Settler colonial and anti-colonial legalities in Palestine

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I. Introduction

In May 2013, the conference *Law and Politics: Options and Strategies of International Law for the Palestinian People* was held at Birzeit University. The aim was to “examine the currently dominant international law paradigm, its merits, limitations and possible alternatives”. The concept note for the conference further stated:

The Israeli occupation – which operates under the legal premise that it is temporary – has developed into almost half a century of military control and Israeli colonies. Still, Israel’s occupation regime *per se* has never been declared illegal by the United Nations. The assumption of the lawful, temporary character of Israel’s occupation is being upheld despite ample evidence of Israeli policies and practices of colonialism and forced population transfer which systematically discriminate and oppress Palestinians … These Israeli policies and practices have been documented by UN human rights treaty committees, UN Special Rapporteurs and fact-finding missions… Under the dominant IHL [International Humanitarian Law] paradigm, however, although occasionally condemned, they are treated as single incidents and exceptional acts of an otherwise lawful occupation regime, justified by Israel on grounds of public order, security or military necessity.

This article is an attempt to think with the organizers and participants of the *Law and Politics* conference about international law’s complicity in Israeli settler colonialism and, ultimately, about what is required, in terms of international law, to unsettle this status quo.

The argument is that the disciplining of state *means* – the extensive practices of documentation and condemnation discussed in the concept note – at the same time reifies the settler colonial *ends* of the Israeli state, and that this impasse holds true both in and beyond the occupation. What is needed is a legal framework that breaks with this structure. To that end, this paper is divided into four parts. The first section

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1 The ideas in this paper have benefited from being presented and discussed at the following conferences: *Walter Benjamin in Palestine: The Place and Non-place of Radical Thought*, Ramallah 2015; *International Law and the State of Israel: Legitimacy, Responsibility and Exceptionalism*, Cork 2017; *International Law in a Dark Time*, Helsinki 2017 and the *Law and Disaster* workshop, Melbourne 2017. I am very grateful to the organizers of these events and would like to especially mention Sami Khatib, George Bisharat, Martti Koskenniemi & Anne Orford and Adil Hasan Khan. The first steps were taken when Vasuki Nesiah, John Reynolds, Nahed Samour and myself decided to put together a panel for the *Benjamin in Palestine* conference and this collective have provided inspiration, encouragement and critical insights throughout the project. Many thanks to Vasuki Nesiah, Sundhya Pahuja, Gregor Noll and Jens Bartelson for close engagement with earlier versions of the paper and to Ardi Imseis for taking interest in it, for very helpful comments and for guiding it to completion. Mistakes and views are mine alone.

2 *Birzeit Institute of Law, Civic Coalition for Palestinian Rights in Jerusalem and the Decolonizing Palestine Project, Law and Politics: Options and Strategies of International Law for the Palestinian People: Concept Note* [on file with author][hereinafter Birzeit Concept Note].

3 *Id.*
develops a theoretical framework for understanding international law’s complicity in the continuing Palestinian Nakba, drawing on the heterodox Marxist Walter Benjamin’s critique of positive law in terms of the dialectics of means and ends sketched out in the foregoing. Drawing on this framework, the second section takes on the occupation and the IHL-centrism marked out as the problem to be addressed by the Law & Politics conference. The fateful transformation of the “Question of Palestine” in international law into the terms of communication and substantive content of the laws of occupation in and after 1967 is examined through 1967 United Nations (UN) Security Council (UNSC) deliberations around Resolution 242 and by considering Hani Sayed’s clear-sighted account of the place of the occupation in the wider Israeli settler-colonial project. The third section considers if the criticism levelled against international law and international legal institutions for treating Israeli transgressions on the West Bank and Gaza as single incidents and exceptional acts of an otherwise lawful occupation regime, cannot also be applied to the state of Israel itself, in its treatment of the Palestinian population from 1948 up until today. As a starting point, I return here to 1948 deliberations in the UNSC on the status in international law of the newly proclaimed state. This is complemented by an appraisal of Antony Carty’s account of the continuing relevance of 1948 for Israel as a subject of international law. The fourth section turns to the significance of the international law of anti-colonialism, in particular the prohibition against apartheid, for breaking with the dialectics of means and ends found to be propping up Israeli settler-colonial structures even in the act of criticizing Israel for violations of international law. The recent UN Economic and Social Commission for Western Asia (ESCWA) report written by Richard Falk and Virginia Tilley – Israeli Practices Towards the Palestinian People and the Question of Apartheid – is considered for its uncovering of this problem and, in particular, for marking out not the means, but the settler-colonial ends of the Israeli state as prohibited by international law.

Based on a particular strand of Marxist legal theorizing, the conclusions from this article do not follow the usual pattern of optimism or cynicism, where international law’s indeterminacy is either seen as an opportunity for waging “lawfare” against the occupation or the state of Israel itself or, alternatively, as a reason to abandon international law as a tool for progressive politics in Palestine and beyond. Instead, I describe the legal politics of Palestine today as a contest between settler-colonial and anti-colonial legalities, where international law plays a significant part in both. Thus, the question of the indeterminacy of international law is raised from the level of norms to the level of the international legal order itself.

II. Positive law: Disciplining means and reifying the ends of the state
At the outset, I emphasized how the 2013 Law and Politics conference highlighted how, in the context of the occupation, more law – more authoritative statements and monitoring of violations of humanitarian law –
may entrench the status quo. The key to this reading of the situation is to be found in the concept note when it speaks about an assumption of the lawful, temporary character of Israel’s occupation – an assumption upheld despite ample evidence of Israeli policies and practices of colonialism and forced population transfer, systematically discriminating and oppressing Palestinians – and, toward the end, that violations are treated as single incidents and exceptional acts of an otherwise lawful occupation regime.

I will argue that Walter Benjamin in his iconic 1921 essay *Critique of Violence* provides, through a Marxist critique of law, a simple way of understanding why such situations evolve. Indeed, the other projects that Benjamin was working on in the context of writing his *Critique*, shows that he was studying jurisprudential texts but also commodity fetishism in Karl Marx’s *Capital.* Benjamin’s writings – stretching across, or rather defying, the disciplinary boundaries of literary theory, art criticism, political theory, even fiction – offers a sustained criticism of modern society’s idolatrous forms of representation. In *Critique of Violence* Benjamin brings this general concern to bear on the “justice” of positive law. In this context he criticizes positive law for being entirely consumed with disciplining state means and, in the same instance, of fetishizing the state and its “justice”.

In Marx’s *Capital*, the structural separation between the spheres of production and exchange by means of fetishism is described as the valorizing of something that is a contrivance of market forces; reifying, “thingifying” an object as “valuable” in and of itself, independent of its historical origins and conditions of production. In the capitalist economy, commodities are fetishized so as to make them something other than social products of concrete labor (*i.e.* the difference between exchange- and use value).

Hedrick argues that just as consumers in a capitalist economy are compelled to fetishize commodities – a process through which they assume “magical”, “larger-than-life” properties – legal actors fetishize the objectiveness of legal outcomes, the legal order and ultimately state “justice” itself. Legal actors know, of course, that the materials they work with are indeterminate human creations but are structurally compelled to consider the process as one of discovering fixed and objective meanings. Moreover, insofar as they accept the process of application as *de facto* legitimate, legal subjects habitually accede to the idea of justice in law. On an aggregate level this has effects that Marx himself points to in *Notes for a Critique of Hegel’s Philosophy of Right* – “All told, the whole legal order acquires a petrified, think-like visage: ‘sovereignty, the essence of the state is here conceived to be an independent being; it is objectified’”.

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9 Walter Benjamin, *Critique of Violence*, in REFLECTIONS, ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277-300 (Peter Demetz ed., 1986) [originally published in German in 1921] [hereinafter *Critique of Violence*].
13 Id., 185 (Marx’s quote).

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Russian legal theorist Evgeny Pashukanis’s commodity-form theory of law has become the foremost reference point in Marxist jurisprudence.\textsuperscript{14} I will take a different path here: one that leads to Frankfurt School critical theory. In this tradition, commodity exchange is understood to saturate not just the economy and law but all dimensions of social experience. The commodity structure penetrates society in all its aspects and remolds it in its own image, in the expression of Georg Lukács.\textsuperscript{15} I argue that it is possible to conceive of Walter Benjamin’s \textit{Critique of Violence} as part of this tradition.

Right at the beginning of the text, Benjamin writes that distinctions in law between legitimate and illegitimate force will be based on the presence or absence of a “general historical acknowledgment” of the ends to which specific uses of force serve as means.\textsuperscript{16} Building on the basic distinction between means and ends Benjamin scolds the “justice” of natural law for only being concerned with just ends and therefore of being apologetic about the means that achieve them, and, conversely, the “justice” of positive legal systems for being entirely consumed with disciplining means, and therefore of reifying the historically constituted ends those means serve.

The connection to Palestine and the prefatory observations about occupation law from the \textit{Law \& Politics} conference concept note will be immediately clear. Even more so when considering the multiple indications in the text about how law’s “justice” covers up historical injustices in this way. Benjamin writes that violence crowned by fate is the origin of law and military violence is a primordial condition, paradigmatic of the violence that makes it.\textsuperscript{17} He also writes about how, when the highest form of violence – that which can impact life and death – occurs in the legal system, the origins of law just manifestly and fearsomely into existence, something “rotten” in law revealed.\textsuperscript{18}

\section*{III. IHL and the 1967 Occupation}

In this section, the use of IHL as the dominant paradigm for Palestine will be scrutinized. The historical dimension is given to us already in the \textit{Law \& Politics} conference concept note where the 1967 UNSC Resolution 242\textsuperscript{19} is said to have laid the foundations for this significant shift. For reasons I will come back to, I see Resolution 242 less as laying the foundation for this paradigm and more as symptomatic of the structural problem of international law discussed in this article: of disciplining \textit{means} while reifying the \textit{ends} of the state.

\begin{thebibliography}{99}
\bibitem{Lukacs} \textsc{Georg Lukács}, \textit{History and Class Consciousness} (1971) [originally published 1923], 85.
\bibitem{Benjamin} \textsc{Critique of Violence}, 280.
\bibitem{Id.} \textit{Id.}, 283.
\bibitem{Id.} \textit{Id.}
\end{thebibliography}
On 22 November 1967, the UNSC held its 1382nd meeting. On the agenda, was a UK proposal to deal with the then 5-month-old Israeli occupation of what remained of mandate Palestine after the 1948 war – resulting in the passage of Resolution 242.

From 1948 to 1967, the question of Palestine in international law was understood as encompassing the entire territory and population of the former British Mandate. Resolution 242 established that the West Bank, including East Jerusalem and the Gaza strip were occupied territory and, as such, they could never become Israeli territory absent Palestinian acquiescence and that Israeli withdrawal from them was a requirement for peace.20 Under the legal paradigm that evolved out of Resolution 242, however, “the Palestine question became the question of the future status of the Israeli occupied West Bank and Gaza Strip, rather than the issue of the indigenous Palestinian people and citizens of former British Mandate Palestine with substantial outstanding rights and claims in their homeland”.21 This shift did not go unchallenged.

The UK proposal followed the vote on two resolutions in the UN General Assembly (UNGA). One was introduced by a group of Latin American and Caribbean countries, the other by Yugoslavia on behalf of several non-aligned states. Both affirmed the inadmissibility of the acquisition of territory by conquest and a complete Israeli withdrawal,22 but failed to achieve the two-thirds majority required, according to the Charter, for recommendations with respect to the maintenance of international peace and security. The different draft resolutions that would later be circulated in the UNSC followed the same principle but differed in relation to the use of definite language or indefinite language in the withdrawal provision. Israeli representative Abba Eban insisted on indefinite language – no use of “the” or “all” in relation to the territories from which a demand would be made of Israel to withdraw.23

George Tomeh, representative from Syria, (invited to take part in the meeting without vote) would be first to speak in the 22 November 1967 meeting in the UNSC. At the outset, he noted that they session may prove to be a crucial turning point in the tragic history of Palestine and that “whether it may be so depends basically on the safeguarding of Arab rights, so far ignored or disregarded”. Tomeh continues:

But as one looks around this Council table, when the future of a whole area and the destiny of a whole people are being decided on, one is struck by an anomalous fact, namely, that the party directly concerned, the Arab people of Palestine, who should themselves be the first speakers to be heard – since they have never ceded their inalienable rights to anybody nor forfeited them – are totally absent from the picture. No reference is made to them in the draft resolution, except, belatedly, in sub-paragraph (b) of operative paragraph 2, as constituting the refugee problem. Yes,

20 Birzeit Concept Note.
21 Id.
23 Id., 11.
this is the Arab people of Palestine, the uprooted, dispossessed people in exile, crying for justice for over twenty years now, without so far finding justice in the councils of the world.24

The absence of the Palestinian people at the table of the UNSC and the failure to take the Palestinian perspective into account serves as a reminder of how the international legal regime “reflects and reifies the status, rights, and obligations of states”.25

Another criticism towards the process was how it opened for the resolution to be instrumentalized to serve the Israeli interest of a prolonged occupation. This could already be gleaned from the Israeli vetting of the issue in preparing the draft resolutions and by statements in the UNSC. Tomeh argues that “it goes without saying” that the withdrawal of Israel from the occupied territories should be a key focus of the attention and efforts of the international community, but that this requirement is “almost nullified” by the absence of both time-limits and that the withdrawal is to be to the pre-June 5 armistice lines.”26 Michael Lynk, current UN special rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, would later opine that “the missing definite terms – ‘the’, ‘all’ or ‘4 June 1967 lines’ [constituted] the slender hook that Eban, Israel and its supporters would…hang their interpretative hats to employ Resolution 242 as a justification for its prolonged occupation and colonization of the 1967 lands”.27

Tomeh, in the UNSC, gives even more space to what is not in the UK draft proposal and, as far as I know, not in the other draft proposals either. First and foremost, there is no mention of a Palestinian right to self-determination as enshrined in the UN Charter and the Universal Declaration of Human Rights. Tomeh also makes reference to the fact that the UNGA, at its very first session held after the expulsion of the majority of the Arab inhabitants of Palestine, had endorsed the recommendation of the assassinated Swedish mediator, Folke Bernadotte: that the refugees wishing to return to their homes and live at peace with their neighbors shall be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property.28 Instead, Resolution 242 speaks in characteristically vague terms of “a just resolution of the refugee problem”. Tomeh continues:

but what has happened to those rights, affirmed regularly every year since 1948? Why have they been glossed over in the present draft? Why is no reference whatsoever made to those resolutions, as if they did not exist at all? It is in the light of this experience and of Israel’s disregard of those resolutions that we consider the present United Kingdom draft resolution … It is inconceivable to Syria that this draft resolution be accepted because it ignores the roots of the problem, the various resolutions adopted by the United Nations on the Palestine question and the right of the Palestinian people to self-determination, and goes further than that; it crowns all those failures by offering to

27 Lynk, 15.
the aggressors’ solid recognition of the illegitimate truths of their wanton aggression when it speaks of “secure and recognized boundaries”.  

The theoretical framework adopted here suggests that there are structural reasons not just for the absence of Palestinians in the UNSC deliberations but for the change of approach to the question of Palestine in international law announced by Resolution 242. Once effective control over foreign territory is a fact and an occupation regime established, the attention it gets from the patrons of international law is one of disciplining this legal power through the means provided by IHL, at the same time, then, naturalizing the occupation and limiting the ways in which Israeli governance of the West Bank and Gaza can be thought of. In this way, the question of Palestine was transformed into the terms of communication and substantive content of the laws of occupation.

Hani Sayed’s *The Fictions of the “Illegal” Occupation in the West Bank and Gaza* is a remarkably clear-sighted analysis of the consequences of this shift. Sayed starts out by noticing how academic and policy discussions around the State of Israel’s control of the West Bank and Gaza Strip centers on legality, particularly the laws of occupation. Sayed notices how, in this mainstream approach, the laws of occupation provide a grid of intelligibility for all the concrete practices of Israel as an occupying power and legal analysis becomes a matter of comparing the concrete practices of the occupying power with the abstract norms of the law.

Sayed further notes that others have pointed to how a discourse of condemnation vs. justification from within this grid of intelligibility paradoxically has served so as to legitimate the occupation and resulted in a situation where the more the practices of the occupying power are audited for compliance with the laws of occupation, the more the systemic connections between them are made difficult to discern and are immunized from critique.

Sayed’s suggestion is that in order to get around this, the question of how the West Bank and Gaza is governed will need to be studied outside of the grid of intelligibility provided by occupation law. Deducing the elements of Israeli governance from the legal regime applicable according to the international law of occupation will need to be avoided. In other words, occupation law cannot be seen as a framework for speaking truth to power but as a legal regime which is constitutive of systems of social control. What he finds, when doing so, is conveniently summed up like this:

> The government of Israel maintains a strategic control over the territories and Palestinian populations of the WBGS [West Bank and Gaza Strip] with the ability to project military power at will. In international law such level of control satisfies the legally accepted definition of effective

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30 This is Peter Fitzpatrick’s formulation of the work of reification in law; see Peter Fitzpatrick, *Law and Societies*, 2 OSGOODE HALL L. J. 115-138 (1984), 126.
32 Id., 81.
33 Id., 110
In the territories under its effective control, the government of Israel has set up a dual governance regime that distinguishes between Palestinian-Arab persons and places and Israeli-Jewish persons and places; and the government of Israel has abdicated any responsibility over civilian affairs of the Palestinian Arabs in the WBGS. Jewish residents are Israeli citizens, and Jewish places are effectively integrated in the Israeli legal system, administration, and economy. International donors and humanitarian agencies are by default responsible for the welfare of the Palestinians in the WBGS.  

As we can see, Sayed agrees that the level of control exercised by Israel in the West Bank and Gaza fulfil the criterion of effective control. However, in suspending occupation law for the purpose of understanding Israeli governance, a different image of the “occupation” emerges. It becomes possible to see that conceiving of Israeli governance of the West Bank and Gaza as an occupation covers up the links to internal state policies and to an overarching settler colonial project that does not accept the 1967 armistice line as a limit. As put by Darryl Li, “occupation law’s assumption of otherness, premised on a simple dichotomy between occupied territory and occupying states, are not particularly helpful in grasping a basic fact: since the 1967 war, the territory of the British Mandate has been ruled by a single supreme authority.”

The legal order of the occupation is key for understanding how it is possible to maintain this situation, even if the authorities are constantly charged with illegal acts, according to that same legal regime. In fact, the use of occupation law to regulate the occupation, rein in the most egregious policies or actions by the authorities – as important as it is – serves exactly to thingify the occupation; makes it not just regulative but constitutive of a regime for acquisition of land and domination of the Palestinian population.

Sayed is not saying that we therefore should turn our attention to the lawfulness of the occupation per se. He sees a number of problems with simply scaling up the question of the legality and the occupation in this way: it reinforces the assumption that as occupied territories, Gaza and the West Bank are distinct territorial units with a special governance regime, in other words, it suffers from the same problem of concealing systemic links to internal state policies as the mainstream approach. The other, associated, problem is that it leads to a narrowing of the field of vision to an, increasingly untenable, two-state political solution to the conflict.

In the next section I will consider if the criticism of how international lawyers and international legal institutions have dealt with the occupation – treating Israeli transgressions as single incidents and exceptional acts of an otherwise lawful regime – cannot be applied to the state of Israel itself. This brings

34 Id., 110-111.
37 Aeyal Gross has contributed to this discourse in important ways and his recent book provides the most sophisticated account of it, in and beyond the context of Israel/Palestine: AYEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION (2017).
38 Sayed, 83.
us back to 1948 and the settler-colonial terms on which the state of Israel was founded; terms – if the argument holds – that are reified when international law is used to discipline the Israeli state.

IV. International Law and the 1948 Nakba

The 1948 UNSC deliberations on the newly proclaimed Israeli state provide a useful starting point for understanding the terms on which the Israeli state was founded and their relationship to international law.

On the agenda for the 339th meeting on 27 July 1948 was a proposal from Syria that, because the United Kingdom had abandoned its mandate without having established any governmental organization to resume power of administration, the International Court of Justice (ICJ) should give an advisory opinion as to the status of Palestine. Israel had declared its independence just two months earlier and the civil war in the former mandate had entered its inter-state phase between the nascent Israeli state and a coalition of Arab neighbors. Israel was in the process of claiming significantly more than was reserved for the Jewish state in UN Resolution 181 (on the partition) and hundreds of thousands (the numbers 750,000 or 800,000 are often used by historians) of Palestinians were in the process of becoming the first of many generations of refugees while others would be subjected to a discriminatory military rule inside the state of Israel itself.

In this context, the Israeli representative Abba Eban, who was invited to take part in the deliberations without vote, was able to exploit the international law of statehood operative at the time to push back against the resolution, and the idea that the UNSC should request an advisory legal opinion. He did this in the following terms:

> All States known to history have become States by their own unilateral assertion, without any injunction or permission from the organized international community … If legitimate origin were relevant – which it is not – in determining statehood, there would be only one instance in which it could be established, for the General Assembly required and demanded the establishment of the State of Israel … Israel, in fact, possesses the only international birth certificate in a world of unproven virtue, and by a strange irony, it is precisely in this instance – the only instance in which the international community has pronounced itself – that the legitimacy of statehood is to be submitted to the International Court of Justice for investigation. It is not within the capacity of the International Court of Justice to determine the existence or the non-existence of the State of Israel, which is a question of fact and not of law, based on criteria of effectiveness and not of legitimacy.39

The question was never referred to the ICJ. The failure of the Syrian resolution to obtain the necessary affirmative votes cannot be taken as proof of the extreme position on the pure fact of statehood in international law taken by Eban but it is a fact that international law authorities understand Israel to have

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become a subject of international law sometime between 1948 and 1949 on terms that later would be implicitly or explicitly accepted in international fora.  

Experts disagree whether international law prohibited the Nakba but not over whether Israel became a subject of international law on the terms established through its war of independence. In the UNSC, the representative of Egypt, Mahmoud Bey Fawzi (also invited to take part in the deliberations, without vote) underlined the long-term consequences of those terms, and of the establishment of a Jewish state for the Palestinian population.

On every occasion when we speak to them of our fairness, of our rights, of our justice; they will say, ‘But we have a State.’ Even when we point out that there are already immigration laws governing all Palestine, that those laws are not yet repealed, and that neither the Mediator, nor the Security Council, nor the so-called Jewish authorities in Palestine, are in law empowered in the present situation to legislate for Palestine or any part of it, the Zionists, will again say, ‘But we have a State.’ This is their only retort. They have extorted what they wanted and they are simply sitting tight with, so far, no means of redress for the Arabs.

Anthony Carty has seized on the question of the continuing normative significance of the events of 1948 in the case of Palestine. He points to a debate in the UNSC in 1966 where the Israeli representative stated:

And whatever we do, whatever our Government decides to do, it is done in order to defend and protect our national independence and our national security – on the sole responsibility of our Government and not on behalf of anybody else or on behalf of any other considerations but our own.

Carty also notes how the words from the Declaration of the Establishment of the State of Israel – that Israel must be the master of its own fate, how the Jewish state exists to protect the Jewish people and so forth – continues to be commonplace in official political discourse. In this context, Carty refers to a “dynamic or drive underlying state action…for the state to sustain and preserve itself precisely with the same independent force and energy with which it originally established itself”. Carty makes clear the effects of this “meta-legal drive” on the international legal order; when law is completely determined by the factual in this way, he argues, it is more intellectually honest to accept that we find ourselves in the “absence of any international legal order”.

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45 Carty, 158.
46 Id.
Elsewhere I have drawn on Carty, and on the 1948 events in the UNSC just mentioned, to make a similar point. The argument about how international law disciplines means while reifying the ends of the state, is a different one, however; one that can be used to understand the situation in Palestine not as absence, but presence, of international legal order.

The recent ESCWA report entitled *Israeli Practices Towards the Palestinian People and the Question of Apartheid*, written by Richard Falk and Virginia Tilley helps us understand how. The report argues that Israel has established an apartheid regime that dominates the Palestinian people as a whole and that the core method of doing so is upholding the separation of Palestinians into the categories of refugee, occupied and minority populations. Most importantly, the report charges the international community of having unwittingly collaborated with this regime by distinguishing between Palestinian citizens of Israel and Palestinians in the occupied territories and those outside the country as “the refugee problem”. International law’s focus on discrete illegalities in these different spheres, has obscured the fact that what we are dealing with is one, not many, legal regimes.

V. Anti-colonial legalities: The prohibition of apartheid

Mazen Masti notes that in Arabic literature going as far back as the founding of the Israeli state, distinctions are made between the colonialism that other countries in the region suffered from and Zionist settler-colonialism, which “aims to substitute one homeland for another, and eliminate one group so that another can settle in its place”.

In the history of colonialism, Israel is characterized not just by its settler-colonial characteristics but by the fact that this state project was realized at the same time as decolonization took place around it. In an article published in the *Palestine Yearbook of International Law* (Vol. XV), Laura Ribeiro describes Palestine as the “last colonial encounter”. After the First World War, Palestine found itself at the center of the project of the transformation of colonial territories into independent states and a key concern of the newly formed international institutions set to achieve it. Eventually the state would receive its international legal “birth certificate” by the UN but equally significant is the fact that the discussions around recognition of Israeli

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49 ESCWA Report, 37.
50 From Constantin Zareiq “the Meaning of the Nakba”, translated in Masti, Mazen 2017. *The Dynamics of Exclusionary Constitutionalism*, Oxford and Portland, Oregon, Hart, p. 16. The description of Israel as a settler colonial state, pivots on the fact that the founding and preserving of a Jewish state in Palestine implies what Patrick Wolfe has described as a ‘logic of elimination’: replacing indigenous society with the society of the colonizer. In his theory, this need not involve events of physical violent elimination, although this has certainly been the case in Palestine, but is rather to be understood as a structure to be found in the economy, the political system and the law. Wolfe, Patrick 1999. *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event*, London & New York, Cassell. On Palestine see also chapter 8 of Wolfe, Patrick 2016. *Traces of History: Elementary Structures of Race*, London, Verso.
statehood show that states indeed were preoccupied with determining whether the Montevideo Convention criteria were fulfilled or not. These criteria were a product of the efforts of subjugated peoples to achieve the sovereignty they had been denied under the earlier standard of civilization and was used for purposes of liberation elsewhere at this time. According to Ribeiro,

The case of Palestine marks a duplicitous break in international law. Post-WWII international law became the dominant language and institutional means through which de-colonization was articulated, while in Palestine, it reproduced colonial structures and legitimized a new colonial outpost. Moreover, this contradiction was not dichotomized – international law did not just allow decolonization for some while facilitating colonization for others – it colonized and liberated at the same time, in the same place. In the case of Palestine, international law recognized Israel as both the native and colonizer at the same time. It was a settler-colonial project facilitated and validated through international laws and institutions, while simultaneously being an act of de-colonization …

The argument in this article about the complicity of international law in Israeli settler-colonialism concerns the failure to understand the Israeli state in terms of this duplicitous break. Even taking the extensive international legal criticism directed towards it into account, this failure consists in the normalization of the Israel state during a time in which the international legal order became increasingly hostile toward colonialism.

Although this era of anti-colonialism in international law is over, the prohibition of colonialism, population transfer and apartheid is still part of positive international law and for the last few decades has increasingly been brought to bear on Israel. This gives me good reason to offer a few words about the nature and role of that law from the perspective advanced here. I will do so by focusing on the 2017 ECSWA report written by Falk and Tilley.

The key finding of the Falk and Tilley report is that Israel has established an apartheid regime that dominates the Palestinian people as a whole – meaning not just Palestinians ruled by military law in the West Bank and Gaza Strip, but also citizens of Israel, residents of Jerusalem and refugees and exiles living outside historic Palestine. The report finds that, although fragmented through a history of wars and expulsions and treated according to different laws in these four spheres, ultimately the four domains make up one comprehensive regime. The core method of controlling the Palestinian population and to preserve Israel as a Jewish state

55 For an excellent overview, see Reynolds.
is upholding, as Falk puts it in another context, the “discriminatory separation of Palestinians into such subordinated categories as occupied, refugee, terrorist and minority in a Jewish state.”

This is also where the report charges the international community for having collaborated with this regime by mimicking this separation in its treatment of the Israeli state. This extends the criticism of Hani Sayed on the reliance of occupation law for understanding the Israeli governance of the West Bank and Gaza, to the conceptualization in international law of the Israeli state’s historical treatment of the Palestinian population as a whole. The reasoning applied there also applies here: the more Israeli policies and actions are audited for compliance in these different spheres, the more the systemic connections between them are obscured and the regime itself is immunized from critique.

The significance of the international law prohibition against apartheid is that it allows us to expose and consider this from the point of view of positive international law. Apartheid, according to the report’s understanding of the Apartheid Convention and the Rome Statute definition, can be established only if discrete acts are part of an institutionalized regime with the intention or purpose of racial domination and oppression. Ultimately, the prohibition against apartheid deals with apartheid as an end of the state, not as a means. This can be understood from the Apartheid Convention prohibiting a list of “inhuman acts”, “committed for the purpose” of racial domination and when a people are systematically oppressed. Similarly, the Rome Statute crime of apartheid hinges on an “institutionalized regime of systematic oppression and domination…committed with the intention of maintaining that regime”. The application of these norms to Israel is examined in the historical makeup of the geography of Israel-Palestine, state discourse and laws on Israel as a Jewish state, policies for demographic engineering, Jewish-national institutions and the above-mentioned fragmentation of the Palestinian population.

VI. Conclusion

The power of international law simultaneously sustains individual states, the state system and the existing power structures determining that system at any particular point in time. For a very long time, those existing power structures served the ends of imperialism and colonialism. The statehood secured by international law was a proxy for civilization and a license for the violent European civilizing mission. At the time of the founding of the Israeli state, this was changing. Similar to Ribeiro, David Theo Goldberg has described Israel as an anomaly at its founding, “reflecting conflicting logics of world historical events between which its declarative moment was awkwardly wedged”. It mimicked rather than properly mirrored the logics of independence that could be seen in decolonizing societies of the day while embodying “in

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60 For the customary law status of the prohibition of Apartheid, see Dugard & Reynolds.
61 ECSWA Report.
potential, by the structural conditions of its very formation, some key features of the apartheid state”. 63 What I have been trying to show in this short paper is that the complicity of international law in Israeli settler-colonialism, and its derivative apartheid 64, is premised not just on the establishment of the Israeli state on settler-colonial terms in 1948, but on the way in which international law disciplines means while reifying the settler colonial ends of the state and that this is true both in and beyond the occupation. This is captured in the Falk and Tilley report when they charge the international community for being complicit with this regime in so far as distinguishing between Palestinian citizens of Israel, permanent residents of Jerusalem, Palestinians in the occupied territories and those outside the country as “the refugee problem”. The focus on discrete illegalities in each of these spheres has not just obscured what they have in common but normalized the separation of the Palestinian population that is a key feature of Israeli apartheid. This explains the paradox where Israel is so often criticized for violating international law, yet the status quo is maintained. In contrast, the prohibition of apartheid, as part of a legacy of anti-colonial international legal power structures, directly address such ends as prohibited by international law. This is an anti-fetishist international law directly addressing the question of the “presence or absence of a general historical acknowledgment of ends” that Walter Benjamin refers to, and, as such, is calling into question the very basis upon which questions of legality are presently determined in historic Palestine.

64 See Reynolds, 10.