
Third World Approaches to International Law
Writings on Palestine
2019-2023
TWAILR

THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

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Published by TWAIL Review ~ Bogotá, Colombia & Windsor, Canada ~ 2023
ISBN: 978-1138040724

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THIRD WORLD APPROACHES to INTERNATIONAL LAW Review

TWAILR: Dialogues ~ August 2019

International Law and the Question of Palestine: Imperial Exceptionalism, Third World Resistance & the Entanglement of Law and Politics

Noura Erakat in conversation with John Reynolds on Noura's book Justice for Some: Law & the Question of Palestine (Stanford University Press, 2019)

John: What motivated you to write this book?

Noura: The seeds of inquiry for this project were planted in the course of my human rights advocacy. I went to law school with the naive vision that legal advocacy could overcome the political and diplomatic intransigence that has impeded Palestinian freedom. After graduation, I worked on litigation attempts to bring war crimes suits against Moshe Ya'alon and Avi Dichter in US federal courts under the Alien Torts Claims Act. Both cases were dismissed on non-justiciability grounds, on the basis that they concerned political questions about Palestine/Israel that should not be subject to US judicial oversight. This put my entire vision into question. Then, in the course of strategic litigation mapping I was doing, I discovered something strange: other similarly "political" cases were not being dismissed even where they invoked the Palestinian question. The difference here was that the plaintiffs were Israeli and the defendants were Palestinians or Arabs. That research ultimately became my first law review article.[1] I continued to search for ways to use law to advance Palestinian rights in my work with the BADIL Resource Center for Refugee and Residency Rights and with the National Lawyers' Guild Fact-

[1] Noura Erakat, 'Litigating the Arab-Israeli Conflict: The Politicization of U.S. Foreign Courtrooms' (2009) 2 *Berkeley Journal of Middle Eastern & Islamic Law* 27.

Finding Mission to Gaza following Israel's 2008/09 offensive. I kept encountering the same political hurdles. My desire to understand the relationship between law and politics began in this context, and shaped my inquiry in the book.

John: What is the central claim you are making in the book?

Noura: I am arguing that the law is politics - which is not a bold claim for critical legal scholars - but I am nuancing this understanding by adding that it can be used on behalf of progressive causes if used in the sophisticated service of a political movement. In particular, I am using Duncan Kennedy's work to show that the utility of law depends on the strategy of those harnessing it, together with the historical context in which that strategy is being pursued. So rather than overemphasizing the content of the law to demonstrate its indeterminacy and susceptibility to manipulation, I focus on the historical junctures in which the law is put to work across a century-long arc between 1917 and 2017. It this vista, we see one legal instrument or principle taking on different meanings across time and space - as was the case for instance with the principle of self-determination and with UN Security Council Resolution 242. Ultimately, I demonstrate that the law is both a site of oppression as well as resistance for Palestinians but has, on the whole, been more advantageous to Israel's interests.

John: Presumably the first of these key junctures revolves around the Balfour Declaration and the creation of the League of Nations Mandate. To what extent was this a juridical moment? What work was law doing in shaping the question of Palestine at that point, in those contexts of diplomacy, geopolitics and imperial governance?

Noura: Absolutely. The Balfour Declaration and its incorporation, verbatim, into the preambular text of the Mandate for Palestine in 1922 established the legal structure of exception that continues to shape the question of Palestine. This Declaration - a commitment by Britain's Foreign Secretary to the head of the Zionist Federation in Britain, later endorsed by Britain's Parliament - committed to establish a Jewish national home in Palestine where a native population sought to govern itself. The Balfour Declaration refers to the native Palestinian population, some ninety percent of the whole, as 'non-Jewish communities'. They are not recognized as a nation and to the extent that they have rights, those entitlements are 'civil and religious' but not national, thereby negating a right to self-determination. The Declaration marked the juridical erasure of Palestinians as a political community.

And in 1922, after four years of diplomatic negotiations, the League of Nations incorporated the Balfour Declaration into the Mandate for Palestine, thus enshrining the commitment to settle Jews there as a matter of international law and policy .

While some critical scholars may argue that this was exemplary of colonial hubris, I argue that such an interpretation is both a misunderstanding about the nature of law and too forgiving of it. The Balfour Declaration constitutes a form of sovereign exception whereby a unique fact pattern (the cause of establishing a Jewish national home together with a racist rejection of Palestinian peoplehood) justified the establishment of a specialized legal regime (the Mandate for Palestine). The fact-pattern and the legal regime were co-constitutive: the unique fact pattern justified the specialized legal regime and the regime reified the unique fact pattern.

John: Much of the conceptual debates around states of exception have grappled with the relationship between norm and exception, and have theorised the state of exception as a type of liminal space that is both within and beyond the realm of law. In colonial contexts though, the law has typically been front and centre in the construction of exceptional circumstances and the execution of exceptional governance measures. Where does the exception that you are describing here fall in this sense?

Noura: Far from establishing a legal void, the sovereign exception designated Palestine as a sui generis mandate and justified the creation of new law where no other law could apply. It was on this basis that the Permanent Mandate Commission rejected Palestinian legal arguments that the designation of Palestine as a Jewish settlement violated multiple articles of the League of Nations Charter. The Palestinian argument included most notably Article 20, which prohibited a Mandatory Power (Britain) from undertaking an obligation (establishing a Jewish national home in Palestine) in contravention of the terms of the Covenant (ushering a native population to independence). Though the Permanent Mandate Commission was vexed, it ultimately concluded that the Mandatory Power was obliged to accomplish both goals, and that the more urgent task was facilitating Jewish settlement. Later, when the UN Special Committee on Palestine considered a solution to the Question of Palestine, it recognized that the Mandate for Palestine violated the principle of self-determination but that this was consistent even with the League of Nations Covenant which did not *command* the 'recognition of certain communities of the Turkish empire as independent nations' but only *permitted* such recognition, and the League chose not to recognize Palestinians as a nation in order

to fulfill the terms of the Balfour Declaration. This was a legal analysis, not merely a political dictate.

This legal structure of exception is not unique to Palestinians but, in fact, characteristic of nearly all settler-colonial regimes where native sovereignty impeded colonial settlement and settler sovereignty. And it is why legal argument alone is insufficient to overcome Palestinian juridical erasure, since it is a legal argument that justified their elision. I establish this in the first chapter of the book, which is a survey chapter spanning fifty years from 1917 to 1966. The four subsequent chapters each trace how Israel has used this legal structure to facilitate their territorial ambitions or how the Palestinian Liberation Organization (PLO) resisted and overcame the exception and later established a new exception when it entered into the Oslo negotiation process.

John: One compelling part of the story you tell here is about how the Palestinians do use legal tactics to counter Israeli domination (albeit in a somewhat haphazard and short-termist manner, rather than as part of a coherent strategy for political and economic emancipation) in sometimes quite interesting and reasonably successful ways?

Noura: Indeed. What makes the story interesting is that, in spite of some significant structural obstacles, Palestinians do also manage to use the law as a tool of resistance. This is most clear during the 1970s, when the PLO turns to the United Nations and international law more generally. During this time, the PLO successfully inscribes the juridical status of Palestinians in international legal documents and institutions (UNGA Resolutions 3236 and 3237 in 1974); when it condemns Zionism as a form of racism and racial discrimination as part of the Decade Against Racism (UNGA Resolution 3379 in 1975); and when it helps bring guerilla warfare within ambit of legitimate violence (First and Second Additional Protocols to the Geneva Conventions in 1977).

John: This period in the 70s where you are talking about the PLO turning to the UN and international law is a really interesting moment. How would you describe the role of the Third World there? By this point the Non-Aligned Movement had emerged out of the Bandung conference, OPSAAAL out of the Tricontinental conference, and the majority of colonial territories had achieved national liberation, at least in the formal sense which allowed them access to the UN arena. After the anti-colonial declarations by the General Assembly in 1960, the texts of UN documents focused a lot on condemning colonialism, apartheid, and military

occupation, and in the early 1970s specifically pointed to 'the unholy alliance between Portuguese colonialism, South African racism, zionism and Israeli imperialism' (General Assembly Resolution 3151 in 1973). How much of this was general anti-imperial symbolic name-checking, or were there deeper relationships of solidarity there that the PLO was tapping into and that were reflected in the crafting of UN texts and the additional protocols? Could the Third World have done more to build on this with the PLO to shape a more coherent strategy?

Noura: I consider this period of decolonization - featuring national liberation armed struggles - as third world upheaval against an imperial order. As Adom Getachew shows in her lucid work, this was not merely a bid for independence and membership in the international community but one of worldmaking.[2] The global battle was over the future of the world and not just a negation of colonial domination. The PLO aligned itself with several new formations including the Non-Aligned Movement to combat racism. The first global human rights treaty was the Convention on the Elimination of All Forms of Discrimination. They also legislated new treaties legitimating guerilla warfare in the First and Second Additional Protocols, changed UN rules in order to unseat South Africa as a member state, advanced the New International Economic Order in a bid to supplant a global neoliberal order that had been ushered in by Bretton Woods. The PLO, because of its commitment to worldmaking and its role in combating US-Israeli imperialism in the Middle East was often at the center of these efforts.

The lack of a coherent strategy is due to a few factors. One, the PLO itself was internally fractured as the Middle East peace process that began after the October 1973 War created new opportunities for diplomacy. This catalyzed a split between a Pragmatist camp that sought to establish a Palestinian state as an interim or final resolution through negotiations, and the Rejectionist Front which sought to continue a revolution through armed struggle. Two, the consensus international position following the 1967 War and, which became reified after the 1973 War, was one that sanctified Israel's settler sovereignty. Throughout the 1970s, this remained an implicit and unaddressed tension that contributed to a lack of a coherent strategy - one that vascillated between articulating Palestinian self-determination as a state on the one hand, and the toppling of Zionist settler sovereignty on the other. This tension ran through the PLO and on the international level and was not resolved until 1988 when the Palestinian National Council (PNC) endorsed a Palestinian state in the West Bank and Gaza.

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[2] Adom Getachew, *Worldmaking after EmpireThe Rise and Fall of Self-Determination* (Princeton University Press, 2019).

John: These tensions and this lack of coherent strategy that you are pointing to have been quite visible, and quite debilitating, in the oscillations over time of the Palestinian position on recognition of Israel and the 1967 borders in general, and specifically in terms of law through the way in which discourse on Security Council Resolution 242 has mutated?

Noura: That's actually a very interesting story. When it is first passed in 1967, Palestinians regard it as a dismal Arab failure. The Resolution reified the juridical erasure of Palestinians by referring to them as a "refugee problem" and conditioned Israel's withdrawal from Arab lands on normalization of relations with Israel thus enshrining it a political reality. In fact, the PLO passes UNGA Resolution 3236 as a corrective to 242. Palestinians condemned 242 for twenty-one years until November 1988, when the PNC declared that a Palestinian state would be established in the West Bank and Gaza. At that point, the PLO retooled 242 to be a tool of resistance affirming their right to national self-determination in the Occupied Palestinian Territories. We see, at about this same time, Israel begin to put the meaning of 242 into question as well as diminish its prescriptive function.

The haphazard nature of Palestinian legal tactics becomes most acute after the Oslo peace process begins in 1993 because the agreement was predicated on a stark bifurcation of legal norms and political negotiations by design. There is no mention of the law in the documents, save for reference to UNSC Resolutions 242 and 338, and even then the Resolutions serve a descriptive rather than a prescriptive function - meaning that the parties will consider the mandate of 242 fulfilled once the PLO and Israel reach a permanent agreement. In fact, after Oslo, Israel and the United States frame all invocation of law and legal tools by Palestinians as tantamount to "lawfare" or a move to "undermine peace efforts", as we saw during the ICJ submission regarding the route of the separation barrier in 2004 or during the 2011/12 UN statehood bid. During this era, Palestinians have invoked legal tactics haphazardly as a threat or as an ad-hoc effort, but without a clear strategy.

John: In response to this you have been trying to think seriously about how Palestinians can get out of the sovereignty trap and fixation on this particular form of statehood that they've been stuck in since Oslo. What kind of alternative frameworks and futures are you imagining?

Noura: I end the book by highlighting how Israel's successful use of law has helped fulfil its territorial ambitions. In 2019, Israel exercises complete control from the

Mediterranean Sea to the Jordan River and has destroyed the possibility of a Palestinian state. This outcome, however, is also Israel's Frankenstein as it now controls the lives of six million Palestinians that it neither wants to recognize as sovereign nor as citizens. Continuing this arrangement is literally maintaining an apartheid regime. And yet, Israel has been able to continue it because the Palestinian leadership continues to participate in the farcical "peace process". Even though the leadership has refused to resume negotiations since the Trump Administration moved the U.S. embassy from Tel Aviv to Jerusalem, it is still hopeful that an incoming U.S. administration will reverse course and offer better options. But regardless of the administration, continuing within the Oslo framework is a sovereignty trap: a political arrangement whereby good native behavior assessed by a settler sovereign is rewarded with limited autonomy without the promise of independence, thus enshrining a condition of permanent subjugation.

While I do not have precise answers as to what is *the* alternative, what I suggest is that we need to approach the question in a completely different way. Rather than think through different political outcomes - statist outcomes that balance native and settler sovereignty - I suggest that we begin to think in terms of belonging, about how different peoples can belong in shared spaces in a framework that is not necessarily mutually exclusive. I ask the reader to imagine the return of Palestinian refugees, not as an optimal outcome of struggle but as the first step to begin to imagine new futures. How does the return of nearly six million Palestinian refugees open up new possibilities to imagine ourselves? How, for example, would this help us think about the place of Jews from the Middle East who have had to bifurcate their Arab and Jewish identities in order to become Israeli? How does this process help us imagine Israel as a part of the Middle East rather than as a satellite state in the Middle East? I think that if Palestinians can answer these questions for themselves, they will not only pave the path for their freedom but offer the world new futures as well.

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THIRD WORLD APPROACHES to INTERNATIONAL LAW Review

TWAILR: Extra ~ December 2019

Palestine +100: Stories from a Century after the Nakba

This year, Comma Press published what is – in their own words – 'probably the first anthology of science fiction from Palestine'. The book, *Palestine +100: Stories from a Century after the Nakba*, edited by Basma Ghalayini, is a collection of short stories in which 12 Palestinian writers offer visions of life in 2048. The stories deploy a range of approaches 'from science fiction noir to nightmarish dystopia, to high-tech farce – these stories use the blank canvas of the future to reimagine the Palestinian experience today'. Those genres involve a new departure for many of the writers involved – often seen as the type of escapism in which Palestinians cannot afford to indulge. But, as Ghalayini points out, for those living in Palestine, science fiction in some ways speaks quite directly to their own experiences and can in fact be a useful device to tell their story:

'Everyday life, for them, is a kind of a dystopia. A West Bank Palestinian need only record their journey to work, or talk back to an IDF soldier at a checkpoint, or forget to carry their ID card, or simply look out their car window at the walls, weaponry and barbed wire plastering the landscape, to know what a modern, totalitarian occupation is – something people in the West can only begin to understand through the language of dystopia.' (p.xii)

TWAILR: Extra is happy to share a couple of excerpts from the book with permission – the first from Basma Ghalayini's introduction, the second from Selma Dabbagh's short story 'Sleep it Off, Dr Schott'. The book is available here.

Excerpt from Basma Ghalayini's introduction

When Palestinians write, they write about their past through their present, knowingly or unknowingly. Their writing is, in part, a search for their lost inheritance, as well as an attempt to keep the memory of that loss from fading. In this sense, the past is *everything* to a Palestinian writer; it is the only thing that makes their current existence and their identity meaningful. And the Nakba, of course, sits at the heart of

this. Whether it is Jabra Ibrahim Jabra's novels, *A Cry in a Long Night* or *In Search of Walid Masoud*, or Ghassan Kanafani's *Men in the Sun* or *Returning to Haifa*, Palestinian authors have all felt obligated to, as well as inspired by, the Nakba. They have a cultural duty to remember it.

It is perhaps for this reason that the genre of science fiction has never been particularly popular among Palestinian authors; it is a luxury, to which Palestinians haven't felt they can afford to escape. The cruel present (and the traumatic past) have too firm a grip on Palestinian writers' imaginations for fanciful ventures into possible futures.

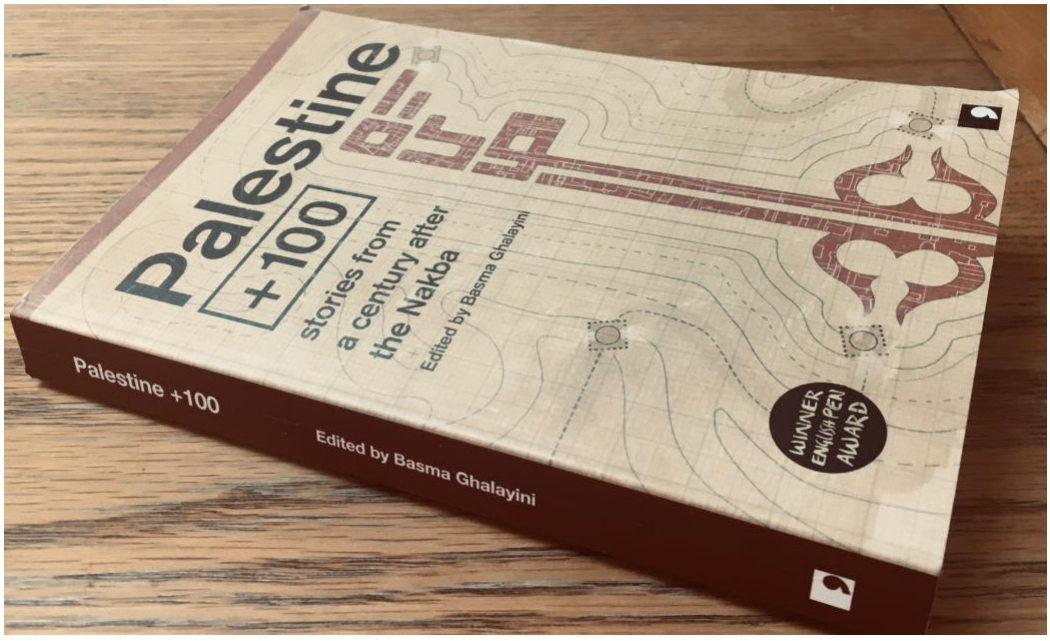
Another reason why science fiction might not have been popular among Palestinian writers is it doesn't offer an obvious fit to the Palestinian situation. In classic science fiction, the battle lines are drawn quickly and simply: the moral opposition between a typical science fiction protagonist and the dystopia or enemy he finds himself confronting is a diametric one. But in Palestinian fiction, the idea of an 'enemy' is largely absent. Israelis hardly ever feature, as individuals, and when they do, they are rarely portrayed as out-and-out villains. In Ghassan Kanafani's *Returning to Haifa*, for example, we follow the unlikely visit by two Palestinians, Said and Safeyya, to the city they fled twenty years earlier, where they get to know the Israeli woman, Miriam, now occupying the house that was stolen from them. Instead of portraying her as a zealot, a woman self-convinced of her people's holy right to the land, Kanafani presents us with a sensitive, compassionate individual, someone who, when confronted by it, is ashamed of what her people did to the Palestinians.

The absence of an 'enemy' isn't the only absence in Palestinian fiction. You might even say absence *generally* is one of the defining features of Palestinian fiction – which is where science fiction might be able to contribute. Absence, and the feelings of isolation and detachment that come with it, are easy to magnify in a context of galloping, future technology. In the twelve stories specially commissioned for this project, absence is everywhere. In Saleem Haddad's 'Song of the Birds' and Rawan Yaghi's 'Commonplace', young protagonists are haunted by the voices of their dead siblings. In Anwar Hamed's 'The Key', Israelis are plagued by nightmares about Palestinian ghosts. In Abdalmuti Maqboul's 'Personal Hero', the absence of a grandfather in her mother's life, inspires a scientist to make a game-changing invention. In all cases, the future's technology, though designed to ease conflict or ameliorate trauma, manages only to exacerbate it.

Perhaps another defining feature of Palestinian fiction is the cultural disconnect felt between different sets of refugees and, within those, different generations of

refugees. Once more, science fiction – in this case its love of alternate realities – offers surprising opportunities for exploring this. In Saleem Haddad's story, the existential boundary between Aya's world and Ziad's provides a metaphor for the author's own dilemma as a Palestinian in exile: do you accept your condition and make a home for yourself where you are? Or do you return, fight, and give up all the comforts of your life abroad? In the story, 'N', by Majd Kayyal – a writer whose grandparents were displaced inside what became Israel but never left it – we are presented with a cosmological solution to the Arab-Israeli conflict: the creation of two parallel worlds – one for Palestinians, one for Israelis – both occupying the same geographic space. In this future, only Palestinians born after the establishment of the parallel worlds are allowed to travel between them; thus a deep cultural fissure opens up between the eponymous 'N' and his father when he leaves to study in the Israeli world. Once again, we see how even the most extraordinary future technology can do little more than mirror or reframe the current, real-world impasse.

But that's what science fiction does; it uses the future as a blank canvas on which to project concerns that occupy society *right now*. The real future – the *actual* future – is unknowable. But for science fiction writers, the mere idea of 'things to come' is licence to re-imagine, re-configure, and re-interrogate the present.



Excerpt from 'Sleep it Off, Dr Schott', by Selma Dabbagh

I'm going to send this on as a voice file to both of you. It is a vocal, digital letter of apology. No, it is more than that. It is a vocal, digital letter of apology with evidence. I have the recordings and I will include them. That is what I do after all. I record things. Like you two, for example.

If you've ever been in the Enclave's basement, you'll know where I am by the sounds that are being picked up. The drones are a bit more muffled down here and you can hardly hear the netting. It's just the rattle of the air-conditioning vents most of the time.

Given that this is a letter of sorts, I should possibly be more formal and present my case with specifics, as any scientist should. It's 15 June, 2048. I'm recording this in the Security Bunkers, Secular Scientific Enclave, Gaza and my name is Layla Wattan. I'm from Deir el Balah. You know Deir el Balah, the camp in the South that's spilling over into the sea. My family are from Haifa, but by that, I mean my great-grandparents lived there over a hundred years ago now.

As I said, this is an apology; a way of explaining to both of you. I couldn't explain at the time, because I couldn't speak. I still can't get your voices out of my head. It doesn't help that I keep replaying the recordings. Here's the one of Dr Schott shouting at me when we finally met, our first and last encounter. The one where he asked who I was.

SCHOTT: *[Shouting] Who is this girl? What are you doing? Mona, why is this woman in the corridor? Give me that!*

I can tell you what Professor Kamal said after that, but I think you may prefer to listen.

KAMAL: *She's a Recorder. Look at her equipment. Who gave you this?*

I'd rather you didn't think of me as being a creep, or a snoop. I'm not even a proper spy. Okay, yes, I was a Recorder, but I really hadn't known what that meant when I was recruited. I am sorry for the shock I caused you both. I can hear it in your voices. Listen.

KAMAL: *They can't do this to me. I was granted non-monitored status years ago. Did the General Assembly authorise this?*

SCHOTT: *Of course they authorised it. They make up the rules, they can do what they want. What did they tell you about us? Are you going to speak, girl? Why were you spying on us?*

The short answer was that I would've sold my kidneys for a job in the Enclave. The whole of Gaza is desperate to move here. Not just because the food is guaranteed and it's about as safe as it gets; if you obey the rules that is. It was mainly because the Enclave was the type of revolutionary idea we were starving for; turning global perceptions of us on their head. I'd watched them build it from my home. The Secular Scientific Enclave; it sounded like heaven to me. At that point, there'd been rumours about the Hyperloop, it was true, but there'd also been talk of the coming of the next Messiah, the return of our lands in '48 Palestine and compensation. I'd never believed any of it.

For decades, our building methods had consisted of little more than plastering over dirt-packed bags, so for us to see those steel frames and glass panes shoot up to create giant quartz spikes piercing the sky was like wow. Awesome. We watched them grow from our baked-in alleyways overrun with wheelchairs, chickens and petty criminals.

I should explain that the noise out there, back home, was without end or form. It was as though it grew out of the walls and expanded when released. We spoke of the Enclave's silence as a mystical force and I'd anticipated inner calm to go with it, but when I entered the walls, it wasn't like that at all. For all of us in security, accommodation was down here in the bunkers. I went for weeks without seeing any natural light. I had electricity and hot water, but after a while, I started to feel like the water, my uniform, even the walls, were all trying to bleach me inside and out.

I knew of you, Professor Kamal, since I was a young. The faces of you and your family were graffitied onto the walls of our camp. Mona Kamal; a legend. We all worshipped you, particularly the women. I knew of your construction of the first generation of Body-Bots in the underground bunker in Rafah; your ingenious use of 3D printers to create robotic limbs for the disabled, creating our own army of semi-indestructible fighters. I'd heard of how this bot army burst through the borders in 2032. I knew that your husband had been killed in the bombardments that followed, that you'd also lost your daughters to shelling.

I wanted to believe that I was protecting you, Professor Kamal. As you've probably guessed by now, part of the purpose of my mandate was to find out what the nature of your 'interpersonal relations' were with Dr Schott. The General Assembly informed me of its…

ROBOTIC VOICE:

… concern that emotional connections are forming between the Gaza-born Professor Kamal, and one of her co-workers, the Tel Aviv-born (and Guest Visa holding) Dr Eyal Schott, in a way that will compromise their professional integrity and the security of the Economic Hyperloop or Bullet Project. Aural and sensory monitoring have detected distinctive tonal variations, all consistent with romantic empathy. Positive indicators show an 'erosion of the natural boundaries of professional camaraderie' giving rise to a danger of 'compromising national security,' as set out in the Koh' Code of Conduct Manual (2034) for the Guest Visa holders in security clearance positions. No physical rituals indicating a consummated relationship have been identified to date.

Security around the Bullet was such that even I, as a resident of the Strip, hadn't been aware that it was about to launch. It was explained to me as a…

ROBOTIC VOICE:

… high-speed, underground shuttle link carrying goods from the Strip's economic zones to neighbouring, affiliated countries in exchange for medical, educational and infrastructural materials.

That, at least, is what the General Assembly told me it was for. My understanding is that essentially, it's frictionless transportation down a tube. I couldn't see how we could afford to undertake such an extravagant project; traditional international banking systems had been completely closed off to us for decades. The breakthrough came only, as I was told…

ROBOTIC VOICE:

… with the development of cryptocurrencies and the agreement to make block chain backed Ethocoin an official currency of the Strip, opening Gaza to new investment, from countries that felt a political solidarity. Countries as far away as Mexico, Central Africa, and China –

There were other parts of the world where people lived behind walls, it turned out. And you know how the trend goes: the more countries whose citizens' freedom of movement is restricted, the more call there is, from those countries, to only recognise Ethocoin as an international currency. The global economic balance is shifting, they say.

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THIRD WORLD APPROACHES to INTERNATIONAL LAW Review

TWAILR: Reflections #14/2020

Palestinian Scholarship and the International Criminal Court's Blind Spot

Victor Kattan †

On 20 December 2019, the Prosecutor of the International Criminal Court (ICC) made public a 112-page document that requested Pre-Trial Chamber 1 (PTC) to rule within 120 days on the Court's territorial jurisdiction in the situation in Palestine.[1] Although the Prosecutor concluded that there is a reasonable basis to initiate an investigation into crimes within the jurisdiction of the Court, she was also of the view that 'the question of Palestine's statehood under international law does not appear to have been definitively resolved'.[2] While the Prosecutor was of the view that the ICC may exercise its jurisdiction notwithstanding these matters, she was aware of contrary views, and wanted these to be aired before the PTC. Specifically, she sought confirmation that the territory over which the ICC may exercise its jurisdiction comprised the West Bank, including East Jerusalem, and the Gaza Strip.

The ICC's request to Pre-Trial Chamber 1 is a well drafted, cogently argued, and, for the most part, legally sound document. However, I have some misgivings with some of the Prosecutor's conclusions and omissions. Specifically, I take issue with its failure to consider Palestine's statehood prior to the June 1967 war, and its failure to take into consideration Palestinian scholarship on the legal issues raised by the referral, such as the historical background to the situation in Palestine, which

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[1] The request no longer appears on the ICC website following a decision by the Pre-Trial Chamber over the length of the Prosecutor's request. 'Pre-Trial Chamber I found that it was inappropriate for the Prosecutor to submit her Request for an extension of the page limit alongside her Request pursuant to article 19(3) of the Statute, the very document for which she was seeking an extension of the page limit.' See Decision on the Prosecutor's Application for an extension of the page limit, 21 January 2020.

[2] See Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 20 December 2019, p. 5.

may have helped it avoid some pitfalls like describing Jordan as an 'occupying power' in the West Bank between 1948 and 1967.[3]

The absent Palestinian voice

I have criticized the Office of the Prosecutor before for its failure to reference non-Western sources, especially for the lack of references to Arabic, Hebrew, and Turkish news sources in its decision to close its preliminary examination into the Mavi Marmara affair.[4] Unlike Hebrew and Turkish, however, Arabic is an official language of the Court. Accordingly, there can be little excuse for the failure of the Prosecutor to consider Palestinian points of view.

As I shall explain, the Prosecutor's request barely considered Palestinian sources, and treated Palestinians as objects of international law, rather than subjects. Palestine remains a "question" that is not capable of being answered conclusively. The continued doubt that the Prosecutor has about the question of Palestine's statehood and its borders is emblematic of the entire approach of the ICC to the Situation in Palestine. No one – neither this Prosecutor, nor the previous one, wants to take a decision. They have passed on the buck to someone else. Again.

It appears that the Prosecutor was primarily concerned with Israel's reactions to the document, which might account for the lack of Palestinian sources cited. Of course, it had good reasons to be concerned as Israel was likely to challenge its legal conclusions before the Pre-Trial Chamber, and indeed on the same day the Prosecutor made its request public, the Government of Israel published two documents objecting to the jurisdiction of the Court. After being inundated with Article 15 communications (under which any individual, group, or organization can send information on alleged or potential ICC crimes to the Office of the Prosecutor), the Prosecutor appears to have been spooked, and ended up relying on sources that it believed would be more acceptable to the Israeli Government. This may explain the lack of references to what might be perceived as less authoritative Palestinian sources.

If you think my criticism is misplaced, consider the following statistic: of the document's 648 footnotes, only one reference is made to a Palestinian lawyer, Raja Shehadeh, and then only in passing.[5] Yes, you read that right. Only one Palestinian

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[3] Ibid, p. 30-31, para. 60, and note 145.

[4] See Victor Kattan, 'The ICC and the Saga of the Mavi Marmara' (2015) 18 *Palestine Yearbook of International Law* 53-91, at 61.

[5] See Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 20 December 2019, 36, footnote 201.

lawyer is cited in the document.[6] This is compared to 51 citations to Israeli lawyers. The Israeli lawyers cited include: Yoram Dinstein (cited 28 times); Tamar Megiddo and Zohar Nevo (cited six times); Eyal Benvenisti (cited five times); Yael Ronen (cited five times); Orna Ben-Naftali, Aeyal Gross, and Keren Michaeli (cited three times); and Yuval Shany and Eugene Kontorovich (each cited twice).

This is not a criticism of the Israeli scholars. Much of their work is marvelous, several are sympathetic to the Palestinians, a few of them even cite Palestinians they do not agree with, and some are personal friends. Yet, I am still troubled by the lack of references to Palestinian legal scholars. If self-determination is to mean anything, it must mean that courts and institutions consider the views of Palestinians, even if they disagree with them. After all, the request to the ICC is based on a referral from Palestine, and the central issue that has been raised is Palestinian statehood. This is an issue that concerns the Palestinians, as much as it concerns the Israelis.

The politics of citation

So why are Palestinians not being cited on an issue that concerns them specifically, and is this part of a broader trend in legal scholarship? It is well known that non-Western scholars or what US scholars refer to as 'scholars of color' remain undercited in much academic writing and are less likely to serve on editorial boards.[7] As John Reynolds observed in a hard hitting article he wrote on the Steven Salaita affair,[8] there is a 'professional stigma attached to being overly "passionate" about a particular issue or conflict'.[9] Scholars who identify with a cause (as many Palestinians and left-wing intellectuals are prone to) 'are rebuked on the basis that their work "fails to provide objectivity"'.[10] European intellectuals' (rare) engagement with such issues, he argues are 'often seen in the West as less "emotive" than that of the Third World intellectual'.[11] As a consequence, there may be a tendency on the part of some

[6] I should emphasize that many Palestinian scholars have published in English so the reason for their omission cannot be due to language issues alone. In any event, the ICC has Arabic-speaking staff.

[7] Victor Ray, 'The Racial Politics of Citation', *Inside Higher Ed*, 27 April 2018.

[8] Salaita was denied tenure over tweets that were perceived to be 'uncivil' during Israel's military operation in the Gaza Strip in 2014.

[9] John Reynolds, 'Disrupting Civility: Amateur Intellectuals, International Lawyers and TWAIL as Praxis' (2016) 37:11 *Third World Quarterly* 2098-2118, at 2107.

[10] Ibid, 2107.

[11] Ibid, 2108.

scholars to avoid citing those who are associated with certain causes. The discerning scholar should remain aloof and detached.[12]

Writing more than three decades ago, Richard Delgado observed that in many cases 'people of colour' produce better scholarship on race related issues, precisely because it was a subject they cared deeply about.[13] Delgado was writing about a small group of mainly white scholars who wrote about civil rights issues in the United States in the 1960s and 1970s, and who ignored the scholarship of Black and Hispanic lawyers writing on the same issues. This was also the case with the Courts in the US, who Delgado observed almost never cited minority scholars on civil rights issues. It appeared to Delgado that some of the reasons as to why minority authors who wrote about these issues were not cited as much was because they were not considered 'objective' as passion and anger had rendered them 'unfit to reason rigorously or express themselves clearly'.[14] In contrast, white authors 'were above self-interest and thus capable of thinking and writing objectively'.[15] Delgado wrote these words in 1984, but they could have been written yesterday, when one looks at how Palestinian scholarship continues to be sidelined by scholars and courts.

Another factor that may account for the lack of citations to Palestinian scholars in the Western legal academy is what I call the 'terror factor'. It appears that scholars with Arabic surnames and Muslim first names are not perceived to be credible in the post-9/11 – war on terror – ISIS era, unless they are writing specifically on a 'Muslim issue'. I have not undertaken a comprehensive study on the subject, but anecdotally, I can reveal that on two occasions when I was asked to review articles for prestigious international law journals on the Israel-Palestine issue, not a single Palestinian author was cited. It occurred to me that there may have been a perception on the part of these authors that their articles might not be accepted by the journals if they cited Palestinians or perhaps because they did not consider Palestinian scholars authoritative or persuasive. It is also possible that the lack of references to Palestinian scholars may have been due to difficulties with identifying Palestinian scholars (as it is a very small pool of people) or getting access to

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[12] Edward Said has exposed this mode of gatekeeping and exclusion in the particular context of Palestine and his own experience of being disqualified from "respectable" platforms because he was seen as too partisan and therefore unreliable. See Edward W. Said, *Representations of the Intellectual: The 1993 Reith Lectures* (Vintage, 1996) x.

[13] Richard Delgado, 'The Imperial Scholar: Reflections on a Review of Civil Rights Literature' (1984) 132:3 *University of Pennsylvania Law Review* 561-578.

[14] Ibid, 573.

[15] Ibid.

Palestinian scholarship, which, as I shall explain below, is not as readily accessible as the scholarship published by Israeli or Western academics.[16]

A further reason for the paucity of citations to Palestinian legal academics is that their scholarship has rarely been published by the leading publishing housings like Oxford University Press or Cambridge University Press that have a virtual monopoly over what is considered the top-tier publication of books, chapters, and articles in the field of international law. While these publishers do publish Palestinian scholars in the field of Middle East Studies, and although these presses appear to have started becoming more receptive to publishing work by Palestinian scholars, or books that might be considered sympathetic to the Palestinian point of view,[17] I was surprised to see that none of the leading texts on legal aspects of the Arab-Israeli conflict authored by Palestinian scholars from the list of Palestinian lawyers that I reference below have been published by these presses. Consequently, their scholarship does not have that cachet that is associated by publishing articles and books with these publishing presses.[18] As a result, Palestinians have had to publish with presses that some scholars may perceive as being less credible or authoritative and which are not as accessible to scholars (especially those who don't visit libraries) as they are not as readily available online.[19]

Another explanation for the few citations to Palestinian scholars is that few have achieved critical acclaim in the Western legal academy. They have not held

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[16] As Maldonado has argued, 'The number of books and specialized journals produced in the legal academia of the North, as well as their richness and complexity, is much greater than the number produced in the South'. See Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South* (Cambridge University Press, 2013) 10-11. Similarly, as Xavier has demonstrated, 'in the discussions about global administrative law and global constitutionalism, there is a reluctance to even acknowledge the presence of Third World-based scholarship'. See Sujith Xavier, 'Learning from Below: Theorising Global Governance Through Ethnographies and Critical Reflections from the Global South' (2016) 33 *Windsor Yearbook of Access to Justice* 237-238.

[17] See e.g. John B. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press, 2010). Although a chapter authored by Quigley is cited four times in the Prosecutor's request, I was surprised that not a single citation referenced his book, which remains the best on the subject.

[18] In his review of my book, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949* (Pluto, 2009), Jean Allain criticised my choice of publisher – Pluto Press – which he described as 'not an academic press, but instead markets itself as "the world's leading radical publisher, specialising in progressive, critical perspectives in politics and the social sciences"'. In fact, Pluto is an academic press; it also happens to be a 'radical press' that was willing to take the financial risk of publishing a book by a previously unknown and unpublished author. Compare Allain's review of my book [(2010) 12 *Journal of the History of International Law* 155–160] to the more favourable review by Robbie Sabel, a former Legal Adviser to Israel's Ministry of Foreign Affairs, which did not attack me personally or my publisher. The Sabel review appears in (2011) 24:1 *European Journal of International Law* 1103-1109.

[19] Following their expulsion and dispersal from Palestine after 1948 many of these presses were established in the Arab world like the Institute of Palestine Studies in Beirut. While this institute is known to Palestinians all over the world, and publishes scholarship on Palestinian issues in English, French, and Arabic, it is not as well known to legal scholars as the major institutes of international law or the major printing houses in Europe and North America.

chairs at the major law schools of international law in the US or Europe.[20] Accordingly, they are not "reputable" or "safe" to cite.[21]

Conspicuous by its absence: Palestine's rich legal and historical scholarship

Given the length of the Israeli occupation, many of Palestine's finest legal minds who remembered the days before 1967 or even 1948 have passed on. It is a very sad state of affairs that Palestine's statehood is being debated by people far removed from the scene, who have no historical memory of Palestine before the *Nakba* (catastrophic colonial dispossession and expulsion of Palestinians in 1948), and who have apparently not even bothered to read what they left behind.

But it is not as if Palestinians have not produced good lawyers over the past century. Some prominent names that come to mind include Henry Cattan (1906-1992) who represented Palestine before the United Nations in 1947 and 1948, and who authored several important works on a number of issues.[22] Another name that comes to mind is Eugene Cotran (1938-2014), a former High Court Judge in Kenya, a Circuit judge in the United Kingdom, and a Visiting Professor of Law at the University of London's School of Oriental and African Studies (SOAS) for many years, where he authored several works on African law, but also wrote articles and edited books on Palestine, such as *The Arab-Israeli Accords: Legal Perspectives* (Springer, 1996). Eugene was also editor-in-chief of the *Yearbook of Islamic and Middle Eastern Law*. Along with Anis Al-Qasem, he contributed to the drafting of Palestine's Basic Law (2002). Al-Qasem also published several articles of his own on legal issues relating to Palestine, including on issues pertaining to public international law.[23] Then

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[20] Palestinians have held chairs in the US and Europe in other disciplines such as Islamic law, Arab or Middle East Studies, but to my knowledge no Palestinian has held a chair in international law at any major Western law school.

[21] One of the ironies of this lamentable state of affairs is that Palestinians often do not even cite their colleagues. This raises the question as to whether the Palestinian legal team representing Palestine at the ICC or Palestinian NGOs in their Article 15 communications to the Court cited Palestinian scholars. The lack of citations to Palestinian scholars may explain the paucity of references to Palestinian scholarship in the Prosecutor's request to the Pre-Trial Chamber.

[22] These include *Palestine, the Arabs and Israel: The Search for Justice* (Longmans, 1969); *Palestine: The Road to Peace* (Longman, 1970); *Palestine and International Law: Legal Aspects of the Arab-Israeli Conflict* (Longmans, first edition, 1973, second edition, 1976), *The Palestine Question* (Croom Helm, 1988, and Saqi, 2000), and *Jerusalem* (Croom Helm, 1981, and Saqi, 2000).

[23] Al-Qasem was the author of the country survey for Palestine in the *Yearbook of Islamic and Middle Eastern Law* and in the *Palestine Yearbook of International Law*. This included an important article on the background to the 1988 Declaration of Independence and translations into English of original documentation in Arabic and Hebrew on the background to the 1948 declaration of independence, which have barely been cited in the literature on Palestinian statehood. See the documents published in (1987-1988) 4 *Palestine Yearbook of International Law* 247-331.

there was Musa Mazzawi (1925-2005), a barrister at Gray's Inn, and an international lawyer whose work is essential reading for a thorough understanding of the legal issues.[24] Finally, mention should be made of Anis F. Kassim (not to be confused with Anis Al-Qasem), the founding editor of the *Palestine Yearbook of International Law* who authored important articles on Palestine's legal system and on the status of the Arab Higher Committee and the Palestine Liberation Organization in international law.[25] Nor was there a reference to the scholarship of any of the younger or second and third generation Palestinian lawyers who have written on various aspects of the Israel-Palestine dispute, including the occupation, international humanitarian law, the illegality of the settlements, title to territory, the interpretation of Security Council resolutions, the Oslo Accords, water, access to justice, boundaries, the status of Jerusalem, citizenship, and human rights law, in their numerous articles and books. These include books and articles by Noura Erakat, Ardi Imseis, George Bisharat, Omar Dajani, Mustafa Mari, Mutaz Qafisheh, Asem Khalil, Mona Rishwami, Diana Buttu, Jonathan Kuttab, Nimer Sultany, Reem Bahdi, and Mazen Masri, to name a few.

The sole reference by the ICC Prosecutor to Raja Shehadeh's book *From Occupation to Interim Accords: Israel and the Palestinian Territories* (Kluwer 1997), makes it plain that her office did not read what he wrote since he made it clear that Jordan was not an occupying power in the West Bank (see what Shehadeh wrote at 77-79). As David Kennedy has observed, many of the everyday decisions made by professionals who manage norms and institutions which appear to lie in the background of international politics may be more important than we customarily think.[26] This can become very problematic when an institution endorses a view that, in this case, could undermine the very basis upon which it reached its conclusion that Palestine is a state.[27]

When we turn to the history of the conflict, which is addressed in some detail in the Prosecutor's request (see p. 22-52), the inequity is even starker.[28] Not a single Palestinian historian is cited in the document. Again, you read that correctly. Not

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[24] Mazzawi served as the Dean of the Law Faculty at the Polytechnic of Central London (now Westminster University) in the 1980s, and authored, among other works, *Palestine and the Law: Guidelines for the Resolution of the Arab-Israel Conflict* (Ithaca, 1997).

[25] See e.g. Anis F. Kassim, 'The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law' (1980) 9 *Denver Journal of International Law and Policy* 2-33. Anis F. Kassim, 'Legal Systems and Developments in Palestine' (1984) 1 *Palestine Yearbook of International Law* 19-35.

[26] David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27:1 *Sydney Law Review* 5-28.

[27] On this issue see my chapter 'Jordan and Palestine: Union (1950) and Secession (1988)' in *Research Handbook on Secession* (Edward Elgar, forthcoming), which you can read online here.

[28] The only historians cited are James Gelvin, Ian Black (a former Guardian journalist), and Martin Gilbert.

even one! Imagine a section in a court document that addressed the history of the Jewish people, but that did not cite a single Jewish scholar. There would have been an outcry in Israel, and rightly so. The lack of a single reference to a Palestinian historian is alarming in so many ways because Palestine has produced many first-rate historians.

For those unacquainted with Palestinian historiography, I would have expected to have seen reference to scholars such as A.L. Tibawi, Sami Hadawi, Hisham Sharabi, Walid Khalidi or Rashid Khalidi.[29] Other Palestinian historians and political scientists who have done phenomenal and groundbreaking work on Palestinian history include Salim Tamari, Nur Masalha, May Seikaly, Sherene Seikaly, Yezid Sayigh, Muhammad Muslih, Beshara Doumani, Elia Zureik, and Naseer Aruri (apologies in advance for missing anyone out).

In my own work,[30] I attempted to introduce lawyers to the work of the critical Israeli scholars (along with Palestinian scholars) who emerged in the 1980s when Israel's state archives on 1948 were opened to scholars for the first time.[31] These scholars included Benny Morris, Avi Shlaim, Ilan Pappe, Tom Segev, Baruch Kimmerling, and Joel Migdal. I suggested that a narrative that drew upon Israeli, Palestinian, and Western historical scholarship, supported by Israeli archival evidence, might convince the skeptics to reconsider the orthodox views about the

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[29] A.L. Tibawi (1910-1981) was the senior education officer in mandate Jerusalem before the *Nakba*, and the author of *British Interests In Palestine, 1800-1901* (Oxford University Press, 1961), *Anglo-Arab Relations and The Question of Palestine, 1914-1921* (Luzac, 1977), and *A Modern History of Syria, Including Lebanon and Palestine,* (St Martin's press., 1969), among other works. Sami Hadawi (1904-2004) was a land specialist for the British mandatory authorities in Palestine, and Director of the Institute for Palestine Studies (IPS) in Beirut in the 1970s. He authored *Land Ownership in Palestine* (Palestine Arab Refugee Office, 1957), *Palestine Partitioned, 1947-1958* (New York: Arab Information Center, 1959), *Bitter Harvest: Palestine 1914-1967* (New York: New World Press, 1967), and *Palestinian Rights and Losses in 1948: A Comprehensive Study* (Saqi Books: 2000). Hisham Sharabi (1927-2005) was Professor Emeritus of History and Umar al-Mukhtar Chair of Arab Culture at Georgetown University, and author of *Governments and Politics of the Middle East in the Twentieth Century* (D. Van Nostrand, 1962), *Nationalism and Revolution in the Arab World* (D. Van Nostrand, 1966), and *Palestine and Israel: The Lethal Dilemma* (Bobbs-Merrill Co, 1969). Walid Khalidi (born 1925) was for many years a Professor of Political Science at the American University of Beirut, and a research fellow at Oxford, Harvard, and Princeton universities, and who is the author of, inter alia, *From Haven to Conquest: Readings in Zionism and the Palestine Problem until 1948* (Institute of Palestine Studies, 1987); *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Institute for Palestine Studies, 1992), and *The Ownership of the U.S. Embassy Site in Jerusalem* (Institute for Palestine Studies, 2000). Rashid Khalidi is Edward Said Professor of Modern Arab Studies at Columbia University, who is the editor-in-chief of the long-running *Journal of Palestine Studies*, and whose publications include *Palestinian Identity: The Construction of Modern National Consciousness* (Columbia University Press, 1997); *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (Beacon Press, 2006); *Brokers of Deceit: How the U.S. Has Undermined Peace in the Middle East* (Beacon Press, 2013); and most recently, *The Hundred Years' War on Palestine: A Century of Settler Colonialism and Resistance, 1917-2017* (Metropolitan Books, 2020).

[30] See Kattan, *From Coexistence to Conquest*, at 169-208.

[31] Many of these files have since been removed from the archives by the Israeli censor. See Hagar Shefaz, 'Burying the Nakba: How Israel Systematically Hides Evidence of 1948 Expulsion of Arabs', *Haaretz*, 5 July 2019.

conflict.[32] I was wrong. The Prosecutor's request, for example, does not cite a single critical Israeli historian.

- But we cited Cherif Bassiouni. Isn't that enough?

Although the selection of documents on the Arab-Israeli conflict by M. Cherif Bassiouni (an Egyptian) and Shlomo Ben Ami (an Israeli) is cited quite liberally by the Prosecutor, this does not undermine my criticism, as there is very little analysis in the collection.[33] It is, for the most part, a reference book, and even then it omits important Arab league documents from the 1940s and 1950s.[34] What is missing from the Prosecutor's request are citations to Palestinian scholars who have made arguments or analyzed specific legal claims that are relevant to the issues raised in the Prosecutor's request.

- Objection! This is simply not relevant. The ICC only has jurisdiction from 2015…

Now, I can hear the objection from doctrinal lawyers. This is irrelevant. We don't need a history lesson from you Dr. Kattan. This is the International Criminal Court, not a body for resolving historical controversies or complex legal and factual issues. But wait a minute… isn't this precisely what provoked the Prosecutor's request to Pre-Trial Chamber 1? After all, she wrote: 'Indeed, it is no understatement to say that determination of the Court's jurisdiction may … touch on complex legal and factual issues. Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed. The West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel. The Palestinian Authority does not govern Gaza. Moreover, the question of Palestine's statehood under international law does not appear to have been definitively resolved'.[35]

And here's the problem, because although the Prosecutor can only consider crimes that occurred within the jurisdiction of the Court from 1 April 2015, she must convince the Court that she has jurisdiction over the situation in Palestine. This means that she will have to address the issue of borders. She could have stuck to the internationally accepted June 1967 lines, but the Israelis objected. Apparently, the Government of Israel thinks that it has a strong legal argument to slice up the West Bank, so much so that they have opened a Pandora's Box by publishing a document that raises issues related to the Balfour Declaration, the birth of Israel, and even the *Nakba*.

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[32] Kattan, *From Coexistence to Conquest* 172.

[33] M. Cherif Bassiouni and Shlomo Ben Ami (eds.), *A Guide to Documents on the Arab-Palestinian/Israeli Conflict, 1897-2008* (Martinus Nijhoff Publishers, 2009).

[34] See Muhammad Khalil (ed.), *The Arab States and the Arab League: A Documentary Record*, 2 volumes (Khayats, 1962).

[35] See Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 20 December 2019, p. 5, para. 5.

Conclusion: Be careful what you ask for

In challenging the Prosecutor, the Government of Israel has opened issues that could come back to haunt it. This is because it has raised issues that go back to the founding of the State of Israel that Israel's finest legal minds like Shabtai Rosenne did their best to shield from legal scrutiny by drafting carefully worded Article 36 declarations in the days when Israel recognized the compulsory jurisdiction of the International Court of Justice (ICJ).[36] Now that Israel has raised these issues, what is to stop Palestine from advancing legal arguments of its own going back to the Mandate? If Israel wants to expand its border deep inside the West Bank, what is to stop the Palestinians from making an argument that the only legitimate border is the UN partition line? As Judge Awn al-Khasawneh warned in his Separate Opinion on the issues raised by the construction of a wall inside the West Bank in 2004: 'Attempts at denigrating the significance of the Green Line would in the nature of things work both ways. Israel cannot shed doubts upon the title of others *without expecting its own title and the territorial expanse of that title beyond the partition resolution not to be called into question*. Ultimately it is through stabilizing its legal relationship with the Palestinians and not through constructing walls that its security would be assured'.[37]

To conclude, I want to emphasize what I wrote at the beginning of this article: the Prosecutor's request to the PTC is a good outcome for the Palestinians *so far* (it's still early days, and we must see how proceedings develop before the Chamber). Frankly, I am concerned about the lack of time given to the Palestinians to organize *amicus curiae* submissions to the PTC. This would appear to indicate that the ICC does not appreciate or understand the difficulties that face the Palestinians, who remain under occupation,[38] from organizing, let alone paying for, expensive attorneys and barristers to make submissions to the PTC.[39] This concern has been

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[36] Israel withdrew its optional clause declaration with the ICJ in 1985 following its decision in the first phase of the *Nicaragua* case. The withdrawal request was signed by Benjamin Netanyahu.

[37] Awn al-Khasawneh, Separate Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 231, para 11(2) (emphasis added).

[38] When I served as legal advisor to the Palestinian Negotiations Affairs Department, it took eight months for five law books to arrive at the office (which included Eyal Benvenisti's book on the law of occupation and a book by William Schabas on the ICC). The delay was caused by the military censor, which scrutinizes all mail sent to the occupied Palestinian territories (including to Arab postal addresses in East Jerusalem). Although we were able to manage without the books, they would have been helpful. In the end, I used the library facilities of a local NGO.

[39] See, for example, Request for Leave to Submit Observations with respect to the Situation in the State of Palestine on behalf of the European Centre for Law and Justice (4 February 2020), at http://media.aclj.org/pdf/ICC-Request-for-Leave---Palestine-Filed20200204.pdf. The request was signed by Jay Sekulow, a member of Donald Trump's legal team, who served as lead outside counsel for Trump's impeachment trial in the United States Senate.

borne out by the very few Palestinian *amicus* submissions to the Chamber.[40] In my view, the Prosecutor's request would have been much the better if it cited or took into consideration the views of Palestinian scholars, who are as equally authoritative on this issue as any of the other scholars writing on the subject today.

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[40] From my count, of the 36 amicus curiae requests, only three are from Palestine. These include a submission from a group of Palestinian NGOs (including Al Haq), a submission from two professors at Birzeit University (Asem Khalil and Halla Shoabi), and a submission from the Palestine Bar Association (represented by Mutaz Qafisheh).

THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

TWAILR: Extra ~ November 2020

The Inhumanity of Academic Freedom

Steven Salaita

A transcript of the 2019 TB Davie Memorial Lecture at the University of Cape Town.

I begin with a straightforward proposition: academic freedom is inhumane. Its inhumanity isn't of the physical, legal, or intellectual variety. Even at its best, academic freedom is capable of transforming human beings into instruments of bureaucracy. It is inhumane as an ontological category. It cannot provide the very artifact it promises: freedom. To become practicable, academic freedom requires textual boundaries. Under this sort of regime, freedom is merely academic.

Freedom in a rights-based structure is easy to visualize, which means that it's tethered to orthodoxy. This doesn't make a rights-based structure unimportant; it is something to be preserved and strengthened. It merely peters out somewhere short of freedom. Academic freedom can do little to alter the fine-tuned cultures of obedience that govern nearly every campus around the world. I cannot venture a comprehensive theory of freedom or know for certain in what spaces freedom may be possible, but it won't be in selective institutions possessed of wealthy donors, legislative overseers, defense contracts, and opulent endowments.

If you'll grant me the patience, I'll recall a few of my experiences in and beyond academe in an effort to illuminate these points.

A few years ago, after my lawsuit with the University of Illinois had been settled but before I left academe, I visited a US campus to speak about academic freedom. The itinerary included a thought-session with the local AAUP. The AAUP, for those unfamiliar with the acronym, is the American Association of University Professors, a venerable organization that more or less sets the criteria for academic freedom and investigates cases where it appears to have been violated; its influence extends

beyond the USA. As an organization, the AAUP opposes academic boycott of Israeli universities but intervened strongly on my side after the Illinois firing.

Rather than a discussion or even an argument about what academic freedom means for Israel's critics, the gathering of faculty ended up being a kind of inquest. The gentleman who had convened the roundtable read some of my provocative tweets—without mentioning the horrors to which they responded—and then compared them against relevant sections of the AAUP manual. I confess to having been annoyed.

By that point I no longer thought about the tweets. I couldn't recall my state of mind when I wrote them and had published an entire book defending them. More important, numerous bodies had already declared my case a clear-cut violation of academic freedom: dozens of scholarly associations, various committees at the University of Illinois, labor unions, a federal judge, individual theorists of free speech, the AAUP itself. It didn't seem useful to relitigate a historical episode contested only by fascists and reactionaries.

Listening to my words interspersed with itemized bylaws was jarring, but it helped clarify an ethic that's normally implicit: when I make a public comment, I don't care if it conforms to the etiquette of a speech manual. I'm instead concerned with the needs and aspirations of the colonized, the unempowered, the dispossessed. Conditioning critique on the conventions of bourgeois civil liberties, and in deference to specters of recrimination, abrogates any meaningful notion of political independence. To ignore those conventions, to engage the world based on a set of fugitive values, will necessarily frustrate centers of power in ways that require protection beyond the scope of academic freedom. The damnable comment is precisely what academic freedom attempts to protect, but it is incapable of preventing unsanctioned forms of punishment, regulation of the job market according to docility, or the increasing contingency of labor, which stands today as the greatest threat to academic freedom.

Human beings are too complicated for rulebooks. Problem is, we're also too unruly for freedom. In institutions trained on reproducing social order, rulebooks will always win that battle.

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In order to productively discuss academic freedom, we first need to determine the nature of the product we're discussing. I don't want to recite arguments anyone who bothered to attend this lecture almost surely agrees with: academic freedom

preserves democracy; academic freedom emboldens research; academic freedom facilitates faculty governance. These by now are truisms.

Academic freedom is no simple matter, though. We have distinct ways of understanding it, often according to class, discipline, race, gender, and ideology. At base, academic freedom entitles us, as both faculty and students, to say or investigate things that might upset others without the fear of retaliation. As with any condition of speech, limits exist. (And as always, complexity begins at the imposition of limits.)

Many people, for example, are unwilling to protect a Nazi's right to teach undergraduates. Others believe that the principle of speech overrides the harm attending the Nazi's presence. Using Nazis in a hypothetical scenario used to be considered overkill, but these days, unfortunately, it requires no hyperbole. Let's grant the argument that the Nazi has to go. We don't want racism on campus, right?

But what happens when a Jewish student says criticism of Israel is anti-Semitic or when a white student considers affirmation of Blackness a form of racial hostility? We've been warned again and again that limiting the reactionary speech will inevitably lead to repression of the political left. This is the absolutist view of academic freedom—the belief that protection ought to be evenly applied across the ideological spectrum. It's a solid view. I have no fundamental problem with it. But I do question the wisdom of allowing a civil liberty to dominate notions of freedom.

In the end, we have to apply value judgments (mediated by lawless forces) to balance speech rights with public safety. In societies like the USA and South Africa, steeped in the afterlives of colonization, this task is remarkably difficult. We know that racism is bad, but global economic systems are invested in its survival. We know that anti-Zionism isn't racism, that in fact it is the just position. Yet no agreement exists about what comprises appropriate speech, in large part because maintaining a community is at odds with corporate dominion. As a result, there's no way to prioritize a set of beliefs without accusations of hypocrisy (or without actual hypocrisy). The easy answer is to protect speech equally and let a marketplace of ideas sort the winners and losers.

There's a catch, though. Value judgments don't arise in a vacuum and discourses don't exist in a free market. Structural forces, often unseen, always beneficial to the elite, determine which ideas are serious and which in turn get a hearing. If we conceptualize speech as a market-driven phenomenon, then we necessarily relinquish concern for the vulnerable. We're left with competing narratives in a system

designed to favor the needs of capital. It's a highly lopsided competition. Those who humor the ruling class will always enjoy a strong advantage, which aspiring pundits and prospective academics are happy to exploit. Corporate and state-run media don't exist to ratify disinterest, but to reproduce status quos.

The political left is already restricted, on and beyond campus. The same notions of respectability or common sense that guide discussion of academic freedom also limit the imagination to mechanical defense of abstractions. Sure, academic freedom is meant to protect insurgent politics, and often does, but the milieu in which it operates has plenty of ways to neutralize or quash insurgency.

I focus on radical ideas because Palestine, one of my interests and the source of my persecution, belongs to the set of issues considered dangerous by polite society, at least in North America and much of Europe (and, for that matter, the Arab World). Others include Black liberation, Indigenous nationalism, open borders, decolonization, trans-inclusivity, labor militancy, communism, radical ecology, and anti-imperialism. Certain forms of speech reliably cause people trouble: condemning the police, questioning patriotism, disparaging whiteness, promoting economic redistribution, impeaching the military—anything, really, that conceptualizes racism or inequality as a systemic problem rather than an individual failing. More than anything, denouncing Israeli aggression has a long record of provoking recrimination. Anti-Zionism has always existed in dialogue with revolutionary politics around the globe, including the long struggle against Apartheid.

Academic freedom doesn't prevent sexual violence. It doesn't disrupt racial capitalism. It doesn't hinder obscene inequality. Academic freedom isn't a capable deterrent to genocide.

The devotee of academic freedom will say that it's not meant to do any of those things. This is correct. Academic freedom has humbler ambitions. The fact that academic freedom has a specific mandate doesn't detract from its importance. I'm not attempting to convince you to dispose of academic freedom. I'm suggesting that it shouldn't be the limit of your devotion.

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I've been tracking Anglophone academic job listings for five years, monitoring them for twenty, and have yet to see the word "Palestine" in a single advertisement. There's also precious little about Pakistan, Nigeria, Indonesia, Brazil, and South Africa. Israel, on the other hand, is the subject of endowed

professorships across the globe. Why does this comparatively miniscule country, in both size and population, enjoy such prominence on campus?

The obvious answer is that the state's supporters spend money on professorships. This explanation isn't comprehensive, though. Lots of factors exist: the importance of Israel to US culture and identity; Israel's prominent role in Western imperialism; the pro-Israel leanings of many professors and administrators; the state's seamless reproduction of orthodoxy; the notion that Israel is exceptional and thus worthy of special analysis; the methodical effort to scrub Palestinians from the globe.

The last point—the decades-long attempt to scrub Palestinians—is critical. Zionists have made it so that even identifying as Palestinian is contentious. Articulating nationalist politics, a central feature of Palestinian identity, is likely to inspire remonstration. It's an awful predicament. In spaces devoted to learning, inquiry into our very existence is verboten. We cannot claim a history. We cannot share our culture. We cannot speak without oversight.

My life in academe, as both a student and teacher, was defined by the tyranny of balance, the idea that no criticism of Israel can stand on its own, and that my obligation was to internalize the oppressor's feelings rather than interrogate my own. As I grew and met more people, I learned that my experiences were exhaustingly common.

In 2018, Palestine Legal, an organization that assists people on campus targeted for punishment by Zionists, responded to 289 incidents of suppression of U.S.-based Palestine advocacy. In 2017, the number was 318. Since 2014, Palestine Legal has responded to a total of 1,247 incidents of suppression. The number of actual incidents is no doubt much higher.

Upon becoming president, Donald Trump appointed Kenneth Marcus as head of the Office for Civil Rights at the Department of Education. Marcus is a Likudnik who founded the Louis Brandeis Center for Human Rights, which has dragged dozens of pro-Palestine activists into court—including myself. To this day, not a single university president has condemned the University of Illinois's 2014 annihilation of academic freedom or its destruction of the program in American Indian Studies; eight months earlier, hundreds found time to bemoan a scholarly association's boycott resolution.

All the institutions of state maintain ideological and material devotion to Israel: administrative offices, law enforcement agencies, legislative bodies. The

argument that Zionists repeat about campus being awash in anti-Israel (and thus anti-Semitic) sentiment is a fantasy—or, more precisely, a rhetorical gimmick to convey a more critical point, that challenging their supremacy is a form of prejudice.

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Humor my self-indulgence for a moment. I want to consider what that word, "freedom," means in economies structured to reward obedience. No thinking person buys the myth of merit as an explanation for wealth or upward mobility. Academe and corporate media are filled with mediocrities who achieved stardom by flattering the ruling class.

Already, then, freedom is tenuous because livelihood is contingent on respectability, itself contingent on whatever version of exceptionalism pleases a local elite. Cultures of online exchange promise a kind of freedom, but more than anything they illuminate the preponderance of coercion, a much greater social force. Nobody who covets white-collar stability will make a comment on social media without considering specters of recrimination, if only in a hypothetical future. Every hiring committee you'll ever encounter staffs Twitter's electronic panopticon.

Once a narrative about an academic's offensive social media profile takes hold, it becomes a permanent demerit. Because I was marked in a particular way, deliberately and publicly, I can't visit Palestine, my mother's ancestral land, as the Zionist occupiers control all ports of entry. I can't find a single university president who will affirm my right to extramural speech. I can't get an office job with any campus or corporation that has access to Google. I've been sued two different times by the same people who wrecked my academic career. Civil liberties can offer recourse against governmental repression, but they're helpless against the capitalist impulse to eliminate disruption of commerce.

Tell me, then. What opportunity? What autonomy? What freedom?

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I'm not sure, anyway, that it's wise or accurate to limit academic freedom to a narrow civic imperative. Academic freedom exists in countless relations of power, which render it dynamic and inconsistent.

The primary muscle behind academic freedom, in the USA, at least, are courts and labor unions. The AAUP, for example, functions as a union on various campuses, including the American University of Beirut, where I worked for two years. Unions

have a mandate to do more than observe and document violations of academic freedom. They attempt to strengthen faculty governance, which is obliged to serve the interests of underrepresented students and instructors, along with fighting the growing tide of precarity. (I don't think faculty governance, even where it still enjoys some autonomy, adequately does these things, but we're talking about hypothetical transactions related to academic freedom.) It's not at all clear, then, that concern with justice is beyond the purview of academic freedom.

As to the courts, they can sometimes provide recourse, but we should consider the timing of litigation and the nature of the restitution it offers. Upper administrators certainly consider these things. When a professor generates controversy, university leaders will undertake a cost-benefit analyses wherein they measure the damage from a broken contract or violation of academic freedom against the losses they might incur from unhappy donors and politicians. In my case with Illinois, administrators and politicians represented the interests of wealthy investors.

I sued and the courts, as the university's leadership knew would happen (because they said so in private emails), took my side. Academic freedom provided recourse. Case closed, right? Not quite.

No amount of money, no legal recognition that I was wronged, will replace the loss of my academic career, to which I devoted the majority of my life. There's no such thing as becoming whole when the same state that destroyed my livelihood tries to return it in piecemeal increments. Academic freedom can't make any university hire me, no matter how strong my CV. It can't alleviate the fear administrators have of upsetting the Israel lobby. It can't alter the ideological conditions that make campus so hostile to Palestinians. Everybody involved in the imbroglio at Illinois got to pick up the pieces of their vocation and move on to different pastures. I didn't. The fallout for me was permanent. They can put the ugly situation behind them. It's always right in front of me. I think about these things when I'm inspecting my school bus in the dark of a twenty-degree morning.

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I've been discussing the variability of academic freedom as both a discourse and a practice—basically, the ways it can be instrumentalized in service of various ideological projects. One example involves the University of Cape Town. When your university Senate passed a resolution ending collaboration with Israeli universities in March 2019, it set off a flurry of disapproving and often reproachful

commentary from Zionist scholars. Most of them, not wanting to betray partisan motivations, disapproved of the resolution by citing academic freedom.

Leaving aside the demonstrably false notion that boycott and civil rights are incompatible—they have historically gone hand in hand—the partisans pretending to be objective relied on troublesome assumptions about the range and purpose of academic freedom.

First of all, the decision was made according to a democratic governing process, so it represented a classic example of academic freedom in action. What, then, are critics of the resolution actually doing? What do they truly want, beyond the piety and the platitudes? They're asking upper administrators or outside forces to intervene in faculty governance based on political displeasure, the very thing academic freedom is supposed to prevent.

Moreover, what vision of academic freedom are the critics promoting? Working outside the boundaries of state power in order to defend the disenfranchised and dispossessed—after having exhausted the possibility of change through conventional channels—embodies the sort of public engagement university PR departments relentlessly market. Yet the detractors' conception of academic freedom, one deployed to dissuade or shut down extracurricular activism, tacitly (and sometimes openly) encourages sites of authority to regulate ideas, to mediate which of them become normative, and to subdue activism with potential to disrupt extant structures of power. Those who oppose BDS don't simply abjure radical discourses; they deploy an iteration of academic freedom that serves managerial interests.

Academic freedom is always conditional on a corresponding politics, always conditioned by the issues with which it corresponds. We can't treat it as timeless or discrete. Rights pretend to be neutral entitlements disbursed according to need. In fact, they are commodities managed by bureaucrats paid handsomely to indulge the ruling class under the guise of collective values.

Mainstream debates about BDS disappear the people at the heart of the issue. Almost exclusively, conversations about academic boycott describe the ways it might harm Israelis (none of which has come to fruition). But what about Palestinian students and scholars? (This question always comes out of nowhere because Palestinians aren't part of the calculus.) The moment we decide that they're worthy of academic freedom—that is, to the promise of movement and development and interchange, to an existence that isn't criminalized, to lives of

inquiry unfettered by suppression—boycotting Israeli universities becomes the only ethical response.

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It shouldn't be surprising that some advocates of Palestinian liberation express skepticism about the prospects of academic freedom in the corporate university. Recrimination against anti-Zionists on campus is a bona fide phenomenon. It's been happening for decades. Professors are fired or arrested; some have been deported. The lucky ones merely suffer alienation, ignominy, and abuse. Students are profiled as terrorists on websites intended to harm their career prospects. Management shuts down clubs devoted to Palestine. Outside of leftist and civil libertarian spaces, this stuff is mostly ignored. What should be a continual scandal generates attention only when there's opportunity to situate Palestine as a strange, aggressive geography. Dozens of pundits have made lucrative careers of defending free speech as if it's a neutral phenomenon, an approach that inevitably benefits the political right because neutrality in essence is the logic of power. Those pundits never invoke Palestinians as victims of the repression they deplore.

I hope that my focus on Palestine isn't out of place in Cape Town. I'm recalling the deep and lasting ties between the anti-Apartheid struggle and Palestinian nationalism and want to give a nod to the people of this nation who have been unflinching supporters of Palestine's liberation. South Africa has always been a source of strength in our imagination, a place where solidarity goes beyond narrative to achieve an existential kinship that comes to us in tableaus of emotion. The large statue of a triumphant Mandela in Ramallah is a gift of steadfastness—of what we call sumoud—to a people still suffering a regime of racial segregation.

The examples of Palestine in relation to academic freedom aren't isolated to a particular geography. We need only consider the imperatives of any localized ruling class to see the situation repeated across the globe. All states harbor communities whose desire to survive threatens the supremacy of individuals and institutions invested in their dispossession.

In a world of ascendant fascism, we can't simply accept academic freedom as a given, nor is it prudent to imagine academic freedom as a constant amid curricular and pedagogical changes. Threats to academic freedom coincide with ominous prospects for biological and ecological survival. Academic freedom can't exist without the very forces it opposes. It is at once sovereign and derivative. Raise a revolutionary politics, one that stresses the violence of colonization and capitalism, and you'll

quickly encounter the limits of civil liberties. The system crushes substantive dissent with or without them, even if it has to spend a bit of money or face a few days of acrimony on Twitter.

It's important, then, to avoid treating academic freedom as sacrosanct and view it instead as a participant in material politics. Academic freedom cannot function without tenure, worker solidarity, and an adequate job market, which are increasingly in decline. "Can academic freedom be saved?" is perhaps a less pertinent question than "Is there any longer a marketplace for academic freedom?" The corporate university is disarming academic freedom by diminishing the circumstances in which it can be effective.

Let's not shy away from the complicity of the tenured professoriate in the sorry state of affairs that now affect the global academy. Tenured positions are down. Government funding has decreased. The managerial class is a bloated monstrosity. Some instructors work multiple jobs without adequate benefits. Sexual violence is common. Racism appears poised for another golden age. The humanities are barely surviving. Student debt is outrageous. And those with job security did little to prevent any of it.

This is the kind of comment that gets me into trouble. "What evidence is there for the claim?" tenured faculty will want to know. Well, my evidence is simple: everything on the list occurred while you were on the clock. Their occurrence creates a paradox for anybody who would disavow responsibility. You either claim helplessness, in which case academic freedom is unnecessary, or you acknowledge that academic freedom is a limited commodity available to those who enjoy some level of institutional power.

I was a tenured faculty member for twelve years and count myself among the complicit. I didn't do nearly enough to support my contingent comrades—because I didn't properly see them as comrades, something my position informally demanded. And trying to produce meaningful criticism put me in serious conflict with my employers. We all know, in personal moments of brutal honesty, that radical devotion to lesser classes is almost always just professional branding, because we're scared of the punishment that awaits if we offend the wrong people, those who occupy floors above the ivy. Academic freedom doesn't take away the fear because we know that management can always find ways around it.

The problem ultimately isn't individual, though. Professional associations talked a lot about this crisis or that emergency, but did little to organize their

members. Departments and colleges consented to divide and conquer strategies rather than uniting across disciplinary boundaries. Prestige triumphed over solidarity. Now the damage may be irreversible.

I can be accused of speaking from a sense of pessimism cultivated by ostracization. I accept that criticism. I'd respond by pointing out that useful critique often comes from people who suffer the worst tendencies of a culture or profession. I can't feign objectivity or claim to speak for any collective. Academe is a large profession, with thousands of disciplines and subcultures. Its inhabitants have vastly different experiences and impressions.

But this much I know: my ouster from academe brought into focus problems I scarcely noticed when I was still on the inside. College students often talk of unlearning the dogmas they internalized from their homes, secondary schools, and places of worship. I'm constantly unlearning the strictures of being learned, exorcising the finely-tuned customs of obedience into which I and my peers were so carefully socialized. Now I instantly recognize when putatively radical scholars reproduce the imperatives of power through a compulsion to find nuance where old-fashioned outrage is appropriate.

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I've talked longer already than I'm normally comfortable doing. I don't want to stretch the limits of your patience, so let me try to synthesize a central point to all this philosophizing, reflection, storytelling, whatever you want to call it.

If you are interested in a revolutionary politics, by which I mean if you harbor a desire to subvert, or at least alter, the structures that govern inequality, then academic freedom will neither offer guidance nor protect you from recrimination. This isn't to say that academic freedom is unimportant. It is critical to a functional university. However, academic freedom shouldn't be an end in itself. It is an instrument, one among many, to help us realize a world unlimited by stagnant doctrines of pragmatism.

Rehearsing the commonplaces of academic freedom isn't an adequate substitute for the uncomfortable inquiry it's meant to protect. Let us then imagine what a truly free campus in a free society would look like. Let us not wait for institutions to authorize our imagination. Let us create unsanctioned solidarities. Let us redefine disrepute. Let us harbor intellectual fugitives.

Let us, above all, embrace the painful but liberating recognition that optimizing our humanity depends upon the obsolescence of civil rights, for they are necessary only in societies that profit from repression.

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My son just finished first grade. The only time I know freedom is in his company. He hasn't yet discovered the enervating logic of civility. We've spent this summer, up in the northern hemisphere, searching the woods for railroad tracks, watching un-educational cartoons, and creating a ruckus at our community pool. It was hard as hell to pry myself away from this routine even though I'm happy to have visited. My experience in this beautiful city has been cathartic.

He started playing baseball in April. I want to say he took to the game like a natural, but the sport doesn't agree with his body. He's a gangly kid, unusually tall—been in the 99th height percentile since birth. His attitude was lukewarm, too. He liked batting—what child doesn't like carrying a big stick?—but in the field mostly devoted himself to skipping in circles and kicking up dust.

At the end of my afternoon shift, I'd park my bus and rush across the lot to my car, speeding away in order to make practice on time, two, sometimes three times a week. There I sat on a grassy hillside and watched my boy run and smile and I'd remember the meaning of freedom—not as a term, but a feeling, its most essential incarnation.

Not even striking out repeatedly while his teammates became power hitters quelled the child's enthusiasm. He'd miss the third pitch, glance bashfully in my direction, and then bound behind the backstop to retrieve his glove. The failure became my burden. During games I stewed in tension as the ball flew past his bat, standing to clap and shout "good job" as he scampered to the dugout, his bat dragging behind him.

With only two games left, I took him to an empty field to practice swinging. The day was humid and neither of us wanted to be outside. For the first time, I could see that striking out was bothering him, and I wasn't sure what it meant that it had occurred in my company. He began connecting with the ball, dinks and foul tips. It was enough for him. He wanted to visit the mall or watch TV, anything that would get us out of the sun. I pressed him to continue.

"The practice will pay off during the game," I kept saying, my tone excitable, my body language impatient. "It'll pay off." He dutifully continued swinging.

At the game the following day, there was no change in his gait or demeanor as he approached the plate. Three pitches. Three swings. Three misses. I searched his face for signs of disappointment, but he carried his normal expression of wonderment. I suppose I needed to search my own expression to find the sentiment.

About five minutes later, he had sneaked beside me on the bleachers. I turned my head and there he stood. Startled, I asked what was the matter. He beckoned me to lean closer. When my ear was an inch from his mouth, he clasped my shoulders. "Papa," he whispered, "it didn't pay off."

He slid onto my lap. I took off his cap and tussled his hair. "You did great," I reassured him. He returned to his teammates, to the field where he did pirouettes at the edge of the outfield grass, to the plate where he struck out two more times before picking up a paper bag filled with snacks and a bottle of Gatorade.

All seemed normal on the ride home, but I was in turmoil. It was hard for me to believe that my child's visit to the bleachers wasn't motivated by a sudden loss of innocence, by a terrible recognition: the rewards that are supposed to come of hard work don't always materialize. It must have been confusing for him, but it wasn't a bad lesson, I figured. We all learn it at some point, perhaps with the exception of those born into wealth. It's no accident that those types are most apt to aggressively defend capitalist myths of upward mobility.

In time, I realized that I had learned something, too: for five years, almost exactly five years to this day, I've had to consider whether my sharp criticism of Israel and subsequent recalcitrance—the unwillingness to grovel my way back into academe's good graces—were worth it. But it's been almost impossible to understand the stakes because the story is ongoing, its plot out of my control. I wouldn't change anything, nor do I entertain regret. Still, the decisions I've made will feel incomplete, disaggregated, until the situation on which I commented ceases to be catastrophic.

All I know is that I'm determined to keep alive the idea of freedom. If I back down from a dangerously simple vision of Palestinian liberation, one intolerant of anything less than equality, then I will have betrayed the people with whom my destiny is aligned—objects of disrepute in the white-collar economy, unwelcome proof that greed has real-life consequences. I endure the punishment not because I'm a sucker or a martyr—I have no illusions about the ruthlessness of capital and I despise the lionization of public figures—but because I want the vision of freedom ubiquitous among the dispossessed to survive.

I dislike it when activists and intellectuals in the metropole compromise that vision for the sake of access, market share, or respectability. Likewise when they accommodate Zionism in order to sanitize the image of Western politicians. These actions aren't necessary compromises or reluctant overtures to realism. They're voluntary acts of conciliation. Worse, that conciliation proceeds without the consent of people the activists and intellectuals purport to represent. No matter how much punishment I suffer, I will never abdicate my commitment to human beings dismissed as surplus, devoid of influence, unloved by power.

That's how we win. That's how the downtrodden have always won. Every single time. By defying the logic of recrimination. By depleting its power through unapologetic defiance. That's why they hate me. Because I'll face down any punishment they decide to serve. Because I won't ratify their defamation. Because I'll never compromise the humanity of the Palestinian people in order to assuage a colonizer. We have to be willing to drive buses, sweep floors, stock groceries, wait tables, to do the kind of labor that frees the mind from exploitation of the body. Whatever keeps the idea alive. That's our greatest source of power, something basic to survival, something so damn simple. The goal shouldn't be to build an audience, to humor arbiters of respectability, to craft ideological brands, to make good money. No. It should be to inoculate yourself against the malice of your oppressor.

They took my career. They continue to patrol academe to make sure I never return—that's why they're complaining about my presence here at UCT; they're sending a message: don't even dream of hiring this guy; don't even consider it. We'll create a circus, a ragbag of bad press, the one thing that administrators of all ideological leanings dread. We'll withhold donations. We're willing to harm the entire institution in order to preserve our anachronistic politics. I know this because they do the same thing at every campus I've ever visited.

Why should they complain about BDS? Are they really worried about academic freedom? Every attempt to hire me, a project that's supposedly the autonomous domain of faculty, meets with remonstration from the outside. In fact, they intervene before employment is even an idea. And for what? Viewpoints with which they disagree. They have no standing to cite concern for academic freedom, not while they reproduce the textbook behavior of its historical enemies.

They took my health insurance. They keep dragging me into court. They forced me into hourly labor. What do I have left? The one thing they can't extinguish: a

fixation on equality, recorded in steady rhythms with an uncapped pen. In other words: freedom.

Don't ever voluntarily cede that power. Your recalcitrance will pay off. And then we'll join the continents in victory. The system of compensation into which we're acclimated can never match that kind of reward.

Here is the problem with orthodoxy. Here is the moral limit of pragmatism. Institutions wring humanity out of social relations and so the indescribable closeness of filial love, in whispered exchanges of hope and anxiety, becomes a lifeline to meaningful futures. I don't want to conceptualize justice as an attempt to curtail our worst tendencies, but as a disposition that reproduces the imperatives of filial love in spaces of mercy and compassion.

Recalcitrance is our only source of power against a voracious ruling class. Being recalcitrant—a refusal to passively consume injustice as a matter of economic or psychological expedience—is worth the hatred and suffering it generates across the political spectrum, from the fascists, the bosses, the racists, but also from the self-described paladins of justice with bureaucratic aspirations, those who expect makeshift devotion to immediately pay off.

I want to take up residence with you in a world of impossible ideas.

And the main idea we must nurture isn't academic freedom; it's simply freedom, unadorned, unmediated, unmodified.

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THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

TWAILR: Dialogues ~ February 2021

Human Shields and the Location of Agency

Neve Gordon & Nicola Perugini discuss their new book, *Human Shields: A History of People in the Line of Fire* (University of California Press, 2020) with Ayça Çubukçu, Noura Erakat & John Reynolds.

John: What inspired you to write this book, and what is it, in essence, about?

Neve & Nicola: While working on our previous book, *The Human Right to Dominate*, we repeatedly encountered Israel's accusation that Palestinians use human shields as a warfare strategy in the Gaza Strip. The argument was straightforward: since armed Palestinian groups deploy civilians as human shields, placing them in front of legitimate military targets, Israel is not responsible for civilian casualties and cannot therefore be blamed for violations of the laws of war. We sensed that Israel's accusation was part of a preemptive defence strategy against the allegations that it had committed war crimes during its 2014 military campaign "Protective Edge", where at least 2,133 Palestinians were killed, 1,489 of whom were civilians, including 500 children and 257 women.

We also realised that this line of reasoning was common in other theatres of political violence--from the military campaign against the Islamic State in Iraq, to the wars in Afghanistan, Sri Lanka, Syria and Yemen. We decided to create a google alert for news articles mentioning the phrase "human shield", and as time passed the number of alerts increased exponentially. The fact that numerous states were increasingly accusing their non-state enemies of hiding behind civilian shields – while using this accusation to justify and legitimise high civilian casualties – was chilling, and prompted us to ask a series of questions: How is it possible that residents who are trapped in a war zone are, at times, portrayed as human shields while on other occasions they are presented as innocent civilians? How does framing civilians as shields operate to legitimise violence? From a different perspective, does

volunteering to become a human shield in an attempt to stop state violence constitute a humane or inhumane act? And what does this figure tell us about the broader global history of political violence and the ethical claims mobilised to justify violence?

Our goal, in other words, was not to discover the "origin" of human shielding – since the question of origins is always very tricky, frequently concealing more than it reveals. Instead, we were interested in tracing the emergence of human shielding as a legal, ethical, and political question. We consequently decided to reconstruct a genealogy of human shielding, asking ourselves when did the deployment of vulnerable people as a weapon of deterrence become an issue that disturbed people's ethical and legal sensibilities?

We begin the story by examining incidents of human shielding during first the American Civil War (1861-65) when the Lieber Code was drafted, and then the Franco-German War (1870-71) which triggered heated international debates about the legality and morality of using human shields. We then went on to chronicle and analyse the mobilisation of involuntary and voluntary human shielding throughout the twentieth century and up until the present day, underscoring how human shields have acquired different meanings and have been deployed in different ways and for different purposes. To do this, we look at colonial wars, environmental struggles, humanitarian wars, the war on terror, and civil protests – including the use of shields to resist state violence in Palestine and in Black Lives Matter protests.

Michelle Bhasin on twitter: 'When White people ask what they should say to black people show them this video. The answer is simple. Keep your eye on this White girl in the front who uses her privilege to prevent violence. Be that girl. Raise that girl.'

During our research we discovered that human shields are like a seismograph that registers the ethical, legal and political value attributed to groups of human beings at different historical moments and in different geographical locations. Indeed, an analysis of human shielding helps expose the intricate ways through which class, race, gender and other political constructs have inflected the laws of war, thus providing a vital lens for understanding the global history of political violence.

Ayça: As you perceptively observe, the figure of the *voluntary* human shield is 'inconceivable' in international law because it jeopardises the notion of the civilian as essentially a passive victim of violence (p.84). Throughout the book, when theorising this figure, you make a distinction between human shielding as a 'weapon of war' and as a 'weapon of peace'. Besides the element of "choice" on the part of human shields (and that may be complicated enough a matter), which ethical, legal, historical, and/or political criteria underwrite the fundamental distinction you assert between these two types of human shielding? How sustainable is this distinction, especially in situations where the meaning, requirements, and even the desirability of "peace" are at stake?

Neve & Nicola: Yes, you are right. We argue that the law's imagination is, so to speak, limited, and that voluntary human shields destabilise the way in which civilians are usually framed by the law, so much so that such shields are practically inconceivable within existing legal reasoning. Following Helen Kinsella as well as Amanda Alexander, Karma Nabulsi, and Christiane Wilke, we maintain that this is because the civilian is imagined within the laws of war as a noncombatant, a passive (often feminised) figure and an innocent bystander "in need of protection". Accordingly, the legal distinction between the combatant and civilian is anchored in "agency" rather than "choice". When civilians challenge their constitutive condition of passivity they are usually framed as combatants. Indeed, the law does not seem to contemplate the possibility that civilians can be active within a war zone without wielding violence and thus becoming combatants.

The same is true about the distinction between voluntary and involuntary human shields: agency is the fundamental difference between the two, and this distinction is crucial for understanding how the law operates. According to the Additional Protocols, involuntary human shields are protected people – civilians or prisoners of war – who are '*used* as shields'. The legal charge against the deployment of involuntary shields arises from the assumption that civilians are passive and that it is wrong to transform them into weapons of war in a coercive manner. Indeed, the

power of this legal provision depends on the presupposition of a passive civilian. Enter voluntary human shields, civilians who challenge their legal ascription of passivity, and the law quivers. Simply put, it has no vocabulary to define the status of civilians who use their own bodies to actively resist violence.

The distinction between the two types of shields has to do, on the one hand, with the *location of agency*, and, on the other hand, with shielding's *relation to violence*. Voluntary shields are people who visibly assert their own agency, while involuntary shields are those who ostensibly lack agency and whose body is exploited by an active warring party to advance its goals. Agency, in other words, is *located within* the voluntary shield, while it *acts upon* the involuntary shield. Just as importantly, voluntary shields use their body in a non-violent way in an attempt to prevent or stop violence, while involuntary shields are part and parcel of the existing economy of violence.

Thus, while challenging the architecture of the laws of war, the distinction between voluntary and involuntary shields also challenges the ethics of war. It is in this context that we introduce the distinction between 'weapons of war' and 'weapons of peace'.

On the one hand, human shields become a 'weapon of war' when violence is deployed by a warring party not only to transform their bodies into a warfare technology deployed to protect a military target, but also to confine them to a framework of passivity. On the other hand, civilians become 'weapons of peace' by transforming their own body into a living defensive weapon utilized in a non-violent way to prevent or stop the use of lethal violence. From Maude Royden and the "peace army" she tried to organise in the 1930s to stop the Sino-Japanese war to the Iraq Human Shield Action group and solidarity activists like Rachel Corrie in Palestine, civilians have continuously chosen to use their bodies to oppose war.

However, as we also show in the book – building on the important works of Banu Bargu and Gada Mahrouse – only certain, mostly privileged, groups of people can act as voluntary shields and become 'weapons of peace'. The point is not only that their lives are seen by the attacking party to matter more than the lives of the people they are shielding and therefore they can, at least potentially, deter the attackers, but also that their agency can be recognised as non-violent. By contrast, the agency of those who are less privileged is almost always deemed violent. Voluntary human shielding thus helps expose how social hierarchies determine the interpretation of the

act and how only those who are positioned at the top of the ladder can be recognised as voluntary shields, something we have witnessed time and again in our work in Israel/Palestine where Palestinians are always framed as violent and can only be *used* as human shields. For them, voluntary shielding is not really an option. This, then, complicates the notion of choice, suggesting that the location of agency and its relation to privilege that determines both the possibility of voluntary shielding and its potential to be successful.

Noura: One of the most striking things I found about your book was how the vignettes unsettle nearly all definitive categories when it comes to human shields. It is as if each instance not only tells us about how privilege, or the lack thereof, inflects the concept of humanity but also how that particular story is historically contingent. Even in your robust answer above, you indicate similar outliers as in Palestine where voluntary shielding is not an option – not for Palestinians, nor often for their white allies. It is the location in Gaza that typically determines culpability rather than passivity, nationality, race, gender, class, or even methods of violence.

In that spirit, I wonder whether Carl Schmitt's critique of liberal universalism is sustaining. Is there, in fact, one script for the (former) colonial powers and another for the rest of the world? Is geography determinative? For example, in addition to the combatant and the civilian, there is also the noncombatant figure who assists the war effort but does not take up arms - i.e., the cooks, the drivers, the medics, who should also enjoy immunity. Similarly, the civilian who takes up arms is recognised as a direct participant in hostilities and becomes a target for 'such time as' they bear arms, but regains immunity once they put down their arms. Even the combatant soldier who is wounded on land or sea or held as a POW is no longer a legitimate target. Immunity in each of these cases is tethered to military threat, not merely agency: if there is no threat, there is immunity and conversely, if there is a threat, immunity is lost. But as we have seen in Gaza where there is no distinction between noncombatants and combatants, where the temporal scope of direct participation in hostilities is removed, and there is effectively no recognition of legitimate combatants – are there geographic sites where these legal nuances are obsolete? Is Gaza unique in this instance or, in the course of your extraordinary research across time and space, did you find that notwithstanding the achievements of the 1977 Additional Protocols as well as national independence for nearly all of the world's colonies, colonial geographies remain decisive in determining humanity?

Neve & Nicola: Thanks so much for this, Noura. Rather than being determined, we would argue that colonial geographies are intertwined in a dialectical relation with violence and the law. Thus, it is more a matter of violence and the law shaping colonial geographies and spaces of confinement, while the colonial organisation and compartmentalisation of the world has profoundly influenced the way international law was formulated, as well as how this body of law continues to be interpreted, operationalised and applied. This is one of Tony Anghie's insights which we have taken to heart.

One could say that Gaza is an extreme contemporary manifestation of some of the historical processes described in *Imperialism, Sovereignty and the Making of International Law*. Gaza reveals with particular clarity how violence, law, and colonial geography are mutually constitutive. In 1948, as a result of ethnic cleansing carried out by Israel, this strip of Mediterranean coast was constituted as a refugee space, a space inhabited primarily by people who were expelled or had fled from their homes during the war. As we showed in our previous book, Gaza and Palestine more broadly were reshaped and incorporated into the global order through settler colonial violence, and this turn of events was justified by the victors of World War II as political and legal reparation for crimes perpetrated against Jews on European soil.

Gaza's Palestinian refugees alongside the region's original Palestinian inhabitants have since been fenced in, denied sovereignty, and from 2007 framed by Israel as an "enemy entity", forced to live under an ongoing military siege. Lacking any viable political solution, the only way they can resist the siege while legitimately fighting for self-determination and liberation from colonial domination is by mobilising civilians and establishing an irregular army. Yet these irregular militants, made up in the past by *fedayeen* belonging to different political factions and today primarily by Hamas's military wing, have always been cast as terrorists.

Thus, it is not only that colonial geographies help shape international legal hierarchies of humanity, but also that the law helps to produce these hierarchies along colonial – and thus racial, and national – lines. Indeed, Gaza exposes the inherent and unresolved tension informing the 1977 Additional Protocols. On the one hand, the Protocols legitimise armed struggle carried out by irregulars in the context of the right to self-determination and liberation from colonialism. On the other hand, the same Protocols continue to be confined within a state-centric paradigm which privileges state over non-state actors, ultimately outlawing anti-colonial resistance. Indeed, since the Protocols' ratification, violent resistance – and

often non-violent resistance – carried out against the state by non-state actors has consistently been framed as terrorism, particularly in contexts of neo-imperial military occupation and colonisation. One could say that the irregular within the Protocols is legitimate but not quite.

What happens to non-combatants in such contexts? In Gaza, Israel has denied the civilian population both sovereignty and any possibility of supporting the legitimate struggle for self-determination – including through armed struggle. Israel has placed Palestinians on a humanitarian "diet" by imposing a military siege, and those who dare protest their subjugation become killable or maimable subjects.

Gaza thus reveals how international law traps Palestinians within an impossible binary, condemned to either remain passive colonial subjects or, alternatively, branded as terrorists or people who harbour terrorists. In the book, we show that the shielding accusation plays a central role in policing the borders of this binary. The shielding charge helps cast Palestinian irregulars as barbarians since it ostensibly demonstrates that they weaponise civilians, refusing, as it were, to maintain the moral and legal distinction between civilians and combatants. In-distinction when carried out by a non-state actor is a key mark of terrorism.

Simultaneously, the same charge helps assign guilt for the death of Palestinian civilians to Hamas; Israel claims that even though its soldiers may have killed Palestinian civilians, actually Hamas is to blame because it had illegally coerced those who had died, forcing them to serve as human shields. The Protocols provide a decisive framework that helps sustain this violent colonial condition, since the legal provisions are unable to protect the right of people to engage in anti-colonial resistance, while they clearly stipulate that shields will not render a legitimate military target immune from attack.

During the 2012 war on Gaza, Israel Defense Forces launched an infographic campaign on social media platforms. The campaign focused on human shields and was used not only to accuse Hamas of violating the laws of war, but also to lay claim to a civilizational divide. Source IDF blog.

John: Apart from the distinction between voluntary and involuntary human shields, another phenomenon that you chart through the book is the evolution of different types of 'involuntary' human shields within that particular rubric. One manifestation of this is obviously the difference that emerges between involuntary human shields depending on who is using them. On the one hand, irregular forces or partisans in the context of a people's war, insurgency against the state or national liberation movement as you've just been discussing are portrayed as 'using' their 'own' communities as shields – whether by deliberately taking cover in or launching operations from civilian spaces, or simply by virtue of living there. On the other hand, we find colonial or occupying forces deploying the bodies of the 'enemy' community as (hostage-type) shields when conducting patrols and raids. This was common colonial practice in the British empire (plus more recently in the north of Ireland), and in the book you discuss some continuing examples of Indian forces doing so in Kashmir, Israeli troops when conducting incursions in the West Bank and Gaza, and so on. It is clear that the two are perceived differently due to the distinction that (as yourselves and Noura have alluded to, and despite evolutions in the laws of armed conflict) is still presumed to exist between legitimate state belligerents and subversive resistance forces. State and occupying forces have sought to frame their own human shielding measures as legitimate reprisals or as a necessity of counter-insurgency. Through all this we can hear echoes of the 'how to fight savage tribes' canon of racial tropes reverberating in current counter-insurgency practices.

We also see the impact of lawyers, legal advisors and military manuals, which you cover incisively in the book. And out of that analysis another manifestation of the evolution of involuntary shielding comes up. You show very usefully I think a process where involuntary shielding is steadily expanded to incorporate (or become outgrown by) what you call 'proximate' human shields. During the Vietnam war, the US Department of Defense expanded its interpretation of human shielding from the coercive use of a small group of civilians (to shield a specific military target or operation) to the 'use' by insurgents of whole villages and towns as shields. By the time we get to northern Sri Lanka in 2009 or Gaza in 2014 or Mosul in 2016, entire urban landscapes or swathes of territory are being characterised by military strategists and international lawyers in these terms, with thousands of civilians being cast as human shields at a given moment. Could you talk us through this process, what you mean by proximate shields and what's at stake in this development?

Neve & Nicola: Thanks John. As we show in the book, proximity does not refer to civilian populations trapped in a besieged city or near state military forces within a war zone, but rather to civilians trapped in proximity to irregular fighters, who are usually cast as terrorists. This explains the absence of proximate shields in Mosul in 2014, when the city was protected by Iraqi soldiers, and the framing of the same civilian population as proximate shields in 2016, when the city was controlled by ISIS. We also try to explain why this form of shielding has become more prominent in battlespaces around the globe over time – from Africa through the Middle East and all the way to Southeast Asia. Part of the answer clearly has to do with the war on terror and the increasing involvement of nonstate actors in both inter and intra state conflicts. One of the fallouts of the ubiquitous war on terror – that frames multiple countries across different continents as terrorist bases harbouring irregular fighters – is that entire civilian populations are continuously exposed to lethal state violence due to their proximity to military targets.

Human shields are often produced through acts of framing. ABC News embeds on its website a military clip with the caption: "Drone video appears to show ISIS forcibly moving civilians into a west Mosul home as human shields."

Yet, in the book we maintain that this has to do also with the intimate relationship between speech, law and violence. The phrase human shields, particularly in its connotation as proximate shield, should be perceived as a *performative iteration*. We suggest that proximate shielding does considerable legal and political work for those waging the war on terror since, in the very utterance of the phrase 'human shields', that which is announced is also enacted, and therefore produces a series of lethal effects.

This is precisely what we saw happening in Mosul in 2016. As we chronicle in the chapter on proximity, in the days leading to the military campaign to recapture the city, Pope Francis expressed his concern about the use of over two hundred boys and men as human shields in the Iraqi city. In a campaign rally the following day, Donald Trump decried the enemy's use of 'human shields all over the place', and the *New York Times* reported that the Islamic State was driving hundreds of civilians into Mosul and using them as human shields. More and more newspapers picked up the item until it reached the United Nations which ultimately claimed that 'ISIS is using one hundred thousand civilians as human shields' in the city. One might say that these utterances helped to transform the city's entire civilian population into human shields and by so doing they also helped determine the repertoires of violence that would be used in the ensuing military campaign against ISIS. In other words, the pre-emptive iteration – before the fighting in Mosul even began – of the phrase "human shields" served to transform a hundred thousand civilians into killable subjects.

We also suggest that three significant factors have come into play in the recent proliferation of proximate shields. These shields introduce numerical, spatial, and temporal dimensions that do not exist with respect to the two other types of shielding – i.e., voluntary and involuntary – and render this kind of shielding more conducive to those carrying out the war on terror. Numerically, entire urban populations can be framed as proximate shields precisely because the shield is produced through a performative speech act. Thus, no agency by either the belligerents or civilians who are on the ground is needed in order to render the civilians as proximate shield. Thus, through the ongoing citation of the term in press releases or by spokespeople (representing states, militaries, and humanitarian organisations), literally millions of people across Asia and Africa are being framed as proximate shields.

Spatially, the portrayal of a city's whole civilian population as proximate shields allows the attacking forces to frame huge urban spaces as targets – since by definition human shields protect a legitimate military target. If voluntary and involuntary shields occupy a specific space between a belligerent and its target, proximate shields can be anywhere, and are often everywhere, in a particular urban space.

Temporally, proximate shielding can endure far longer than either voluntary or involuntary shielding, because the latter two are restricted to the time during which the civilian acts or is forced into acting as a shield. By contrast, since proximate

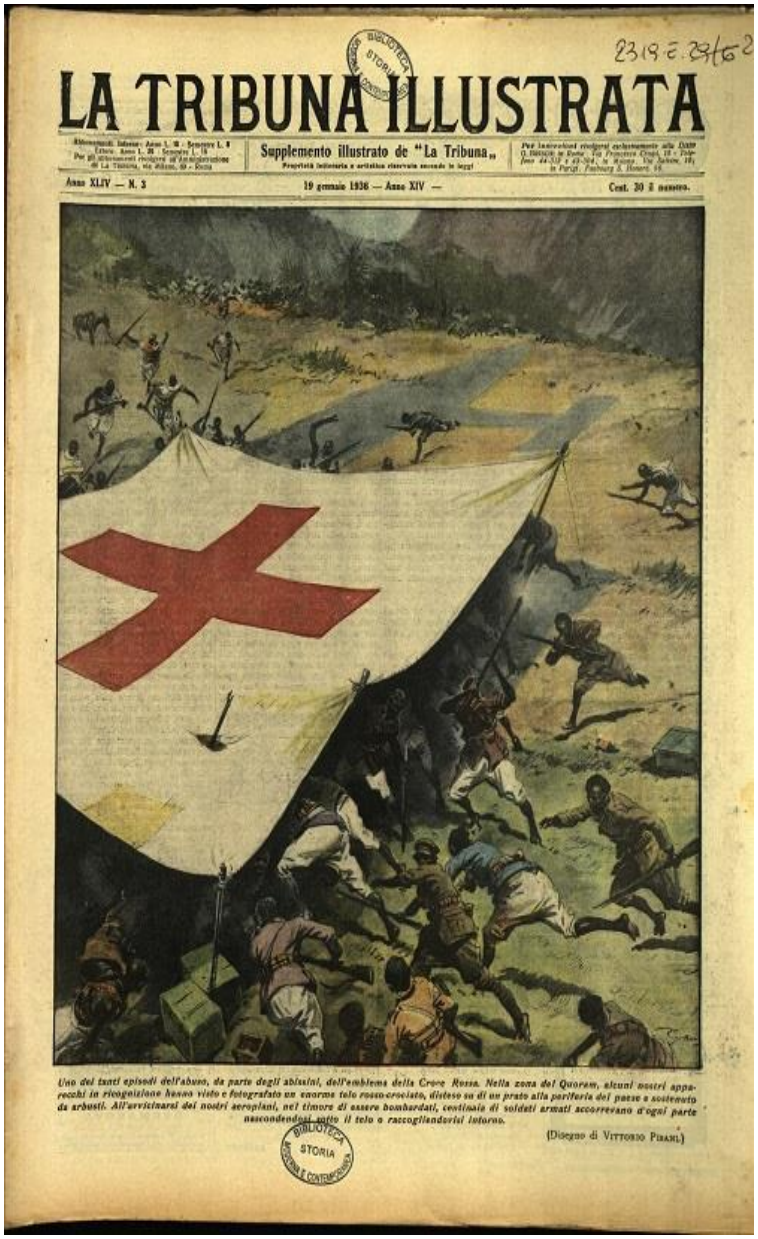
shields become shields through performative iteration they can be characterized as shields for days, weeks, and, at times, months on end. Proximate shields can exist as long as urban areas are attacked and the fighting persists.

Crucially, the numerical, spatial, and temporal features characterising proximate shielding expand the ability of a warring party to claim that the civilians it killed were human shields and to assign the ethical and legal responsibility to the enemy.

Noura: I want to build on this by drawing on a resonance I found in your book between Italy's fascist war against Ethiopia, the US's imperial war against Vietnam, and Israel's colonial wars against Gaza. In each of those examples, there was a four-part phenomenon: 1) racialised dehumanisation of the native population; 2) legal manouevres to change the laws of war to accommodate the stronger military's means and methods of warfare; 3) popular mobilisation of the aggressor's population in support of the war effort; and 4) deployment of a media strategy to mobilise global support for the tactics of the strong. I have two questions related to this phenomenon and I leave it to you to answer one or both of them. Firstly, related to your point about 'performative iterations', in your analysis of US, Israeli, and Italian media interventions, how did their relative prowess on the global scale allow them to shape the media narrative? How much of it was in fact due to the efforts of those belligerents, and how much of it has reflected the complicity of increasingly corporatised media conglomerates who share similar interests with the stronger belligerents and an investment in colonial futures? Secondly, and related to your point about the manipulation of 'proximate shielding' that has the capacity to render entire urban areas as legitimate targets, how has the framework of "shielding" effectively subsumed the concept of "people's war" to the detriment of anti-colonial struggles? It seems that on some level, any mass mobilisation is now tantamount to shielding, rendering the ability to resist obsolete within the language of law. Was this outcome inevitable or historically contingent?

Neve & Nicola: Thanks so much, Noura. Your first question relates to a key element that accompanies human shielding accusations both historically and in the present: namely, their continuous iteration in the media. We came across it in pro-fascist newspapers, which during the 1935-1936 Italo-Ethiopian war published caricatures of the 'savage Ethiopian fighters' shielding behind Red Cross medical units. We chronicled how in the 1960s and 1970s media outlets in the United States recast popular support for the Viet Cong as an act of human shielding, framing the Vietnamese militants as terrorists who use innocent women and children as human

shields. We also analysed a sophisticated infographic campaign launched by the Israeli military media unit and disseminated during the 2012 war on the Gaza Strip through Twitter, Facebook and YouTube. In this campaign, Israel aimed to produce a civilisational divide between itself and Hamas by depicting the Palestinians as barbarians who ignore the principle of distinction through their continuous deployment of human shields. The history of human shielding is, as you intimate, also a history of its mediation, who controls the media narrative and who has the ability to disseminate their narrative widely.



Fascist Italy developed different forms of propaganda during its 1935-36 war in Ethiopia in an effort to brand the armed resistance as barbarians who ignore the laws of war. In this image, Ethiopian fighters are depicted as using Red Cross medical units as shields. Source: La Tribuna Illustrata, January 1936.

Building on the work of Judith Butler and Paul Virilio, we show how it becomes unintelligible to distinguish actual acts of *human shielding* from instances in which *civilians are framed as human shields,* not least because the act of framing not only produces the perception of human shields, but as a performative iteration it actually creates human shields as such. This is perhaps best illustrated in cases which we call proximate shielding. State actors together with the corporate media have been playing a crucial role in casting civilians as shields, and, as we argue in the book, the shielding accusation and its ongoing citation helps to render the widespread killing of civilians both legal and ethical. Events depicting the weaponization of the human body also attract audiences, and are thus relished by corporate media whose financial model is based on selling large audiences to advertisers.

While the alignment between state violence and corporate or national media is relatively unsurprising, the role played by human rights and humanitarian NGOs in this process is striking. During our research we came across the increasing and, one might say, astonishing participation of prominent human rights and humanitarian international organisations in framing thousands of civilians as human shields as well. Indeed, organisations like Human Rights Watch, Amnesty International, the International Committee of the Red Cross, as well as several UN agencies have adopted and have often helped produce the same non-critical human shielding narratives that cast whole civilian populations – often tens of thousands of people – as shields in their reports and press releases. Most commentators think of these organisations as restraining and even challenging state violence against non-combatants. However, when it comes to human shields, we witness something different: human rights and humanitarian organisations actually enable violence against civilians by mimicking state and corporate media human shielding discourses. Such interpretations of the battlefield often end up condoning state violence.

As to your second question, you are spot on when you say that the shielding accusation can be deployed to outlaw mass mobilisation of popular resistance. The Vietnam war illustrates this point in a particularly illuminating way. Building on successful anti-colonial resistance against the French colonisers, the Viet Cong adopted the Maoist idea of a people's war as it mobilised the Vietnamese population against the US occupation. Infiltrating the social body, they promoted cooperation between soldiers and civilians and in this way involved the masses in the anti-imperial war effort. The Viet Cong understood that their forces' success depended

on the guerrillas' capacity to work together with the people, and so they also intermingled with the rural population like 'fish in the water'.

The US was intent on undermining the relation between the Vietnamese guerrillas and civilians. When the International Committee of the Red Cross asked the United States to uphold the Geneva Conventions while fighting against the Viet Cong, the Lyndon Johnson Administration invoked the human shielding clause to accuse the Vietnamese enemies of relying 'heavily on disguise', including shielding behind innocent civilians. It is striking that almost the exact same script was used by Italy's fascist regime in Ethiopia thirty years earlier and by Israel when it launched its military campaigns in the Gaza Strip half a century later. In the book, we trace how the Johnson and Nixon administrations attempted to flatten the complex notion of Mao's people's war – where, for example, the civilian population participates in the war effort by feeding the fighters, caring for the wounded and sick, and providing the fighters with intelligence – by casting the civilian population as hostages in the hands of the Viet Cong. By accusing the Viet Cong of deploying Vietnamese civilians as shields, the US could then blame the guerrilla fighters for the death of civilians which American forces had killed.

The reduction of a people's war to an act of human shielding was also used as part of a domestic propaganda campaign aimed at convincing the American public that their military was facing a barbaric human shielding enemy. This frame, that was produced as part of the effort to delegitimise the right of the Vietnamese to resist foreign invaders, was picked up and amplified by the corporate media. This endeavor is paradoxical, given the way in which the American Revolution against the British has been framed as a people's war, a moral form of resistance that, to this day, is considered a source of national pride. In 1918, photographers Arthur Mole and John Thomas were commissioned by the US military to produce a series of "living photographs". For *The Human US Shield*, taken at Fort Custer training center in Michigan, the photographers assembled no less than 30,000 men in military and civilian clothes to form a huge living human shield, which served as a symbol of the people who were willing to shield the US polity against any attack.

Mole and Thomas's photograph of 30,000 people posing for 'The Human US Shield' does not explicitly promote the use of civilians to shield military targets. Yet, given its aim of establishing a sense of unity between the armed forces and the American people, the picture reveals that civilian participation in the war effort was deemed a source of national pride.

Source: Arthur Mole and John Thomas, Library of Congress.

Along similar lines, the contemporary democratic liberal order casts the struggles that created European states during the nineteenth century as people's wars. The participation of civilians in several liberation efforts, including the partisan wars against the Nazis and the Fascists, have been framed as courageous moral acts, and the notion of the people and the people's right to resist have been inscribed in the constitutions of countries like Italy and France. Yet when people's wars were adopted by non-white liberation movements fighting to achieve self-determination in the global south, the concept acquired a completely negative valence aimed at generating moral and legal aversion.

Through this racialised notion of the people, the legal figure of the human shield has become a tool in the hands of powerful states, where it serves as a central component in a lawfare strategy aimed at quelling popular resistance. Human

shielding is invoked to deny the colonised the right to engage in people's wars aimed at achieving self-determination and collective liberation. This can happen not only because, as we discussed above, international law imagines the civilian as passive, but also because it imagines the civilian as an atomised individual and never as a member of a political community – of a people. Indeed, the deployment of the human shielding accusation in anti-colonial and anti-imperial wars shows how international humanitarian law can be mobilised to undermine the fundamental right to self-determination the moment civilians act in concert with an armed group to achieve this right. The right of civilians – not as individuals, but as a collective – to be part of a *people's* war is anathema to the laws of war.

John: On the question of 'voluntary' shields as a form of activism, one of the things you touch on in the book is how that practice has been effective in certain instances – particularly as an 'ecotactic' in campaigns against nuclear weapons, commercial whaling and deforestation in the 20th century environmentalist context – while it has had more mixed results and contingent dynamics in other instances (anti-war activism, racial justice protests, etc). So looking ahead, how might we be thinking about the question of agency in relation to political praxis and social struggles, especially the ecological struggle? Are pro-active human shielding tactics and related forms of direct action adaptable to the strategies needed to combat carbon capitalism and the various forms of imperialism and settler colonialism that it's bound up with? Can the human shield also be a spanner in the works of pipelines and property, infrastructure and investment? How might the human shield function in conjunction with the street protest, the squatter movement, the sabotage campaign, the hunger strike, the labour strike … class war itself? Can it help to buffer the inevitable confrontations with police, state and law? Do you see the human body itself becoming more (or less?) relevant in emancipatory and existential struggles?

Neve & Nicola: Wow! Those are a lot of questions John. We will limit ourselves to addressing only some of them. Generally, we do not think we can offer a prescription as in 'human shielding is a good or useful practice of resistance', since the usefulness of a practice always depends on the context in which it is deployed. In environmental struggles, human shields can reinforce the hierarchy between humans and non-human organisms when the lives of the shields are perceived to be worth more than the life of the organism the shield aims to protect. The notion of the human as the lord of the land is dangerous and ultimately does little to undermine the capitalist system which is threatening to bring an end to all life on this planet. So, there is an anthropocentric risk in environmental human shielding.

But human shields who protect the environment can also help draw a connection between human and non-human life and by so doing can also underscore the dependence of the human on the non-human, thus reconfiguring existing anthropocentric hierarchies. This is how we understand the struggles of the Bishnoi sect in India, which already in the sixteenth century advocated a bodily politics of environmental protection from sovereign dispossession. The same is true for Palestinians who shield olive trees from settler colonialists trying to uproot them. What they are defending is not so much the right to property, but the affective-political relationship between them and non-human elements of the environment, a relationship they call Palestine.

So yes, voluntary human shielding can be practiced as a powerful act of refusal and resistance to capitalist plunder or colonial dispossession. But it is important to keep in mind that voluntary human shielding per se is not emancipatory. The political meaning of voluntary shielding is determined through the relationship between the shield and the target. If a white voluntary shield does not problematise his or her privilege and the political conditions that structure the act of shielding, then the voluntary act might end up reinforcing existing racial hierarchies rather than serving as a force aimed at dismantling them.

This leads directly to the political function of voluntary human shielding in emancipatory struggles. In the book, we reflect on the fact that human shields were called *human screens* during the First World War. Thus, in the literal sense, human shields serve as a screen or buffer to protect a target, but they can also serve as a screen in the sense of projecting and rendering something visible, like a television screen. In several chapters we show how human shields have helped uncover institutionalised or structural relations of power and violence. Human shields, we maintain, are an effective tool of resistance when they reveal through their bodily interventions the oppressive elements within the existing social order.

We would make one final point on environmental shielding and its 'revelatory function'. The proliferation of environmental shielding over the past five decades points to the radicalisation of a process. After centuries of unfettered extraction and careless pollution, continued human life on earth is in jeopardy. After we have transformed the environment into a threat, we have to find ways of shielding it before we all die. Voluntary shielding in this context is a form of extinction rebellion.

Ayça: Bearing *TWAIL Review* readers in mind particularly, I would like to seize this chance to ask you a final, "meta-question" about lawfare, international law, and your careful meditations throughout the book on how international humanitarian law can be detrimental to emancipatory struggles. Apart from humanitarian and human rights organisations that you critique for mimicking human shielding discourses propagated by powerful states, what is your interpretation of democratic, grassroots struggles that increasingly resort to the logic and language of international (humanitarian) law today? Are they misguided, necessary, detrimental, "strategic", short-sighted, beneficial? Even critical international lawyers tend to refer us to "the context" and/or to the possibility of a "truly universal" international law when assessing the promise of such mobilisations – do you share this view?

Neve & Nicola: Thanks so much for this great final question, Ayça. And thanks, Noura and John for the terrific conversation.

We obviously do not embrace the idea of a "truly universal" international law, since the universal is always contaminated by the particular. Moreover, we do not subscribe to an essentialist or ahistorical notion of either the universal or the law. In fact, we like to think of our book as an exploration of the ways in which the laws of war continue to be contaminated by racist and sexist forms of exclusion. We use the figure of the human shield to explore how international law's universal pretensions help to conceal and at times even facilitate forms of systemic racism and sexism, while also using the figure of the human shield as a lens to interrogate how the laws are deployed to legitimise state violence against particular groups. Even though we did not have a chance to read Darryl Li's recent book on jihadists in Bosnia before completing our own, we have done since and we agree with him that since many groups lay claim to universalism, the universal needs to be understood as a plural word and that its use as a singular is a manifestation of power.

Undoubtedly, imperial powers have laid claim to an ethos of universal justice in order to justify oppression and domination, but this does not mean that we must forsake the desire to construct an 'insurgent universality', to borrow from Massimiliano Tomba. The wholesale renunciation of both the universal and the law risk replacing one form of essentialism with another form of essentialism, one that insists that certain notions or tools are inherently oppressive. Although every universal has an exclusionary component, in specific historical moments anti-slavery and anti-colonial groups as well as a variety of other social movements have laid claim to a universal to advance a politics of liberation. Context is crucial. Also crucial

is the understanding that the universal is always contingent, suggesting, for instance, that human rights should be considered not as some kind of absolute universal reference point or set of categories but rather as a contingent foundation – a site where critical struggles over interpretation of rights, the frontiers of the field and its makeup are constantly taking place. As long as those who deploy the laws of war understand that their pretension to universality is always contingent and that the meaning of these laws is produced through their use, then in certain circumstances they can advance an emancipatory politics.

We are not saying this ingeniously. We realise that the laws of war constitute the civilian as passive and that human rights law constitutes the subject as an individual bearer of rights. We are also keenly aware of the far-reaching implications of the way that these bodies of law imagine and produce subjectivity, as well as how dominant states and other powerful actors tend to control how international humanitarian and human rights law is interpreted and used in the global arena. But history also suggests that the laws can undergo a process of re-interpretation and popular appropriation, and can be re-shaped, even if temporarily, by the oppressed for their own benefit. We do not believe that the political 'force field' – to draw on Pierre Bourdieu – of international law should be abandoned, and, in fact, this is one of the reasons we wrote *Human Shields*.

We cite, for instance, Mohammed Bedjaoui, one of the legal advisers to the Algerian National Liberation Front, who maintained that 'anti-colonialism' should become a legitimate part of a 'universal legal expression'. He is an example of an anti-colonial jurist who tried to avoid the risk of essentialism, while, simultaneously, refusing to dismiss the law's emancipatory potential. Indeed, as Luis Elsava, Michael Fakhri, and Vasuki Nesiah have effectively underscored, in Bandung the non-aligned movement tried 'to both conform and to resignify the language and categories of the international legal order.' Thus, the challenge, as we see it, is to develop forms of contingent universalism that are able to utilise this kind of anti-colonial energy – an energy that is aimed at fighting a racist conception of humanity in order to produce a new form of humanity, as Frantz Fanon and Aimé Césaire might have put it.

Alas, we live in a different era from the one in which anti-colonial and anti-imperial movements transformed the world. The kind of political force, imagination, and energy that those movements were able to unleash have all but disappeared, even as the racial underpinnings of the colonial order are still very much alive and kicking, and inscribed, as it were, within legal regimes. So, it is still crucial to expose the law's

racial and sexist underpinnings and to identify, if possible, ways of retooling and mobilising the law in the hope of reshaping and 'remaking'—to borrow from Adom Getachew—a more egalitarian world where people are able not just to survive but thrive.

Take the Palestinian-led international Boycott, Divestment, and Sanctions (BDS) movement. It is a grassroots movement that aims to bring an end to apartheid and colonialism in Palestine. To achieve its goals, the movement utilises a range of political practices and political registers of justice, and international law is one of them. The movement is conscious of the role international law has played in bolstering and reproducing existing political asymmetries, but it still believes that boycotts, divestments, and sanctions can contribute to achieving an anti-colonial, anti-apartheid, and ultimately anti-racist international legal-political order. BDS is a strategy not a principle, according to the movement's founders, and the moment that Israel will abide by international law through ending its occupation and colonisation of Palestinian territory, granting equal rights to Palestinian citizens of Israel and respecting the right of Palestinian refugees to return, they will stop advocating BDS. Moreover, the movement's adherence to international human rights law helps explain why a multitude of political parties, unions, religious and non-religious associations, NGOs, and individuals have joined the movement. Is BDS's entanglement with international law dangerous? Probably. But is such an approach misguided? We don't think so. Indeed, the BDS movement has managed to mobilise hundreds of thousands of people around the question of justice in Palestine, to the extent that Israel sees this grassroots social movement as, alongside Iran, its most significant strategic threat. In a certain sense the BDS movement has popularised international law and developed transnational political alliances through this popularisation. TWAIL for the 21st century!

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TWAILR THIRD WORLD APPROACHES to INTERNATIONAL LAW Review

TWAILR: Reflections ~ 30/2021

A Palestinian Perspective on Teaching International Law

*Ata R. Hindi**

This reflection is about teaching international law in Palestine, to Palestinians. I reflect on the challenges of international law teaching in the Palestinian context. I will also reflect upon international law teaching to non-Palestinians, although that is not the focus of this essay.

Overall, this short article attempts to highlight the challenges that Palestinian teachers and students of international law encounter in their studies and beyond. While there is much work to be done, teaching and learning international law must, as a baseline, provide students the ability to operate as "textbook" international lawyers, while also fostering the capacity and ability to critique – especially where international law ignores the Palestinian people.

First, I will examine the implications of international law teaching in Palestine and to Palestinians. *Second,* I will discuss the mechanics of teaching international law both "inside" and "outside" of the classroom in Palestine. *Third,* I will explore the "positivist" and "critical" aspects of international law teaching. *Finally,* I will consider the importance of fostering critique and providing more space to critical legal voices in the classroom.

International Law Teaching in Palestine, to Palestinians

In this essay, I refer to both "Palestine" and to "Palestinians" as a means to recognize the unfortunate reality faced by the state of Palestine and the Palestinian people. This unfortunate reality is premised on the fragmentation of, and between, the Palestinian people and their homeland as a consequence of colonization and occupation by Israel. Within the occupied State of Palestine (*i.e.* "1967" Palestine),

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the Palestinian population is currently estimated to be just over 5 million.[1] In 2017, the Palestinian population in "1948" Palestine minus "1967" Palestine (*i.e.* what became Israel) was estimated to be close to 1.5 million.[2] The 2017 estimate of Palestinian refugees is nearly 5.9 million, including over 3.4 million in Jordan, Lebanon, and Syria.[3] These figures do not fully account for the vast Palestinian diaspora population, for example those in living in the Americas.

Palestinians, then, might learn international law "at home" or abroad, each with different and unique educational experiences in regard to language, methods, theories, approaches, politics, etc. This unfortunate reality is why teaching international law "at home" in Palestine and to Palestinians is so crucial. At home, Palestinians can learn international law free of the antagonistic politics, and with a focus on those areas relevant to their struggle.

This unfortunate reality is also why the Palestinian Boycott, Divestment, and Sanctions movement (BDS) is so important to Palestinians. The BDS movement calls for Israel's compliance of the following demands based on international law: "1. Ending its occupation and colonization of all Arab lands and dismantling the Wall; 2. Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and 3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194."[4] Teaching international law in Palestine and to Palestinians requires engaging with the law underlying these demands, for instance the rights of Arab-Palestinian citizens of Israel under international human rights law, or the law of state responsibility vis-à-vis the Wall. I would approach international law teaching the way that that the movement does, sewing together various areas of international law relevant to the Palestinian experience, and including the plight of *all* Palestinians, regardless of where they may be.

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[1] State of Palestine, Palestinian Central Bureau of Statistics, 'Estimated Population in Palestine Mid-Year by Governorate, 1997-2001' http://www.pcbs.gov.ps/Portals/_Rainbow/Documents/-2097%المحافظات%20انجليزي 2017.html (accessed 14 February 2021).

[2] State of Palestine, Palestinian Central Bureau of Statistics, 'Number of Palestinians in the Occupied Palestinian Territory in 1948 for Selected Years, End Year' http://www.pcbs.gov.ps/Portals/_Rainbow/Documents/Number-of-Palestinians-in-Occupied-Palestinian-Territory-in-1948-Selected-Years-ee..html (accessed 14 February 2021).

[3] State of Palestine, Palestinian Central Bureau of Statistics, 'Number of Registered Palestinian Refugees by Country, January 2017' http://www.pcbs.gov.ps/Portals/_Rainbow/Documents/Registered-Refugees-by-Country-Diaspora-E-2017.html (accessed 14 February 2021). In 2017, Palestinian refugees within the State of Palestine number over 2.4 million.

[4] BDS, 'Palestinian Civil Society Call for BDS' (July 9, 2005) https://bdsmovement.net/call (accessed 14 February 2021).

For Palestinians, the implications of teaching international law's rules, interpretation, and application are not imaginary, moot court exercises – they are real. These issues are at the heart of their collective and individual rights at stake. It is then unsurprising that Palestinian students have felt principled and dedicated to their cause and struggle in their studies of international law. For example, I have seen students refrain from employing arguments that, in one way or another, would comply with Israeli positions, such as arguing against extraterritorial human rights obligations or against the right of return for refugees. Likewise, in keeping with the BDS principles, students that I have trained for moot courts have refrained from competing against Israeli universities. On one particular occasion, these students were reprimanded by the organizers of a prominent international law moot court competition for doing so. The students were told that they undermined the spirit and purpose of the competition, and that the competition was not about advancing political positions or pre-judging individuals due to where they originate. Of course, reiterating the fact that the institutions, rather than individuals, are the subject of their protest, is like talking to a wall.[5]

The underlying fact within these examples is that there seems to be more concern for the reputation of Israel's higher education institutions than the everyday experience of Palestinian students. Palestinian students do not benefit from solidarity from institutions like those that organize prominent international law moot court competitions, let alone enjoy equal opportunities. The exception here includes Palestinian citizens of Israel or Jerusalem ID holders, who may be able to attend the higher education institutions in Israel but must expose themselves to positions in the classroom that are hostile to their individual and collective rights.

International Law "Inside" and "Outside" the Classroom

Given these realities is why ownership over teaching international law is so important for Palestinians. At home, in the classroom, Palestinian exposure to international law teaching is somewhat limited. At the university level in Palestine, international law may be offered as a course during a Bachelor's of Law. More specialized courses have been offered at some Palestinian universities over the years, such as international human rights law, international humanitarian law, international organizations, or international refugee law. These courses may even find their way into a Master's program, such as Birzeit University's interdisciplinary Master's

[5] BDS, 'PACBI Guidelines for the International Academic Boycott of Israel' (July 9, 2014) https://bdsmovement.net/pacbi/academic-boycott-guidelines (accessed 14 February 2021).

Program in Democracy and Human Rights.[6] However, there is little investment beyond these course offerings by the few experts who teach them and the basics these courses cover. Furthermore, Palestinian universities do not benefit from international law centres and institutes similar to their counterparts elsewhere.

Beyond issues of capacity, Palestinian universities suffer from a lack of resources. This is especially the case with regards to books and electronic resources, which are, for the most part, too expensive to subscribe to. There are only a handful of Arabic international law textbooks and some of these resources are somewhat underdeveloped. Instructors try to find other means to access materials for their students. For example, on one occasion, I snuck into an Israeli university in order to scan pages of several international textbooks from the library, so that the Palestinian students could use them. This reality is often unappreciated by scholars in the Global North. I recall one particular Facebook group where one participant from a Western country criticized fellow participants for asking for resources. It is perhaps inconceivable to the privileged – and this is certainly a manifestation of privilege – that there is really no alternative to crowdsourcing in countries that cannot access many of those resources otherwise. Further, whatever materials are available through crowdsourcing moreover is, unsurprisingly in English.

For advanced studies in international law, such as an LLM or a PhD, Palestinians have no choice but to go abroad, mainly the Global North. The decision to study abroad has its own set of challenges. Some of these challenges include: lack of funds and scholarships; travel and visa restrictions by Israel (especially for students from the Gaza Strip); having to significantly self-improve foreign (particularly English) language skills; or being denied visas to study abroad (by the United States for example). With respect to the last example, on one particular occasion, my students, having won the regional rounds in a prominent international law moot court, were denied visas to participate in the international rounds in the United Kingdom. In another instance, a number of my students had to withdraw from university offers because they just could not afford the cost of studying overseas. For those that are able to somehow overcome these hurdles, many elect to study in the United States and a handful of European countries (like the United Kingdom, Ireland, and The Netherlands). Of course, depending on the institution, Palestinian students have different experiences, and may be exposed to problematic positions on issues related

[6] Birzeit University, 'Democracy and Human Rights' https://www.birzeit.edu/en/study/programs/dmhr (accessed 14 February 2021).

to Palestine, and the Arab World generally, especially in for example US law schools.[7] For many of these students, they attain whatever knowledge and expertise they can, and return home to work in both the private and the public sectors.

Shifting away from formal higher educational institutions, "teaching" does not necessarily take place in the university classroom. Many Palestinians supplement teaching by "training" in international law through various programs and projects hosted by civil society. Over the years, national and international non-governmental organizations (NGO) in Palestine have conducted various ongoing and ad-hoc trainings to a wide and diverse range of stakeholders such as law students, students in various disciplines, as well as foreign diplomats, government officials, NGO workers, journalists, and others. These trainings usually deal with the "basics" and apply international law to the situation in Palestine with the typical focus on international human rights law, international humanitarian law, international criminal law, state responsibility, and self-determination. For example, in my past work, I have conducted trainings in various international law topics applicable to the Palestinian context to build awareness and strengthen legal advocacy at the national and international levels.

On another note, for those from abroad (including those from the Palestinian diaspora), Al-Haq's International Law Summer School Program brings together students and practitioners from all over the world interested in learning international law *in* Palestine.[8] Many people may sign up for the program, risking the possibility of being denied entry by the Israeli Government. In delivering these types of courses, there are other challenges that may arise. Some active civil donors may want to be involved and may attempt to dictate the topics that are selected and taught.

Whether inside or outside of the classroom, there is a delicate balance to be had about what the law says and what the law does. In my experience, students have often questioned the relevance of international law. What they learn may work elsewhere, but not in Palestine. The students err on the side of caution in thinking that international law can achieve justice and accountability, let alone Palestinian liberation. While the "textbook" version of international law may provide the groundwork for operating professionally as international lawyers, teachers should welcome discussion on the critique.

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[7] Palestine Legal, *The Palestine Exception,* https://palestinelegal.org/the-palestine-exception (accessed 14 February 2021).

[8] Al-Haq, 'Al-Haq International Law Summer School program 2020' (February 17, 2020) http://www.alhaq.org/alhaq-center/16499.html (accessed 14 February 2021).

Between "Positivism" and Critique

The endeavour of teaching international law, both within the classroom and to broader audiences, entails both "positivist" and "critical" approaches. Of course, the reality of teaching is much more complex. The presumption is that there are two competing forces: a "positivist" international law that is doctrinal and black-letter and a critical international law, where international law's flaws are displayed. Paraphrasing a fellow colleague, he found it difficult to understand how an international lawyer can make positivist doctrinal arguments before international courts and tribunals but simultaneously write in the most critical of terms. Yet, if both sides of an adjudication are deploying positivist claims, then either one side is completely deviating from the doctrinal, black-letter rules, or positivism is a fallacy. Irrespective of this much broader question, for Palestinians, part of the answer is about survival and the immediacy of their claims.

The student is expected to "adapt" – like preparing for a moot court. This is not much different from what Mari Mastuda described as "multiple consciousness as a jurisprudential method."[9] Matsuda's student shifts "back and forth between her consciousness as a Third World Person and the white consciousness required for survival in elite education institutions."[10] I will add that this reaches far beyond elite education institutions, and to the majority of international law's establishments. While the culture is changing to embrace diversity and inclusion of people and ideas, students will find themselves shifting into survival mode by operating within *their* understanding of international law, as if it came right out of the textbook.

Once the classroom experience is over, operating as if the law is doctrinal and black-letter then goes to the immediacy of claims for Palestinians, no matter how critical we may be. For one, we keep up with the step-by-step process of "filing suits" before the International Criminal Court (ICC), but many are wary of its history and approach to the situation in Palestine, much like other situations.[11] We may be critical that the ICC has largely targeted non-Western States, particularly in Africa, but that should not negate Palestinians the opportunity to engage the ICC as a mechanism towards achieving justice and accountability. The issue of statehood before the ICC may lead to various interpretations for which there is no actual standard, no matter

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[9] Mari J. Mastuda, 'When the First Quail Calls: Multiple Consciousness as a Jurisprudential Method' (1989) 11;7 Women's Rights Law Reporter 7.

[10] Ibid, 8.

[11] *See, e.g.* Jon Reynolds and Sujith Xavier, *'The Dark Corners of the World': TWAIL and International Criminal Justice,* 14 J. Int'l Crim. Justice 959 (2016); Ardi Imseis, *Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967-2020,* 31 Eur. J. Int'l L 1055 (2020).

what the international law textbooks may say. We argue for and against statehood on whatever possible sources we can gather and dispute the weight of those sources.[12] Palestinians have learned to reckon with the readings of competing "positivists" with different politics. One part of the world largely recognizes Palestine as a State, while another largely refuses to do so on the basis of various doctrinal arguments about the meaning of statehood. The part of the world that largely refuses to recognize Palestine hosts the world's prominent international law spaces (schools, centers, organizations and so on). Palestinians then are forced to argue in these spaces and within the confines of the two-State solution, accepting the injustices of the United Nations Partition Plan and the events thereafter. As such, while being critical of the Plan, Palestinians explore its margins and other areas of international law to find some kind of justice and accountability and perhaps even emancipation, in a language that that part of the world might find acceptable. We cannot argue beyond the confides of the two-state solution and against the colonization of historic Palestine as a whole.

One can appreciate that there is in fact room within positivism. Law is a process of rule deduction and application that can lead to fundamentally different results. The point of all this is to say that teachers should prepare students to *consciously* shift between multiple consciousness. They can strive by mastering a textbook understanding, while being able to critically engage the rules, interpretation and application. Students need not shy away from critically engaging the State interests and politics that have exercised dominion over the process at the expense of Palestine and the Palestinian people.

Fostering Critique & Identity

When a Palestinian student – like other students with similar experiences – is learning international law in colonial and imperial spaces, they are bound to face Western interpretations and application. Sometimes, these interpretations can be outright insulting (*e.g.,* Palestine is not occupied, it is not a State, etc.). It is difficult, in a setting like Palestine, to avoid the history and politics of international law. International law is, inherently, colonial and imperial.[13] Yet much has changed over time – a decolonized and decolonizing world has worked, and continues to work, in tandem as part of the de-colonizing and de-imperializing project. More and more,

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[12] UNISPAL, 'Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations' U.N. Doc. S/2011/705 (11 November, 2001) https://unispal.un.org/DPA/DPR/unispal.nsf/28ead5e67368b9ea852579180070e4d6/097acc6ffff29d5785257949005d2a63?OpenDocument (accessed 14 February 2021).

[13] See generally Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005).

these spaces have allowed for greater diversity and critique. However, there is still much more to be done.

The international law textbook is a prime example of this. Most teachers base the learning experience on one of the more commonly used textbooks. These textbooks also originate from colonial and imperial spaces. While I was personally taught with Malcolm Shaw's text through my studies as an Advanced LLM student at Leiden University, I was hesitant to use it in Palestine, particularly due to Shaw's questionable positions on Palestine both within the text, and elsewhere, such as his submissions to the ICC.[14] Shaw has clearly advanced a position that "Palestine is not a state under international law as it does not conform with the internationally recognised Montevideo criteria."[15] Brownlie's *Principles of Public International Law*, and its current author, James Crawford, are conversative. When compared to Shaw however, Crawford is more nuanced.[16] Nonetheless, the textbooks generally do not foster critique. Moreover, as I have set out earlier, accessing English-language textbooks is an issue.

Overall, the burden is on the teacher to provide the student with the capacity and resources to operate as international lawyers and foster the student's ability to critique. As international law teaching develops in Palestine (and elsewhere for the matter), students should be expected to critically engage the law, its interpretation, and subsequent application. The endeavour requires due consideration from critical legal studies and voices emanating from Third World Approaches to International Law (TWAIL). From my experience as an academic and a practitioner in Palestine, Palestinian international lawyers and jurists have been highly influenced by TWAIL. For example, at the Palestine Yearbook of International Law, which is hosted by the Institute of Law at Birzeit University, we have a keen interest in publishing TWAIL voices. Our recent call for papers has also invited scholars of Critical Race Theory, which I believe is an underutilized framework in international law. Over time, I believe it is also necessary to engage our students in other critical approaches, such as Marxist, feminist, and others, as a way towards "liberating" the curriculum. Students should also be critical of those aspects as well. For example, it is fascinating to appreciate Marxist approaches to international law in practice, scholarship, and

[14] See Malcolm Shaw, *International Law*, *Eighth Edition* (Cambridge India, 2018) 186-187.
[15] See ICC-CPI, 'Submission of Observations to the Pre-Trial Chamber Pursuant to Rule 103, Professor Malcolm N Shaw QC' (16 March 2020) https://www.icc-cpi.int/CourtRecords/CR2020_01017.PDF (accessed 14 February 2021).
[16] James Crawford, *Brownlie's Principles of Public International Law*, Ninth Edition (Oxford University Press, 2019).

teaching,[17] while also being cognizant of Marx's underlying Eurocentric and racial undertones (although this is a debatable opinion).[18]

Finally, there is something to be said about narrative. Whether through Edward Said's writings, or Mahmoud Darwish's poetry – amongst other brilliant Palestinian artists and thinkers – their platforms were made to share the Palestinian experience; narratives woven in their skills and trade to share a unique and extraordinary history. There is pride in being Palestinian that never wavers – harnessed in Said's writings and Darwish's poetry, amongst others, and should similarly be harnessed by Palestinian international lawyers. US, UK, and other lawyers don't shy away from taking pride in their nation's contributions to international law. On one occasion, one international law professor told me that I should *not* discuss Palestine and Palestinian-related legal issues because I am Palestinian. This type of biased outlook, of course, would not be expected of other lawyers (*e.g.* US lawyers discussing issues like the *jus ad bellum* or British lawyers discussing issues related to arms sales). Palestinian international lawyers must outright reject these notions. The Palestinian international law narrative is rich and should, similarly, be embraced for its exceptional and formidable contributions.

Concluding Remarks

In this essay, I have jumped between discussing the current state of international law teaching in Palestine and current and future considerations in that regard. There is much more work to be done on the ground in terms of developing international law. Capacity and resources are a real issue and there is no easy answer to correcting those deficits. Nevertheless, the objective should be teaching to create the best possible standard of Palestinian international lawyers. In that process, I submit that it is important to be able to teach students a "textbook" version of international law while also being able to develop student abilities to genuinely critique the law and its contemporary interpretation and application. This is especially the case with respect to those areas of international law most relevant to Palestinians – that have seen the rules, interpretations, and subsequent application miss them entirely. There is much more to offer, and ownership is crucial. In that process, Palestinian international law students and lawyers can claim our own narrative, without the need to feel like we need to belong to other narratives.

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[17] See Susan Marks (ed.), *International Law on the Left* (Cambridge University Press., 2009). For an interesting counter to this assertion, see Robert Knox, 'Valuing race? Stretched Marxism and the logic of imperialism' (2016) 4:1 London Review of International Law 81.

[18] See this critique of Marx in Edward Said, *Orientalism* (Pantheon Books, 1978).

TWAILR THIRD WORLD APPROACHES to INTERNATIONAL LAW Review

TWAILR: Reflections ~ 33/2021

We Charge Apartheid?
Palestine and the International Criminal Court

Noura Erakat & John Reynolds reflect on Palestinian efforts to engage the International Criminal Court, in the context of Israeli settler-colonialism and both its spectacular and structural violence. Conscious of the limits of international criminal law, they think about Palestinian activist legal tactics – and the charge of the crime of apartheid in particular – in relation to political strategy.

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At the end of 2008, Israel went to war on the Gaza Strip on a scale not seen in Palestine for decades. The Israeli military's International Law Department had spent months prior crafting 'legal advice that allowed for large numbers of civilian casualties'. This heralded the starting point of formal Palestinian interaction with the International Criminal Court, with an initial failed attempt by the Palestinian authorities to trigger ICC jurisdiction over crimes committed in occupied Palestine. It would be a long twelve years before eventually, in February and March 2021, the ICC's Pre-Trial Chamber ruled that the Court does indeed have jurisdiction and the Prosecutor confirmed that an investigation will now proceed. Through these years, the Office of the Prosecutor often appeared at pains to draw out the wrangling over the preliminary question of whether it could accept jurisdiction. In the meantime, Gaza was besieged and bombarded, again and again: 'sky of knives ... reincarnation of metal, children limp grey dust beneath buckled buildings', as captured by Hala Alyan. This materialised most devastatingly in Israel's 2014 war on Gaza. Its modalities of lethal force were also adapted in 2018 to maim and execute Palestinians demonstrating in the Great March of Return.

This hot violence of intense and spectacular military assault – airstrikes and artillery shelling, sonic booms and white phosphorous, home demolitions and shoot-to-kill sniping, plus the resistance of Palestinian armed groups (of a decidely lesser scale and 'gravity' in its reach) – will be an obvious focus for the ICC investigation into events

from June 2014 onwards. But 'not all violence is hot', as Teju Cole succinctly surmises. The slow, cold violence of Israeli apartheid has continued to plough its furrow ever-deeper. This encompasses the settlement project and economic exploitation of Palestinian land and labour in the West Bank, the blanket denial of Palestinian refugee return, and the Israeli state's exclusionary constitutionalism. As Hassan Jabareen shows, it transcends the partition lines and permeates through a single legal order of Israeli racial domination over the Palestinians. All of these elements are ongoing, all are pillars of what Lana Tatour emphasises as the overarching *settler-colonial structure* of apartheid – and all are potentially within the remit of the ICC.

And so our purpose here is not to dwell on the technicalities around jurisdiction, but rather to take the ICC conjuncture as grounds for reflection on the politics of Palestinian legal engagement. We situate this reflection in the larger context of Israeli colonial-apartheid, thinking about Palestinian legal tactics – and the charge of the crime of apartheid in particular – in relation to political strategy. Conscious of the limits of international criminal law, we are at the same time animated by the question of whether the turn to international criminal justice as a site of struggle can feed into the more radical transformations of social, economic and ecological relations that are needed for settler-decolonisation[1] and liberation of Palestine.

Warfare, Lawfare and the Limits of International Criminal Law

Many may consider criminal investigation and prosecution for purposes of accountability and deterrence to be sufficient ends in themselves. Our particular concern is the potential of the ICC bid, precipitated as it was by the hot violence of the Gaza wars, to foment a rupture whereby an international tribunal contends with the cold violence of Israeli apartheid. We are clear that law itself, especially international criminal law, is 'insufficient to lead Palestinians to emancipation'. Beyond

[1] Settler-decolonisation here exceeds the international legal understandings of colonialism and decolonisation that began to crystallise in the aftermath of the First World War. It evokes Indigenous Studies literatures which have clarified that land and territory remain central elements of settler-colonial domination and its unravelling. It also challenges time as a linear continuum whereby the Indigenous body stands in as a primordial figure and therefore an anachronistic possibility of becoming. Relevant works include Nick Estes, *Our History Is the Future: Standing Rock Versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* (Verso, 2019); Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press, 2014); Eve Tuck & K Wayne Yang, 'Decolonization is not a Metaphor' (2012) 1:1 *Decolonization: Indigeneity, Education & Society*; Rana Barakat, 'Lifta, the Nakba, and the Museumification of Palestine's History' (2018) 5:2 *NAIS: Journal of the Native American and Indigenous Studies Association* 1; Lana Tatour, 'The Culturalisation of Indigeneity: the Palestinian-Bedouin of the Naqab and Indigenous Rights' (2019) 23:10 *International Journal of Human Rights* 1569; Raef Zreik, 'When Does a Settler Become a Native? (With Apologies to Mamdani)' (2016) 23:3 *Constellations* 351.

the general incapacities of individualised responsibility to produce social transformation, we agree with and are engaged in particular critiques of international criminal law that have come from TWAIL and Marxist perspectives: of international criminal law as 'reproduction of the civilizing mission' and 'capitalism's victor's justice'.

The ICC itself is a political institution which 'operates ideologically' as part of our contemporary global order to 'sustain prevailing constellations of power'. Kamari Maxine Clarke has shown how the Court reifies white supremacy and helps mask and perpetuate core-periphery relations of economic exploitation and inequality. If the institutional dynamics at the UN were different, we would certainly be directing all arguments and energies towards the necessity of political and economic sanctions against Israel itself rather than criminal prosecutions of some officials. As things stand, however, the ICC is the institutional door that has been forced ajar, and so it is imperative to think about what space it may open for anti-colonial forms of 'principled opportunism'.

With this in mind, we support the sentiment that the jurisdiction decision was a victory for Palestinian legal activists and a testament to their tireless work. The functional question of whether the ICC could accept jurisdiction over a situation in Palestine under the Rome Statute should have been straightforward – if not in response to the initial request in 2009, certainly after Palestine was admitted as a full member of the Court in 2015. Yet there was a very real possibility that the ICC would have found a way to reject jurisdiction as advocated by the 'strained arguments and conspicuous hypocrisy' of Israel-supporting ICC members, or to continue to drag out any decision indefinitely. And so the victory, such as it is, was hard-fought. It is a victory for Palestine over major ICC member states such as Germany, Canada, Brazil and Uganda who actively intervened to advocate that the Court refute jurisdiction (with Brazil and Uganda taking 'manisfestly incoherent' positions against their own pre-existing recognition of Palestine, in favour of new-found neocolonial alliances). It is vindication for Palestinian rights organisations over the Israeli Attorney-General and the self-proclaimed 'leading experts on international law' who feature on a mock 'ICC Jurisdiction' website sponsored by Israel's Ministry of Strategic Affairs.

At the same time, the victory is very much provisional. Political hurdles, in the form of Israeli and US opposition backed up by quintessential European duplicity, have been surmounted for now but will redouble in the higher-stakes contestations to come. Such external pressures will compound the particular technical and logistical challenges of prosecuting Israeli personnel in a context of staunch formal non-

cooperation from Israel, and the potential for jurisdiction challenges to arise again in individual cases. Funding and basic administrative challenges are also an ongoing material issue for the Court. In her statement confirming that an investigation will now be initiated, the Prosecutor was careful to temper expectations in terms of the priority and pace of proceedings, as well as striking an almost contrite tone to convince Israel to trust the ICC.[2] Still, Israel confirmed it does not recognise the Court's authority and will not cooperate with the investigation. Israeli Prime Minister Benjamin Netanyahu characterised the Court's decision to accept jurisdiction as 'pure antisemitism'. This absurd claim fits the Israeli playbook. Israel and its Ministry of Strategic Affairs have spent the last fifteen years trying to undermine the Boycott, Divestment, Sanctions (BDS) movement, and are now deploying similar tactics to delegitimise the ICC. The appointment of an army Major General[3] rather than a lawyer to 'lead the battle against the ICC' highlights, as observers have quipped, that Israel's 'lawfare' is 'getting increasingly literal'. In this context, questions of strategy and tactics are crucial.

Tactics and Strategy

In the *New Left Review* in 1971, Palestinian intellectual and PFLP spokesperson Ghassan Kanafani emphasised the need for anti-colonial struggle not to be dictated by 'bourgeois moralism and obedience to international law'. There is a legitimate critique that, over the decades since, the Palestinian liberation project has become overly dominated by legalism and, more generally, has functioned to assuage power structures rather than disrupt them. Mezna Qato and Kareem Rabie make the case persuasively that organising around international law involves a reduction of the original and higher aim of 'until liberation and return' to a less ambitious and ultimately self-defeating resort to liberal legalism. Conscious of international law's

[2] On the question of pace and priorities, according to the Prosecutor's statement: 'How the Office will set priorities concerning the investigation will be determined in due time, in light of the operational challenges we confront from the pandemic, the limited resources we have available to us, and our current heavy workload. ... To both Palestinian and Israeli victims and affected communities, we urge patience'. On the point about appealing to Israel, the Prosecutor goes out of her way to emphasise that in the other situation previously referred to the Court regarding Israel – the Israeli military attacks on the Mavi Marmara humanitarian flotilla – she declined to pursue any charges. The statement's references to complementarity and continuing scope for domestic investigations, as well as to the Court's commitment 'to investigate incriminating and exonerating circumstances equally', also appear designed to placate specific concerns that Israel has raised previously.

[3] Previously this general, Itai Virob [also transliterated Veruv], was a brigade commander placed under investigation between 2009 and 2011 'when he admitted he encouraged his soldiers to use violence against Palestinians they were questioning'. Israel's Military Advocate-General concluded that Virob had not been advocating 'violence for the sake of violence' but rather 'violence which was necessary for the mission'. So Virob was absolved in 2011, promoted straight away by then Israeli military Chief-of-Staff, Benny Gantz, and continued to rise up the ranks. See *+972 Magazine*'s report here.

own colonial entanglement, they argue that law-based advocacy ends up being geared 'towards a better colonialism rather than the end of colonialism'. By fixating on Israel's excesses and not Zionism's essence, legalist advocacy elides the state's settler-colonial nature and the underpinning structures of imperialism and capitalism. In this sense, it is 'problematic to pivot movement strategy on bodies of law that emerged in order to regulate imperialism, and that often function to legalize Israeli colonization'.

The reference to strategy here is key. Strategy cannot hinge on law. But in certain conditions, legal tactics may work to support transformative strategy. What is needed most in the Palestinian context, as we have both argued previously drawing on the work of Duncan Kennedy, Robert Knox and others, is 'a coherent political strategy towards which appropriate legal tactics are thoughtfully deployed' and 'a robust political movement to inform legal advocacy and to leverage tactical gains'. In this sense, engagement through law requires an acute understanding of international legal institutions as a field of political struggle. Knox and Ntina Tzouvala trace the lineage of such thinking in anti-colonial movements back to the Bolshevik theory of imperialism, which had 'a certain *irreverence* for international law, and an explicit sense that it needed to be subordinated to the wider anti-imperialist project'.

There is a rich and growing tradition of Palestinian scholars and activists today who are thinking deeply about these dynamics in various iterations as well, including George Bisharat, Lana Tatour, Mazen Masri, Nimer Sultany, Samera Esmeir, Yara Hawari, Rafeef Ziadah, Suhad Bishara, Victor Kattan, Nahed Samour, Nadija Samour, Emilio Dabed, Ardi Imseis, Ata Hindi, Hadeel Abu Hussein, Reem al-Botmeh, Hassan Jabareen, Munir Nuseibah, Reem Bahdi and Mudar Kassis, and many more. Certain core threads run through their work: Israel's settler-colonial essence; its oppression of the Palestinians *as a whole*; the one-state reality over the fictions of partition; law as often central to these problems; and the necessity of political strategy in relation to law, rights, development, recognition, and so on. Masri's articulation is illustrative: 'law and legal tactics cannot replace strategy, but they can play a role in a strategy – one that enjoys a high level of support, mobilizes the grassroots, employs a range of tools and is guided by a clear vision'.

In this sense, there is scope for principled anti-apartheid legal tactics to trigger transformational possibilities, if harnessed effectively under the right conditions in service of a cogent political strategy. However, given the current state of the Palestinian leadership, and the disconnects between Palestine's political institutions, popular movements and global solidarity campaigns, such conditions and strategy

remain distant. Following the PLO's abandonment of the single democratic state strategy and its 'pragmatic revolutionary' tactics, and especially since the collapse of the Camp David talks signalling the putative death of the Oslo peace process, the Palestinian leadership has pursued a politics of acquiescence. They have placed faith in the idea that good native behaviour will be rewarded with imperial benevolence, despite consistently damning evidence to the contrary. Palestinian foreign policy is, of course, subject to larger systemic coercive forces, and the 'sovereignty trap' that presently incapacitates it is constructed by international relations and international law. But Palestinian officialdom has also sacrificed vital opportunities over the past two decades to reconstruct a serious anti-colonial political strategy and to channel available legal mechanisms accordingly.

The 2004 ICJ Advisory Opinion on the Wall offered a major opening for the Palestinian official leadership to build an alliance towards pushing UN members not to recognise or assist the illegitimate occupation infrastructure – to divest from and sanction Israel. Palestinian civil society played its part by launching its BDS call in 2005 on the first anniversary of the ICJ opinion. This was inspired by the struggle to abolish apartheid in South Africa, and sought to build upon and expand the growing global anti-apartheid movement for Palestine. The Palestinian leadership should be mirroring this at an institutional level. It could have formulated an expansive, proactive strategic vision of decolonisation with which the BDS tripartite goals (ending occupation and colonisation, full equality, refugee return) align. The Palestinian leadership has instead been preoccupied with 'preening like a state' – even if that means a limited Bantustan state – and its legal iniatives have been haphazard and reactive. Rather than lead an anti-apartheid freedom struggle, the Palestinian Authority has been implicated in neoliberal apartheid and unequal capital accumulation.

This context has underpinned ongoing debates among Palestinian legal practitioners and scholars that consider what Palestinians can realistically obtain in court settings, versus what Palestinians need to do in order to catalyse fundamental paradigmatic shifts at the real cost of losing legal contests along the way. We are sympathetic to the school of thought that favours pragmatic advancements over more radical tactics. But in the absence of an institutional strategy to harness any such incremental advances, we find this approach uncompelling.

How then does a more radical tactical approach overcome the debilitating lack of a visionary programme from above? It doesn't. It is, rather, a bet placed on the capacity of movement to develop strategy in the course of what will be an explicit

and pitched political contest. This approach seeks to propel strategic coherence from below in the course of fervent but fluid struggle and provocation, based on historical evidence that societies can be prepared for transformative social justice movements but cannot dictate them. This approach may be fraught, but in light of the current status quo and uninspiring alternatives, there is little to lose. Thinking about this in the context of the ICC involves acceptance of the limits of the process on its own terms and places focus on how it is harnessed tactically in the 'legitimacy war', regardless of victory or defeat in the courtroom. Criminal prosecutions, even if they happen, will not deliver justice for the Palestinians in the larger sense of the settler-colonial structure that shapes their lives. The struggle will remain political.

With that in mind, what tactical opportunities can be located in the ICC's exercise of jurisdiction? Michael Kearney has done important analysis on both the war crime of transfer of settlers and denial of the right to return as a crime against humanity, while Palestinian organisations have flagged the pillage, extraction and destruction of Palestinian natural resources. These are all essentially forms of colonial crime within the jurisdiction of the Court, and offer avenues into unsettling certain facets of Zionism through their prosecution. The larger structural framework within which these crimes are all committed, however, is the Israeli apartheid regime over Palestinians. Exposing the crime against humanity of apartheid itself can potentially work in tactical service of broader anti-apartheid political strategy and grassroots organising. It can also operate as a crucial bridge on a number of fronts: linking together the hot violence of Israel's war crimes with the cold violence of its legal structures of dispossession, exclusion and persecution; reconnecting the partitioned but shared realities of occupied, exiled and citizened Palestinians under Israel's constitutional order; and mapping the trail from individual responsibility for crimes of apartheid to state responsibility and sanctions for maintaining an apartheid regime.

We Charge Apartheid?

The controversy which engulfed the UN's 2001 Durban anti-racism conference was precipitated by the insistence of social movements from around the world on calling Israel out as an apartheid state. This was a political and moral argument to challenge institutionalised racism against Palestinians in the context of global anti-racist action. The anti-apartheid framework became increasingly central to political organising and global solidarity through the Palestinian BDS call and initiatives like Israeli Apartheid Week. More recently it has informed renewals of Black-Palestinian solidarities and the Black Lives Matter demand for divestment from apartheid Israel. While Palestinians

had diagnosed and detailed Israeli apartheid conditions for many decades prior, the concomitant international legal arguments had only started to be developed in the 1990s by individual scholars and Palestinian rights organisations. More concerted legal analyses likewise began to follow after Durban. Palestinian organisations like Badil, Al-Haq, Adalah, and Stop the Wall applied the prohibition of apartheid as part of their deconstruction of Israeli law and policy. International legal studies, scholarship and reports steadily mounted. The Russell Tribunal on Palestine deliberated the issue in Cape Town and concluded that 'Israel's rule over the Palestinian people, wherever they reside, collectively amounts to a single integrated regime of apartheid'. The UN Special Rapporteurs, CERD Committee and ESCWA Commission made similar findings in their own spheres.[4] There is clear momentum.

After Palestine joined the ICC in 2015, a collective of Palestinian rights organisations began to file submissions to the Prosecutor detailing crimes committed by high-level Israeli civilian and military officials. The first three submissions related to the hot violence of the wars and siege on Gaza. The fourth, a 700-page brief submitted in 2017, covered war crimes and crimes against humanity in the West Bank – including the crime of apartheid. Following the Pre-Trial Chamber's February 2021 jurisdiction decision, the organisations reiterated the charge, albeit limited in this context as it is to the manifestations of apartheid in the West Bank: Israel's systemic segregation and subjugation of the Palestinians constitute 'an institutionalised regime of racial domination and oppression, and amount to the crime of apartheid; it is imperative that the Prosecutor include acts of apartheid in the scope of her investigation'.

While Palestinian rights organisations filing submissions to the ICC today are more legalistic in their approach and less radical in their politics, we understand their 'charge' of apartheid as carrying some echoes of the *We Charge Genocide* petition submitted by the Civil Rights Congress to the UN in 1951. Knox and Tzouvala recount how the Black radicals behind that petition were informed by Marxist conceptions of imperialism and political economy as much as by the Genocide Convention itself. The petition represented a 'tactical deployment of international law in order to serve broader purposes of radical social transformation', and was consciously aimed at 'connecting US racism at home with structures of US imperialism abroad'. It was 'invoked tactically to strengthen those forces who were opposing racism and imperialism' more than in expectation that an international legal

[4] Most recently, Israeli human rights organisations Yesh Din and B'Tselem have also adopted the apartheid framework – albeit based on somewhat more 'liberal readings of Israeli apartheid' – and international human rights organisations are expected to follow.

process would itself resolve deep racial injustice in the United States. Coming at a crucial transitional moment for the Black freedom movement, UN institution-building processes, Cold War manoeuvring, and Third World liberation struggles alike, the petition was significant in mobilising internationalist support and damaging US delegations at the UN. Eleanor Roosevelt lamented that the petition was so 'prominently featured in the papers'[5] during the UN General Assembly in Paris and admitted that 'we were hurt in so many little ways' by it. It also had lasting ramifications within the US, both on the back of its submission to the UN and its wide circulation in book form. It exposed the extent of ongoing racial violence, 'whipped up the kind of necessary pressure that led to the final cracking of the spine of Old Jim Crow',[6] and charted a more radical course for equality struggles that continues to reverberate. William Patterson, primary architect of the petition, was forthright in response to criticism of his organisation's 'politicisation' of civil rights by conservative and anti-communist elements of African-American leadership: 'The attitude of using only the legal approach had something of the Booker T. Washington in it. The NAACP leadership did not understand the gravity of the situation'.[7]

Though coming in a very different moment and political context,[8] the Palestinian activist charge of Israeli apartheid is a comparable vanguard assertion of institutionalised oppression as international crime beyond what mainstream representatives of the oppressed group have articulated. It is likewise one which the offending state goes to great lengths to undermine as beyond the pale. Crucially, it is also the legal claim that most directly feeds into the mass popular mobilisation of

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[5] Gerald Horne, *Communist Front? The Civil Rights Congress, 1946–1956* (Associated University Presses, 1988) 172.

[6] Ibid, 167.

[7] Quoted in Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (CUP 2003) 210. The NAACP is the National Association for the Advancement of Colored People. Booker T. Washington was an early 20th century moderate Black leader who was seen by many contemporary and subsequent strands of civil rights activism as too accommodating of white supremacy.

[8] Even physically submitting *We Charge Genocide* to the UN was a debacle for the CRC. Patterson had asked WEB Du Bois and Paul Robeson to join him in Paris to present the petition to the UN General Assembly. The US government had, however, just attempted to prosecute Du Bois as a foreign agent and confiscated his passport, deterring him from travelling. The State Department also stripped Robeson of his passport – meaning he was only able 'to deliver a copy of the petition to a "subordinate in the Secretariat's office" in New York' (Anderson, ibid, 194). The main consignment of copies of the petition was intercepted on route to Paris, resulting in Patterson having to bring other copies in Budapest to distribute them at the General Assembly. He then had to flee Paris himself when the US embassy tried to seize his passport and deport him. The Palestinian rights organisations' submissions to the ICC were a more standard process, though not without their own backstory: the file containing the apartheid allegation was handed over to the Prosecutor by Al-Haq director Shawan Jabarin who Israel had previously detained without trial and then placed under travel ban for many years, and researcher Nada Kiswanson who has been subjected to repeated death threats due to her work on the ICC and Palestine.

Palestinian and global social movements over the last twenty years, which have emphasised the racialised legal structure of settler-colonial dispossession.

Even with this relatively radical approach, the distinct tactical risks in engaging the ICC generally and the crime of apartheid specifically must be acknowledged. Most obviously, it is a tactic without control over the agenda when compared with other forms of civil or inter-state litigation. The Prosecutor may choose to ignore apartheid entirely and focus the investigation on more discrete war crimes, irrespective of Palestinian interventions.

Warning signs are already there in the scope of the investigation. In the Prosecutor's summary of preliminary examination findings, several crimes are identified as likely to have been perpetrated. The document refers to five categories of war crimes committed by Israel – four specific to Gaza, plus transfer of settlers into occupied territory – and six categories of war crimes when it comes to Palestinian armed groups. There is no reference to apartheid or any other crimes against humanity. That said, the document emphasises that the crimes mentioned are 'illustrative only' and the 'investigation will not be limited only to the specific crimes that informed the assessment at the preliminary examination stage'. A new Prosecutor will take over before any investigation gathers pace, adding another variable to this mix. [9]

For Israeli officials to be indicted for apartheid, the prosecution needs to show an intention to maintain systemic racial oppression. There is a perception that this element of intent makes it more difficult to prove than some other categories of crime. But the intentional nature of the regime is what underpins the significance of the crime of apartheid, and the concerted design and maintenance of Israel's oppressive regime is well-documented. As a structural crime, it demands prosecution of its political architects at the highest level. Because of this, combined with 'the racial politics of international criminal law', there has never been a prosecution of the crime of apartheid in any court. In this sense, we see the charge of Israeli apartheid as being also an indictment of, and challenge to, international criminal law itself. If the ICC cannot bring itself to investigate and prosecute apartheid crimes in the most widely-

[9] There has been much speculation about the potential implications of Karim Khan's appointment as incoming Prosecutor, for the ICC generally and the Palestine investigation specifically. According to some media conjecture, 'Israel reportedly hopes Khan may be less hostile or even cancel' the investigation. An April 2021 letter from British Prime Minister Boris Johnson to the Conservative Friends of Israel group put it on record for the first time that the British government is opposed to the ICC investigation in Palestine, and also appears to claim the appointment of Khan, a British national, as a victory for Britain and its allies seeking to 'reform' the Court in accordance with their own agenda. The role of the Prosecutor is formally independent of any state interests, but clearly Johnson's wording must be either a reflection of a pre-designed diplomatic initiative, or a statement of intent to mark Khan's card.

analysed instance of apartheid since South Africa – after it has been presented with documentation and asked to do so by those subjected to the apartheid regime – that will say a lot about the politics of international criminal law.

The very fact of Palestinians submitting the claim of apartheid to an international tribunal can make its own tactical contribution to anti-colonial strategy, as global consciousness of the cold violence of Israeli apartheid continues to grow. All too often, cold violence 'takes its time and finally gets its way' and so, against that, a sharper focus on the strategic horizons ahead is essential. We see a place for legal contestations in that vista, though we should be under no illusions about the prospects of seeing Netanyahu and his counterparts on the stand, or the likelihood of big courtroom 'victories' for Palestinians. And, ultimately, the law cannot serve as a substitute for 'what only a critical mass of people are capable of achieving'.

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THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

Palestine & Praxis

May 2021

In the midst of Israel's escalation of settler-colonial violence in Palestine, Scholars for Palestinian Freedom have circulated *Palestine & Praxis*: *Open Letter and Call to Action* for scholars of any discipline, anywhere in the world, to sign. You can read the statement and its commitments here, with the link to sign at the bottom.

The statement highlights 'our role and responsibility as scholars to theorize, read, and write on the very issues unfolding in Palestine and among all oppressed nations today'. With that in mind, we are sharing some resources and materials below that may be of interest to TWAILR readers on the current situation across Palestine – from Sheikh Jarrah to Lydd, from Haifa to Gaza. Palestinians have also called for a general strike across Palestine on 18 May 2021, and a global day of action in support.

Articles & Analysis

Noura Erakat & Mariam Barghouti, Sheikh Jarrah highlights the violent brazenness of Israel's colonialist project, *Washington Post*, 10 May 2021

Nimer Sultany, Colonial Realities: From Sheikh Jarrah to Lydda, *Mondoweiss*, 12 May 2021

Steven Salaita, Sheikh Jarrah: Zionism distilled to its purest expression, *Mondoweiss*, 12 May 2021

Lana Tatour, This isn't a civil war, it is settler-colonial brutality, *Mondoweiss*, 13 May 2021

Amjad Iraqi, Against the horror, Palestinians are still rising, *+972 Magazine*, 13 May 2021

Samera Esmeir, The Palestinians and the struggle of the dispossessed, *Open Democracy*, 14 May 2021

Tareq Baconi, Sheikh Jarrah and After, *London Review of Books*, 14 May 2021

Dima Srouji, Living the Nakba, over and over, *+972 Magazine*, 14 May 2021

Adalah, Adalah takes urgent action against organized far-right Jewish mob violence targeting Palestinian citizens, and Israeli police brutality & inaction, 15 May 2021

Akram Salhab, On Nakba Day, Palestine Is Rising Against Decades of Oppression, *Tribune*, 15 May 2021

Lina Alsaafin, Palestinian protests in Israel showcase 'unprecedented' unity, *Al-Jazeera*, 16 May 2021

Bashir Abu-Manneh, As an Occupier, Israel Has No Right to "Self-Defense", *Jacobin*, 16 May 2021

Patrick Gathara, The fallacy of the colonial 'right to self-defence', *Al-Jazeera*, 16 May 2021

Haidar Eid, Israel's Wehda Street massacre shows it seeks to annihilate us. We won't let it, *Mondoweiss*, 16 May 2021

Webinars

Urgent Teach-In Roundtable on Sheikh Jarrah
Wednesday 19 May 2021 6pm EST
Ussama Makdisi, Sherene Seikaly, and Mouin Rabbani

Black & Palestinian Freedom Struggles
17 **May 2021** at 6 PM US central
Khury Petersen-Smith & Eve L. Ewing
YouTube

Holding Palestinian Ground: Lessons from Gaza to Sheikh Jarrah
14 May 2021
Sheren Seikaly, Issam Adwan, Mariam Barghouti, Amjad Iraqi, Mouin Rabbani, Noura Erakat, Yasser Qous, Ziad Abu-Rish
https://www.youtube.com/watch?v=rIXqlYwzpic

We Will Not Be Erased: Ongoing Nakba
14 May 2021
Sandra Tamar, Mohammed El-Kurd, Majd Kayyal, Sumaya Awad
https://www.youtube.com/watch?t=936&v=6e6GEd9FNbY&feature=emb_imp_woyt

From Sheikh Jarrah to Gaza: Israel's War on Palestine
13 May 2021
Issam Adwan, Fayrouz Sharqawi, Tamer Nafar, Ken Loach, Roger Waters, Frank Barat, Annemarie Jacir
https://www.youtube.com/watch?v=eU-LqcV099k&t=384s

Other Statements & Teaching Resources

Palestinian Feminist Collective - A Love Letter to Our People Struggling in Palestine

Letter to ICC Prosecutor from residents of Sheikh Jarrah and supporting organisations

Statement from Michael Lynk (UN Special Rapporteur on the situation of human rights in the Palestinian Territory) & Balakrishnan Rajagopal (UN Special Rapporteur on adequate housing)
East Jerusalem: UN experts deplore brutal police response to protests, urge eviction threats to be lifted

Aijaz Ahmad, Arundhati Roy, Githa Hariharan, Mohammed Yusuf Tarigami, Naseeruddin Shah, Nayantara Sahgal, Prabhat Patnaik, Ratna Pathak Shah, Subhashini Ali, Sudhanva Deshpande & Vijay Prashad – We Stand With Palestine

Jadaliyya - Sheikh Jarrah, Expulsion, Occupation, and Settler Colonialism – Reading List
BDS Movement - 5 things you can do
Verso Books - Palestine Solidarity Reading List
Palestine Yearbook of International Law
Journal of Palestine Studies
Jadaliyya Palestine page
MERIP - Middle East Research and Information Project
The Nakba Files
Israeli Apartheid Week
Palestinian Campaign for the Academic and Cultural Boycott of Israel
Decolonize Palestine
Gaza in Context

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THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

(2021) 2 *TWAIL Review* 97–121

'We Desire Justice First, Then We Will Work for Peace': Clashes of Feminisms and Transnationalism in Mandatory Palestine

*Paola Zichi**

Abstract

The article focuses on the activism of the early Palestinian women's movement in the terrain of Mandatory Palestine. It illustrates the tensions between transnational understandings of women's rights and questions of orientalism and imperialism within the international arena. This tension is framed through a critical historical perspective that, on the one hand, includes women's contributions to and strategic interventions in the legal infrastructure of the British Mandate for Palestine, and on the other hand, reflects on the weight of critical historical writings to foreground the relevance of decolonial and critical feminist approaches to international law for Israel/Palestine. By highlighting the oscillations of the first wave of the Arab feminist movement between resistance to and compliance with international law, it argues that transnational histories of an early Arab feminist activism challenged the horizon of a liberal Western feminism and that these interventions are often neglected in the international legal history of the origins of the Israeli/Palestinian conflict. Arab-Palestinian feminists, in fact, often swung between establishing women's participation in the anticolonial nation building project dominated by male elites and the struggle to have their anti-colonialism recognised in the feminist international fora advocating for gender equality, which were often dominated by white feminists. By highlighting the contradiction between anti-colonialism and the social progressivism experienced by Arab feminists at the time, the article aims to re-draw the history of feminist endeavours in Palestine, not along a linear trajectory of the struggle for gender equality in the Middle East, but rather as a movement for individual and collective self-determination anchored in cosmopolitan and anticolonial understandings of citizenship.

Key Words

Mandate Palestine; transnational Arab feminisms; critical history; decolonial feminism

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1 Introduction

'We desire justice first, then we will work for peace'

Unidentified Palestinian-Arab Woman to WILPF Member[1]

Histories of the Mandate for Palestine have recently received renewed interest from an international legal perspective,[2] but accounts of the politics of the early Palestinian women's movement, caught in its complex relationship between feminism, internationalism and colonialism, are scarce.[3] Issues of self-determination and sovereignty over the land of Palestine are now, more than ever, distressingly urgent as Israel continues to assert its hegemonic power in the region while continuing to violate Palestinians' international and basic human rights, both in the West Bank and the Gaza Strip. The colonial structure of the British Mandate for Palestine not only deeply influenced the development of the Israel/Palestine conflict, but also permeates the juridical, ethical, economic and political relations between Israel and Palestine to the current day.[4] In 1922, Samuel Herbert, the first High Commissioner for Palestine (1920-1925) under the British Mandate, reassured William Rappard of the Permanent Mandates Commission (PMC) that 'the Arabs had nothing to fear' regarding the compatibility of the Balfour Declaration with the British Mandate for Palestine as 'there was no chance of establishing a Jewish Kingdom or a Zionist state in Palestine for two or three generations at least'.[5] However, the State of Israel and its ethnocratic constitution has been a reality for decades,[6] and the Zionist settler colonial project continues to reject claims of self-determination put forward by the Palestinians and inexorably advance its politics of annexation.[7]

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[1] The Arab Women, *Pax International,* January 1930, 396-1 (53). LSE Women's Archive.

[2] Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford University Press, 2019); Lauren Banko, *The Invention of Palestinian Citizenship 1918-1947* (Edinburgh University Press, 2017); Zeina B Ghandour, *A Discourse of Domination in Mandate Palestine: Imperialism, Property and Insurgency* (Routledge, 2010); Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (OUP, 2015); John Quigley, *The Case for Palestine: An International Law Perspective* (Duke University Press, 2005); John Reynolds, *Empire, Emergencies and International Law* (CUP, 2017).

[3] Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale University Press, 1992); Cf. Chandra Talpade Mohanty, Anne Russo & Lourdes Torres (eds.), *Third World Women and the Politics of Feminism* (Indiana University Press, 1991) 1-53; Kumari Jayawardena, *Feminism and Nationalism in the Third World* (Kali for Women, 1986).

[4] Lauren Banko, 'Historiography and Approaches to the British Mandate in Palestine: New Questions and Frameworks' (2019) 4:1 *Contemporary Levant* 1.

[5] Cited in Pedersen (2015) 97.

[6] Rashid Khalidi, *The Hundred Years' War on Palestine: The History of Settler Colonial Context and Resistance* (MacMillan, 2019); Mazen Masri, *The Dynamic of Exclusionary Constitutionalism: Israel as a Jewish and Democratic State* (Hart Publishing, 2017).

[7] Israel Ministry of Foreign Affairs, 'President Rivlin launches Declaration of Our Common Destiny for the unity of the Jewish people (9 September 2019) https://mfa.gov.il/MFA/AboutIsrael/Spotlight/Pages/President-Rivlin-launches-Declaration-of-Our-Common-Destiny-for-the-unity-of-the-Jewish-people-10-September-

Legal histories of the Mandate for Palestine have focused on reconstructing the legal foundations leading to the establishment of the State of Israel, the colonial erasure of the Palestinian people and the construction of a system of racialised exception as a system of governance.[8] Once the Mandate system had been established through the League of Nations Covenant, the British Mandate for Palestine entered into force after the 1923 Treaty of Lausanne. International legal interest has focused on the history of the Commissions and their reports (the Kings-Crane, Shaw and Royal Commissions); the revolts (Buraq Uprising and Arab Revolt) and the security laws issued to repress them (i.e. the 1929 White Paper and the 1936 Emergency Regulations); and, from 1945 on, the role of the UN.

With only a few exceptions, the role of early Arab feminist activism during the Mandate period is overlooked in mainstream domestic accounts of the history of Palestinian nation-making and in international legal scholarship.[9] Similarly, the negotiations between feminism and nationalism – i.e. the question of whether a feminist struggle for women's rights and emancipation had to be de-prioritised for the benefit of the nationalistic struggle aimed at sovereignty and state equality in the international arena – are not discussed within the broader international legal history.[10] This article is inspired by a set of international legal feminist critiques which have problematised the paradox of self-determination, posing the problem of the legal priority of collective rights over individual (women's) rights on a global scale.[11]

2019.aspx (accessed 12 August 2021); Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (University of Pennsylvania Press, 2006); Ronit Lentin, 'Palestine/Israel and State Criminality: Exception, Settler Colonialism and Racialization' (2016) 5:1 *State Crime* 32.

[8] Erakat (2019); Reynolds (2017).

[9] John Strawson, *Partitioning Palestine: Legal Fundamentalism in the Palestinian-Israeli Conflict* (Pluto Press, 2010). See, for example: Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891–1949* (Pluto Press, 2009); Henry Cattan, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* (Longman, 1976); W. Thomas Mallison & Sally V. Mallison, *The Palestine Problem in International Law and World Order* (Longman, 1986); Musa Mazzawi, *Palestine and the Law: Guidelines for the Resolution of the Arab-Israel Conflict* (Ithaca Press, 1997). Assaf Likhovski takes a different approach to the legal history of the mandate years, focusing on the relation between law and identity in *Law and Identity in Mandate Palestine* (University of North Carolina Press, 2006).

[10] Ellen Fleischmann, *The Nation and Its 'New' Women: The Palestinian Women's Movement 1920-1948* (Princeton University Press, 2003); Ellen Fleischmann, 'Selective Memory, Gender and Nationalism: Palestinian Women Leaders of the Mandate Period' (1999) 47:1 *History Workshop Journal* 141; Charlotte Weber, 'Between Nationalism and Feminism: The Eastern Women's Congresses of 1930 and 1932' (2008) 4:1 *Journal of Middle East Women's Studies* 83; Lila Abu-Lughod (ed.), *Remaking Women: Feminism and Modernity in the Middle East* (Princeton University Press, 1998); Leila Ahmed (1992); Nadje Al-Ali, *Secularism, Gender and the State in the Middle East: The Egyptian Women's Movement* (CUP, 2000); Margot Badran, *Feminists, Islam, and Nation: Gender and the Making of Modern Egypt* (Princeton University Press, 1995).

[11] Hilary Charlesworth, Christine Chinkin & Shelley Wright, 'Feminist Approaches to International Law' (1991) 85:4 *American Journal of International Law* 613; Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000); Kimberly Hutchings, 'Towards a Feminist International Ethics' (2000) 26 *Review of International Studies* 111; Wendy Brown, 'Finding the Man in the State' (1992) 18:1 *Feminist Studies* 7; Ngaire Naffine, 'The Body Bag' in Ngaire Naffine & Rosemary Owens (eds.), *Sexing the Subject of Law* (LBC, 1997) 79; Helen Kinsella, 'Gendering Grotius: Sex and Sex Difference in the Law of Wars' (2006) 34:2 *Political Theory* 161.

However, the article departs from a liberal understanding of state sovereignty and self-determination relying on unequal distribution of power and resistance in international law, particularly due to the long-lasting legacy of colonialism. On the other hand, it also departs from mainstream historiographical accounts of Middle Eastern history which frame early Arab feminism as a mere by-product of a Western-based state-centric approach, as 'inauthentic', elitist and detached from the conditions on the ground, or as expressing a naively statist dimension in its belief that the establishment of a sovereign state would not automatically bestow 'rights on women'.[12]

Instead, this article mobilises Palestinian women's strategic interventions in the mandate legal infrastructure, pointing out their connections with British mandate authorities and with feminist western organisations, to advance women's rights in the field of international law. It is based on minutes and reports from Arab feminists' national and transnational meetings and conferences between 1930-1939[13] and on the analysis of an important petition sent after the first Jerusalem Arab Women's Congress in 1929 to the Permanent Mandate Commission of the League. In these meetings, the commonality of experiences of racism, colonial and intra-religious violence, and the imperial condition marked the rise of early Global Southern women's alliances and networks. [14]

This article argues that Arab-Palestinian feminists deployed a gender essentialist strategy to petition the PMC as an act of subaltern compliance with a male-oriented international order and used international solidarity networks as an act of anticolonial resistance to advance gender-related legal reform in commonality with women from the Arab world and the Global South. The history of these conferences highlights the complicated negotiations between liberalism and colonialism within the transnational arena and the difficult conciliation between emerging transnational

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[12] Fleischmann, *The Nation* (2003) 146.

[13] This was the longest petition sent by the Arab Women's Executive, the most active petitioner of the Arab women's committees within the mandate territories between 1929-1939 to the PMC. My counting follows Pedersen's: Susan Pedersen, 'Samoa on the World Stage: Petitions and Peoples before the Mandates Commission of the League of Nations' (2012) 40 *The Journal of Imperial and Commonwealth History* 231, at 237. I have considered women's petitions among the 428 petitions from Palestine taken from the register of petitions created at the League in 1928. S1681, LNA.

[14] Common understanding of law-making processes in international law points at intergovernmental processes through which state entities would express their consensus as a method of making international law. However, more pluralistic interpretations of international law-making in the interwar period include a variety of multilateral sources such as the informal and/or semi-formal gatherings promoted by organisations, women's groups and associations which, by formulating draft agendas of international legal reforms, would constitute the pre-condition of the preparatory work from where internationals treaties or declaration come. The importance of retrieving marginalised Global Southern voices and experiences in international women's gatherings will highlight the negotiations of an international feminist agenda before law-making, and in this sense are read in this article. Alan Boyle & Christine Chinkin, *The Making of International Law* (OUP, 2007).

and postcolonial feminist voices.[15] However, it also enriches our understanding of how race, ethnicity and religious affiliations were mobilised on the contested terrain of Mandatory Palestine to shape an early anticolonial axis of feminist politics of human rights formation in both the private and public law domains.

The article adopts race and gender as tools of historical analysis and re-centres Arab and Global Southern women's contributions to the history of international law and institutions. In other words, instead of an approach that sees nationalism and state sovereignty as the most critical categories in studying the history of Mandate Palestine, and gender, race and religion as tangential identitarian concerns, my article explores the Arab-Palestinian politics of feminist formation in Mandate Palestine, and the moments of continuity and rupture in feminist transnationalism as the Palestinian question surfaced as a place of contestation of an unequal international order. In mobilising Arab feminists' interventions, I argue that the question should be what values of feminist solidarity they voiced, which networks they fostered and whether or not this was based on shared aspirations and understandings of gender and women's social and political roles in Arab and/or Global Southern societies. The question should not be centred on whether or not Arab-Palestinian women articulated their demands in the same terms as men. As such, the old dilemma between female emancipation and national self-determination connects with the debate around how the principle of self-determination operated 'on the ground'. Our understanding of the historical interactions of gender politics and history of gender legal reform law in Mandate Palestine, I argue, would be further enriched by tackling the question of the role of early Arab feminism in order to show the extent to which feminism, nationalism and religion were fluid and contradictory categories of political mobilisation instead of homogenous and demarcated zones of differentiation.[16] In this manner, I narrate histories of solidarity against the empire, contributions to feminist transnationalism and resistance to colonialism[17] with the aim of knitting together the complex and contested history of the British Mandate for Palestine, the development of an early global transnational

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[15] Sari Kouvo & Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart Publishing, 2011).

[16] Susanne Schneider, *Mandatory Separation: Religion Education and Mass Politics in Palestine* (Stanford University Press, 2018).

[17] Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies & Vanessa Munro (eds.) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 13; Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir (eds.), *Governance Feminism: Notes from the Field* (University of Minnesota Press, 2018); Judith Butler & Elizabeth Weed (eds.) *The Question of Gender: Joan W. Scott's Critical Feminism* (Indiana University Press, 2011).

feminism in the Levant and the genealogies of international legal women's rights agendas.[18]

The next section briefly reviews the literature on the international mandate system and the colonial origins of the Palestinian feminist movement and discusses the politics of gender and race as a tool of historical analysis able to displace nationalist frameworks. Section 3 highlights the main interventions and themes of Arab feminists, focusing on the legal progressivism put forward by Palestinian women's collectives and societies. Section 4 highlights the nodes of tensions and contestation between the Arab women's movement and the international one in the former's efforts to balance social progressivism with an anti-imperialist stance. The article concludes by highlighting the significance of this pre-history of Palestinian and Arab women's activism for the history of international institutions and law, well before the birth of the UN and the inauguration of Third World women's voices in the Mexico Conference of 1975.[19]

2 The Mandate for Palestine and the Missing History of the Palestinian Women's Movements

Given the extent of the historiographical debate on the matter, it is not easy to more poignantly summarise the contradictions which led to British rule in Palestine than in the words of historian Tom Segev: 'The British entered Palestine to defeat the Turks; they stayed there to keep it from the French; then they gave it to the Zionists because they 'loved' the Jews even as they loathed them'.[20] Indeed, the letter 'conveyed' on 2 November 1917 by Lord Balfour, Foreign Office Secretary, to Lord Rothschild, head of the British Zionist Federation, saying that His Majesty's British Government viewed with sympathy Jewish aspirations to the land of Palestine, still remains one of the most controversial political and legal texts in European and Middle Eastern contemporary history.[21] The 'Balfour Declaration' came to enshrine the necessary recognition from the international community of the entitlement of the Jewish people to self-determination through constructing a legal personality as a prerequisite to statehood, sovereignty and independence. At that time, as Andrew Patrick and Roberto Mazza have pointed out, the principle of self-determination,

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[18] Judith Butler, *Parting Ways: Jewishness and the Critique of Zionism* (Columbia University Press, 2013); Luis Eslava, Michael Fahri & Vasuki Nesiah (eds.), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (CUP, 2017).

[19] Aziza Ahmed, 'Bandung's Legacy: Solidarity and Contestation in Global Women's Rights' in Eslava, Fahri & Nesiah (eds.), ibid.

[20] Tom Segev, *One Palestine, Complete: Jews and Arabs under the British Mandate* (Metropolitan, 2000) 33.

[21] Letter from UK Foreign Secretary, Arthur James Balfour to Baron Walter Rothschild, 2 November 1917 (*The Times,* 17 November 1917).

with few exceptions,[22] was a by-product of a Wilsonian idea, but 'how it operated on the ground [i.e. in a mandate] is a different story'.[23]

Moreover, self-determination as a legal and political principle was anything but consolidated. Woodrow Wilson's 'Fourteen Points' referred only generally to self-determination and the principle of representation to grant national sovereignty to the oppressed.[24] Point five recited the principle that 'a free, openminded and absolutely impartial adjustment of all colonial claims based upon a strict observance of the principle that in determining questions of sovereignty, the interests of the population concerned must have equal weight with the equitable claims of the Government whose title is to be determined', before specifically referring to the conditions of Russia, Belgium, Italy, Austro-Hungary, Romania, Serbia and Montenegro, Turkey and Poland.[25] In other words, in the famous speech to Congress on 8 January 1918, the acclaimed 'Moses of the Atlantic' and 'Saviour of Humanity'[26] set out his vision of ending war for all time through a peaceful international order only vaguely defined by the principle of national self-determination, the League of Nations and collective security, to be enshrined in a Covenant.[27] Initially, he conceived self-determination as a realisation of a principle of autonomy, a principle according to which all people should be free to live equally – i.e. in conditions of equality with other nations, therefore being equally free to determine their system of governance without fear of interference from other states. Wilson also specified that this principle of self-sufficient bounded autonomy of modern formation had nothing to do with 'ethnic nationalism'.[28] Despite this, self-determination was not realized in the Paris Peace Treaties.[29] Instead, it was

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[22] Banko (2019) 2.

[23] Erez Mandela questions such centrality of the principle of self-determination which basically collapsed in one year. Vladimir Ilyich Lenin, *The State and Revolution: The Marxist Teaching on the State and the Tasks of the Proletariat in the Revolution* (Foreign Languages Press, 1970); Deborah Whitehall, 'A Rival History of Self-determination' (2016) 27:3 *European Journal of International Law* 719.

[24] Woodrow Wilson, 'The Fourteen Points, Address to the Congress of the United States' (8 January 1918) https://avalon.law.yale.edu/20th_century/wilson14.asp (accessed 20 August 2020).

[25] Ibid.

[26] Mark Mazower, *Governing the World: The History of an Idea* (Penguin, 2013) 118.

[27] Plans for the League differed. See: Jan C. Smuts, *The League of Nations: A Practical Suggestion* (Hodder & Stoughton, 1918); John Maynard Keynes, *The Economic Consequences of the Peace* (Macmillan, 1920); Hersch Lauterpacht, 'The Covenant as the Higher Law' (1936) 17 *British Yearbook of International Law* 55. The Paris Peace Conference ran from 18 January 1919 to 21 January 1920 and generated five peace treaties: the Treaty of Versailles between the Allied Powers and Germany (28 June 1919); the Treaty of Saint-Germain with Austria; the Treaty of Neuilly with Bulgaria (27 November 1919); the Treaty of Trianon with Hungary (4 June 1920); and, the Treaty of Sèvres with the Ottoman Empire (10 August 1920).

[28] Erakat (2019) 34.

[29] E D Dickinson, 'A League of Nations and International Law' (1918) 12:2 *American Political Science Review* 304.

articulated as one of the components of a series of treaties concluded under the auspice of the League of Nations for the protection of minorities.[30]

At the beginning of the 20th century, the acquisition of territory through settlements and force was legitimate according to international law and organised anticolonial movements were yet to come.[31] After World War I, the Zionist nation-building project received the support of the United Kingdom. Surrendering to a deep internalisation of the racialised prejudices throughout a Europe which had never solved the contradiction of 'minorities' within the borders of the homogenous modern state, European states were attracted to the idea of finding a mediated solution to the intractable Jewish Question in Europe. The (un)mediated solution was to satisfactorily place them into a 'national home', i.e. grant Jews the status of a legally recognised political community.[32] Palestinians, however, were not granted the same privilege. Instead, they were defined in purely negative terms as the 'non-Jewish communities' whose 'civil and religious' rights should not be compromised.[33] This posed two sets of interrelated political issues: firstly, denying Palestinians' status as a legally recognised political community was tantamount to denying the right of a people to be bound by some shared sense of belonging to a community through language, culture and history. Despite many consultations of Arab political parties and groups on the question of sovereignty, Palestinians were not deemed or recognised as a population entitled to self-determination in the British Mandate for Palestine.[34] Secondly, the Balfour Declaration was in open contrast to the promises exchanged in letters from the British High Commissioner in Egypt, Sir Henry McMahon, to Hussein Bin Ali, Sharif of Mecca, between July 1915 and March 1916[35]

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[30] Cassese argues that self-determination did not form part of the Covenant of the League and therefore during the interwar period was understood as a political principle rather than a legal precept. This was confirmed by the Council of the League of Nations in the Aaland Island dispute, although in particular circumstances autonomy rights were granted to the population concerned. Antonio Cassese, *International Law*, 2nd ed (OUP 2004) 19; *Aaland Island* case, LNOJ, Supp. No. 3 (1920), at 5-6 and Doc. B7/21/68/106 VII; Antony Anghie, 'Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations' (2006) 41 *Texas International Law Journal* 447; Carol Weisbrod, 'Minorities and Diversities: The 'Remarkable Experiment' of the League of Nations' (1993) 8:2 *Connecticut Journal of International Law* 359.

[31] Eslava, Fakhri & Nesiah (eds.) (2017) 4-32 and 66-80.

[32] Erakat (2019).

[33] Strawson (2010); Ilan Pappé, *The Modern Middle East: A Social and Cultural History* (Routledge, 2014). Therefore, whereas Jewish rights were articulated in national terms, Palestinian ones were phrased in terms of individual rights; this had devastating consequences as it implied that native Palestinians did not possess any national rights. For an account of the inclusion of the Balfour Declaration in the Mandate for Palestine, see: Joseph Mary Nagle Jeffries, *Palestine: The Reality. The Inside Story of the Balfour Declaration* (Olive Branch Press, 2018).

[34] Lori Allen, *A History of False Hope: Investigative Commissions in Palestine* (Stanford University Press, 2021).

[35] The text of the correspondence can be found at: Jewish Virtual Library, 'Pre-State Israel: The Hussein-McMahon Correspondence (July 15 – August 1916) https://www.jewishvirtuallibrary.org/the-hussein-mcmahon-correspondence-july-1915-august-1916 (accessed 15 November 2020).

in which the British promised independence in exchange for Arab military support against the Ottomans.[36]

Legal historians have long debated these cardinal moments in the shaping of the international legal history of Palestine. The interpretation of this history, which reflects a critical and unorthodox approach to the history of international law, has the merit of bringing together contested histories of nationalism and illuminates the racialised inequalities of an international order solidly based on the reproduction of colonial and capitalist transitional modes of production and the dispossession of Palestinians. However, with few exceptions,[37] histories of international law and institutions do not acknowledge the contributions made by Arab feminists, whether in terms of developing a women's rights agenda, or in relation to the specific question of Palestine. In fact, Palestine has been a divisive and emotional question, not only within the history of international law, but also within the history of feminist transnationalisms and their different traditions – liberal, anticolonial or imperial – during the interwar period.[38]

Scholarly accounts of the Arab women's movements, among them the pivotal works of Fleischmann and Weber, have provided a historical analysis of Palestinian 'feminism'.[39] Arab-Palestinian women followed the development of the events after the Balfour Declaration with apprehension. Soon after its publication, in addition to the middle- and the upper-class charitable dimension of Levantine feminism, women's activities took on a more pregnant political extent: women journalists and writers, such as Sadhij Nassar in *El Carmel*, openly denounced the dispossession enforced through Zionist aspirations to the land[40] and demonstrations, marches, and sit-ins were held in cities such as Tulkarem, Haifa and Jaffa.[41] Pan-Arab sentiments informed Arab women's circles, together with reflections on the nature of

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[36]Ibid; Pedersen (2015); Roger Owen, *State, Power and Politics in the Making of the Modern Middle East*, (Routledge, 2004) 5-22.

[37] Likhovski (2006).

[38] Leila J Rupp, *Worlds of Women: The Making of an International Women's Movement* (Princeton University Press, 1997). Mineke Bosch (ed.) with Annemarie Klooster, *Politics and Friendship: Letters from the International Woman Suffrage Alliance 1902-1942* (Ohio State University Press, 1990); Myriam Everard & Francisca de Haan (eds.) *Rosa Manus (1881-1942): The International Life and Legacy of a Jewish Dutch Feminist* (Brill, 2018).

[39] Islah Jad, *Palestinian Women's Activism: Nationalism, Secularism and Islamism* (Syracuse University Press, 2018); Fleischmann, *The Nation* (2003); Fleischmann 'Selective Memory' (1999); Weber (2008); Abu-Lughod (ed.) (1998); Leila Ahmed (1992); Al-Ali (2000); Badran (1995).

[40] Arab women's circles were grounded in women's charitable work, linked to Islamic religious principles and Jewish and Christian missionary activism, which had been rooted in the Levantine Middle East for centuries. At the turn of the century, transnationally educated women writers, poets and artists were active agents in the contested nineteenth century *Al Nahda* - women's unions, book clubs and associations bloomed from Iraq to Egypt. Literary work often had political connotations and as such, at the beginning of the 20th century, women's activism was suppressed by the Ottoman authorities trying to quell anti-Ottoman Syrian sentiments.

[41] Badran (1995); Fleischmann, *The Nation* (2003).

female emancipation and the role of women in society. Institutionally, Arab feminist networks emerged from the first Palestinian general Women's Congress in Jerusalem which hosted more than 200 women from the region in October 1929.[42] This had been preceded by a series of women's gatherings in Beirut in 1928 and was followed by another in Tehran in 1930.[43] From these conferences, petitions were sent to the League of Nations. Arab women not only campaigned for women's rights in education, and health and labour reforms, but also tackled the issues of colonialism, peace, immigration and foreign occupation of their respective countries: Palestine, Lebanon, Syria, Egypt, Iran and Iraq.[44] Rightly so, this period has been defined as 'the age of associations' and marked the birth of the *strictu sensu* Palestinian women's movement[45] and the formation of the Arab Union of Women.[46]

These histories of Arab feminism have shown how national self-determination, decolonisation and social justice were deemed central concerns by the Arab women's movement.[47] Nevertheless, early Arab feminism, specifically in Middle Eastern scholarship, is often dismissed as 'state feminism', fixed in heteronormative foundations, rooted in an acritical faith in western-oriented state reformism and marked by class privilege. The early Palestinian women's movement is described in the literature as an example of an early development of liberal state feminism, often serving the colonial interests of the British Government and Palestinian elite families, both disconnected from the daily realities of working class, uneducated and rural women.[48] Although this cannot be denied, the overzealous focus of this scholarship on fixed and essentialised notions of identity and race runs the risk of producing an overly descriptive account which is blind to the processes of gender legal reform put in place during the legal modernisation period.[49]

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[42] Numbers vary depending on the literature.

[43] Charlotte Weber, 'Making Common Cause: Western and Middle Eastern Feminists in the International Women's Movement, 1911-1948' (PhD thesis, Ohio University, 2003).

[44] Anbara Salam Khalidi, *Memoirs of an Early Arab Feminist: The Life and Activism of Anbara Salam Khalidi* (Pluto Press, 2013).

[45] Andrew Arsan, 'This is the Age of Associations: Committees, Petitions, and the Roots of Interwar Middle Eastern Internationalism' (2012) 7 *Journal of Global History*, 166; Fleischmann, *The Nation* (2003). Generally speaking, the distinction between women's and feminist associations lies in the definitions used in the sources.

[46] In this sense, the Arab Union of Women preceded the formation of the Arab League as an Arab Union of States (1945) establishing the roots of a feminist pan-Asian and pan-Arab solidarity that would develop further in 1955 (Bandung), 1965 and 1975 (Mexico). Eslava, Fakhri & Nesiah (2017) 12.

[47] Ingrid Sharp & Matthew Stibbe, 'Women's International Activism during the Inter-War Period, 1919–1939' (2017) 26:2 *Women's History Review* 163; Weber (2003).

[48] Rosemary Sayigh, 'Palestinian Women: Triple Burden, Single Struggle' in Khamsin Collective (ed.), *Palestine: Profile of an Occupation* (Zed Books, 1989); Leila Ahmed (1992); Abu-Lughod (1998).

[49] For an overview see Deniz Kandyioti, 'Contemporary Feminist Scholarship and Middle East Studies' in Deniz Kandiyoti, *Gendering the Middle East. Emerging Perspectives* (Syracuse University Press, 1996).

Child marriage, nationality, divorce and the denouncement of colonial brutality and violence against women were at the top of the socio-legal agenda of a series of eastern and western conferences in the 1930s in Europe and the Middle East.[50] The history of these conferences and the negotiations between liberalism and colonialism, as well as race and religious affiliations, shaped an early anticolonial axis of feminist politics of human rights formation in both the private and public law domains. They reveal tensions, convergences, and moments of solidarity and departures, as Arab and Global Southern women activists tried to develop a unified front to advocate a women's rights agenda in international institutions. As such, the history of the making of global feminisms enriches our understanding of histories of international law and the notion of a global legal history.[51]

Regarding the state-centrism of early Arab feminism, an analysis of women's petitions and feminists' transnational gatherings shows that these offered public fora that Palestinian women navigated with an early strategic use of 'gender essentialism'. Spivak coined this term to highlight the deconstructive strategy involving the adoption of essentialist and reified positions, i.e. 'oriental women', in order to mobilise a collective representation of common political goals and legal aims within the politics of the mandate.[52] Palestinian women used strategic essentialised notions of gender and womanhood to foster transnational anti-colonial networks that had at their core anti-imperialism and the struggle for social progressivism. Accordingly, this early liberal *and* anticolonial politics of gender legal reform within mandate borders enriches our understanding of international legal history and first first-wave feminism and eventually paves the way to centring race and gender as analytical categories to write a transnational legal history of gender politics and feminist reform. As Ann Genovese has argued, this implies a re-articulation of the relationship between law, history and feminism rather than a mere reaction to the absence of women in mainstream history.[53] The question is not how feminists use law as a political means or strategy, but rather how to embrace the concept of feminism as historical construction to avoid both teleological and civilisational dimensions of legal history. This is a reasonable concern when thinking about

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[50] Generally speaking, personal status legislation in the 1920s and 1930s defined women as dependent on men, as emotional beings who could not be trusted and who were granted a divorce only if the husband was ill or impotent. Mai Taha, 'Reimagining Bandung for Women at Work in Egypt: Law and the Woman between the Factory and the Social Factory' in Eslava, Fakhri & Nesiah (eds.) (2017) 349.

[51] Myra Marx Ferree & Aili Mari Tripp (eds.), *Global Feminism: Transnational Women's Activism, Organizing, and Human Rights* (NYU Press, 2006).

[52] Gayatri Chakraborty Spivak, 'Can the Subaltern Speak?' in Cary Nelson (ed.), *Marxism and the Interpretation of Culture* (Macmillan, 1988).

[53] Ann Genovese, 'How to Write Feminist Legal History: Some Notes on Genealogical Method, Family Law, and the Politics of the Present' in Diane Kirkby (ed.), *Past Law, Present Histories* (ANU Press, 2012).

processes of exclusion and inclusion of Palestinian feminist histories and knowledge which are often read in either a celebratory or disparaging tone, whether it is about celebrating their inclusion (for example, in peace initiatives or processes) or lamenting their exclusion (from the Mandate to Oslo and today).[54]

To conclude, the rise of transnational and Global Southern feminist activisms and their interaction with international institutions during the interwar period is now starting to be acknowledged in the literature. From the 1915 Hague Congress onwards, the entry of women into the hall of international institutions signals their effort to envision, although not unitarily and cohesively, a global platform for advocating peace and women's rights.[55] While an early transnational feminist stage was being set up between the 'West' and the 'East', I argue that the question of Palestine was always on the agenda, in a way that allows critical feminist historians to debate less the male mutually-exclusivist and ancestral connections to the land of Palestine, but more the development of an anticolonial politics of gender legal reform and the centrality of a first wave of Arab women's solidarity movements in the Levant.

3 Legalism and State Feminism: The Early Arab-Palestinian Women's Movement

'State feminism' is an often-abbreviated locution used in feminist, postcolonial and Middle Eastern studies to define an early Arab feminism that was often too reliant on Western-imposed state structures. Instead, bearing in mind that feminist engagements with state infrastructures, in some cases coming from an elite position, are seen as embedded in the postcolonial condition,[56] in this section, I focus on the use of legal tools and engagements with international mandate law as a way for Palestinian women to participate in international governance. The emerging 'first-wave' feminism(s) in Palestine soon developed one of its core characteristics: the ability to legally handle and politically mediate between different socialist, left-wing, nationalistic and anti-authoritarian social forces, Western-imposed civilisational standards and state-elite formations to promote gender legal reform.[57] Interests in social progressivism and anti-imperialism informed a double strategy used by

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[54] Amal Kawar, 'Palestinian Women Activism after Oslo' in Suha Sabbagh (ed.), *Palestinian Women of Gaza and the West Bank* (Indiana University Press, 1998) 233.

[55] Peggy Antrobus, *The Global Women's Movement: Origin, Issues and Strategies* (Zed Books, 2004); Rupp (1997); Susan Pedersen, 'Metaphors of the Schoolroom: Women Working the Mandates System of the League of Nations' (2008) 66:1 *History Workshop Journal* 188.

[56] Laura Bier, *Revolutionary Womanhood: Feminisms, Modernity and the State in Nasser's Egypt* (Stanford University Press, 2011)

[57] Badran (1995); for a historical perspective see Rupp (1997). See also Glenda Sluga, 'Female and National Self-Determination: A Gender Re-reading of the "Apogee of Nationalism"' (2000) 6:4 *Nations and Nationalism* 495.

Palestinian women in legal and political institutions: on the one hand, they engaged with the legal procedures put in place by the League and the mandate authorities to advance a nationalistic politics. On the other hand, they mobilised through axes of broader socio-economic issues centred on race and colonialism to forge a Global Southern women's-based solidarity network in international feminist conferences.[58]

In 1923, the Egyptian Feminist Union was included in the International Women's Suffrage Alliance (IWSA), and was very vocal in various conferences (Paris, 1926; Berlin, 1929; Istanbul, 1935; Copenhagen, 1939) about the fact that freedom and justice for women from the 'East' depended on national self-determination, sovereignty and the advancement of women's rights.[59] The IWSA Conferences of 1923 (Rome) and 1926 (Berlin) paved the way for Arab women to reject the Western representations of a backward East. But this rejection was not without its contradictions.[60] The subtle balance between regional Arab solidarity committed to social and cultural development, and the resistance to a racialised euro-centric international system on whose recognition colonised communities conditionally depended, characterises the turbulent atmosphere and the different inclinations of feminisms in the interwar period. Nevertheless, because of the peculiar conditions of the British Mandate for Palestine, Palestinian feminism was singular in its ability to combine a legalistic and liberal approach focused on the inclusion of women in the nation-building project when dealing with the mandate authorities, and an anti-imperial stance in international feminist gatherings. No other women's group in the Middle East petitioned the Permanent Mandate Commission as relentlessly as the Arab-Palestinian women's organisations.[61]

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[58] The first Arab women's conferences took place in Beirut in 1928, Damascus in 1930 and Tehran in 1932 and were organised by the Women's Union in Syria and Lebanon. The 1928 Beirut conference saw the formation of the Arab Union of Women, to which all Arab women's federations throughout the Arab countries were affiliated. Khalidi (2013) 114.

[59] Al-Ali (2000). This clash between nationalism, feminism and colonialism has been defined as the 'sisterhood of unequal sisters' in Bosch (ed.) with Klooster (1990). Most importantly, for a Third World perspective, see Jayawardena (1986).

[60] Moreover, and at the same time, different forms of non-Western orientalism were also in play: Nabarawi contrasted Egypt with 'savage Africa', and El Aklee Faridaa in Syria also distanced Syrian women from all other backward 'Muslim women'. In fact, Baron points to the 'central paradox' of Egyptian nationalists fighting 'European imperialism at the same time that they sought to regain control of their own empire in the Sudan': Beth Baron, 'The Making of the Egyptian Nation' in Ida Blom, Karen Hagemann & Catherine Hall (eds.), *Gendered Nations: Nationalisms and Gender Order in the Long Nineteenth Century* (OUP, 2000) 137-58.

[61] In particular, I examined 12 petitions whose archival references were taken from the register of petitions created at the League in 1928. S1681, LNA. Van Ginneken, in her foundational work on the petitions and communications which were sent to the PMC, counted 3044 petitions, 1237 from Palestine. A H M Van Ginneken, 'Volkenbondsvoogdij: Het Toezicht van de Volkenbond op het Bestuur in Mandaatgebieden, 1919-1940' (Diss. University of Utrecht, 1992). Pedersen (2012) counted only those petitions contained in the register of petitions: of the 428, 16 were from women or women's groups.

Legalism required a strong command of the international mandate governance and a belief that women's conditions would be improved by securing their political and social rights and equality with men within the nation-state. For example, Matiel Mogannam, in *The Arab Woman and the Palestine Problem,* briefly recalls the history of women's movements in Arab countries during the interwar period.[62] On women's rights, Mogannam praised feminist activism in Turkey and Egypt as more in line with the standard of 'modern' legislation. She lamented the state of Levantine countries, which, under the Mandate system imposed by the League, had yet to put in place those 'desirable measures of reform of the social order … most desirable in bringing to an end many of the age-old evils which for centuries had debarred women from entering public life'.[63] However, on Palestine, the question was even more complicated: 'how can women claim rights, if men do not have any?'[64] In January 1929, Jerusalemites Walidha Al-Khalidi and Zulaykha Al-Shihabi organised the first Palestine Arab Women's Congress in Jerusalem, hosting more than 300 women to discuss Palestine's political situation.[65]

Figure 1. Arab Ladies Women's Group, Matson. Photograph Collection, Library of Congress

[62] Matiel ET Mogannam, *The Arab Woman and the Palestine Problem* (Hyperion Press, 1937).

[63] Ibid, 50.

[64] According to Fleischmann, this rhetorical question was articulated by the former president of the Tulkarm Arab Women's Union, Wadi'a Khartabil: Ellen Fleischmann, 'Nation, Tradition and Rights: The Indigenous Feminism of the Palestinian Women's Movement, 1929-1948' in Ian Christopher Fletcher, Laura E Nym Mayhall & Philippa Levine (eds.), *Women's Suffrage in the British Empire: Citizenship, Nation and Race* (Routledge, 2000) 146.

[65] Fleischmann, *The Nation* (2003) 116-120.

Figure 2. Arab Women's Union of Ramallah. Photograph Collection, Library of Congress.

Anbara Khalidi writes in her memoirs that she was struck by the frankness of the political demands of Palestinian women and the patriotic positions adopted in the Arab Congress, and praised the resilience of individual feminists – Zakiyya Al Husayni, Wahida al Khalidi, and Tarab Abd al-Adi – who attended and tirelessly balanced feminist political organising and social care.[66] In the context of the regional 'Arab Women's Awakening',[67] the Arab-Palestinian women's focus, as demonstrated by the petitions sent to the Permanent Mandate Commission at the League of Nations, was more on 'political' issues such as economic rights, 'civil discrimination' and 'national rights'. From first-hand accounts of the period, the feelings of women in Jerusalem in 1929 varied, but the urgency of the Palestinian question and the centrality of British and Zionist colonial interests in denying the Palestinian people's right to self-determination remained constant. Indeed, the resolutions of the first Arab Palestinian Congress in 1929 focused on rejecting the Balfour Declaration, which was described as 'the sole cause of all the troubles that took place in the country, and which may arise in future'.[68]

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[66] Anbara Salam Khalidi (2013).

[67] Ibid, 116-122.

[68] Matiel Mogannam, 'The Struggle for National Rights (1937)' in Maureen Moynagh with Nancy Forestell, *Documenting First Wave Feminisms: Transnational Collaborations and Crosscurrents* (University of Toronto Press, 2012) 209.

It was strongly believed that the emancipation of Arab women and their preparedness to be part of the political body of the nation state depended strongly on their participation in the international arena using the legal tools offered by the British Mandatory government and advocating women's emancipation through women's rights and equality in the nation state. A long petition emerged from the Congress and was sent to the Permanent Mandate Commission of the League of Nations on 28 September 1932.[69] The petitioners criticised the excessive expenditure of the Palestine administration; condemned the racial discrimination in the civil service; denounced the situation of the *fellah* (peasants), whose difficulties arose from the confusing policy of the Palestinian Government in regard to land; lamented the state of primary and secondary school education; demanded abolition of the tithe and, finally, in a section titled 'The Right of the Arabs to a National Government', addressed the question of self-government and self-determination. By highlighting these issues, the Arab Women's Committee projected its manifesto into the politics of international mandate law: legal equality, economic modernisation, resistance to colonial dispossession and education were indeed pillars of any national project. However, as Khalidi suggested, the forthright and unequivocal phrasing of the Arab Women's Executive's (AWE) demands caused unease at the Colonial Office, some of whose denizens were about to become acquainted with the existence of the 'oriental ladies' themselves.[70]

Some scholars have argued that it is inappropriate to classify the politics of the Arab women's movement as 'feminist' since the articulation of its politics and nationalistic demands simply followed, as mere counterparts, those of their male colleagues.[71] In contrast, I argue that a more attentive look at the contents of the petition shows that the AWE not only put forward the interests and conditions of the most vulnerable members of society (e.g. education for the young, abolition of the tithe for peasants), they also used the petitions as a legal tool to hold the Mandatory power accountable for its discriminatory policies in Palestine and to demonstrate their 'preparedness' for self-determination and national government.

I argue that the demands for protection for the more vulnerable parts of society express the willingness to balance two different interests: the resistance to colonial mandate authorities in the light of women's nationalist struggle and the legal progressivism required to foster better protections of workers, and civic equality in

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[69] Executive Committee of the First Palestine Arab Women's Congress to the President of the Permanent Mandates Commission, 28 January 1932, 6A/37592/224, R2288, LNA.

[70] Petition regarding the administration of Palestine, FO 371/16052, TNA, 66; First Palestine Arab Women Congress: memorandum to the Permanent Mandates Commission CO 733/221/9, TNA.

[71] Fleischmann, *The Nation* (2003).

the mandate legal arena. However, this claim for protection was mostly directed to a coexisting plurality of actors – to the poor, the women and the national community.[72] Rather than considering this as an absence of a coherent feminist strategy, it shows how early Arab-Palestinian women, in their multiplicity and differences, were less single-mindedly obsessed with the state, both in terms of women's rights and in terms of self-determination. Rather, they seemed preoccupied with guaranteeing basic economic and legal protection to all members of society and locating themselves with their own specific interests in relation to the exceptionality of Palestine in political circles. The impact of their interventions was underlined by the British Mandatory authorities' twofold response: because of their gender, Mandatory authorities felt obliged to pay the respect devoted to women in Arab societies and saluted with 'honour' their 'awakening'.[73] However, the provenance of the document from an 'obviously sectional body of this kind'[74] unsettled the British Mandate authorities who found it discomforting having to deal with these 'violent Arab women'.[75]

The Arab-Palestinian women's associations were the most active petitioners to the PMC in regard to the Palestine Mandate.[76] This could be explained by the well-educated and elite background of Palestinian women's activists, who were well versed in dealing with state authorities and international tools of governance. Feminist interventions that came from an elite formation and engaged in various ways in international governance are, in this article, nevertheless considered embedded in the (post)colonial condition. I argue that some of Palestinian women's class privilege should be read in tandem with their ability to strategically use their gendered and racialised identity as 'Arab women' in front of international mandate authorities to push the urgency of their demands. In some cases, and this is certainly true for those women, such as Matiel Mogannam and Anbara Khalidi, who were active participants in the politics of wealthy and influential Palestinian families, the overall assessment of their politics is ambivalent. As Salem has argued, the peasant woman was agitated as a symbol of freedom without much reflection on the fact that the economic disadvantage of those women was dependent on the class privilege

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[72] Ibid, 142.

[73] Ibid, 116.

[74] First Palestine Arab Women Congress: Memorandum to the Permanent Mandates Commission CO 733/221/9. TNA.

[75] Ibid.

[76] This is compared to other mandate territories in the Middle East. In the Levant, I found only four petitions from individual women and women's collectives on Syria and Lebanon, out of a total of 746. Two of them were from British women, one from the Arab Union of Beirut and one from the IWSA. S1681 LNA.

enjoyed by the upper-class and middle-class elite.[77] However, elite women used their privilege as an opportunity to organise, to publish and to agitate at an international level. Thus, notwithstanding their class privilege, a study of Palestinian women's role as agents of resistance through legal (i.e. petitioning the League) and political (i.e. fostering transnational network tools) shows women's efforts to make Palestine a central and global feminist issue. The number of petitions sent by women's groups from Palestine and the Global South supports the thesis that Palestinian women were not marginal in either the history of international law or feminist transnationalism.[78]

To conclude, in alignment with their 'sisters' elsewhere in other countries, the fight for national self-determination ran parallel to a reconsideration of women's role in (Arab) societies. The demands for basic social-economic protections centred on equality as a pivotal principle of a civilised and democratic nation-state, and which was central to women's struggles against the British Mandate authorities. Without denying their contradictions in terms of class privilege, shared by both the liberal and socialist strands of the transnational women's movements of the time, as we will see in the next section, their interventions in international law should be acknowledged along with the genealogies of feminist peace activism and the forging of the links between humanitarianism, peace and justice during the interwar period.[79]

Figure 3. 1929, Women Delegates to the High Commissioner

[77] Sara Salem, 'On Transnational Feminist Solidarity: The Case of Angela Davis in Egypt' (2018) 43:2 *Signs: Journal of Women in Culture and Society* 245, at 261.

[78] Mogannam (1937).

[79] Patricia Owens & Katharina Rietzler (eds.), *Women's International Thought: A New History* (CUP, 2020).

Figure 4. 1930, Arab Women's Congress, University of Damascus

4 Race and Identity: Ruptures within Feminist Transnationalism

A second important characteristic of the Arab-Palestinian women's movement was its transnational reach to foster Global Southern solidarity networks. In July 1930, the first Eastern Women's Congress (also known as the General Congress of Oriental Women or Oriental Women's Congress), held at the University of Damascus, included delegates from Egypt, Turkey, India, Persia and Afghanistan, as well as Iraq, Hedjaz and Aleppo.[80] The meeting was chaired by Nour Hamada, who blamed the low attendance on the opposition of the French Government of Syria. However, committed to counteracting French policing of feminist meetings by inviting an international observer, she asked IAW member Avra Theodoropolous to attend the conference. Describing the multi-faith character of the meeting ('Christians, Jews, Moslems, Maronites, Greek Orthodox, Behai, Druses, etc'),[81] Theodoropoulos recognized how Eastern women had to fight multiple causes: against the conservative religious men (scared that women were rebelling against traditions) and the nationalist elites (scared that they were not supporting enough the project of national liberation) and against the colonialist (government – feared that it was a national organisation).[82]

Moreover, the Arab feminist transnational reach was also directed toward the Indian women's movement. Accounts of the 'oriental' or 'eastern' congresses of Beirut (1928) and Damascus (1930) were published by the All-Asian Women's

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[80] Eastern Women's Conference, 1931, *Pax International*, PC:09:56e, LSE Women's Library. *Pax International* was the magazine of the Women's International League for Peace and Freedom (WILPF), as emerged from the International Congress of Women in The Hague in 1915.

[81] Quoted in Ellen Carol DuBois & Haleh Emrani, 'A Speech by Nour Hamada: Tehran, 1932' (2008) 4:1 *Journal of Middle East Women's Studies* 107, at 110; Theodoropolous, an IWSA delegate coming to Greece, a Mediterranean country between the 'West' and the 'East', was deemed by Hamada to be best placed to mediate between the international feminist movement and the Arab regional one.

[82] Weber (2008).

Conference of January 1931. There, Indian feminists articulated a 'spirit of Asian sisterhood', with the object of preserving all that was valuable in their national and social cultures and choosing what was best for them to assimilate from outside Asia.[83] The congress resolutions underlined their support for peace and the League of Nations and sought: the inclusion of world religions in school and college curriculums; free and compulsory education for both girls and boys; equal moral standards and women's equality (abolition of polygyny, equal custody and property rights, equal rights to divorce and equal nationality rights), just as much as their demand for equal suffrage.[84] In a preliminary way, the feminist agenda sketched in those transnational endeavours foregrounded what would be a greater articulation of women's rights from a Third World perspective, one that the women's movement would finally delineate during the decolonisation years.

But on Palestine, transnational and international feminist solidarity took a more controversial shape. As argued in the section above, the 'political' character of the Palestinian women's movement was a challenge. The negotiations between 'the colonialists' and the 'nationalist elites' had to include the Mandatory Government and a pluralised network of progressive and cosmopolitan women's organisations from both Palestine and from the Jewish and Arab diasporas. In some instances, gender-related legal reform in Palestine profited from successful Arab Muslim, Christian and Jewish feminist cooperation in international mandate law-making. For example, prompted by a concerted international feminist campaign, as Likhovski demonstrated, the legal reform achieved on child marriage was remarkable.[85] The Social Service Association, composed of elite wives of Mandatory officials but in contact with a pluralised ensemble of Arab local women's groups in the country, praised as a great legal victory the raising of the minimum marital age for girls to 16.[86] Many British and feminist commentators, often members of secular feminist groups, cherished this as an example of successful inter-faith cooperation, being fully aware of the role of religion in the Holy Land. However, this acknowledgment was a double-edged sword for the emancipation of the Arab woman and a question for Arab self-governance in the Levant;[87] for example, while female Jewish lawyers won

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[83] Sumita Mukherjee, 'The All-Asian Women's Conference 1931: Indian women and their leadership of a pan-Asian feminist organisation' (2017) 26:3 *Women's History Review* 363; Weber (2008); Sharp & Stibbe (2017).

[84] Weber (2008).

[85] Likhovski (2006).

[86] Ibid.

[87] Mogannam (1937).

the right to practice in civil and rabbinical courts, Palestinian Muslims were excluded from practicing law in Shari'a and tribal courts.[88]

However, in several IWSA and WILP conferences, instances of disparate treatment demonstrate the use of a double standard in response to Palestinian women's condition and an aversion to the inclusion of Palestine in women's spaces. The question of Palestinian women's 'self-consciousness' and preparedness for world governance and solidarity was often discussed in condescending and orientalist tones within transnational feminist circles, and more skeptically acknowledged than any other feminist movement in the Middle East. Reports such as the one below testify to Westerners' inadequate understanding of the colonial conditions on the ground where national struggle in the Middle East arose. It was with condescending and patronising tones that Juliette Rao, a French member of the executive board of the Women's International Alliance for Peace and Freedom (WILPF),[89] reported for *Pax International,* from the Palestinian Arab Women Congress:

> Because of their absorption in patriotism the Arab women have not yet acquired a sense of world solidarity. One of them with whom a friend and I talked about the purpose and work of W.I.L. said: 'We desire justice first, then we will work for peace', to which one might reply there can be no justice without peace. But national consciousness is a step towards world consciousness. The former has united Christians and Mohamedans. We need not fear that this consciousness will not grow. The Arab women will become in time active and enthusiastic members of our great world family of women.[90]

WILPF defined itself as a 'pioneer in world mentality' and 'a psychological laboratory for developing that sense of oneness and world citizenship'.[91] The question of Palestine remained a terrain of contested tension and the 'patriotism' of Palestinians and, by association, Arab women became a *leitmotif* of Western women's attitudes towards Palestinian feminism. This tendency became even more obvious as

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[88] Justin Quinn Olmstead (ed.), *Britain in the Islamic World: Imperial and Post-Imperial Connections* (Palgrave MacMillan, 2018) 179. Civil discrimination was also invocated by one petitioner, Wadhie Attalah, protesting to the PMC against the existing legislation in Palestine relating to the admission of persons to practice as barristers, contending that the admission of foreigners was unfair competition for Palestinian barristers. 'Liberte d'exerces la profesion d'avocat. 14 July 1932. S1681; minutes of PMC 23rd session, 1933, 167.

[89] Born of The Hague Congress in 1915 and traditionally more left-wing, socialist and pacifist than the International Alliance for Suffrage. Women International League for Peace and Freedom, *Generations of Courage, The Women's International League for Peace and Freedom from the 20th Century into a New Millennium* (US Branch, Women International League for Peace and Freedom, 2004).

[90] The Arab Women (1930).

[91] Madeleine Zoty, 'The W.I.L. World Section (1930)' in Moynagh with Forestell (2012) 197. Indeed, WILPF, founded at the Peace Congress in The Hague in 1915, was the most active at a transnational level compared to the other main international organisations such as the IWSA (Suffrage Alliance) and the IWC (Women Councils). Unlike those, WILPF by statute expected the nationally affiliated section to follow the international one, promoting a more centralised, transnational and inclusive view of women's issues and organisations. Karen Offen, *European Feminisms 1700-1950: A Political History* (Stanford University Press, 2000)

international relations deteriorated in the late 1930s due to the rise of Nazism and Fascism in Europe and later, the first Arab Revolt in 1936. In other words, after the 1935 International Women Suffrage Alliance conference (IWSA) in Istanbul, historical evidence shows no further instances of effective cooperation between anticolonials and liberals within the international (mainly Western) and regional (Middle Eastern and pan-Asian) feminist movement. The Congress is cherished in the literature as an example of international 'feminist success' and its resolutions were widely agreed on and focused on international peace, child labour and rights to vote and divorce. After their struggle towards national independence its 'Eastern members' were finally welcomed by acclamation to the 'world family of women'.[92] However, despite the welcoming declaration, the downturn in international politics after 1936 greatly impacted the activities of the transnational feminist movement.

The relation of international feminists to justice and peace became deeply vexed, and not a single organisation had a unitarian, homogenous and cohesive feminist politics towards international peace, colonialism or national liberation as the international relations in the 1930s unfolded. In theory, IWSA was suffragist and pacifist, grounded in a maternalistic view of international affairs based on an essentialised idea of women's reproductive role in society. Some of the more 'equal rights' and legalistic of its members considered national liberation as somehow outside feminist work. WILPF, however, had a broader vision of women's rights *as* human rights, often supporting national liberation struggles, and in general its members remained faithful to the international agenda of peace.[93] In a time of renewed militarism, totalitarian politics and racial and ethnic exclusion, WILPF focused on disarmament, protecting minorities, fostering anti-fascist alliances and fighting anti-Semitism in Europe.[94] Some attempts to move beyond eurocentrism and build a global and transnational feminist alliance were made, for example protesting against Japan's and Italy's invasions of China and Ethiopia. However, by 1936, the Spanish Civil War and the Nazis' militarist aggression and breach of the Treaty of Versailles meant many European feminists had to choose, in the short term at least, between peace and antifascism.

It is in the light of the idea of a 'planetary civilisation' embodied by WILPF feminists[95] that Juliette Rao's reply 'there can be no justice without peace' is read:

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[92] International Alliance of Women for Suffrage and Equal Citizenship, *Report of the Twelfth Congress,* Istanbul, April 18th to 24th, 1935, 8.

[93] Offen (2000) 341-379.

[94] Ibid.

[95] Catia Confortini, 'Race, Gender, Empire, and War in the International Thought of Emily Greene Balch' in Owens and Rietzler (eds.) (2020) 244, at 252.

after 1930-1933 came the complicated problem of whether their long-term principle of peace and feminist solidarity should be put aside in order to deal with the perceived short-term emergency of Nazi-Fascism. Views differed. Emily Green Balch, for example, claimed that 'everything should be set aside until Germany is liberated' whereas Helena Swanwick's relentless defence of peace almost gave her the role of a public apologist for Nazi crimes to her colleagues.[96] But in general, Ashworth claims that towards the mid-1930s, fascist aggression rendered the otherwise compatible issues of peace and justice incompatible for most European feminist members. [97] However, in the unequal (settler) colonial society, the issue was not a short-term emergency but part of the daily structural constant negotiations of power relations in an unequal international order.

In fact, the IWSA 1935 conference was already a watershed.[98] For members of the WILPF and IWSA, the international women's movement aimed to cultivate a culture of internationalism. However, it was very clear to their Arab counterparts that that aim would not be possible without the recognition of preconditional national sovereignty. The centrality of national sovereignty can be exemplified by the issue of sex work/prostitution. At Istanbul, Egyptian feminism pointed out how transnational sex work/prostitution was protected by capitulations and enforced by the British-controlled colonial police.[99] Therefore, to end state-protected prostitution, the abolition of capitulations was essential. The IWSA refused to get involved, claiming it was a national affair. Indeed, in 1938, the issue of Jewish immigration and refuge in Palestine was also classified as a national affair. Huda Sharawi, an IWSA Executive member, attempted in 1938 to pass a proposal from the Palestinian Arab Women's Executive to block Jewish immigration to Palestine. However, the IWSA, during Jewish persecution in Europe, did not want to discuss it, and the issue was classified as a national concern during the executive meeting. Sharawi tried to raise it again during the Copenhagen conference in 1939, after having organised the Conference for the Defence of Palestine in Cairo in 1938 in support of the 1936-1939 anticolonial Arab Revolt, but the Jewish Women's Equal Rights Association rejected it without hesitation.

Meanwhile, one of the most active Palestinian feminists and unionists, Sadhij Nassar, had been abducted by the British police in Haifa and imprisoned in the

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[96] Lucian Ashworth, 'Women of the Twenty Years' Crisis: The Women's International League for Peace and Freedom and the Problem of Collective Security' in Owens and Rietzler (eds.) (2020) 136, at 153.

[97] Ibid.

[98] In fact, Rupp shows how this trend of 'liberating Oriental women' did not go unchallenged. Rupp (1997) 80.

[99] Even if the capitulations regime was theoretically abrogated by the Treaty of Lausanne, the capitulation treaty between the UK and Egypt remained in force until 1937. Badran (1995) 99; Beverley Milton-Edwards, *Contemporary Politics in the Middle East*, 3rd ed. (Polity, 2011).

Bethlehem women's prison. A further node of tension around national sovereignty arose because of the alleged double standard used by the IWSA in dealing with feminist Jewish and Arab prisoners. In particular, IWSA and WILPF members had different reactions to the arrest of Sadhij Nassar in Haifa, and that of Františka Plamínková, a Czech senator in Prague. Plamínková was a Jewish Czech affiliate of the IWSA who was detained by the Germans after the March 1939 Nazi entry into Prague.[100] Sadhij Nassar, president of the local branch of AWU, the Haifa Women's Union, and *Carmel* journalist, who headed the Palestinian delegation to the IWSA Istanbul conference in 1935, was arrested on 23 March 1939 and detained without trial, the first Palestinian woman to be imprisoned under the Emergency Regulations. The IWSA issued a statement of protest in favour of Plaminkova but not of Nassar. This was perceived as a double standard in its response to violating individual liberties – i.e. one standard for Nazi-Fascist totalitarian states, and another for imperialist democratic ones.[101]

Both the eurocentrism within white feminist organisations and the exceptionalism of Palestine can explain this differential treatment of Palestinian women. In favour of a Eurocentric critique, what does emerge from the IWSA minutes is that Plamínková was extremely vocal, participative, and solidly rooted in the WILPF and IWSA executive board and its work in a way that differed from Sadhij Nassar who was far from them in terms of geography, politics and background. However, this tension illustrates the centrality of the difficult negotiations between the nation as a precondition of equality in the international arena, and the racialised politics of internationalism within the early feminist movement. In other words, the national equaled the political, and if the women's movement wanted to reach its goals, petty national politics had to be left at the door. Unfortunately, claiming neutrality and eliding politics had the undesired consequence of foreclosing the possibility of interrogating colonialism and its implications, and it is in this sense that Arab women's marginalisation in the world of feminist networks is read.[102]

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[100] Released after a few weeks, she remained under Gestapo surveillance, was then arrested a second time and was murdered by the Nazis in 1942.

[101] Weber (2008).

[102] Weber (2008).

5 Conclusion

The negotiations between colonialism, nationalism and feminism were a controversial issue for women's activism under the British Mandate, and early Palestinian feminism has been characterised in the literature as immature and incomplete because of its statist dimension. It is seen as lacking, under the conditions of a colonial world order, the legal understanding that the mere establishment of a sovereign state would not automatically bestow 'rights on women'.[103] The qualification of the 'state feminism' in Mandate Palestine points to the limitations of an imposed Western liberal standard and notions of women's rights and citizenship in the Levant. However, it also often marginalises what I argue was remarkable transnational legal activism by the early regional women's organisations, an activism rooted in anti-imperialism within a federate regional governance in the Levant in a way that, while modelling a liberal reformist standpoint, actually contributed to challenging it from within by posing questions of equality, race and privilege that are at the core of political organising.

This leads us to conclude that the panorama of Arab-Palestinian feminism at the time, although presenting different political preferences, was united in opposing the settler colonial Zionist project, therefore leading to a balanced understanding between feminist and national emancipation in a way that was not single-mindedly obsessed with the state. In this sense, balancing social progressivism with anti-imperialism was seen as essential to this struggle, and anti-discrimination, both against colonial powers and within the early rise of an international feminist movement, was of paramount importance. In other words, rather than aiming for seats of power in an abstract notion of an independent and centralised state, Arab women's activism of the 'first wave' seemed more directed at balancing social progressivism and rejecting foreign Western control (albeit without denying their own imperialism)[104] through the fight against religious and racial discrimination and colonial violence, with the aim of improving education, social justice, the conditions of the poor, prisoners, workers and the elderly, i.e. the most vulnerable members of society. Methodologically, retrieving and including women's voices from international accounts of nationalism and sovereignty in Mandate Palestine is not a mere fulfilment of the monotonous requirements imposed by a feminist commitment to include gendered subjects in historical canon. On the contrary, precisely because of their articulation on an indissoluble mediation between visions of rights and justice, it is conducive to rethinking the boundaries of the foundational

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[103] Fleischmann, *The Nation* (2003) 146.

[104] Baron (2000) 137.

legal concepts to which the roots of the Arab/Israeli conflict have traditionally been ascribed.

To conclude, this contribution aimed to complement an established legal framework of the origins of the Arab/Israeli conflict with the historical endeavours of an early Arab transnational feminist formation in the Levant. In contrast to some literature which sees 'state feminism' in the Levant as a mere by-product of European imperialistic modernisation, by highlighting the intersections and the trajectories of local actors, both in the domestic history of Israel/Palestine and within the emerging Arab feminist movement, the article complicates the discourse on nationalism, history and feminism. The contradiction between fighting for national state independence while having to experience a subordinate role within the state has been the object of a relentless critique in feminist theory and practice, and Palestinian women lived the often incompatible and contradictory natures of these political goals. Instead, by locating historical negotiations between social justice, imperialism and race at the intersection of feminist and international legal history, the article aims to contribute to histories of international legal institutions and politics by sketching a pre-history of postcolonial feminist interventions in the history of women's activism and international law, including Arab and South Asian women's networks, showing their contributions in drafting a global agenda of women's human rights, long before the emergence of postcolonial voices at the Mexico Conference of 1975.[105]

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[105] Aziza Ahmed (2017); Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton University Press, 2008).

THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

TWAILR: Reflections #45/2022

The Sea is in front of You, and the Enemy is behind You: The Paradoxical Borders of the Right to Freedom of Speech

Shahd Hammouri

> *oh father, my tongue is a horse who threw me over*
> *It has worn me out a lot, but it has guided me*
> *it has led me and taken me*
> *as it told stories*
> *as per the whim of my heart*
>
> ~ Ahmad Fouad Nijm, *As per the whim of my heart* (sang by Sheikh Imam)

Ahmad Fouad Nijm was an iconic Egyptian poet, known for his revolutionary spirit and literary talent. From a small room on the rooftop of a house in al Giza, Cairo in the 1960s his words came to life in the voice of his comrade Al-Sheikh Imam. Both artists come from impoverished families, and found their way to poetry and music through a mixture of strong will, and a mystical pull of luck. Nijm's first poems were written while he was a prisoner, his later poetry is defined by a sarcastic and humorous commentary on the Egyptian people's misfortunes. Throughout his life, he paid a heavy price for his artistic expression 'as per the whim of his heart' – from imprisonment to poverty. One always risks paying a price when contesting the status quo, but the 'right of freedom of speech' supposedly minimizes such costs.

To say that 'A has the right to freedom of speech' is a statement that can be subject to a wide range of critiques. One critique is that doctrines of human rights are generally premised on a top-down approach that risks parading the right on

paper without partaking in the economic, political and social drivers that sustain the attainment of this right. This critique can be spiced by some reminders of the Eurocentricity of the conception, and its historical contingence. The transplant of this notion into the constitutions of the global South as a token of 'civilization' was hasty to say the least, risking its instrumentalization as a tool to support some forms of speech over others. Nijm was critical of all the different faces of excessive power under the different rulers of Egypt during his lifetime, but the notion of 'right to freedom of speech' is not one that protected him per se. The substantive reach of the 'right to freedom of speech' seems in practice to infer the protection of certain liberal values, spoken with the use of specific terminologies accepted by the international status quo – making the right substantively shallow and foreign to outspoken activists of the global South whose struggles with power are translated in a different light.

Building on this critique, this short piece explores the substantive limitations of the right to freedom of speech through the narration of my own experience of self-expression and self-censorship as an early career Jordanian academic, teaching law in Britain with a 'long tongue' as we say in Arabic, which connotes (in my own understanding) speaking one's mind openly. I argue that the limitations of the right to speech are the limitations of the terminologies used by the liberal mindset within the special and disciplinary boundaries they are accepted in. Such limitations place the subject in a paradoxical situation that limits their capacity for political engagement led by intellectual reflection, ascertaining a tragic separation between the intellectual and the political. In this discussion, my position is that the language of international law is not inherently the direct mirror of politics, rather it is the translation of the boundaries of the ideal that would uphold the status quo in its equilibrium. In other words, underlying the following conversation is an affirmation that legal language is inherently interlinked with politics alongside a host of other imaginative ideals that shape law and its practice.

To undertake this venture, I explore the idea that the substantive borders of the right to freedom of speech stem from a paradoxical absence in vocabulary across different communities. Herein, I demonstrate three such borders: 1) the translation of critical perceptions on economic order in the local struggles of my own country; 2) the translation of the vocabulary of Arab struggle in the international legal community; 3) the translation of my identity as a woman to both communities (the national and the international academic).

Border 1: speak not of the dark sides of neoliberalism in your own state

In late March 2022, over 30 people were arrested in Jordan in anticipation of planned protests to mark the anniversary of the 24th March movement for economic welfare (which itself had also met with a harsh state security agenda from the outset in 2011). Many of them were teachers brutally arrested in front of their families. The teachers' union was only established in 2011 after over 20 years of demands, and the government's decision to grant the teachers their union was a policy concession in the bid to steer the Arab Spring away from Jordan in 2011. In a country where there are clear prohibitions against the formation of any political party that has substance, the popularity of the teachers' union gives it notable political power. Its members are chosen democratically and are largely representatives of middle- and lower-class employees. Over the past few years, the union organized actions to demand equitable pay and dignified work for the teachers. Their movements were continuously shut down by the government. The union lacks the privilege of international support, and monetary capacity, rendering it an easy subject of oppression.

Last time I was in Jordan, I went to one of their protests. I had never seen such a level of security around a protest, despite the obvious physical harmlessness of the teachers. As I carefully marched, attempting to take pictures without being noticed by the police, I witnessed the heart-wrenching scene of teachers being lined up to enter the police van. Being arrested in Jordan means that you lose any job security you had. The threat of prison is also a threat of hunger for the teacher and their family. I was almost arrested when the police noticed that I was filming, but my London hipster attire threw a puff of privilege on my presence that perhaps led the police to overlook me, despite arresting a teacher filming just right next to me.

An undergraduate law student in the global North who took modules on international economic law and post-colonial theory can easily tie the knots to understand the larger picture leading to the protests. Jordan's economy is intertwined with that of the US, forgoing economic sovereignty: we have an abundance of questionable free trade agreements and free trade areas, and our Jordanian Dinar is pegged to the US dollar. The IMF is the mastermind of our economy, and we drool over foreign direct investment. Our king was featured in the Credit Suisse leaks and the Pandora Papers; financial structures of exploitation have been facilitated by the trends towards deregulation in the ethos of free market agendas. We adore 'free trade' – you can easily attain the newest international products in our markets, but you would struggle to find any local products. My mother buys Waitrose (a British brand) cat litter for our cats. Jordanian foreign policy is reflective of US and Persian Gulf states' security needs, and any alternative national positions on foreign policy are automatically dismissed. We have numerous US military bases; we are a good

customer of weapons and have even managed to start our own small weapons production. Meanwhile, as is typical in such contexts and indeed economically foreseeable, audacious inequality has been consolidating for over a decade. Our unemployment rate is at a record 19% according to the World Bank, with many estimates suggesting that in reality it is much higher. A good part of the population cannot afford basic commodities. Our public education runs on low standards of knowledge and low institutional capacity. This is all compounded by the undervaluation of the lives of Palestinian, Syrian and Iraqi refugees who make up over a third of the population. To sustain the status quo, a security-oriented policy and the affirmation of tribal sentiments in a manner that stresses differences rather than cohesion among the people has been the state's go-to answer. Discussing the above with an eye towards structural responsibility is a taboo perspective of thought, one which I have seen many friends and acquaintances lose their livelihoods for expressing.

Jordan is represented as a friendly liberal state, in line with (Western) international values. 'I hear Jordan is doing great' is a sentence I often here in England. Jordan is a buffer state in the midst of a zone of proliferated international interest and inter-imperial agendas. We have borders with Iraq, Syria, Palestine, Israel and Saudi Arabia. On paper we are sold as the friend of the liberal mindset, a 'civilized' nation unlike our messy neighbors. What is often forgotten is that we are asked to forgo our neighbors, and are taught to think we are different – despite the easy observable fact of the unity of the whole area of the Levant, historically and culturally.

I have a passport which says that I am the responsibility of the Jordanian government, with a dash of privilege due to my affiliation with western institutions, seemingly reflected in my hipster attire. I have been teaching international economic law this last semester, and I was lucky enough to be in a place where the course design is *de facto* critical. I have dissected with my students the international legal, political and economic structures that make my country's misery a reality. From a small cold village in the global North, I am given the microphone and the freedom to articulate the full picture. I do so with full awareness that the translation of my words into my local context, in a Jordanian classroom, would be like drawing a go-to-jail card in monopoly, despite my relative privilege. One can say that to speak against the liberal status quo in its context is to risk forgoing your 'freedom of speech' card. My speech is spatially limited in a space where its political potentialities as an act of resistance are limited.

Border 2: speak not of political struggles that drift far from the liberal mindset of the international legal community

> *If I speak I am condemned, if I stay silent, I am dead*
> ~ Herbert Kretzmer, *Who Am I?* (*Les Misérables* musical)

On the flip side, as a new member of the international legal academia, there are clear limitations on how far I can translate my abstract theoretical contemplations into political positions. I have observed that the community of critical legal theory shares a distaste for action on social reality despite its relentless critique of the liberal status quo. Positions in solidarity with those affected by a tragic war that is recognized as such by the dominant liberal discourse are available in abundance. Yet, taking positions in solidarity when it comes to tragic wars that happen to touch upon the lives of those less white, I am advised by colleagues more senior to practice caution if I want to have a career in the field. Deconstruct all you like, reach the highest ends of critique – but dare not take a position of solidarity on issues not approved by the wave of the liberal status quo.

The past few months have seen the escalation of violence by the Israeli occupation in Palestine: relentless Israeli attacks on religious sites and worshippers during Ramadan, destruction of homes, murders of Palestinian children, the targeted killing of an iconic journalist and the assault on her funeral, the racist incitement of the settlers, and so on. In the wake of this, I felt the recurrence of the same sense of exclusion and perceptions of near-madness that I felt emanating against me, as a person of Palestinian origins, from international lawyers during the prior wave of Israeli hostility in 2021 in response to the unity intifada. Overwhelmed by the need to partake in mundane discussions to assert, once more, that Israel is a colonial state, and yes even its recognition in 1948 was wrong. The UN normalized an act of colonization and adopted a Zionist rhetoric that is inherently racist against my ancestors. Tired of the fact, that once again, very few people care, and I will stand helplessly tweeting along with millions of others.

In late March 2022, 26-year-old Diaa' Hamarshe shot five civilians in the street. He was killed shortly after by the Israeli police. Two other Palestinians took to the streets and carried out similar acts in the same week. The Israeli prime minister responded, with a patriarchal tone, advising Israeli citizens to carry their own arms in the streets. Because killing more of the people we occupy and treat as inferior is the wise response to their anger at our endless acts of domination, especially, in their holy month, where they historically rebel against their oppression. There are two ways of looking at this, and they both exist in parallel. On a micro-level, civilian causalities in a war are tragic; the people killed were ordinary people without much

power. On a macro-level, the accumulation of trauma over one lifetime leads one to severe psychological frustration; what about that collective societal accumulation over five generations? I am acutely aware of the paradox that this is considered radical in my scholarly field and yet is common sense and presumed knowledge in my home country.

The IHRA definition for antisemitism pushed by extreme right-wing sentiments – and enthusiastically embraced by conservatives and liberals alike tripping over each other to placate Israel and its apologists – equates the critique of the state of Israel with antisemitism, leaving many scholars who stand in solidarity with Palestine at the risk of persecution and delegitimization by Zionist lobbies. This has even spread out to the music scene, with lobbies pushing for the rapper Lowkey to be banned from Spotify. How can I communicate how insulting it is to call a Palestinian a terrorist, without being attacked myself? And alienated from the field? Without being called just another angry Arab woman. To translate a struggle against a settler colonial state, to translate the struggle and anguish of the whole area of the Levant over generations, I struggle to find words in the community of international law.

Border 3: do not speak loudly in the face of patriarchy

> *The sea is in front of you, and the enemy is behind you*
> ~ Tareq ibn Ziyad (c. 718 AD)

To be an independent woman with a critical mindset from my community is an inherently paradoxical situation in and of itself that is difficult to express. It is a position born in the aftermath of a radical political rupture or an 'event' that led to a void caused by the absence of continuity in collective thought. On one end, along with many women in my region, we are trying to dismantle the deeply-rooted presumptions of patriarchy that normalize the heartbreak of the women in our community. While on the other we are simply holding on – to avoid falling into the traps of liberal mindsets on the positioning of women in the society and narratives calling for the 'saving' of Muslim women. To engage in feminist discourses, one finds oneself reverting to English, risking further alienation from one's own community and self. An easy, overused counterargument in the face of an angry Arab woman is: these thoughts are transplanted in your mind by foreign bodies. At the same time, to normalize my womanhood in Anglophone terms is a reductive experience, for feminism in the west has its own set of imaginative limitations.

Getting a scholarship for a PhD in Britain was my ticket out. Education is a respectable thing for a woman to do, and now having finished it, my social credit as a potential wife is hitting a new high. As a youngster, I was always called out for being outspoken, and I was sold the dream of opting to integrate my existence under the shadow of a man instead of 'becoming' my own person. Perhaps a part of me wanted to get the PhD because I was aware of the following paradoxical situation: I needed a western institution to validate my thoughts in order to be able to have a conversation on somewhat equal grounds with the men of my family. A family friend who called me out for having delivered a public speech with a t-shirt that was half-sleeve rather than full-sleeve at the age of 16 is now asking for my opinion on politics. However, even with a PhD, there is so much I cannot translate about womanhood. Attempting to challenge norms of ownership over women's bodies in Arabic for example is a venture that women of my region struggle to perceive and translate in their own words without forgoing their sense of identity. In the words of another family friend: 'Oh dear, you should marry a westerner, no Arab man will accept what you say'. It seems, in her perspective, that my feminist positions have no acceptable terms in the language of our community or within the spaces of our shared identity.

While there is a growth of feminist sentiment in my region, it is always at the risk of the liberal and classist trap. In other words, at the risk of becoming a discourse focused on the problems of higher-class women from a liberal perspective. Nonetheless, the label of 'feminist' sustains a distasteful aura that can be used to undervalue my political positions, even from the perspective of other women. Herein, if I were to engage in political activism in my own region, I would be asked to hide the deconstructive ethos of the feminism I described above and to opt instead for a reductive advocacy of women's rights in accepted liberal terminologies. Paradoxical.

Conclusion

The borders of freedom of speech are paradoxical. Such limitations are drawn alongside the liberal status quo, and the 'acceptable' forms of speech. They are not direct but hidden in the intimate layers of signs and social codes. The effects of overstepping those borders are also paradoxical: if I critique the status quo of my state, I am left with nothing but fleeing to the west or accepting the inevitability of jail; if I solidify my critique of the liberal status quo in political positions, I might be asked to leave western institutions; if I speak against the predispositions on the position of women, I risk alienation from my sense of identity. Risks are inevitable, but their paradoxical nature in different spaces, and the difficulty of translation

without entrapment is what renders the space of free speech – not only for me, but for many of us – acutely limited.

The hegemonic structures of thought are deeply entrenched in our minds. Resisting such limitations requires distilling existing terminologies and frameworks of thought. To do so, one needs to protect thought prior to the protection of speech, and the normalization of engaged intellectualism before stating a right to 'freedom' of speech. Without engaging in a genuine freedom of thought that is not afraid to reimagine the world, the gap between intellectual discourses and political action will remain a tragic blind spot for humanity. This will continue to limit spaces of resistance between the local and the international, within the local, and within any given social and political community.

> *The bitter word is like a sword, cuts wherever it passes*
> *The sweet word is easy and comfortable, it tricks but harms*
> *The word is a helpless debt that can only be repaid by she/he who is free*
>
> ~ Ahmad Fouad Nijm, *The Bitter Word*, sang by Al Sheikh Imam

~

THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

TWAIL scholars and allies for Palestinian Freedom

29 November 2022

We as TWAIL scholars and allies affirm our commitment to Palestinian freedom and our solidarity with Palestinians collectively struggling towards liberation. We, the signatories to this statement, unequivocally support the Boycott, Divestment, Sanctions (BDS) movement, including the academic boycott as the most direct and relevant expression of our solidarity.

The global south has a long history of engagement with the 'Question of Palestine', understanding it as an anti-imperialist and anti-racist struggle. Palestine has been central to the Third World agenda and inextricable from similar liberation movements across Asia, Africa, the Caribbean, and the Americas. While this engagement has not always been unified, at pivotal moments at the United Nations, in the Non-Aligned Movement and in the Tri-Continental conferences, the peoples of the global south have come together to support the Palestinian struggle for self-determination and protested Israel's occupation and colonization of Palestinian lands, discrimination against Palestinian citizens, violence against Palestinian people, and the denial of the right of Palestinian refugees to return to their homes.

We have valued the intellectual and political diversity of the TWAIL community, just as we have valued the TWAIL community's shared commitment to decolonization, racial justice and the right to self-determination. It is in that context that, for us, support for BDS is grounded in our support for academic freedom and the right to self-determination in historic Palestine. We similarly commit to support and pursue the core aims of the *Palestine & Praxis* statement, including by actively supporting Palestinian scholarship, as well as pressuring our own academic institutions and organizations to respect the Palestinian call for BDS and to remove any complicity or partnership with military, academic and legal institutions involved in entrenching or whitewashing Israel's policies.

Israeli academic institutions are implicated in Israel's worst forms of violence, including weapons technologies and military ethics that have facilitated the killing of

great numbers of Palestinians. Israeli universities in 1948 Palestine are inaccessible to Palestinian students and scholars in the 1967 occupied territories because of movement restrictions denying them access to their own archives as well as educational opportunities, while Israeli universities inside the occupied territories are an integral part of settler colonial expansion and the displacement and dispossession of Palestinian communities. Israeli authorities have denied students and scholars the ability to travel abroad for conferences; the Israeli military has systematically attacked students on Palestinian university campuses, and most recently, have instituted a policy that makes international study or work at a Palestinian university contingent on military approval.

BDS is a Palestinian-led movement 'for freedom, justice and equality'. The academic boycott is a central dimension of BDS and of critical relevance to TWAIL scholars invested in academic freedom for Palestinian students, researchers and faculty. BDS is inspired by the pivotal role that the boycott movement played in third world solidarity with South Africans resisting apartheid. The boycott will not end Israeli apartheid or settler colonialism by itself; however, it interrupts its normalization, including our own complicity with these systems of oppression. BDS is also a way to publicly express support for those struggling against injustice in Palestine - a struggle that is often a lonely and isolating one for Palestinians because collusion between Israeli colonialism, American empire and anti-Palestinian racism has worked to deter open criticism of Israel.

In that light, in response to the clear and simple request from our Palestinian colleagues for an institutional academic boycott of Israel and in line with the guidelines they have set out, we pledge not to engage in any professional engagement with Israeli academic, research, or state institutions until Israel ends its regimes of occupation, colonialism and apartheid over Palestinian lands and people, and respects the right of the Palestinian refugees to return to their homes. This does not apply to individual scholars acting in their individual capacity, as is well-known and made clear in the Palestinian guidelines. For us, our support for BDS is an expression of our ethical commitment as TWAIL scholars. We echo the message from Palestine & Praxis that 'scholarship without action normalizes the status quo and reinforces Israel's impunity', and we call on fellow international law scholars across the world to respect the academic boycott and the BDS movement's goals for freedom, justice and equality.

Signatories listed at https://twailr.com/twail-scholars-allies-for-palestinian-freedom-solidarity-boycott-statement/

THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

TWAIL Review ~ Issue 4 (2023) 1-35

Unlawful Occupations? Assessing the Legality of Occupations, including for Serious Breaches of Peremptory Norms

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Abstract

In light of the United Nations (UN) General Assembly request on the legality/illegality of Israel's occupation of the occupied Palestinian territories (oPt)/State of Palestine and the existence of several occupations elsewhere that are or will be prolonged, this contribution looks to address the legality of occupations under the rules of state responsibility, including for serious breaches of peremptory norms (particularly the prohibitions on annexation, denial of the right to self-determination, and racial discrimination and apartheid). The article engages the discourse of various UN mechanisms in that regard, as well as the scholarly discourse. It stresses the importance of the separation and co-applicability of both IHL (jus in bello) and the law on the use of force (jus ad bellum) in such situations. Further, it argues against a discourse that entertains shifting duties and obligations in such situations which could, in turn, benefit an Occupying Power and provide leeway prolonged occupations which cross further into the occupation-to-annexation threshold. The article then discusses the importance of assessing the legality/illegality of occupations, including for serious breaches of peremptory norms, and the subsequent legal consequences for the Occupying Power and third States. As such, it discusses the occupation-to-annexation paradigm and the findings of international bodies on the situation in the oPt/State of Palestine.

Key words

International humanitarian law; occupation; Palestine; Israel; International Court of Justice

[*] Many thanks to: Valentina Azarova, John Dugard, Ardi Imseis, and Nimer Sultany for their thoughtful advice, critique, and insights. Special thanks to the John Reynolds, Usha Natarajan, and the *TWAIL Review* for the same and more.

1 Introduction

The idea for this paper came several years ago around 2015 while I was working in and on Palestine. In its beginnings, the idea was to: *firstly,* discuss the legality of 'prolonged' (long-term) occupations under international humanitarian law (IHL);[1] and, *secondly,* to discuss the legality of occupations under the rules of state responsibility for serious breaches of peremptory norms of international law. As for the former, I felt it was an interesting, but unnecessary exercise.[2] As for the latter, I didn't feel it was anything extraordinary. It was simply addressing whether, in line with the rules on state responsibility, a situation of occupation could be considered 'unlawful' (or, synonymously, 'illegal') when it gives rise to serious breaches of peremptory norms. If the serious breaches are attributable to a state vis-à-vis its occupation, wouldn't the rules on state responsibility demand that said occupation end?[3]

While working in Palestine, I heard peers brand the occupation as unlawful on several occasions. Others were cautious, concerned that if an occupation was found to be unlawful, then IHL would no longer apply. This was expressed to me in clear terms, especially by third state representatives (including their legal advisers, surprisingly). There seemed to be confusion between the rules and how they interact in situations of occupation. This confusion has crept into the discourse and may, perhaps, have something to do with the way we are programmed. From a Palestinian perspective, generally speaking, the legal frameworks that we operate within have demonstrated an inability to fully encapsulate the situation of historic Palestine and its people.[4] The piecemeal treatment of addressing international law violations (by international organizations, NGOs, and so on) constrains advocates to operating in a

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[1] Namely, the occupation of '1967' Palestine (*i.e.* the oPt/State of Palestine); and as opposed to temporary, short-term occupations.

[2] Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' (1990) 84:1 *American Journal of International Law* 44; Iain Scobbie, 'Fourth Geneva Convention: Why the International Court Got It Wrong Substantively and Procedurally', *EJIL: Talk!* (16 June 2015), https://www.ejiltalk.org/prolonged-occupation-and-article-63-of-the-fourth-geneva-convention-why-the-international-court-got-it-wrong-substantively-and-procedurally/. However, it has been argued that occupations can be 'unlawfully prolonged'. Valentina Azarova, 'Israeli's Unlawfully Prolonged Occupation: Consequences under an Integrated Legal Framework' *European Council on Foreign Relations* (June 2017). http://www.ecfr.eu/publications/summary/israels_unlawfully_prolonged_occupation_7294.

[3] It was drafted in a form of a 'report' by a colleague and myself for an international NGO operating in Palestine. Large sections of the first part of the report were nixed for various reasons and the second part became the focus. Once a draft was circulated, the home office decided not to move forward due to the report's 'tone, content, and format'. My request for substantive feedback and reasoning was ignored, and I had little to no support from colleagues to further develop the draft. Following a separate request, I was given ownership over the draft. My supervisors and peers expressed serious concerns over, and challenging, discussions of certain peremptory norms, especially racial discrimination and apartheid. The censoring of the report (amongst other publications) was the greatest factor that led to my resignation.

[4] Birzeit University, Institute of Law, 'Advocating for Palestinian Rights in Conformity with International Law Guidelines' (May 2013), https://fada.birzeit.edu/bitstream/20.500.11889/53/1/986afcc6c9.pdf.

limited and reactionary fashion. To some extent, this article operates within those constraints.[5] Neither international law alone nor dealing with '1967' alone will provide the Palestinians emancipation, let alone justice and accountability for the historical wrongs faced from colonialism and imperialism.[6] However, this should not be seen as negating, and even undermining, Palestinians turning to international mechanisms and employing the underlying legal doctrines.[7] It is but semblance of justice and accountability, no matter how small, and for the Palestinians to debate between themselves.

As such, Palestinian and allied advocates began exploring the extent of those constraints with regard to third state and state party responsibility. Yet, even within those constraints, third states[8] – especially from the West/Global North– are averse to accepting legal determinations that increase obligations, especially for Israel. However, in light of Ukraine's similarly unfortunate situation, commencing with Russia's occupation of Crimea in 2014 and continuing today, and against the backdrop of several occupations elsewhere, it is a fitting time to discuss the legality and legal consequences of occupations that are prolonged such as Palestine, or will likely be prolonged such as Ukraine.[9] The idea was that if a situation, which happens to be one of occupation, was unlawful for its serious breaches of peremptory norms, it would mean increased obligations towards reversing the situation, which is to say, ending the occupation. Such occupations would cross the occupation threshold and become an annexation, whether or not they are prolonged. These issues have increased relevance given that the United Nations (UN) General Assembly (UNGA) has recently tasked the International Court of Justice (ICJ) with a request to answer a variation of this question, specifically in the Palestinian context. The ICJ's answer

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[5] This piece focuses solely on Israel's occupation of '1967' Palestine, and, within those constraints, does not engage a more holistic approach concerning historic Palestine and the Palestinian people ('1948' Palestine and Palestinians, refugees, etc.). In particular, it does not fully engage the situation for what it is and what international law has failed to holistically address – 'settler-colonialism'. See, for example, Markus Gunneflo, 'Settler-colonial and Anti-colonial Legalities in Palestine' (2018) 20 *Palestine Yearbook of International Law* 171; Mazen Masri, *The Dynamics of Exclusionary Constitutionalism: Israel as a Jewish and Democratic State* (Hart, 2017).

[6] Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford, 2019).

[7] Ata Hindi, 'The "Visible" and "Invisible" College of Legal Advisers' (2019-2020) 22 *Palestine Yearbook of International Law* 217.

[8] This is largely focused on third *states*, although parts are relevant for third *parties* (international organizations, businesses, etc).

[9] The situations in Palestine and Ukraine offer interesting contrasts and similarities. What is referred to as '1967' Palestine (*i.e.* the occupied Palestinian territories (oPt) or 'State of Palestine') has been occupied for over five decades, while Ukraine has experienced two waves of occupation since 2014 and 2022. Palestine is distinct in the sense that its occupier is a settler-colonial entity-turned-state. With respect to Palestine, the Global North/Western-dominated legal framework understands Palestine as being occupied by a neighboring state, Israel, both within historic Palestine. While the occupation of Palestine has been prolonged, the occupation of Ukraine is more recent where the OP – Russia – has clearly demonstrated long-term ambitions. Both states have been subject to OPs treating the territory as their own, like many other existing prolonged occupations, and both have suffered from serious breaches of peremptory norms by their OPs, particularly annexation.

will have significant repercussions for international law in situations of occupation, past, present, and future.[10] This contribution addresses only specific aspects of the question put to the ICJ, while also examining broader issues on determining an occupation's legality.

This is not an attempt to argue for a new approach to IHL, occupation law, or international law applicable to situations of occupation. In many ways, much of the discourse pertaining to the oPt/State of Palestine is already doing that, the merits and flaws of which will be discussed. These assessments stray away from a traditional, doctrinal analysis and distract from the urgency of assessing the occupation's legality based on serious breaches of peremptory norms. Thus, while there may be some existing and potential worthwhile endeavors, the contemporary necessity for legal action from offending and third States still demands a turn to doctrine (and critique thereof). Further, some assessments have explored questionable and, at times, risky contours to the law applicable to situations of occupation, which should be altogether avoided. Overall, this contribution contends that if an occupation gives rise to serious breaches, then the situation should be considered unlawful outright. The serious breaches can only end by ending the occupation. That is to say, the serious breaches would not occur sans the occupation. The peremptory norms are namely the prohibitions on the forcible acquisition of territory (annexation), the denial of the right of peoples to self-determination, racial discrimination, and apartheid, and possibly others.[11]

Part 2 of the article discusses recent developments on Palestine, including at the United Nations and drawing from the scholarly discourse. Part 3 discusses IHL specifically and the notion of prolonged occupation, looking at the fundamental tenets as drawn from occupation law and the problematic discourse on shifting duties and obligations. Part 4 assesses the legality of occupations, including with regard to serious breaches of peremptory norms, by identifying the peremptory norms and then discussing the legal consequences. Part 5 discusses the situation in the oPt/State of Palestine, zeroing in on the occupation-to-annexation paradigm, and then discussing the findings of international bodies on various international law violations that would amount to serious breaches of peremptory norms.

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[10] Here, 'occupation law' (or 'law of occupation') refers to the body of IHL rules applicable to situations of occupation, as opposed to *all* international law applicable to situations of occupation.

[11] Which may include, for example, certain IHL rules, under the argument that certain IHL rules may qualify as peremptory international law norms. Ata Hindi, 'Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms' (2023) 19:2 *Loyola University Chicago International Law Review* 127.

2 Recent Developments on Palestine and the Legality Discourse

This section will first discuss recent UN developments on Palestine and the legality of the occupation, from UN-mandated reports to the recent UNGA request for an ICJ advisory opinion. Second, it considers the scholarly discourse on the legality of occupations generally and Palestine specifically.

2.1 Recent United Nations Developments

The On 30 December 2022, the UNGA requested an advisory opinion from the ICJ as follows:

> 18. *Decides*, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:
>
> (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
>
> (b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?[12]

Civil society has been pushing for this sort of question for years.[13] In many ways, the question seemed to be an attempt to cover all possible inquiries, assuming that the

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[12] UNGA Res. 77/400, 14 November 2022, para. 18. For the discussions therein, see UN Doc. A/77/PV.56 (resumed).

[13] The originally intended report on which this writing is based included the idea of an ICJ advisory opinion. From the academic discourse, *see, e.g.,* John Dugard, 'Lifting the Guise of Occupation and Recourse to Action Before the ICJ and ICC' (2014) 17 *Palestine Yearbook of International Law* 9, at 18 (2014); Allegra Pacheco, 'The Israeli Supreme Court Case on Israeli Quarrying Licenses in the West Bank: Why a Second ICJ Advisory Opinion on Palestine is Needed' (2014) 17 *Palestine Yearbook of International Law* 57, at 81. In his August 2007 report, former UN special rapporteur John Dugard expressed the idea that the ICJ should assess the legal consequences of the prolonged occupation and its characteristics of apartheid and colonialism. John Dugard, 'Situation of Human Rights in the Palestinian Territories Occupied Since 1967' UN Doc. A/62/275, 17 August 2007, para. 8. Former UN special rapporteur Richard Falk made a similar request that '[e]fforts be undertaken to have the [ICJ] assess allegations that the prolonged occupation of the West Bank and East Jerusalem possess elements of 'colonialism', 'apartheid' and 'ethnic cleansing' inconsistent with [IHL] in circumstances of belligerent occupation and unlawful abridgements of the right of self-determination of the Palestinian people'. Richard Falk, 'Report of the Special

more asked, the better. Ideally, a more appropriate variation on this question could have delineated a specific legal framework – the rules on state responsibility, including language on peremptory norms, and identifying those norms of particular concern[14] – and subsequent legal consequences for Israel, as the Occupying Power (OP), as well as third states. Of course, the qualification of a situation as unlawful is but a first step to bringing an unlawful situation to an end.[15] Thus, the ICJ was essentially tasked with assessing the legality of Israel's occupation (not a piecemeal analysis of Israel's violations) and the subsequent legal consequences. Assessing the occupation's legality was at the root of the question and not to be overlooked, although there are different ways about going about it.

The request rode the momentum of two recent UN-mandated reports concluding that Israel's occupation of the 'Palestinian territories' is unlawful. These reports include those of the current *Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, Francesca Albanese, and the recently established *Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel*. Both reports built upon the analysis of Albanese's immediate predecessor, Michael Lynk. Building upon the work of his predecessors and some academic discourse, Lynk asked 'whether an [OP] – whose authority as occupant may have initially been lawful – can cross a bright red line into illegality because it is acting contrary to the fundamental tenets of international law dealing with the laws of occupation'.[16] He referred to this as '[a]n unresolved question in international humanitarian law'.[17] Lynk's conclusion was rather straightforward: 'a purposive reading of these [IHL] instruments, together with the foundational tenets of international humanitarian and human rights law, leads to the conclusion that an [OP] whose intent is to turn occupation into annexation and

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Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967' UN Doc. A/HRC/16/72, 10 January 2011, para. 32(b).

[14] While the ICJ has exercised restraint in identifying peremptory norms, it has embraced some discussion on *erga omnes* obligations, which are inherently related (further discussed below).

[15] James Crawford, *State Responsibility: The General Part* (CUP, 2013) 389.

[16] Michael Lynk, 'Prolonged Occupation of Illegal Occupant?' *EJIL: Talk!* (16 May 2018)), https://www.ejiltalk.org/prolonged-occupation-or-illegal-occupant/. This is under the assumption that the initial use of force is lawful. See also Ardi Imseis, 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967-2020' (2020) 31 *European Journal of International Law* 1055, at 1073; Ralph Wilde, 'The Illegality of the Israeli Occupation of the Palestinian West Bank (including East Jerusalem) and Gaza: What the International Court of Justice Will Have to Determine in its Advisory Opinion for the United Nations General Assembly', *Opinio Juris* (23 December 2022) [Wilde (2022a)], http://opiniojuris.org/2022/12/23/the-illegality-of-the-israeli-occupation-of-the-palestinian-west-bank-including-east-jerusalem-and-gaza-what-the-international-court-of-justice-will-have-to-determine-in-its-advisory-opinion-for-th/; Ralph Wilde, 'Is the Israeli Occupation of the Palestinian West Bank (including East Jerusalem) and Gaza 'Legal' or 'Illegal' in International Law?' Legal Opinion (29 November 2022) [Wilde (2022b)], https://www.ucl.ac.uk/laws/sites/laws/files/ralph_wilde_opt_legal_opinion.pdf.

[17] Lynk (2018). However, this is a question that goes beyond IHL (*jus in bello*) alone, as Lynk's analysis provides.

conquest becomes an illegal occupant'.[18] He introduced a four-part test 'to determine whether an occupier is administering the occupation in a matter consistent with international law and the laws of occupation, or whether it has exceeded its legal capacity and its rule is illegal'.[19] The four-part test include the 'fundamental tenets of international law dealing with the laws of occupation':

(i) an OP cannot annex any of the occupied territory;
(ii) an occupation is inherently temporary, and the OP must seek to end the occupation as soon as reasonably possible;
(iii) during the occupation, the OP is to act in the best interests of the people under occupation; and
(iv) the OP must act in good faith.[20]

Overall, Lynk concluded that a determination in which an OP 'has breached *one or more* of the fundamental principles – has become an illegal occupant would elevate the duty on the international community to bring the occupation to a successful and speedy close'.[21] Breaching one of these tenets would seem sufficient to determine illegality. The test is not strictly IHL (*jus in bello*)-based; each part is a 'principle' of international law applicable to situations of occupation. While Lynk included the prohibition against annexation as a principle, he did not explicitly assess legality based on an OP's serious breaches of peremptory norms, annexation or otherwise.

A few years later, Albanese built on Lynk's work.[22] Drawing from Lynk, Albanese explained that '[t]he Israeli occupation is illegal because it has proven not to be temporary, is deliberately administered against the best interests of the occupied population and has resulted in the annexation of occupied territory, breaching most obligations imposed on the occupying Power'.[23] Separately, drawing from Ardi Imseis, Albanese added that the occupation's illegality 'stems from its systematic violation of at least three peremptory norms of international law: the prohibition on the acquisition of territory through the use of force; the prohibition on imposing regimes of alien subjugation, domination and exploitation, including racial discrimination and apartheid; and the obligation of States to respect the right

[18] Ibid. The IHL instruments referred to are Hague Convention IV, the Fourth Geneva Convention, and Additional Protocol I.

[19] Michael Lynk, 'Situation of Human Rights in the Palestinian Territories Occupied Since 1967' UN Doc. A/72/556, 23 October 2017, at 9.

[20] Ibid, 9-13.

[21] Lynk (2018) (emphasis added).

[22] Francesca Albanese, 'Situation of Human Rights in the Palestinian Territories Since 1967' UN Doc. A/77/356, 21 September 2022, paras. 10(a)-(b). Albanese opines that analyses on Israeli apartheid 'must address the experience of the Palestinian people in its entirety and in their unity as a people, including those who were displaced, denationalized and disposed in 1947-1949'. Ibid, para. 10(a). Further, the recent focus on apartheid 'misses the inherent illegality of the Israeli occupation of the Palestinian territory'. Ibid, para. 10(b).

[23] Ibid, para. 10(b). The reasoning is similar to, but not entirely in line with, Lynk's test.

of peoples to self-determination'.[24] Albanese further added that the occupation 'constitutes an unjustified use of force and an act of aggression'.[25] More succinctly, these findings read as violations of four, possibly five, serious breaches of peremptory norms: the prohibitions on annexation, denial of the right to self-determination, racial discrimination, apartheid, and possibly aggression (which annexation would fall under). While Albanese scratched the surface, she stopped short of furthering her assessment on legality based on the occupation's serious breaches of peremptory norms.

The UN commission reached the same conclusion, albeit differently. It explained that '[t]here are reasonable grounds to conclude that the Israeli occupation of Palestinian territory is now unlawful under international law due to its permanence and the Israeli Government's de-facto annexation policies'.[26] For the commission, '[i]t is unclear in international law and practice when a situation of belligerent occupation becomes unlawful'.[27] Accordingly, it is unclear whether and if the occupation is *now* unlawful as opposed to before, if unlawfulness commenced at a particular time in the past, or if it was always unlawful. Drawing from Lynk and others, the commission outlined its understanding of several 'principles' that may be used to determine an occupation's legality.[28] These include 'whether sovereignty and title are not vested in the occupying power, the occupying power is entrusted with the management of public order and civil life in the occupied territory, the people under occupation are the beneficiaries of that trust in view of their right to self-determination, and the occupation is temporary'.[29] The commission then shifted its analysis to focus on two 'indicators' to determine legality, being 'the permanence of the Israeli occupation … and actions amounting to annexation'.[30] The shift from 'principles' to 'indicators' transpired without elaboration of either as determinative criteria. It then found it necessary to distinguish between de jure and de facto

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[24] Ibid.

[25] Ibid. Annexation, amongst other acts, is considered an 'act' of aggression. See UNGA Res. 3314 (XXIX), 14 December 1974, art. 3(a) (prohibiting 'military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof').

[26] Press Release, UN HRC, 'Commission of Inquiry Finds That the Israeli Occupation is Unlawful Under International Law' (20 October 2022), https://www.ohchr.org/en/press-releases/2022/10/commission-inquiry-finds-israeli-occupation-unlawful-under-international-law. See also James Crawford, *Brownlie's Principles of Public International Law* (OUP, 9th ed., 2019) 212.

[27] 'Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel', UN Doc. A/77/328, 14 September 2022, para. 8.

[28] Ibid, para. 10.

[29] Ibid.

[30] Ibid, para. 11. This is similar to Lynk's occupation-to-annexation language. Lynk (2018).

annexation,[31] stressing the importance of distinguishing between the two while referencing language from the ICJ *Wall* advisory opinion that makes no explicit reference to, let alone define, either term.[32] The commission employed its own definitions: de jure annexation is 'the formal extension of a State's sovereignty into a territory recognized under its domestic law (but not necessarily under international law)', and de facto annexation 'is a term that was used by the [ICJ] in its advisory opinion'.[33] For the latter, the commission roughly relied on Lynk's analysis, in that:

> [de facto] annexation implies a gradual or incremental process in which it is not always clear at what point the threshold has been crossed. The transition involves establishing 'facts on the ground' that are intended to be irreversible and permanent while avoiding any formal proclamation in order to evade diplomatic and political repercussions.[34]

Based on the indicators, the commission 'finds that there are reasonable grounds to conclude that the Israeli occupation of Palestinian territory is now unlawful under international law owing to its permanence and to actions undertaken by Israel to annex parts of the land de facto and de jure'.[35] Its conclusion was somewhat haphazard, particularly in relation to third state and party responsibility, with broad reference made to Geneva Conventions (GCs) Common Article 1 (CA1) obligations – to respect and ensure respect for the GCs – by non-recognition of violations, and non-aid and non-assistance to their commission as drawn from the *Wall* advisory opinion,[36] and the obligation to investigate and prosecute grave breaches.[37] Unsurprisingly, the commission affirms the indicators have taken place. The Commission came close to, but also stopped short of, taking the further step of

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[31] Ibid, para. 12.

[32] Ibid (citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, 9 July 2004, 136, paras. 74-78). The specific reference is found in para. 121, where the ICJ 'considers that the construction of the wall and its associated regime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation'.

[33] Ibid.

[34] Ibid, para. 13. The 'facts on the ground' purview has largely been the language used by legal and policy stakeholders operating in/on Palestine. See Al-Haq, 'Questions and Answers: Israel's De Facto Annexation of Palestinian Territory' (25 May 2021), https://www.alhaq.org/publications/18430.html; International Commission of Jurists, 'The Road to Annexation: Israel's Maneuvers to Change the Status of the Occupied Palestinian Territory: A Briefing Paper' (2019), https://www.icj.org/wp-content/uploads/2019/11/Israel-Road-to-Annexion-Advocacy-Analysis-brief-2019-ENG.pdf.

[35] Independent International Commission of Inquiry (2022), para. 75.

[36] Ibid, para. 89.

[37] Ibid, para. 90, and the recommendations in paras. 91-95. As discussed below, the expansive nature of third state and party responsibility for IHL violations has developed over time to include demands similar to, but not completely in line with, those required for serious breaches of peremptory norms.

assessing whether the occupation is unlawful due to its serious breach of a peremptory norm, the prohibition on annexation, let alone other serious breaches.

All three legality assessments – Lynk, Albanese, and the commission – were similar but not entirely in sync. Broadly speaking and in their respective orders, Lynk covered non-annexation, temporariness of occupation, best interests of occupied populations, and good faith. Albanese covered temporariness, best interests, annexation, and breaching most OP obligations. The commission covered the OP not asserting sovereignty or title, OP acting as trustee of public order and civil life, the occupied territories as being the beneficiaries of the trust and having self-determination, and temporariness. The tests seem largely IHL (*jus in bello*)-based, although they also include non-IHL (*jus ad bellum*) rules such as those pertaining to annexation, self-determination, and others. The commission summarized its understanding of the test drawn up by Lynk and others but shifted its focuses to the indicators, being permanence and annexation. In that sense, the various tests and indicators may be informative.

When treated separately, acting contrary to these fundamental tenets mentioned would amount to (mostly) singular violations. However, when grouped together, they are seen not as disconnected violations, but as all together creating an unlawful situation. The three assessments are inconsistent, with each employing diverse determinative criteria and shifting between the *jus in bello* and *jus ad bellum*. One may feel the need to address these sometimes nuanced legal differences. Yet, the various criteria would probably better serve as non-exhaustive, non-cumulative factors in determining legality. Of the three, the commission's approach stands out for zeroing in on the occupation-to-annexation paradigm through its indicators. However, the key elements could have simply included whether there is an occupation and whether the OP has taken measures to annex the territory through its occupation. This would address whether the occupation-to-annexation threshold has been crossed and, if so, qualify the situation as unlawful by way of the occupier's serious breach of at least that peremptory norm. As discussed later, the occupation-to-annexation threshold does not mean that the latter replaces the former and it is no longer a situation of occupation. Moreover, what is important is to identify whether the OP has taken steps that would amount to annexation. What has been referred to as *de jure* annexation is relatively straightforward, as is the case of East Jerusalem. What has been referred to as *de facto* annexation is problematic because it creates an ambiguous threshold. Regardless of this differentiation, the fact that Israel has already 'formally' annexed East Jerusalem would mean that it has crossed the threshold, even if it is only part of the oPt. Further, as Hoffman explains, '[a]nnexation presupposes the effective occupation of the territory in question and

the clear intention to appropriate permanently'.[38] As such, certain acts by the OP should be identified as amounting to annexation regardless of an East Jerusalem-like legislative act or declaration. These would include, for example, the expansion and maintenance of the settlement enterprise and the construction of the Wall.[39]

Overall, all three forwent the opportunity to assess whether the situation is unlawful by way of the occupation's serious breaches of peremptory norms, especially the prohibition on annexation. The ICJ – and others engaged in the discussion – should not miss the opportunity to assess the legality of the occupation based on its serious breaches of peremptory norms and the legal consequences. Whether an occupation is legal should firstly be determined based on the situation the OP creates regarding its peremptory norm obligations.

2.2 Scholarly Discourse

As mentioned, the idea of seeking an ICJ advisory opinion on the occupation's legality is not new. Similarly, there has been scholarly discourse on an occupation's legality and, more specifically, the Israeli occupation's legality. As noted by Lynk, Israeli scholars have, in particular, taken part in this discourse.[40]

Eyal Benvenisti has suggested that 'an occupation regime that refuses earnestly to contribute to efforts to reach a peaceful solution should be considered illegal. Indeed, the failure to do so should be considered outright annexation'.[41] The occupation would cross the occupation-to-annexation threshold by its failure to end the occupation. Benvenisti has further added that:

> no such claim of illegality would be proper as long as the occupant's conditions for peaceful settlement of the conflict are motivated by reasonable security interests … any measure aimed at creating new hurdles to the negotiations by changing the status quo in the occupied areas … is also tainted with illegality.[42]

As the situation in the oPt/State of Palestine suggests – not unlike other several occupations – arguments on the basis of security interests can be farcical, with peculiar standards advanced with the goal of prolonging the occupation.

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[38] Rainer Hofmann, 'Annexation' *Max Planck Encyclopedia of Public International Law* (2020), para. 1.

[39] ICJ Wall Advisory Opinion (2004), para. 121.

[40] It should be said here that, unfortunately, while many aspects of this work are important, Israeli scholars have been able to build their scholarship and find willing engagement in considerably greater fashion than their Palestinian counterparts. This is an unfortunate reality that is overlooked in the international legal academy.

[41] Eyal Benvenisti, *The International Law of Occupation* (OUP, 2012) 245.

[42] Ibid, 245-246.

Largely inspiring Lynk's test and others thereafter, Orna Ben-Naftali, Aeyal Gross, and Keren Michaeli posited their arguments on an occupation's legality based on violations of the normative regime's basic tenets,[43] being: (a) occupations don't confer title; (b) occupations are obligated to acts as trustees on behalf of the occupied population; and (c) occupations are temporary, not indefinite.[44] Gross explained that:

> the idea of 'illegal occupation' does not imply that the norms binding occupiers cease to apply, but rather that once an occupier no longer manages the territory in accordance with its core principles (that it is a temporary regime that does not grant sovereignty and must be managed for the benefit of the local population) the occupation itself becomes illegal.[45]

The tenets are largely IHL (*jus in bello*)-based. Yael Ronen's earlier contribution posited a different approach.[46] Ronen remarked that 'an occupation may be considered illegal if it involves the violation of a peremptory norm of international law that operates *erga omnes* and is related to territorial status'.[47] These are occupations that 'are primarily achieved through violation of the prohibition on the use of force, or maintained in violation of the right to self-determination'.[48] Ronen shifted from *jus in bello* to *jus ad bellum* and comes closest to tackling the occupation-to-annexation paradigm. The condition that it should be related to territorial status at first glance may be considered moot because an occupation that involves serious breaches of peremptory norms will likely be related to an OP's territorial ambitions. However, this this is not always the case, for instance if the peremptory norm in serious breach is racial discrimination or apartheid and may not necessarily have a nexus to territorial status.

Susan Power has organized the arguments into two (possibly three) categories: *jus ad bellum*, *jus in bello*, and peremptory norms.[49] Yet, much of the

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[43] Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law* 551.

[44] Ibid, 559-560.

[45] Aeyal Gross, 'Writing "The Writing on the Wall"' (2018) 6:2 *London Review of International Law* 303, at 303-304. As explained later, this also contends what should be a straightforward conclusion in that regardless of an occupation's determined illegality, international law applicable to situations of occupation continues to apply. See Aeyal Gross, *The Writing on the Wall* (CUP, 2017).

[46] Yael Ronen, 'Illegal Occupation and its Consequences' (2008) 41:1-2 *Israel Law Review* 201. Ronen also includes a list of past 'illegal occupations'.

[47] Ibid, at 244, 204-211.

[48] Ibid, at 244.

[49] Susan Power, 'UN General Assembly Committee Adopts Resolution Requesting Second Advisory Opinion from ICJ on Occupied Palestinian Territory' *EJIL: Talk!* (20 December 2022), https://www.ejiltalk.org/un-general-assembly-committee-adopts-resolution-requesting-second-advisory-opinion-from-icj-on-occupied-

discourse is not organized, instead borrowing from a combination of rules from *jus ad bellum* and *jus in bello*, with rare deviation into peremptory norms analysis. The peremptory norm analysis by Imseis and, to an extent, Ronen, is convincing, as is the language of former UN-special rapporteurs John Dugard and Richard Falk. Ralph Wilde similarly posits peremptory norm arguments on a rule-by-rule basis.[50] There is noteworthy debate as concerns this categorization and the combination of rules between the two (or three) categories. However, the essential question that should be addressed is whether the occupation gives rise to serious breaches of peremptory norms, therefore creating an unlawful situation that can only be reversed by ending the occupation. Would Israel be able to commit serious breaches of peremptory norms – annexation, denial of the right to self-determination, racial discrimination, and apartheid – sans the occupation of Palestine? Would Russia in Ukraine? Other answer is no.

3 International Humanitarian Law and Prolonged Occupation

Before assessing the legality of occupation vis-a-vis the rules on state responsibility and based on serious breaches of peremptory norms, an IHL-centered discussion is warranted. More specifically, the discourse on prolonged as opposed to temporary occupation is examined to underline that occupations that *are* prolonged or occupations that *will be* prolonged should not be seen as distinct legally. An occupation's duration has been prominent in the abovementioned and similar assessments, shaping the various criteria used. In light of this, attention should be given to the fundamental tenets of international law applicable to situations of occupation as drawn from IHL. The analysis demonstrates that the notion of prolonged occupation has led to some problematic and unnecessary debate, particularly with respect to the bounds and limits of OP duties and responsibilities.

3.1 Fundamental Tenets of Occupation Law

The abovementioned assessments include a combination of *jus ad bellum* and *jus in bello* rules based on what have been referred to as fundamental tenets of international law applicable to situations of occupation, including rules drawn from conventional and customary IHL. Regardless of the legality of the occupation (or the use of force leading up to it), it is pertinent to affirm that IHL/occupation law continues to apply in its entirety.

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palestinian-territory/. For the *jus ad bellum*, this includes: Azarova (2017). For the *jus in bello* and/or peremptory norms, this includes: Lynk (2018); Imseis (2020); Ben-Naftali et al (2005); Ronen (2008).

[50] Wilde (2022a); Wilde (2022b). As explained further below, one approach, which I disagree with, may look at each international law violation as stand-alone unlawful acts.

The main part of occupation law is found in the 1907 Hague Regulations (HRs),[51] the Fourth Geneva Convention (GC4),[52] Additional Protocol I to the four Geneva Conventions (API),[53] and – drawing from these instruments – customary IHL.[54] The 1907 HRs obligate the OP to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.[55] The OP cannot act as sovereign. Relatedly, the HRs stipulate certain prohibitions against various types of irreversible changes (physical and otherwise) in occupied territories. With respect to property (both public and private), the ICRC summarizes the rules as follows:

> In occupied territory: (a) movable public property that can be used for military operations may be confiscated; (b) immovable public property must be administered according to the rule of usufruct; and (c) private property must be respected and may not be confiscated; except where destruction or seizure of such property is required by imperative military necessity.[56]

The OP cannot transfer its own civilian population into occupied territory[57] and is prohibited from collective or individual forced transfers out of and within the occupied territory.[58] Moreover, the HRs provide that '[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected'.[59] A variation of this particular provision is found in the GC4, stipulating that '[p]rotected persons are entitled, in all circumstances, to respect for

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[51] Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277) [1907 Hague Regulations]. Many Hague Regulations provisions are reflective of customary IHL.

[52] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV)].

[53] Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII).

[54] For the ICRC's study on customary IHL rules and practice, see ICRC, IHL Database: Customary IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

[55] 1907 Hague Regulations, art. 43.

[56] ICRC, IHL Database, Customary IHL, 'Rule 51. Public and Private Property in Occupied Territory'. On movable public property, see 1907 Hague Regulations, art. 53. On immovable public property, see 1907 Hague Regulations, art. 55. On private property, see 1907 Hague Regulations, art. 46 (and the exceptions and limits in arts. 52 & 53.)

[57] Ibid, 'Rule 130. Transfer of Own Civilian Population into Occupied Territory' (*i.e.* settlements). This is drawn from the 1949 GC4 art. 49 para. 6 and identified as a 'grave breach' in 1977 AP1 art. 85(4)(a).

[58] Ibid, 'Rule 129. The Act of Displacement'. This is drawn from the 1949 GC4 art. 49 para. 1 and also identified as a 'grave breach' in both 1949 GC4 art. 147 and 1977 AP1 art. 85(4)(a).

[59] 1907 Hague Regulations, art. 46.

their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs'.[60] Under IHL, occupations are envisioned to be of a temporary nature and cannot transfer any sovereign rights in the territory to the OP. Most importantly, regardless of what the OP attempts to do with the occupied territory, occupation law continues to apply.[61] Protected Persons in occupied territory cannot renounce the rights they are guaranteed by GC4.[62] The OP cannot not curtail its IHL obligations, even in the event of annexation. These rules inspired the IHL parts of the abovementioned assessments that group together what would ordinarily constitute singular IHL violations to determine an occupation's legality. A doctrinal evaluation of these rules is required to assess whether an OP is meeting its IHL obligations.

Due to the prominence of duration in debates, attention should be given to terms of art denoting duration. These terms are drawn across all three UN reports. While prolonged occupations are not explicitly prohibited by IHL, several of its rules imply that occupations are meant to be temporary or short-term.[63] However, the legality of an occupation need not be assessed based on its duration. Many occupations either *are* or *will be* prolonged so arbitrary temporal determinations should be avoided.[64] It has been argued for the international community 'to promulgate clear time limitations for the duration of an occupation, thereby offering a solution to the problem identified in, but not resolved by, Article 6 of the Fourth Geneva Convention'.[65] However, the better approach would be an assessment as to whether the occupation is 'unlawfully prolonged' by assessing whether the OP 'seeks to permanent transform the international status, government or demographic character of a foreign territory'.[66] In such an approach, duration would serve as a non-exhaustive factor. Ultimately, occupation-to-annexation is precisely the result

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[60] 1977 GC4 art. 27, para. 1.

[61] 1949 GC4 art. 47; Jean S. Pictet, *Commentary: The Geneva Convention Relative to the Protection of Civilian Persons in the Times of War* (ICRC, 1958) 275; ICRC, 'Expert Meeting: Occupation and Other Forms of Administration of Occupied Territory' (March 2012), https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf

[62] GC4 art. 4; John Cerone, 'Expert Opinion on the Non-Renunciation of Rights Under International Humanitarian Law' *Norwegian Refugee Council* (June 2017), https://www.nrc.no/globalassets/pdf/legal-opinions/cerone.pdf.

[63] ICRC Expert Meeting (2012), at 36 (including 'prohibition of populations transfers, prohibition against requiring allegiance to the occupant, limitation on the use of the resources of the occupied territory').

[64] Roberts (1990) 47, defining prolonged occupations 'to be an occupation that lasts more than 5 years and extends into a period when hostilities are sharply reduced'; Richard Falk, 'Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank' (1989) 2:1 *Journal of Refugee Studies* 40, at 46 (suggesting that, if an occupation lasts over ten years, some procedure is established where inhabitants exercise their right to self-determination).

[65] Naftali et al (2005) 613; 1949 GC4 art. 6; 1977 AP1 art. 3(b); Scobbie (2015) (that art. 6 'did not survive the adoption of [1977 AP1 art. 3(b)]').

[66] Azarova (2017).

that occupation law seeks to prevent. Nevertheless, regardless of annexation, the situation remains an occupation wherein IHL applies in entirety. The occupation's duration should not change the applicability of occupation law and for this reason utmost care should be taken to avoid creating different categories of occupation.

3.2 Shifting Duties & Obligations?

As alluded to above, '[t]he precise definition of 'prolonged occupation' is likely to be a pointless quest'.[67] While there has been scholarly debate, the definition of prolonged occupation is unaddressed in authoritative legal texts. Post-World War II, states considered – but did not fully contemplate – the consequences of indefinitely prolonged occupations when drafting either the four GCs or Additional Protocols (APs).[68] IHL does not explicitly prohibit prolonged occupations although the spirit of its rules are to safeguard against such a possibility.[69]

The prolonged occupation notion may provide some factors for determining legality but it is not necessarily determinative. Prolonged occupation does not allow for the possibility of alternative governance models vis-à-vis OP duties and obligations. While exploring questions of legality in situations of occupation that *are* or *will be* prolonged, OPs should not be given leeway to entertain such models whilst pursuing annexation ambitions. In some debates, determinations on legality and OP duties and obligations have been at times linked; this is a linkage that should be altogether avoided.

The academic debate on prolonged occupation is scattered and not new. Adam Roberts in 1990 opined that 'prolonged occupation may be a feature of the contemporary world, but it does not necessarily mean permanent occupation'.[70] Of course, all occupations can end, but Israel's is still ongoing as are several others. Currently, there are a number of military occupations that *are* prolonged,[71] with other

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[67] Roberts (1990) 47.

[68] See the exception in 1947 GC4 art. 6, in Pictet (1958), 56-64 (ensuring the application of a set of provisions after the 'general close of military operations'). Ibid, 61-62. Drafters particularly had the cases of post-WW2 Germany and Japan in mind and concerned a very limited temporal concept of prolonged occupation. Ibid, 62. However, on how art. 6 doesn't apply to the oPt. See Scobbie (2015); Ardi Imseis, 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion' (2005) 99:1 *American Journal of International Law* 102, at 106; ICRC Expert Meeting (2012) 77-78.

[69] ICRC Expert Meeting (2012) 13, 55, 61, 69-78.

[70] Roberts (1990) 102 (referencing the examples of 'the Soviet Union in Afghanistan, Vietnam in Kampuchea, and South Africa in Namibia').

[71] Geneva Academy, *Rule of Law in Armed Conflicts*, http://www.rulac.org/browse/conflicts - including Israel's military occupation of not only the oPt/State of Palestine, but also of Lebanese and Syrian territory. Current military occupations, including those which may be considered 'prolonged' include the territories of: Moldova (by Russia since 1992), Western Sahara (by Morocco since 1975), Azerbaijan (by Armenia since 1991), Cyprus (by Turkey since 1974), amongst others. In each of these cases, the OPs do not consider the respective territories to be 'occupied'.

occupations facing the reality that they *will be*.[72] IHL neither imposes specific deadlines for an OP to withdraw from the occupied territory, nor does it distinguish between different types of occupation.[73] For IHL purposes, there is no difference between short and long-term military occupations.[74] The same IHL rules apply regardless of an occupation's duration. Simply put, occupations are meant to be temporally finite, having a beginning and an end.[75] The rules apply to everything in between.[76]

Lynk referenced the ICRC expert meeting and the (largely disregarded) idea that 'the laws of occupation may have to be modified to enable the [OP] to maintain an effective rule over the territory in light of evolving administrative needs and emerging social and economic developments'.[77] However, this 'flexible' approach is the very problem alluded to above. It furthers the possibility of justifying prolonging the occupation, with the OP acting as at least a quasi-sovereign, if not sovereign, authority. This is where Lynk found that qualifying a situation as a prolonged occupation and as such, a distinct legal category, is problematic, thus triggering his four-part test.[78] As for the effects of prolonged occupations, Ben Naftali et al argue that:

> Indeed, it is not only the purpose of the regime of occupation, but also its essential nature, that may well be defied if the occupation is allowed to continue indefinitely. The occupied population under foreign control does not enjoy the full range of human rights, in the very least insofar as it is deprived of citizenship and the rights attached to that status. The prolongation of such a situation may well be in the interests of an occupying power who may rely on the provisions of the law relative

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[72] Such as the territory of Ukraine (by Russia).

[73] Adam Roberts, *What is a Military Occupation*?, (1985) 55:1 *British Yearbook of International Law* 249; Michael Bothe, 'Expert Opinion Relating to the Conduct of Prolonged Occupation in the Occupied Palestinian Territory', *Norwegian Refugee Counc*il (June 2017) https://www.nrc.no/globalassets/pdf/legal-opinions/bothe.pdf.

[74] For more on the length of an occupation, and its effects, see ICRC Expert Meeting (2012) 13, 55.

[75] 1907 Hague Regulations art. 42; Institute of International Law, Manual on the Laws of War on Land art. 41 (9 September 1880). See also Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 *International Review of the Red Cross* 133 (in particular the arguments at 146 n.44); Marco Sassoli 'The Concept and the Beginning of Occupation', in *The 1949 Geneva Conventions: A Commentary* 1455, at 1466 (Andrew Clapham, Paola Gaeta, & Marco Sassoli eds., 2015).

[76] Roberts further opines that 'in a prolonged occupation, as in a pacific one, the rights of the occupants are vastly curtailed'. Roberts (1990) 52. As Benvenisti notes, Roberts 'does, however, recognize the occupant's power to make drastic and permanent changes in the economy or system of government if such are needed'. Ibid, 53 (cited in Benvenisti (1990) 246, n.245).

[77] Lynk (2018).

[78] Ibid ('Otherwise, the concept of prolonged occupation may well become a legal guise that masks a de facto colonial exercise and defeats the transient and exceptional nature which occupations are intended to be'.).

> to the maintenance of the status quo, as well as to its security concerns, to the detriment of the population.[79]

For Gross, in such situations, OPs enjoy a 'pick and choose' approach to occupation law, 'pretending that their *sui generis* or inconclusive nature was a logical result of the factual circumstances'.[80] It is from such a pick and choose approach that '[c]haos and complexity allowed the creation of a legal regime that gave Israel the authority of an occupier while relieving it from many of the duties and the restrictions incumbent on an occupying power'.[81] However, Ronen opines that when determining an occupation's illegality, it similarly 'may result in greater injury than benefit to the population under occupation, by making the applicable law less clear and more susceptible to manipulation'.[82] However, as discussed above, a determination of the occupation's illegality should not have any effect on the applicability of IHL rules in their entirety. Ronen concludes that:

> A formalistic approach, of applying a body of law (the law of occupation) to a situation which in practice is governed by an entirely different body of law (the domestic law of the occupant) may result in greater harm than benefit to the population. A more realistic approach would allow some flexibility in the application of the law of occupation.[83]

Following Gross's argument, harm would more likely result from flexibility in the application of the law of occupation. For this reason, such a shift in discussion that needlessly muddies the water should be avoided altogether. There should be no leeway for an OP to curtail its duties and obligations as this furthers the conditions for prolonged, long-term occupations. Similarly, regardless of a legality determination, occupation law applies, and the OP cannot 'pick and choose' which rules it wants to apply.

While it may help to inform the analysis, prolonged occupation is not in itself strictly relevant. An occupation does not have to be prolonged for it to be unlawful, such as in the case of Ukraine. An occupation's prolonged nature may be a factor in determining legality but is not necessarily determinative. A finding that an occupation is unlawful should not be seen as somehow shifting or negating the obligations of an OP. Occupation law does not operate on a spectrum. Prolonged

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[79] Naftali et al. (2005) 600.

[80] Gross (2017) 263-264 (emphasis in original).

[81] Ibid.

[82] Ronen (2008) 244.

[83] Ibid, 245.

occupation is not a legal category separate from ordinary occupation and does not create increased entitlements for the OP under IHL.[84] While the duration of the occupation may not be a reason for illegality in itself, its causes and effects are factors. Furthermore, IHL does not provide the means to assess a prolonged occupation's legality. Increased scholarly focus on this matter, driven by the pressing need to respond to situations of prolonged occupation and their connected international law violations, is pushing for attempting to determine an occupation's legality based on IHL.[85]

The occupation-to-annexation paradigm provides a more useful approach and it has been at the heart of advocacy for Palestinians and their allies.[86] Once the shift to annexation occurs, in any way, shape, or form, then the OP is in serious breach of at least one peremptory norm, the prohibition of annexation. Of course, this also would not necessarily mean that an unlawful occupation would have to be equated with instances of annexation alone. Rather, as explained below, the question is whether the serious breaches a peremptory norm is attributable to the state[87] and is a 'purely normative operation'.[88] The state is able to commit serious breaches by way of its occupation. If it is by way of the occupation that any of the virtually agreed upon peremptory norms are seriously breaches, then it would be equated with a determination of illegality. There is also something to be said of causation in this regard, but that analysis is more relevant for assessing damages and reparations under the rules on state responsibility.[89] The characteristics and features of the occupation – in terms of all these norms – do not have to altogether combine to justify an illegality determination. Thus, priority should be given to an assessment of whether the occupation gives rise to serious breaches of peremptory norms and, if so, what the legal consequences are for the OP and third states and parties.

4 Assessing the Legality of Occupations, including for Serious Breaches of Peremptory Norms

Pertinent analysis that has been largely overlooked is whether occupation gives rise to serious breaches of peremptory norms such as the prohibitions on annexation, the

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[84] Bothe (2017) 3.

[85] ICRC Expert Meeting (2012), 13, 55; Lynk (2018).

[86] Al-Haq, 'International Conference: The Threshold from Occupation to Annexation (3-4 October 2018)', 30 September 2018, https://www.alhaq.org/advocacy/6155.html.

[87] Thomas Weatherall, *Jus Cogens: International Law and the Social Contract* (CUP, 2015).

[88] León Castellanos-Jankiewicz, 'Causation and International State Responsibility' SHARES Research Paper 07 (2012), ACIL 2012-07, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039268, at 64.

[89] Ibid, 1, 5, 64.

denial of the right to self-determination of peoples, racial discrimination, apartheid, as well as other norms. Other than Imseis and, to a lesser extent, some others, the abovementioned debates have not undertaken such an analysis.

4.1 Identifying the Peremptory Norms

It is first necessary to identify the peremptory norm, then whether there is a serious breach, and then the legal consequences for the offending state as well as third states and parties. With respect to the oPt/State of Palestine, there are four peremptory norms of concern discussed here: annexation, denial of the right to self-determination, racial discrimination, and apartheid; with the possibility of others.[90] Peremptory norms sit at the top of the hierarchy of international law rules.[91] Here, we are interested in those peremptory norms creating *erga omnes* obligations. As Eric Suy explains, 'an act or action that breaches a peremptory norm establishing an *erga omnes* obligation invokes a special responsibility of the State…*erga omnes* obligations form part of the law on the responsibility of States for internationally wrongful acts…[it] involves a breach of a peremptory norms by an act or deed'.[92] With respect to *erga omnes,* Jochen Frowein explains that '[a] rule from which no derogation is permitted because of its fundamental nature will normally be one in whose performance all States seem to have a legal interest'.[93] While there is no comprehensive list of peremptory norms, international bodies including the ICJ, the International Law Commission (ILC), and legal scholarship have identified several.[94]

Annexation falls under the prohibition of the illegal use of force by the UN Charter and general international law,[95] and unambiguously reaffirmed by UN organs.[96] Under the *jus ad bellum*, a state's use of force is a means of last resort and is

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[90] Imseis (2020), 1071-1081; Albanese (2022), paras. 10(a)-(b); Wilde (2022a); Wilde (2022b).

[91] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1969), 1155 UNTS 331, art. 53; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session' (2001) UN Doc. A/56/10 [43] [ARSIWA]; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc. A/56/10 [56, 84-85, 111-113] [ARSIWA ILC Commentaries]; ILC, 'Draft Conclusions on the Identification and Legal Consequence of Peremptory Norms of General International Law (*Jus Cogens*)' (2022) UN Doc. A/77/10 (Annex) [ILC Peremptory Norms].

[92] Eric Suy, 'Volume II, Part V: Invalidity, Termination and Suspension of the Operation of Treaties, s.2 Invalidity of Treaties, Art.53 1969 Vienna Convention', in *Vienna Conventions on the Law of Treaties*, 1226, paras. 4-5 (Olivier Corten & Pierre Klein eds., 2011).

[93] Jochen Frowein, Obligations Erga Omnes, *Max Planck Encyclopedia of Public International Law* (December 2008), para. 3.

[94] ARSIWA ILC Commentaries; ILC Peremptory Norms; Crawford (2013), 316, 380, 692.

[95] UN Charter, art. 2(4); UNGA Res. 2625 (XXV) (24 October 1970); UNGA Res. 3314 (XXIX) (1974) art. 3(a); ICJ Wall Advisory Opinion, para. 87 (citing *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA), Judgment,* 27 June 1986, 14, paras. 187-190).

[96] UNSC Res. 242 (22 November 1967) (oPt); UNSC Res. 660 (2 August 1990) (Kuwait); UNSC Res. 662 (9 August 1990) (Kuwait).

lawful only when in self-defense.[97] The use of force does not necessarily amount to annexation, although annexation may occur either through the threat or use of force.[98] Under IHL, occupations are not identified as 'lawful' nor 'unlawful' in line with the 'strict separation of *jus in bello* from *jus ad bellum*' and, as such, '[i]nternational law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in occupied territory'.[99]

Self-determination is enshrined in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR). The realization of the right to self-determination 'is an essential condition for the effective guarantee and observance of individual human rights'.[100] Further, 'the principle of equal rights and self-determination of peoples' embraces the right of all peoples 'freely to determine, without external interference, their political status and to pursue their economic, social and cultural development' as well as the duty of every State 'to respect this right in accordance with the provisions of the Charter'.[101] The 'modes' of implementing the right include 'the establishment of a sovereign and independent State, the free association or integration with an independent State, or the emergence into any other political status freely determined by a people'.[102]

Racial discrimination is defined and prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The ICERD prohibits discrimination on grounds of race and terms akin to it such as color, descent, and national or ethnic origin. ICERD state parties are obligated to 'particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction'.[103] The International Convention on the Suppression and Punishment of the Crime of Apartheid, which categorizes apartheid as a crime against humanity, is different from the ICERD in that it characterizes apartheid by the outcomes of a

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[97] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, 226, para. 41; ICJ Nicaragua, para. 194 (June 27).

[98] UN Charter, art. 2(4).

[99] Ferraro (2012), at 135.

[100] UN Human Rights Commission, 'General Comment 12: Article 1 (The Right to Self-determination of Peoples)' UN Doc. HRI/GEN/1/Rev.9, (1984), para. 1.

[101] UNGA Res. 2625 (XXV).

[102] Ibid.

[103] ICERD, art. 3.

state's institutionalized racial discrimination, motivated by establishing and maintaining racial domination for one group over another or others.[104]

Several IHL rules are inspired by these preemptory norms or, more accurately, some historical variation thereof; and these IHL rules are largely reflective of challenges of their time (the post-World Wars Geneva Conventions and the anticolonial anti-imperial Additional Protocols). Several IHL rules incorporate the logic of the prohibition of annexation by,[105] for example, prohibiting demographic changes and the unlawful appropriation of property for settlements.[106] The OP continues to be bound by conventional and customary IHL, which continue to apply regardless of the unlawful situation.[107] Certain IHL rules are also meant to prevent discrimination based on race and other similar distinctions, whether through general provisions,[108] the prohibition on settlements,[109] or others.[110] Similar protections were included in API,[111] wherein policies and practices of racial discrimination and apartheid were included as grave breaches.[112] API also integrated language pertinent to self-determination with respect to anti-colonial struggles.[113]

The ICJ and ILC consider the prohibition of annexation,[114] the denial of the right to self-determination,[115] racial discrimination, and apartheid,[116] to be peremptory norms creating obligations *erga omnes*.[117] It is worth noting that racial discrimination and apartheid also may consist of 'composite acts', or a series of actions or omissions constituting a wrongful act under international law.[118] Such a breach begins with the first action or omission of the series, and lasts so long as they

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[104] International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, art. 2.

[105] Ibid*,* 1460-1461.

[106] Bothe (2017) 4-5.

[107] 1949 GC4, art. 47; Pictet (1958) 275; Sassoli (2015) 1406; Bothe (2017) 5.

[108] 1949 GC4, arts. 3, 13 & 27; Pictet (1958) 119, 206-207.

[109] 1949 GC4, art. 49, para. 6; Pictet (1958) 283.

[110] 1949 GC4, arts. 64 & 66; Pictet (1958) 335 & 340.

[111] 1977 AP1, arts. 9(1) & art. 75.

[112] 1977 AP1, art. 85(4)(c).

[113] 1977 AP1, art. 1(4); Amanda Alexander, 'International Humanitarian Law, Postcolonialism, and the 1977 Geneva Protocol I' (2016) 17:1 *Melbourne Journal of International Law* 1.

[114] ARSIWA ILC Commentaries, 98, 112 n.640 & n.644, 114-115 (including aggression, which annexation falls under).

[115] Ibid, 85, 111, 112 n.641, 113, 113 n.651, 114, 120, 127.

[116] Ibid, 33, 62-63, 85, 112, 112 n.640, 113 fn 651.

[117] ILC Peremptory Norms, 89. Annexation is not mentioned, but is considered as falling under the prohibition on aggression. See, generally, ARSIWA ILC Commentaries.

[118] ARSIWA ILC Commentaries, 62 (on art. 15).

continue.[119] As mentioned with respect to the Apartheid Convention, apartheid is different from acts of racial discrimination, just as genocide is different from acts of ethnic or racially-motivated killing – the former is the institutionalization and systemization of the latter.[120]

Some attention should also be given to colonization, involving maintenance by force, which can be considered an example of a breach of an international obligation having a continuing character.[121] Colonial domination would constitute a breach of the peremptory norm of the right to self-determination.[122] International law sources do not provide a specific definition of colonization,[123] although its prohibition is inherently linked to the right to self-determination.[124] The UNGA, in particular, has been at the forefront of condemning colonialism and colonial practices as illegal.[125] The UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples called on all States to take 'immediate steps' to 'transfer all powers to the peoples' of colonized territories.[126] It provides that '[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights … contrary to the [UN Charter]'.[127] The UNGA has called on all States to 'bring a speedy end to colonialism'.[128] Historically, before the decolonization era, the subjects of colonial practices and policies did not benefit from occupation law.[129] Over time, IHL rules developed to prohibit certain colonial policies and practices and ensure full IHL protection during occupations.[130] GC4 had already specified that '[t]he [OP] shall not deport or transfer parts of its own civilian

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119 Ibid.

120 Ibid*,* 62-63.

121 ARSIWA ILC commentaries, 60 (on art. 14).

122 Ibid.*,* 113 (on art. 41) & 113 n.650; Robert McCorquodale, 'Rights of Peoples and Minorities', in Daniel Moeckli et al., *International Human Rights Law* (OUP, 2010) 365; Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP, 1999) 133-140; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP, 1989) 96.

123 Or 'colonies'. See Nishat Nishat, 'The Structure of Geneva Convention IV and the Resulting Gaps in that Convention,' in Clapham et al (2015), 1078, at 1069.

124 John Dugard, 'Lifting the Guise of Occupation and Resource to Action before the ICJ and ICC'*,* (2014) 17 *Palestine Yearbook of International Law* 9, at 11.

125 Ibid.

126 UNGA Res. 1514 (XV). On the weight of this resolution, particularly on ICJ cases in the Namibia and Western Sahara cases, *see* Marco D. Oberg, 'The Legal Effects of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 15:5 *European Journal of International Law* 879.

127 UNGA Res. 1514 (XV), art. 1. This terminology is used by Imseis (2020) & Albanese (2022).

128 UNGA Res. 2635.

129 Yukata Arai-Takahashi, 'Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation' (2012) 94:885 *International Review of the Red Cross* 51.

130 1977 API art. 1(4). Also, relatedly on the prohibition of settlements.

population into the territory it occupies'.[131] This specific prohibition was adopted to 'prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories'.[132] Certainly, colonialism may violate several of the abovementioned peremptory norms.

4.2 Legal Consequences for Internationally Wrongful Acts, including Serious Breaches of Peremptory Norms

The laws of state responsibility provide a framework for legal consequences for the offending state and third states for internationally wrongful acts, including serious breaches of peremptory norms. Unlike the IHL regime, the rules on state responsibility define a more specific and stringent set of third state obligations for unlawful acts, including serious breaches of peremptory norms.[133] When a serious breach of peremptory norms occurs,[134] the accompanying unlawful situation demands: a) non-recognition; b) non-aid or assistance; and c) cooperation to bring that serious breach to an end through lawful means.[135] These are, in turn, the *erga omnes* obligations of third states.

The obligation of non-recognition has historically been employed within the ambit of the prohibition on forcible acquisition of territory.[136] State practice on non-recognition has developed over time to include obligations on, among others, the 'right to self-determination, the prohibition of racial discrimination and apartheid and basic principles of [IHL]'.[137] Third states are obligated not to recognize, nor aid or assist, annexation.[138] They have a collective obligation of non-recognition to situations of 'attempted acquisition of sovereignty over territory through the denial of the right of self-determination of people', which 'not only refers to the formal recognition of these situations, but also prohibits acts which would imply such

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131 GC4 art. 49, para. 6.

132 Pictet (1958) 283.

133 Hindi (2023). Most importantly, the obligation to act individually and collectively.

134 'A breach will be considered "serious" where 'it involves a gross or systematic failure by the responsibility state to fulfil the obligation'. Crawford (2013) 381.

135 ARSIWA art. 41; Crawford (2013) 380. See, generally, Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford, Alain Pellet & Simon Olleson (eds.), *The Law of International Responsibility* (OUP, 2010) 677; Nina H. B. Jørgensen, 'The Obligation of Non-Assistance to the Responsible State' in Crawford et al (2010), 687 [Jørgensen (2010a)]; Nina H. B. Jørgensen, 'The Obligation of Cooperation' in Crawford et al (2010), 695 [Jørgensen (2010b)].

136 Dawidowicz (2010) 677, at 678.

137 Ibid.

138 ARSIWA ILC Commentaries, at 114 (as in the case of Kuwait and with reference to the Friendly Relations Declaration).

recognition'.[139] Non-assistance extends 'not only to assistance in the commission of the breach, but assistance in maintaining an internationally unlawful situation that may result'.[140] Thus, the 'obligation not to assist the responsible State is limited to acts that would assist in preserving the situation created by the breach'.[141] Most importantly, States must collectively bring to an end, through lawful means, an unlawful situation. As Crawford notes, the qualification of a situation as unlawful is but a first step to bring an unlawful situation to an end.[142] Further, '[a]n authoritative prior determination as to the nature of the wrongful act is desirable, if not a necessity, if the obligation to cooperate is to be meaningful'.[143] Here is where, in the case of the State of Palestine/oPt, an ICJ determination would be most valuable. Nevertheless, lack of collective action should not be interpreted as exempting states from taking individual action in this regard.

If each of the above peremptory norms are not analyzed as peremptory norms but instead as stand-alone 'internationally wrongful acts', such an approach would be a shortcoming with regard to third state responsibility. There is no shortage of internationally wrongful acts by states, as opposed to serious breaches of peremptory norms. For internationally wrongful acts, third states may invoke responsibility of the offending state *only if*: '(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole'.[144] Satisfying this requirement, third states may then claim from the offending state: '(a) cessation of the … act, and assurances and guarantees of non-repetition … ; and (b) performance of the obligation of reparation … in the interest of the injured State … '.[145] In contrast, if the internationally wrongful act amounts to a serious breach of a peremptory norm, the obligations of non-repetition, non-aid and assistance, and the obligation to cooperate are demanded. As for the offending state, they are required to cease the act (if continuing),[146] offer appropriate assurances and guarantees of non-repetition,[147] and

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[139] Ibid.

[140] Crawford (2013) 385.

[141] Jørgensen (2010a) 691.

[142] *See* Crawford (2013) 389.

[143] Jørgensen (2010b) 700.

[144] ARSIWA, art. 48(1).

[145] Ibid, art. 48(2).

[146] Ibid, art. 30(a).

[147] Ibid, art. 30(b).

make full reparation.[148] For reparation, this includes either or all of restitution, compensation, and satisfaction.[149] Crucially, restitution demands that the offending state 're-establish the situation which existed before the wrongful act was committed'.[150]

The ICJ *Wall* advisory opinion seems to have taken an expansive approach to the rules on state responsibility in this regard. The ICJ made no mention of peremptory norms, but invoked *erga omnes* obligations, including the right to self-determination and IHL rules.[151] From this, the ICJ called for third states to perform non-recognition, non-aid and assistance, but in addition asked only that they 'should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associate regime'.[152] While the ICJ's conclusions are correct, the rules on state responsibility do not necessarily tie non-recognition, and non-aid and assistance, to internationally wrongful acts. However, the relevant internationally wrongful acts in that case – denial of the right to self-determination and IHL rule violations (and annexation for that matter) – would, in fact, amount to serious breaches of peremptory norms that create *erga omnes* obligations. Moreover, the ICJ's language on the legal obligations of third states ('should consider') fell well short on what should have been clear language on the obligation to cooperate.

It must also be said that each of the peremptory norms – annexation, denial of the right to self-determination, racial discrimination, and apartheid – require an end to the occupation. There is, at this point, no possible way that Israel can make restitution while the occupation is ongoing. These peremptory norms are seriously breached *by* the occupation.[153] Maintaining the territorial integrity of the occupied territory is arguably the fundamental element of ensuring Palestinian self-

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[148] Ibid, art. 31.

[149] Ibid, art. 34.

[150] Ibid, art. 35.

[151] ICJ Wall Advisory Opinion, paras. 155-160. This follows the ICJ consideration of the 'legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States'. Ibid, para. 154.

[152] Ibid, para. 160.

[153] Ralph Wilde, 'Expert Opinion on the Applicability of Human Rights Law to the Palestinian Territories With a Specific Focus on the Respective Responsibilities of Israel, as the Extraterritorial States, and Palestine, as the Territorial State', *Diakonia* (12 February 2018) https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/07/expert-opinion-applicability-of-human-rights-law-to-the-palestinian-territories-with-a-specific-focus-on.pdf. While Israel must secure rights to Palestinians until then, 'this does not affect Israel's obligation to give up' its control of the oPt, particularly where it prevents Palestinians from full self-administration.

determination. Without this, other freedoms are impossible.[154] Further, looking in particular to the settlement enterprise, the issue of reversing racial discrimination and apartheid cannot be seen as equating rights between settlers and the Palestinians. Rather, it entails dismantling the settlement enterprise in its entirety.[155]

5 The Situation in Palestine

Palestine here refers to the oPt/State of Palestine, that is to say the part of historic Palestine occupied by Israel in 1967. This section provides a summary of the occupation-to-annexation shift, while also covering more recent findings on serious breaches of peremptory norms in Palestine.[156]

5.1 Occupation-to-Annexation

As with 'forms' of occupation, international law provides no clear differentiation between 'forms' of annexation. Whether de jure or de facto, annexation is illegal.[157] A focus on the differentiation between de jure and de facto has taken a life of its own and dominated debate, including within civil society, particularly since the language of the ICJ *Wall* advisory opinion.[158] In actuality, differentiation between sorts of annexation are not legally relevant.[159] Indeed, findings of de facto annexation are not findings of annexation in its purest sense, and as such the notion produces confusion and semantic nonsense.[160]

There is no shortage of events that have evidenced the occupation-to-annexation shift in Palestine, though some should be highlighted. Immediately after occupying the Gaza Strip and the West Bank, including East Jerusalem, in 1967, Israel unilaterally annexed around 70 square kilometers of the West Bank ('East Jerusalem') into its municipal borders.[161] Through the *1980 Basic Law: Jerusalem as Capital of Israel*, the Israeli Knesset applied Israeli domestic law to the entire city of

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[154] UNGA Res. 1514 (XV) (1960), preamble ('all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory').

[155] This was included in a legal brief on racial discrimination drafted for the same international NGO mentioned in footnote 3 above, which has since been removed online (hard and soft copy available with author).

[156] Of course, as mentioned, there are also several other situations of prolonged occupation. It would be beyond the scope of this paper to give these situations proper discussion. However, in light of the request of an ICJ advisory opinion, it is an opportune time for practitioners and scholars – particularly from those states suffering from prolonged occupation – to apply this analysis (and others) to their situations.

[157] Omar Dajani, 'Israel's Creeping Annexation' (2017) 111 *AJIL Unbound* 51-56.

[158] See the language in ICJ Wall Advisory Opinion, paras. 74-78.

[159] Imseis (2020), 1073 ('The question of whether or not occupied territory may be considered annexed is a factual one not requiring formal declarations of annexation to be satisfied under international law'.).

[160] As shared with me by Luigi Daniele, 'it has ended up normalizing the abyss between facts and legal prescriptions'.

[161] UNSC Res. 242, 1(i) (22 November 1967).

Jerusalem. The international community has never recognized Israel's annexation of East Jerusalem.[162] Throughout its occupation, Israel has continuously denied the applicability of the Fourth Geneva Convention there, but rather used a 'pick and choose' approach to IHL rules with the Israeli Supreme Court (sitting as the 'High Court of Justice' in the oPt) providing its stamp of approval in draconian fashion.[163] The international community has consistently reaffirmed the status of 1967 Palestine as occupied, and the applicability of the Fourth Geneva Convention throughout.[164]

A declaration is not required to prove annexation.[165] Israel has 'formally' exercised sovereignty in East Jerusalem through its legislature, while the West Bank is ruled through its military and to enable its settlement enterprise there. Since 1967, Israel has transferred its civilians into the oPt building a massive settlement enterprise. While Israeli law is applied to Israeli settlers there, the Knesset is not presently authorized to automatically legislate for the occupied territory. The applicability of Israeli law to settlers in Area C still takes place in the form of promulgation by the military commander (Area C is comprised of about 61% of the West Bank which is under full Israeli control, and largely off limits for Palestinians).[166] Nevertheless, the military and judicial system operating in the oPt are fully part of Israel's legal and political order.[167]

Successive Israeli governments have openly stated Israel's long-term intentions vis-à-vis the West Bank, and so-called 'Area C' in particular. For example, recently, a draft plan was circulated to transfer power from the Israeli Civil

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[162] The former US Trump administration recognized Jerusalem as capital of Israel, although not clearly stating what part(s) of Jerusalem. 'Statement by President Trump on Jerusalem', White House (6 December 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem/. This did not change under Joe Biden's presidency.

[163] Theodor Meron, 'The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War' (2017) 111:2 *American Journal of International Law* 357 (2017); Israel Ministry of Foreign Affairs, 'Is the West Bank 'Occupied' or 'Disputed' Territory,'

http://mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx#Settlements1.

[164] Conference of High Contracting Parties to the Fourth Geneva Convention Declaration (17 December 2014), https://unispal.un.org/DPA/DPR/unispal.nsf/0/E7B8432A312475D385257DB100568AE8. See also the various, annual, resolutions of the UNGA and, more recently, UNSC Res. 2334 (23 December 2016).

[165] See the evolution of international law in this regard in Hofmann (2020).

[166] For more on this, see Association for Civil Rights in Israel (ACRI), 'One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank' (October 2014), https://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf. See also IDF MAG Corps, *Issues of Real Estate, Construction and Municipal Law*, http://www.law.idf.il/602-2385-en/Patzar.aspx; IDF *MAG Corps, FAQ*, http://www.law.idf.il/327-en/Patzar.aspx.

[167] David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2017) 94 *International Review of the Red Cross* 207.

Administration operating in the oPt to Israeli civilians.[168] Over time, annexation has taken place in calculated, incremental, as well as sometimes chaotic, fashions. A legal instrument, or unilateral declaration in that regard, is but a formality, though there has been no shortage of bills and laws evidencing Israel's overall objectives.[169] Israel's means and measures of land confiscation have included: the formal annexation of East Jerusalem; declaring closed military zones; building, expanding, and consolidating settlements; declaring natural reserves and national parks; declaring 'State land'; agricultural landgrabs; restricting Palestinian movement; dividing the West Bank into Areas A, B, and C through the Oslo Accords; and the Wall; and among other means.[170]

The settlement enterprise has been at the core of Israel's annexation. In 2012, the Israeli government appointed an internal committee to assess the legal status of unauthorized Israeli settlement 'outposts' (those built without a permit under Israeli law) in the West Bank. The committee published the so-called 'Levy Report' which contained a series of conclusions extending far beyond questions concerning the legal status of settlement outposts in occupied territory. The Committee contended that occupation law was inapplicable to the West Bank given its 'disputed territory' status. While Israel has never officially endorsed the findings contained in the Report, it has implemented several of its recommendations,[171] which have so far included: the retroactive authorization of around a quarter of the illegal outposts present in the West Bank;[172] the establishment of a '[land] regulation committee' in order to 'outline a process for the legalization of Jewish structures and neighborhoods built in 'Judea and Samaria' (West Bank) with the involvement of the authorities'; passing of the 'Validation Law' ('Regularization Law') with the express objective to 'regularize settlement in Judea and Samaria' (West Bank) and legalize previous Israeli settlement construction by way of retroactive expropriation, planning

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168 Hagar Shezaf, 'Israeli Gov't Circulates Draft Plan to Transfer Powers Over Civilian Life in the West Bank to Smotrich's Control', *Ha'aretz* (15 February 2023), https://www.haaretz.com/israel-news/2023-02-15/ty-article/.premium/smotrich-pushes-plan-to-transfer-powers-over-west-bank-civilian-life-to-finance-ministry/00000186-529d-d603-a7bf-debfb36b0000.

169 Yesh Din, *Annexation Legislation Database,* https://www.yesh-din.org/en/legislation/; B'Tselem, *The Annexation That Was and Still Is,* https://conquer-and-divide.btselem.org/map-en.html.

170 B'Tselem, *Conquer and Divide,* https://conquer-and-divide.btselem.org/map-en.html.

171 Yesh Din, *From Occupation to Annexation: The Silent Adoption of the Levy Report on Retroactive Authorization of Illegal Construction in the West Bank* (22 February 2016) https://www.yesh-din.org/en/from-occupation-to-annexation-the-silent-adoption-of-the-levy-report-on-retroactive-authorization-of-illegal-construction-in-the-west-bank/.

172 Yesh Din, *Under the Radar: Israel's Silent Policy of Transforming Illegal Outposts Into Official Settlements* (11 March 2015), https://www.yesh-din.org/en/under-the-radar-israels-silent-policy-of-transforming-illegal-outposts-into-official-settlements-2/.

and zoning regulations;[173] and the completion of a land survey process in the West Bank to identify which areas should be designed as 'State Land' as a vehicle for further expansion and consolidation of settlements and outposts.[174] The report's positions on the 'disputed' character of the West Bank, inapplicability of occupation law, and consequent legalization of settlement activities were even included in a note circulated to Israeli foreign missions by its Ministry of Foreign Affairs in November 2015.[175] Israel's planning and zoning regime in Area C favors settlement growth, designed to reject the vast majority of Palestinian building permit applications, in many cases mandating the demolition and seizure of Palestinian properties (including humanitarian and donor-funded properties).[176] As explained by Yesh Din, '[t]his institutionalization of land grab and dispossession reinforces the impression that Israel is planning to reduce the number of Palestinians in Area C, where the settlements and outposts are located, by forcing them out of the area. This raises the concern that Israel's ultimate goal is to facilitate the official annexation of Area C to Israel'.[177]

The occupation-to-annexation threshold has been crossed long ago with East Jerusalem and into the remainder of the West Bank. In such circumstances, the situation of occupation does not cease and nor does the application of occupation law. The international community has rejected annexation but how they have reacted as third states is a different matter altogether. Yet, the 'facts on the ground' are clear. Israel has, through various means and measures, annexed the oPt, in whole or in parts, and, as such, committed a serious breach of that peremptory norm. Further, these means and measures have also led to other serious breaches, including, amongst possible others, the denial of the right to self-determination, and the prohibition of racial discrimination and apartheid.

5.2 Findings of International Bodies

Of course, with respect to peremptory norms, the situation in the State of Palestine/oPt includes not only annexation, but several peremptory norms. For guidance, one may look to recent findings of several international bodies (and

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[173]Law for the Regularization of Settlement in Judea and Samaria, 5777-2017, at: https://www.adalah.org/uploads/uploads/Settlement_Regularization_Law_English_FINAL_05032017.pdf.

[174] For a detailed analysis of each of these measures and their combined effects on the future status of the West Bank, see Yesh Din (2016), 8-30.

[175] Israeli Ministry of Foreign Affairs, *Israeli Settlements and International Law* (30 November 2015) http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx. Yesh Din (2016) 5 (for critique of this adoption).

[176] B'Tselem, *Planning Policy in the West Bank,* https://www.btselem.org/planning_and_building.

[177] Yesh Din (2016) 6.

previous reiterations therein). While these bodies do not identify particular rules as peremptory norms, their findings could inform the analysis, including the ICJ's advisory opinion.

For example, with respect to annexation, determinations are found in various resolutions, including those of the UNSC and UNGA. In the aftermath of the Six Day War, the UNSC passed Resolution 242, emphasizing the 'inadmissibility of the acquisition of territory by war' and calling on Israel to withdraw from the occupied territories.[178] Further, in 1980, the UNSC reaffirmed the 'overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem'.[179] In response to the adoption of *1980 Basic Law: Jerusalem*, the UNSC determined that 'all legislative and administrative measures and actions taken by Israel, the [OP], which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent 'basic law' on Jerusalem, are null and void and must be rescinded forthwith'.[180] No state has recognized Israel's sovereignty over East Jerusalem or Israel's position that Jerusalem is its 'undivided capital'. Of course, there is no shortage of annual UNGA resolutions to this effect.

With respect to racial discrimination and apartheid, several findings have been made by international bodies on the situation in the OPT. Previous UN Special Rapporteurs have made determinations on the existence of racial discrimination and apartheid within the oPt.[181] In its latest Concluding Observations on Israel, as with previous Concluding Observations, the UN Committee on the Elimination of the Racial Discrimination (CERD) identified a series of ICERD violations.[182] A number of these findings involved violations of ICERD article 3, which specifically prohibits racial segregation and apartheid.[183] The UN Human Rights Committee has identified a series of ICCPR violations by Israel, including violations of the right to self-determination.[184] In its last report, the Committee specifically calls on Israel to '[t]ake immediate steps to dismantle the wall in line with the advisory opinion of the [ICJ] on the legal consequences of the construction of the wall in the [oPt] … with a view

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[178] UNSC Res. 242 (22 November 1967), preamble & para. 1(i).

[179] UNSC Res. 476, para. 1 (30 June 1980).

[180] UNSC Res. 478, para. 3 (20 August 1980).

[181] UN Doc. A/HRC/4/17, 28 January 2007, at 2; Richard Falk, 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967' UN Doc. A/65/331 (30 August 2010) para. 3.

[182] UN CERD, 'Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel' UN Doc. CERD/C/ISR/CO/17-19 (27 January 2020).

[183] Ibid, paras. 22-23.

[184] UN Human Rights Committee, 'Concluding Observations on the Fifth Periodic Report of Israel' UN Doc. CCPR/C/ISR/CO/5 (5 May 2022). On violating art. 1 (self-determination), see paras. 14, 38. On violating art. 2 (non-discrimination), see paras. 18, 22, 24, 36, 42.

to ensuring Palestinians' full access to their lands and livelihoods and the enjoyment of their [ICCPR] rights, including the right of self-determination'.[185] The Committee on Economic, Social, and Cultural Rights has similarly identified ICESCR violations by Israel, including violating the right to self-determination.[186] There is also no shortage of conclusions made by other UN special procedures in this regard, such as the works of various UN special rapporteurs on the oPt, including on serious breaches of peremptory norms.[187]

Moreover, the UN fact-finding mission on settlements noted a series of discriminatory Israeli policies and practices, and called upon States 'to comply with their obligations under international law and to assume their responsibilities in their relationship to a State breaching peremptory norms of international law – specifically not to recognize an unlawful situation resulting from Israel's violations'.[188] The mission emphasized that the establishment of settlements 'is a mesh of construction and infrastructure leading to a creeping annexation that prevents the establishment of a contiguous and viable Palestinian State and undermines the right of the Palestinian people to self-determination'.[189] As mentioned, the ICJ concluded that the Wall and measures to alter the demographic composition of the oPt 'severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right',[190] and that 'obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law'.[191]

There is also no shortage of determinations from UN organs and bodies on Israel's various international law violations since 1967, only some of which are highlighted here. These violations equate to serious breaches of peremptory norms. As Wilde explains, peremptory norms are 'not a separate category of substantive international legal rules but is, rather, a way of characterizing certain rules as being of a special character when it comes to their interaction with other rules of international

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[185] Ibid, para. 15(c).

[186] UN CESCR, Concluding Observations on the Fourth Periodic Report of Israel, U.N. Doc. E/C.12/ISR/CO/4 (Nov. 12, 2019). On violating art. 1 (self-determination), see paras. 16-17, 20-21. On violating art. 2 (non-discrimination), see paras. 18-19, 50-51.

[187] U.N. Doc. A/HRC/4/17, para. 57 ('Israel has systematically violated peremptory norms of international law [jus cogens] in the oPt, ranging from the denial of self-determination to serious crimes against humanity'.).

[188] Ibid, para. 116.

[189] Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, U.N. Doc. A/HRC/22/63 (7 February 2013), para 101.

[190] ICJ Wall Advisory Opinion, para. 122.

[191] Ibid, para. 155.

law'.[192] When looking at the various findings, the idea here is that it would be an injustice to look at each of these as standalone violations and/or as 'internationally wrongful acts'. Instead, the act should be assessed as peremptory norms having *erga omnes* obligations and, as such, the legal consequences for Israel's serious breaches of those norms.

6 Concluding Remarks

Israel's occupation of the oPt has lasted for over 55 years. It is, currently, the longest of all military occupations. The occupation should have ended long ago with Israel's complete military and civilian withdrawal from the entirety of the oPt. While conventional and customary IHL rules are numerous and detailed, IHL does not prescribe an obligation to end an occupation. It is, rather, commonsensical and implied through other conventional and customary IHL rules.

The ICJ has a unique opportunity to address the illegality of Israel's occupation of the oPt. There are, of course, several ways of going about this, through different legal frameworks and subject-matter. This article contends that it would be best to identify those rules that amount to peremptory norms and the obligations of Israel and third States upon violation of such norms. So long as the occupation gives rise to a serious breach of one or more peremptory norms, then the occupation should be considered unlawful outright. Israel's occupation is unlawful by way of its serious breaches of several peremptory norms, including, amongst possible others, the prohibition of annexation, the right to self-determination, and the prohibitions of racial discrimination and apartheid. With respect to these peremptory norms, Israel is bound to cease such acts, offer appropriate assurances and guarantees of non-repetition, and make full reparation. Most importantly, in order to make full reparation, it must make restitution by reestablishing the situation that existed before the wrongful act was committed. Thus, restitution means in effect ending the occupation in its entirety. Third states are obligated to non-recognition, non-aid and assistance, and the obligation to cooperate to bring to an end the unlawful situation.

There have been several attempts over the past two decades to assess the illegality of occupations, including Israel's occupation of the oPt. Yet, some these assessments were needlessly complicated and muddied the legal waters with harmful effects. In light of this, it is particularly important to keep in mind that the notion of prolonged occupation should not be seen determinative, though it may provide factors in determining legality. Furthermore, discussions about shifting duties and

[192] Wilde (2022a) 5.

rights of the occupier are best avoided altogether. In contrast, the laws of state responsibility and peremptory norms provide a more productive way forward. Based on the principles of sovereignty and equality of States, Palestine as a recognized state should enjoy the protections stipulated in the UN Charter against the threat or use of force against its territorial integrity and political independence.[193]

This article speaks only to the oPt/State of Palestine and the limits within that formulation, and should be seen as without prejudice to the rights of *all* Palestinians to redress for the historical wrongs that they have suffered. International law alone will not liberate Palestine. Neither would dealing with only a 'carve-out' of the historical wrongs that the Palestinians have faced. But it may give the Palestinians something – some semblance of justice and accountability. It does not cover all the interesting and important aspects of international law that may be also involved in the advisory opinion, including a deeper historical and legal analysis into each of above-mentioned peremptory norms and others, as well as issues of Palestinian sovereignty/sovereign equality, political independence, and territorial integrity.

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[193] Azarova (2017) 3. In 2012, the UNGA granted Palestine an 'upgrade' in its status from 'non-member Observer entity' to that of a 'non-member observer State' status. UNGA Res 67/19 (29 November 2012). This does have bearing on Palestine's existence as a state beforehand. The resolution reaffirmed the Palestinian right to self-determination and 'to independence in their State of Palestine on the Palestinian territory occupied since 1967'. Ibid, para. 1. Palestine had previously attempted to obtain full UN membership, although this never came to a vote due to the US and UK. See UN Doc. S/2011/705 (11 November 2011). Nevertheless, Palestine is recognized as a State from 137 UN member States. See Permanent Observer Mission of the State of Palestine the UN New York, *Diplomatic Relations*, http://palestineun.org/about-palestine/diplomatic-relations/.

THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

Public Statement: Scholars Warn of Genocide in Gaza

15 October 2023

As scholars and practitioners of international law, conflict studies and genocide studies, we are compelled to sound the alarm about the possibility of the crime of genocide being perpetrated by Israeli forces against Palestinians in the Gaza Strip. We do not do so lightly, recognising the weight of this crime, but the gravity of the current situation demands it.

The pre-existing conditions in the Gaza Strip had already prompted discussions of genocide prior to the current escalation – such as by the National Lawyers Guild in 2014, the Russell Tribunal on Palestine in 2014, and the Center for Constitutional Rights in 2016. Scholars have warned over the years that the siege of Gaza may amount to a "prelude to genocide" or a "slow-motion genocide". The prevalence of racist and dehumanising language and hate speech in social media was also noted in a warning issued in July 2014 by the UN Special Adviser on the Prevention of Genocide and Special Adviser on the Responsibility to Protect, in response to Israel's conduct against the protected Palestinian population. The Special Advisers noted that individual Israelis had disseminated messages that could be dehumanising to the Palestinians and that had called for the killing of members of this group, and reiterated that incitement to commit atrocity crimes is prohibited under international law.

Israel's current military offensive on the Gaza Strip since 7 October 2023, however, is unprecedented in scale and severity, and consequently in its ramifications for the population of Gaza. Following the incursion by Palestinian armed groups on 7 October 2023, including criminal attacks against Israeli civilians, the Gaza Strip has been subjected to incessant and indiscriminate bombardment by Israeli forces. Between 7 October and 9:00 a.m. on 15 October, there have been 2,329 Palestinians killed and 9,042 Palestinians injured in Israeli attacks on Gaza, including over 724 children, huge swathes of neighbourhoods and entire families across Gaza have been

obliterated. Israel's Defence Minister ordered a "complete siege" of the Gaza Strip prohibiting the supply of fuel, electricity, water and other essential necessities. This terminology itself indicates an intensification of an already illegal, potentially genocidal siege to an outright destructive assault.

Late on 12 October, the Israeli authorities issued an order for more than 1.1million Palestinians in Gaza City and the northern Gaza Strip to leave their homes and flee to the south of Gaza within 24 hours, knowing that this would be practically impossible for many. Palestinians who did start to evacuate south reported that civilians and ambulances were targeted and hit by Israeli airstrikes on the designated "safe route", killing at least 70 Palestinians who were fleeing to seek refuge. The ICRC stated that "the evacuation orders, coupled with the complete siege" are incompatible with international humanitarian law. Almost half a million Palestinians have already been displaced, and Israeli forces have bombed the only possible exit route that Israel does not control, the Rafah crossing to Egypt multiple times. The World Health Organisation published a warning that "[f]orcing more than 2000 patients to relocate to southern Gaza, where health facilities are already running at maximum capacity and unable to absorb a dramatic rise in the number patients, could be tantamount to a death sentence".

There has also been an escalation of violence, arrests, expulsions, and destruction of whole Palestinian communities in the occupied West Bank and Jerusalem. Since 7 October, Israeli settlers, with the backing of the army and police, have attacked and shot Palestinian civilians at point blank range (as documented in the villages of a-Tuwani and Qusra), have invaded their homes and assaulted residents. A number of Palestinian communities have already been forced to abandon their homes, after which settlers arrived and destroyed their property. Between 7 – 15 October, Al-Haq documented the killing by Israeli military and settlers of 55 Palestinians in the West Bank, and more the injury of 1,200 Palestinians there.

Statements of Israeli officials since 7 October 2023 suggest that beyond the killings and restriction of basic conditions for life perpetrated against Palestinians in Gaza, there are also indications that the ongoing and imminent Israeli attacks on the Gaza Strip are being conducted with potentially genocidal intent. Language used by Israeli political and military figures appears to reproduce rhetoric and tropes associated with genocide and incitement to genocide. Dehumanising descriptions of Palestinians have been prevalent. Israeli Defense Minister Yoav Gallant declared on 9 October that "we are fighting human animals and we act accordingly". He subsequently

announced that Israel was moving to "a full-scale response" and that he had "removed every restriction" on Israeli forces, as well as stating: "Gaza won't return to what it was before. We will eliminate everything." On 10 October, the head of the Israeli army's Coordinator of Government Activities in the Territories (COGAT), Maj. Gen. Ghassan Alian, addressed a message directly to Gaza residents: "Human animals must be treated as such. There will be no electricity and no water, there will only be destruction. You wanted hell, you will get hell". The same day, Israeli army spokesperson Daniel Hagari acknowledged the wanton and intentionally destructive nature of Israel's bombing campaign in Gaza: "The emphasis is on damage and not on accuracy."

Since 2007, Israel has defined the Gaza Strip as a whole as an "enemy entity". On 7 October, Prime Minister Benjamin Netanyahu said that Gazans would pay an "immense price" for the actions of Hamas fighters. He asserted that Israel will wage a prolonged offensive and will turn parts of Gaza's densely populated urban centres "into rubble". Israel's President emphasised that the Israeli authorities view the entire Palestinian population of Gaza as responsible for the actions of militant groups, and subject accordingly to collective punishment and unrestricted use of force: "It is an entire nation out there that is responsible. It is not true this rhetoric about civilians not being aware, not involved. It's absolutely not true". Israeli Minister of Energy and Infrastructure Israel Katz added: "All the civilian population in Gaza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world."

Evidence of incitement to genocide has also been present in Israeli public discourse. This ranges from statements by elected officials – such as Knesset member Ariel Kallner's call on 7 October for "one goal: Nakba! [catastrophe for Palestinians] A Nakba that will overshadow the Nakba of 1948" – to public banners displayed in Israeli cities calling for a "victory" signified by "zero population in Gaza" and the "annihilation of Gaza". On national television, security correspondent Alon Ben David relayed the Israeli military's plan to destroy Gaza City, Jabaliyya, Beit Lahiya, and Beit Hanun. Such statements are not new and resonate with a wider Israeli discourse showcasing the intent for elimination and genocide against the Palestinian people. Earlier in the year, for example, Israeli Minister of Finance Bezalel Smotrich called Palestinians "repugnant", "disgusting" and called for "wiping out" the entire Palestinian village of Huwwara in the West Bank.

On 12 October 2023, a group of UN Special Rapporteurs' condemned "Israel's indiscriminate military attacks against the already exhausted Palestinian people of Gaza, comprising over 2.3 million people, nearly half of whom are children. They have lived under unlawful blockade for 16 years, and already gone through five major brutal wars, which remain unaccounted for". The UN experts warned against "the withholding of essential supplies such as food, water, electricity and medicines. Such actions will precipitate a severe humanitarian crisis in Gaza, where its population is now at inescapable risk of starvation. Intentional starvation is a crime against humanity". On 14 October 2023, the UN Special Rapporteur on the situation of human rights in the occupied Palestinian territory warned against "a repeat of the 1948 Nakba, and the 1967 Naksa, yet on a larger scale" as Israel carries out "mass ethnic cleansing of Palestinians under the fog of war".

The Palestinian people constitute a national group for the purposes of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The Palestinians of the Gaza Strip constitute a substantial proportion of the Palestinian nation, and are being targeted by Israel because they are Palestinian. The Palestinian population of Gaza appears to be presently subjected by the Israeli forces and authorities to widespread killing, bodily and mental harm, and unviable conditions of life – against a backdrop of Israeli statements which evidence signs of intent to physically destroy the population.

Article II of the Genocide Convention provides that "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."

All states are bound as a matter of law by the principle that genocide is a crime prohibited under international law. The International Court of Justice has affirmed that the prohibition of genocide is a peremptory norm of international law from which no derogation is allowed. The Convention provides that individuals who attempt genocide or who incite to genocide "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

Article I of the Convention on the Prevention and Punishment of the Crime of Genocide provides that: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". The International Court of Justice has clarified that "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit".

Palestinian human rights organisations, Jewish civil society groups, Holocaust and genocide studies scholars and others have by now warned of an imminent genocide against the Palestinian population in Gaza. We emphasise the existence of a serious risk of genocide being committed in the Gaza Strip.

The undersigned urgently appeal to states to take concrete and meaningful steps to individually and collectively prevent genocidal acts, in line with their legal duty to prevent the crime of genocide. They must protect the Palestinian population, and ensure that Israel refrains from any further incitement to genocide and from the perpetration of conduct prohibited by Article II of the Genocide Convention.

All states should immediately act under Article VIII, and should call upon the competent organs of the United Nations, particularly the UN General Assembly, to take urgent action under the Charter of the United Nations appropriate for the prevention and suppression of acts of genocide. We note specifically the role of the General Assembly here, given that the Security Council is compromised by the United States and the United Kingdom (both permanent veto-holding members) sending military forces to the eastern Mediterranean in support of Israel.

We recall that in 1982, the General Assembly condemned the massacre of Palestinian civilians in the Sabra and Shatila refugee camps as "an act of genocide". We note also that the state of Palestine is entitled to initiate, in accordance with Article IX of the Genocide Convention, proceedings before the International Court of Justice in order to prevent the perpetration of genocidal acts.

Finally, we call on all relevant UN bodies, including the Office on Genocide Prevention and the Responsibility to Protect, as well as the Office of the Prosecutor of the International Criminal Court to immediately intervene, to carry out the necessary investigations and invoke the necessary warning procedures to protect the Palestinian population from genocide.

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Full list of 800+ signatories at https://twailr.com/public-statement-scholars-warn-of-potential-genocide-in-gaza/

THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

TWAILR: Dialogues ~ November 2023

Palestine, the UN and International Legal Subalternity

Ardi Imseis discusses his work on the United Nations and the question of Palestine with John Reynolds of the TWAIL Review editorial collective.

Ardi's new book *The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity* (Cambridge University Press, 2023) draws on TWAIL ideas and scholarship to examine the UN's management of the question of Palestine and to interrogate the received wisdom of the UN as the standard-bearer of the international rule of law.

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John: In examining the role of the UN in the question of Palestine since the 1940s, you suggest that there has been 'a vacillating gulf' between the claims and requirements of international law on one hand, and the positions adopted by the UN on the other. What forms has that taken, how has it played out?

Ardi: The starting point of the book is the widely held representation and belief that the UN is the standard bearer of the rules-based international legal order. This is something that has regularly been proclaimed by a succession of Secretaries-General of the Organization, to say nothing of being propagated throughout the UN Charter system. Based upon a close examination of the UN record, however, as well as my own first-hand 12-year career as a UN Official in occupied Palestine, my book interrogates this received wisdom by demonstrating that there exists a vacillating gulf between what international law requires and what the UN has actually done on the question of Palestine when it has mattered most. The forms this gulf has taken have been varied. They include both actions and omissions, they cover a variety of sub-sets of international law and practice, and they span an unusually long period of time, from 1947 to the present. Despite the breadth and expanse of this sordid story, it is

marked by a singular experience of Palestine and its people: to have been consigned to a seemingly permanent state of deprivation and disenfranchisement in the international legal order.

Following a brief international legal history of Palestine during the interwar years (chapter 2), the book examines four key moments in the UN's handling of the question of Palestine. The analysis of the 1947 UN plan of partition and the work the UN Special Committee on Palestine (UNSCOP) is probably the most important of the empirical chapters (chapter 3). This is because those fateful actions led to the imposition, in both normative and discursive legal terms, of the two-state paradigm that would thereafter underpin the UN's position on the question of Palestine – a paradigm that was, and continues to be, inherently inequitable for Palestine's subaltern natives. It shows that although partition violated the prevailing law and practice on self-determination of peoples in class A mandated territories, and it displayed an unadulterated contempt for principles of democracy, it was driven by hegemonic European states and their settler-colonial affiliates who wished to rectify Europe's centuries-old Jewish question in the wake of the Holocaust. The result was for the UN to have reified Palestine's contingent status on the international legal plane, with consequences that helped pave the way for the 1948 Nakba.

Another demonstration of Palestine's contingent status emerged with the UN's creation of a distinctive institutional and normative regime for the Palestinian refugees following the 1948 Nakba (chapter 4). This was in the form of two subsidiary organs of the General Assembly – the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) – aimed at providing protection and assistance, including a search for durable solutions, to their plight. This chapter juxtaposes that regime against the international institutional and normative regime applicable to all other refugees in the world, as administered by a third subsidiary organ of the UN, the United Nations High Commissioner for Refugees (UNHCR). While the received wisdom holds the special regime for Palestinian refugees out as demonstrative of the UN's unique responsibility for their plight, a critical examination of the UN record reveals that it was never intended to give effect to Palestinian refugee rights as established under prevailing international law, including as affirmed by the UN itself, the negative consequences of which remain in place to this day.

Yet another example of Palestine's enervated status in the international legal order is found in the UN's position on the OPT in the post-1967 era (chapter 5). Conventional wisdom presents the UN's copious documentation of the human rights and humanitarian law violations in the OPT as demonstrative of the Organization's commitment to supporting Palestinian legal rights, including to self-determination. The fact that this has taken place largely as a result of the effect of decolonization and the rise of the Third World in the Organization would suggest a trajectory of gradual empowerment for Palestine. Nevertheless, under this approach, the UN has satisfied itself merely with documenting a wide variety of discrete violations by Israel, the occupying power, of international humanitarian and human rights law in the OPT without definitively addressing the legality of the very regime giving rise to those violations themselves. Instead, the UN has insisted on negotiations as the only means through which the occupation can be brought to an end, despite the plethora of evidence in its own record to demonstrate that the occupation is itself unlawful and therefore must be ended forthwith and unconditionally.

A final example of Palestine's contingency on the international legal plane concerns its 2011 application for UN membership. UN admission has long been marked by a liberal, flexible and permissive interpretation of the test for membership in Article 4(1) of the UN Charter. In contrast, an assessment of the UN Committee on Admission's consideration of Palestine's 2011 application demonstrates that it was subjected to an unduly narrow, strict and resultantly flawed application of the Article 4(1) criteria. An examination of the contemporaneous debates of the Security Council demonstrates that the main driver of this approach was the United States, which used the legal authority vested in it as a permanent member of the Council to block membership for political reasons thinly veiled as sound legal ones. Despite the General Assembly's 2012 upgrade of Palestine's status to non-member observer state, failure to secure full membership of the UN has only further disenfranchised Palestine in international law and world order.

John: Your central argument then, as I read it, is that this tension between normative promise and political practice creates a situation whereby the UN is not so much the guardian of an international rule of law, but the purveyor of an international rule *by* law. The UN provides a mirage of international justice to the global underclass, but repeatedly withholds the possibilities for this to be made real. This produces what

you describe as a long-range condition of 'international legal subalternity' – what do you mean by this?

Ardi: Your question captures the essence of it. The UN's purported role as the guardian of the international legal order means that its actions should always be consistent with the international rule *of* law. Under the rule of law framework, all subjects of the international system – including States, individuals, and the UN itself – are to be held to the same legal standards, as applicable, without regard to their relative power or station. What the case of Palestine demonstrates, however, is that the UN has all too often been governed by a rule *by* law framework, which has been characterized by the exercise of power in an arbitrary, *ad hoc* or purely discretionary manner, including on the basis of political preferences or ideology. In this sense, law becomes a tool to further the interests of power under the guise of legality, while encouraging and relying upon double-standards in its application or non-application.

In turn, the rule by law framework ultimately produces a condition that I have identified as international legal subalternity, the defining feature of which is that international law is repeatedly held out by the UN to the global underclass as offering a promise of delivery from injustice, but its activation is repeatedly and paradoxically withheld through operation of the Organization itself. To my mind, no other case exemplifies this condition better than that of Palestine and its people. At the same time, when its essential features and operation are considered, international legal subalternity is clearly an affliction that impacts other subaltern groups. Although the book does not go into great depth about these other examples, it briefly highlights the situation of refugees, indigenous peoples, internally displaced persons, and persons subjected to slavery.

The structure of international legal subalternity is characterized by three cross-cutting and related themes. I examine these themes through a TWAIL lens, and they will be readily cognizable by your readership. First, is the theme of the Eurocentricity of the modern international legal order, rooted in Europe's imperial and colonial past. Second, is the theme of the circumscribed nature of Third World sovereignty and international legal personality in the post-decolonization era. Third, is the theme of neo-imperial power and the role it has played in perpetuating the contingency and marginalization of global subaltern classes in the contemporary period. These themes run like a thread, to varying degrees and across time, through the problems that legal subalterns face on the international plane today. And the challenge for us is to figure

out ways of confronting the condition of international legal subalternity while being mindful of its structural and continuing character.

John: You refer to 'TWAIL's blind spot' in the context of international legal subalternity – suggesting that due to its insistence for the most part (in spite of its own structural critiques) on the counter-hegemonic potential of international law, TWAIL literature may suffer from a blind spot of sorts?

Ardi: Indeed. For all of its vital critique of the history and praxis of public international law from the standpoint of the global south, TWAIL's blind spot appears to be that it has yet to identify and name the common condition that afflicts those whom its progenitors wish to liberate from the shackles of international law's violence. What's more, in its interrogation of the tension between law as the tool of hegemony and law as holding some form of counter-hegemonic promise for subaltern classes, TWAIL appears to have failed to appreciate that this common condition is in fact a fixed feature of the international legal order, one that cannot be eradicated. This derives from the fact that although some change in international law can be brought about through the creative use of elements of that law to challenge it on its own terms, as new law is created, and the position of global subalterns is either wholly or partially assuaged, new subalterns invariably emerge who were never part of the initial equation, and whose legal contingency *vis à vis* the new law must then be addressed. What we are left with is a cycle of law-making and law-challenging that transfers the burden of legal contingency from one group to another, but never really comes to a close itself. This is why I have concluded – on the basis of the example provided by the UN's management of the question of Palestine over various time periods and political paradigms – that international legal subalternity is a long-range condition and a fixed feature of the international legal order.

John: You make the point that the UN has presided over both the unmaking of Palestine (its attempted partition, military conquest, depopulation and political effacement between 1947 and 1967) and its qualified re-emergence, at least in truncated, fragmented and subjugated form (in the occupied Palestinian territory post-1967). One of the core arguments you put forward in this context is about the illegality of Israel's continued presence in the 1967 territories. This is also now the question pending before the International Court of Justice. Why did you feel it was

important to zoom in on this element, what is the basis for the occupation's illegality as you see it, and what are the implications of the illegality?

Ardi: The reason why I felt it important to address the issue of the legality of Israel's occupation of the OPT is because since 1967 the UN has taken what I call a managerial approach to the issue rather than an emancipatory one. As noted above, this has entailed the documentation of discrete violations by the occupying power of international humanitarian and human rights law in the OPT without paying sufficient attention to the legality of the very regime giving rise to those violations themselves. Rectification of Israel's respect for IHL and IHRL would not necessarily lead to an end of the occupation. In contrast, a determination that the occupation is in itself an internationally wrongful act would help in this regard. General Assembly resolution 77/247 of 30 December 2022 was therefore a watershed moment for having put the question of the legal status of Israel's 'temporary' 56-year occupation of the OPT before the ICJ. This resolution did not come out of the blue, however, as a number of others – academics and UN special procedures – have in recent years argued that Israel's occupation is unlawful and have encouraged recourse to the Court to confirm it. I did this in an article I wrote in 2020 in the *European Journal of International Law*, which forms the basis of chapter 5 of my book.

Some regard Israel's occupation of the OPT as unlawful *ab initio* because it was the result of an impermissible use of force in 1967. I sympathize with this view, but because the UN record is silent on who was legally to blame for beginning the war in 1967, one must find another way to arrive at the same conclusion if recourse is to be had to the ICJ on the matter. To that end, building on the growing literature in the area, I argue that the occupation is illegal because over time it has become inextricably connected to the violation by the occupying Power of three *jus cogens* norms, derogation from which is not permitted: (1) the inadmissibility of the acquisition of territory through the use of force; (2) the violation of the right of peoples to self-determination; and (3) the imposition of a regime of widespread and systematic racial discrimination and/or apartheid. Since 1967, the UN record is replete with evidence of Israel's violations of all three of these norms. Today, it begs incredulity to suggest that a situation that is meant to be temporary and provisional, and which is existentially reliant of the violation of these core peremptory norms, can in any way be lawful. The implications of this would be considerable as under the law of state responsibility Israel would be required to withdraw from the OPT immediately, unconditionally and totally if its presence in that territory were to be declared to be illegal. This would remove what I have called the 'negotiations

condition', according to which the freedom of Palestine and its beleaguered people has been made subject to the non-existent will of an occupying power which has manifestly acted in bad faith in its administration of the territory over many decades. To this extent, the upcoming ICJ advisory opinion proceedings represent a good example of the subaltern class making counter-hegemonic use of prevailing legal mechanisms to mitigate their contingent status in the international legal order. It remains to be seen what comes of it.

John: Israel is currently waging a devastating genocidal war and ethnic cleansing campaign against Palestinians in Gaza, with the full backing of many western powers. (How) does Palestine's international legal subalternity reveal itself again in this moment, and what is the UN's responsibility?

Ardi: Without exaggeration we are now witnessing the greatest calamity faced by the Palestinian people since 1948. As at the time of writing, according to the UN there are almost 15,000 Palestinians in Gaza killed, 2/3 of whom are women and children, another 6,500 missing, including at least 4,400 children, and a further over 36,000 injured. The wholesale and indiscriminate bombardment of the Gaza strip has targeted homes, hospitals, schools, churches, mosques and UN shelters, with at least 45% of the housing stock in Gaza having been destroyed or damaged as part of a declared scorched earth tactic aimed at rendering return of displaced persons impossible. On day 2 of the hostilities, starvation as a tool of warfare was openly declared by the Israeli Minister of Defence, including the cutting off of all water, food, fuel and electricity to the whole of the Gazan population whom he called 'human animals', and which threatens to usher in waterborne disease and famine. On day 5 of the hostilities, the Israeli military ordered over 1.1 million Palestinians in northern Gaza to move to purportedly 'safe zones' in the south, only to find themselves bombarded on the way there or upon arrival in the south. Over 1.7 million people (80% of the Gazan population) have now been forcibly transferred within the Strip, and that number promises to grow. The prospect of the complete transfer of the whole population out of the Gaza Strip is a clear and present danger, given that it has been declared as an operational goal of the Israeli intelligence ministry and numerous members of government, to say nothing of the historical record in this regard. Even more startling, all of these criminal actions have been undertaken with apparent genocidal intent, as expressed in numerous harrowing public statements of the Israeli leadership, from the Prime Minister on down. In the West Bank, the occupying power and its armed settler auxiliaries have been steeply increasing their use of violence, terror and pogroms on Palestinians, killing

approximately 200, arbitrarily incarcerating thousands, and aiming to drive Palestinians off their land while the world's eyes are focused southwards. This has included psychological warfare, including through the distribution of leaflets across the West Bank warning the Palestinian population of another Nakba if they do not flee to Jordan.

In the face of all of this, one would think that the UN would have, virtually from the start of Israel's operation given its devastating blitzkrieg-like scope and disproportionate effect, expressly called for a ceasefire in line with the duty of its Member States to ensure respect for international humanitarian law and to prevent the crime of genocide from taking place. As at the date of writing, however, this has yet to happen. The closest one has come is Security Council resolution 2712, passed on 15 November – over *five* weeks from the outbreak of hostilities – calling merely for 'humanitarian pauses' in the fighting, thereby signaling that the Council accepts that the onslaught of Palestinians will continue into the foreseeable future.

While political stalemate is a natural feature of the Security Council's work, at the very least one would have expected the Organization's Secretary-General as chief administrative officer of the Secretariat to have behaved differently. Nevertheless, to this day the Secretary-General has yet to call for a general ceasefire. The most he has been willing to say has been to call for a 'humanitarian ceasefire', and this after 11 days of fighting. All of this while the State of Palestine has daily called upon the UN to call for a complete end to the hostilities and invited the Organization to deploy appropriate mechanisms on its territory to protect its people and assist it, as it is legally entitled to do and to receive.

While events in the OPT are still unfolding, it is difficult to come to a final assessment as to whether these current events portend yet another instance of the international legal subalternity of Palestine and its people. At first glance, however, it is hard not to see them ultimately doing so when one considers the multiplicity of legal obligations of UN Member States, of the Organization itself, and of the State of Palestine's ostensible rights under prevailing international law, none of which seem to be respected.

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THIRD WORLD APPROACHES
to INTERNATIONAL LAW *Review*

TWAILR: Extra ~ November 2023

International Law is Dead

Ata R. Hindi

Front page of Al-Hayat Aj-Jadeeda, 1 November 2023, with the headline: 'The Rubble of International Law'

International law is dead. I am not the first person to say it.

Yet, I say it with inspiration from Nas, my favorite rap/hip-hop artist growing up. Palestinians have always had a special place in their hearts for rap/hip-hop. It was one of the

few mediums that spoke for, and to, people like us. It spoke about themes that we related to and grew up with – conflict, oppression, poverty, violence, etc. – chaotically structured, structurally chaotic, and everything in between.

In 2006, Nas released his title track "Hip Hop is Dead." In his final verse, he recited the following bars: "[e]verybody sound the same/ commercialize the game/ reminiscin' when it wasn't all business/ if it got where it started/ So we all gather here for the dearly departed." For Nas, the shift "went from turntables to mp3s/ from "Beat Street" to commercials on Mickey D's/ from gold cables to Jacobs/ from plain facials to Botox and face lifts." Its purpose and meaning had shifted into something else. An endless void, perhaps. An industry lost of its character and soul. Take it as you may. If *you*, as a rap/hip-hop artist felt attacked, then it was probably a *you* problem. You needed clarification. *What do you mean? Were you talking about me?* Many artists took it as an attack. Before continuing, I will note that within this short piece, there will be "subliminals." No names. No institutions. Don't take them personally. If *you* feel attacked, then it is probably a *you* problem.

International law, like hip-hop, is all business. There might be subtle differences, but *everybody sound the same*, more or less. The labels and venues all have set criteria. The sound needs to sell. Of course, unlike rap/hip-hop, international law was a force of, and for, colonialism and imperialism. Yet, at some point, things were changing – a bit too much, maybe. It was progressively developing and evolving. It began speaking for the streets. It started talking about: principles like sovereignty, territorial integrity, and political independence; aggression; peremptory norms; national liberation movements; etc. New, fresh sounds. The art form was going too far. The new artists had to be co-opted. If they could be co-opted, then maybe their albums could be sold. Then, artists could be silenced *vis-à-vis* their contracts.

They began to *commercialize the game*. Over time, the "game" became brand names and lame, money and fame restrained quatrains. International law was commercialized, plastered with brand names that sold to the yielding consumer classes. Even its critical inquiries (approaches, methods, and theories) have become brands. Some brands loved, some acceptable, and some even "hated." The last cannot be co-opted. The big labels can't sign them. Of course, no rap/hip-hop head loves all its brands. Consumer tastes are defined by different decades, geographic locations (e.g. East, West, North, South; New York, Los Angeles; etc…), sub-genre (old-school, alternative, gangsta, etc…), and the list goes on. Some things can sell, while others cannot. International law is similar. Some things still cannot sell (not quite yet, at least). Issues of race, racism, and racialization can find outright hostility. For the most radical scholars (looking at you, critical peoples), no verses about Palestine and the Palestinians. Not too different from the radical emcees (or "MCs"). There are limits. You can talk about the streets, but not too much. It will hurt your record sales. You'll hurt the label. It has to be molded into something for the market. Let's be honest, would you rather have your concert in New York City or Amman?

Everybody sound the same. Or at least, that's what the industry wants. This doesn't mean that you brand and rebrand. We share, discuss, debate, etc. But really, it requires some of the same. It has to sell. Perhaps, we *reminiscin' about a time when it wasn't all business*. It was a culture. A way of life. It became a force for decolonization, shedding itself from its colonial and imperial origins (arguable, of course). Yet, within our "critical" circles, we could not lose our sponsorships. Even Third World Approaches to International Law (TWAIL) has its sponsors and, God forbid, we lose our place at the American Society of International Law or the European Society of International Law's lineups because well – we said something that the sponsors do not like. We are "pseudo-critical." Wannabemceez.

As many have said in variations, decolonization is "cool" until theory becomes practice. It depends on *who* is talking about it and *how* they are talking about it. Some practitioners and scholars are on their own level and answer to no one. Some can state things without losing sponsorship – Palestinians, like others, can resist/rebel and, through that choice, are subject to the laws of war – however unequal or prejudiced the rules may be. They, somehow, have that privilege. Others, not so much. Between 2,000 words, one is chosen – void of legal meaning – really, to discredit the substantive entirety. International law was at its last breaths and we gladly obliged.

Some joined the mob early. Some called it "whatabout TWAIL whataboutism" (even amongst TWAIL indifference). Weak bars. Some attacked and discredited the oppressed, demanding they toe the line because, at some point, they gave charity. They were owed something. Some used their platforms for good; some for evil; and some not at all. Some created their careers off Palestine and the Palestinians. Some had censored themselves and others – including Palestinians – because it was "strategic" or because it was "politically sensitive" (you know who you are). Some opened their platforms for persons and institutions with questionable affiliations, dealings, and practices.

As international law was taking its last breaths, friends in the industry became enemies. Others, who weren't so sure of their friendships, were relieved to finally see how their peers actually saw them. Lesser. Dehumanized. Some even disappeared. Those emcees never wrote their lyrics – really they just recycled some old stuff and hired a couple ghostwriters. The *jus ad bellum* and the *jus in bello* became distant memories, to remind us about a time when international law was better, supposedly.

We wonder about *if it got where it started*. At least from one point in its history. For some, like myself, who grew up in the rougher parts of the world, rap/hip-hop was a way out. It was a voice for the voiceless. It spoke about the past – about themes like conflict, oppression, poverty, and violence – but the main tracks did not; not really. The singles needed to sell, at least. The rest were fillers. As we grew, in places where violations were commonplace, international law became a way out. It spoke for the streets. It, too, was a voice for the voiceless. At least that is what we thought. A form of art where we can share our struggles

with the rest of the world. We found a medium where we can share our rhymes and our stories. For hip-hop, that too was fine – to an extent. The consumer was fascinated, almost obsessed, with a world that they were unfamiliar with. It was, in some ways, not too different from what we call "orientalism." But there were boundaries – red lines. The artists could not cross those lines. They could not say "f*** the police" when they needed to speak on police brutality and racial profiling. There were issues, both domestic and international, where they needed to tread carefully. Free speech has its limits. For certain people, there really are no bounds, and no repercussions. For certain others, know your place and tone it down.

International law is dead. So, we *gather here for the dearly departed*.

It should not be controversial. We saw it happening and we were in denial. International law has been dying. What? Did we forget how more and more commonplace these violations have become? Did we forget that we actively fought for justice and accountability for some, and denied it for others (*e.g.* "Palestine will ruin the International Criminal Court!")? We entertained the biggest stadiums. We entertained the exceptions to the absolute prohibition of torture. We entertained the pre-emptive use of force. We entertained extrajudicial killings. We entertained over the dead. We booked the entertainers for our venues and we sold tickets. When we started to question certain bookings, the organizers doubled down. We listened, nodded our heads, and even moved to the flow. Maybe some just wanted the experience. A selfie. Maybe even a record deal. But we took it too far. We denied serious breaches of peremptory norms, grave breaches and other serious violations of the Geneva Conventions, and the commission of international crimes. We even went so far as to limit, or outright silence, free speech altogether, including the soundest discussions on justice and accountability *vis-à-vis* international law. Hardly controversial tracks or albums. Some were not so bad, just silent. They didn't want to give an opinion on any track or album for fear that they might be judged too harshly (even Nas had his limits).

We were told to be professional. We weren't on the streets anymore. Do not shout and curse at the government officials who also happen to be complicit in the commission of international crimes. It is rude to throw shoes at war criminals. Don't interrupt their dinners to tell them about the dead children. Be kind. Be courteous. And for those you don't like or don't look like you, they are guilty until proven innocent. For those you do like or who look like you, the opposite – assume the best, and remember to "ask for more." Sentence the "uncivilized." Give the "civilized" another standard. Is there something higher than "beyond a reasonable doubt." Hell, create thresholds even when the rules don't demand it.

F*** it. International law is dead. *You* killed it; yes *you*.

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