vehicle, but this was never plausible, appearances and widespread affirmations notwithstanding. The disposition of Palestinian refugees and the future of Jerusalem were issues of such crucial importance that it was a diplomatic illusion to think that they could be brushed aside, or dealt with by some kind of diplomatic photo shopping air brush. In other words, if 242 is interpreted according to the tenets of 'political realism' the resolution badly miscalculated the interplay and tenacity of forces on both sides of the conflict, not only at leadership levels, but also among the affected peoples. Israel successfully undermined the limitations supposedly placing a lid on Zionist territorial expansionism, while Palestinians as a people have never accepted the notion that their grievances can be essentially reduced to a dispute over territory, nor of course, have they abandoned the importance of land in relation to their grievances and aspirations, above all for self-determination and a secure national homeland and statehood status.<sup>lv</sup>

As suggested, Israel undermined the clear meaning of the 242 compromise by deliberately and massively encroaching on the territory set aside for Palestinian self-determination and through legalistic exegesis to justify the non-implementation of the withdrawal provisions. These Israeli initiatives had sufficient geopolitical backing in Washington so as to be undertaken without any significant adverse effects, although from time to time American leaders would administer a light slap on the Israeli wrist as by suggesting that the latest surge of settlement building was 'not helpful.'<sup>lvi</sup> For a brief period George H. W. Bush withheld American loan guarantees to Israel over settlement construction, and this was the only time that an American political leader took concrete action to express opposition to Israeli behavior, even if short-lived, and

more a gesture than a credible effort to influence Israeli behavior. And despite these continuing unlawful encroachments, the settlement phenomenon was not treated as challenging the basic international approach that the Palestinian territories taken by Israel in the 1967 War resulted in their ‘occupation,’ and as such, were viewed as temporary. This legal understanding of belligerent occupation is clearly entrenched in international humanitarian law, and especially, the Fourth Geneva Convention, and is anchored in the norm that the territory of another political entity cannot be acquired by international force, and hence any occupation must be seen as temporary, and lasting only until withdrawal takes place by negotiations or otherwise.<sup>lvii</sup> How long is temporary is a fair question after the passage of more than 50 years.

This approach was also carried forward, without such a clear reliance on 242 in the Oslo Framework of Principles agreed upon in 1993. The underlying implicit expectation was that the negotiation between the parties would end up with the establishment of a Palestinian state, although territorially diminished by Israeli settlement blocs, the separation wall, annexation of the whole of Jerusalem, and an array of security claims that limited normal rights of a sovereign state. Palestinian prospects were further compromised with respect to sovereign rights by deferring to these one-sided Israeli security claims, which were framed in ways that underscored the inequality between the two states. Yet the fundamental faulty assumption remained, to wit, that the conflict could be effectively ended by giving the Palestinians a state of their own, with some sort of side-payments to divert attention from the failure to uphold the repatriation rights of Palestinian refugees and the grant of a symbolic presence in East Jerusalem to satisfy Palestinian claims that related to this holy city. Furthermore, from a practical perspective what this meant in *international* diplomacy was that an ‘Oslo Peace’ rested almost exclusively on ‘ending the occupation,’ and associated territorial arrangements with non-territorial issues being marginalized or ignored, which in practical terms meant forfeiting law and morality-based Palestinian grievances.

To all intents and purposes, the Palestinian Authority and the Palestine Liberation Organization, (although only the PLO can claim to represent the Palestinian people as a whole in global settings) did not object, at least not overtly, to this framing of the peace process. This unfortunate silence by Palestinian leaders has definitely led to confusion about the nature of a *sustainable* peace, as well as helping to explain the slowness of public opinion to appreciate essential flaws in the occupation paradigm.<sup>lviii</sup> Oddly enough, Hamas also seems recently to subscribe to the occupation paradigm as a temporary expedient. Also, since Hamas views the entirety of Palestine as administered by Britain as ‘occupied,’ thus implying that ending the occupation could only take place following the dissolution of Israel as a Jewish state.<sup>lix</sup> Recent Hamas positions are more forthcoming with respect to some sort of long-term accommodation with Israel provided withdrawal from all territory occupied in 1967 takes place. Hamas leaders have expressed rather convincingly their readiness to abide by a long-term peaceful coexistence arrangement with Israel that would include a renunciation of violence, but it agreed that such an arrangement was establishing ‘peace’ in the limited sense of being a mutual commitment to nonviolent interaction. As a formal matter such a long pause should be viewed as a provisional stage that improved conditions on the ground for both peoples with the

future left intentionally uncertain. Given fragmented Palestinian leadership, raising questions about adequate representation, there is a fundamental ambiguity about what would achieve a long-term sustainable peace between Israel and Palestine. This uncertainty should cast strong doubts on the authenticity of any Palestinian acceptance of the occupation paradigm, but not necessarily on ceasefire and mutual security proposals that promise only what might be identified as *interim* peace arrangements. Little attention has been given to such interim approaches by either side, although given the diplomatic impasse, it might be worth exploring, although some formidable obstacles would surround implementing withdrawal even in contexts where non-territorial grievance were neither renounced nor resolved. The future of Israeli settlements, separation wall, and security zones would seem difficult, if not impossible, to agree upon.

A different kind of ambiguity underlies the Israel acceptance of the occupation paradigm. Although during the period of Oslo diplomacy Israel purported to accept the occupation scenario, making proposals on several occasions that were shaped on the basis of such an orientation toward ending the conflict, their actions and domestic dialogue seemed to cast doubt on their sincerity, especially after the assassination of Yitzhak Rabin in 1995, Israel never acknowledged the inalienable Palestinian right of self-determination nor formally accepted the idea of Palestinian statehood and national sovereignty.

At times, the basic objection seemed to derive from the continuing commitment of Zionism to expand the territorial and sovereignty claims of Israel until it encompassed the whole of biblical Israel, especially the West Bank (Judea and Samaria) and Jerusalem. In this regard, the true Israeli position was the inverse of the Hamas approach, that is, seeking to *extend* the occupation temporarily until it achieved a permanent de facto status rather than *end* it by withdrawal. At other times, Israel seemed to insist upon retaining all its settlements without any account taken of their unlawful establishment as by reference to Article 49(6) of Geneva IV. Also, by continuing throughout Oslo to expand the settlements and increase the settlement population as well as constructing an expensive network of Israeli Only roads, doubt was cast on whether Israel ever seriously accepted an intention to comply with the spirit of 242 by withdrawing from the territory taken in the 1967 War. In effect, negotiations aiming to 'end the occupation' seem most plausibly interpreted as an elaborate public relations cover for the actual policies that revolved around 'continuing the occupation' while realizing the goal of substantial or total de facto *annexation*.

Of course, not all Israelis favored the settlement movement, and in the period after 1967 many thought that a sustainable peace could be achieved, and was desirable, by a timely withdrawal provided Palestinian demands relating to refugees and Jerusalem could be ignored or diverted. Yet, as the settlements grew and settlers gained what amounted to a veto power over Israeli policy toward the Palestinians, the 242 vision of peace through withdrawal seemed increasingly irrelevant, and serving no purpose other than blunting international criticism of Israeli unilateralism and defiance of international law. For this reason, the occupation paradigm, although once avowed by the Israeli peace camp, lost its appeal as a path to peace. Ending the occupation came to seem as little more than a pacifying posture of convenience that somewhat

disguised the true dimensions of Israeli territorial ambitions and political intentions, diverting attention from its apartheid matrix of control, which was only partially based on territoriality.<sup>lx</sup> As the ESCWA Report shows control was based on a politics of demographic and political fragmentation weakening the capabilities of the Palestinians to mount opposition, which supplemented Israeli counterinsurgency and military capabilities.

Finally, Israel has further compromised and confused the meaning of ‘end the occupation’ by its disingenuous contention that the Sharon ‘disengagement’ plan of 2005 effectively ended the occupation of the Gaza strip. This Israeli contention has not been accepted by the United Nations, nor by a consensus of international law specialists. In this sense, the essence of ‘occupation’ is the maintenance of effective control, and this has continued through control of the borders, access and exit, airspace and territorial waters, periodic military incursions undertaken at Israeli discretion without international accountability, and redeployment of IDF military capabilities in patterns that threatened the internal security of the civilian population of Gaza. At the same time, the Gaza Disengagement seems to forecast what an ‘independent’ Palestine might expect to face if the statehood approach had been attempted. Some conservative Israeli politicians, including Olmert, seem to feel that a circumscribe Palestinian state is preferable to what they acknowledge as the alternative—apartheid.

International humanitarian law (IHL). Neither Geneva IV nor the Geneva Protocols put any limit on the duration of occupation, but the implications of giving the Occupying Power a quasi-permanent military authority over a civilian society seems radically inconsistent with the minimal protection of human rights or an ethos of human dignity. For a civilian society to be deprived of elemental rights for over a half a century should by itself produce the conclusion that such a regime is intolerable from the perspective of international humanitarian law and international human rights.<sup>lxi</sup> The situation confronting the Palestinians living under this kind of prolonged occupation without rights and the benefits of the rule of law undermines the humanitarian intentions of IHL, and exposes a serious legal/humanitarian gap.<sup>lxii</sup> When this condition of quasi-permanence is combined with annexationist moves that undermine expectations that occupation will ever be ended, except in partial and nominal ways, it further explains why reliance on the status of occupation as specified through IHL is deceptive and unsatisfactory from a Palestinian and humanitarian points of view.<sup>lxiii</sup> Although as earlier argued ending occupation is far from enough to establish a real peace, but even it will not happen as matters now stand. Continuing to condition hopes on the premise that it could happen if both sides make difficult sacrifices (the Obama approach), is nothing other than a cruel mind game. I found it disturbing that despite my efforts to gain some interest in addressing these issues from the International Committee of the Red Cross, I encountered the distressing response that the Geneva Conventions remained adequate despite the length of the occupation, I could not tell whether this response was an expression of habitual institutional conservatism by the Red Cross or ‘humanitarian realism’ given the likely angry opposition to be expected from Israel and the United States.

Part of what makes IHL so unsatisfactory is that even when there is a clear directive from an authoritative source of international law, the outcome is rejected by Israel, and no effort at



enforcement is made. Such was the instance of the ICJ Advisory Opinion in the wall case where an unusually strong majority of 14-1 agreed that international law prohibited Israel as an occupying power from constructing a separation wall on occupied Palestinian territory.<sup>lxiv</sup> Israel refused to comply, and no further steps were taken to overcome this unambiguous instance of Israeli defiance with respect to international law.<sup>lxv</sup> In this central respect, if 'occupation' does not even ensure respect within the limits of IHL, then the other weighty reasons to object to the terminology of occupation gains even greater weight.

Descriptive Misnomer. As already suggested, Israel's policies of settlement construction and expansion on a massive scale, various expressions of annexationist intent confirmed with respect to settlement blocs, road network, infrastructure, wall, and Jerusalem, and most of all, the exclusion of several categories of Palestinians enduring racist domination and prolonged refugee or exile status from meaningful concern in diplomatic settings, makes the occupation paradigm anachronistic and normatively regressive. In sum, 'occupation' is not an accurate descriptive term to identify the actual extent of either Israeli control or severe Palestinian victimization when Palestinians are treated as a fragmented people living under a range of conditions that are distinct from Palestinians living under occupation, but one of several modes of apartheid control. Thus, to reiterate a central point, ending the occupation, even in the unlikely event that at some future time it were to become feasible, it would not by itself end Palestinian victimization as it is being experienced by refugees, exiles, the Palestinian minority living in Israel, and the Palestinians living in Jerusalem under conditions of Israeli annexation. As will be made clear in later sections, ending Palestinian victimization can only occur if understood by reference to the apartheid paradigm, and that can only happen politically when Israel gives up the contention that it is a democratically constituted Jewish state augmented by biblical entitlements, an ethnocracy.

Normative Misnomer. From the perspective of Palestinian rights, the continuing reliance on the occupation paradigm is also regressive. First of all, the actual situation for Palestinians living under various forms of subjugation by Israel on the basis of their ethnic identity is worse than occupation because Israel has created a series of conditions deliberately created that seem intended to make it not feasible to end the occupation or to undo obstacles to withdrawal, even if such a political will suddenly emerged. Secondly, prolonged occupation poses essentially moral and political challenges that are not even addressed by the legal/diplomatic framings of the conflict as mediated through the occupation paradigm, and can thus persist indefinitely until political capabilities to challenge apartheid came into existence. Thirdly, to establish sustainable peace, Palestinians living as refugees within 'occupied Palestine' or in neighboring countries, as exiles throughout the world, as discriminated minority in Israel, and as discriminated residents of Jerusalem must be liberated from their respective oppressive circumstances of subjugation. As the most liberal Zionists affirm, their support for territorial withdrawal from occupied Palestinian territories presupposes the rejection of any large-scale Palestinian right of return.

Fourthly, to retain the occupation paradigm is to encourage the kind of diplomatic charade that occurred for more than twenty years within the Oslo Framework, as modified along the way by

the formation of the Quartet under UN auspices, and its issuance of a roadmap that fully incorporated ‘occupation’ and ‘partition’ thinking.<sup>lxvi</sup> In contrast, a diplomacy that has any prospect of achieving a genuine political accommodation must possess three features: inclusiveness (reaching out to all Palestinians currently victimized by Israeli subjugation), representativeness (legitimate representation of the two peoples involved, (currently impossible on the Palestinian side because of the PA/Hamas split), and equality (as between the parties, which necessitates a truly neutral negotiating framework including an impartial intermediary party).

Fifthly, and least noticed, the reformulation of Zionist goals or the abandonment of the Zionist organization of Israel so as to posit a right of self-determination on behalf of the Jewish people that is also respectful of the reciprocal right of the Palestinian people. Such a reformulation would need to involve at least a tacit acknowledgement by Israel that the road to peace depends on respect for applicable international law. The task, then, of genuine peacemakers is to find formulas for the reconciliation of self-determination claims of these two peoples that balance the removal of historically grounded grievances against the realities of present circumstances. On the Palestinian side this means finding credible ways to end fragmentation and discriminatory policies. On the Israeli side it means seeking a legitimate territorial base for a Jewish homeland, but without claiming an unlimited right of return for Jews worldwide without granting an equivalent right to the Palestinians or ethnic privileged status within respective national homelands.

#### Adopting the Apartheid Discourse and Paradigm

The ESCWA Report concentrated on exploring the argument that Israel had become an apartheid state from the perspective of international law, and making recommendations for policy initiatives that might hasten the end of apartheid as a criminal undertaking as applied to the Palestinian people. The purpose of this analysis on implications is to discuss why adopting the apartheid discourse and paradigm will enable a better appreciation of the current phase of the conflict as well as provide a far more usable roadmap for ending the conflict.

The essence of the crime of apartheid as defined by international law is a structure of intentional racial domination that relies on ‘inhuman acts’ to maintain discriminatory control. More concretely, Jewish ethnicity has deliberately constructed this structure to achieve effective subjugation of the Palestinian people as a whole so that a Jewish state, with a variety of preferential nationality laws favoring Jews, can be maintained.<sup>lxvii</sup>

Partly influenced by the South African precedent the image of apartheid that is most easily absorbed in the Israel/Palestine context is the reality of prolonged subjugation existing in the West Bank, especially in light of the explicit dual regime of governance—rightless military administration of the Palestinians combined with protecting the Israeli settler population by adherence to the rule of law, as well as blatant double standards in addressing incidents of unlawfulness and violence by Jewish settlers and Palestinian residents. Most of the apartheid

discourse within Israel and internationally conceives of apartheid in this limited way as existing or not on the West Bank, which also incidentally most closely resembles apartheid as it was understood to function in South Africa. Such a resemblance made it seem more appropriate and less radical to contend that the Palestinians in the West Bank were being controlled by an apartheid regime, but that otherwise the condition of Palestinians should be seen as it appears in most academic and political literature, that is, as refugees, exiles, minority. The ESCWA Report, above all, seeks a unified discourse, rejecting both fragmentation and occupation alternatives, and proposing the apartheid discourse for analysis and critique, and the apartheid paradigm for policy purposes.

The most radical feature of the ESCWA Report is not its finding that the Government of Israel is guilty of the ongoing crime of apartheid, but that the structure of apartheid that has been deliberately constructed by Israel applies to the Palestinian people *as a whole* regardless of their specific circumstances of living under occupation or not. At first glance this allegation of an extended structure of apartheid seems strained. If examined in relation to their distinct and fragmented reality, unlike South Africa and the West Bank, there are no dual structures of racial discrimination in the same geographic space. The victimization of Palestinians living as refugees and involuntary exiles for generations is acute but perceived *on its own* does not resemble apartheid as it was conceptualized and practiced in South Africa. The same is true for those Palestinians living in the Gaza Strip or as residents of Jerusalem governed as if a part of Israel.

Perhaps, the most difficult case of all in demonstrating the existence of the extended conception is the claim that the Palestinian citizens of Israel minority of about 20% are being victimized by the Israeli crime of apartheid. After all, as repeatedly claimed by supporters, Israel operates as a constitutional democracy, Palestinians are Israeli citizens with a right to vote. The fact that nationality laws in Israel subject Palestinians to a series of harsh discriminatory laws based on race does not by itself constitute apartheid until it is connected to the underlying dynamics and structures of displacement, dispossession, and domination that has always been the driving force in pursuing the Zionist project from its earliest inception until the present day.<sup>lxviii</sup> It is the widespread acceptance of and ignorance about the Israeli politics of fragmentation, and accompanying control of the mainstream narrative, which helps account for the widespread international acceptance of this compartmentalized view of the scope of the crime of apartheid. The 2018 Basic Law: Israel-The Nation State of the Jewish People, stripped away most illusions that Israel is a democratic polity, and lends credence to the contention that it is an ethnocracy, which is a less provocative way of talking about racial hierarchy than is the apartheid discourse.<sup>lxix</sup>

This is not to condemn the Zionist narrative altogether. As a response to Hitler's rise in Germany and the culminating evil of the Holocaust, and in light of the Jewish experience of anti-Semitism over the centuries, the Zionist worldview provides an historically compelling narrative, but it needs to be critically viewed in light of its own tactics, but most importantly, by its failure to take account of the Palestinian narrative and reality, above all of the Palestinian primary rights of self-determination as the majority and historically grounded resident population of Palestine.<sup>lxx</sup> It is only habit and Zionist discourse dominance that blinds us to the

absurdity of a small Jewish minority acting to take over control of the territorial governance of the country, and in the course of doing so, denying the most fundamental rights of the majority population in what had been their own country. In the United States suppose that African Americans or Hispanics organized in such a way as to claim a historical entitlement to the land, and subjugated all other ethnicities, which would be necessary due to the inevitable hostility and resistance to any such takeover of the governing process including the symbols of statehood.

In contrast, the argument in support of apartheid as applied to the overall Israeli matrix of control conceives of the Palestinian people as a unity, and regards their fragmentation, whether or not by design, as an aspect of their purposeful victimization, but this ethnic compartmentalization is not the cornerstone of their identity. The essential contention is that Israel deliberately fragmented the Palestinians as a people as a central element in evolving their grand strategy of establishing an exclusivist Jewish state with the ability to maintain a secure Jewish majority population within its borders. The puzzle facing the Zionist movement from its inception in the late 19<sup>th</sup> century was how to go about establishing a Jewish state in face of these political and demographic obstacles. The main strategy adopted was to invite and subsidize the return to Palestine of Jews worldwide, and thereby by stages to diminish the earlier overwhelming non-Jewish majority. Partition was a means to achieve temporary demographic parity by means of ethnic sequestration while further expansion has now dispensed with the need for partition. The nature of the puzzle over time altered due to the success of Zionists in increasing the Jewish demographic presence in Israel and their security in the region. At the same time the settler colonizing movement is being faced with growing moral, political, and even legal hostility as sentiment grows for the establishment of legitimate Palestinian statehood exclusively resting on an anti-colonial right of self-determination.

The distinctive Israel structure of apartheid must be understood against this *historical* and *normative* background. South Africa achieved white domination and supremacy by a politics of separation applied within national territorial boundaries. In actuality, this politics of separation was an ideological and mythic fiction as the South African economy and society was totally dependent on black African labor, including household domestic workers. At the same time, white South Africans accepted the permanence of their minority status, and never even flirted with the idea of claiming to be an inclusive democratic society for all its inhabitants, which would have required the enfranchisement and constitutional incorporation of the majority population. The idea of becoming a constitutional democracy except for the ruling ethnic minority was not on the political agenda until a combination of internal resistance and international pressures gave rise over several years to the unexpected Afrikaner pragmatic decision to give up their racist structure of domination in the face of growing international isolation and continued internal resistance.

In contrast, Israel achieved Jewish domination and supremacy by the adoption of a multinational politics of fragmentation. Its challenge was totally different than that facing South African whites. Zionism from its outset rested its legitimacy on a commitment to constitutional democracy *within* its territorial boundaries, which presupposed a demographic majority, and

this in turn depended on the timely displacement and expulsion of a substantial proportion of the non-Jewish population living in Palestine for generations. Israel's economy never acknowledged its dependence on Palestinian labor and sought to rely on non-Palestinian workers to the extent possible. Israel's emphasis on a technologically oriented economy reduced its need for wage labor. Israel has come for political and security reasons to rely increasingly on non-Western contract labor to satisfy low-end employment needs.<sup>lxxi</sup> Thus, the *nakba*, so catastrophic for the Palestinians, was for Zionism an indispensable step toward the fulfillment of the Zionist project.<sup>lxxii</sup>

The *nakba* also was responsible for the multinational foundation upon which structures of apartheid were constructed part by part over the decades, epitomized in this initial phase by hundreds of thousands of Palestinian refugees that spilled across the borders of Palestine to neighboring Arab countries. From the perspective of the future, it was imperative to deny permanently a right of return to these expelled Palestinians, regardless of the injustice endured and their deep roots in Palestine or even their potential usefulness to the construction of a vibrant Israeli society. It should still be viewed as a moral scandal from the perspective of human rights to deny every Palestinian a right of return while granting every Jew anywhere in the world an unrestricted right of return embedded in the most revered founding documents of the new Israeli state. As with the establishment of Israel itself, there existed international sympathy and support for the idea that Jews deserved a secure sanctuary, given the freshness of the Holocaust in the moral and political imagination of the West, and a correlative cultural, ethical, political, and legal blindness to the injustice associated with driving Palestinians from their homeland. This blindness resulted from a lingering Orientalism when it came to a collision between the promotion of Western priorities and a resultant Arab suffering. It would have been more reasonable to establish a Jewish sanctuary in Palestine based on need, but to recruit Jews living peacefully, prosperously, and securely throughout the diaspora is both to divert attention from German responsibility for the Holocaust and centuries of European anti-Semitism. Without an embrace of *ethnically* based birthright option of return for Jews, a political compromise might have become negotiable. Of course, such a rights based approach to Jewish immigration could arguably have produced a disaster as it might have shifted the balance of forces to the Arab side before an Israeli homeland or polity was securely established. Second-guessing history can help us understand what went wrong, but it is hazardous, at best, as the basis for prescribing an alternate path to the present.

Israel has its own largely pragmatic fears of apartheid. These continue to be mainly associated with the corrosive effects on the Israeli social fabric of indefinitely administering a hostile occupation of the West Bank on one side, and the risk of losing their demographic edge within 1967 Israel on the other side if the maximum Zionist territorial goal were to be realized by incorporating all or most of the West Bank. As earlier suggested some Zionist critics of recent Israeli patterns of governance insist that Israel has already become an 'ethnocracy,' which can be construed as an implicit acknowledgement of limited apartheid without employing this terminology that would criminalize the behavior and policies of the Israeli state.<sup>lxxiii</sup> Second only to 'genocide,' characterizing policies as 'apartheid' is by itself treated as a provocation even as in this instance it seems the most accurate overall description of the political reality

that has emerged. From an international law standpoint, 'ethnocracy' amounts to a euphemism, although meant as a criticism, as it evades issues of accountability and international responsibility. It is true that it is possible to imagine a benign ethnocracy in which the material and cultural benefits were accorded to all, and the sense of inclusive community was such that there was no need for repressive policies and practice. By its nature, it is not possible to envision a 'benign apartheid.'

South African apartheid operated with the territorial boundaries of South Africa, while Israeli apartheid operates on a multinational geographic basis due to the dispersion of more than five million refugees and several million involuntary exiles. Despite tactical and ideological differences, both structures of domination are organized on the basis of racial categories, and both have produced systems of governance best regarded from a human rights and international perspective as instances of apartheid.

### The Geopolitics of Criminalizing Apartheid

There is a haunting question that hangs over this entire inquiry, why is there such intense resistance to an assessment of Israel that concludes that the government is guilty of the crime of apartheid either as pertaining to the occupation of the West Bank or more broadly as characterizing the Israeli state's mode of governance with respect to the relations of Jews and Palestinians as derived from the Israel matrix of control? What can be seen clearly by any objective analysis is that this public display of anger surrounding such an assessment is not a matter of legal qualms associated with interpreting the evidence as to whether or not apartheid is present or more frontally, whether or not Israel has become an apartheid state with respect to the hierarchical and discriminatory governance of the Palestinian people. Nor is the concern about whether prolonged occupation or indefinite confinement to refugee camps or the cruel confinement and daily harassment of the civilian population of Gaza or a series of other Israeli policies and practices qualify as 'inhuman acts' as defined within the Convention on the Crime and Punishment of Apartheid (1973). Nor is it about whether or not Jews and Palestinians are properly considered to be distinct 'races,' which is a necessary component of a discriminatory structure that legally qualifies as 'apartheid.'

It is not even a matter of voicing vigorous opposition to the more expansive view of Israeli apartheid contained in the ESCWA Report. In the very emotional attacks on the report at the time of its issuance it seemed that for both American and Israeli diplomatic representatives at the United Nations, the word 'apartheid' was by itself, without any consideration of whether or not its usage was justified in either its more conventional application as limited to the conditions of prolonged occupation or in its more comprehensive application to the reality of subjugation being endured in varying formats by the Palestinian people as a whole. The emotive power of the word 'apartheid' was illustrated by the defamatory backlash against even

such an honorable and moderate political figure as Jimmy Carter when he titled his book “peace or apartheid?” A practical motivation for such an intense reaction is to shift the conversation from the substance of controversial allegations, especially if well supported by evidence and legal reasoning, to an attack on the credibility of the messenger. By such a move, the message is evaded, not only in international venues, including the UN, but in crucial media venues that exert such an influence over civil society opinions over what is right and wrong. This is particularly relevant at this stage of the Palestinian struggle due to the decades of failure by international diplomacy and by the UN to achieve sustainable peace or even to contain Israeli expansionism, and the consequent importance of civil society solidarity activism.

In the background, of course, are the memories of moral opprobrium and political mobilization associated with South African racism and the robust Anti-Apartheid Campaign spearheaded by UN support. These memories raise hopes and encourage engagement among those in international civil society who support the Palestinian national struggle, but for this very reason they also wave a red flag in front of those seeking to vindicate Israel as a normal state and developmental model exercising its sovereign rights in a challenging regional and global setting. Such displays of political passion are understandable from the perspective of either partisan politics or tactical geopolitics, but they cloud and polarize a necessary discussion of the serious charges implicit in the contention that Israel is guilty of the crime of apartheid, and that the Palestinian people in whole and in part are being victimized by this international crime, which at this point is neither acknowledged or shows any sign of abating. On the contrary, since the release of the ESCWA Report in 2017, Israel by way of the Basic Law and otherwise has shown contempt for any political outcome that does not validate an Israeli political victory over Palestinian national self-determination claims. It would seem that Trump’s overt Israeli partisanship fully supports this Israeli defiance toward the international consensus and gives Israel the confidence to be more forthright in acknowledging its racist claims to Jewish exclusivity and hegemony even at the cost of undermining its earlier legitimating boast of being the only democracy in the region.<sup>lxxiv</sup>

The gravity of the issues raised is underscored by the failure of the UN and of international diplomacy to find a solution over the course of seventy long years during which the unresolved future of Palestine remains high on the global agenda. This record of frustration and failure is unlikely to be overcome anytime soon, especially given the apparent commitment of Israel’s present leadership and probably alternatives to ensure that the current structures of control over the Palestinian people persist without any significant humanitarian modification for the indefinite future. By concluding that the apartheid issue must be clarified, and the clarification acted upon, there is, at least, posited a scenario of closure, and an accompanying potential encouragement of a genuine peace process that is responsive to the rights and aspirations of both peoples.

End Apartheid Now

At the present time, the level of pro-Palestinian activism and solidarity is not generating sufficient pressure to affect Israeli policies or expectations, although it is sufficient to mobilize Zionist forces to play ‘the anti-Semitic card’ to weaken and discredit nonviolent solidarity initiatives. Despite the pushback, criticism of Israel centering on the fundamental illegitimacy of its policies and practices is mobilizing solidarity initiatives, especially BDS, and encouraging Palestinian resistance even in the face of the escalation of Israeli oppression and reliance on excessive force.<sup>lxxv</sup> The ordeal of the Palestinian people, with no end in sight, is also part of an overall picture in which it is reasonable to conclude that Israel has been losing the legitimacy war with Palestine over the course of the last decade.<sup>lxxvi</sup> Such a reality has induced Israel, and mimetically the United States, to make moves designed to discredit these adverse developments, labeling serious criticism of Israel and nonviolent activism as the ‘new anti-Semitism,’ and using censure and even legal mechanism to shame and punish those who dare to align themselves openly with such activities.

It is notable that during the anti-apartheid campaign targeting South African racism, while South Africa criminalized such behavior at home as ‘terrorism’ or ‘communism’ it was never successful in discrediting, much less criminalizing, overseas anti-apartheid militants, including in the United States. In this respect, the strong Zionist presence, especially in Europe and English-speaking countries, has given Israel a strong secondary shield to rely upon in conjunction with their primary geopolitical shield based on the muscular support offered by the United States in international arenas

It is within this context that the controversy concerning the ESCWA Report, and its central findings relating to Israel as an apartheid state with respect to the Palestinian people as a whole, should be understood and interpreted. Despite this conceptualization, the pushback against the report was directed at the contention that Israel is presumptively guilty of the crime of apartheid without drawing the crucial distinction between apartheid in relation to occupation and apartheid with respect to a people fragmented in a series of physical domains.<sup>lxxvii</sup> The opprobrium associated with ‘apartheid,’ is more moral and psychological than legal or even criminal, and that is what best explains the furious attempt to discredit the report without even attempting to consider or refute its analysis and findings. Nevertheless, the report even without any legal authority beyond the weight of its analysis and the credibility of its scholarship has achieved political and normative relevance by providing both a reasoned argument and supporting evidence for reaching its central assessment that Israel operates as an apartheid state.

This relevance is first, and foremost, a matter of influencing the discourse used to discuss Israel/Palestine relations in various policy and civil society arenas, including religious institutions, labor unions, and universities, as well as municipal and national governmental venues. The contentions of apartheid had been made by activists for several years, for instance, in ‘Apartheid Week’ observances on many college campuses, but a UN commissioned scholarly analysis normalizes the use of ‘apartheid’ in relation to Israel. It also gives confidence to church and labor groups that might previously been hesitant to go too far out on a limb if their



criticism can be dismissed as ‘radical’ or smeared as ‘anti-Semitic.’ Even if these contentions are made, as they will be, the report gives such groups a tool with which to respond.

Beyond this, the ESCWA Report, as the output of a UN organ representing the Arab world, gives the apartheid conclusions a certain new weight within the UN System. This weight was augmented by the principled resignation of Rima Khalaf, the director of ESCWA, who was unwilling to remove the report from the UN website. It also exposed geopolitical bullying by the United States that led the UN Secretary General to push back against a report that was only commissioned by ESCWA, with no claim that it was an official endorsed document of the UN agency. Such a firestorm of controversy has lent the report unprecedented salience among those concerned with seeking a just peace whether within the UN or in civil society at large, and actually made it more, not less, influential.

The public denunciation of the report failed to draw the central distinction between apartheid limited to the dual legal systems relied upon by Israel in the occupation of Palestinian territories and apartheid as pertaining to Palestinians as a people whether living in the West Bank, Jerusalem, Gaza, Israel, refugee camps, or involuntary exile. As authors of the report for reasons delimited above we believe this distinction is crucial, and hope that it will shape discourse in all arenas, informing scholarly debate and civil society activism. One encouraging effect of the report has been to prompt academic conferences devoted to Israel/Palestine to highlight the apartheid issue, including its more innovative usage in the report as extending beyond territorial occupation.<sup>lxxviii</sup>

The most ambitious objective of the report is to deepen our understanding of the conditions pertaining to sustainable peace for both peoples. The central claim, in disagreement with almost all recent assessments, is that intergovernmental diplomacy of the sort practiced since the 1990s is delusional so long as Israel clings to the present matrix of racist control over the Palestinian people that we have labeled as apartheid. There is a further complication associated with the fact that so long as Israel insists on being a Jewish state, as distinct from a Jewish homeland, it will be unwilling and psychologically unable to address the apartheid agenda.

As the sun sets it tends to burn brighter, and so it seems with Israeli efforts to control the discourse, and establish the rules for an endgame dictated by Tel Aviv. There is now a *Nakba* Law that penalizes with heavy fines those that observe the *nakba* or cast doubts on the legitimacy of proclaiming Israel as a Jewish state. Along similar lines, Israel is now denying entry and mandating deportation to those, including Jews that the government identifies as supporters of BDS even if their support is only verbal.

In effect, a central battleground in the current phase of the legitimacy war concerns discourse management and impact. It is a struggle for shaping the media, public opinion, and the outlook and behavior of governments, international institutions, and NGOs. As suggested above, the battle lines are proceeding on parallel tracks, with critics moving cautiously from occupation to apartheid and apologists angrily alleging anti-Semitism, Israel-bashing, and planting the story in

the mainstream that the Palestinian struggle has become ‘a lost cause’ or at best, ‘a forgotten cause or backburner issue.’

What gives this discourse rivalry a telling character is that the critical side relies on analysis and a search for a sustainable peace while the apologetic side concentrates its energies and considerable capabilities on name calling, backroom influence, suppressive violence, and further encroachment on areas of Palestinian population majorities, with the exception of Gaza, which for largely demographic reasons, Israel would like to have absorbed by its Arab neighbors or remove itself from the Palestinian struggle by becoming somehow an autonomous region . We do not believe that it is possible to develop a scholarly analysis that demonstrates that Israel, appearances notwithstanding, is not an apartheid state. I am not sure that the UN could find reputable authors to take on such a challenge, but it might be worth a try to move the debate into the open, yet I suspect this is the last thing that Israel and militant Zionists would want.

In conclusion, we claim that the apartheid argument is better understood and more widely accepted than before the ESCWA Report was released in 2017. Such a development has intensified Israeli and Zionist pushback efforts at a time when Israel’s diplomatic future seemed more secure than it has ever been due to accommodating moves with most Arab governments (over the heads of the people who continue their ardent support of the Palestinian national struggle). These regional developments are fragile, and could quickly turn in directions unfavorable to Israel. As with the last stages of the movement against South African apartheid, hopes for peace with justice rest more and more on the degree of mobilization that takes place in global civil society. In this regard, this conference represents an exciting and encouraging sequel to the perspectives and recommendations put forward in the ESCWA Report, and we are hopeful about the potentiality of building momentum by an emphasis on the criminality of Israeli apartheid structures.

Part II:  
Reimagining Palestine:  
Implications of the ESCWA Report for a Paradigm Shift

Virginia Q. Tilley

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I. Introduction: The Failed Paradigm

In arguments about the “Palestine problem,” people disagree on almost everything: who was originally responsible for it, who has rights or what kind of rights, how it should be resolved, even what “exists”—that is, whether “Palestine” ever existed and whether the Palestinians and Jews are “peoples” with the right to self-determination in Mandate Palestine.<sup>1</sup> These differences are so deep that their proponents can seem to live in different universes. Still, anyone with a longer memory of the Palestine problem—say, three decades or more—readily agree on one thing. The human rights situation for Palestinians living under Israeli occupation is worse today, *far* worse, than it was when they first encountered it.

Thirty years ago, the occupied Palestinian territories (OPT) were certainly dangerous and difficult places to live. As documented by innumerable reports to United Nations committees, Palestinians were facing land confiscation, arbitrary arrests, illegal detention, torture, assassinations, harassment at Israeli checkpoints, military raids and a host of other stresses and human rights abuses. Palestinian businesses were struggling, Palestinian agriculture was losing water and markets, unemployment was high and poverty was rising. Still, no Wall stood anywhere: there was no “Seam Zone.” Palestinians moved freely around the West Bank and passed daily in and out of Jerusalem, while hundreds of thousands of Palestinians crossed into Israel every day for work or even a day at the beach. Palestinian cultural institutions were thriving and universities were hotbeds of revolutionary politics. Politically, although factionalism ran deep, the Palestine Liberation Organization (PLO) was maintaining a general environment of Palestinian national unity. Although the First Intifada in 1987 challenged its leadership, the mass uprising also demonstrated the cohesion then holding for the “Palestinian people” as a whole.

International engagement also looked very different. The PLO stood tall on the international stage as the “sole legitimate representative of the Palestinian people” and used the UN effectively as a human rights and solidarity forum. Thousands of nongovernmental organizations (NGOs) around the world coordinated with the Division on Palestine in working on issues such as settlement growth, land confiscation, military violence and the special needs of Palestinian prisoners, women, children, refugees, journalists, artists, academics and farmers. In 1992, for example, three hundred such NGOs were registered with the Division in North

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<sup>1</sup> The term “Mandate Palestine” is used here to reference all territory under Israeli rule except the Golan Heights. The Mandate was established by the League of Nations for the British Mandate for Palestine in 1922, which includes all territory presently governed by Israel except the Golan Heights. It remains the framework for all diplomacy on the conflict as well as debates about partition or a one-state solution.

America alone and the European version was larger<sup>2</sup> All this work reflected a collective optimism that US and European public opinion would eventually shift toward pressuring Israel to end the occupation, allowing the Palestinian people to express its right to self-determination in a Palestinian state in the OPT. When the Oslo Accords were signed (in 1993 and 1995), people rejoiced that a two-state solution, a just and stable peace, was only a few years away.

The result? Today, some two million people in the Gaza Strip live under siege, facing what independent observers warn is imminent “catastrophe” due to a poisoned water supply and unemployment soaring over 60 percent. In Jerusalem, Palestinian neighborhoods have been fragmented, sealed and whole areas demolished to serve Israel’s plan to “judaize” the expanded city. (In 2019, the rate of houses demolitions actually reached a historic high.)<sup>3</sup> Meanwhile, Jewish settlements have expanded to consume over two-thirds of West Bank territory, while the Wall has created a fully segregated Jewish-national life, reducing Palestinian Arab society to isolated cantons. Within those enclaves, such as Ramallah, Palestinians live in bubbles of superficial normalcy. Otherwise, they face the same human rights abuses as before, yet in a society far more suffocated, economically, socially and culturally, by surrounding settlement cities, pass laws and closed zones.

Striking, too, is the leadership vacuum. The “peace process” has lost so much credibility that it is written today only in scare quotes. The Oslo Accords were supposed to bring a two-state solution, but Palestinian governance operates only in a few West Bank areas entirely surrounded by Israeli settlements and in the sealed “open-air prison” of Gaza. Diplomatically, the PA’s diplomatic standing has sunk so low that in 2018 the United States casually recognized Israel’s annexation of Jerusalem, tossing out a crucial “final status” issue. Polls suggest that many Palestinians have come to see the Palestinian Authority (PA) as merely an arm of the occupation. The decades have also seen a deep rift in Palestinian national unity, through the split between Fatah and Hamas, with neither party able to lead the national movement. In the resulting leadership vacuum, the international “Boycott, Divestment and Sanctions” (BDS) movement has gained ground, an achievement whose importance is suggested by Israel’s increasingly harsher methods to suppress it. But the BDS leadership is a civil society group, lacking any electoral mandate, and it cannot negotiate in the halls of power on behalf of the Palestinian people.

Most importantly, the famous “two-state solution” has proved a chimera. Although the Oslo Accords did not spell out a two-state solution, most people thought they aimed for one, and several UN Security Council resolutions endorsed, “two democratic States, Israel and Palestine, [living] side by side in peace within secure and recognized borders.”<sup>4</sup> As generally conceived, this solution requires Israel’s withdrawal from the OPT to allow partition of Mandate Palestine into a “Jewish state” and a “Palestinian Arab state.” Yet no such withdrawal is

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<sup>2</sup> This number is drawn from the author’s records from running the Washington Office of the North American Coordinating Committee (NACC) for NGOs on the Question of Palestine, Washington, DC, 1991-N. The contemporary European Coordinating Committee was even more active and an International Coordinating Committee was briefly important as well.

<sup>3</sup> B’tselem, “Statistics on demolition of houses built without permits in East Jerusalem,” updated 24 October 2019; [https://www.btselem.org/planning\\_and\\_building/east\\_jerusalem\\_statistics](https://www.btselem.org/planning_and_building/east_jerusalem_statistics). [accessed 4 November 2016].

<sup>4</sup> See UN Security Council resolution 2334 of 23 December 2016.

happening. Everything Israel has done over the past half century has signaled its intention to annex the West Bank, particularly through the spectacular growth of the Jewish settlements and their infrastructure. No treaty, promise, compromise or pressure has deterred Israel from continuing this agenda. Under Binyamin Netanyahu, the Israeli government instead signaled its intention to make a formal declaration of annexation.

This situation forces serious rethinking. Decades of work have led to this, expectations and hopes proving greatly misplaced. Something is wrong, somewhere, with people's basic assumptions about the Palestinian problem. With annexation looming, it is now mandatory that these mistakes be identified and corrected.

## II. The Partition Paradigm: "End the Occupation" by withdrawal

The two-state solution is the latest and most serious model for solving the Palestinian problem. In the 1970s and early 1980s, the international community's "solution" was to ignore the problem altogether: concerns about "conflict" in the region was only called the "refugee problem". The first Intifada (Palestinian insurrection) in the late-1980s demolished this neglect by establishing beyond doubt that Israel will see no stable peace until the Palestinian Arabs gain their full human rights (political, civil, economic, social and cultural). Since the Palestinians have flatly rejected Israeli proposals for doing this outside of Palestine (such as making Jordan the "Palestinian state"), international consensus finally accepted that Palestinian rights can be met only in an independent "Palestinian state" established somewhere in Mandate Palestine.

This goal led to the infamous "peace process": US-led negotiations based on a two-state solution that staggered for two decades. The whole process reflected a dominant reading of the Palestine problem as "two peoples in one land," tacitly if not explicitly recognizing that both the Palestinian people and the Jewish people have the right to self-determination. (Of course, each side still regularly argue that the other is not truly a "people," but this snag is quietly set aside for this purpose.) Since Israel is recognized as an independent state within the borders of Mandate Palestine and the Palestinian state must also form somewhere in Mandate Palestine, a two-state solution requires the territorial partition of Mandate Palestine.

The obvious basis for partition is the 1949 Armistice Lines, established after the 1948 War, which came to constitute Israel's internationally recognized borders. Since Israel first occupied the territories it seized in the Six-Day War of 1967—the West Bank, including East Jerusalem, and the Gaza Strip—the rest of the world has assumed that Israel will, and must, eventually withdraw from them. International lawyers insist that Israel's withdrawal is legally mandatory, as otherwise Israel would violate the prohibition on acquiring territory by war. Advocates sympathetic to Israel argue that Israel must relinquish the OPT in order to divest itself of the "demographic threat" (that is, demands for equal rights by the millions of non-Jews who live there) in order to remain a Jewish state. People sympathetic to Palestinian rights argue that Israel's military withdrawal from the OPT is the minimal condition for accepting a "Palestinian state" in less than one-quarter of Mandate Palestine. All these views interpret the "Palestinian problem" equating "end the occupation" with ending the problem itself.

The trouble with this equation is that Israel demonstrably has no intention of withdrawing from the OPT. In 1972, the Jewish Agency and World Zionist Organization launched the settlement project in the West Bank to install a civilian population that would consolidate Israel's permanent hold and ensure that Israel never withdraw. That this aim was serious is, again, demonstrated by the landscape today: the enormous settlement infrastructure Israel built on this agenda: industrial zones, residential apartment complexes and their schools, universities, office complexes, synagogues, shopping malls, recreation center, parks, and highways, the electrical, water and telecommunications grids, farms and so forth.

Partition therefore requires that Israel reverse this policy by abandoning all this infrastructure and handing it over to Palestinian control. Outsiders might hope that Israel will do this, given the right combination of incentives and pressure, but Israel has raised several objections to withdrawal that, within Israel at least, hold irresistible force for Zionists of different ideological persuasions.

- *Economic.* Private Israeli business interests, as well as the Israeli State, have made staggeringly large financial investments in the West Bank settlements. After four decades of construction, the value of the entire infrastructure is estimated at over US\$1 trillion. Moreover, this investment does not exist as a separate sector. It is seamlessly fused into the Israeli economy. At this stage, abandoning this huge investment, whether by handing it over to Palestinian use or by “dismantling” (bulldozing) the entire infrastructure, would sink the Israeli economy. Nor could Palestinians, or international funders, conceivably buy it out.
- *Military.* The majority of Israeli military advisers still argue that the West Bank is essential for “strategic depth,” an argument less compelling in the age of drones and missiles but nonetheless a fixture of the state’s security strategy. Controlling the entire West Bank is also considered mandatory to protect neighboring Jewish areas from the kind of security threats experienced in Israeli towns near the Gaza Strip. Both arguments have become engrained in popular Jewish-Israeli imagination (especially for settlers) by the frightening experience of hand-made missiles launched from the sealed Gaza Strip into nearby Israeli towns. That a peace agreement might eliminate these threats is considered inadmissibly naïve.
- *Water.* Israel sit in an arid region with insufficient water for its own population. The Mountain Aquifer, flowing through rainfed limestone deposits under the West Bank, provides around one-fifth of Israel’s national supply, while the Jordan River and springs in the Jordan Valley contribute more. The Palestinian state would need all this water (and more) for its own needs, but Israel cannot give it up without devastating effects on its agriculture and the first-world lifestyles of its population. Some argue that desalination plants might replace some of this lost resource, but desalinization is expensive and so far it has filled the shortfall rather than provided any surplus. Israel has every incentive to keep control over the best renewable water supply in the region.<sup>5</sup>

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<sup>5</sup> Israel treats statistics on water resources and usage as matters of state security and precise data on OPT resources and their management is difficult to obtain. Estimates here should be treated with caution.

Some people imagine that all the above interests would be sacrificed if Israel were forced to choose between holding onto the West Bank and preserving itself as a Jewish state. Yet this assumption misses the real reason that Israel will not—cannot—withdraw from the OPT: because doing so would imperil Jewish statehood itself. This is something no Israeli government will ever do, and understanding this national imperative reveals the underlying error in the two-state solution.

### III. Zionism In the OPT

The ultimate reason compelling Israel to keep the West Bank is, for many third parties, the poorest understood. That is the territory's importance to Israel's remaining a Jewish state. This factor manifests in two ways: (1) the West Bank's importance to Jewish-national (Zionist) unity; and (2) its importance to maintaining an overwhelming Jewish majority in Israel. So far, the doctrine of Jewish statehood (Zionism) has not been raised for review in any international diplomatic process, reflecting both misunderstanding of its role and its explosive political sensitivity. Yet it is this doctrine of sustaining Israel as a Jewish state that lies at the heart of Israel's occupation, precluding withdrawal from the West Bank and therefore the partition considered essential to resolving the Palestine problem.

#### A. Jewish-national unity

First, it is important to recognize a fundamental fact about Israel: it is not a “nation-state” in the sense this term is used other states around the world, including France (with which Israel's advocates often compare Israel). In all countries today, being a “national” of a state (that is, being legally “French,” “Dutch,” “Italian” and so forth) is acquired simply by citizenship. In international law, “nationality” and “citizenship” are indeed the same concept. If someone holds citizenship in a state, then that person is a “national” of that state regardless of religion, ethnicity, “race” or ethnic or national origin,. In Israeli law, however, nationality and citizenship are entirely separate categories. Israeli Basic Law establishes Israel as the state of the *Jewish people*, not any “Israeli people” (which Israel's High Court has confirmed does not legally exist.)<sup>6</sup> While all “citizens” of Israel are treated equally, many special privileges and rights under Israel law are accorded exclusively to Jews (as nationals of the Jewish state) and denied to Israel's non-Jewish citizens—that is, non-nationals. Israel's much-cited “Nation-State Law,” a new Basic Law passed in 2018, expresses this in plain language, but those familiar with Israeli jurisprudence know that the concept has operated since Israel's founding. It informs Israel's policy to implant Jewish settlers in the West Bank, as extending Jewish statehood into occupied territory is facilitated by creating a sufficiently large Jewish demographic presence.

At the same time, Israeli policies toward the OPT reflect an old internal split: disputes within the Zionist movement about just what “Jewish statehood” means. Any short treatment

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<sup>6</sup> Israel's Basic Laws serve as the state's constitutional law. Basic Laws can be passed with a simple majority of the Knesset.

of Zionism abuses its complexity as a movement, but for purposes here it will serve to cite the broad distinction commonly drawn between so-called “religious” and “secular” Zionists. Religious Zionists conceptualize Eretz Israel—the Land of Israel—as sacred land, drawing on the Biblical account of God’s Covenant with the Israelites to provide a land in which they could live a virtuous life in accordance with God’s laws. Jewish life outside this land has no spiritual meaning. “Returning” to this land is therefore a spiritual quest, “redeeming” both the land and the chosen people. Although all of modern Israel is Eretz Israel in this sense, the West Bank—in Israel, “Judea and Samaria”—is its heartland, where the epic Biblical narratives played out (the stories of the Patriarchs, the Kingdom of David and so forth). Living in Judea and Samaria is therefore the fullest expression of a true Jewish life and withdrawing from it is not only unimaginable but would fly against the central purpose of Israel’s existence. About one-third of West Bank settlers today are “religious” in this sense.

“Secular” Zionists have a much wider understanding of “being Jewish” and actual religious observance varies widely. For this broad sector, “being Jewish” draws more from a sense of Jewish national unity than religious tradition: that is, the unique Jewish-Israeli culture that developed in the twentieth century through the collective experience of immigration and settlement, the binding influence of Modern Hebrew, a rich nationalist corpus of Jewish-Zionist literature, art and imagery, the sense of perennial threat from surrounding Arab states and other classic nationalist experience. This identity also invokes a commitment to “western” liberal values, such as democracy, and the Israeli government promotes Israel as a beacon of progressive principles such as gender rights. Many Jews in this “secular” category do not consider Judea and Samaria more “sacred” than any other part of Israel and can imagine Israel continuing as a Jewish state without them.

Yet in recent years another variant of Zionism has gained ground to the point of dominating in Israel’s Knesset. Called by some “ultra-nationalist,” this camp emphasizes the universal principle of self-determination. The claim is that the Jewish people is Palestine’s true indigenous people and therefore the rightful sovereign in the land from which it was, according to the Zionist account, unjustly exiled by the Romans. In this view, the supposed split between “religious” and “secular” ceases to matter. As Israeli schools teach the Bible as objective history, they instill in all Jewish Israelis the belief that the West Bank is the literal site of the mythic kingdoms of David and Solomon. In this view, the right of the “Jewish people” to its ancient homeland is inalienable and that no other group, whatever its history in the land, has comparable national rights there. This sector would see withdrawal from Judea and Samaria not as sinful but as treasonous.

Both religious and ultra-nationalist Zionism would therefore view any withdrawal from part as a national betrayal. Their adherents have indeed sworn to take up arms to defend the settlements in Judea and Samaria from either destruction or (even more odious) any handover to non-Jews. Religious and nationalist Jewish riots protesting Israel’s withdrawal of eight small settlements from the Gaza Strip in 2006 confirmed the seriousness of this threat. Yet the Gaza crisis was a mere teaser, or warning, of the mortal schism that would erupt within Zionism if any Israeli government proposed withdrawing from Judea and Samaria. Even if such resistance were suppressed, the clash would leave whole sectors of disillusioned Zionist Jews denying that



Israel is truly a Jewish state, thereby wrecking Israel's claim to be the nation-state of Jews everywhere. No Israeli Government would invite such a national debacle, or survive one.

In sum, Israel cannot withdraw from the West bank without facing a fatal rift in the Zionist body politic. The territory too central, too cherished, and too embedded in the national geographic imaginary. Israel's policy is therefore to keep the territory and Jewish settlement is the way to secure it.

## B. The Demographic Threat

The obvious problem for Israel in keeping the West Bank is that it holds millions of non-Jews.. As a "Jewish and democratic state," Israel faces the same danger faced by any ethnic democracy: that ethnic Others, if they gained the vote, could eradicate ethnic rule. Just as British whites in Australia" faced the "threat" of mass Asian immigration and Afrikaners in South Africa faced the "threat" of the Black African majority, Israel faces the "threat" of a Palestinian majority voting Jewish statehood out of existence. The ESCWA Report clarified how Israel's policies to secure a Jewish majority in Israel have guided its policy in four "domains": inside Israel, in Jerusalem, in the OPT and outside Mandate Palestine (refugees). To date, this system has allowed Israel to shelter its parliamentary democracy from the "threat" of a Palestinian majority vote.

Still, ethnic states face another intrinsic threat: ethnic miscegenation. In any society, routine inter-ethnic mixture (through marriage and families, friendships, businesses associations and so forth) eventually blur ethnic boundaries. Intermarriage especially casts as unfair any laws that treat ethnic groups differently. For this reason, ethnic democracies must strictly segregate ethnic groups in order to prevent such mixing.

For this reason, Jewish statehood faces its most serious danger from the Palestinian population living in the OPT, now some five-million strong. Two million can be safely sealed inside the Gaza Strip, but some three million Palestinian Arabs live in "Judea and Samaria," which Israel is committed to annex. Somehow, Jews and Palestinians, although living within a stone's throw of each other, must be kept apart. It is this demographic imperative that truly precludes a two-state solution.

The logic becomes clear upon simply laying it out. As noted earlier, Zionist unity requires that Israel retain most of "Judea and Samaria" under permanent Israeli sovereignty. A Palestinian state can be allowed to form in part of this territory, as an inescapable necessity, but keeping Israel "Jewish" requires that Palestinians living there be prevented from freely mixing with Jewish-Israeli society. To secure this strict segregation, Israel's present system of forced segregation—the Wall with its caged gates guarded by Israeli soldiers, the permit regime (Pass Laws) that tightly limit passage—must be sustained. It should be obvious that no Palestinian state can operate a viable national economy in the OPT without open borders: conditions in Gaza show what results from that scenario.

Outsiders might believe that such tight border controls would relax as relations normalize and security conditions improve. But this view assumes that border controls indeed

exist to deter security threats, such as terrorism. It misses the intractable problem that Jewish statehood itself is threatened by any free mixing of populations and will always rely on closely controlling who leaves and enters a Palestinian state nested within Israeli territory. Even in the impossible scenario of a full Israeli withdrawal from the OPT, borders between the two states would have to stay closed. Again, Israel has no incentive to undertake the horrific consequences to its economy and national cohesion that would result from fully abandoning all its investments and Jewish settlements in Judea and Samaria. Jewish statehood and the two-state solution are simply incompatible.

Yet in retaining the OPT, Israel still faces the “threat” that Palestinians living under occupation would eventually demand the vote. The occupation is a problem also for Israel’s foreign relations, embarrassing its western allies and impeding its fully normalizing relations with neighboring Arab states. Israel therefore must therefore find a way to consolidate its sovereignty in the West Bank without making the Palestinians Israeli citizens. Fortunately, Israel has another state’s experience to draw upon. White supremacy in South Africa faced the same problem: a large indigenous population whose vote would eradicate white supremacy, yet whose political exclusion raised worsening difficulties for internal security and the state’s foreign relations. South Africa’s answer was to establish Black “Homelands” or Bantustans: enclaves for Black South Africans, safely nested within all-white territory, in which they could have their own governments and to which their citizenship could be transferred. The Bantustan system seemed promising to its architects, but it was rejected as racist ploys both by the people forcibly transferred to them and by the international community. What Israel required was a Bantustan that both Palestinians and international opinion would endorse.

#### IV. The Bantustan Solution: The Oslo Accords

Brokered by the US Administration of Bill Clinton, the Oslo Accords provided the answer. The 1995 “Interim Agreement on the West Bank and the Gaza Strip” proposed a staged Israeli withdrawal from the West Bank, based on a map dividing the territory into three gerrymandered “Areas.” The idea of a staged withdrawal struck many as sound, allowing a process of confidence-building and incremental normalization culminating in partition and two states. Yet amid all the celebrations and optimism, even the Palestinian leadership failed to notice that Israel had built its annexation strategy into the fine print.

##### A. Replicating the Bantustan Model

First, few people noticed that the borders of Areas A, B and C were drawn along lines that correlated with long-standing Israeli master plans for the West Bank Jewish settlements. Israeli forces did immediately withdraw from Area A, turning these enclaves over to the newly established PA. Yet the patchwork of canton comprising Area A had already been destined by Israeli planners to become Palestinian zones, which Israeli settlements were designed to encircle. In following years, withdrawal from Area B lagged, while Jewish settlements continued to expand in Area C. In 2003, the Bush administration tried to revive the stalled process in his

“Road Map to Peace,” which explicitly called for two states and which Israel signed.<sup>7</sup> Yet in its “reservations” to the agreement, Israel conditioned any further withdrawal on actions by the PA that it was clearly unable to do: for example, ensure the complete “cessation of incitement,” which Israel interprets to include any expression of criticism toward Israel. Since the PA could never imaginably meet this standard, Israel was protected (at least, in its own estimation) from having to withdraw any further. Throughout the following decade, settlement construction in the West Bank actually accelerated.

Second, people failed to notice how closely the institutional design of the “Palestinian Interim Self-Government Authority” replicated the constitutional design of Bantustans in apartheid South Africa. It was unlikely that this mirroring was accidental. Israel and South Africa had been close allies throughout the apartheid era, considering themselves fellow travelers as ethnic states located in continents of ethnic Others. Their strategic military alliance and dense business ties were based on this bond. Even the names matched up: the term in South African law was “Bantu Self-Government Authorities.”

The South Africa Bantustans provided another feature replicated in the 1995 Accord: the language of “peoples,” “homeland” and “right to self-determination.” In both settings, this language rang as morally noble and politically sound, but was actually deployed to absolve the dominant state of any responsibility for the unwanted group’s rights and welfare. The native people would have autonomy in something called a “state.” Yet the dominant state (Israel or White South Africa) would retain veto power over that state’s internal development and security policies. Once established in this unthreatening formulation, such states could safely be awarded “independence.” In South Africa, the citizenship of black South Africans would be transferred to the Homelands; in the OPT, stateless Palestinians were to gain citizenship in their own new “state.”<sup>8</sup> In both cases, the Bantustan “state” was safely nested inside the dominant state, with no independent access to the outside world, ensuring that it could not escape the tight restrictions on travel, trade, development and movement that secured ethnic (racial) segregation.

In this design, “Palestinian state” had come to mean something the Palestinians had never intended. “State-building,” as pursued by the PA and external funders ever since, is a trap.

## B. The Electoral Fig Leaf

The South African Bantustans faced one fatal flaw that would lead to their downfall. At an early stage, the apartheid government had recognized “tribal” Black leaderships as local authorities (and proxy agents for white rule). As the Black Homelands matured into “states,” these leaderships became government leaderships vetted and approved by the apartheid regime. Unsurprisingly, these governments had difficulty gaining any popular legitimacy. The

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<sup>7</sup> A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, 30 April 2003.

<sup>8</sup> This move was effected by the Black Citizenship Act of 1970.

African National Congress (ANC) always rejected them as quislings, insisting that the true leaders of Black South Africans were people the regime had exiled or imprisoned, such as Nelson Mandela. Equated with apartheid itself, the Bantustans were the sites for the last open battles against apartheid. As the apartheid regime's great effort to eliminate the "demographic threat," the Bantustans were abject failures. The apartheid regime began to buckle in 1990 and by the time Israel signed the 1993 Accord it had collapsed completely. The lesson could not have been lost on South Africa's close ally, Israel.

Accordingly, the 1995 Accord brought Yasir Arafat and his Fatah elite back into the OPT to serve as the PA. It also provided for an electoral mandate—popular elections for the PA presidency and parliament—to avoid the Bantustan's fatal problems with leadership legitimacy. Initially, the effort worked. Still seen by most Palestinians as the principled father of Palestinian resistance, Arafat swept the presidential elections of 1996 with over 88 percent of the vote.

However, the effort failed in two respects. First, the PA was unable to secure the OPT for an independent Palestinian state as had been expected. The 1995 Oslo Accords had established a five-year deadline for Israel's withdrawal, culminating in fully autonomous rule by the Palestinian Authority in the West Bank and Gaza Strip. Yet even by 1998, Palestinians were seeing West Bank settlement construction continue, while checkpoints, closures and other obstacles were further restricting daily movement. By 2000, Israeli's intentions had become clear. The Oslo Accords had transferred primary responsibility for West Bank security to the Palestinian Authority, although never transferring actual sovereignty. They thereby ensured what Israel had not been able to sustain: a peaceful and secure environment for Jewish settlements in the West Bank. Terminally frustrated by the betrayal, some Palestinian factions launched a second uprising. Yet this time—with Fatah operating in league with Israel to suppress Palestinian dissent—insurrection politics were fragmented and no clear ideology prevailed.

The result was the Second Intifada: an inchoate explosion of Palestinian violence that, disastrously for all concerned, included maverick acts of terrorism. The violence inspired Israel to even harsher measures to separate the ethnic populations. Most dramatic was what Israel called the "separation barrier"—an enormous concrete Wall established as a contiguous barrier embracing all the West Bank settlement blocs, through which Palestinians could pass only by shuttling through metal gates guarded by Israeli soldiers. With Jewish-only settlements, industrial parks, "nature reserves," agriculture and closed military zones flanking Palestinian cantons on all other sides, Palestinians in one Area A canton could not travel even to other Area A cantons without enduring an Israeli security search.

After Arafat died, endemic corruption in Fatah and growing disillusion with the Oslo process as a whole allowed the Islamic party Hamas in the Palestinian to win the PA's 2006 parliamentary elections. The electoral fig leaf was promptly abandoned: Israeli and US promptly launched a covert program to support a local Fatah strongman (Muhammed Dahlan) in overthrowing Hamas by military force. Although the Hamas leadership learned of the attack just in time to thwart it, the outcome was never in doubt. When the dust had settled, Fatah was again safely reinstalled in Ramallah to head the PA while Hamas was confined to the Gaza Strip.

Israel and the United States then promoted the myth of a “ Hamas attempted coup ” to plaster over the entire affair.

By 2008, it was becoming clear to everyone that no sovereign Palestinian state was forming. The situation baffled outsiders. Why had Israel not withdrawn, as the Oslo Accords called for it to do? Why would Israel deliberately wreck the two-state solution that seemed essential to its remaining a Jewish state?

The answer was explained above: it was precisely to preserve Jewish statehood that Israel was blocking formation of a truly sovereign Palestinian state. Proponents of a two-state solution had completely missed this, assuming that Jewish statehood was itself unproblematic and could flourish within partitioned territory. But as Oslo failed so badly, assumptions about the situation had to shift. Another model better explained Israel’s behavior and the collapse of the two-state paradigm. The Palestine “ problem ” was not that two peoples were making rival demands for self-determination that could be satisfied only by partition and a independent state for each. Rather, it was the fundamental incompatibility of any state doctrine of ethnic statehood with the universal human rights of everyone living in that state’s territory. The real problem, in other words, is the doctrine of ethnic domination itself. And that problem is captured by one term from international law: apartheid.

## V. The Apartheid Question

The term “ apartheid ” has floated through discussions of the Palestinian problem for half a century. As early as the 1960s, the UN General Assembly coupled Israeli policies to denunciations of apartheid in resolutions denouncing Israel and apartheid South Africa. The idea floated unevenly through human rights debates, although in 1987 one short book did urge that Israel’s regime be seen as an apartheid state.<sup>9</sup> During the Oslo years (1990-1995), the term fell into disuse, marginalized by the two-state “ vision, ” but as Oslo failed, it reappeared in activist rhetoric. In 2005, activists launched the annual “ Israel Apartheid Week ” and slogans such as “ Apartheid Wall ” became common. The term remained firmly excluded from formal diplomacy. Yet some prominent politicians—including former US President Jimmy Carter, U.S. Secretary of State John Kerry and even leading Israelis such as former Prime Minister Ehud Olmert—warned that if partition truly failed then Israel’s ruling two ethnic groups according to different laws would effectively be apartheid.<sup>10</sup> In 2009, the Human Sciences Research Council

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<sup>9</sup> Uri Davis, *An Apartheid State* (Zed Books, 1987).

<sup>10</sup> As one commentator noted: “ ... several high-profile Israelis have suggested that apartheid is not a future risk but a present reality, including former education minister Shulamit Aloni (“ Israel practises its own, quite violent, form of apartheid with the native Palestinian population ”), former environment minister Yossi Sarid (“ what acts like apartheid, is run like apartheid and harasses like apartheid, is not a duck — it is apartheid ”) and former attorney general Michael Ben-Yair (“ we established an apartheid regime in the occupied territories ”). Others have gone even further, recognizing that Israel is in complete control between the Jordan River and the Mediterranean Sea, and extending the apartheid analogy from the occupied West Bank and Gaza to inside the Green Line, to what’s considered Israel proper. Former Foreign Ministry chief Alon Liel, who also served as ambassador to South Africa, has said that “ until a Palestinian state is created, we are actually one state. This joint state...is an apartheid state ”: Mehdi Hassan, “ Top Israelis Have Warned of Apartheid, so Why the Outrage at a UN Report? ”, *The Intercept* (22

of South Africa raised the ante further by issuing a scholarly study (hereafter, the HSRC Report) finding Israel's practices in the occupied Palestinian territories (OPT) were already consistent with the definition of apartheid in international law.<sup>11</sup>

In reaction, Israel's defenders insisted that any association of Zionism with apartheid was outlandish, an anti-Semitic slur. As this warning was backed by the United States, UN forums carefully avoided the term, But on 15 March 2017, the taboo was broken. The UN Economic and Social Commission for West Asia (ESCWA) held a press conference presenting a commissioned study finding that Israel is an apartheid regime.<sup>12</sup> For the first time, a United Nations organ had lent the imprimatur of its authority to the accusation that Israel is an apartheid regime.

The impact was chronicled in rounds of newspaper headlines around the world. Within hours, Israel issued outraged denunciations of the Report (and its authors). The US and Israeli ambassadors to UN met with Secretary General Antonio Guterrez to demand that the Report be "retracted," Gutierrez ordered ESCWA to do this (on the false excuse that the Report's release had violated UN procedure), and ESCWA Chair Rima Khalaf resigned in protest. The Report would not be formally "retracted." But within days it was removed from the UN website. Within ESCWA itself, the Report was quietly shelved and its translation into official UN languages, normal treatment for such documents, was put on indefinite hold. This treatment allowed Israel to claim that the Report had been retracted and was worth no further consideration, except as an expression of "the new anti-Semitism."<sup>13</sup>

The rest of the world was not so sure. For one thing, even the Report's harshest critics had not disputed the Report's actual evidence or findings. Attacks on it were almost entirely *ad hominem*, as critics accused its authors of anti-Semitism. For another, those familiar with Israeli policies did not consider the finding of apartheid far-fetched. Most of the evidence had long been known; the Report's principal innovation was to match Israel's policies against the definition of apartheid in international law. Yet observers were less sure what to do about it, and not only because the US Government made clear the penalties of acting on the Report's recommendations. People were truly unclear about exactly what the finding signified. If the Israeli-Palestinian "conflict" was truly a case of apartheid, the first outside of southern Africa. what, if anything, did that finding signify for diplomacy and for a just and stable peace?

The Report had not addressed this question. Respecting the parameters of the ESCWA commission, it had drawn only two general conclusions. First, Israel is guilty of the crime of apartheid, in having deliberately established a regime of racial domination imposed on the Palestinian people as a whole. Second, because the crime of apartheid has become customary

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March 2017), <https://theintercept.com/2017/03/22/top-israelis-have-warned-of-apartheid-so-why-the-outrage-at-a-un-report/>. [accessed 27 October 2019]

<sup>11</sup> Subsequent endorsement of the apartheid finding by the Russell Tribunal, at a conference in Cape Town, followed in 2011 to much international publicity.

<sup>12</sup> Richard Falk and Virginia Tilley, "Israeli Practices regarding the Palestinian People and the Question of Apartheid," *Palestine and the Israeli Occupation*, Issue #1, UN Economic and Social Commission for West Asia.

<sup>13</sup> For additional details on this reaction to the Report, see Richard Falk, "The Inside Story on Our UN Report Calling Israel an Apartheid State," *The Nation*, 22 March 2017.



law, all state governments are obliged not only to oppose it but act to end it.<sup>14</sup> This observation left unclear, however, how apartheid should be “ended.” Can it be accomplished simply by Israel’s withdrawal from the OPT? The ESCWA Report had cited Israel’s policies not only in the OPT but inside Israel, Jerusalem and regarding Palestinian refugees as comprising one synchronized apartheid regime. In that light, ending the occupation would not end apartheid. Apartheid is not ended by moving a border; it is ended by eradicating the racial ideology that drives the “inhuman acts” of apartheid, which are crimes against humanity. Did “ending apartheid” therefore require confronting something deeper about the conflict—Jewish statehood itself?

In fact, the apartheid finding suggested the necessity of rethinking the entire “Palestine problem.”

## VI. Revisiting the Politics of “Self-Determination”

The plan to partition Palestine into two states had always been based on the demand of both “peoples” for recognition of their right to self-determination. Indeed, nothing in the Palestine problem has carried more ideological and political weight than this demand. Zionists claim it for the “Jewish people”; Palestinians claim it for the “Palestinian people.” Both equate self-determination with national liberation from a bitter and traumatic history of statelessness, exile and persecution. As noted earlier, these rights have been acknowledged by outsiders in anodyne phrases such as “two peoples in one land” and “two states for two peoples.” Legally, Jewish self-determination was tacitly recognized by the international community in accepting that Israel is an expressly “Jewish” state, while the existence of a “Palestinian people” and its right to self-determination have been confirmed by the International Court of Justice.<sup>15</sup>

In finding that Israel is practicing apartheid, however, the ESCWA Report threw this construction into a new light, raising a disturbing comparison. In Palestine, the international community has accepted self-determination as the legally correct and politically appropriate principle to guide conflict resolution, taking as a given that two “peoples” are involved. Yet in apartheid South Africa, it was *white supremacists*, not the ANC or leaders like Mandela, who insisted that the country was composed of different “peoples,” each with the right to self-determination. In South Africa, that formula was accordingly rejected by that same international community. Why was it rejected there and endorsed in Palestine? What is the difference?

The “self-determination” argument in South Africa here requires a short summary. In 1931, when South Africa became fully independent from British rule, Afrikaners (white Dutch

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<sup>14</sup> Since the prohibition of the crime of apartheid is now recognized as customary law, the obligation to oppose it applies to all states regardless of whether they are parties to the Convention on the Suppression and Punishment of the Crime of Apartheid or the Rome Statute of the International Criminal Court.

<sup>15</sup> Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), <https://www.refworld.org/cases,ICJ,414ad9a719.html>. [accessed 9 July 2004]

settlers) saw their opportunity to impose the unfettered white supremacy that British rule had impeded. In 1948, the Afrikaner (white Dutch settler) Nationalist Party came to power and passed the elaborate system of racial legislation called “apartheid” (Dutch for “existing apart”). Apartheid imposed a draconian racial hierarchy and strict segregation of the racial groups it recognized (black, white, Indian and Colored). However, the system soon generated serious domestic resistance as well as international pressure. To appease and deflect criticism, the apartheid regime attempted to legitimize apartheid by claiming that Black South Africans actually consisted of nine “peoples” (based on language differences), each with the right to self-determination. The corollary claim was that white people also comprised a separate “people” in the sense and that it too had the right to self-determination. The aim was to provide legal and moral cover for partitioning South Africa into separate racial zones suggestively called “Homelands”: Black South African “peoples” in ten nominal “Homelands” and white South Africans in their own “homeland”—that is, the rest of the country. The whole scheme was called “Grand Apartheid”: the “final solution” to governing a country with an overwhelming black majority.

Although pursued with alacrity by the white apartheid regime, Grand Apartheid never gained legitimacy for anyone else. It was horrifying to most black South Africans, who stood to lose access to “white” areas (most of the country) where they had previously lived as South African citizens. The ANC denounced the “self-determination” argument as transparently racist deceit. The international community soon came to agree and no other UN Member State recognized any of the Bantustans as independent states (except Israel).<sup>16</sup> Consensus was universal: ending apartheid required discrediting and eliminating racial divides, not reinforcing them through the window-dressing of “national” self-determination.

The Palestinian demand for self-determination has a different historical profile, of course, having emerged as a variant of the modern Arab nationalism that arose in the nineteenth century. What matters here is how the emerging “Palestinian” national identity was impacted in the twentieth century by the Zionist movement.<sup>17</sup> At the dawn of the Mandate period (1922), “Palestinian” was simply a geographic referent, embracing everyone who lived within Palestine’s newly defined borders. In this sense, it was an expressly non-ethnic identity. Moreover, Arab nationalists in Mandate Palestine had certainly sought a secular state. Despite its ominous references to “civil and religious” rather than “political” rights of the “non-Jewish communities” and its inconsistent language about “peoples” and “communities,” so did the British.<sup>18</sup> As the British Government clarified in 1922, “... it is contemplated, that *the status of*

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<sup>16</sup> Four Bantustans were eventually declared “independent”: Bophuthatswana (the “Homeland” of the Tswana), Venda (centered on Venda ancestral territory) and Transkei and Ciskei (for the Xhosa).

<sup>17</sup> Charter of the Palestine Liberation Organization (1969) Articles 9, 19 and 26.

<sup>18</sup> In the 1922 Command Paper, issued to accompany the British Mandate. “... the terms of the Declaration referred to do not contemplate that Palestine as a whole should be converted into a Jewish National Home, but that such a Home should be founded ‘in Palestine.’ ... Further, it is contemplated that the status of all citizens of Palestine in the eyes of the law shall be Palestinian, and it has never been intended that they, or any section of them, should possess any other juridical status.” The same paper confused the situation by alternatively referring to Jews as a “community” and as a “people.” In 1939, another White Paper attempted to explain what was meant:



*all citizens of Palestine in the eyes of the law shall be Palestinian, and it has never been intended that they, or any section of them, should possess any other juridical status.*"

Disputes about the Mandate could, at this point, consume this discussion. Contradictory British statements at different points in history certainly provide plentiful fuel for entirely opposing interpretations. Yet, for all those old controversies, the main point remains: Mandate Palestine was created as one country, with one citizenship, to become one unified state for one "people of Palestine." The League of Nations mandate system had established this premise as the rationale for all the mandate states and the British held to it from the start. "Palestinian" nationalism did incorporate the ethnic quality of "Arab," reflecting the contemporary importance of Arab nationalism as well as local tensions between Arabs and "Europeans. But in its original concept, "Palestinian" national identity was, by necessity and by design, a non-ethnic identity that would embrace Muslims, Christians, Jews and everyone else. In this respect, Palestinian nationalism was, from the start, a true *civic* nationalism, well ahead of its time in insisting that all citizens have equal rights irrespective of ethnicity or religion.

It was the Zionist movement that deliberately stripped "Jewish" out of this formula. Political Zionists such Theodor Herzl promoted the radical new idea that Jews comprised a separate *people*, not in the older sense of religious community but in the new sense of nations with the right to self-determination. Jewish nationalism in Palestine indeed functioned much as Afrikaner nationalism was functioning in South Africa in the same period: as an ethnic nationalism claiming the right to operate its own ethnic state in territory holding a majority of ethnic Others. Yet in seeking a territorial Jewish nation-state, Zionism introduced into Palestine a division that had not existed before, fragmenting one people into two, just as Afrikaners fragmented South Africa's population into ten. According those fragments the right to self-determination simply capped its ethnic-nationalist mission, reconstructing the entire political landscape into a pattern that secured its own supremacy.

## VII. Conclusion: Reimagining Nations

This essay's focus on national identities in Palestine is not meant to suggest any disrespect either for their sensitivity or for their complexity. For one thing, a national identity is not an empirical fact, like a geographic feature, that can be independently identified and assessed by outsiders. It is a shared sense of identity, developed subjectively by its people. Famously, nations are "imagined"<sup>19</sup> and all of them depend, to some extent, on "getting history wrong"<sup>20</sup> This means that, once an identity has come to shape how people see their world and behave in it, then it is a political "fact on the ground."

Recognizing that nations are "facts" in this sense, it may seem a matter of practical necessity to accept that a "Jewish people" and a "Palestinian people" exist in Mandate Palestine. It can also seem a moral necessity. After a century of strife, both identities are the

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<sup>19</sup> The term is drawn from Benedict Anderson's canonical work, *Imagined Communities: Reflections on the Rise and Spread of Nationalism* (multiple editions, originally 1983).

<sup>20</sup> Ernst Renan, "What is a Nation?" ["Qu'est-ce qu'une nation?"], Conference held in the Sorbonne, 11 March 1882, Second Edition 2011 (Paris: Calmann Levy),

ideological foundations on which millions of people have built cherished visions of justice and rights and for which some have given their lives. Moreover, both identities have been acknowledged in international law. As noted earlier, the International Court of Justice, the world's highest authority on international law, expressly confirmed the existence of the "Palestinian people" in 2003. The existence of a Jewish people has been confirmed indirectly, as the very premise of a two-state solution rests on the assumption that Israel will remain a Jewish-ethnic democracy.

Still, equally well-known is that national identities regularly evolve to suit changing times. That they are inherently adaptable is shown in how politicians compete to define them, promoting various versions of the "nation" that support their political agendas or careers. Populations may indeed fight openly about this: for example, whether the nation can indefinitely absorb immigration by ethnic others without damaging its essential "character." Where public policies become attached to doctrine in this way, the national identity can become a political football.

International law has no say in establishing whether a "people" exists. But it does have something to say about racial discrimination and apartheid regimes, as well as any ideology that leads to them. The two-state solution has been justified as satisfying the right of both "peoples" to self-determination by creating a democratic secular Palestinian state in the OPT and sustaining Israel as a Jewish state within its 1948 borders (or something close to them). By finding Israel to be an apartheid regime, however, the ESCWA Report exposed this "solution" as legally fallacious. Apartheid is not ended by moving a border. It remains illegal anywhere it exists. Because the only reason to divide such a small and crowded land into two nation-states except to preserve apartheid in one of them, doing this violates the legal obligation to oppose apartheid in any form. Not incidentally, it would also ensure perpetual unrest, insecurity and wars.

What then should be done? As noted earlier, the fall of apartheid in South Africa is suggestive. In that setting, the liberation movement's most important discovery was that even a conflict over three centuries old could be transformed by reimagining the "national" identities that constructed it. This effort proceeded in two ways. First, the regime's opposition flatly rejected the Afrikaner National Party's claim that the Dutch-Afrikaner settler population comprised a unique *national* community with the right to self-determination. It insisted that Afrikaners were, by contrast, an ethnic group within the "people of South Africa." Second, the opposition rejected the apartheid regime's attempt to divide its own ethnic constituencies into multiple "nations" and assign them to separate state-like "Homelands." Only by rejecting this "Grand Apartheid" strategy could the apartheid regime be discredited and defeated as irredeemably racist.

Merely from outside observation, Palestinian nationalism would seem to have a natural advantage in such an approach, as, from its inception, it embraced all religions. It was precisely on that basis that Palestinians rejected Zionism as racist.<sup>21</sup> The PLO confused that rejection in

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<sup>21</sup> The fullest expression of this view in the UN was General Assembly resolution 3379 (XXX). "Elimination of all forms of racial discrimination" (10 November 1975), which concluded by declaring that "Zionism is a form of racism and racial discrimination."

1993 by recognizing “the right of the State of Israel to exist in peace and security,” unilaterally retracting “those articles of the Palestinian Covenant which deny Israel's right to exist.”<sup>22</sup> Yet the PLO (and the PA after it) never recognized Israel's right to exist *as a Jewish state*, because that would endorse Israel's continuing discrimination against its own Palestinian citizens and accept Israel's denying Palestinian refugees their right to return. The PLO did accept partition on the badly mistaken premise that Israel would (and could) accept creation of a sovereign Palestinian state while its apartheid ideology stayed intact. Yet, those two aims have been exposed as incompatible and the Palestinian “compromise” has led only to a Bantustan state in the OPT.

The South Africa precedent has more to offer Palestine than the fall of apartheid, The parallels run deeper, particularly regarding the demographic dilemma. In both places, a large and entrenched European-settler population “indigenized” (cut ties to its home country), developed a powerful sense of “peoplehood” based on the pioneer experience and persecution (by the Nazis or British), adopted a religiously informed sense of entitlement to the land and constructed the political rights of the indigenous population as existential threats. In both places, this perspective led to the same logic: any indigenous “state” was acceptable only in racial enclaves kept carefully subject to the settler society's hegemony.

In South Africa, the anti-apartheid liberation movement called this package “colonialism of a special type.” The only solution, it recognized, was to accept that history could not be rolled back, voluntary withdrawal of the settler society could not be expected and any attempt at its forced expulsion would bring cataclysmic consequences. The only way to avoid mass bloodshed or perpetual oppression was to accept that the settler society must be accommodated in one country somehow. Yet partition—consigning one portion of the country to exclusive (racial) white use—clearly violated everyone else's rights as well as international law. Building a *nonracial* (rather than *multi-racial* or *anti-racial*) South Africa reflected this position. The liberation movement invoked universal human rights principles in order to reject the country's partition on “tribal” lines. And it worked. Apartheid's terrible legacy still plagues South Africa, but the transition was peaceful, the demographic landscape is entirely transformed and the country is stable, the dominant power in Sub-Saharan Africa.

Notably, this approach had crucial impact in attracting global support. By invoking *universal* values, rather than nationalist self-determination (say, “Zulu self-determination” or “Xhosa self-determination”), the anti-apartheid movement struck a chord with people all around the world, galvanizing the international BDS movement that contributed so strongly to discrediting and isolating the apartheid regime. Both internationally and domestically, the apartheid regime could not withstand this pressure.

A second question is the role of outsiders. Each national identity is unique and its reconstruction is the prerogative solely of its members. Still, third parties can facilitate or block such processes, as they long have done. For example, by accepting that a “solution” must come through negotiations managed within the US-dominated “peace process,” the international community has helped block alternative debates that could bring critical attention to Jewish

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<sup>22</sup> Letter from Yasser Arafat to Prime Minister Rabin:(9 September 1993).

statehood itself. In endorsing the apartheid Report, ESCWA was poised to break through that blocking maneuver until the US and Israel slapped it down. Yet it left the Report's implicit message standing as the elephant in the room. If Israel is an apartheid regime, then partition is no solution. The only way to end apartheid in Mandate Palestine is to reject and defeat ethnic domination itself, and the only way to do that is by reuniting Palestine as one nonracial country.

Such a country requires a new nationalist ideology to make sense of it. Here Palestinian nationalism has the advantage of being consistent with international law, which Jewish statehood, in requiring apartheid to survive, is not. As Ali Abunimah wrote in closing his seminal 2006 book, *One Country*, "a chauvinistic appeal to ethnic tribalism ... stands no chance in a contest against democratic and universal principles."<sup>23</sup> Can a campaign based on such principles inspire a new global movement to defeat "colonialism of a special type" in Mandate Palestine? Given that state power, national identities and apartheid interplay so forcefully in this land, this question has become unavoidable.

END

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<sup>i</sup> Whether this entails also ending or only modifying the Zionist conception of Jewish statehood will be addressed separately. Of course, ending apartheid would undoubtedly at this stage of Israeli belligerent occupation of West Bank, East Jerusalem, and the Gaza Strip also include ending the occupation, but conceptually it is quite possible to envision an occupation, even as prolonged as this one, without it necessarily depending on an apartheid structure of control. For instance, Kashmir while under Indian occupation was analogous to apartheid in being abusive, but not apartheid, as the differentiation was based on religion rather than race.

<sup>ii</sup> The question of the rights of the Jewish people in Palestine has rarely been systematically analyzed in conjunction with the rights of the Palestinian people, except implicitly by the assumption that the two-state solution is an acknowledgement that both peoples claim a right of self-determination, and would administer their respective sovereign territory in accord with international law standards. This way of approaching the accommodation of rights ignores two crucial asymmetries: of history that favors Palestinian grievances; of geopolitics and hard power that favors Israeli claims. A productive diplomacy will need to take both of these asymmetries into account if its goal is a sustainable peace. On this basis there are two preconditions: ending apartheid and some acknowledgement that Jews have rights in Palestine in accord with international law, especially human rights standards that include the right of self-determination. Such an affirmation is complicated and would need to rest on a transformed conception of the Zionist Project.

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<sup>23</sup> Ali Abunimah, *One Country: A Bold Proposal to End the Israeli-Palestinian Impasse* (Metropolitan Books, 2006).

<sup>iii</sup> Jews and Palestinians are destined to live together, that is, in close proximity, in Palestine, but the challenge so far evaded, is whether they can find *benevolent* forms of living together, although not necessarily in a single shared governmental arrangement. The analysis of the ESCWA Report is based on the legal finding of apartheid as a malevolent and criminalized form of living together, which has been criminalized in contemporary international law. See Jacques Derrida in Elisabeth Weber, ed., *Living Together: Jacques Derrida's Communities of Violence and Peace* (Fordham University Press, 2013)

<sup>iv</sup> Jonathan Cook and others have written about the degree to which journalists who seek to depict Israeli control of the Palestinians are censored or intimidated. I experienced a similar kind of double reality while UN Special Rapporteur, with delegates who delivered strong public statements denouncing my report on Israeli violations of international human rights law coming to me afterwards to tell me that they were speaking under instructions, but privately agreed with the analysis in my report.

<sup>v</sup> See Intercept article on references to the threat of apartheid arising from occupation or long-term inclusion, related to 'demographic bomb'; how to ensure 'a Jewish state' if there is a Palestinian majority population.

<sup>vi</sup> See Article 7(j) of the Rome Statute of the ICC, and the 1973 Convention on the Prevention and Punishment of the Crime of Apartheid, Article II.

<sup>vii</sup> Such an assertion should not be understood as in any way minimizing the responsibility of Israel as an Occupying Power for compliance with the Fourth Geneva Convention governing Belligerent Occupation, and potential accountability for flagrant and continuing violations of its core provisions for a period that now exceeds fifty years. Citation needed to confirm this determination of responsibility as authoritative.

<sup>viii</sup> Reference to Obama and others declaring that everyone agrees on the shape of a peace agreement, which is essentially an implementation of Security Council Resolution 242 according to the consensus interpretation of its meaning, which ignores the Israeli contention that successful negotiations of peace arrangements, including adjustment of borders must precede an Israeli withdrawal. It's notable that even Hamas has indicated its acceptance of a long-term ceasefire in the event that Israel ends the blockade of Gaza and withdraws to 1967 borders. Such an interim vision of peace does not include taking adequate account of the situation of Palestinians in refugee camps, living as a minority in Israel or Jerusalem, and living under conditions of involuntary exile. For these reasons it will not produce real peace between the two peoples. Such a conception of peace if seen as other than a pause seems to involve false consciousness.

<sup>ix</sup> The initially unexpected agreement to dismantle apartheid did not come about overnight, but was achieved as a result of many intervening events, such as the murder of Chris Haney in 1993, and lengthy negotiations designed to reassure that the end of apartheid would not entail the loss of white socio-economic privilege. In some sense, contrary to popular perceptions, ending apartheid in South Africa was part of a comprehensive compromise, and should not be regarded as an all-out victory for the anti-apartheid forces or a complete defeat for the apartheid leadership and the settler white minority.

<sup>x</sup> As the South African experience illustrates by its divergent effects, what it means to abandon political apartheid is far from clear in socio-economic domains, and post-apartheid outcomes continues to stoke controversy and conflict more than twenty years after transition to a legally

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mandated multi-racial South Africa. What is clear in the Palestinian situation, as it was in the South African context, is that the abandonment of apartheid means at minimum the adoption of legal and political forms of governance that discarded all official categorizations of rights and duties on the basis of race. The more ambiguous dimensions of abandonment involve the economic, social, and cultural dimensions of apartheid, which could have been dismantled by decree or agreement among negotiators representing both sides, but were largely left untouched. Such questions entangle issues of class relation with questions of race.

<sup>xi</sup> South Africa invented the term ‘apartheid,’ touted its positive features as an inter-ethnic arrangements, framed a series of racially articulated laws on this basis, and justified rather than disguised their reliance on racial classifications..

<sup>xii</sup> The delimitation of international humanitarian law relevant to belligerent occupation is set forth in the Fourth Geneva Convention of 1949 and the two Additional Protocols to the Geneva Convention of 1977. Also authoritative are the norms of customary international law that inform and purport to regulate all uses of international force.

<sup>xiii</sup> See ESCWA Report for analysis of the four domains of control established by Israel to exert discriminatory control over the Palestinian people.

<sup>xiv</sup> To clarify, so long as Israel claims an unlimited right of return for Jews worldwide, and a denial of an equivalent right to Palestinians, including those with claims of family residence, there would be a need to maintain an apartheid stricture to ensure security given reliance on such a racialized structure of domination. Additionally, because of the deep roots of Palestinian resistance, such a structure could only be reliably maintained by ‘inhuman acts’ to ensure subjugation. See ESCWA Report on relevance of ‘inhuman acts.’ See also Edward W. Said, *The Question of Palestine* (Quadrangle/NY Times Books, 1979)

<sup>xv</sup> It should be observed that partly as a reaction to the ESCWA Report and civil society activism, as well as the more overt Zionist and Israeli acknowledgements, the shift from occupation to apartheid is starting to take place in political discourse, especially among civil society activist groups, yet continues to be resisted by the governments almost all sovereign states except, most aptly, Sout Africa.

<sup>xvi</sup> For validation see Ambassador Haley and Danon’s attacks on the report; see Falk and Tilley Open Letter in response.

<sup>xvii</sup> I acknowledge that there is a certain regressive aspect to an analysis that rests so explicitly on ‘two peoples’ and their reconciliation. It confers a defining status to race and ethnicity, which is contrary to human rights culture, which is centered on the dignity of all persons regardless of race. It also ignore those in Israel and Palestine who are neither Palestinian nor Jewish such as the Druze and various Christian denominations living in Jerusalem. My justification in the Palestinian/Jewish setting is that this is the way both the Zionist Project and the UN have proceeded, and its dominance has led the Palestinian or Arab side to be reactive, framing their grievances and demands by reference to the two peoples. For a more nuanced and sophisticated use of ‘peoples’ in the context of this struggle, see Virginia Tilley’s parallel discussion.

<sup>xviii</sup> There were many versions of Zionist thought, which have vied for political influence over the years. What seemed as important as the ideological vision was the consistent tendency as a political project to take what was available at a given time, periodically expanding ambitions

and expectations. With persistence, the leaders of Israel have enjoyed success in persuading the world to accept conditions deliberately altered in favor of expanding expectations, an approach critiqued as encompassing unlawful settlement and wall construction. In effect, Israeli diplomacy was able to alter prevailing ideas of what was reasonable at various critical moments, while managing to diminish Palestinian expectations to a corresponding degree. A prime example relates to the so-called ‘settlement blocs,’ which seem clearly established in violation of Article 49(6) of the Fourth Geneva Convention, and yet have been gradually accepted internationally as territory to be incorporated into Israel as part of a final solution. The abandonment of any right of return for Palestinian refugees dispossessed at various times is another important example of where politics overwhelms legality.

<sup>xix</sup> This can be clarified by taking note of the fact that the anticipated territorial allocation envisioned by the two-state approach in response to Israel’s ongoing push to establish ‘facts on the ground,’ in large part to expand the reasonableness of their claims on territory.

<sup>xx</sup> Such a view seems like the dominant intention of unanimous Security Council Resolution 242 adopted in 1967; compare with GA Res. 181 adopted on November 29, 1947, but over the objections of Arab UN members. For such a momentous historical arrangement, the UN support for partition was not strong, considering the intense opposition of neighboring countries, the region more generally, and the fact that at that time much of Asia and Africa were still colonized, and thus underrepresented. The vote on 181 was 33-13, with 10 abstentions.

<sup>xxi</sup> This realism is quite understandable given the balance of forces that blocks any kind of resolution of the conflict that does not satisfy Zionist and Israeli expectations. See Dennis Ross’s book on diplomacy for a confirmation of this view that no peace proposal was put forward at the U.S. brokered negotiations between the parties that was not approved as acceptable to the Israeli side. Dennis Ross, *The Missing Peace: The Inside Story of the Fight for Middle East Peace* (Farrar, Straus and Giroux, 2005)

<sup>xxii</sup> This modified colonialist country grab was itself a betrayal of wartime British promises to Arab leaders of political independence if they joined the Allied war effort and fought against the Ottoman Empire. See McMahon/Hussein correspondence for background. Isaiah Friedman, “The McMahon/Hussein Correspondence and the Question of Palestine,” *Journal of Contemporary History*, Vol. 5, No. 2, 83-122(1970)..

<sup>xxiii</sup> At least, in terms of intention and scope the two styles of advocacy of self-determination were quite different. Wilson’s view of self-determination was narrowly focused on a smooth aftermath to the Ottoman Empire, and was not meant to challenge European colonialism. In contrast, Lenin’s advocacy was anti-colonial at its core, and only incidentally concerned with post-Ottoman arrangements. At the time, Wilson’s Secretary of State regarded self-determination as a ‘dangerous’ idea, which once endorsed would have a life of its own, and could not be limited in the manner originally intended. Of course, over time the Leninist version of self-determination became universally accepted, in principle, and incorporated into contemporary international law as common Article 1 of the two human rights international covenants and as a basic principle informing the international legal order, although its application to specific cases remains highly contested (e.g. Kashmir, Tibet, Catalonia, Western Sahara, as well as Palestine).

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<sup>xxiv</sup> For analysis see Arno Mayer, *Wilson v. Lenin: Political Origins of the New Diplomacy 1917-1918* (1959) on WW I peace diplomacy.

<sup>xxv</sup> For a thorough analysis of the Balfour Declaration see Jonathan Schneer, *The Balfour Declaration: the Origins of the Arab-Israeli Conflict* (Random House, 2010); for more general treatment see Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (Pluto, 2009).

<sup>xxvi</sup> It should be appreciated that as of the Balfour Declaration there were only approximately 60,000 Jews living in Palestine as a minority of about 8% among a majority Arab population of 700,000. Even in 1947 the percentage of Jews in the overall population was only about 30%, and Jews would have been a minority in the part of Palestine allocated to become the Jewish state if it had not been for the forced departure of 700,000 Arabs in the 1948 War. After the ceasefire was established in 1948 the Jewish proportion of the population jumped to 82%, and has remained roughly at that level ever since. For demographic summary see “Jewish and non-Jewish Populations of Israel/Palestine, 1517-Present),” Jewish Virtual Library. For further discussion with some differences of emphasis see Virginia Tilley’s contribution.

<sup>xxvii</sup> See Thomas Suarez, *State of Terror: Terrorism Created Modern Israel* (2016)

for documentation of recourse to terrorist tactics, ambivalently addressed by political Zionism led by David Ben Gurion, and accompanying claims that despite owing the certification of their state-building project to British colonialism, the Zionist Project declared itself anti-colonialist. See also Amy Kaplan, *Our American Israel: The Story of an Entangled Alliance* (2019).

<sup>xxviii</sup> This sophisticated double policy of diplomatic respectability and supposedly unacceptable terrorist criminality was brilliantly manipulated by the Zionist leadership to avoid losing sympathy and support in the West.

<sup>xxix</sup> The relationship between the political Zionist movement led by David Ben Gurion and the various terrorist groups working to advance the Zionist project is depicted by Thomas Suarez in his book based on extensive archival research. See Suarez, Note 27

<sup>xxx</sup> For a critical assessment of apartheid as a sequel to ‘divide and rule’ colonial policy see Radha Kumar, *Making Peace with Partition* (Penguin, 2005).

<sup>xxxi</sup> See Virginia Tilley for a more nuanced treatment of the evolution of British thinking on partition of Palestine along ethnic lines. In her view, “the Peel Commission was actually only one of several British royal commissions (following, e.g., the Shaw report and the Hope-Simpson report) and its findings were immediately rejected by the far more expansive and rigorous Woodhead Commission. The whole idea of territorial partition was rejected by the British government in the [1939 White Paper](#) on the basis of evidence in the Woodhead report. The White Paper refers to the “Partition Commission” – this is the Woodhead Commission, which tried to establish a practical plan for partition, and proposed one under a “Plan C”. That it was itself unworkable and very strained was discussed by Reid: see his critique in Walid Khalidi, *From Haven to Conquest: Readings in Zionism and the Palestinian Problem Until 1948* (1971). The White Paper clarifies the British interpretation of Peel and Woodhead that partition was not the original aim of the Mandate and should also not become the aim in 1939. That it became the recommended solution reflects the inability of the British to harmonize these antagonistic territorial and sovereignty claims, leaving partition or the exclusion of one or the other people as the only possible solutions.

<sup>xxxii</sup> See Benny Morris, Avi Shavit, Ilan Pappé for various interpretations of what for the Palestinians is uniformly known as the *nakba*, or catastrophe. Benny Morris in his later writing faults David Ben Gurion for not expelling the entire resident non-Jewish population from the territory set aside for the state of Israel. Morris and Shavit both insist that it was necessary to dispossess the Palestinians to establish a durable Jewish state. See Walid Khaleji, *Nakba 1947-*



1848 (2012); Benny Morris, *1948: A History of the First Arab-Israeli War* (Yale, 2008); compare Benny Morris, *One State/Two States: Resolving the Israel/Palestine Conflict* (Yale, 2009); *Righteous Victims: A History of the Zionist-Arab Conflict* (Vintage, 1999); *Birth of the Palestinian Refugee Problem Revisited* (Cambridge UP, 2004); for a general insightful account of this evolution see Ari Shavit, *My Promised Land: The Triumph and Tragedy of Israel* (Spiegel & Gray, 2013).

<sup>xxxiii</sup> Shavit, Note 32, is the most articulate about this political necessity at the heart of the Zionist Project; see also Avi Shlaim, *The Iron Wall: Israel and the Arab World* (Norton, 1999).

<sup>xxxiv</sup> See Edward Said, *Orientalism* (Pantheon, 1978).

<sup>xxxv</sup> The blurred boundaries between law, morality, and politics in East Timor case; see Percy Corbett, *Law and Society in the Relation of States* (1951).

<sup>xxxvi</sup> From a Zionist point of view the validity of the establishment of Israel rests mainly on a religio-historical narrative (not on international law, and self-determination). The problematic challenge confronting the Zionist leadership was associated with the priority accorded to ensuring that Israel was realized in the form of a constitutional democracy. This characteristic of an imposed identity of the state, required that the Jewish small minority in Israel be transformed by every feasible means into a governing majority. Only then could the citizenry of such a state express its genuine consent periodically through elections and the protection of basic rights. Such a transformation could not be achieved consensually or even peacefully, and this explains the dependence of Zionism and Israel on lawless violence from the moment the Zionist Project was pursued as something more than a utopian vision, becoming a political project with statehood as its objective. For interpretations of Zionist thought see Arthur Herzberg, ed., *The Zionist Idea: A Historical Analysis & Reader* (Philadelphia Jewish Publication Society, 1997); Alain Dieckhoff., *The Invention of a Nation: Zionist Thought and the Making of a Nation* (2003); Khalidi, Note 31; David Goldberg, *The Promised Land: A History of Zionist Thought from its Origins to the Modern State of Israel* (2009).

<sup>xxxvii</sup> In some respects, this was a *legally* controversial baseline even if the UN partition plan is treated as a legitimate solution to the post-mandate reality of Palestine as the Jewish forces acquired territory by force of arms, which was prohibited in contemporary international law. See strong language confirming this prohibition in the preamble of SC Resolution 242:

“..emphasizing the inadmissibility of the acquisition of territory by war..” Some supporters of Israel have incorrectly claimed that since Israel acquired the West Bank in the course of a ‘defensive’ war it was entitled to retain the territory. More objectively considered, the 1967 War was not defensive, and even if it was, Israel is not entitled to incorporate such territory.

<sup>xxxviii</sup> See Eugene V. Rostow, and others on the interpretation of 242 as a legal text. “Statements Clarifying the Meaning of UN Security Council Resoution 242,” Israeli Ministry of Foreign Affairs, 22 November 1967.

<sup>xxxix</sup> It seems clear that Israel could only be persuaded to move toward participating in a diplomatic process that looked toward its future withdrawal after the *intifada* of 1987 significantly discredited the occupation and Israel’s coercive administration of these occupied territories.

<sup>xl</sup> It is impossible to gauge to what extent this Israeli fear is genuine or reasonable. It has links to the Israeli justification for the stealth acquisition on nuclear weapons. See chapter in Shavit, Note 32; Jodi Magness, *Masada: From the Jewish Revolt to Modern Myth* (Princeton, 2019) and

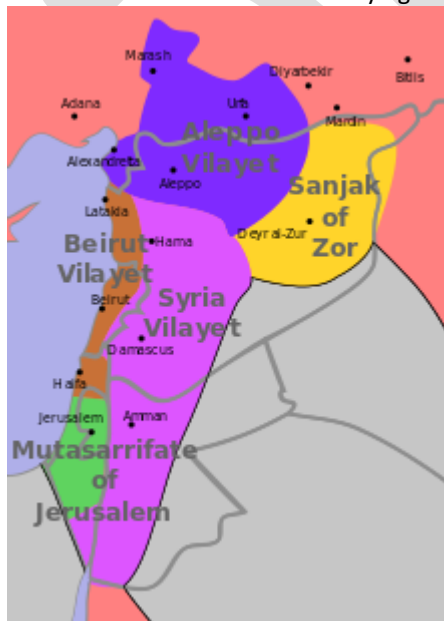
to the ‘Masada complex,’ suggesting a readiness of Israeli society as a collective whole to fight unto death rather than surrender. See also thoughtful review of Magness book by Josephine Quinn, “Enemies on All Sides,” *London Review of Books*, 12 September 2019.

<sup>xli</sup> For the Palestinian Authority, and in recent years even Hamas, to go along with the near exclusive emphasis on occupation as the challenge to peacemakers, was a seemingly unwitting concession to Israel, and as the passage of time made clear, a setback to the national struggle of the Palestinian people to achieve self-determination. In the case of Hamas, their endorsement of the occupation paradigm was explicitly provisional and tactical as Hamas has never given up their challenge to the establishment of the Israeli state in 1948 on what they conceive as belonging to the non-Jewish population of Palestine. See the recent reformulation of the Hamas position in their *A Document of Principles and Policies*, 1 May 2017.

<sup>xlii</sup> With regard to diplomacy, the position advocated here is one of ‘restorative diplomacy’ rather than ‘coercive diplomacy’ (fraught with threats and geopolitical leverage that doomed the Oslo process). See Petter Bauck & Mohammed Omer, eds. *The Oslo Accords: A Critical Assessment* (American University in Cairo, 2013).

In the context of this essay the present phase of restorative diplomacy is to make the apartheid paradigm central to a proper understanding of how to shape diplomacy as a peacemaking process, assuming the overarching goal to be a just and sustainable peace for both sides. Imagine the political ineptness of a South African campaign during the apartheid era that placed its emphasis only on ending discriminatory townships or on the much hated ‘pass laws.’ Occupation should never have been conceived as the whole problem or even the core issue, but as a part of a more comprehensive and multi-dimensional whole.

<sup>xliii</sup> Although not relevant for present purposes the status of Palestine was more complex throughout the period of Ottoman control, and its geographic and administrative character altered from time to time. “Palestine” was not an official jurisdiction under Ottoman rule. In 1900 the territory of Mandate Palestine was administered, as it had been for some centuries with varying borders, as the Vilayets of Beirut, Syria and Jerusalem.



<sup>xliv</sup> In effect, international law as developed and administered during the entirety of the colonial period, which includes the years in which the League of Nations represented the organized

international community as well as the attitudes prevailing at the time the UN was established, especially during its first years of operation. It was only when the anti-colonial movement began transforming the climate of opinion within the General Assembly, which can be conveniently correlated with the UN Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514, 14 December 1960; only then did international law clearly support fundamental Palestinian claims, but by then the Jewish presence was so validated by the admission of Israel to the UN that it was no longer morally or legally credible to challenge the UN on the grounds of the illegitimacy of Zionism as a settler colonial project. Such a challenge was also strongly inhibited by the fresh memories of the Holocaust, including the failure of the liberal democracies to do more to protect Jews from genocidal forms of discrimination. It was also inhibited by the liberal perception of Israel as having waged an anti-colonial struggle during the last stage of the British mandate, and hence a post-colonial polity.

<sup>xlv</sup> UN Charter, Chapters VI and VII.

<sup>xlvi</sup> This normalcy was under challenge, explaining the secrecy of the Sykes-Picot diplomacy, and the controversial nature of the Balfour Declaration, but it was still a debate focused on political effects and diverse moralities. The idea of ‘white man’s burden’ and ‘civilizing mission’ still embedded in the European political mentality.

<sup>xlvii</sup> Before the Holocaust, many Jews felt secure in their nationalist identities in their European and Middle Eastern places of residence and nationality, and were reluctant to superimpose a second political identity. The 1967 War overcame anti-Zionist concerns that establishing a Jewish state in the midst of the Arab World would lead at some point to a second Holocaust, or at least a new Jewish catastrophe, especially given the pro-Arab pressures arising from energy geopolitics. The war in 1967 was not only a source of Jewish pride that decisively overcame any lingering impression of Jews as timid, and afraid to fight, but it made strategic planners, especially in the Pentagon, appreciate Israel as more of a partner than a burden throughout the Middle East. See Amy Kaplan’s discussion of *Exodus* as having a massive early success in altering the image of the Jew as a passive victim. See Note 27. But see Shlomo Sand, *The Invention of the Jewish People* (Verso, 2009).

<sup>xlviii</sup> Leon Uris’s novel *Exodus* (Doubleday, 1958) and even more so, the film with the same name, were immensely effective influence in establishing the central Zionist narrative as the dominant way of interpreting the clash between Jews escaping genocidal victimization and the nearly invisible and backward Arabs residing in Palestine giving way to heroic and glorified Jewish settlers ‘making the desert bloom.’ See Amy Kaplan, Note 27, for graphic depiction of the impact on the *Exodus* film on American perceptions of Israel.

<sup>xlix</sup> The episodic delegitimation of Zionist/Israel claims and behavior by the UN General Assembly can be traced back to the affirmation of the right of return of Palestinian refugees in GA Res. 194, 11 December 1948; see also the Zionism as Racism resolution, GA Res. 3379 (adopted by a vote of 72-35, with 32 abstentions), 10 November 1975; revoked by GA Res. 46/86 (adopted by a vote of 111-25, with 13 abstentions), 17 December 1991; also, by the particular initiatives in such UN bodies as the Human Rights Council and UNESCO where non-Western governments control the agenda. The Goldstone Report, UNESCO censure of Israeli interference with protection of holy sites in Jerusalem, and ESCWA report are illustrations of a more neutral normative logic at work. This in turn has led to a variety of Western, usually American-led efforts to insulate Israel and Zionism from criticism, include the repeal of the

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Zionism is racism resolution, the burying of the Goldstone Report on Israeli violations of international law during the attack on Gaza in 2008-09, defunding of UNESCO and the Human Rights Council, and accusations of Israel-bashing in response to the release of the ESCWA Report.

<sup>i</sup> See Shlomo Sand's Open Letter to Macron; Macron statement that criticism of Israel is the new anti-Semitism is an indication of the leverage wielded by Zionism in shaping European and North American elite views. Such shielding of Israel occurs without any consideration of whether or not the criticisms are reflections of the Israeli violations of international law, as well as the refusal to deal with the Palestinians on a proper moral, legal, and political basis. See "France's Macron says anti-Zionism is a form of anti-Semitism," *Reuters*, February 21, 2019.

<sup>ii</sup> The French created deep problems of withdrawal for themselves by treating colonized peoples as extensions of France. This was especially true of Algeria, and helps explain why it was far easier for Britain as compared to France to give up its colonial possessions.

<sup>iii</sup> Jeff Halper provocatively raises the question "How does Israel get away with it?" in his important book, *War Against the People* (Verso, 2015). In other words, Israel's abusive denial of Palestinian rights does not lead to adverse consequences for Israel. Halper's well-documented answer, aside from the special relationship with the United States, is diplomatic relations with more than 100 governments based on their niche dependence on Israeli weapons and spare parts, as well as police and counterinsurgency training programs. Halper makes clear that the normative logic of neoliberal capitalism also works to the benefit of Israel as it leads market imperatives to prevail over political preferences and ethical considerations.

<sup>iiii</sup> Illustrative instances of non-compliance by Israel and activation of oppositional activism including condemnations of settlement expansion, affirmation of a right of return for Palestinian refugees, and calls for withdrawal from territories occupied by way of uses of force, Israel complains that it is singled out for criticism and censure forgetting that the UN had accepted a special responsibility for producing a Palestinian solution that was unique.

<sup>liv</sup> Obama and others often spoke of this territorial allocation as the basis of a solution to the conflict that is widely believed to be the agreed and only practical outcome of diplomatic efforts; note that Israel argues that the territories occupied in the 1967 War are 'disputed' rather than 'occupied' because of the absence of a recognized sovereign authority. See Jeremy Pressman, "Obama and the Israeli-Palestinian Conflict," *E-International Relations*, July 14, 2016; Josh Ruebner, "Obama's Legacy on Israel/Palestine," *Jerusalem Quarterly*, Vol. 46, 2016/17.

<sup>lv</sup> This assertion is admittedly controversial as it acknowledges that the official representatives of the Palestinian people on a global level have accepted this territorial delimitation of the conflict (although explicitly denying that this is so), but the Palestinian people, as expressed through their civil society leadership, make clear that peace depends on rights, refugees, and Jerusalem as much or more than it does on the recovery of territory.

<sup>lvi</sup> This American partisan role is demonstrated in a scholarly manner in Rashid Khalidi's *Brokers of Deceit: How the U.S. has Undermined Peace in the Middle East* (Beacon, 2013); Jeremy Hammond, *Obstacle too Peace: The U.S. Role in the Israel-Palestine Conflict* (Worldview, 2016).

<sup>lvii</sup> While serving as Special Rapporteur I made the argument that an occupation that lasted 50 years was well beyond the contemplation of the drafters of the Geneva Conventions, and that a new legal arrangement was needed to address such instances of prolonged occupation. Michael Lynk, the present SR has made a similar argument in his 2019 Report to the UN General

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Assembly. He correctly identifies the Israeli role as annexationist as well as that of a prolonged occupier, which are grounds for a UN declaration of unlawfulness, thus providing ample grounds for calling for an immediate withdrawal.

<sup>lviii</sup> For the extent of PA/PLO willingness to subscribe to the occupation paradigm see Clayton E. Swisher, ed., *Palestine Papers: The End of the Road*, (Hesperus Press, 2011).

<sup>lix</sup> See Hamas Document on Principles, Note 41.

<sup>lx</sup> Jeff Halper, Note 52, developed this notion of a ‘matrix of control.’

<sup>lxi</sup> There is a gap in IHL, which is also not overcome by the two human rights covenants. It would appear that a protocol is necessary, perhaps ideally a joint protocol attached to both the Geneva Conventions and the two human rights Covenants.

<sup>lxii</sup> The Palestinian situation is not unique. Depending on how ‘occupation’ is defined many peoples face versions of denials of human rights, including Kashmiris, Chechnyans, Tibetans, Kurds. Citation on occupation. What is distinctive about the Palestinian occupation is that it has engaged UN concerns from its outset, including the applicability of IHL, and the political consensus that Israel did not openly contest, that the occupation of the West Bank, East Jerusalem, and Gaza were temporary and could be ended by negotiations. In these other situations the occupying governmental authority claims sovereign rights, and will only end the occupation if forced to leave.

<sup>lxiii</sup> See Michael Lynk, UNHRC Report to the General Assembly, 74<sup>th</sup> Session, October 2019.

<sup>lxiv</sup> See “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,” Advisory Opinion, International Court of Justice, 9 July 2004; this Advisory Opinion was written in response to questions of law put to the World Court by the General Assembly, Res ES 10/14, 8 December 2003, 10 Emergency Session

<sup>lxv</sup> Although the outcome at the ICJ was labeled ‘advisory,’ the judgment of the highest tribunal within the UN system, represents the most authoritative reading of international law available, especially in a situation like this where the findings are so strongly endorsed by such a one-sided majority, which is not common in the jurisprudence of the Court. Only the American judge dissented, and he only partially.

<sup>lxvi</sup> See Bauck & Omer, Note 42.

<sup>lxvii</sup> As is widely appreciated, Israel maintains ethnic equality with respect to citizenship, but constructs ethnic hierarchies on the basis of a large number of nationality laws that greatly curtail Palestinian freedoms within Israel, and concern such vital human concerns as security of residence, family unification, and status of real estate.

<sup>lxviii</sup> See Avi Shlaim, *The Iron Wall*, Note 33; Suarez, Note 33.-

<sup>lxix</sup> See Henry Siegman, “Zionism is not Racism, but Zionists can be Racists,” *Foreign Policy*, May 1, 2012.

<sup>lxx</sup> For a moving, fictionalized overview of the long post-1948 Palestinian narrative see Susan Abulhawa, *Mornings in Jenin* (Bloomsbury, 2010).

<sup>lxxi</sup> See Andrew Ross, *Stonemasons: The Palestinians Who Built Israel* (Verso, 2019).

<sup>lxxii</sup> Benny Morris, earlier a leader of revisionist accounts of the Israeli narrative, has more recently argued that Ben Gurion’s most significant mistake was the failure to expel the entire non-Jewish Arab population of Palestine in 1948. See Morris, Note

<sup>lxxiii</sup> See Siegman, Note 69.

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<sup>lxxiv</sup> This seems to be the thrust of the as yet not fully disclosed ‘deal of the century’ as drafted by Jared Kushner. This important shift of Israeli advocacy has been most clearly articulated in a series of articles in the website of Middle East Forum. See e.g. See Daniel Pipes, “Achieving Peace Through Israeli Victory,” *Middle East Forum*, Jan. 2, 2018; there are numerous variations on this victory theme to be found on the MEF’s website.

<sup>lxxv</sup> The Great March of Return illustrates all facets of this analysis. It reveals a remarkable display of Palestinian resilience in the context of Israeli reliance on excessive force to crush the will of a largely nonviolent protest movement resting on the rights-based Palestinian demand of return to their place of ancestral residence.

<sup>lxxvi</sup> For depiction of ‘legitimacy war’ as a mode of struggle see Richard Falk, *The Legitimacy of Hope*, (Just World Books, 2014); Falk, *Palestine’s Horizon: Toward a Just Peace* (Pluto, 2017).

<sup>lxxvii</sup> As should be evident, a report analyzing evidence of legal culpability is not empowered to reach authoritative legal findings. Such authoritativeness is a function of appropriate institutions of governance, including more controversially those with civil society identities (e.g. the work of Permanent Peoples Tribunal and the Bertrand Russell Tribunal). See proceedings of Palestine Session of Russell Tribunal in Cape Town, 5-7 November 2011.

<sup>lxxviii</sup> See for example the program of the conference devoted to Israel/Palestine at the University of Cork, Cork, Ireland, March 2017.”.