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SYMPOSIUM ON RACE, RACISM, AND INTERNATIONAL LAW

RACE, PALESTINE, AND INTERNATIONAL LAW

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In 1922, the League of Nations inscribed the goal of establishing a settler colony in Palestine for the Jewish people—in denial of the national self-determination of the Indigenous Arab population—in public international law.[1] The Palestine Mandate juridically erased the national status of the Palestinian people by: (1) framing the Arabs as incapable of self-rule; (2) heightening the significance of establishing a Jewish national home; and (3) distinguishing Palestine from the other Class A mandates for possessing religious significance that exceeded the interests of any single national group. A century later, the still-unresolved "question" of Palestine remains central to struggles for anti-racism and anti-colonialism in international law. This essay revisits two flashpoints in the tangled history of Palestine and international law, where questions of race and racism have been central: first, ongoing debates over the regime and crime of apartheid; and second, the now-repudiated UN General Assembly Resolution 3379, recognizing Zionism as a form of racism and racial discrimination. Both stories demonstrate the importance of understanding race and colonialism as conjoined concepts, neither of which can be properly understood in isolation from the other.

The "Question" of Palestine

Palestine's centrality to debates over race, racialization, and racism in international law stems in significant part from the unusual timing of the Zionist movement's attempt to establish a new settler-colonial state in an era when formal decolonization and liberal denunciations of racism were gaining steam worldwide. Zionism, in this context, means support for the creation and maintenance of a state for all Jews in historic Palestine, in which Jews will retain a demographic majority and preferential citizenship. The Zionist movement established Israel by war and displacement of three-quarters of the native Palestinian population in 1948. The state is both the manifestation of Zionism as well as the vehicle that continues the process of colonization, settlement, and displacement. As Palestinian jurist and scholar Fayez Sayegh noted in 1965, "the fading-out of a cruel and shameful period of world history has coincided with the emergence, at the land-bridge between Asia and Africa, of a new offshoot of European Imperialism and a new variety of racist Colonialism."[2] Unlike older Anglo settler states that could continue their colonial practices with less international scrutiny, Israel's seemingly anachronistic status has frequently positioned it as a test case in emergent debates over racism and colonialism.

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[1] British Mandate for Palestine, 3 League of Nations Official J., Annex 391, 1007–12 (1922).

[2] Fayez A. Sayegh, Zionist Colonialism in Palestine v (1965).

The question of Palestine thus provides an ideal lens for the questions animating this symposium that have long been marginalized in international legal scholarship—including in the pages of the *American Journal of International Law* (*AJIL*). Our own review of *AJIL*'s coverage of Palestine reveals patterns of exclusion and tokenization strikingly consistent with the findings of the Richardson Report and other critical analyses.[3] Of forty-three articles dealing broadly with Palestine that we identified, only three (not including this one) were authored by Palestinians, and all of them were in symposia.[4] Sixteen articles were authored by Israeli Jews, but even this lopsided figure understates the disparity. *AJIL*'s Palestine coverage has also been shaped by non-Israeli authors who nonetheless advance pro-Israel arguments[5] or are members of Zionist organizations.[6] Leo Gross, a longtime *AJIL* editor, single-handedly wrote as many articles expounding pro-Israel positions as all Palestinian authors combined.[7] There is a qualitative disparity as well: Israeli authors regularly publish on universal themes, while Palestinians are relegated to the particular—granted the "permission to narrate"[8] on a single issue and only when their perspectives are arrayed alongside even more numerous opposing ones.

The question of Palestine also highlights the importance of understanding race and colonialism as concepts that do distinct work but are nonetheless irrevocably entwined. Long-running conversations between jurists and scholars working in the traditions of Critical Race Theory (CRT) and Third World Approaches to International Law (TWAIL) similarly remind us of this dynamic elsewhere.[9] In this respect, Palestine presents a cautionary tale for the larger "turn to race" of which this symposium is a part. While TWAIL perspectives have at times undertheorized race or swiftly subsumed it into the category of colonialism, we should be more careful and precise lest hasty invocations of race and international law simply restate arguments about colonialism or, worse yet, reproduce a methodological nationalism that disconnects race from its global dimensions.[10]

This is why it is crucial to restate the fundamental parameters of Zionism as *both* a racializing project and a colonial one. Zionism proposes that all Jews in the world are one group based on hereditary descent alone, regardless of any personal or familial connection to the specific territory in question. It invests in Jewish nationality a certain property—including rights to land, citizenship, employment, life, and housing—that is based on the continuous and systematic dispossession of Palestinians, who are marked as nomadic and fungible "Arabs."[11] The Zionist project thus entails a racial hierarchy that is also explicitly global: the state of Israel does not merely favor the Jewish parts of its population

[3] Am. Soc'y Int'l L., *The Richardson Report, Final Report from the ASIL Ad Hoc Committee Investigating Possible Exclusion or Discouragement of Minority Membership or Participation by the Society During Its First Six Decades* (2020); James Gathii, *Studying Race in International Law Scholarship Using a Social Science Approach*, 22 Chicago J. Int'l L. 71, 75 (2021).

[4] This search encompassed both *AJIL* and *AJIL Unbound* coverage of the "Arab-Israeli conflict," as well as several articles on global topics that devoted considerable space to Palestine. It included research articles, symposia, book reviews, and shorter pieces on doctrinal and practice developments with named authors. Research on file with the authors, who thank Hassan Mohammadi Doostdar for assistance in compiling and analyzing this data.

[5] *See, e.g.,* Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AJIL 1, 52 (2005).

[6] For example, Malvina Halberstam, a regular contributor to *AJIL* in the 1980s and 1990s, including on Palestine/Israel, serves on the board of the Zionist Organization of America's Center for Law and Justice.

[7] Leo Gross, *Voting in the Security Council and the PLO*, 70 AJIL 470 (1976) (criticizing UN Security Council decisions permitting participation of the Palestine Liberation Organization in debates); Leo Gross, *The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba*, 53 AJIL 564 (1959) (defending right of Israeli ships to pass through the Straits of Tiran); Leo Gross, *Passage Through the Suez Canal of Israel-Bound Cargo and Israel Ships*, 51 AJIL 530 (1957) (opposing Egyptian restrictions on Israel's access to the Suez Canal).

[8] Edward W. Said, *Permission to Narrate*, 13 J. Palestine Stud. 3, 27 (1984).

[9] E. Tendayi Achiume & Aslı Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 UCLA L. Rev. 1386 (2021).

[10] Darryl Li, *Genres of Universalism: Reading Race Into International Law, With Help From Sylvia Wynter*, 67 UCLA L. Rev. 1686 (2021).

[11] Noura Erakat, *Whiteness as Property in Israel: Revival, Rehabilitation, and Removal*, 31 Harv. J. Racial & Ethnic Just. 69 (2015).

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over its non-Jewish parts, but invests superior rights in foreign Jews as well. It is precisely this interconnection that has been obscured in the two key debates around Palestine and international law that we reconstruct below.

Apartheid Without Racism?

One of the most important—and contentious—debates over racism and international law concerns the concept of "apartheid." Originally a euphemism deployed by Afrikaner white supremacists to justify and organize their colonial regime, "apartheid" was turned into a term of opprobrium in international law by national liberation movements in southern Africa. Apartheid as an egregious form of racial segregation and domination was first prohibited in the 1965 Convention on the Elimination of All Forms of Racial Discrimination.[12] It was then labeled as a crime against humanity in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and more fully codified in the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.[13] No international legal body has made a finding of apartheid beyond southern Africa in a concrete judgment to date, though human rights treaty bodies, like the Committee Against Racial Discrimination, have confirmed its universal applicability. The most active and long-standing debate over the application of the apartheid concept outside its original context—and, thus, the key site for contests over its universalization—has been Palestine.[14]

In recent years, the nature of the apartheid system in Palestine has also become an increasingly central focus of international legal analysis—in the work of legal scholars, UN mechanisms, and western advocacy organizations. But much of this commentary does not reference settler-colonialism or Zionism, or the constitution of the Israeli state, as such, as an apartheid entity from its very formation in 1948. Prominent mainstream interventions have been framed instead around a narrative that the situation crossed a threshold into apartheid only in the more recent past. The reality is that these developments are less anomaly and aberration—more continuation and codification. But framing them as a new departure, somewhat independent of underlying structures or colonial ideology, makes possible a narrative that Israeli apartheid has emerged through excess over time "without being founded on racist ideology."[15]

This notion of apartheid "without racist ideology" builds on long-standing tensions within the understanding of apartheid itself in international law. Since the 1960s, international law has essentially conceptualized apartheid along two parallel lines: an anti-colonial reading that emphasized the denial of a collective right to self-determination by an oppressive regime of racial domination; and a more liberal interpretation, as systemic discrimination within a state's legal system against individuals from a particular racial group.

From the formal onset of apartheid in South Africa in 1948, Third World intellectuals, political leaders, and legal scholars understood apartheid very clearly as a legal-political architecture of colonialism, not something new or separate from it. After 1960, when the Third World bloc acquired a majority position, UN General Assembly resolutions started to consistently employ the language of self-determination and ending colonialism in all its forms and manifestations. They repeatedly condemned apartheid as a regime of racial domination which amounted to an inherent violation of self-determination. Apartheid was understood very much in the same bracket as colonial rule and foreign occupation, necessitating similar types of remedy: collective liberation and land back.

[12] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 UNTS 195.

[13] GA Res. 2391 (XXIII), Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Nov. 26, 1968); GA Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid (Nov. 30, 1973).

[14] John Dugard & John Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, 24 EJIL 867 (2013).

[15] Yesh Din, The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion 5 (2020).

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In time, with the marginalization of more radical streams of the Third World liberation project by the early 1980s, the individualizing logic of human rights law and international criminal law asserted precedence over the anti-imperial politics that had briefly threatened to transform international law. With that, the anti-colonial essence and implications of the apartheid prohibition have faded into the background somewhat. Apartheid, as "colonialism of a special type"—as the South African Communist Party described it—has been recast as (or reduced to) something more approximate to "racial discrimination of a special type."

It is understandable, then, that human rights organizations have utilized the less contentious, narrower version of apartheid offered to them by international law. This enables them to avoid reckoning with the material imperatives of decolonization in the face of an ongoing settler project. This more liberal, criminal law-oriented understanding of apartheid can potentially be remedied by formal equality, without necessarily having to directly confront the colonial conquest and political economy that the apartheid regime has consolidated. Apartheid could be "ended," in that sense, without decolonization, restitution, or redistribution.

In South Africa, this narrower reading of apartheid has produced a form of "neo-apartheid."[16] In Palestine, it would delink Israeli apartheid from settler-colonialism. For these reasons, the centrality of self-determination must be foregrounded in apartheid debates—not only for the sake of Palestinians, but for the sake of all those who may seek recourse to a capacious framing of apartheid in struggles against racism and colonialism.

Zionism as Racism

While the prohibition of apartheid was being developed as an anti-racist instrument in international law, a parallel effort was underway with respect to naming Zionism as a specific form of racism. In the UN's "Decade Against Racism" initiative, a coalition of states sought to insert the word "Zionism" into texts wherever colonialism, racial discrimination, alien subjugation, and apartheid appeared.[17] On November 10, 1975, the UN General Assembly passed Resolution 3379, recognizing Zionism as a form of racism. The resolution explicitly named Zionism alongside "colonialism and neo-colonialism," as well as apartheid, and also cited an Organization of African Unity resolution naming the "common imperialist origin" of the "racist regime[s]" in Palestine, Zimbabwe, and South Africa.[18]

Resolution 3379 was informed by analyses of Zionism's racist and colonial character previously developed within the Palestinian liberation struggle. The resolution's primary architect was none other than Fayez Sayegh. Sayegh highlighted how racial purity, segregation, and supremacy constituted Zionism. At the United Nations, Sayegh explained that for Zionism, "it was the racial link that made a Jew a Jew," and proceeded to demonstrate this point by reading aloud writings by the founder of modern Zionism, Theodor Herzl.[19] Proponents of this argument understood the irony inherent to Zionist claims of a singular Jewish race reflecting a pillar of antisemitism that rendered Jews ineligible for inclusion within Europe.

The best-known objection to Resolution 3379 unsurprisingly came from the United States. U.S. ambassador Daniel Moynihan rejected the idea that Zionism could be a form of racism, and insisted on understanding Zionism as a political movement—a point critics like Sayegh would not dispute, but one that Zionists themselves routinely elide in their insistence that any criticism of it is tantamount to an attack on Jews as such. Ostentatiously quoting dictionary definitions of racism that invoked biological notions of race, Moynihan insisted that Jews are

[16] Tshepo Madlingozi, *Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution*, 28 Stellenbosch L. Rev. 123 (2017).

[17] UN GAOR, 30th Sess., Third Committee Mtg., UN Doc. A/C.3/L.2157 (Oct. 1, 1975).

[18] GA Res. 3379 (XXX) (Nov. 10, 1975).

[19] UN GAOR, 30th Sess., 2134th Mtg., paras. 16–17, UN Doc A/C.3/SR.2134 (Oct. 17, 1975).

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not a race in the biological sense.[20] This was, of course, a complete non sequitur. As Sayegh and others had convincingly demonstrated, what mattered was not whether Jews *are* a race in any "objective" sense, but rather how Zionism itself understands Jews. Moynihan's fixation on biological notions of race was unsurprising, given his notoriety in debates over racism and anti-Blackness within the United States. A decade before his strenuous defense of Zionism at the United Nations, Moynihan was the lead author of a widely cited U.S. government report on "the Negro family," whose pathologization of Black mothers fueled decades of Black feminist critique.[21]

Resolution 3379 was passed thanks to overwhelming support from Third World states, but the voting was contentious: seventy-two states in favor; thirty-five against; and thirty-two abstentions. In Israel, the United States, and other bastions of Zionism, Resolution 3379 became a symbol of a United Nations taken over by insurgent Third Worldist, anti-Israel sentiments. Largely overlooked in the legacy of these debates was how the condemnation of Zionism as racism explicitly understood racism as part and parcel of a colonial regime.

But 1975 was in some ways a high-water mark of Third Worldist—and, by extension, Palestinian—influence in the United Nations. In the following years, the Palestinian liberation movement did not advance a legal strategy to address Zionism in international law as a jus cogens violation or a crime against humanity, as had been done with apartheid.[22] By 1991, the Palestine Liberation Organization agreed to rescind the resolution as a precondition for entering the Oslo Peace Process.[23] Thereafter, the U.S.-led bilateral negotiations have obscured the racial and colonial dimensions of the Palestinian freedom struggle and framed it as a matter of conflict resolution, despite the stark maldistribution of power between a nuclear power and a stateless people.

Conclusion

Using traditions drawn from local arenas of struggle together with the conditions that shape their life and its prospects, Palestinian communities and movements have theorized the racial and colonial dimensions of their oppression and developed strategies for confronting them. The core demands of Palestinian activists, captured for example in the tripartite 2005 Boycott, Divestment, and Sanctions call, are not just for an end to the 1967 occupation, but for the right of return for Palestinian refugees, and an end to the Israeli state's racial regime. This puts the settler-colonial and apartheid essence of the state itself as the locus of the freedom struggle.

But just at the moment that Palestinian movement work has forced mainstream acknowledgment of the realities of Israeli apartheid and a renewed reckoning with Zionism as a form of racism, the December 2022 UN General Assembly request for an International Court of Justice advisory opinion on the legal status of Israel's prolonged occupation may represent a missed opportunity.[24] It comes after many years of tactical discussion around the focus and purpose of a potential advisory opinion, and ample opportunity for the Palestinian leadership and its allies to flesh out the Israeli state's constitutive settler-colonialism and institutionalized racism. Defaulting instead to a question about the status of the 1967 occupation and thereby limiting self-determination to one fraction of the Palestinian people, the terms of the request reify the conservative and partitionist logic of international law itself. While any occupation will impact the self-determination of the population under occupation, a colonial and racist regime aimed at irreversible demographic transformation aims to destroy that right and the very possibility of its exercise. At this point, it is not enough to scrutinize the occupation without confronting the racial and colonial regime in which it is embedded.

[20] GA Res. 3379 (XXX), *supra* note 18, paras. 323, 327.

[21] Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 Diacritics 2, 64 (1987).

[22] On the Palestinian leadership's international law strategy generally, see Noura Erakat, Justice For Some: Law and the Question of Palestine (2019).

[23] GA Res. 46/86 (Dec. 16, 1991).

[24] GA Res. 77/400 (Dec. 30, 2022).

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