

The Palestine Yearbook of
International Law, Volume 18
(2015)

Edited by

Ardi Imseis



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THE PALESTINE YEARBOOK OF
INTERNATIONAL LAW XVIII (2015) 8–52

Palestine
Yearbook of
International
Law

Anti-Colonial Legalities: Paradigms, Tactics & Strategy

*John Reynolds**

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In the history of colonial invasion maps are always first drawn by the victors, since maps are instruments of conquest. Geography is therefore the art of war but can also be the art of resistance if there is a counter-map and a counter-strategy.¹

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1 Edward Said, *Peace and its Discontents* 27–28 (1996).

I The Limits of 'Traditional' International Law Paradigms

In discussing how regimes of land confiscation and territorial expansion work in tandem with the obstruction of the political self-determination of a people – as well as the denial of a vast array of individual rights – Judith Butler considers “the way that both occupation and expulsion foreclose on the right and the power of self-determination”. She explains:

Resistance to such denial and foreclosure is only possible by a full resistance to continuing forms of colonial subjugation. Indeed, the occupation and the settlements need to be understood as a continuation of the project of settler colonialism that has defined political Zionism from the start, if such resistance is to be possible at all.²

This encapsulates quite well the Palestinian predicament. In the context of a growing consciousness as to the limits of the legal paradigms – of belligerent occupation, armed conflict and individual civil rights – that have traditionally been the basis of Palestinian legal struggles, it implies a need to emphasize and cultivate parallel and alternative paradigms.

The situation in Palestine is structurally entrenched. At root, it is a colonial context, with all of the architecture that such entails. In that scenario, the work of documenting and challenging violations of individual rights and transgressions of the laws of armed conflict is important, but insufficient in expounding the underlying nature of the conflict and explaining Israel's relationship with the Palestinian people as a systemic regime of control. It has been suggested, as a result, that the laws prohibiting the fundamental elements of that regime – colonialism, apartheid and forced population transfer – may be more apposite in this regard.³ In some quarters of the Palestinian justice movement, “the use of international humanitarian law as the dominant paradigm for Palestine” has been cast not merely as insufficient, but as “the problem to be addressed”.⁴ While there is obvious validity to this argument insofar as international humanitarian law is incapable of reconciling the full content of the

² Judith Butler, *Palestine, State Politics and the Anarchist Impasse*, in *The Anarchist Turn* 207 (Jacob Blumenfeld, Chiara Bottici & Simon Critchley eds., 2013).

³ Birzeit Institute of Law, Civic Coalition for Palestinian Rights in Jerusalem & the Decolonizing Palestine Project, ‘Law and Politics: Options and Strategies in International Law for the Palestinian People: Conference Concept Note’ (May 8, 2013).

⁴ Id.

Palestinian right to self-determination and the situation of those Palestinian communities cast as 'refugees', it remains important not to fetishize legality to the extent that false delusions of law's grandeur and centrality to national liberation are created or perpetuated. The multiple potential pitfalls arising from an over-reliance on legal argument in the quest for socio-political emancipation must be acknowledged, regardless of the particular legal framework used. With that in mind, the task of this paper is to explore the 'alternative' public international law paradigms put forward by some as preferable to the *jus in bello*, and to offer some thoughts on questions of tactics and strategy if law is to be deployed in pursuit of Palestinian liberation.

Settler colonialism is the core ideological project from which the derivatives of forced population transfer and apartheid flow. These three overlapping conceptual frameworks are knitted together by common underpinning logics of settlement and racialization. This was the case historically in European colonial empires, as it was under apartheid in southern Africa and as it remains in Palestine today. The paper therefore begins by situating these conceptual frameworks in historical and legal context. It then considers law as a skeletal structure that can be fleshed out with hegemonic or counter-hegemonic muscle, before turning to discuss the perils and possibilities of employing legal tactics in pursuit of a transformative anti-colonial strategy. The disconnect between current popular liberation efforts (centered around grass-roots Palestinian resistance and international solidarity in the form of Boycott, Divestment and Sanctions initiatives) and those of the Palestinian political leadership in the West Bank (centered around nominal statehood and international institutions) presents significant conceptual and practical challenges.

II 'Alternative' Legal Paradigms

A *Settler Colonialism*

The socio-political formation under white minority rule in South Africa was characterized by the anti-apartheid movement as "colonialism of a special type".⁵ Understood as a system of 'internal colonialism' where there is no spatial-territorial separation between the colonizing power and the colonized population, this formation may be understood as a particular stage in, and manifestation of, broader processes of settler colonialism. Settler colonialism is itself a category that can be distinguished on certain levels from other

⁵ See, e.g., African National Congress, *Apartheid South Africa: Colonialism of a Special Type*, Discussion Documents (Mar. 24, 1987), <http://www.anc.org.za/show.php?id=4518>.

stages or forms of colonialism, particularly the model of a fixed and centralized rule maintained from the metropole (which may, but does not necessarily, include civilian settlement of the colony). The more fluid process of settler colonialism begins with migration and settlement. Settlers are a distinct class of migrants, however. As Mahmood Mamdani puts it, settlers are “made by conquest, not just by immigration”.⁶ Generally sponsored ideologically, economically and militarily by their state of origin, they are founders of new political orders who strive to carry sovereignty with them, as opposed to migrants seeking to join the already-constituted order.⁷ Having migrated and settled, the settler society effectively naturalizes itself, staking its own claim to sovereignty in the territory that it has seized as its just spoils by right of settlement. The extent of the execution of settler colonialism’s “logic of elimination”⁸ for such territorial capture has varied across space and time. Settler independence movements often subsequently aim to advance their case by assuming the mantle of a self-determination struggle, concomitantly eschewing the legitimacy of any anti-colonial claim by the displaced native population. Where this finds success, settler colonies are (trans)formed and recognized as independent states, with their colonial foundations effaced from international law and discourse. The displacement or eradication of indigenous sovereignty is given a retroactive seal of approval. The settler colonies successfully established as modern nation-states in North America and Australia are quintessential. The settler colonial process is also often defined by an additional trait exhibited along the way – a pattern of advancing civilian settlement across frontiers. This embodies an expansionary thirst for land and resources, and a logic of militarization to securitize the shifting borders and quell the inevitable indigenous resistance. In settler colonial situations, therefore, indigenous relationships with the territorial land were often extinguished not through a decisive moment of outright conquest, but by way of incremental advance by the settler movement.⁹

6 Mahmood Mamdani, *When Does a Settler Become a Native? Reflections of the Colonial Roots of Citizenship in Equatorial and South Africa*, Inaugural Lecture as A.C. Jordan Professor of African Studies, Centre for African Studies University of Cape Town (May 13, 1998), <http://citizenshiprightsinafrica.org/docs/mamdani%201998%20inaugural%20lecture.pdf>.

7 Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* 3 (2010).

8 Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 *J. Genocide Res.* 387 (2006).

9 *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* 19–20 (Virginia Tilley ed., 2012) [*hereinafter* Tilley].

Jewish migration to Palestine as it began on a collective scale in the early 1880s was quickly followed by the escalation of Zionist discourse aimed at the creation of a 'Jewish state'. By the time of the 'Second Aliyah' of 1904–1914, it was clearly constituted as a settler colonial movement whose constituents sought no part in the existing polity in Palestine, but rather aimed to establish their own sovereignty.¹⁰ In the idiom of Zionist ideology, the term 'settlement' (*yishuv*) carries a powerful resonance. Its roots lie in the phrase *Yishuv Eretz Yisrael* (or "settlement of the land of Israel"), and the pre-state Jewish community in Palestine is still referred to in Hebrew as the *Yishuv*. In the Israeli psyche, settlement is inextricably linked to the procurement of sovereignty – an essential precursor to the attainment of statehood and title to territory. This epitomizes settler colonial ideology, and shines a stark light on the rationale underpinning Israel's continuing 'settlement' of the West Bank.

While anchored by certain cardinal features, every colonial encounter and every settler colonial process has its own defining idiosyncrasies. Zionist settler colonialism is somewhat distinct in that it did not have a 'mother' nation-state in Europe from which the settler population and other forms of logistical and political support were predominantly drawn (before cutting ties in the name of independence).¹¹ It was, nonetheless, in the context of the Balfour Declaration and the League of Nations Mandate for Palestine (which resolved to "facilitate Jewish immigration" and "encourage, in cooperation with the Jewish Agency . . . close settlement by Jews of the land") that Jewish settler sovereignty developed in the protected space of "the womb of British colonialism".¹² The emergence of the Israeli state from that embryonic sanctuary was a markedly less anti-colonial event than other moments of decolonization throughout Africa and Asia that came soon afterwards. A chain of coloniality narrates the Israeli state project, connecting early Zionist settlement with British imperial foreign policy, the League of Nations Mandate, the role of the United Nations (UN) in legitimizing Zionist claims to sovereignty via settlement (in the 1947 UN Partition Plan and subsequent recognition of

¹⁰ See, generally, Gershon Shafir, *Land, Labor and the Origins of the Israeli-Palestinian Conflict, 1882–1914* (1989).

¹¹ This is not to ignore, of course, the many examples in colonial history of where significant settler populations were not nationals of the metropolitan government (the French in Canada, the Boers in South Africa, the Italians in France's north African colonies, and so on). It is, as such, important to read the nationality components of colonialism in concert with those of race.

¹² John Strawson, *Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination*, 20 Penn St. Int'l L. Rev. 363, 377 (2002).

Israel's independence) and Israel's continued colonization of the West Bank today. These connections are woven deep into the fabric of political and legal discourse in Palestine, and point us to the conclusion that international law and institutions – far from remaining above the political fray – are profoundly compromised by their engagement in the whole affair.

This, of course, is nothing unique to Palestinian history. From its sixteenth-century inception, the law of nations functioned to reinforce the sovereignty of European nations and – in the colonial encounter – to facilitate the extension of that sovereignty from core to periphery, enveloping those peoples and nations considered insufficiently civilized to exercise sovereignty themselves. The League of Nations institutionalized this condition with only slightly less racialized undertones. The initial talks on the foundational values of the UN at Dumbarton Oaks in 1944 made no mention of liberation for colonial territories. When the Philippines delegation proposed that a commitment to independence be written in to the UN Charter, they were leaned on by the United States (US). The Wilsonian pretense of self-determination had, by then, ceded ground to an acute realization of the strategic value for the US of holding territories in the Pacific and elsewhere. An Ecuadorian attempt to allow a vote by two-thirds of UN members to bring about a colony's independence was similarly quashed and "wartime American drafts of a declaration of independence of colonial peoples were archived".¹³ Mandates became trusteeships, and colonies became dependent territories, but little of substance changed. The evolution of Israel from a settler colony to a settler colonial state in 1948, therefore, came at a time when colonialism was still condoned and facilitated by the dominant (western) current in the international legal order.

Things changed somewhat during the 1950s as Third World resistance took hold, the Non-Aligned Movement took shape, and the European empires began to formally unravel. The year of 1960 marked a decisive turning point, with the entry of 17 new member states into the UN – 16 of them from the African continent – producing a spike in the share of the UN General Assembly vote held by former colonies from 13% up to 45% within the space of a decade.¹⁴ At the end of that year, the Assembly voted overwhelmingly in favor of adopting the Declaration on the Granting of Independence to Colonial Countries

13 Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origin of the United Nations* 62–63 (2009).

14 David A. Kay, *The Politics of Decolonization: The New Nations and the United Nations Political Process*, 21 *Int'l Org.* 786 (1967).

and Peoples,¹⁵ affirming that “subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights” (including a people’s collective right to freely determine its political status and freely pursue its economic, social and cultural development) and, accordingly, that “an end must be put to colonialism and all practices of segregation and discrimination associated therewith”. Subsequent legal instruments and state practice have bolstered the prohibition of colonialism to the point that, as a denial of self-determination, it is considered a peremptory norm of international law.¹⁶

The Declaration condemns “colonialism in all its forms and manifestations”, including settler colonialism by implication. Existing states established as the culmination of settler colonial processes, however, were immunized from the reach of the norm by virtue of a stipulation that a colony is “geographically separate” (that is, beyond existing borders, although not necessarily separated by salt water) from the administering state.¹⁷ This served to allay any concerns that states such as Australia or Canada may have had about the prohibition applying to their rule over indigenous peoples within their borders. In essence, therefore, the initiation of a settler colonial process is normatively prohibited from 1960 henceforth, while pre-established settler colonial states – regardless of the aggression, genocide, or ethnic cleansing on which they may have been built – are legitimized. A positivist reading of the Declaration thus envisages the illegality of Israel’s continued frontier settler colonialism only beyond the Green Line. The inextricable linkages and overlap between the colonization of the West Bank and the colonization of historic Palestine more broadly, however, allow for the ongoing ramifications and derivatives of Israeli settler colonialism writ large to be appraised from an international legal perspective.

B *Population Transfer*

In the colonial paradigm, settlement and dispossession make up the two sides of the coin of ‘population transfer’ (or, less euphemistically, ‘ethnic cleansing’). Implantation of the self goes hand in glove with displacement of the other. This is the rationale upon which the logic of Zionism rests, articulated clearly by its two most famous architects. Herzl’s 1895 writings, advocating that the “gentle expropriation” and “removal” of the native population in a future

¹⁵ G.A. Res. 1514 (XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960).

¹⁶ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ 114 (2001) [*hereinafter* ILC Draft Articles], http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

¹⁷ *Supra* n15.

Jewish state “be carried out discretely and circumspectly”, set the tone for increasingly public espousals by Zionist leaders of what Nur Masalha labels the “de-Arabizing” of Palestine.¹⁸ By 1937, the intentions were unequivocal in Ben-Gurion’s speech to the Zionist Congress:

*... transfer of population has already taken place ... You are aware of the work of the Jewish National Fund in this respect. Now a transfer of wholly different dimensions will have to be carried out. In various parts of the country new Jewish settlement will not be possible unless there is a transfer of the Arab fellahin ... The transfer of population is what makes possible a comprehensive settlement program.*¹⁹

This is, of course, a familiar colonial tale, mirroring the forced removals involved in the establishment of the plantations of Ireland, the reservations of the Kenyan highlands, the colonies of Algeria and the white enclaves of South Africa. The construct of ‘a land without a people’ in Palestine is as much a façade as the legal fiction of *terra nullius* before it in Australia and the Americas.

Israeli ‘master plans’ for settlement and demographic configurations since 1948 have consistently invoked or implied the element of transfer. The pre-independence Plan Dalet, formulated in March 1948 and described by Benny Morris as “a strategic-ideological anchor and basis for expulsions”,²⁰ called for transfer as a form of self-defense.²¹ This evokes Vitoria’s jurisprudence on the right of the Spanish colonizers in the Americas to depose and dispossess any native Indians meeting them with hostility.²² The 1978 Drobles Plan²³ set out a blueprint for exponential expansion of the settler colonization of the West Bank. In calling for wholesale seizure and settlement of ‘uncultivated land’ and

18 See Nur Masalha, *Expulsion of the Palestinians: The Concept of “Transfer” in Zionist Political Thought, 1882–1948* (1992).

19 Cza, S5–1943, text of Ben-Gurion’s speech, Aug. 7, 1937, quoted in: Benny Morris, *Revisiting the Palestinian Exodus of 1948*, in *The War for Palestine: Rewriting the History of 1948* 43 (Eugene Rogan & Avi Shlaim eds., 2003).

20 Benny Morris, *The Birth of the Palestinian Refugee Problem: 1947–1949* 63 (1989).

21 Section 3(b)(4) of Plan Dalet states: “In the event of resistance, the armed force must be destroyed and the population must be expelled outside the borders of the state”.

22 Franciscus de Vitoria, *De Indis et de Ivre Belli Relectiones* 155 (Ernest Nys ed., John Pawley Bate trans., Carnegie Institution of Washington) (1917). See further Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 23–28 (2005).

23 World Zionist Organisation, *Master Plan for the Development of Settlement in Judea and Samaria 1979–1983* (Oct. 1978), available as an annex to U.N. Doc. A/34/605-S/13582 (Oct. 22, 1979).

'state land',²⁴ it cemented the legal bifurcation (constructed by Israel's military lawyers) between Palestinians living on privately-owned land and those living on 'state land'.²⁵ The implication was that the latter could be dispossessed and transferred as the settlement enterprise dictated. As Raja Shehadeh points out, when the Israeli authorities claim that private Palestinian land will not be settled, they are simply announcing that other Palestinian land will be.²⁶

In a similar vein, the series of master plans which inform all planning and zoning schemes in the Jerusalem municipality are imbued with insinuations of population transfer and demographic engineering (as well as overt compulsions toward discrimination and segregation). The stated target in the Jerusalem Master Plan 2030 of maintaining a 70:30 Jewish to Arab population split in the municipality – at a time when projections based on prevailing demographic trends suggest that the existing 64:36 ratio would be close to 50:50 by 2030 – speaks for itself. Forcible population transfer, as understood in international law, may be effected directly through residency revocations, evictions and house demolitions,²⁷ but also indirectly through planning restrictions, zoning maneuvers and the creation of unviable living conditions.²⁸ This concerted 'Judaization' of Jerusalem has seen the violent expulsion of Palestinian residents during the wars of 1948 and 1967 punctuate what Valerie Zink terms a sustained "quiet transfer" since the foundation of the state.²⁹ South Africa saw similar policies of urbanized colonialism in its cities during the apartheid era.

Beyond Jerusalem, settler colonial-inflected ethnic cleansing, deeply entwined in the foundation of the state of Israel in 1948, continues within its borders today. In 2011, the government formulated the Bill on the Arrangement

²⁴ See David Kretzmer, *The Occupation of Justice* 90 (2002).

²⁵ Ra'anana Alexandrowicz's 2011 documentary film, *The Law in These Parts*, provides interesting insights into how the appropriation of Ottoman legal doctrine regarding 'dead' or 'uncultivated' land was advanced in the late 1970s by the military jurists advising Ariel Sharon, in order to construct a legal basis for the accelerating settler colonial project. See particularly part III of the film, 'Dead Land'.

²⁶ See Raja Shehadeh, *The Law of the Land: Settlements and Land Issues under Israeli Military Occupation* 11–30 (1993).

²⁷ See, e.g., Avocats Sans Frontières, *Enforcing Housing Rights: The Case of Sheikh Jarrah* (May 2011), <http://www.asf.be/blog/publications/asf-housing-rights-report-may-2011/>.

²⁸ See, e.g., Al-Haq, *Al-Nu'man Village: A Case of Indirect Forcible Transfer* (Nov. 2006), <http://www.alhaq.org/publications/publications-index/item/al-nu-man-village-a-case-study-of-indirect-forcible-transfer>.

²⁹ Valerie Zink, *A Quiet Transfer: The Judaization of Jerusalem* 2 *Contemp. Arab Aff.* 122 (2009).

of Bedouin Settlement in the Negev (Naqab)³⁰ for the mass transfer of more than 40,000 Palestinian Bedouin citizens of Israel from their so-called 'unrecognized villages' of the Naqab desert.³¹ The Bill was approved on first reading by majority in the Knesset in June 2013, and proceeded to committee stage. While it was ostensibly suspended in December 2013, officials working on the legislation stated that their work will continue.³² In the meantime, the ordeal of being uprooted continues to penetrate the unrecognized villages, often as merely the latest phase in a cycle of ongoing dispossession. The following example is indicative: in 1948, the Bedouin villagers of Khirbet Zubaleh were forcibly displaced from their land "which they had cultivated for centuries"; in 1956, they were relocated to newly established villages of Atir and Umm el-Hieran (which, although established by Israeli military order, would remain unrecognized by the Israeli state); from 2002, plans for Jewish-Israeli settlement of this area were announced and demolition and eviction orders began to be served on the Bedouin residents, at which point the Regional Master Plan for Be'er Sheva (Bir Saba) "designated these two villages, home to 1,000 people, as sites for the expansion of Yatir Forest and the development of the new exclusively-Jewish town Hiran, respectively".³³ Bedouin residents appealed against demolition orders on their homes in Umm el-Hieran but, in 2015, the Israeli Supreme Court approved the state's demolition and eviction plan for

30 Commonly referred to as the 'Praver Plan' after Ehud Praver, head of policy planning in the Prime Minister's office, who was responsible for the proposal on which the Bill was based.

31 Adalah: The Legal Center for Arab Minority Rights in Israel, *Analysis of the Praver Plan* (Oct. 2011), <http://www.adalah.org/uploads/oldfiles/upfiles/2011/Overview%20and%20Analysis%20of%20the%20Praver%20Committee%20Report%20Recommendations%20Final.pdf>. As communities not recognised as legal settlements by the Israeli state, the 'unrecognised villages' are denied basic municipal services including connection to electricity and water supplies, and are precluded from electing government representatives. On the concerted 'de-development' of Palestinian areas of the Naqab, see Ismael Abu-Saad, *State-Directed "Development" as a Tool for Dispossession of the Indigenous Palestinian Bedouin-Arabs in the Naqab*, in *Decolonizing Palestinian Political Economy: De-development and Beyond 138–157* (Mandy Turner & Omar Shweiki, eds., 2014).

32 Jonathan Lis, Jack Khoury & Shirley Seidler, *Netanyahu's point man on Bedouin relocation says plan still on track*, Ha'aretz (Dec. 17, 2013), <http://www.haaretz.com/news/israel/premium-1.563930>.

33 Adalah: The Legal Center for Arab Minority Rights in Israel & Negev Coexistence Forum for Civic Equality, *The Praver-Begin Bill and the Forced Displacement of the Bedouin* (May 2013), <http://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Praver-Begin-Plan-Background-Adalah.pdf>.

the purposes of establishing the new Jewish-Israeli town.³⁴ Such stories of multiple displacements over successive decades are all too common in the Palestinian experience.

Historically, population transfer was viewed by international law as an acceptable, often recommended, solution to hostilities arising from ethnic tensions, and by the early twentieth century as a legally formalized mechanism of nation-building.³⁵ In the aftermath of the First World War, the League of Nations viewed transfer favorably in the context of states with large national minorities.³⁶ A number of bilateral 'transfer agreements' were signed and implemented,³⁷ with grave human and economic consequences. The western powers encouraged utilization of similar population transfer policies in Palestine. In 1937, the British government's Peel Commission recommended "compulsory population exchange", which Ben-Gurion seized upon.³⁸ Even as the world was coming to terms with the extent of the misery wrought by forcible transfer and deportations during the Second World War, it remained a formula favored in the west for dealing with the Palestinian 'problem'. In 1944, the Labour Party Executive in Britain resolved that "the Arabs be encouraged to move out as the Jews move in". The following year, former US President Herbert Hoover "advocated a solution of the Palestine problem by 'engineering' which involved the transfer of the Arabs of Palestine to Iraq".³⁹ Elsewhere, in the fragmenting British Empire, transfer was a notable outcome of colonial policy, with the displacements and relocations involved in the partition of India being a case in point.

34 HCJ 3094/11 Ibrahim Farhood Abu al-Qi'an, et al. v. The State of Israel [May 5, 2015] (Isr.). See also Amira Hass, *Israeli Colonialism, Plain and Simple*, Ha'aretz (May 11, 2015), <http://www.haaretz.com/news/diplomacy-defense/premium-1.655812>.

35 See, e.g., Umut Özsu, *Formalizing Displacement: International Law and Population Transfers* (2015).

36 The 1923 Convention concerning the Exchange of Greek and Turkish Populations, for example, provided for League of Nations supervision of the compulsory transfer of 400,000 ethnic Turks of Greek nationality in one direction, and 1.5 million ethnic Greeks of Turkish nationality in the other.

37 See, e.g., the 1919 Convention Respecting Reciprocal Emigration, whereby Greece and Bulgaria agreed to the consensual exchange of minorities.

38 "If we do not succeed in removing the Arabs from our midst, when a royal commission proposes this to England, and transferring them to the Arab area – it will not be achievable easily (or perhaps not at all) after the state is established . . . This thing must be done now". David Ben-Gurion Diary, 12 July 1937, the Ben-Gurion Archive, Sede Boker, quoted in Benny Morris, supra n20, 43.

39 Walid Khalidi, *Plan Dalet: Master Plan for the Conquest of Palestine*, 18 J. Palestine Stud. 4, 11 (1988).

While many of the expulsions and forced transfers that took place in Europe during and after the Second World War went without legal redress, and transfer agreements between states returned as a default setting in the wake of the war, international law's turn towards prohibition of population transfer was in motion by this time. The Charter of the International Military Tribunal saw deportation of civilians listed as a war crime and crime against humanity,⁴⁰ and prosecutions followed in Nuremberg on this basis. Subsequently, Article 49 of Fourth Geneva Convention prohibited forcible transfer by an occupying power, although it did allow for temporary evacuations when demanded for the security of the population or "imperative military reasons". According to a noted UN report of more recent times, forced population transfer, which has come to be equated with ethnic cleansing,⁴¹ is defined as the "systematic, coercive and deliberate . . . movement of population into or out of an area . . . with the effect or purpose of altering the demographic composition of a territory in accordance with policy objectives or prevailing ideology, particularly when that ideology or policy asserts the dominance of a certain group over another".⁴² Further, the report emphasizes that "[t]he objective of population transfer can involve the acquisition or control of territory, military conquest or exploitation of an indigenous population or its resources". This practice has now been denounced under the rubric of "deportation or forcible transfer of population" as a crime against humanity in the statutes of international criminal tribunals.⁴³

C *Apartheid*

A settler colonial state is, typically, a racial state. Nadia Abu El-Haj points to the "racist character of the Israeli state – the organization of the state around the distinction between Jew and non-Jew, military and civilian legal systems, enclosure and movement, and, since the 1967 war, the additional distinction

40 UN, Charter of the International Military Tribunal arts. 6(b–c) – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (Aug. 8, 1945).

41 See, e.g., Richard Falk, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, ¶ 19, U.N. Doc. A/HRC/16/72 (Jan. 10, 2011).

42 Awn Shawkat Al-Khasawneh & Ribot Hatano, *The human rights dimensions of population transfer, including the implantation of settlers* (Preliminary Report), U.N. Doc. E/CN.4/Sub.2/1993/17 (July 6, 1993), ¶ 15, 17.

43 Statute of the International Criminal Tribunal for the former Yugoslavia art. 5(d), U.N. Doc. S/25704 (May 3, 1993). Rome Statute of the International Criminal Court art. 7(1)(d), July 17, 1998, 2187 U.N.T.S. 3 [*hereinafter* Rome Statute].

between citizen and subject".⁴⁴ In recent years, Israel's racialized regime of domination over the Palestinian Arab population under its control has increasingly come to be characterized as one of apartheid. Apartheid is, of course, a consequential term, steeped in the brutal, recent history of southern Africa. Apartheid as designed in South Africa was a system of white domination structured on three pillars: racial categorization/segregation, territorial fragmentation, and political repression. It was an institutionalized system in the sense that it was created by law and enforced by legal institutions. While reinforced by social convention and practice, and an entire economic model, it was this institutionalized character that made it particularly visible and offensive.⁴⁵

The apartheid analogy has been used rhetorically in Palestinian liberation discourse for some time, garnering sporadic mention in commentary on the conflict throughout the 1980s and 1990s⁴⁶ before subsequently gaining prolificacy in mainstream media reports⁴⁷ and bestseller lists.⁴⁸ As Israel's occupation policies became all the more entrenched during the second Palestinian intifada, prominent South Africans wrote about the painful memories of apartheid that were exhumed upon witnessing the reality in the West Bank and Gaza Strip.⁴⁹ South African government departments have, on several occasions, described Israeli practices as "reminiscent of apartheid".⁵⁰ Even

44 Nadia Abu El-Haj, *Racial Palestinianization and the Janus-faced nature of the Israeli state*, 44 *Patterns Prejudice* 27, 30 (2010).

45 For a full examination of the laws of apartheid, see John Dugard, *Human Rights and the South African Legal Order* 53–202 (1978). See also John Dugard, Nicholas Haysom & Gilbert Marcus, *The Last Years of Apartheid: Civil Liberties in South Africa* 3–54 (1992).

46 Uri Davis, *Israel: An Apartheid State* (1987); Samira Shah, *On the Road to Apartheid: The Bypass Road Network in the West Bank*, 29 *Colum. Hum. Rts. L. Rev.* 221 (1997–1998).

47 See, e.g., Chris McGreal, *Worlds Apart*, *Guardian* (Feb. 6, 2006), <http://www.theguardian.com/world/2006/feb/06/southafrica.israel>.

48 See e.g., Jimmy Carter, *Palestine: Peace Not Apartheid* (2006).

49 Desmond Tutu, *Apartheid in the Holy Land*, *Guardian* (Apr. 2, 2002), <http://www.theguardian.com/world/2002/apr/29/comment>; Arun Gandhi, *Occupation "Ten Times Worse than Apartheid"*, Speech at the Palestinian International Press Center, (Aug. 29, 2004); Ronnie Kasrils, *Israel 2007: Worse than Apartheid*, *Mail & Guardian* (May 21, 2007), <http://mg.co.za/article/2007-05-21-israel-2007-worse-than-apartheid>.

50 See, e.g., South African Department of International Relations and Cooperation, *South Africa's response to latest Israeli settlement activities in East Jerusalem* (Nov. 24, 2009), <http://www.gov.za/south-africas-response-latest-israeli-settlement-activities-east-jerusalem>.

former Israeli municipal representatives⁵¹ and government ministers⁵² began to criticize their own government's treatment of the Palestinians as akin to apartheid. 'Moderate' Israeli leaders expressed concerns that persisting with its policies of subjugation would leave Israel facing a South African-style struggle for equal rights, which would ultimately spell the collapse of Israel's regime as an ethnic-based state of the Jewish people.⁵³ Of equal significance to the adoption of the language of apartheid in critiques of Israeli state policy, is the older and extensive tradition in Zionist discourse that cited apartheid South Africa as a positive model of 'separate development'. Ariel Sharon was an ardent admirer of South Africa's Bantustans.⁵⁴

From 2007, the question of the relevance of an apartheid paradigm to the situation in Palestine, not merely by analogy to South Africa but as defined by international law, started to gain currency with authorities in the UN. John Dugard, former UN Special Rapporteur on human rights in the Palestinian territories, first raised the issue of whether Israel's practices may fit the legal definition of apartheid in his January 2007 report to the UN Human Rights Council.⁵⁵ Miguel d'Escoto Brockmann, as President of the UN General Assembly in 2008, spoke of the importance of the UN using the apartheid terminology to describe Israeli policies.⁵⁶

51 Meron Benvenisti, *Bantustan Plan for an Apartheid Israel*, Guardian (April 26, 2004), <http://www.theguardian.com/world/2004/apr/26/comment>.

52 Shulamit Aloni, *Indeed there is apartheid in Israel*, Counterpunch (Jan. 10, 2007), <http://www.counterpunch.org/2007/01/08/yes-there-is-apartheid-in-israel/> [translation of Hebrew original published in Yediot Aharonot on Dec. 31, 2006]; Yossi Sarid, *Yes, it is apartheid*, Ha'aretz (April 25, 2008), <http://www.haaretz.com/print-edition/opinion/yes-it-is-apartheid-1.244643>.

53 Rory McCarthy, *Israel risks apartheid-like struggle if two-state solution fails, says Olmert*, Guardian (Nov. 30, 2007), <http://www.theguardian.com/world/2007/nov/30/israel>; Rory McCarthy, *Barak: make peace with Palestinians or face apartheid*, Guardian (Feb. 3, 2010), <http://www.theguardian.com/world/2010/feb/03/barak-apartheid-palestine-peace>.

54 See, e.g., Akiva Eldar, *Sharon's Bantustans are far from Copenhagen's hope*, Ha'aretz (May 13, 2003), <http://www.haaretz.com/print-edition/features/people-and-politics-sharon-s-bantustans-are-far-from-copenhagen-s-hope-1.10275>.

55 John Dugard, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007).

56 Miguel d'Escoto Brockmann, *On the International Day of Solidarity with the Palestinian People*, U.N. Headquarters, New York (Nov. 24, 2008), <http://www.un.org/ga/president/63/statements/ids241108.shtml>; Miguel d'Escoto Brockmann, *At the 57th Plenary Meeting on Agenda Item 16, the Question of Palestine*, UN Headquarters (Nov. 24, 2008), <http://www.un.org/ga/president/63/statements/agendaitem16241108.shtml>.

International law's relationship with apartheid is a curious one. Although prohibited⁵⁷ and criminalized⁵⁸ in the international legal order in response to the situation in southern Africa, the concept of apartheid was never given enormous attention by international lawyers, particularly in the west. Codification of the definition of apartheid ("inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them") – and acknowledgment of its prohibition as a *jus cogens* norm⁵⁹ notwithstanding – the the global anti-apartheid struggle inhabited a space that was couched more in the language of morality than legality; anti-colonial politics, anti-racist activism and solidarity more than human rights complaints and petitions. The Third World bloc at the UN pushed the issue through General Assembly resolutions, but western states refused to sign the Apartheid Convention for fear of their own citizens and corporations being held accountable for aiding and abetting the South African apartheid regime.

With the eventual collapse of the formal system of racial supremacy in South Africa came the suspension of the UN treaty-monitoring body for the Apartheid Convention (the "Group of Three"), as well as the dissolution of the Special Committee against Apartheid and the UN Centre against Apartheid. Underlying all of this was a perception among international lawyers of apartheid as a *sui generis* regime, now purged from the concerns of the global legal order. This is not the case under doctrinal international law, however, as evidenced by the inclusion of apartheid as a crime against humanity in the Rome Statute of the International Criminal Court (ICC), after the end of South African apartheid. The sense nonetheless persists that western states – who had balked at the ideas of criminal responsibility and universal jurisdiction in the Apartheid Convention – were happy to acquiesce to a crime of apartheid lingering in international criminal law merely as an empty concession to the Third World, confident that it would be too difficult to enforce in practice.⁶⁰

57 International Convention on the Elimination of All Forms of Racial Discrimination art. 3, Mar. 7, 1966, 660 U.N.T.S. 195.

58 Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243; Rome Statute arts. 7(1)(j) & 7(2)(h).

59 ILC Draft Articles, supra n16, 62 & 112.

60 For an account that calls into question the enforceability, and indeed the existence, of the crime of apartheid, and that argues that its inclusion in the Rome Statute was the product of political engineering, see Alexander Zahar, *Apartheid as International Crime*, in *The Oxford Companion to International Criminal Justice* 245–246 (Antonio Cassese ed., 2009).

The question of the applicability of the prohibition of apartheid in the Palestinian context was taken up by the Human Sciences Research Council of South Africa which, in 2008, convened a team of international lawyers from Palestine, Israel, South Africa and Europe to examine the matter. The findings were published in book form in 2012 and concluded, *inter alia*, that there exists in the occupied Palestinian territories (oPt) an institutionalized and oppressive system of Israeli domination and oppression over Palestinians as a group – that is, a system of apartheid.⁶¹

This was based on a detailed exploration of Israeli practices vis-à-vis the “acts of apartheid” elucidated in the Apartheid Convention that feed into the required institutionalized system of domination. Such acts range from the violent (torture and ill-treatment, extra-judicial killing, persecution of dissent) to, perhaps more significantly, the administrative (categorization of different population groups, permit systems, appropriation of land for exclusive Jewish use, carving up of territory into segregated reserves).

The architecture of apartheid is underpinned by an Israeli legal system that affords preferential legal status and material benefits to Jews over non-Jews, stemming originally from the 1950 Law of Return and Israel’s citizenship laws, as well as by separate legal systems for Jewish-Israelis (civil law) and Palestinians (military law) in the oPt. Here, the significance of the underlying settler colonial paradigm returns to the fore. The 1950 Law of Return defines who is a Jew for purposes of the legal system and entitles every Jew to immigrate to Israel (extending, since 1967, to the occupied Palestinian territory) under the *oleh* visa regime. The 1952 Nationality Law then grants such immigrants the right to gain immediate citizenship while explicitly excluding those who were residents and citizens of Palestine before the creation of the state of Israel if they were not “in Israel, or in an area which became Israeli territory after the establishment of the State, from the day of the establishment of the State [May 1948] to the day of the coming into force of this Law [April 1952].”⁶² Thus, long-time Palestinian residents forcibly transferred before and during the 1948 war were legally barred from taking up citizenship in the newly-created state and returning to their homes. Others with no prior connection to Israel, meanwhile, are entitled to citizenship on the basis of a particular construction of Jewish nationality. This situation of preferential citizenship is further carved

61 Tilley, *supra* n9, 107–221.

62 Nationality Law art. 3, 5712–1952, 6 LSI 50 (1951–1952) (Isr.).

out in Israel's constitutional law,⁶³ with a number of the Basic Laws codifying Israel as 'the state of the Jewish people'.⁶⁴

The premise of Israel as a state of the Jewish people amounts to more than mere symbolism, underpinning as it does much of the Israeli legal system. Notably, for instance, Basic Law: Israel Lands (1960) provides that ownership of real property ("land, houses, buildings and anything permanently fixed to land") held by the State of Israel, the Development Authority and the Jewish National Fund "shall not be transferred either by sale or any other manner" but is to be held in perpetuity for the benefit of the Jewish people. According to government sources, "93% of the land in Israel is in the public domain; that is, either property of the state, the Jewish National Fund or the Development Authority"⁶⁵ and thus cannot be leased by non-Jews (including non-Jewish citizens of Israel). The foundation provided by the concept of Jewish nationality for an institutionalized system of discrimination and domination is further visibly evidenced in the dual legal system in place in the West Bank, where Jewish settlers are subject to an entirely separate body of laws and courts than Palestinian residents. The law, in this sense, is both instrumental to, and constitutive of, apartheid.⁶⁶

63 Israel does not have a written Constitution, but a series of Basic Laws operating in practice as the constitutional law of the state.

64 See, e.g., Basic Law: Knesset 5718–1957, 12 LSI 85 (1957–1958) (Isr.); Basic Law: Human Dignity and Liberty 5752–1992, 1391 LSI 150 (1991–92) (Isr.); Basic Law: Freedom of Occupation, 1994, 47 LSI 90 (1994).

65 Israel Land Authority, General Information, http://www.mmi.gov.il/Envelope/indexeng.asp?page=/static/eng/f_general.html.

66 For more detailed analysis of the separate legal systems in place and the racialized 'channelling' of Israeli civil law into the settlement colonies from 1967 onwards through a blend of personal and territorial jurisdiction grounds, see John Dugard & John Reynolds, *Apartheid, International Law and the occupied Palestinian territory*, 24 Eur. J. Int'l L. 867 (2013). See also *Interview with Raja Shehadeh*, 94 Int'l Rev. Red Cross 13, 17 (2012). Shehadeh identifies the establishment of the Israeli Civil Administration in the West Bank as the clincher: "The most important legal change that occurred, which was and continues to be fundamental to this day, came in 1981 when Military Order 947 was issued. This order established the civil administration that continues to be in place to this day. It was a way of separating the civilian rule of Israeli Jews from that of non-Jews living in the same territory, making each group subject to different laws and different authorities that implement different laws, which is a form of apartheid. A whole series of military orders and Jordanian laws were transferred from the military government to the Israeli civilian administrator who governed the non-Jews living in the occupied territories. At the same time, using various 'legal' devices, Israeli laws came to be applied to the Israeli Jews living in those same territories. The head of the civil administration was an Israeli

Significantly, in March 2012, the UN Committee on the Elimination of Racial Discrimination took the unprecedented step of censuring Israel under the rubric of apartheid as prohibited by Article 3 of the International Convention on the Elimination of all forms of Racial Discrimination. Having reiterated previous concerns about the general nature of the segregation of Jewish and non-Jewish sectors of Israeli society,⁶⁷ the Committee declared itself “particularly appalled at the hermetic character of the separation” between Jewish and Palestinian populations in the oPt (specifically citing separate legal systems and institutions, physical infrastructure, access to services and resources, and entitlements to freedoms and rights) and urged Israel, in accordance with its Article 3 obligations, to prohibit and eradicate any policies or practices of racial segregation and apartheid that “severely and disproportionately affect the Palestinian population.”⁶⁸

The international campaign against apartheid in South Africa was an emblematic Third World struggle. With the workings of international law rarely favoring the peoples of the global South, it represents a rare success story at the UN (and beyond) that postcolonial nations can claim ownership of. In this sense, apartheid offers a useful lens through which to understand the engagement of the post-independence Third World with international law. In the same vein, the international legal prohibition of apartheid today can provide a valuable normative framework for deconstructing Israel's regime of domination over the Palestinian people. It carries tactical weight in underpinning the mobilization of international solidarity with the Palestinian people, which itself occupies a central space in the progressive emancipatory politics of our time, and unlocks legal avenues that can complement political strategy.

official appointed by the army, so it wasn't much of a civilian rule. But it was a structure that Israel devised to resolve the problem of how to apply Israeli laws to one part of the population and not to the other, and how to discriminate in an official, 'legal' manner between the two groups of inhabitants living on the same territory. This was how apartheid was introduced to the opt”.

67 Committee on the Elimination of Racial Discrimination, Concluding observations: Israel, U.N. Doc. CERD/C/ISR/CO/14-16 (Mar. 9, 2012), ¶ 11.

68 *Id.*, ¶ 24.

III The Anatomy of Law

A *Hegemony*

As a constitutive feature of socio-political structures, law is by its nature enmeshed in political and social power dynamics, and thus typically replete with structural biases – international law, all the more so, as Martti Koskenniemi has consistently and eloquently reminded us.⁶⁹ Mahmoud Darwish also captures some of the hallmarks of law's form and design selectivity in his prose:

You consider the law. How innocent we were to think the law is a vessel for rights and justice! The law here is a vessel for what the ruler wants, or a suit that he orders to his own measure. I have been in this country even before the state that negates my existence came into being. You realize once again that justice is a hope that resembles an illusion if it is not supported by power and that power transforms the illusion into a reality.⁷⁰

As I have noted above, colonialism and forced population transfer were historically condoned and facilitated by international law, and often implemented by occidental legal codes and custom. Apartheid was, in essence, a legal system that institutionalized racial domination. While eventually prohibited under international law, its very legalistic persona in the domestic setting engendered dilemmas for anti-apartheid activists wishing to invoke law as a modality of resistance. So it is in Palestine, where law functions in the Israeli state apparatus as a technology of control, and a conduit for the ongoing political project of settler colonialism. Racialized parallel juridical systems, emergency regulations and military legal governance are foundational to this process, and have long extended beyond the immediate spheres of national security to underwrite land appropriation, settlement and segregation.

International law's indeterminacy and malleability allow it to be commanded and sculpted by Israel's military legal advisors and Supreme Court judges to endorse such policies, as well as, among other things: to deny the existence of any sovereign claims to the West Bank and Gaza concomitant or

69 See, generally, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989); Martti Koskenniemi, *The Politics of International Law* 1 *Eur. J. Int'l L.* 4; Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 *Cambridge Rev. Int'l Aff.* 197 (2004); Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 *Eur. J. Int'l L.* 7 (2009).

70 Mahmoud Darwish, *Journal of an Ordinary Grief* (Yawmiyyât al-Huzn al-Âdi, 1973) (2010) 102.

subsequent to their status as British colonial territory and prior to their colonization by Israel; to discard the 'non-humanitarian aspects' of international humanitarian law; to afford privileges, protections and impunity to settlers; to legitimize the construction of the Wall and its associated colonizing infrastructure in the West Bank; to sanction extra-judicial executions; and to legitimize the siege of Gaza and the launching of aerial bombardments and ground incursions in 'self-defense'. As has been noted:

Playing within the interpretative windows left open by law's indeterminacy is as old as international law. Because law is expressed through ordinary language, it is necessarily replete with loopholes. We all know that. International law – and even more international humanitarian law – does not prescribe any bright line on the basis of which a certain behaviour is clearly bad or wrong.⁷¹

This is exemplified in the ability of the Israeli Military Advocate General to decide that attacks such as the multiple missile strike that killed four young boys on a beach near Gaza City port on 16 July 2014 "accorded with Israeli domestic law and international law requirements".⁷² It is exemplified in findings by US Naval War College academics that Israel's targeting practices in Gaza and Lebanon are "clearly well-regulated and subject to the rule of law".⁷³ Israel's own soldiers have described these practices the following terms:

- 71 Jean d'Aspremont, *The International Legal Scholar in Palestine: Hurling Stones under the Guise of Legal Forms?* 14 *Melbourne J. Int'l L.* 1, 3 (2013).
- 72 IDF Mag Corps, Decisions of the IDF Mag Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge' – Update No. 4. "The Military Advocate General found that the professional discretion exercised by all the commanders involved in the incident had not been unreasonable under the circumstances. However, it became clear after the fact that the identification of the figures as militants from Hamas's Naval Forces, was in error. Nonetheless, the tragic outcome of the incident does not affect the legality of the attack ex post facto. Accordingly, the Military Advocate General ordered that the investigation file be closed without any further legal proceedings – criminal or disciplinary – to be taken against those involved in the incident". See further Peter Beaumont, *Israel exonerates itself over Gaza beach killings of four children last year*, *Guardian* (June 11, 2015), <http://www.theguardian.com/world/2015/jun/11/israel-clears-military-gaza-beach-children>.
- 73 Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 371 *U. PA. J. Int'l L.* 53, 136 (2015). For a response, see Noura Erakat, *If Israeli Tactics in Gaza Are Legal, No One is Safe: Response to Michael N. Schmitt and John J. Merriam*, *Jadaliyya* (June 18, 2015), <http://www.jadaliyya.com/pages/index/21929/if-israeli-tactics-in-gaza-are-legal-no-one-is-saf>.

*The instructions are to shoot right away. Whoever you spot – be they armed or unarmed, no matter what. The instructions are very clear. Any person you run into, that you see with your eyes – shoot to kill. It's an explicit instruction.*⁷⁴

It is exemplified in the fact that the Israeli Foreign Ministry⁷⁵ and a self-proclaimed 'High Level International Military Group' can release reports detailing the ways in which Israeli attacks in Gaza in 2014 "not only met a reasonable international standard of observance of the laws of armed conflict, but in many cases significantly exceeded that standard".⁷⁶ These reports were both released in May 2015 in a bid to pre-empt the findings of the UN's independent commission of inquiry presented the following month.⁷⁷ Even where documenting the targeting of civilians in bombardments as one-sided as Operation Cast Lead in 2008/2009 and Operation Protective Edge in 2014, such UN investigations themselves participate to a certain extent in constructions of false balance by indulging the 'both sides' narrative. They also avoid the big-picture public international law questions around the use of force, and refuse to challenge Israel's claims of self-defense.⁷⁸

The occupation law framework that was constructed with a temporary, transitional (and essentially intra-European)⁷⁹ situation in mind has been widely and rightfully critiqued as incapable of coping with occupations that are stretched out over decades.⁸⁰ The upshot of this incapacity is that occupation

74 Breaking the Silence, *This is How We Fought in Gaza: Soldiers' Testimonies and Photographs from Operation "Protective Edge"*, 79 (May 2015), <http://www.breakingthesilence.org.il/pdf/ProtectiveEdge.pdf>.

75 Israel Ministry of Foreign Affairs, *The 2014 Gaza Conflict: Factual and Legal Aspects* (May 2015), <http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/2014-Gaza-Conflict-Factual-and-Legal-Aspects.aspx>.

76 High Level International Military Group, *The Gaza Conflict 2014: Preliminary Findings*, annexed to Letter to Judge Mary McGowan Davis, Chair of the UN Commission of Inquiry on the 2014 Gaza Conflict (May 31, 2015), at 6. This group was made up predominantly of retired western military generals and senior officers, many of whom served in imperial operations in Iraq and Afghanistan. The group's work was sponsored by the Friends of Israel Initiative.

77 *Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict*, U.N. Doc. A/HRC/29/CRP.4 (June 22, 2015).

78 John Reynolds, *The Use of Force in a Colonial Present, and the Goldstone Report's Blind Spot*, 16 *Palestine Y.B. Int'l L.* 55 (2010).

79 Nehal Bhuta, *The Antinomies of Transformative Occupation* 16 *Eur. J. Int'l L.* 721 (2005).

80 The restrictive interpretation of Article 6 of the Fourth Geneva Convention by the International Court of Justice merely served to reinforce such critiques. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,

law functions as a useful smokescreen for a state wishing to acquire and maintain the benefits of the sovereign, without being encumbered with the burdens and responsibilities that sovereignty entails. Darryl Li highlights the related assumptions that are embedded in the demands to apply occupation law in the Palestinian case, assumptions that themselves perform a political function: first, the acceptance of a territorial partition based, at best, along the lines of Israel's founding aggression; and second, the assumption that Israel has only limited humanitarian obligations towards the Palestinian population of the occupied territories (whether that extends any further than the bare resources and conditions necessary to sustain life is questioned by Israeli authorities) without any specific political relationship or responsibilities towards them.⁸¹

International humanitarian law, so-called, has also been particularly plagued by what Lama Abu Odeh calls "the limits of international law legalese" evidenced in the "porousness" of the principles of necessity and proportionality as they relate to the conduct of war. The result of competing contestations from opposite sides of the legal trenches is a moderate "difference-splitting position that wants to stand on behalf of the civilians on both sides and wants to condemn military action, resistance or self-defense only half way".⁸² This 'difference splitting' is prone to belie the imbalances inherent in an asymmetric conflict by insisting on an ostensibly 'balanced' or 'reasonable' non-political stance that ultimately masks the crude political reality:

... this pre-choreographed legal dance of international law, of step one maximalist position on both sides, step two split the difference... leaves us Palestinians confined in what I think has become a new "centrism"... This new centrism is armored with law talk – with all its technicality and pretense to objectivity and neutrality – and even though it liberates us from the limitations of our political prison and offers us a place that is a bit more airy and with some more light; it is imprisoning nevertheless. We are a few inches to the left thanks to international legalese but remain so many miles away from real justice.⁸³

Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 125 (July 9). See also Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 Am. J. Int'l L. 102 (2005).

81 Darryl Li, *Occupation Law and the One-State Reality*, Jadaliyya (Aug. 2, 2011), <http://www.jadaliyya.com/pages/index/2295/occupation-law-and-the-one-state-reality>.

82 Lama Abu Odeh, *The Limits of International Law Legalese*, Jadaliyya (Dec. 5, 2012), <http://www.jadaliyya.com/pages/index/8800/the-limits-of-international-law-legalese->.

83 Id.

In other words, international law – in the senses described by both Li and Abu Odeh, relating to occupation and the conduct of hostilities respectively – essentially allows a hegemonic colonial position to prevail. The incisive critiques of international law from a Marxist perspective that have infiltrated the space of international legal theory in recent years drive the point further, suggesting in their most acute articulation that international law as a whole is so inextricably bound up with imperialism as to be inherently incapable of opposing it on any level.⁸⁴

B *Counter-Hegemony*

On the other hand, an extension of Edward Said's framing of geography (as an art of resistance, not just the art of war) to the legal realm would allow us to view law, similarly, as a possible site of resistance and not merely an instrument of conquest. Legal argument has, indeed, historically functioned not exclusively as a vehicle for the implementation of colonial policies but also as a site of contestation against colonialism. While the indeterminacy of international law generally facilitates the suffusion of its structures by hegemonic architects, that same aura of indeterminacy may imply cracks that can be filled with progressive content or sequestered for emancipatory purposes. Susan Marks, for one, has argued this from a perspective on the critical left:

*... critique seeks to show how international law can serve to stabilise oppression but also to unsettle it, to obstruct emancipation but also to enable it. Viewed in this light, indeterminacy is at one level international law's weakness, at another its greatest strength. It is precisely because principles are contradictory that we are able to find in them counter-systemic logics. It is precisely because norms are unstable that we can lead them to "surpass themselves"... From a critical perspective, then, the issue is not just whether we perceive indeterminacy, but what we do with it.*⁸⁵

Reading international law with Palestine in mind, we can ask whether norms have emerged to allow a pushback against traditional structures that have facilitated settlement and colonization? Perhaps less so with regards the *fait accompli* partition of 1948. In the domestic legal setting, can any counter-systemic logics be located in the laws imposed by the colonizer?

⁸⁴ China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005).

⁸⁵ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* 144 (2007).

Although far from having ruptured decisively from its Eurocentric past, the content of international law does offer norms framed in the postcolonial context that can counter and criminalize settler colonial practices. Despite the doctrinal limitations of the laws of war in particular – murky elements susceptible to the so-called fog of war, as well as the shortcomings of occupation law in coming to terms with the spatial and temporal realities of an integrated regime of domination over the Palestinian people – certain parts of the normative content of humanitarian law do speak to the more systemic elements of the Israeli project. Forced transfer and apartheid are listed as “grave breach” crimes under the Fourth Geneva Convention and the First Additional Protocol to the Geneva Conventions.⁸⁶ Perhaps most significantly, Article 49 of the Fourth Geneva Convention prohibits the settlement of occupied territory by the occupying power. As such, settler colonialism in a context of occupation is rendered beyond the pale of legality. The anti-colonial purpose of the provision is explicit in the commentary to the Convention:

It is intended 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. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.⁸⁷

That is, settler colonial policies in occupied territory were ostensibly prohibited by the laws of occupation more than ten years before normative censure of colonialism itself was adopted by the UN General Assembly. This is not without its shortcomings, of course, demonstrating as it does a willful blindness to colonization by European powers outside the context of the Second World War, as well as playing up to distinctions between settler colonialism and colonialism as mere foreign rule. The drafters of the Geneva Conventions were primarily contemplating a regime of settlement that would exist between

86 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, ¶ 6, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 85, June 8, 1977, 1125 U.N.T.S. 3.

87 Commentary to Geneva Convention iv Relative to the Protection of Civilian Persons in Time of War 283 (Jean Pictet ed., 1958). Even on this seemingly incontrovertible provision, which the commentary clarifies is not intended to be equivalent with forced transfer or deportation in the sense of Article 49(1), and despite Theodor Meron's 1967 legal advice to the contrary, the Israeli government has argued that Jewish settlement of the West Bank is voluntary, and thus not encompassed by Article 49(6).

recognized states, rather than 'frontier' colonization. In the context of the West Bank, at least, while the law of armed conflict framework may be silent and unhelpful with regard the legality and permanence of the occupation, it is not without merit in tackling Israel's ongoing colonization.⁸⁸ As such, my argument would be that there is a need for Palestinian legal activists to continue moving beyond the parameters of international humanitarian law, without abandoning occupation law altogether. While I have alluded above to the inability of a framework premised on temporary occupation to fully grapple with the realities of a prolonged occupation, it does retain anti-conquest norms against the acquisition of territory or extension of sovereignty. This has allowed for some insurance, for instance, against formal western recognition of Israel's annexation of East Jerusalem. Contrary to some suggestions, the law of armed conflict framework of occupation, and the broader public international law framework of apartheid, for example, are not mutually exclusive. It is possible to have a regime of apartheid within the context of military occupation. It is also possible, however, for that same regime of apartheid to extend beyond the occupied territory. As the Namibian precedent indicates, the prohibition of apartheid is not constricted to a particular territorial unit, be that the state's sovereign territory or an extra-territorial space in which it exercises effective control. It can transcend the borders that occupation law is constrained by. What the framework of settler colonialism in its broad understanding (encompassing the prohibitions of forced population transfer and apartheid) therefore allows – in a manner that occupation law (and individual human rights) does not – is a deconstruction of the holistic nature of Israel's control regime over the Palestinian people, uncurbed by temporal or spatial boundaries.

The norms against colonialism and apartheid, for instance, precipitate an examination of the prevailing situation in Palestine that is grounded in international law, yet does not fall prey to a traditionally blinkered *modus operandi* that accepts and constructs at least three (citizens of Israel, occupied territory residents, refugees) and up to seven (Israel, West Bank, seam zone, Jordan Valley, East Jerusalem, Gaza Strip, refugees) distinct categories of Palestinian legal subjects and territorial zones – or that maintains a fallacious presumption of the 'temporariness' of the occupation. By appraising whether Israel's

88 It is also worth remembering that the Palestinian majority regions inside Israel were treated by Israel as occupied territory until the formal establishment of the military government regime over Palestinian citizens in January 1950. That is, for a short window of time, there may in principle have been violations of Article 49(6) of the Fourth Geneva Convention occurring inside Israel, as well as for a much longer period in the Gaza Strip, dating back as far as the 1956 occupation. See Sabri Jiryis, *The Arabs in Israel 15–16* (1976).

rule over the Palestinian people, in all of their constructed avatars, amounts to a permanent and institutionalized regime of systematic oppression and domination by one racial group over another, the core questions of equality, ethnic privilege and emancipation can be put in perspective.

Further, even if the Green Line is accepted as legal 'reality', the frameworks of apartheid and settler colonialism necessitate a more fundamental examination of Israel's relationship with the Palestinian people than can be allowed with reference only to occupation law. The absolute, albeit fuzzy, prohibitions of apartheid and colonial rule as forms of governance stand in contrast to 'grey' areas of international humanitarian law – doctrines such as proportionality and military necessity that remain prone to manipulation and distortion by narratives seeking to justify given military actions. A holistic portrait of a systematic apparatus of racial domination and colonization connects the dots between discrete and disparate rights violations, illuminating them against a common backdrop, and highlighting root causes rather than symptoms. It serves as a counter-point to an occupation law discourse that distorts reality by suggesting particular moments of violence as 'exceptional' – the Battle of Jenin, Operation Cast Lead and so on. As Nimer Sultany points out, "the occupation is no less oppressive during normal times".⁸⁹ This sharpens our focus on the nature of the occupation as a normative regime,⁹⁰ as opposed to the habitual focus on specific actions undertaken within the occupation. While international humanitarian law assumes the legality and temporariness of occupation, a determination of a colonial and apartheid regime as an intrinsically unlawful modality of governance may add credence to claims that Israel's occupation of the West Bank and Gaza is illegal in and of itself. Settlement colonies can operate as the bridge that traverses the gaps between the laws of armed conflict and the more systemic regimes of colonialism and apartheid.

Here, then, my argument is that colonization ought to remain (or, in some cases, become) the conceptual nucleus around which Palestinian legal advocacy and resistance revolves. Land rights and settlement colonies must be placed in sharp focus within the overarching vision. The inherent failing of the Oslo process, as we know, was its blindness to these most glaring of issues. Essential to this is the need to tackle the politics of language and naming, and to transform the dominant media and diplomatic terminology from that of

89 Nimer Sultany, *Roundtable on Occupation Law: Part of the Conflict or the Solution?* Jadaliyya (Sep. 22, 2011), http://www.jadaliyya.com/pages/index/7325/roundtable-on-occupation-law_part-of-the-conflict.

90 Orna Ben-Naftali, Aeyal Gross & Keren Michaeli, *Illegal Occupation: The Framing of the Occupied Palestinian Territory*, 23 Berkeley J. Int'l L. 551 (2005).

Jewish 'neighborhoods' in East Jerusalem and 'settlements' and 'outposts' in the West Bank to that of 'colonies' or 'settlement colonies', and, ultimately, to Israel as a colonial power.⁹¹ This is commensurate with the lexicon of international law, and is nothing new or radical. Palestinian social scientists have been denominating it as such since the foundation of the state. The French Marxist historian Maxime Rodinson published an essay in 1967, which was later translated into English under the title *Israel: A Settler Colonial State*.⁹² The French versions of UN resolutions refer to settlements as *colonies de peuplement* – settlement colonies. Yet in the Anglophone sphere of international lawyers, legal institutions and human rights organizations – and the diplomatic community that those actors seek to influence – references to Israel as a colonial and colonizing state remain marginal, despite Israel's fundamental coloniality and the resonance that the prohibition of colonialism carries in international law. Amnesty International, for example, for all of its important work in documenting abuses perpetrated within the context of the occupation, persists with the 'political neutrality' leanings of international law in characterizing the Israeli occupying forces and Palestinian resistance groups as equivalent in capacity and responsibility, an ultimately conservative move which hollows out the political and moral realities of the colonizer-colonized relationship.⁹³ Positioning Israel's settler colonialism in its broader context will necessarily focus on the ever-proliferating colonization of the West Bank, but also allows the dots to be joined to dispossession and racial inequality inside Israel, the asymmetry of the use of force in Gaza, the plight of the refugees and the continuing impact of the settler colonial process throughout historic Palestine.

IV Legal Resistance: Tactics & Strategy

In the Palestinian liberation context, as in any struggle where legal activism is pursued as part of a diversity of actions, it is crucial to emphasize the distinction between tactics and strategy, concepts that are too often conflated in the

91 This principle can equally be applied to other terminology, the re-framing of 'Arab-Israelis' or 'Palestinian citizens of Israel' – arguably disempowering categories that privilege a certain conception of the state – as 'natives of historic Palestine', the 'indigenous population' or, simply, 'Palestinians'.

92 Maxime Rodinson, *Israel, fait colonial?* (1967). Published in English as Maxime Rodinson, *Israel: A Colonial Settler-State?* (David Thorstad tr., 1973).

93 See, e.g., Amnesty International, *Unlawful and Deadly: Rocket and Mortar Attacks by Palestinian Armed Groups During the 2014 Gaza/Israel Conflict*, MDE 21/1178/2015 (Mar. 2015).

language of international lawyers seeking to intercede in political and legal debates. The compulsive desire for 'strategic' intervention in such debates results in the systematic incorporation of tactical considerations as strategy, collapsing the distinction between the two as it was originally articulated in military theory and subsequently translated into political vocabulary.⁹⁴

Simply put, "strategy refers to the achievement of long term, structural (or organic) goals, whereas tactics refers to the achievement of short term, conjunctural ones".⁹⁵ Robert Knox draws on Gramsci's distinction between "organic" ("relatively permanent... far-reaching historical significance") and "conjunctural" ("occasional, immediate, almost accidental... of a minor, day-to-day character") phenomena in framing this distinction.⁹⁶ In the Palestinian context, therefore, liberation strategy implies ending military occupation, institutionalized discrimination and cultural domination, by a unity of mobilization and a diversity of modes of resistance. Tactics entail pragmatic and opportunistic interventions aimed at more immediate results that can contribute towards attainment of the larger strategic outcome. Legal interventions – be it the prosecution of war criminals, the filing of civil suits against corporations complicit in repressive practices, or the triggering of UN mechanisms – are some such tactics, but do not amount to strategy in themselves. While legal tactics can make important contributions to a strategy for change, it is important to be conscious at the same time of the pitfalls that arise from using legal argument, and of the need to mitigate them to the extent possible through the selection of which particular legal tactics to pursue (at which junctures) and which to eschew. The inconsistencies inherent in critiquing the law, while also advocating use of the law, are impossible to extinguish entirely. They can, at best, be attenuated with reference to a coherent political strategy towards which appropriate legal tactics are thoughtfully deployed. The task for movements engaged in projects for radical change is to institute "a strategic approach to resistance that departs from the production of certain truth claims that underlie liberal equality and equal opportunity arguments that are typically centered by legal reform projects".⁹⁷ This is no easy quest and is compounded by a number of other potential drawbacks with the resort to law for political ends. The tendency of legal discourse and the vocabulary of rights to depoliticize and individualize struggles – and to mediate them in a particular language and institutional structure that privileges the legal profession – is something that must be taken into account. Related to this is the fact

94 Robert Knox, *Strategy and Tactics*, 21 Finnish Y.B. Int'l L. 193 (2010).

95 *Id.*, 227.

96 See Antonio Gramsci, *Selections from the Prison Notebooks 177–178* (2003).

97 Dean Spade, *Laws as Tactics*, 21 Col. J. Gender L. 40 (2011).

that the terms on which legal argument must be conducted are often too limited to allow the roots of a given problem to be exhumed. In this regard, Stuart Scheingold's analysis of liberal-left cause lawyering in the US posits the 'myth' of rights as a phenomenon "that grossly exaggerates the role that lawyers and litigation can play in a strategy for change".⁹⁸

For these and other reasons, we must remember that law is not, and should not be, the exclusive tactic to be wielded. International lawyers focus on law because it is our relative area of competence, not because it is a superior site of struggle to other discourses aimed at social change. It is one of the languages through which political debates have come to be conducted, and the legal terrain is by consequence difficult to vacate. The political and economic forces that have driven the prevalence of law historically remain as pertinent as ever, however. It is crucial, therefore, to distinguish between law as instrumental to socio-political struggles, and law as constitutive of those struggles. Here, the emphasis is on capitalizing on opportunities that arise for legal action in the course of the struggle, as opposed to conceiving of the struggle itself purely in terms of legal rights. The need to maintain sight of the strategic political purpose toward which legal tactics are directed is paramount.

I have suggested that the Palestinian liberation strategy necessitates ending occupation and discrimination as lowest common denominators. Beyond that, however, there is a discernible lack of strategic clarity across Palestinian resistance groups, political actors and social movements. What place for socialist and feminist visions of Palestinian liberation, for example? The dearth of such visions has typically been debilitating to anti-colonial nationalist movements. Political revolution led by national bourgeoisie has so often been unaccompanied by social revolution, meaning the structures and consequences of oppression continue in only slightly different post-colonial guises. Economic aspects of the colonization of Palestine remain strikingly subordinate to political elements in the discourses of both individual rights and collective self-determination. All the while, the profiteering elements of Israel's occupation, complicit Palestinian elites and the international donor industry proliferate. It remains unclear how the tactics of legal resistance can best be deployed in response to this, and towards a more radical political strategy. The divergence in trajectory between the respective liberation efforts of Palestinian popular movements (and international solidarity campaigns) on the one hand, and the Palestine Liberation Organization's (PLO) statehood quest on the other, must be confronted if there is to be any chance for legal efforts to be coordinated in

98 Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* 5 (2nd ed., 2004).

viable pursuit of common strategy. There are also lingering questions over the legal status of, and relations between, the PLO, the Palestinian Authority, and the State of Palestine, which inherently bear upon strategy insofar as they raise prefatory questions of strategy by whom and for whom. I will not intervene directly in that particular conversation here, but will attempt to sketch some general thoughts towards conceptualizing anti-colonial legality in the context of Palestinian liberation.

For a start, I would suggest that Palestinian legal activists and their allies should not be afraid of the 'lawfare' label. They might best, indeed, embrace it: subvert the notions of lawfare as "something sneaky",⁹⁹ as a "strategy of the weak",¹⁰⁰ as "misusing law"¹⁰¹ (as though law has a singular and predetermined acceptable use). Law is one – and, it is important to remember, only one – of the weapons in the arsenal of any struggle for equality, social justice and self-determination. Progressive ideals that involve disrupting existing socio-political structures are rarely achieved without an intensely political fight. There is no need to shy away from that reality. Use the law instrumentally, but do not strive for the fantasy of an 'apolitical' notion of law or rights. Following Carl Schmitt's friend-enemy construct of politics, all "neutralizations and depoliticizations"¹⁰² are liberal delusions – there can be no such thing. Rights are political. Law is political. In what is a deeply political struggle, a coherent and long-term strategy is essential. The use of legal mechanisms can be a useful tactic in that broader strategy, but will be no panacea.

I have alluded above to the space created by the indeterminate and potentially counter-hegemonic dottings of international law's normative topography. Where the discipline remains less divorced from the history of imperial power dynamics, and where the obstructing levees are firmly entrenched, is in the institutional and enforcement spheres. The 'content' of international law, in this sense, may be distinguished from its 'form' – the transformative potential of the former curbed by the structural constraints of the latter. Strategic awareness is needed to remain conscious of the fact that mere alignment of international law with the aims of the colonized is often insufficient for their realization. The challenge for a progressive politics of international law then,

99 David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 Case W. Res. J. Int'l L. 457, 458 (2010–2011).

100 US Department of Defense, *The National Defense Strategy of the United States of America* (Mar. 2005), at 5.

101 Charles J. Dunlap, *Lawfare Today: A Perspective*, 3 Yale J. Int'l Aff. 146 (2008).

102 Carl Schmitt, *The Age of Neutralizations and Depoliticization* (Matthias Konzett & John P. McCormick trans.) in *The Concept of the Political* (Carl Schmitt, expanded ed., 2007).

as Knox puts it, is “to take advantage of the content of international law in such a way as to mitigate the effects of its form”.¹⁰³ To do so, Knox refers to a “principled opportunism” that identifies cracks in the hegemonic legal form and instrumentalizes the law to transform regressive and repressive socio-political structures should be pursued. This is, ultimately, about being political lawyers and using the appropriate doctrinal hooks as they become available.

The question of how to put international law to work for progressive purposes in a post-colonial setting – that is, to use a Eurocentric discipline for non-Eurocentric aims – is something that Third World lawyers have long grappled with. Similarly, the question arises as to whether counter-systemic logics can be located in colonial law to turn the overarching structures against themselves – to chip away at the imperial spine. In mapping the Eurocentrism that defines mainstream historiographies of international law, Koskenniemi floats a number of potential directions for anti-colonial legal discourse to turn in response. One such direction is what he calls the hybridization of legal concepts as they travel from metropole to colony, and their re-appropriation into the hands of the colonized. He explains that “[t]his approach might, for example, examine particular colonial actors – jurists, politicians, resistance fighters – using European concepts but turning them to support of a particular indigenous project or preference”.¹⁰⁴

Nathaniel Berman’s study of the strategy adopted by Moroccan rebel leader (and student of international law) Mohamed ben Abd el-Krim el-Khattabi is cited as a notable example of the periphery using imperial discourse to challenge its core. This included the manipulation of colonial versus anti-colonial debates among the French intelligentsia in relation to the Rif War of the 1920s to rally support for self-determination and the shaking off of Spanish and French influence. Berman discusses Abd el-Krim’s “desire to disorient” international characterization of the struggle in the Maghreb, and to “dis-Orient” European projections of ‘Orient’ and ‘Occident’, instead “reconfiguring them in the name of an anticolonial political project”.¹⁰⁵

103 Robert Knox, *Marxism, International Law, and Political Strategy*, 22 *Leiden J. Int’l L.* 413, 436 (2009).

104 Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, 19 *Rechtsgeschichte* 152, 173 (2011).

105 Nathaniel Berman, “*The Appeals of the Orient: Colonized Desire and the War of the Rif*,” in *Gender and Human Rights* 195, 224 (Karen Knop ed., 2004). Tshekedi Khama’s role in frustrating Jan Smuts’ early attempts to annex South West Africa into a ‘Greater South Africa’ is also notable here. See, e.g., Michael Crowder, *Tshekedi Khama, Smuts, and South West Africa*, 25 *J. Mod. Afr. Stud.* 25 (1987).

An analogous form of such inversion can be seen in a later historical precedent, from the same region, of an explicitly anti-colonial movement attempting to articulate a strategy of resistance through law. The investment in legal action by Algeria's Front de Libération Nationale (FLN) through the 1950s included a particular type of engagement in the courts of the colonizer. Among the 'unorthodox' legal tactics pursued by Jacques Vergès and the legal teams defending FLN suspects were 'rupture' defenses that involved exposing and exploiting the contradictions inbuilt in the colonial state's use of criminal law. In simple terms, this involved an attacking brand of defense that accused the prosecuting colonial authorities of the same charges as those leveled at the defendants, so as to contextualize the FLN's actions. The French courtroom became a forum where accusations of crimes against humanity, illegitimate colonial domination and systematic torture were directed against the state. Torture was denounced not only for the technical criminal procedure purposes of invalidating information obtained under duress, but to demonstrate the larger impact of its normalization as illustrative of colonialism's malevolence. Similar contradiction and discrimination in the official French positions on mass internment and investigation policies¹⁰⁶ were targeted by the FLN's legal maneuvers:

"Tactical exploitation" of the contradiction forged the emergence of the truth of an independent national Algerian identity, an affirmation which, with the escalation of resistance and the broadening of the repressive measures against the insurgents, became irrepressible.¹⁰⁷

Such initiatives remind us that the pursuit of legal arguments need not be only on its own terms for the purposes of the legal victory in the case or debate at hand, but can have a broader ambition in the context of what Richard Falk calls the "legitimacy war".¹⁰⁸ Turning to explore some of the sites where principled opportunism has been or might be pursued in the context of Palestinian liberation, I will do so with reference to: (i) courts of law (in Israel and other

¹⁰⁶ Vergès cites the opening of a legal inquiry into the deaths of 35 Europeans but not those of the 700 Algerians in the "double massacre" of El-Halid by way of example.

¹⁰⁷ Emílios Christodoulidis, *Political Trials as Events*, in *Events: The Force of International Law* 138–139 (Fleur Johns, Richard Joyce & Sundhya Pahuja eds., 2011). See further Jacques Vergès, *De la stratégie judiciaire* (1986); Emílios Christodoulidis, *Strategies of Rupture*, 20 *L. Critique* 3 (2009).

¹⁰⁸ Richard Falk, *The Palestinian "Legitimacy War"*, Al-Jazeera (Déc. 24, 2010), <http://www.aljazeera.com/indepth/opinion/2010/10/20101021113420124418.html>.

jurisdictions); (ii) international institutions (some of the 'hard' law options in relation to the International Court of Justice (ICJ) and the ICC have been discussed at length previously,¹⁰⁹ so my focus veers instead towards some 'soft' law avenues, primarily within the UN system); and (iii) campaigning and solidarity action in the context of global social movements. What follows is merely illustrative of some of the many fronts on which tactical engagement and legal resistance to Israeli colonialism, apartheid and ethnic cleansing occurs, and by no means purports to be exhaustive.

A Courts

The broad deference of the Israeli Supreme Court to military and security interests has been well-scrutinized,¹¹⁰ and so arguably legal activism at the domestic judicial level in Israel can only really be pursued in the context of the broader legitimacy war – or for the purposes of creating a historical record of events and mobilizing international legal bodies¹¹¹ – rather than on expectations of sustained success in the courts. While the Israeli judiciary may occasionally depart from its default position by ruling in favor of Palestinian rights on micro issues, on a macro level the Supreme Court's ideological alignment with the settler colonial process historically and contemporaneously is beyond doubt. The illegality of Jewish settlement of the West Bank – regardless of what international law may say – for example, is not something which the Supreme Court is willing to entertain, but rather a matter of policy which the executive branch is free to pursue as it pleases on its own terms.¹¹²

Palestinian and Israeli human rights organizations engaged in a series of conversations in the aftermath of Operation Cast Lead in 2009 reflecting on their engagement with the Supreme Court and considering possible collective courses of action that might depart moderately or radically from the approach to that point. Al-Haq subsequently published a study analyzing some of the Court's more regressive doctrinal tendencies, as well as recent jurisprudence on the construction of the Wall and the siege of Gaza. The study ended by floating a number of potential courses of action for the legal community in Palestine/Israel to consider, individually and collectively, including:

¹⁰⁹ John Dugard, *Lifting the Guise of Occupation and Recourse to Action before the ICJ and ICC*, 17 *Palestine Y.B. Int'l L.* 5 (2014).

¹¹⁰ See, e.g., Kretzmer, *supra* n24; Michael Sfard, *The Price of Internal Legal Opposition to Human Rights Abuses*, 1 *J. Hum. Rts. Practice* 37 (2009). In cases relating to the occupied territories, Israel's Supreme Court sits as the High Court of Justice (HCJ).

¹¹¹ Hassan Jabareen, *Transnational Lawyering and Legal Resistance in National Courts: Palestinian Cases Before the Israeli Supreme Court*, 13 *Yale Hum. Rts. & Dev.* 239 (2010).

¹¹² HCJ 4481/91 Bargil v The Government of Israel, ILR 158 [1993] (Isr.).

The mounting, with consensus in the human rights community, of a comprehensive or partial boycott against the Court. This principled stance would have to be weighed against the losses suffered by Palestinians. In order to both justify these immediate sacrifices and increase any potential effectiveness of a boycott, the latter should be accompanied by a coordinated and sustained advocacy campaign. While there may be an argument that a comprehensive boycott would be unfeasible, a partial boycott might better allow for individual relief to be sought where and when it may help, while at the same time refraining from allowing the Court the opportunity to rule on fundamental legal issues regarding Israeli policies in the OPT. This can serve to discredit the Court and highlight its role to date in effectively fortifying the occupation's illegal policies.¹¹³

No such boycott has been mounted to date, however, and the Court has continued to vindicate Israeli colonial policy – from validating the state of emergency that has been in place without interruption since 1948¹¹⁴ to permitting the application of the 1950 Absentee Property Law in occupied East Jerusalem¹¹⁵ and sanctioning the expropriation of natural resources from occupied territory by the occupying power.¹¹⁶ With its judgment upholding Israel's anti-boycott law,¹¹⁷ according to commentators in Israel, the Court "is going places no Western democracy has been".¹¹⁸ Human rights lawyers and civil society organizations have amplified their criticism of the Court's

¹¹³ Al-Haq, *Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory* (2010), at 49, <http://www.alhaq.org/publications/publications-index/item/legitimising-the-illegitimate>.

¹¹⁴ HCJ 3091/99 The Association for Civil Rights in Israel v. The Knesset and the Government of Israel, [2012] (Isr.). For analysis, see John Reynolds, "Intent to regularise": *The Israeli Supreme Court and the Normalisation of Emergency*, Adalah Newsletter, Vol. 104 (May 2013), <http://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/Intent-to-regularise-Supreme-Court-State-Emergency-Reynolds-2013.pdf>.

¹¹⁵ Civil Appeal 2250/06, Custodian of Absentees' Property et al. v. Daqaq Nuha et al. [2015] (Isr.). The practical effect of this ruling is to allow the Israeli state to take control of property in East Jerusalem whose owners live in the West Bank or Gaza.

¹¹⁶ HCJ 2164/09 Yesh Din v The Commander of the Israeli Forces in the West Bank et al., [2011] (Isr.).

¹¹⁷ HCJ 2072/12 The Coalition of Women for Peace, et al v. The Minister of Finance et al., [2015] (Isr.).

¹¹⁸ Noam Sheizaf, *You Can Boycott Anything in Israel – Except the Occupation*, +972 Mag (Apr. 16, 2015), <http://972mag.com/you-can-boycott-anything-in-israel-except-the-occupation/105600/>.

increasingly reactionary decisions,¹¹⁹ and it appears that the primary tactical value of continued litigation for now lies not in the potential for success on the merits, but simply in exposing the reality of the Court's politics to a wider audience locally and globally, and in the formality of exhausting domestic remedies that is required for admissibility to certain international adjudication bodies.

If we move abroad to reflect on initiatives to get Palestinian rights issues heard before foreign judges, it is worth giving thought to the experience gained to date. The effort directed towards universal criminal jurisdiction has not produced the outcomes hoped for. Much energy has been expended on compiling case files, building networks with lawyers overseas, preparing briefs and doing everything possible to lay the groundwork for the possibility of an arrest warrant being issued for this Israeli general or that cabinet minister allegedly responsible for grave breaches of the Geneva Conventions. Ultimately, however, the matter is often in the hands of a foreign public prosecutor and subject to the intervention of the state's political authorities. Apart from temporarily prompting a select few Israeli officials to give second thought to their itineraries overseas, there has been little concrete return. This is not to underestimate the impact of the publicity around such fears of arrest in the legitimacy war, however. On a more normative level, the pursuit of such forms of liability is symptomatic of the overly individual focus of international criminal law accountability regimes, and for the most part seeks to address crimes within the occupation, rather than the coloniality of the occupation itself. It is also susceptible to the potential problems flagged above in regards the adjudication of hazy concepts of proportionality and necessity. That is not to say that the important work of documenting international crimes should be abandoned, particularly with the ICC now also in the frame, but alternatives to criminal suits against Israeli officials might perhaps be pursued more vigorously in the near term. This may include initiatives to submit criminal complaints to third state public prosecutors on the basis of abuses committed by citizens (Israeli soldiers with dual nationality, for example) or companies¹²⁰ from that state.

119 On 7 June 2015, twenty-nine civil society organizations took out a front-page ad in the Hebrew edition of Ha'aretz describing the Supreme Court ruling in the unrecognized villages case of Ibrahim Farhood Abu al-Qi'an, et al. v. The State of Israel as "unjust, racist and discriminatory". See discussion of the case above, *supra* n34.

120 See, e.g., Al-Haq, *The Case Against Riwal: Corporate Complicity in International Crimes* (Oct. 16, 2010), <http://www.alhaq.org/advocacy/targets/accountability/71-riwal/307-the-case-against-riwal-corporate-complicity-in-international-crimes->.

Civil claims against Israel's agents and accomplices also offer potential openings. In jurisdictions with legislation incorporating the Geneva Conventions and Rome Statute into domestic law, settler colonization in occupied territory will be a listed crime and potentially also the basis for a civil wrong. This opens particular legal avenues that the right to self-determination and the general customary norm of international law prohibiting colonialism do not allow for. Such cases, however, will not be immune from the types of obstacles that have inhibited the exercise of universal jurisdiction in the criminal law realm, as evidenced by the *forum non conveniens* decision in the *Bil'in* case in Canada.¹²¹ The destiny of how the claim is brought, though, is in the plaintiff's own hands at least, and foreign judges may be more willing (and under less political pressure not) to proceed against a private company domiciled in their own jurisdiction, than against an Israeli government official. The increasing complicity of multinational corporations in the implementation of Israel's colonial and apartheid project, and the growing volume of documentation of such, lends itself to a ramping up of the legal pursuit of such actors. The US Supreme Court decision in *Kiobel*¹²² – which dismissed the Nigerian plaintiffs' claims against Royal Dutch Petroleum on the basis that corporations cannot be held liable for violations of customary international law – was a normative setback in the US and reveals the pitfalls of pinning too many progressive hopes on the hegemonic legal form. It does, however, leave as many questions as answers regarding the circumstances in which the domestic Alien Tort Statute¹²³ can be applied extra-territorially by US courts, while the contours of other avenues and other jurisdictions remain uncharted.

As well as exploring those avenues in which law is drawn as a sword, it is worth remembering its converse function as a shield. The defensive use of law is tactic that receives little forward thought (it is by definition, obviously, externally contingent), but is likely to become increasingly important as Zionism's own reactionary lawfare against solidarity campaigns continues. The case of *R. Fraser v. University & College Union* before an Employment Tribunal of the courts of England & Wales is significant in this regard.¹²⁴ Academic Friends of Israel director Ronnie Fraser brought a claim against Britain's largest academic union arguing that the union's officers had exhibited "institutional anti-Semitism", causing Jewish members to feel racially harassed, through their calls for a boycott of certain Israeli institutions. High-profile figures in Britain's

121 *Bil'in (Village Council) v. Green Park International Ltd.*, [2009] QCCS 4151 (Can.).

122 *Kiobel v. Royal Dutch Petroleum Co.*, [2013] 133 S.Ct. 1659 (US).

123 Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2006) (US).

124 Case Number 2203390/2011 *R. Fraser v. University & College Union* [2013] (UK).

Jewish community came on board to support the claim in the forms of legal counsel, financial backers, expert witnesses and research assistants, and Zionist ideologues prepared for victory in “a hugely important political moment”¹²⁵ in “this decade’s version of the Irving trial.”¹²⁶

The Tribunal dismissed the complaints as “without substance”, “devoid of any merit”, and stated that “a belief in the Zionist project or an attachment to Israel or any similar sentiment cannot amount to a protected characteristic. It is not intrinsically a part of Jewishness.”¹²⁷ The importance of the legal defense of the union in this case must be noted, especially given the extent of political and financial capital invested in supporting Fraser by influential organizations such as the Board of Deputies of British Jews and the Jewish Leadership Council.¹²⁸ In recent years, these organizations have set up a body specifically mandated to “fight anti-Israel boycotts”,¹²⁹ reflecting a broader trend internationally. The following excerpt from a speech given to the Israel Advocacy Seminar in Johannesburg in February 2013 by Amir Sagie, director of the Civil Society Affairs Department in the Israeli foreign ministry, offers insight into the measures contemplated to attack Boycott, Divestment and Sanctions (BDS) initiatives:

Legal sphere: various ministries have been investing heavily in this area – in research, mainly in key countries in the EU. For us to challenge BDS initiatives we need to understand the legal environment. Over the last six months

125 Martin Bright, *Pivotal Moment for Unions and Labour*, Jewish Chronicle (July 7, 2011), <http://www.thejc.com/news/uk-news/51289/pivotal-moment-unions-and-labour>.

126 Referring to the 2006 Austrian conviction of David Irving for holocaust denial. See *Time for Action*, Jewish Chronicle (July 7, 2011), www.thejc.com/comment-and-debate/leader/51275/time-action.

127 Fraser, *supra* n124, ¶ 152, 157, 150.

128 The legal costs claimed by the University & College Union against Fraser ran to £600,000. This was settled in a confidential out of court agreement but must also serve as a warning bell to Palestinian justice campaigners considering litigation against administrative bodies in instances where rights of free expression or assembly may have been restricted. The cancelled April 2015 conference at Southampton University on ‘International Law and the State of Israel: Legitimacy, Responsibility and Exceptionalism’ is a case in point. With permission for the conference withdrawn by the university on security grounds, after it came under intense political pressure, legal costs in unsuccessful judicial review proceedings at the High Court in London were awarded against the conference organizers.

129 Anshel Pfeffer, *British Jewry in turmoil after tribunal blasts pro-Israel activist for bringing harassment case*, Ha’aretz (Apr. 8, 2013), <http://www.haaretz.com/jewish-world/jewish-world-news/british-jewry-in-turmoil-after-tribunal-blasts-pro-israel-activist-for-bringing-harassment-case.premium-1.514173>.

Israel has taken on two (court) cases in partnership with UK Jewry. We are trying wherever possible to challenge BDS morally and legally. But some legal systems are not geared to this. France's legal system (provides ways to challenge boycotts) while the UK (legal) system is not (similarly geared).¹³⁰

Whether *Fraser* was one of the cases being directly supported by the Israeli government in Britain or not remains unclear; what is clear is that Israeli institutions will continue to court law as a surface upon which to inscribe Zionist ideology and to cast criticism of Israeli state policy as a form of impermissible hate speech.

B *Institutions*

There is available momentum to be channeled on the question of settlement colonies and apartheid at the UN. The UN Human Rights Council's fact-finding mission on the impact of the settlements unpacked the "legal regime of segregation operating in the OPT [that] has enabled the establishment and the consolidation of the settlements through the creation of the privileged legal space for settlements and settlers."¹³¹ This left Israel retreating to its familiar territory of calling 'bias' and edging closer to pariah status by stripping the 'universal' from Universal Periodic Review with its refusal to engage in the process.¹³² Read together with the censure of Israel under article 3 (apartheid and segregation) of the International Convention on the Elimination of all forms of Racial Discrimination by its treaty-monitoring committee, and the consistent references since 2007 to colonialism and apartheid in the context of prolonged occupation in the reports of John Dugard and Richard Falk as the Special Rapporteurs on Palestine, it becomes clear that the conceptual frameworks being applied in the UN arena have been evolving.¹³³ The concerted

¹³⁰ Transcript ("edited to exclude strategically sensitive information from the eyes of anti-Israel forces who are becoming increasingly common users of the website") published in Ant Katz, *Israel's Top Anti-BDS Man: Trends to Expect from BDS & How to Klap Them*, MyShtetl (Feb. 6, 2013).

¹³¹ *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, ¶ 49 (Feb. 7, 2013).

¹³² *Israel boycotts scheduled UN human rights review*, Ha'aretz, (Jan. 29, 2013), <http://www.haaretz.com/news/diplomacy-defense/israel-boycotts-scheduled-un-human-rights-review-1.500158>.

¹³³ This has provoked an inevitable pushback, however, with the UN moving to placate Israel. As Falk himself points out, his successor "was explicitly chosen in 2014 to be Special Rapporteur for Palestine on the perverse rationale that he was more qualified

work of Palestinian jurists and their allies in this regard should be continued. The calls for a second advisory opinion to be sought from the ICJ on the legal character of the prolonged Israeli occupation¹³⁴ might, for example, be complemented by a campaign to push the UN to revive its currently defunct committees on colonialism and apartheid. Diplomatic pressure of the kind that forced the Obama administration to expose its true colors in February 2011 by vetoing UN Security Council adoption of a benign resolution (sponsored by over 120 members of the UN General Assembly and supported by the other fourteen members of the UN Security Council) condemning settlements in the West Bank is also worth marshaling and sustaining.

Palestine ratified a host of international human rights treaties in April 2014, and potential inter-state complaints against Israel under provisions that it has ratified without reservation as to dispute settlement are the type of tactic that could now be explored by the Palestinian political leadership if it is serious about challenging the logic of Israel's domination. Also at the level of the human rights treaty-monitoring bodies, but in the context of engagement from below, the complaint filed with the UN Human Rights Committee by representatives of Bil'in village against Canada offers a glimmer of light for the prospects of innovative and creative engagement continuing to emerge from the shadows of the law.¹³⁵ The complaint follows the failure of the Canadian courts to accept jurisdiction in a civil suit filed by the villagers against two Quebec-domiciled corporations contracted by the Israeli government to construct residential units in the Jewish settlement colony of Modi'in Illit on land expropriated from the village. On the basis of this failure, the villagers argue

than other candidates *because* he had no expert knowledge of the subject-matter". See Richard Falk, *Weakening and Discrediting the UN: The Mission of Israeli QGOs*, presented at the National Press Club conference, "The Israeli Lobby: Is it good for US? Is it Good for Israel?", Washington, D.C. (Apr. 10, 2015), published online on www.richardfalk.wordpress.com (Apr. 17, 2015). The first report to the UN Human Rights Council by Falk's successor, Makarim Wibisono, notably failed to make any mention of the systemic regimes of colonialism and apartheid in the occupied territories that Dugard and Falk had developed as the central analytic frame, reverting instead to cataloguing "a long list of pressing human rights issues". See Makarim Wibisono, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, U.N. Doc. A/HRC/28/78 (Jan. 22, 2015).

¹³⁴ Tilley, *supra* n9, 229.

¹³⁵ Bil'in Village Council et al. v. Canada, Individual Complaint to the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil & Political Rights, submitted Feb. 28, 2013.

that Canada has “violated its extra-territorial obligation to ensure respect” for five separate provisions of the International Covenant on Civil and Political Rights to which it is party. Given the increasingly transnational and extra-territorial impacts of state and corporate activity, concrete initiatives such as this may be able to push the boundaries in ways that meek ‘corporate social responsibility’ and ‘business and human rights’ frameworks as currently formulated¹³⁶ cannot. Other soft law initiatives in this realm include the evolving discourse around extra-territorial obligations in the socio-economic sphere. The 2011 Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights remain highly aspirational, and may risk sucking energy from more concrete progressive political movements, while at the same time remaining likely to be dismissed or ignored by conservative economic powers. They possess progressive potential if normative traction were to be achieved, however, and as such could be explored in the context of transnational state and corporate reach in Palestine (where Israel’s own concrete extra-territorial obligations in the occupied territory are already established), rather than discounted entirely.

C *Social Movements*

International lawyers are well-placed to support the important work of Palestinian civil society and global solidarity campaigns through continued research and analysis of the apartheid nature of Israel’s control regime, on the legal intricacies and impacts of settlement colonies, and on the increasingly nefarious role played by corporate actors that aid and abet Israeli policy. The analysis of selected illustrative examples of corporations that have linked their operations to Israel’s settlement project in the West Bank contained in Special Rapporteur Richard Falk’s 2012 report to the UN General Assembly is a reflection of tireless research conducted by a variety of organizations and activists on the matter.¹³⁷

Civil society-led ‘people’s tribunals’ have come to occupy an important space in international affairs in filling certain vacuums left by formal

¹³⁶ See, e.g., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (May 25, 2011).

¹³⁷ Richard Falk, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, U.N. Doc. A/67/379 (Sep. 19, 2012). The companies singled out by way of example are: Caterpillar, Veolia Environnement, Group4Security (G4S), Dexia, Ahava, Volvo, Riwal, Elbit Systems, Hewlett Packard, Mehadrin, Motorola, Mul-T-Lock/Assa Abloy, and Cemex.

international legal institutions and providing what Falk calls a “jurisprudence of conscience”.¹³⁸ The Russell Tribunal on Palestine has displayed a reach beyond its own proceedings and findings. Its multi-faceted identity seeing, for example, one jury member (Michael Mansfield) advocating before a UN committee in Geneva one week, another (Roger Waters) discussing Palestinian rights in *Rolling Stone* magazine the next. The special session of the Russell Tribunal convened in the wake of Israel’s Operation Protective Edge assault on Gaza in 2014 was notable for the urgency and efficiency with which it was convened, while so many international institutions dallied, and for going beyond the standard war crimes analysis to tackle difficult questions around the proliferation of racist discourse and incitement to violence in Israeli public and political life.¹³⁹ The Hessel Tribunal, conceived in 2013 as a localized version of the Russell Tribunal by the grass-roots Bil’in Popular Committee against the Wall and Settlements, is another potentially striking example of what Third World scholars call “international law from below”.¹⁴⁰ The Palestine Legal Action Network, a London-based alliance established on the back of the Russell Tribunal on Palestine, offers a progressive model of solidarity work where lawyers and activists are explicitly speaking to each other and designing legal and BDS actions to complement and reinforce one another. The Birzeit Guidelines on Advocating for Palestinian Rights¹⁴¹ also offer useful guidance on how expansive and politically conscious deployment of international legal language and frameworks can best be aligned with progressive activism.

The tradition and success of anti-colonial boycott movements, stretching from apartheid South Africa back to the campaigns against Captain Charles Boycott and the British land agents in Ireland, demonstrate the importance of such tactics in the context of colonizer/colonized relationships marked by a distinct inequality of arms. The global response to the Palestinian call for boycott, divestment and sanctions against Israeli state institutions and agents has been widespread and favorable, and continues apace. Issued in 2005 by a broad collective of Palestinian political parties, unions and civil society orga-

138 Richard Falk, *A Jurisprudence of Conscience*, Al-Jazeera (Nov. 23, 2011) <http://www.aljazeera.com/indepth/opinion/2011/11/201111815484766433.html>.

139 Russell Tribunal on Palestine, *Extraordinary Session on Gaza: Summary of Findings*, Brussels (Sep. 25, 2014).

140 Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).

141 Civic Coalition for Palestinian Rights in Jerusalem & Birzeit University Institute of Law, ‘Advocating for Palestinian Rights in Conformity with International Law: Guidelines’ (Feb. 2014).

nizations, the BDS call is modeled to a certain extent on the South African precedent and, notably, cites Israel's "colonial and discriminatory policies" against the Palestinian people among its core concerns.¹⁴² The boycott campaign has been supported by Jewish groups in Israel and abroad¹⁴³ and has made significant progress in the ongoing legitimacy war. Palestinian lawyers and the human rights community should continue to develop and deepen legal interventions to align with BDS as a solidarity tactic that emphasizes the more transformative visions of Palestinian rights discourse, including the right of refugees to return. At the same time, one must remain conscious of the fact that BDS is itself ultimately based on achieving adherence to an international law "that emerged in order to regulate imperialism", with all of the ambiguities that it involves – including the risk that organising around rights may only propel things "towards a better colonialism rather than the end of colonialism".¹⁴⁴

It is no coincidence that many of Israel's staunchest supporters – the US, Canada and Australia – are themselves settler colonial societies. But they are not internally homogenous societies by any stretch. In his 1994 essay on "Decolonizing the Mind", Edward Said pointed to the importance for the Palestinians of realizing that there is more to 'America' than Time magazine and the White House; that US foreign policy is an acutely layered and intricate process decided not (only) by the president, but with the cumulative contributions of many segments of a very complex civil society.

The point we were all trying to impress on our listeners was that as the weaker party, the Palestinians had to be more ingenious and more discriminating in their dealings with the United States, to exploit differences between the components of society that happened to be our allies and those that opposed us as a way of putting pressure on Washington. But that would have required work, organization, and a need to keep up very conscientiously with changes and developments in each sector. In 1991 after my trip to South Africa I had been impressed how the ANC had done precisely that, and achieved a major victory at home. I distinctly recall being told by Walter Sisulu in Johannesburg that one reason for the ANC's victory was its international campaign against apartheid. Why shouldn't we Palestinians profit from that experience by using similar methods for our cause? Unfortunately

142 Palestinian BDS National Committee, Palestinian Civil Society Call for Boycott, Divestment and Sanctions (July 9, 2005).

143 Groups such as: Boycott from Within; Not in Our Name; Jews Opposing Zionism; and the International Jewish Anti-Zionist Network.

144 Mezna Qato & Kareem Rabie, *Against the Law*, 10 *Jacobin* 75, 77–78 (Spring 2013).

*none of my efforts had any results whatever. The only thing that mattered to our Palestinian colleagues was what happened in Washington, as if Washington was all there was to America; to them, if Washington opposed Palestinian self-determination the rest of America did too.*¹⁴⁵

Palestinian social movements have for some years been ahead of Palestine's political and diplomatic representation (whether denominated as the PLO, the Palestinian Authority, or the State of Palestine) in recognizing this reality that movement tactics have to extend beyond high politics. The inroads made by the BDS campaign across campuses, unions and churches throughout the world (while the PLO's bid for UN membership remains decidedly stalled) are testament to this. The tide of mainstream public opinion even in the US has been slowly, but steadily, turning in recent years. In early 2015, Cornel West noted the major swings in student politics in favor of BDS resolutions, even over the course of the preceding two years, and emphasized that in the US, "the narrative *is* being changed".¹⁴⁶ While Palestinian social movements and activists are well-placed to determine how best to engage their own political authorities, it seems to me that attempts by the PLO delegation in Washington and elsewhere to play down the efficacy of BDS should be the target of unsparing critique. Even the more pragmatic end of the BDS spectrum that focuses specifically on West Bank colony produce (which is viewed in certain quarters as overly conservative and blind to artificial separations of supply chains) serves an important tactical function in striving to cash in on what little institutional political capital is currently available – at the European Union level particularly – for import bans on settlement products. Legal methodologies and arguments may also be formulated to activate third state regulation of dealings with Israel and to compel private sector divestment,¹⁴⁷ or in efforts to defend BDS activists engaged in direct action from criminal charges.¹⁴⁸ Sight must not be lost, however, of the fact that law – like BDS – is a tactic, not an end.

¹⁴⁵ Edward Said, *Decolonizing the Mind*, Al-Hayat (Sep. 16, 1994).

¹⁴⁶ David Palumbo-Lu, "It's ugly, it's vicious, it's brutal": Cornel West on Israel in Palestine – and why Gaza is "the hood on steroids", Salon (Feb. 25, 2015), http://www.salon.com/2015/02/25/its_ugly_it%E2%80%99s_vicious_it%E2%80%99s_brutal_cornel_west_on_israel_in_palestine_%E2%80%94_and_why_gaza_is_the_hood_on_steroids/.

¹⁴⁷ Valentina Azarov, *Making human rights work for the Palestines of the world*, Open Democracy (Nov. 3, 2013) <https://www.opendemocracy.net/openglobalrights/valentina-azarov/making-human-rights-work-for-palestines-of-world>.

¹⁴⁸ *Richardson v. Director of Public Prosecutions* [2014] UKSC 8 (UK). The defendants in this case had sought to disrupt the activity of an Ahava cosmetics shop in London, and were charged with aggravated trespass under the Criminal Justice and Public Order Act 1994.

V Conclusion: The Limits of 'Alternative' International Law Paradigms

The lessons from the failures of Third World decolonization, post-apartheid South Africa and the Oslo Accords are evident. It is imperative to think beyond decolonization as merely the transfer of state authority from colonizer to local elites. Formulations of progressive Palestinian strategy must therefore confront traditional conceptions of the nation-state and attempt to re-imagine sovereignty and the state. As such, the one-state/two-state quandary will be difficult to evade in the thinking through of strategy. Questions of 'national' liberation and anti-racism in Palestine are also problematized by the plight of Asian workers and African migrants, which will most likely continue to further disrupt traditional Jewish-Israel/Arab-Palestinian binaries.

In these contexts, the inherent limits of a state-centric international law, which has reconciled itself with settler colonialism and settler colonial societies, must be reckoned with. The 'traditional' international law paradigms applied in the Palestinian context – those of armed conflict and human rights – can be problematic insofar as they reduce the architecture of Israeli settler colonialism to decontextualized lists of discrete violations. The 'alternative' legal paradigms of colonialism, population transfer and apartheid do allow for a more root and branch appraisal of Israeli policy, but cannot in and of themselves negate deeper doubts as to whether it is possible (or desirable) for law to provide overarching frames that can satisfactorily redress social injustice and structural violence. The conceptualization of colonialism as developed through UN General Assembly resolutions is limited, and evades the legacy issues of settler colonial statehood. The legal framework of apartheid – both as an internationally wrongful act (state responsibility) and an international

Section 68 of that legislation criminalizes the conduct of a person who trespasses on land where there is a person or persons lawfully on the land who is engaged in a lawful activity. The defendants contested the charge on the basis that Ahava was not engaged in lawful activity: by selling goods produced in West Bank settlements, the shop had aided and abetted the illegal civilian settlement of an occupied territory, which itself is an offence against the criminal law of England and Wales under the International Criminal Court Act 2001. Although the Supreme Court ruled against the defendants on the basis that the manufacturing company's alleged illegality in Palestine was not the central activity of the retail arm in London, the Court notably did accept that if the shop, or any other legal person, "had aided and abetted the transfer of Israeli civilians into the OPT, it might have committed an offence against these provisions" of the International Criminal Court Act 2001. The potential intersection of BDS activism and legal argument against Israeli colonialism can thus be seen.

crime (individual responsibility) – may enable a more systemic analysis than international humanitarian law, but does not have the same level of detailed infrastructure attached to it and suffers from a (perceived) lack of definitional clarity. As such, the extent to which colonialism, population transfer and apartheid as interrelated in international law are capable of transcending law's structural biases and indeterminacy remains questionable.

But just as matters of tactics and strategy cannot be reduced to a simple dichotomy of either using law or not using law, it is not a question here of choosing between so-called traditional and alternative legal paradigms in the Palestinian context. A social or political movement should not restrict itself to a monolingual articulation of its struggle; rather than choosing to use only and always *either* the language of human rights *or* that of radical distributive justice, for example, it ought to be a case of tactically mobilizing multiple, complimentary (and sometimes contradictory) discourses towards strategic objectives, in ways that maximize the progressive potential of each and minimize their contradictory effects.¹⁴⁹ For Palestinian liberation and solidarity activism, is not a question of one legal paradigm necessarily being better than others. Their shared usefulness is rather as a tactical support for, and segue to, broader anti-colonial discourses and interventions. Here we return to the tension between international law's aspirational content and its conservative form. The relationship between the two might best be projected as oblique rather than direct, with the crucial tasks being to understand how best to stage tactical interventions and to subvert hegemonic forms in pursuit of emancipatory counter-hegemonic principles, and at what points of the struggle to shift between different registers of law, depending on the prevailing balance of forces. The final point to reiterate here is that of a given tactic being not only about the concrete result that it achieves in the short term, but the platform it lays for the longer term strategic horizon, and the ways in which organizing now shapes the conditions that materialize later. If we think about what the Palestinian liberation project might look like the day after decolonization, for instance, tactics centred around BDS elicit a vision that avoids simply mirroring failed nationalist state structures that are hierarchical, exclusionary and patriarchal, and imagines instead the possibility of a mode of popular sovereignty that is more open, horizontal and inclusive.

¹⁴⁹ Paul O'Connell, *Human Rights: Contesting the Displacement Thesis*, Critical legal Thinking (June 18, 2015), <http://criticallegalthinking.com/2015/06/18/human-rights-contesting-the-displacement-thesis/>.