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The Question of Palestine as a Litmus Test: On Human Rights and Root Causes

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I. Introduction

Recent mainstream human rights discourse displays a paradoxical movement. On the one hand, there is a growing movement toward the acknowledgement of the reality of Israeli apartheid. On the other hand, there is a growing recognition of the long-standing impunity that enabled the consolidation of apartheid in the first place. The first move may revive faith in international law by naming wrongs, articulating legal remedies, and demanding action. It moves the legal debate from the futility of international humanitarian law (IHL), which has failed to even humanize the conflict, to the international legal terrain of apartheid. In contrast, the recognition of impunity would seem to increase skepticism toward the law's ability to deliver the promise of accountability and thus increase a sense of futility. The question becomes the nature of law's predicament and whether better enforcement or more law can remedy it. In other words, the question is whether a change in the terms of the legal analysis would lead to a significant change in law's ability to hold the powerful to account and reduce suffering.

This article argues that the Question of Palestine remains a "litmus test" for international law and human rights and their ability to address historical wrongs.[1] Part II contrasts the legalistic and holistic approaches of mainstream international human rights organizations in their apartheid reports in order to illustrate the indeterminacies and limits of apartheid's application in the Palestine context. Despite differences between human rights organizations' reports, as well as changes in their own reporting and framing over time, the main failings are "structural" because they reflect the limitations, assumptions, and legitimating effects of the human rights discourse and international legal tools they deploy.[2] Thus, the rest of the article contextualizes these reports in wider trends and assesses their potential legal and political effects. Since these reports seek to provide a comprehensive conflict-mapping account, Part III examines the limits of this search for root causes and the full context in which systematic human rights violations occur. It distinguishes between approaches to root causes that centralize occupation, discrimination, or colonialism, and argues that although the apartheid reports provide better context than has hitherto been offered in mainstream human rights discourse, they do not go far enough. This is because they de-politicize and de-

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[1] Nimer Sultany, *Colonial Realities,* THE GUARDIAN (Mar. 3, 2008), https://www.theguardian.com/commentisfree/2008/mar/03/colonialrealities.

[2] Susan Marks, *Human Rights in Disastrous Times, in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 309, 316 (James Crawford & Martti Koskenniemi eds., 2012) [*hereinafter* Marks (2012)].

historicize the Question of Palestine when they omit colonialism as a relevant framework to understanding Zionist practices, as evident in the exclusion of Palestinian self-determination from the crime of apartheid's application. Equally consequential is the omission of imperialism as a root cause, in particular United States (US) support for Zionist colonialism. Foregrounding colonialism and imperialism as root causes uncovers law's complicity in the infliction of injustice on the Palestinians.

Part IV examines the "discourse of failure" that prompts this search for root causes in light of long-standing impunity. This discourse blames the failure on the state or the international community's political will. It thus reduces the failure to a question of lack of enforcement or selectivity and obscures the role of imperialism by referring to an abstract "international community." Consequently, it absolves law from complicity despite the fact that impunity and selectivity are endemic in international law and relations. Part V unpacks the selectivity argument in light of recent international action against Russian aggression in Ukraine. It illustrates that the critique of selectivity fails to recognize the rules' unfairness and that selectivity is a legal – no less than political – condition, as the International Criminal Court's (ICC) practice illustrates. Consequently, demanding better enforcement and offering more and better law is unlikely to solve the predicament of impunity. If the problem is not law's absence as much as law's complicity in injustice, then more law is not going to resolve it.

II. Apartheid's Indeterminacy and Limits

The perpetual nature of Israel's rule over the Palestinians, its increasing brutality, its expansionist trajectory, and its blatant discriminatory regime have finally pushed the human rights discourse to search for root causes and to name the regime that has produced the multitude of violations that human rights organizations have been busy reporting. It is now the view of mainstream international human rights organizations that Israel has committed the crime of apartheid in part or in all of the territory under its control. In particular, the Amnesty International and Human Rights Watch (HRW) reports have established that Israel satisfies the three criteria of the apartheid crime in international law: intent to dominate; systematic oppression; and the commission of inhumane acts.

This is an important leap forward in terms of the legal discourse regarding the Question of Palestine. This is because it provides a more accurate, if belated, legal depiction of reality. The

novelty of these reports does not lie in bringing new facts to light, but in the aspiration to name the wrong that befell the Palestinians in a "comprehensive" framework that frames the numerous particular violations and foregrounds their "systematic nature."[3] They enrich the analysis by placing human rights violations in a broader factual, legal, and moral context. They also expand the temporal horizon of human rights discourse from focusing on "extraordinary" and isolated periods of "crisis" to long-standing processes and a totality of oppression that thwart Palestinian freedom.[4]

Yet the lack of novelty in the 2021-2022 apartheid reports in terms of the reported facts shows that mainstream international human rights organizations like Amnesty and HRW could have identified the crime of apartheid much earlier but did not.[5] The politics of human rights is thus evident in its timing because the change is less in reality as much as in the legal and analytical frame employed to comprehend this reality.[6] Thus, the political judgment that delays the application of the crime of apartheid to a set of well-known and well-documented facts generates indeterminacy. The law is indeterminate when it is open for conflicting interpretations because its meaning and application are unclear or unstable in light of existing gaps, ambiguities, contradictions, qualifications, or exceptions in the legal materials. It thus becomes a site for contestation and justification that simultaneously enables a criticism and legitimation of the status quo.

This indeterminacy is evident in the novel application of the apartheid crime. Generally, human rights organizations need to fill the gap that international law's silence leaves regarding defining fundamental concepts in apartheid's legal definition ("domination," "systematic oppression," and "racial groups").[7] This silence and the lack of judicial determinations to fill the gap open the door for disagreement in interpretation and application.

With respect to the particular application to Palestine, differences arise regarding which parts of Palestine provide the scene for the crime. The differences between different reports illustrate that

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[3] Amnesty Int'l, *Israel's Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity*, MDE 15/5141/2022, at 37, (Feb. 1, 2022) [*hereinafter* Amnesty Int'l (2022)], https://www.amnesty.org/en/documents/mde15/5141/2022/en/ ("The framework of apartheid…allows a comprehensive understanding, grounded in international law, of a situation of segregation, oppression and domination by one racial group over another.").

[4] *See* Gonçalo de Almeida Ribeiro, Vishaal Kishore, & Nimer Sultany, *The Risks of De-Contextualizing Gaza War Crimes*, THE ELECTRONIC INTIFADA (Sep. 25, 2009), https://electronicintifada.net/content/risks-de-contextualizing-gaza-war-crimes/8461. *See generally* Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MODERN L. REV. 377 (2002).

[5] *See* Joseph Massad, *Israel Has Long Been an Apartheid State. Admitting It Now Is Too Little, Too Late*, MIDDLE EAST EYE (May 6, 2021), https://www.middleeasteye.net/opinion/israel-palestine-apartheid-long-making-news.

[6] Compare the HRW and Amnesty reports, for instance, with the earlier: U.N. CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, U.N. Doc. CERD/C/ISR/CO/14-16 (Mar. 9, 2012); in particular: *id.* ¶ 21 (apartheid in the oPt) and *id.* ¶¶ 11-13 (segregation and racial discrimination inside Israel).

[7] *See* Amnesty Int'l (2022), *supra* note 3, at 50-54.

the legal application of the apartheid crime to the Question of Palestine is indeterminate. Some interventions make the case for recognizing Israel's policies in the occupied Palestinian territory (or 1967 borders), particularly the West Bank, as a clear-cut case of apartheid.[8] Others apply the framework of apartheid to all of historic Palestine.[9] HRW exemplifies the former,[10] whereas Amnesty exemplifies the latter. This difference in application showcases indeterminacy because similarly oriented human rights organizations during the same period of time (2021-2022) looked at the same set of facts but provided different legal appraisals. Crucially, when contrasted with the HRW report, Amnesty's argument shows that limiting the argument to the 1967 borders is a self-imposed choice and a matter of judgment.

In its 2021 report, HRW confines the charge of apartheid geographically and temporally to the territory occupied since 1967.[11] According to HRW, Israel "has long sought to engineer and maintain a Jewish majority in Israel and maximize Jewish Israeli control over land in Israel and the OPT."[12] This intent to dominate "developed over many years with much of the architecture established in the early years of the state and the occupation."[13] It thus precedes 1967 and originates in the state's establishment.[14] Yet HRW distinguishes between systematic oppression in the oPt (where "abusive policies are of such intensity that they amount to 'systematic oppression' for the purpose of the crime of apartheid") and institutional discrimination inside Israel.[15] Although the institutional discrimination against Palestinian citizens in Israel is another instance of systematic privileging of Israeli Jews over Palestinians, the "severity of the repression carried out in the OPT"

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[8] *See* Yesh Din, *The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion by Adv. Michael Sfard* (June 2020), https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Apartheid+2020/Apartheid+ENG.pdf; Michael Lynk, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, U.N. Doc. A/HRC/49/87 (Mar. 21, 2021); International Human Rights Clinic, Harvard Law School, & Addameer, *Apartheid in the Occupied West Bank: A Legal Analysis of Israel's Actions, Joint Submission to the United Nations Independent International Commission of Inquiry on the Occupied Territory, including East Jerusalem, and Israel* (Feb. 28, 2022), http://hrp.law.harvard.edu/wp-content/uploads/2022/03/IHRC-Addameer-Submission-to-HRC-COI-Apartheid-in-WB.pdf.

[9] *See* B'Tselem, *A Regime of Jewish Supremacy From the Jordan River to the Mediterranean Sea: This is Apartheid* (Jan. 12, 2021), https://www.btselem.org/publications/fulltext/202101_this_is_apartheid; Al-Haq et al, *Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports, 100th Session* (Nov. 10, 2019), https://www.alhaq.org/advocacy/16183.html; Al Mezan Center for Human Rights, *The Gaza Bantustan—Israeli Apartheid in the Gaza Strip* (June 2021), https://www.mezan.org/en/post/24084/The+Gaza+Bantustan%E2%80%94Israeli+Apartheid+in+the+Gaza+Strip.

[10] *See* Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (Apr. 27, 2021) [*hereinafter* HRW (2021)], https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution.

[11] *See id.* at 10. *See also id.* at 205.

[12] *Id.* at 44.

[13] *Id.*

[14] *See id.* at 45.

[15] *Id.* at 79-80.

satisfies the apartheid criteria of "systematic oppression."[16] The report draws a similar distinction between the oPt, where "many of these abuses amount to inhumane acts, one of the three elements of the crime of apartheid," and the "abuses against Palestinians within Israel" which the report discusses "separately from the inhumane acts."[17] The denial of the refugees' right to return is also included in "other abuses."[18] In sum, the primary focus is on the crime, whereas the politico-legal regime may commit apartheid in some areas under its control but not others despite the unifying logic of domination.

Similarly, United Nations (UN) Special Rapporteur Michael Lynk confined his report to his geographical mandate. Lynk argued that it is no longer sufficient to highlight the Israeli occupation's illegality as a flagrant and long-standing violation of IHL. This is because "illegality" does not capture the "transformative"[19] nature of "Israel's settler-colonial project"[20] and the fact that this "acquisitive"[21] occupation "has become indistinguishable from annexation."[22] The legal significance of this move away from occupation law to naming larger frameworks emanates from the fact that colonialism and apartheid are illegal according to international law whereas, as former Special Rapporteur John Dugard writes, occupation "is a lawful regime, tolerated by the international community but not approved."[23] Nevertheless, this illegality faces the fact of disagreement in law.

In contrast to HRW, Amnesty's application of the apartheid crime goes further in three ways: its focus on the "totality" of a "system of apartheid;" its broader geographical remit that includes Israel's treatment of the Palestinian citizens in Israel; and its longer temporal horizon that starts with 1948 rather than 1967. The main difference between the Amnesty and HRW reports does not lie in exposing a different set of facts because they cover a very similar legal, factual, and historical terrain. Instead, the primary difference is one of interpretation and application. Whereas HRW's approach is more legalistic, Amnesty's is more holistic. The legalistic approach exemplifies a narrower and stricter application of the legal category than the holistic approach. Amnesty maintains:

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[16] *Id.* at 169.
[17] *Id.* at 179, 195, & 203-204.
[18] *Id.* at 202-203
[19] U.N. Doc. A/HRC/49/87, *supra* note 8, ¶ 16.
[20] *Id.* ¶ 42.
[21] *Id.* ¶¶ 40 & 51.
[22] *Id.* ¶ 54.
[23] John Dugard, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶ 62, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007).

> The totality of the regime of laws, policies and practices…demonstrates that Israel has established and maintained an institutionalized regime of oppression and domination of the Palestinian population for the benefit of Jewish Israelis – a system of apartheid – wherever it has exercised control over Palestinians' lives since 1948.[24]

Amnesty repeatedly emphasizes the territorial element of "all areas under" Israel's control.[25] The focus is thus on the "totality of the regime" and "in all areas" because the regime is endemically tainted by apartheid. Therefore, it does not make sense to disaggregate the crime by singling out particular geographical areas. In fact, the policy of dispossession and Judaization after 1967 is an extension and continuation of the policy since 1948.[26] Nor does it make sense to make a distinction between "inhumane acts" and "other abuses," like in the HRW report. This is because all the abuses and crimes are "committed within the context" of the system and with the intent to maintain it.[27] Thus, when one contextualizes discrete violations of IHL – such as the wanton destruction of Palestinian property during Israeli military onslaughts – within this system of apartheid, these violations serve an additional supporting role beyond their immediate and concrete aims.[28]

From the vantage point of the totality, every particular element is understood in relation to other parts and in reference to this totality and the unifying logic of oppression and domination. The part is understood not independently, but in terms of its role in cementing the whole. When the different policies and laws that make up the system are "seen as a totality," one realizes that this system is pervasive, ubiquitous, and destructive because it "controls virtually every aspect of Palestinians' lives and routinely violates their human rights."[29] Armed with an overarching perspective, one also understands that the recursive nature of human rights violations is not "accidental repetitions," but rather evidences the systematic and institutionalized nature of Israeli oppression and domination.[30]

The existence of varying degrees of oppression and differences in Israel's treatment of Palestinian groups does not negate this totality, but is a constitutive part of it because of their

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[24] Amnesty Int'l (2022), *supra* note 3, at 33 & 266.
[25] *Id.* at 267.
[26] *See id.* at 14 & 22.
[27] *See id.* at 30.
[28] *See id.* at 31.
[29] *Id.* at 29.
[30] *Id.* at 30.

similarities, connections, and unifying logic.[31] Thus, differences should not obscure the existence of a totality:

> Israel's rule over the OPT through military orders in the context of its occupation has given rise to a false perception that the military regime in the OPT is separate from the civil system in annexed East Jerusalem and within Israel. This view ignores the fact that many elements of Israel's repressive military system in the OPT originate in Israel's 18-year-long military rule over Palestinian citizens of Israel, and that the dispossession of Palestinians in Israel continues today. The very existence of these separate legal regimes, however, is one of the main tools through which Israel fragments Palestinians and enforces its system of oppression and domination.[32]

By overcoming geographical fragmentation and legal compartmentalization, one can reveal the magnitude of suffering and the gravity of injustice:

> Amnesty International believes that the full extent of Israel's control over Palestinians is only evident when the whole context of the state's control over Palestinians in all domains is taken into consideration. Therefore, instead of assessing separately whether or not Israel has perpetrated the international wrong and the crime against humanity in each of the territories under its control, Amnesty International has analysed the system of institutionalized discrimination against Palestinians as a whole. It has reached its conclusions through legal interpretation that the system and crime of apartheid is best understood holistically as the intentional, prolonged and cruel control of one racial group by another.[33]

Despite this search for "the totality" or the "whole context" and the differences in approach, scope, and emphasis, HRW and Amnesty reports share similar legal limits. Two are of particular importance as they illustrate the challenge of translating reality to legality to accountability: first, is the disjuncture between the legal depiction of the injury and the accountability measures offered in response to it; second, is the gap between the legal category and the historical wrongs it captures.

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[31] *See id.* at 29.
[32] *Id.* at 17.
[33] *Id.* at 38.

The disjuncture between legal injury and accountability is evident in Amnesty's concrete recommendation for the ICC, which exemplifies the limits of apartheid's application. Notwithstanding the wide geographical and temporal remit, Amnesty acknowledges jurisdictional and temporal legal limitations when it asks the ICC to investigate the crime of apartheid "within the current formal investigation of crimes under international law committed in the OPT since 13 June 2014."[34] Thus, particular contexts may require a separation between the holistic identification of the crime and the concrete legal consequences that may follow, thereby limiting its ability to provide an adequate accountability to the infliction of prolonged mass suffering.

Moreover, the juxtaposition between the Amnesty and HRW reports – the holistic and legalistic approaches – outlines the limits of law's ability to depict a totality. Despite Amnesty's compelling emphasis on the totality of the system, the apartheid reports stop short of determining that Israel is an "apartheid state" because it is "a concept that is not defined in international law," as HRW points out.[35] Thus, Amnesty's finding that Israel is an apartheid regime is not translatable to concrete legal terms beyond individual criminal liability as far as international criminal law is concerned.

The problem of law's ability to capture historical wrongs (or the gap between an anti-apartheid legality and a political agenda of decolonization) compounds the difficulties facing accountability. This is evident in the refugees' case. Both the Amnesty and HRW reports emphasize the Palestinian people's fragmentation into different categories and include it as part of the intent to maintain domination.[36] Yet this fragmentation illustrates that the apartheid crime may not be capable of capturing all the aspects of the Palestine Question given the lack of clarity of Israel's territorial and legal framework and the focus on non-discrimination.[37] If the focus of fragmentation is on the 1967 territories (as in the separation between the Gaza Strip and the West Bank, and the latter's internal fragmentation) then this is a partial description as it excludes the refugees (who reside outside Israel's areas of effective control) and the unequal citizens (in pre-1967 areas).[38] Given its wider focus concerning fragmentation, HRW includes the question of refugees as an illustration of the discriminatory and exclusionary nature of Israeli nationality, citizenship, and residency policies to

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[34] *Id.* at 277.
[35] HRW (2021), *supra* note 10, at 9.
[36] *See id.* at 77.
[37] *See* Raef Zreik, *Palestine, Apartheid, and the Rights Discourse*, 34 J. PALESTINE STUD. 68 (2004).
[38] *See* U.N. Doc. A/HRC/49/87, *supra* note 8, ¶ 46.

engineer a demographic majority and maintain Israeli Jewish domination.[39] Nevertheless, it includes the blockage of refugees from returning and the confiscation of their lands within "other abuses," rather than "inhumane acts" that satisfy the apartheid criteria.[40] Thus, and notwithstanding the recommendation that Israel honor the right to return,[41] the legalistic application of the legal category of apartheid excludes the refugees who comprise the majority of Palestinians. Amnesty, in contrast, considers the denial of nationality and right of return an integral part of maintaining the system of apartheid and as examples of the commission of the inhumane act of denial of basic rights and freedoms in all territories under Israel's control.[42]

These differences in application reflect a gap between anti-apartheid legality and decolonization for two reasons. First, from a legalistic perspective it is possible to dismantle Israeli apartheid, by instituting a forward-looking egalitarian legal system and immigration policy, without necessarily allowing refugee return to pre-1967 borders or challenging pre-existing land distribution. Indeed, the legalistic approach limits apartheid to the oPt even though Israel prevents internally displaced persons who became citizens from returning to their depopulated communities inside Israel. In both cases of external and internal displacement, a demand for formal equality does not capture or rectify the historical wrong because it does not entail redistributive or historical justice.

Second, both the legalistic and holistic approaches focus on discrimination and thus decontextualize the right of return. Their demand for refugee return, whether as a part of or in addition to the negation of apartheid, reproduces the very analytical and legal fragmentation they seek to overcome. This is because the demand for the application of the individual right of return is disconnected from the collective realization of the right to self-determination. It thus would reproduce international law's ideological blind spot (as in UN General Assembly (UNGA) resolution 194 (III)) that treats the majority of Palestinians as a humanitarian case of refugees. The following section focuses on contextualization and the exclusion of self-determination.

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39 *See* HRW (2021), *supra* note 10, at 48.
40 *See id.* at 197 & 202-203.
41 *Id.* at 206.
42 *See* Amnesty Int'l (2022), *supra* note 3, at 29-32 & 61.

III. Root Causes and Colonialism

The proliferation and mainstreaming of the apartheid charge in the case of Palestine reflects the increasing attention of mainstream international human rights discourse to the context and root causes of human rights violations. This discourse also seeks to explain the phenomena of long-standing impunity and lack of accountability for human rights violations. As Susan Marks points out, however, such attempts are often unsatisfactory for three reasons.[43] First, the resulting human right discourse does not go far enough. It either: ends the inquiry prematurely without addressing larger frameworks that incessantly create the conditions that make people vulnerable to systematic abuses; or "privilege[s] the state as the primary agent of change;" or focuses "on causes that can be translated into remedial proposals."[44] Second, the discourse treats effects as causes, such as when it considers impunity and lack of accountability as a cause rather than an effect. It thus absolves the legal system because systematic and enduring human rights violations are explained away as "an anomaly or dysfunction, allowed to continue through a failure of political leadership in the country and by the international community."[45] Third, the discourse identifies root causes only to ultimately ignore them in recommendations for programmatic action, thus becoming no more than false promises that are incapable of emancipating the oppressed.[46] Ignoring root causes creates a "disconnection of explanatory analysis from practical proposals, and of strategies for change from the investigation of material conditions."[47] Consequently, contextualization is performed "not in a way that suggests the possibility of actually doing anything about [the root causes]."[48]

This section shows that many of these criticisms are applicable to Palestine. As far as conflict-mapping exercises go, the Amnesty and HRW reports make important contributions given the level of detail and aspiration to comprehensiveness. Nevertheless, the mainstream human rights discourse, as exemplified in these apartheid reports, does not go far enough. In order to flesh out this argument, this section focuses on the omission of colonialism, as evident in the exclusion of self-determination.

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[43] *See* Susan Marks, *Human Rights and Root Causes*, 74 MODERN L. REV. 57 (2011) [*hereinafter* Marks (2011)].
[44] *Id.* at 71-72.
[45] *Id.* at 72.
[46] *See id.* at 73-74.
[47] *Id.* at 73.
[48] *Id.*

A. Root Causes, Self-Determination, Resistance

The discourse on root causes in the Palestine context is not limited to human rights organizations, but is also invoked by UN officials and bodies. It is thus useful to distinguish between three different approaches to the roots and foreground the alternatives they ignore. According to a *first* occupation-centered approach, the root cause for human rights violations and the conflict is the 1967 occupation. Thus, the antidote is ending the occupation through a negotiated two-state solution. The UN Secretary-General,[49] the UN Human Rights Commissioner,[50] the Goldstone Report,[51] and the International Court of Justice (ICJ) *Wall* advisory opinion reflect this view.[52] A *second* discrimination-centered approach casts a broader analytical and geographical net and holds that the root cause is to be found in a broader context of a regime of institutionalized discrimination, which may qualify as apartheid either in part or in all of Palestine, and may qualify as colonialism in the oPt. This approach's primary demand, as in the Amnesty and HRW apartheid reports, is dismantling discriminatory structures.

Unlike these two approaches, which do not go far enough and prematurely halt the root cause inquiry, a *third* colonialism-centered approach identifies pre-1967 colonialism and its denial of Palestinian self-determination as the root cause and thus provides a more profound challenge to the two-state solution. Whereas the occupation-centered approach reduces Palestinian self-determination to the 1967 borders, the discrimination-centered approach neglects it, and the colonialism-centered approach reclaims it on the whole of historic Palestine. What is a root cause for the 1967 occupation-centered approach is considered a symptom or effect in the other two approaches. Beyond the higher level of generality, the discrimination-centered and colonialism-

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[49] *See* U.N. Secretary-General, *Opening Statement at Press Stakeout Following the Ceasefire Announcement Between Gaza and Israel,* United Nations (May 20, 2021), https://www.un.org/sg/en/content/sg/speeches/2021-05-20/statement-press-stakeout-following-the-ceasefire-announcement-between-gaza-and-israel ("I stress that Israeli and Palestinian leaders have a responsibility beyond the restoration of calm to start a serious dialogue to address the root causes of the conflict…I underscore the United Nations' deep commitment to…return to the path of meaningful negotiations to end the occupation and allow for the realization of a two-State solution on the basis of the 1967 lines, UN resolutions, international law and mutual agreements.").

[50] *See, e.g.,* Michelle Bachelet, *To Avoid Next Round Violence, Root Causes Must be Addressed – Bachelet on Escalation in Gaza and the Occupied Palestinian Territory,* U.N. Office High Comm'r Hum. Rts. (May 27, 2021), https://www.ohchr.org/en/2021/05/avoid-next-round-violence-root-causes-must-be-addressed-bachelet-escalation-gaza-and; Michelle Bachelet, *Statement by United Nations High Commissioner for Human Rights Bachelet Delivered at the Human Rights Council 49th Session,* U.N. Office High Comm'r Hum. Rts. (Mar. 25, 2022), https://www.ohchr.org/en/statements/2022/03/occupied-palestinian-territory ("I reiterate that the main driver of human rights violations in the Occupied Palestinian Territory is the occupation. My Office calls for an immediate end to all human rights violations and abuses, and to all violations of international humanitarian law. A lack of accountability lies at the heart of the ongoing violations in the Occupied Palestinian Territory, sustaining a cycle of violence and deprivation which appears to have no end.").

[51] *See Report of the United Nations Fact Finding Mission on the Gaza Conflict,* U.N. Doc. A/HRC/12/48 (Sep. 15, 2009).

[52] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9) [*hereinafter* ICJ Wall Advisory Opinion].

centered approaches have an advantage over the occupation-centered approach because they are more able to neutralize "bad faith" security-based arguments that, as Raef Zreik writes, maintain the status quo and suspend the exploration of "historical justice, sovereignty and self-determination for the Palestinians."[53] These arguments "draw their rhetorical power from the fact that there is an ongoing conflict" in order to deny Palestinian freedom, equality, and return.[54]

An important example of the turn from an occupation-centered analysis to a comprehensive system-level one is the current UN's Independent International Commission of Inquiry, which investigates the 1948 and 1967 territories and the Palestinian diaspora.[55] The UN Human Rights Council (HRC) established the "ongoing" Commission in May 2021 in order

> to investigate in the Occupied Palestinian Territory, including East Jerusalem, and in Israel all alleged violations of international humanitarian law and all alleged violations and abuses of international human rights law leading up to and since 13 April 2021, and all underlying root causes of recurrent tensions, instability and protraction of conflict, including systematic discrimination and repression based on national, ethnic, racial or religious identity…[56]

The Commission's initial report emphasizes the need for a "full context" to comprehend the situation in a systematic manner that overcomes fragmentation.[57] As the Commission explains, Israel's different policies "are all intrinsically linked, and cannot be looked at in isolation. The conflict and the occupation must be considered in their full context."[58] Thus, the Commission indicates a shift from the occupation framework to a unified "occupation plus discrimination" framework, and from examining 1967 territories in isolation to examining Israel's treatment of *all* Palestinians. Accompanying this holistic approach is an acknowledgment that the occupation is no longer temporary, but permanent. The Commission maintains that "[w]hat has become a situation of perpetual occupation" is the root cause for the instability and conflict and that ending it "remains

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[53] Raef Zreik, *Historical Justice: On First-Order and Second-Order Arguments for Justice*, 21 THEORETICAL INQUIRIES L. 491, 495 (2020).
[54] *See id.* at 501-507. For a rejection of the security rationales, *see* Amnesty Int'l (2022), *supra* note 2, at 265.
[55] *See Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*, ¶¶ 44-45, U.N. Doc. A/HRC/50/21 (May 9, 2022).
[56] U.N. Doc. A/HRC/RES/S-30/1, ¶ 1 (May 28, 2021) (24 states voted for, 9 voted against (including the Germany and the UK), and 14 abstained (including Brazil, France, and India)).
[57] U.N. Doc. A/HRC/50/21, *supra* note 55, ¶ 72.
[58] *Id.*

essential in ending the persistent cycle of violence."[59] The Commission further emphasizes that "Israel has no intention of ending the occupation."[60]

Despite the discrimination-based approach's wider search for root causes, and its emphasis on the occupation's permanent nature, the Amnesty and HRW reports focus on institutionalized discrimination and neglect colonialism, even in the oPt. They only partially heed Dugard's conclusion in his 2007 report that Israel's 1967 occupation "contains elements of colonialism, apartheid and foreign occupation."[61] The settlements in the West Bank and East Jerusalem are thus not merely illegal because they violate IHL, but also because they are a "form of colonialism of the kind declared to be a denial of fundamental human rights and contrary to the Charter of the United Nations as recalled in the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (Resolution 1514 XV)."[62]

Although Amnesty and HRW correctly emphasize the Zionist project's tenets (Judaization and maximal land with minimal Palestinians), Lynk's report is distinct in that it explicitly mentions settler colonialism, albeit confined to the 1967 territories. In a 2018 report, Lynk discusses the *de facto* annexation of large parts of the West Bank at length.[63] In his 2022 report, Lynk explains that instead of "abandon[ing] the fever-dream of settler colonialism," Israel "has chosen" to "double-down with increasingly more sophisticated and harsher methods of population control."[64] He continues:

> At the heart of Israel's settler-colonial project is a comprehensive dual legal and political system which provides comprehensive rights and living conditions for the Jewish Israeli settlers in the West Bank, including East Jerusalem, while imposing upon the Palestinians military rule and control without any of the basic protections of international humanitarian and human rights law. Against the grain of the 21st century, Israel assigns, or withholds, these rights and conditions on the basis of ethnic and national identity.[65]

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[59] *Id.* ¶ 69.
[60] *Id.* ¶ 70.
[61] U.N. Doc. A/HRC/4/17, *supra* note 23, ¶ 58.
[62] *Id.* ¶ 60.
[63] *See* Michael Lynk, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, U.N. Doc. A/73/447 (Oct. 22, 2018).
[64] U.N. Doc. A/HRC/49/87, *supra* note 8, ¶¶ 40-41.
[65] *Id.* ¶ 42.

In this formulation, the heart of Israeli settler colonial apartheid is its conduct in the oPt since 1967. Yet Lynk does not mention the Declaration on the Granting of Independence to Colonial Countries and Peoples, which stipulates that "an end must be put to colonialism and all practices of segregation and discrimination associated therewith."[66] Thus, the invocation of the settler colonial context does not feed into the legal argument separately from the charge of apartheid. It thus seems that colonialism retreats while the human rights reports foreground the "associated practices" of "segregation and discrimination" (or apartheid). The omission of colonialism echoes the same omission in the ICJ *Wall* advisory opinion. Unlike its *Chagos* advisory opinion,[67] the *Wall* advisory opinion does not mention colonialism, decolonization, or resolution 1514 (XV) in the context of the Question of Palestine.[68]

At issue here is not a semantic omission, but whether the Question of Palestine is a case of "subjection of peoples to alien subjugation, domination and exploitation."[69] It is also clear that no account can be exhaustive of all the wrongs and injustices that have befallen the Palestinians in over a century.[70] The question centers on the chosen legal framework to frame the multitude of wrongs, particularly when the aspiration is to be comprehensive of the "full context." Equally important is the colonial framework's territorial applicability.

The crucial omission in both the Amnesty and HRW apartheid reports is the right to self-determination. When compared with other and previous legal treatments of apartheid, this exclusion is revealed as a choice.[71] Consider, for example, Cassese's argument that:

> The various measures adopted by the UN with regard to apartheid warrant the conclusion that the latter has been treated as a crime of State. However, international

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[66] G.A. Res. 1514 (XV), pmbl. (Dec. 14, 1960).

[67] *See* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 95 (Feb. 25).

[68] *See* ICJ Wall Advisory Opinion, *supra* note 52.

[69] *See* G.A. Res. 1514 (XV), *supra* note 66, ¶ 1.

[70] Some pro-Israeli critics of Amnesty's report suggested that the report omits details (for instance with respect to the Palestinian citizens) in order to make Israel look worse. Yet, the report (like HRW) also omits the egregious massacre of Palestinian citizens in 1956 in Kafr Qasim, its connection to the expulsion plan ("hafarferet"), and its subsequent legal and political cover up by Israel's upper echelons. *See* ADAM RAZ, KAFR QASIM MASSACRE: A POLITICAL BIOGRAPHY (2018) (in Hebrew). Another important omission in the report is the fact that until 2000, a military court operated in Lydda with jurisdiction over Palestinian citizens who violate state security. The decades-long operation of such a court system does not only exemplify the existence of apartheid given differential treatment of Arab and Jewish citizens, it also encapsulates the enmity in the state's policy towards Palestinian citizens. *See* Smadar Ben-Natan, *Enemy-Citizens: Palestinian Citizens and Military Courts in Israel and the Occupied Territories 1967-2000*, *in* THE POLITICS OF INCLUSION AND EXCLUSION IN ISRAELI-PALESTINIAN RELATION 47 (Amal Jamal ed., 2020) (in Hebrew). Ultimately, the Amnesty report cannot be faulted for focusing on dominant tendencies and fundamental characteristics.

[71] *See* the preamble of the International Convention on the Suppression and Punishment of the Crime of Apartheid, which recalls resolution 1514 (XV) on colonialism.

> sanctions against South Africa have been urged by the UN not so much on account of massive violations of human rights, but insofar as apartheid constitutes a *threat to the peace* (Security Council Resolution 418 of 1977 stated that 'the policies and acts of the South African Government are fraught with danger to international peace and security' and then invoked Chapter VII of the Charter) or amounts to a grave manifestation of *forcible denial of self-determination*. Hence, ultimately apartheid has been regarded as an instance of gross disregard for the ban on the use or threat of force, or for the rules on self-determination, or both.[72]

The omission of self-determination from the apartheid reports is not accidental, but reflects an apolitical posture that inhibits the search for root causes. Mainstream human rights organizations avoid making judgments regarding aggression or self-determination in order to maintain a non-partisan stance in their reporting. Thus, despite the change in the legal framework from IHL to apartheid, the neutrality of human rights discourse persists. Whereas the HRW report is silent on the omission of self-determination, the organization's executive director Kenneth Roth explains elsewhere that HRW "avoids opining on the right to self-determination, even though it is centrally featured in both of the U.N.'s international covenants…because there is no principled way to determine what the relevant 'self' is."[73]

Likewise, Amnesty avoids adjudicating contested historical claims regarding self-determination in Palestine. Its "focus is on human rights violations committed by states, not the legitimacy of governments or states themselves."[74] It thus explains that it will simply focus on the "fact" or "reality" that Israel exists and that it has legal obligations:

> While recognizing the potential validity of the arguments made by some Palestinian human rights groups and others that apply the right to self-determination as the framework of analysis for the situation in Israel and the OPT, Amnesty International limits its analysis to legal frameworks that explicitly address institutionalized racial discrimination. This is because, while the organization recognizes that both the

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[72] Antonio Cassese, *Remarks on the Present Legal Regulation of Crimes of States*, *in* THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS OF ANTONIO CASSESE 403, 404 (Paola Gaeta & Salvatore Zappalà eds., 2008) (emphasis in original) [*hereinafter* Cassese (2008)].
[73] Kenneth Roth, *Saving Lives in Time of War*, DAWN MENA (Aug 5, 2022), https://dawnmena.org/saving-lives-in-time-of-war.
[74] Amnesty Int'l, *Q&A: Israel's Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity* (Feb. 1, 2022), https://www.amnesty.org/en/latest/research/2022/02/qa-israels-apartheid-against-palestinians-cruel-system-of-domination-and-crime-against-humanity.

> Jewish and the Palestinian peoples claim the right to self-determination, Amnesty International does not take a position on international political or legal arrangements that might be adopted to implement that right. Instead, the organization engages with the reality of the existence of the State of Israel, as well as the mandate for its creation in UN General Assembly Resolution 181 (II) of 1947, and the fact that, subsequent to 1967, Israel has exercised effective control over the whole territory of British mandate Palestine.[75]

The focus on the facts then precludes an inquiry into the normative justifiability of the facts. The question here is not merely future solutions, but also historical root causes. Amnesty uses the former to justify its silence regarding whether it is acceptable for the "self-determination" of one people to be achieved through the takeover of another people's homeland and the denial of their self-determination. Amnesty's self-imposed analytical limitation and historical neutrality, which effectively reproduces the historical injustice, is also evident in the choice of seemingly technical terms for momentous events, such as the repeated use of the phrase "1947-1949 conflict."[76] Whereas these legal and rhetorical attempts at detachment in the face of mass suffering may be intended to reduce controversy and shield the organization from political attacks, Israel's vehement response to the report provides no evidence for the success of such tactics.

Besides futility, however, this neutrality comes at price. Critics of neutrality with respect to causes of war, which leads human rights organizations to focus exclusively on violations of IHL, argue that it effectively legitimates war and militarism. This is because human rights discourse fails to challenge aggression and, at the same time, militaries can appropriate IHL to sustain the war effort and to reconcile soldiers with the realities of counter-insurgency and the horror of inflicting civilian deaths.[77] Moreover, applying an even-handed approach to situations of gross asymmetry of power like Palestine distorts reality, diminishes the gravity of the situation, and waters down the culpability of the stronger party.[78] Similarly, a human rights standpoint that adopts neutrality with respect to self-determination legitimates colonialism and benefits the colonizer.

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[75] Amnesty Int'l (2022), *supra* note 3, at 38.
[76] *Id.* at 41 & 81.
[77] *See generally* DAVID KENNEDY, OF WAR AND LAW (2006); SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR (2021); JAMES EASTWOOD, ETHICS AS A WEAPON OF WAR: MILITARISM AND MORALITY IN ISRAEL (2020).
[78] *See* NORMAN FINKESLTEIN, GAZA: AN INQUEST INTO ITS MARTYRDOM (2018) [*hereinafter* FINKELSTEIN (2018)].

In sum, whereas the discrimination-centered approach, which focuses on perpetual occupation and apartheid, exposes the narrowness of the 1967 occupation-centered approach, both remain limited. This is because they are unable or unwilling to confront the nature of Zionism as a colonial movement over all of historic Palestine's territory. In contrast, a third approach locates the root cause of the Question of Palestine in pre-1967 settler colonialism. Racism and discrimination in this approach are internal to the colonial framework rather than freestanding. Whereas the occupation-centered approach invokes self-determination in the oPt, and the discrimination-centered approach identifies apartheid but avoids the question of self-determination, the colonialism-centered approach insists on opening the question of self-determination within a broader historical framework. An example of this approach is Palestine Liberation Organization leader Yassir Arafat's call for a "radical approach as an antidote to an approach to international issues that obscures historical origins behind ignorance, denial, and a slavish obeisance to the present."[79] Accordingly, the root cause is not only Zionist colonialism, but also the global powers' persistent support for this colonialism (*i.e.* imperialism):

> The roots of the Palestinian question reach back into the closing years of the nineteenth century, in other words, to that period we call the era of colonialism and settlement as we know it today. This is precisely the period during which zionism as a scheme was born; its aim was the conquest of Palestine by European immigrants, just as settlers colonized, and indeed raided, most of Africa…This period persists into the present. Marked evidence of its totally reprehensible presence can be readily perceived in the racism practised both in South Africa and in Palestine…the Zionist movement allied itself directly with world colonialism in a common raid on our land…The roots of the Palestine question lie here. Its causes do not stem from any conflict between two religions or two nationalisms. Neither is it a border conflict between neighboring States. It is the cause of people deprived of its homeland, dispersed and uprooted, and living mostly in exile and in refugee camps.[80]

By foregrounding colonialism as a root cause, this view rejects the "conflict between two nationalisms with competing valid claims" idea that pervaded much of the discussion and analysis of

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[79] *See* Arafat's statement on the Palestine Question in: U.N. GAOR, 28th Sess., 2282nd plen. mtg., ¶ 24, U.N. Doc. A/PV.2282 (Nov. 13, 1974) [*hereinafter* Arafat Statement].
[80] *Id.* ¶¶ 25, 30, & 35.

the Question of Palestine from the Peel Commission of 1937 to the Oslo Accords. By grounding imperialism as a root cause – from the British empire's Balfour Declaration to the US empire's support for Israel as its highest military aid recipient and primary beneficiary of its veto power in the UN Security Council (UNSC) – this view enables a more complex understanding of the systematic and prolonged nature of human rights violations.[81]

It is crucial from this colonialism-centered approach that the omission of self-determination in the apartheid crime's application to Palestine enables the silence on the Palestinians' right to resist by use of force.[82] Linking apartheid to self-determination may lead, however, to a different position. Cassese writes:

> It is widely held that forcible denial of the right to self-determination accruing to peoples subjected to colonial domination, racist regimes or foreign occupation, entitles such peoples to use force and to seek the aid of third States…What is indisputable is that third States are authorized to lend assistance to liberation movements, in derogation from the customary rule forbidding any help to rebels fighting against the central authorities. It is thus apparent that gross infringements of the rule conferring the right to self-determination legitimize—in one form or another—the use of force by the oppressed people and of measures by third States that would otherwise be prohibited.[83]

Accordingly, there can be no equivalence between the violence of the oppressed and the violence of the oppressor. From this perspective, and unlike the equivalence in international humanitarian and criminal law (according to which war crimes and crimes against humanity can be committed by both the strong and the weak), colonial counter-insurgency reprisals to suppress resistance to colonial and racist regimes (such as the frequent Israeli military onslaughts) are illegal.[84]

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[81] *See generally* EDWARD SAID, QUESTION OF PALESTINE (1979); MAXIME RODINSON, ISRAEL: A COLONIAL-SETTLER STATE? (1973); Abdul-Wahab Kayyali, *Zionism and Imperialism: The Historical Origins*, 6 J. PALESTINE STUD. 98 (1977).

[82] Regarding this silence towards, even condemnation of, Palestinian resistance in the context of IHL application to military operations *See* Mouin Rabbani, *Human Rights Watch Goes to War*, JADALIYYA (July 11, 2014) [*hereinafter* Rabbani (2014)], https://www.jadaliyya.com/Details/30940; FINKELSTEIN (2018), *supra* note 78.

[83] Cassese (2008), *supra* note 72, at 404-405.

[84] *See* G.A. Res. 3103 (XXVIII) (Dec. 12, 1973); JOHN QUIGLEY, THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE 190-197 (2005).

B. Limits of Root Causes

The limited nature of the discrimination-centered approach illustrates the shortcomings of mainstream human rights and legal discourse because it does not go far enough in analyzing root causes. It fails to analyze the Question of Palestine in a truly comprehensive manner that adequately captures the gravity of the historical wrongs. Whether in analysis or in recommendations, this discourse separates between the colonialism of 1967 and the colonialism of 1948, instead of treating them as part and parcel of the same structure and process and driven by the same political ideology.[85]

Despite identifying institutionalized racial discrimination in Israel proper, the HRW report does not extend the charge of apartheid to all of Israel's territory,[86] and it does not identify colonialism as a fundamental constitutional feature in so-called Israel proper,[87] even when it discusses the Law of Return.[88] Despite discussing the 2018 Basic Law: Israel as the Nation-State of the Jewish People,[89] HRW does not conclude that the law constitutionalizes Israeli colonialism and apartheid on all of Palestine's territory.[90] Despite Amnesty's identification of apartheid in Israel proper, its references to Israel's Declaration of Independence suggest that is does not object to the very idea of a "Jewish state" as inherently discriminatory but only to "its concrete demographic interpretation and implementation."[91] Despite references to policies of Judaization and land appropriation in pre-1967 borders as instances of the "intent to dominate,"[92] the mainstream human rights reports do not equate the policies with an ongoing process of colonization which seeks to turn the majority into a minority and take over native land.[93] Similarly, the discussion of the Jewish National Fund's role in

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[85] *See* Nimer Sultany, *International Law's Indeterminacy and 1948 Palestine: Two Comments on Aeyal Gross's 'The Writing on the Wall',* 6 LONDON REV. INT'L L. 315 (2018); Ralph Wilde, *Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation*, 22 PALESTINE Y.B. INT'L L. 3 (2019-2020) [*hereinafter* Wilde (2020)].

[86] *Compare with* John Quigley, *Apartheid Outside Africa: The Case of Israel*, 1 IND. INT'L & COMP. L. REV. 221 (1991).

[87] *Compare with* MAZEN MASRI, THE DYNAMICS OF EXCLUSIONARY CONSTITUTIONALISM: ISRAEL AS A JEWISH AND DEMOCRATIC STATE (2017); Hassan Jabareen, *How the Law of Return Creates One Legal Order in Palestine*, 21 THEORETICAL INQUIRIES L. 459 (2020).

[88] *See* HRW (2021), *supra* note 10, at 48.

[89] *See id.* at 6-7 & 45-46.

[90] *Compare with* Nimer Sultany, *Israeli Nation State Law and Constitutionalizing Zionist Colonialism*, AL-QUDS AL-ARABI (July 31, 2018) (in Arabic); Hassan Jabareen & Suhad Bishara, *The Jewish Nation-State Law: Antecedents and Constitutional Implications*, 48 J. PALESTINE STUD. 43 (2019).

[91] Smadar Ben-Natan, *The Apartheid Reports: A Paradigm Shift on Israel/Palestine (Part II)*, OPINIO JURIS (April 13, 2022), http://opiniojuris.org/2022/04/13/the-apartheid-reports-a-paradigm-shift-on-israel-palestine-part-ii. *See also* Amnesty Int'l (2022), *supra* note 3, at 14 & 63.

[92] *See* HRW (2021), *supra* note 10, at 57-63.

[93] *See generally* ELIA T. ZUREIK, THE PALESTINIANS IN ISRAEL: A STUDY IN INTERNAL COLONIALISM (1979).

the reports neglects the role of Zionist organizations as instruments of colonization prior to and after the state's establishment.[94]

In contrast, Zionist leaders were forthcoming about the colonial nature of the Zionist project. For example, before the UN Special Committee on Palestine in July 1947, Chaim Weizmann considered Zionist colonialism praise-worthy when "compared with the result of the colonizing activities of other peoples" in terms of its effects on the colonized "backward populations."[95] He explained:

> All of you will remember the East Indian Charter Company. But charter companies were hard to fashion in 1918, the first quarter of the twentieth century. The Wilsonian conception of the world certainly would not have allowed a charter company. Therefore, we had to create a substitute. This substitute was the Jewish Agency which had the function of a charter company, which had the function of a body which would conduct the colonization, immigration, improvement of the land, and do all the work which a government usually does, without really being a government.[96]

In light of this, it is quite ironic that most invocations of apartheid and colonialism relate to the 1967 territories.[97] Earlier invocations of these frameworks in the Palestine context, such as in Fayez Sayegh's work, preceded 1967.[98] Moreover, as Hassan Jabareen shows, Israeli jurisprudence laid the foundations for colonial apartheid vis-à-vis Palestinian citizens inside Israel in the state's early days.[99]

The overall effect of this limited approach to root causes is that it normalizes Israel as a typical and imperfect nation-state. HRW writes:

> While states are sometimes associated with a religious or ethnic identity, a states' prerogative to define its own identity and promote it is not unlimited; it is not a license to violate the fundamental rights of others. Laws and policies adopted by the

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[94] *See* HRW (2021), *supra* note 10, at 54-55.
[95] *See* U.N. GAOR, 2nd Sess., 21st mtg., *Hearing of the Jewish Agency (Weizmann) – United Nations Special Committee on Palestine*, U.N. Doc. A/364/Add.2 PV.21 (July 8, 1947).
[96] *Id.*
[97] *See* Nimer Sultany, *Colonial Realities: From Sheikh Jarrah to Lydda*, MONDOWEISS (May 12, 2021), https://mondoweiss.net/2021/05/colonial-realities-from-sheikh-jarrah-to-lydda.
[98] *See generally* FAYEZ A. SAYEGH, ZIONIST COLONIALISM IN PALESTINE (1965).
[99] *See* Hassan Jabareen, *Agranat's Kul Haam! Which People's Voice?,* 44 IYUNI MISHPAT 627 (2021) (in Hebrew); Hassan Jabareen, *Hobbesian Citizenship: How the Palestinians Became a Minority in Israel*, *in* MULTICULTURALISM AND MINORITY RIGHTS IN THE ARAB WORLD 189 (Will Kymlicka & Eva Pföstl eds., 2014).

> Israeli government to preserve a Jewish majority have afforded benefits to Jews at the expense of the fundamental rights of Palestinians.[100]

But Israel is not a case of a pre-existing national majority that exercises the right to self-determination in a well-defined territory with a legal obligation to respect minority rights. Rather, it claims to represent an extra-territorial and trans-historical nation with exclusive ownership over Palestine despite the majority of that nation being from outside Palestine.[101] While HRW discusses the "demographic considerations" in maintaining a Jewish majority,[102] Zionism is the very project of coercively creating this majority in another nation's homeland. Thus, it cannot be reduced, as in HRW's report, to a question of discriminatory immigration policy:

> International human rights law gives broad latitude to governments in setting their immigration policies. There is nothing in international law to bar Israel from promoting Jewish immigration. Jewish Israelis, many of whom historically migrated to Mandatory Palestine or later to Israel to escape anti-Semitic persecution in different parts of the world, are entitled to protection of their safety and fundamental rights. However, that latitude does not give a state the prerogative to discriminate against people who already live in that country…[103]

Yet the problem cannot be reduced to inequality, exclusion from state identity, or lack of democracy. Nor can the contested nature of Jewish immigration be reduced to the question of refuge. As Arafat explained in 1974, the objectionable nature of Jewish immigration emanated from its goal "to usurp our homeland, disperse our people, and turn us into second-class citizens."[104] The nature of the majority-minority relations inside pre-1967 Israel is colonial, given that both Israel and Zionism reject the Palestinians' political existence and deny their political relation to their homeland.

Ultimately, HRW's blind spots effectively demonstrate the limits of international human rights law (IHRL) when applied to a colonial context without regard to that context. In Amnesty's case, it is the awareness of IHL's limitations that requires the need for a holistic view to capture the root

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[100] HRW (2021), *supra* note 10, at 48.
[101] *See* Azmi Bishara, *Zionism and Equal Citizenship: Essential and Incidental Citizenship in the Jewish State*, *in* ETHNIC PRIVILEGES IN THE JEWISH STATE: ISRAEL AND ITS PALESTINIAN CITIZENS 137 (Nadim N. Rouhana ed., 2017); Nimer Sultany, *Liberal Zionism, Comparative Constitutionalism, and the Project of Normalizing Israel*, *in* ON RECOGNITION OF THE JEWISH STATE 91 (Honaida Ghanim ed., 2014).
[102] *See* HRW (2021), *supra* note 9, at 45-53.
[103] *Id.* at 18.
[104] Arafat Statement, *supra* note 79, ¶ 43.

causes. Amnesty writes that "addressing Israeli violations against Palestinians in the occupied West Bank and Gaza Strip merely within the framework of international humanitarian law, and separately from the violations perpetrated against Palestinians in Israel, has failed to tackle the root causes of the conflict and achieve any form of accountability and justice for the victims."[105] Despite this, Amnesty limits itself to the 1967 territories in some of its recommendations for actions when it calls "on states to institute and enforce a ban on products from Israeli settlements."[106] For concrete action purposes, it thus separates what is analytically inseparable. But if there is one overarching system or totality of apartheid, then limiting the boycott to settlements is a self-imposed limitation that does not exert pressure on the entire system. It thus seems that despite the move from occupation to apartheid, some of the limits of the occupation framework's accountability mechanisms survive in the apartheid framework. Overall, the Amnesty and HRW interventions highlight the limits of both IHL and IHRL, whether applied separately or jointly, and illuminate the problem in applying the law to (and developing a human rights discourse within) a de-historicized "1947-1949 conflict."[107]

C. Law's Limits and Complicity

The preceding discussion reflects the limits of deploying legal and human rights discourse in the service of anticolonial liberation, given that it has been unable to name the colonial condition as the root cause or to capture the historical wrongs inflicted on the Palestinians. The occupation-centered approach that applies IHL reproduces not only its neutrality (regarding causes of war) and futility (in failing to humanize war), but also the blind spots and limitations of occupation law. In particular, occupation law reduces the Palestinian right to self-determination to the 1967 borders,[108] and is silent on the lawfulness of the prolonged occupation itself.[109]

Likewise, the discrimination-centered approach not only reproduces the indeterminacy and limits of apartheid; its omission of colonialism and self-determination is reflective of a more general indeterminacy in international law. From a positivist reading, UNGA resolution 1514 would seem to legitimate forms of settler colonialism that preceded its adoption in 1960 and thus may not challenge

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[105] Amnesty Int'l (2022), *supra* note 3, at 34.
[106] *Id.* at 35.
[107] *Id.* at 15.
[108] *See* Hani Sayed, *The Fictions of the 'Illegal' Occupation in the West Bank and Gaza*, 16 OR. REV. INT'L L. 79 (2014); Wilde (2020), *supra* note 85, at 9-20.
[109] *See* John Reynolds, *Anti-Colonial Legalities: Paradigms, Tactics, and Strategy*, 18 PALESTINE Y.B. INT'L L. 8, 31-34 (2015) [*hereinafter* Reynolds (2015)].

Israel's pre-1967 borders through concrete recommendations.[110] From the perspective of law as constitutive of identities and relations, an international legal emphasis on negotiated settlement – that effectively undermines proclamations of inadmissibility of territorial conquest – disempowers effective legal articulations of a decolonization agenda.[111] The ability of frameworks like colonialism and apartheid to overcome international law's "structural biases and indeterminacy," as John Reynolds writes, "remains questionable."[112]

Moreover, legal discourse is not only limited and indeterminate, but also complicit in the colonization of Palestine. The "application of the law" agenda (from lawlessness to the international rule of law) is ultimately incapable of achieving justice and freedom for Palestinians even if the law were fully enforced. This agenda is oblivious to colonialism and to law's complicity in it, and thus legitimates the international legal order. Ultimately, the main legal pillars of the Question of Palestine are unjust to the Palestinians and fundamentally objectionable. In the first instance, the Palestine Mandate incorporated the Balfour Declaration and denied the native population self-government. Further, UNGA resolution 181 codified settler colonialism against the wishes of the majority of the population and led to the ethnic cleansing of the natives.[113] The partition resolution is defenseless, Bassiouni argues, not only because of the unjust and pro-Zionist "territorial apportionment," but also given the country's "demographic transformation" under foreign colonial rule.[114] Bassiouni further points out that neither UNGA resolution 194 nor UNSC resolution 242 recognize the Palestinians as a stateless people with national rights, but only as a humanitarian category of refugees.[115] Finally, UNSC resolution 242 effectively codified previous Israeli acquisitions of territory by force (in violation of UNGA resolution 181 and the armistice cease fire agreements) and turned the Palestine issue into a border dispute.[116] For Cattan, resolution 242 was a "formula designed to liquidate the Palestine Question and to legitimate Israel's illicit territorial expansion."[117]

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[110] *See id.* at 14.
[111] *See* Omar Shehabi, *No Alternative to Despair? Sahrawis, Palestinians, and the International Law of Nationalism*, 23 PALESTINE Y.B. INT'L L. __ (2021) (this volume).
[112] Reynolds (2015), *supra* note 109, at 52.
[113] *See generally* HENRY CATTAN, THE PALESTINE QUESTION (2000) [*hereinafter* CATTAN (2000)]; Nabil Elaraby, *Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements*, 33 L. CONTEMP. PROBS. 97 (1969) [*hereinafter* Elaraby (1969)]; M. Cherif Bassiouni, *Some Legal Aspects of the Arab-Israeli Conflict*, *in* THE ARAB-ISRAELI CONFRONTATION OF JUNE 1967: AN ARAB PERSPECTIVE 91 (Ibrahim Abu Lughod ed., 1970); Ardi Imseis, *The United Nations Plan of Partition for Palestine Revisited: On the Origins of Palestine's International Legal Subalternity*, 57 STAN. J. INT'L L. 1 (2021).
[114] M. Cherif Bassiouni, *Self-Determination and the Palestinians*, 65 AM. SOC'Y INT'L L. PROC. 31, 36 & 38 (1971).
[115] *See id.* at 35.
[116] *See* Elaraby (1969), *supra* note 113; CATTAN (2000), *supra* note 113.
[117] CATTAN (2000), *supra* note 113, at 283.

Together, UNGA resolution 181 and UNSC resolution 242 provide the basis for a two-state discourse that relegates Palestinian citizens inside Israel into an inferior juridical status within a Jewish state.[118] If the 1967 occupation – or apartheid (when recognized only in oPt) – ends, then the racist structure of the Jewish state may be left unaddressed. It is worth recalling in this context that the peace process is premised on renouncing UNGA's recognition and condemnation of Zionist racism and Israeli apartheid and maintaining the Jewishness of the state in pre-1967 borders.[119] The demographic consideration of maintaining the Jewish majority to perpetuate Jewish privileges and control over the state ("security as a Jewish state") motivates Israeli and US support for the Oslo process.[120] Then, whether by means of war or peace, the Israeli and Zionist goal is to safeguard the consequences of settler colonialism, which engineered this majority and robbed the Palestinians of their homeland.

These are the legally sanctioned root causes that the mainstream human discourse rarely confronts. In these major instances, the law is part of the problem because it has sanctioned Zionist colonization and has tolerated – even rewarded – its expansionism and aggression at crucial junctures. An examination of the root causes that reduces the problem to the lack of enforcement of UNGA resolution 181 and UNSC resolution 242 simplifies the Question of Palestine and overlooks these long-standing injustices. Perhaps, then, the root cause is one of legalized suffering. The next section turns to this question.

IV. Law and Impunity

A major feature of the recent mainstream human rights reports is that they highlight the long-standing impunity for grave, widespread, and well-documented human rights violations in Palestine. This condition of failure motivates the search for root causes for human rights violations. It also produces a "discourse of failure" that recognizes that international law and institutions have hitherto

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[118] *See* Jamil Dakwar, *People Without Borders for Borders Without People: Land, Demography, and Peacemaking Under Security Council Resolution 242*, 37 J. PALESTINE STUD. 62 (2007); Mazen Masri, *The Two-State Model and Israeli Constitutionalism: Impact on the Palestinian Citizens of Israel*, 44 J. PALESTINE STUD. 7 (2015).

[119] *See* G.A. Res. 3379 (XXX), *Elimination of All Forms of Racial Discrimination* (Nov. 19, 1975) (which was rescinded by G.A. Res. 46/86 (Dec. 16, 1991) ahead of the Madrid international peace conference).

[120] *See e.g.* United States-Israel Enhanced Security Cooperation Act of 2012, H.R. 4133, 112th Congress (2012) (enacted); *Remarks of President Barack Obama To the People of Israel*, The White House, President Barack Obama (Mar. 21, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/03/21/remarks-president-barack-obama-people-israel; United States-Israel Strategic Partnership Act of 2014, Pub. L. 113–296, 128 Stat. 4075 (2014).

failed the subaltern and have not delivered on their promises. This failure, however, is perceived as external to law. It is primarily a question of lack of enforcement, whether because of inaction or selectivity. It is a failure of political will to enforce the law. It is the absence of law that enables systematic human rights violations.

The argument in what follows is that the discourse of failure obscures the fact that human rights and international law are sites of contestation and conflict and thus can be mobilized to advance conflicting visions – including ones that enable human suffering.[121] As such, the discourse masks law's dual capacity to hold to account and enable impunity, because of the role it can play in the production and legitimation of mass suffering, as in the case of the legal sanctions on Iraq during the 1990s.[122] Consequently, it obfuscates the fact that impunity is neither an abnormality nor an exception, but rather a generalized condition that can be observed whether the law is vigorously applied or violated. In other words, legality does not necessarily negate impunity because the latter may be an internal condition to legality.[123]

A. The Discourse of Failure and Its Discontents

The discourse of failure emphasizes the long-standing political failure to enforce the law, especially by the international community. HRW exemplifies this discourse when it writes that "the international community has for too long explained away and turned a blind eye to the increasingly transparent reality on the ground."[124] Amnesty International offers a similar damning assessment of the international community's inaction and lack of enforcement:

> …for over seven decades, the international community has stood by as Israel has been given free rein to dispossess, segregate, control, oppress and dominate Palestinians. The numerous UN Security Council resolutions adopted over the years have remained unimplemented with Israel facing no repercussions for actions that have violated international law apart from formulaic condemnations...Without taking any meaningful action to hold Israel to account for its systematic and widespread violations and crimes under international law against the Palestinian population, the

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[121] *See generally* UPANDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2nd ed., 2006).
[122] *See generally* SCOTT VEITCH, LAW, AND IRRESPONSIBILITY: ON THE LEGITIMATION OF HUMAN SUFFERING (2007).
[123] *See id.* at 8, 10-11, & 17.
[124] HRW (2021), *supra* note 10, at 21.

> international community has contributed to undermining the international legal order and has emboldened Israel to continue perpetrating crimes with impunity.[125]

Of course, there are good reasons for this sense of failure. As Lynk explains, Israel "has rarely paid a meaningful price for its defiance, and its appetite for entrenching its annexationist ambitions in East Jerusalem and the West Bank has gone largely unchecked."[126] Indeed, the "international community" has failed to pressure Israel to end its illegal acquisition of territory by force or reverse oppressive measures such as decades of construction of colonies in the West Bank,[127] the 20-year old apartheid wall in the West Bank, and the 15-year blockade on Gaza.[128]

Yet, the longer the failure continues, the more conspicuous the failure of the discourse to raise fundamental questions about the law's role. The discourse of failure is itself by no means new. The long-standing failure of law produces a long-standing discourse about the failure of law to achieve accountability. Yet this discourse does not assign the failure to law itself, but to its absence due to the failure of the international community or the West to implement it. It is a political, rather than legal failure. According to Dugard:

> The Occupied Palestinian Territory is of special importance to the future of human rights in the world. Human rights in Palestine have been on the agenda of the United Nations for 60 years; and more particularly for the past 40 years since the occupation of East Jerusalem, the West Bank and the Gaza Strip in 1967. For years the occupation of Palestine and apartheid in South Africa vied for attention from the international community. In 1994, apartheid came to an end and Palestine became the only developing country in the world under the subjugation of a Western-affiliated regime. Herein lies its significance to the future of human rights. There are other regimes, particularly in the developing world, that suppress human rights, but there is no other case of a Western-affiliated regime that denies self-determination and human rights to a developing people and that has done so for so long. This

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[125] Amnesty Int'l (2022), *supra* note 3, at 33-34.
[126] U.N. Doc. A/73/447, *supra* note 63, ¶ 60.
[127] *See e.g.* S.C. Res. 2334 (Dec. 23, 2016).
[128] *See* Al-Mezan, *supra* note 9; Human Rights Watch, *Gaza: Israel's 'Open-Air Prison' at 15* (June 14, 2022), https://www.hrw.org/news/2022/06/14/gaza-israels-open-air-prison-15; Oxfam Int'l, *Israel's Blockade of Gaza Hits 15 Years With no Diplomatic Resolution in Sight* (June 15, 2022), https://www.oxfam.org/en/press-releases/israels-blockade-gaza-hits-15-years-no-diplomatic-resolution-sight; U.N. OCHA, *Gaza Strip: The Humanitarian Impact of 15 Years of the Blockade – June 2022* (June 30, 2022), https://www.ochaopt.org/content/gaza-strip-humanitarian-impact-15-years-blockade-june-2022.

> explains why the OPT has become a test for the West, a test by which its commitment to human rights is to be judged. If the West fails this test, it can hardly expect the developing world to address human rights violations seriously in its own countries, and the West appears to be failing this test.[129]

What makes Palestine a test for international law and human rights is that it is an instance of long-standing fundamental rights violations, chief among them being the right to self-determination. Since 1948, which coincided with the adoption of the Universal Declaration of Human Rights, human rights have developed and became a dominant and ubiquitous global discourse. Its ascendancy coincided with the long-term denial of Palestinian rights. The increasing power of human rights has seemingly left little effect on the prolonged oppression of the Palestinians. Yet, for Dugard, this is a test for the West, rather than for law or rights, because of Western selectivity. Western states enable human rights violations, such as Israel's denial of fundamental Palestinian rights, when Western-affiliated regimes are the culprits.

Accordingly, the human rights regime remains intact regardless of whether the West fails the Palestine test. In light of this diagnosis, the long-standing discourse of failure about impunity becomes part of the law's failure. This is because the discourse feeds into the perceived gap between reality and legality by reasserting its demands despite its acknowledgment of the enduring failure to realize them. It neither changes the underlying condition of failure that gives rise to the discourse, nor correctly diagnoses the failure (because it absolves the law from complicity).

Consider, for instance, the UN HRC's observation, 15 years after Dugard's call, "that the failure to bring the occupation to an end after 55 years heightens the international responsibility to uphold the human rights of the Palestinian people," and conveys "its deep regret that the question of Palestine remains unresolved 75 years since General Assembly resolution 181 (II) of 29 November 1947 on partition."[130] Despite this failure, the HRC reaffirms "the inalienable, permanent and unqualified right of the Palestinian people to self-determination, including their right to live in freedom, justice and dignity and the right to their independent State of Palestine."[131] It also calls upon Israel "to immediately end its occupation of the Occupied Palestinian Territory, including East

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[129] U.N. Doc. A/HRC/4/17, *supra* note 23, ¶ 63.
[130] U.N. Doc. A/HRC/RES/49/28, pmbl. (Apr. 11, 2022).
[131] *Id.* ¶ 1.

Jerusalem, and to reverse and redress any impediments to the political independence, sovereignty and territorial integrity of Palestine…"[132]

While the call for an immediate end of the occupation is laudable, the repeated nature of this call in the face of recalcitrance undermines its potency and underscores the very failure that the HRC laments. A call to reverse the status quo directed at Israel in light of decades of insubordination is less of an authoritative demand as much as a feeble pleading. The discourse of failure thus effectively highlights the predicament of impunity at the heart of international law in light of the asymmetry between suffering and accountability. The human rights discourse enumerates a long list of grave violations that go unpunished and reiterates a list of demands that remain unanswered. This paradox does not instill confidence in law's power to do in the future what it has failed to do for decades, even with reference to lesser charges than apartheid and weaker demands than ending the occupation or reversing the West Bank's colonization. On the contrary, the more potently legal bodies demand, the more powerless they appear in the face of a recalcitrant state. The greater the suffering they expose – as in enduring cases of apartheid and colonialism – the more glaring the inaction and impunity.

B. More Law?

The proliferation of treaties,[133] reports, commissions of inquiry and fact-finding missions,[134] and monitoring mechanisms do not necessarily improve the plight of the oppressed.[135] Adding more law by identifying more crimes than previously acknowledged merely accentuates the paradox at the heart of legal attempts to hold perpetrators responsible. Whereas identifying apartheid is an important development because it approximates the reality of the oppressed and offers more potential tools to deploy and avenues to petition (such as the ICC), it does not offer a way out of the already existing predicament of impunity. The greater the recognition of mass suffering in Palestine, the clearer international law's helplessness becomes. Whereas this recognition of apartheid adds another ground for the condemnation of international law's inefficacy or the international community's inaction to hold the powerful to account for so long, it is unlikely to fare better in terms of enforcement than previous lower-level charges. This is because it does not change the

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[132] *Id.* ¶ 3.
[133] For a list of Palestine's accession to international treaties since 2014, *see* the UN Treaty Body Database: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=217&Lang=en.
[134] *See generally* LORI ALLEN, A HISTORY OF FALSE HOPE: INVESTIGATIVE COMMISSIONS IN PALESTINE (2020) [*hereinafter* ALLEN (2020)].
[135] *See* Marks (2012), *supra* note 2, at 318.

conditions that enabled impunity in the first place. So long as these conditions persist, a change in the legal analysis from "occupation" to "unlawful occupation" to "apartheid" is not going to transform law into a potent force for positive change. It may, however, legitimate the status quo. By allowing Israeli apartheid to be named without credible prospects for serious sanctions, it maintains the idea of law as a progressive, rights-affirming, subaltern-protecting force, while leaving law's role in enabling the fundamental injustice untouched.

Paradoxically, the more human rights organizations seek to demonstrate that international law matters by documenting abuses and illustrating the applicability of legal categories like apartheid to a particular case, the more they expose its inability to significantly change the reality of the oppressed. The more they document, the louder they denounce, the graver the accusations they hurl, the more suffering they recognize, and the firmer they demand the law's enforcement; the more they increase the sense that law's promise is unrealizable. In this context, the problem of the long list of recommendations in the Amnesty and HRW apartheid reports directed at the US and European states is that it not only amplifies the failure of the international community given the extensive list of unfulfilled obligations, but also the enormity of the task of achieving accountability and justice for the Palestinians. The list of recommendations is both empowering and disempowering because it does not chart a path towards changing the status quo by overcoming existing opposition and bridging the gap between reality and legality. Under these conditions, a list of obligations and recommendations risks turning human rights into a false promise.

From a Palestinian perspective, the repeated expressions of "deep regret" and lamentations of failure are of little practical use when not accompanied by a political program that charts a path from impunity to accountability. After all, Palestine is a primary example of the violation of fundamental rights in "daylight" rather than under the cover of darkness.[136] As Lynk writes, "[w]ith the eyes of the international community wide open, Israel has imposed upon Palestine an apartheid reality in a post-apartheid world."[137] While documentation is crucial, what is really missing is not documentation but, as Amnesty says, "meaningful action."[138] As Arafat reminded the UNGA in

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[136] *See* Susan Marks, *Four Human Rights Myths*, *in* HUMAN RIGHTS: OLD PROBLEMS, NEW POSSIBILITIES 217 (David Kinley, Wojciech Sadurski, & Kevin Walton eds., 2013).
[137] U.N. Doc. A/HRC/49/87, *supra* note 8, ¶ 59.
[138] Amnesty Int'l (2022), *supra* note 3, at 34.

1974, "Zionist terrorism which was waged against the Palestinian people to evict it from its country and usurp its land is registered in your official documents."[139]

A political roadmap from impunity to accountability would require an adequate analysis of impunity: its causes, its prevalence, and the forces behind it. Yet the discourse of failure risks postulating impunity as a cause rather than an effect of the protracted conflict, as well as an exception rather than the norm. In its May 2022 report, the UN Independent Commission explains that:

> This review of past reports indicates that impunity is feeding increased resentment among the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and in Israel and is fuelling recurrent tensions, instability and protraction of conflict and an endless cycle of violence that compromises chances for sustainable peace and security.[140]

Thus, this concern with impunity risks treating impunity as a cause for fueling the conflict, rather than an effect of the protracted conflict, by highlighting the law's absence and then laying the blame for this absence at the door of the political will of the duty-bearers, whether the offending state or international community.[141]

With respect to Israel's legal obligations, the question is whether impunity is the cause for the systematic violations of human rights or their effect. Suggesting that impunity is a cause implies that had the law been present, these systematic violations would not have occurred or continued for an extended period of time. Colonizers, however, do not forcibly transfer native populations, confiscate their lands, build settlements, and suppress resistance because of the law's inability to obstruct their designs, but because they want to dominate, dispossess, and exploit. In fact, the law may facilitate such colonialism.[142] The lack of accountability is an effect of the colonial condition and an integral and typical aspect of it. Thus, pointing out Israel's obligations under international law, and calling upon it to end its systematic violations and dismantle apartheid while it is entrenching its

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[139] Arafat Statement, *supra* note 77, ¶ 49.
[140] U.N. Doc. A/HRC/50/21, *supra* note 55, ¶ 71.
[141] *See* Marks (2011), *supra* note 43, at 72.
[142] *See generally* SAMERA ESMEIR, JURIDICAL HUMANITY: A COLONIAL HISTORY (2012).

domination,[143] is futile because that negates the very logic of the colonial condition in which impunity is the norm, even when legality reigns.

While the discourse of failure that blames the political will of the international community is important, it is ultimately neither helpful in illuminating the causes and forces of impunity nor powerful enough to defeat impunity. On the one hand, the discourse of failure is not powerful enough to deliver accountability neither legally (given the weakness of enforcement mechanisms when powerful interests oppose them) nor politically (because international relations are not governed by the power of the better argument or necessarily guided by moral concerns).[144] This condition leads to a paradoxical situation in which the more this discourse laments failure and the more it repeats the demand for enforcing the law, the more it weakens the sense that impunity is the exception to accountability and that violations are the exception to enforcement.

On the other hand, the repeated use of abstract phrases like the "international community" in the discourse of failure is unhelpful in understanding the reasons for this weakness. This is because they are generic and provide little explanatory value in terms of assigning responsibility for impunity. The discourse eschews analytical and historical terms like imperialism and thus fails to name the handful of powerful actors behind this failure who play an outsized role in international affairs and in the Question of Palestine (the US in particular). A human rights discourse that ignores imperialism abstracts rights claims from the real-world context in which they are operationalized.[145] Imperialism, as Issa Shivji notes, is not an additional external factor, but a structural element of oppressive relations.[146] If, as suggested earlier, imperialism is a root cause for human rights violations and impunity in Palestine, the struggle for Palestinian liberation and the vindication of Palestinian rights necessitates an anti-imperialist agenda that opposes the US empire.

Finally, this discourse of impunity has distraction effects. The problem is not merely one of lack of enforcement, but also one of (initially) mistaken and (subsequently) delayed legal diagnosis, as shown by the lack of novelty in the factual basis for the apartheid reports. This lag means that a decades-long suffering goes unexposed for what it is, and changes on the ground become even more

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143 *See* Amnesty Int'l (2022), *supra* note 3, at 272.

144 *See* Noam Chomsky, *The Possibility of Humanitarian Intervention: Are States Moral Agents?*, BOSTON REV. (Dec. 1, 1993), https://bostonreview.net/articles/chomsky-possibility-humanitarian-intervention.

145 *See* ISSA G. SHIVJI, THE CONCEPT OF HUMAN RIGHTS IN AFRICA 53-59 (1989) [*hereinafter* SHIVJI (1989)]. *See also* RADHA D'SOUZA, WHAT'S WRONG WITH RIGHTS? SOCIAL MOVEMENTS, LAW, AND LIBERAL IMAGINATIONS (2018).

146 *See* SHIVJI (1989), *supra* note 145, at 69.

irreversible, partly because of the delayed recognition of the crimes. Mainstream human rights discourse lags behind reality and the human rights cavalry shows up to the battlefield too late. Thus, mainstream international human rights organizations are obscuring their own responsibility when they criticize the international community's failure for inaction.

This failure is not limited to a misdiagnosis of a situation of apartheid. The discourse of failure is oblivious to the complicity of international law, international bodies, and international legal academic commentary in deferring and undermining Palestinian self-determination and thus prolonging the occupation. Despite repeatedly demanding the end of the occupation of the oPt, this demand has been routinely subjected to conditions – in particular the emphasis on negotiated settlement and safeguarding Israel's security – that reproduce the asymmetry of power between the colonizer and the colonized and defer liberation and make it unlikely.[147] Thus, the problem here is not lack of enforcement as much as it is the intertwinement of law with objectionable politics that recall the colonial era conditioning of non-European peoples' freedom on meeting externally imposed conditions.[148]

In sum, the discourse of failure is doubly misleading to the extent that it presents impunity as an exception despite its enduring quality and reduces the problem to lack of enforcement when the difficulty emanates from bad law and indeterminacy as much as the inefficacy of good law. This is not to deny that violations occur, but to query the normative effects of that fact on understanding law and rights, and to account for the persistence of political and economic structures that undermine their emancipatory potential.

V. Selectivity and the Rules-Based International Order

The discourse of failure is not only misleading, but also self-defeating insofar as it presupposes the existence of a rules-based or law-governed international order. This section focuses on the criticism of selectivity as an offshoot of the criticism of lack of enforcement. The criticism of selectivity reduces the problem to a political will external to law and suggests that if only the law were enforced even-handedly, then accountability for crimes and remedy for suffering would be achieved. Yet the

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[147] *See* Ardi Imseis, *Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine 1967-2020*, 31 EUR. J. INT'L L. 1055 (2020).
[148] *See* Wilde (2020), *supra* note 85, at 43-67.

idea of a "rules-based international order" wrongly presumes that everyone is subject to the law and plays by the same rules.

The reduction of the problem to external politics is surprising in light of the voluntary and cooperative character of international law.[149] Political will (practice, consent, and compliance) is inherent to the system and is supposed to have a normative effect on the evolution of international norms. In such a system, selectivity is endemic to the operation of international law because it is structural. It is not an ephemeral dysfunction, but a systematic and enduring feature beyond the Question of Palestine.

When it comes to veto power holders, impunity for global superpowers is part and parcel of the international order. The criticism of double standards, hypocrisy, and selectivity elides the crucial fact that this is a structural problem of the international legal order because the order does not establish one system of accountability for all. The powerful can break the rules with impunity because the rules allow them to do so.[150] They can be selective regarding who they shield from accountability because the legal order empowers them to do so.[151] Unfairness is systemic.[152] This legally enshrined veto power enables the US to shield Israel from accountability.

Moreover, the international order enables states like Israel to ignore ICJ advisory opinions. These opinions may stipulate and clarify the law, but at the end of day they are non-binding. By designating them as non-binding, the legal order enables the very lack of enforcement that human rights organizations and UN committees decry. Israel is not the only state that rebuffed a damning ICJ advisory opinion, as the United Kingdom's (UK) rejection of the *Chagos* ruling on its unlawful occupation illustrates.[153]

Thus, the problem of impunity cannot be explained away by reference to selectivity because selectivity itself is a structural feature. First, the forces of impunity are not selective because they are misguided, forgetful, or ignorant (and thus the role of human rights organizations is merely to

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[149] *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 15 (2019).
[150] *See* Samuel Moyn, *The 'Rules-Based International Order' Doesn't Constrain Russia – or the United States*, WASH. POST (Mar. 21, 2022), https://www.washingtonpost.com/outlook/2022/03/01/ukraine-international-order-un.
[151] For a list of cases of use of veto power in the UNSC, *see*: https://www.un.org/Depts/dhl/resguide/scact_veto_table_en.htm.
[152] *See* Simon Waxman, *What Rule-Based International Order?*, BOSTON REV. (Mar. 2, 2022), https://bostonreview.net/articles/what-rule-based-international-order.
[153] *See e.g.* Sir Alan Duncan, British Indian Ocean Territory, Statement Made on 30 April 2019, Statement UIN HCWS1528, https://questions-statements.parliament.uk/written-statements/detail/2019-04-30/HCWS1528.

remind them of their obligations and the need for consistency).[154] Rather, it is because their interests and geopolitical considerations guide them into a selective and self-serving application. International law is a medium in which conflicts of interest are articulated, resolved, or aggravated. US policy may be selective with respect to human rights, but it has been consistent in its support to Israel and hostility to Palestinian rights. Second, the charge of selectivity is not immune to manipulation. Israel and its allies have exerted a great deal of effort and resources to present a counterargument in which Israel is a victim, rather than a beneficiary, of selectivity. Third, selectivity is not merely a political ailment confined to political practices in the UN, but is also present in legal avenues such as the ICC. The following discussion elaborates on these points.

A. Forces of Impunity: Against Root Causes

When compared to more recent cases (like the 2022 Russian onslaught on Ukraine), the international legal system is exposed not merely as ineffective in major cases like Palestine, but also as selective. This is because the international community – which is not a monolithic or coherent entity – does not speak with one voice. Hence, it treats some cases with much greater unity, urgency, and decisiveness than others. Commentators are thus forced to question the proclaimed commitment to ideals and their presumed universal applicability.

The UN Independent Commission implies that Palestine is instructive of selective enforcement and differential attitude in light of "the recent demonstration of the ability of third States to take prompt and unified action to ensure respect for international law in the face of violations of international law by a Member State of the United Nations," namely Russian military aggression against Ukraine.[155] Indeed, states like the US, the UK, and Germany were amongst the 141 that voted in the UNGA to demand that Russia "immediately, completely and unconditionally withdraw all of its military forces" from Ukraine.[156]

Remarkably, however, Israel and its supporters flip the argument regarding differential treatment in the case of Palestine to make Israel its victim rather than its beneficiary. The objection of the very states that enable Israeli impunity to the UN Independent Commission's establishment

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[154] *See* Marks (2011), *supra* note 43, at 12.
[155] U.N. Doc. A/HRC/50/21, *supra* note 55, ¶ 79.
[156] G.A. Res. ES-11/1, ¶ 4, (Mar. 2, 2022).

and its mandate is illustrative.[157] Ignoring the apartheid reports and the inconsistency of their own policies, 22 states (led by the US) argued that

> We believe the nature of the [Commission of Inquiry] established last May is further demonstration of long-standing, disproportionate attention given to Israel in the Council and must stop. We continue to believe that this long-standing disproportionate scrutiny should end, and that the Council should address all human rights concerns, regardless of country, in an even-handed manner. Regrettably, we are concerned that the Commission of Inquiry will further contribute to the polarization of a situation about which so many of us are concerned.[158]

The US unconditional support for Israel that shields Israel from accountability is not reducible to bias but is also a matter of strategic alliance.[159] In addition to the US, Germany and the UK are amongst Israel's major partners in the arms trade.[160] In contrast, the same states supplied Ukraine with weapons to defend itself against Russian aggression and occupation.[161] These states imposed a wide range of boycotts and sanctions on Russia at a great cost to their own citizens (in particular a spike in energy prices),[162] and thus instigated a larger economic, cultural, and sports boycott that some critics found excessive.[163] In contrast, these states rejected any form of boycott and sanctions

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[157] *See* Interactive Dialogue with the Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem and in Israel, Joint Statement Delivered by Ambassador Michèle Taylor, Human Rights Council – 50th Session, June 13, 2022, https://geneva.usmission.gov/2022/06/13/id-with-the-coi-on-the-occupied-palestinian-territory-hrc50/.

[158] *Id*. Signers included, amongst others: Austria, Brazil, Bulgaria, Canada, Germany, Hungary, Israel, the Netherlands, and the UK.

[159] *See generally* NASEER H. ARURI, DISHONEST BROKER: THE ROLE OF THE UNITED STATES IN PALESTINE AND ISRAEL (2003); RASHID KHALIDI, BROKERS OF DECEIT: HOW THE U.S. HAS UNDERMINED PEACE IN THE MIDDLE EAST (2013). In 2013, then-Vice President Joe Biden stated: "If there were not an Israel, we would have to invent one to make sure our interests were preserved." Edward-Isaac Dovere, *Biden: Always Israel's Friend*, POLITICO (Sep. 30, 2013), https://www.politico.com/story/2013/09/joe-biden-israel-097586.

[160] *See* Frank Andrews, *Arms Trade: Which Countries and Companies are Selling Weapons to Israel?* MIDDLE EAST EYE (May 18, 2021), https://www.middleeasteye.net/news/israel-palestine-which-countries-companies-arming; Anna Ahronheim, *Defense Exports in 2021 Reach 20-Year High With $11.2b in Sales*, JERUSALEM POST (Apr. 12, 2022), https://www.jpost.com/israel-news/article-703910.

[161] *See* David E. Sanger et al., *Arming Ukraine: 17,000 Anti-Tank Weapons in 6 Days and a Clandestine Cybercorps*, N.Y. TIMES (Mar. 6, 2022), https://www.nytimes.com/2022/03/06/us/politics/us-ukraine-weapons.html; Steven Erlanger, Eric Schmitt, & Julian E. Barnes, *The U.S. Races to Arm Ukraine With Heavier, More Advanced Weaponry*, N.Y. TIMES (Apr. 19, 2022), https://www.nytimes.com/2022/04/19/world/europe/us-ukraine-weaponry.html; Steven Eralnger, *U.S. and Allies Pledge Additional Arms for Ukraine, but Kyiv Wants More*, N.Y. TIMES (June 15, 2022), https://www.nytimes.com/2022/06/15/world/europe/biden-ukraine-weapons.html.

[162] *See* Nikki Carvajal, *Biden Signs Sanctions Bills Targeting Russian Oil and Trade with Russia and Belarus*, CNN (Apr. 8, 2022), https://www.cnn.com/2022/04/08/politics/biden-signs-russia-sanctions/index.html; White House, *FACT SHEET: The United States and G7 to Take Further Action to Support Ukraine and Hold the Russian Federation Accountable* (June 27, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/27/fact-sheet-the-united-states-and-g7-to-take-further-action-to-support-ukraine-and-hold-the-russian-federation-accountable.

[163] *See e.g.* Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain, Yale School of Management (June 5, 2022), https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain; Andrew Limbong, *Some See Hints of McCarthyism in the Cultural Boycott of Russia*, NPR (Mar. 18, 2022), https://www.npr.org/2022/03/18/1087237667/cultural-boycott-russia-effectiveness-fairness; Simon Jenkins, *Britain's Kafkaesque*

against the much smaller state and economy of Israel and branded advocates of BDS as antisemites.[164] Moreover, the US has long pursued "financial warfare" against Middle Eastern actors who are hostile to US and Israeli interests.[165]

This selectivity is also evident in the mobilization of domestic legal mechanisms of accountability. Germany, for example, showed its willingness to use universal jurisdiction against Russians and Syrians accused of war crimes and crimes against humanity, but neither Germany nor other countries have made a similar attempt with respect to Israelis.[166] In fact, UK authorities undermined their own judicial system to prevent the exercise of universal jurisdiction against Israeli suspects.[167] At the same time, US courts exhibited inconsistency and selectivity when they blocked attempts to activate the Alien Tort Statute against former Israeli officials on grounds of the political question doctrine and immunity from suit under the Foreign Sovereign Immunities Act of 1976.[168] This unwillingness is likely to continue despite the recommendation to exercise universal jurisdiction with respect to the crime of apartheid.[169]

In light of this demonstrable and deep-seated selectivity, it is unsurprising that the US-led 22 states rejected the open-ended investigation whereas they do not feel similarly compelled to reject the open-ended occupation and denial of self-determination that gave rise to the investigation in the first place. In order to flip the charge of selectivity, they ignore real consequences (lack of

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Boycott of Russian Culture Plays Straight Into Putin's Hands, THE GUARDIAN (May 27, 2022), https://www.theguardian.com/commentisfree/2022/may/27/britain-boycott-russian-culture-putin-war-ukraine.

[164] *See e.g.* Opposing Efforts to Delegitimize the State of Israel and the Global Boycott, Divestment, and Sanctions Movement Targeting Israel, H.R. 246, 116th Congress (2019); *BDS Israel Boycott Group Is Anti-Semitic, says US*, BBC News (Nov, 19 2020), https://www.bbc.com/news/world-middle-east-54999010.

[165] *See* Hicham Safiedinne, *Consequences of US Financial Warfare in the Middle East*, 294 MIDDLE EAST REP. (Spring 2020).

[166] *See* Bojan Pancevski, *Germany Opens Investigation Into Suspected Russian War Crimes in Ukraine*, WALL STREET J. (Mar. 8, 2022), https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi; Jenny Hill, *German Court Finds Syrian Colonel Guilty of Crimes Against Humanity*, BBC NEWS (Jan. 13, 2022), https://www.bbc.com/news/world-europe-59949924.

[167] For example, the Scotland Yard tipped off Israel to allow former General Doron Almog escape an arrest warrant for war crimes. *See* Vikram Dodd & Conal Urquhart, *Israeli Evades Arrest at Heathrow Over Army War Crime Allegations*, THE GUARDIAN (Sep. 12, 2005), https://www.theguardian.com/uk/2005/sep/12/israelandthepalestinians.warcrimes; Vikram Dodd, *Papers Reveal How Alleged War Criminal Escaped UK Arrest*, THE GUARDIAN (Feb. 20, 2008), https://www.theguardian.com/uk/2008/feb/20/uksecurity.israelandthepalestinians. On another occasion, the British Foreign Office granted former minister Tzipi Livni retrospective diplomatic immunity to evade an arrest warrant for war crimes. *See* Owen Bowcott, *Tzipi Livni Spared War Crime Arrest Threat*, THE GUARDIAN (Oct. 6, 2011), https://www.theguardian.com/world/2011/oct/06/tzipi-livni-war-crime-arrest-threat. Subsequently, the parliament changed the law to prevent the issuance of similar future arrest warrants without the approval of the Director of Public Prosecution. *See* Ben Quinn, *Former Israeli Minister Tzipi Livni to Visit UK After Change in Arrest Law*, THE GUARDIAN (Oct. 4, 2011), https://www.theguardian.com/world/2011/oct/04/tzipi-livni-arrest-warrant.

[168] *See* the US Court of Appeals for the Second Circuit ruling in: *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (which approved the earlier decision by the United States District Court Southern District of New York: *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007)). For a discussion of the political question doctrine, *see*: Gwynne Skinner, *The Nonjusticiability of Palestine: Human Rights Litigation and the (Mis)Application of the Political Question Doctrine*, 35 HASTINGS INT'L & COMP. L. REV. 99 (2012).

[169] *See* Amnesty Int'l, *supra* note 3, at 34.

accountability) and focus on "disproportionate scrutiny" (documentation of this lack of accountability). They produce impunity and reject attempts to document and denounce it. They conspicuously ignore what many of them enabled, namely power asymmetry and disproportionate suffering. In contrast, the UN Independent Commission notes "that the findings and recommendations relevant to the underlying root causes were overwhelmingly directed towards Israel" and it "took this point as an indicator of the asymmetrical nature of the conflict and the reality of one State occupying the other."[170]

This manipulation of the selectivity charge, which feeds into long-standing Israeli attacks on the UN as biased, lacks credibility. Abba Eban – Israel's long time representative at the UN (1949-1959) and its foreign minister (1966-1974) – provided inconsistent assessments over time. In 1975, for example, he attacked the UN as antisemitic.[171] Nevertheless, when evaluating the overall record in 1991, he argued:

> Contrary to the standard view, the U.N. is not a traditional adversary of Israel. No nation has derived comparable advantage from it…There have been many unbalanced [UN Security] Council statements. But these have been rhetorical commentaries on passing events, while the Council's pragmatic, unsentimental determinations on security, national identities, international law and negotiation across four decades are among Israel's principal diplomatic and legal defenses to this day.[172]

Not only is the anti-Israel bias argument lacking in credibility, it is also reminiscent of arguments made in support of the South African apartheid. Apartheid supporters similarly argued that the international community treated South Africa unfairly by singling it out for opprobrium.[173]

The manipulation of selectivity, however, draws its strength from the identity of the forces that deploy it, not because of its logical rigor or rationality. Consequently, exposing the incredible nature

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[170] U.N. Doc. A/HRC/50/21, *supra* note 55, ¶ 28.
[171] *See* Abba Eban, *Zionism and the U.N.*, N.Y. TIMES (Nov. 3, 1975), https://www.nytimes.com/1975/11/03/archives/zionism-and-the-un.html.
[172] Abba Eban, *DIALOGUE: Israel and the Peace Process Does The U.N. Belong at the Table?; The Benefits Would Be Huge*, N.Y. TIMES (June 13, 1991), https://www.nytimes.com/1991/06/13/opinion/dialogue-israel-peace-process-does-un-belong-table-benefits-would-be-huge.html.
[173] *See generally* RON NIXON, SELLING APARTHEID: SOUTH AFRICA'S GLOBAL PROPAGANDA WAR (2016). *See also* Anne-Marie Kriek, *South Africa Shouldn't Be Singled Out*, CHRISTIAN SCIENCE MONITOR (Oct. 12, 1989), https://www.csmonitor.com/1989/1012/ekri.html.

of the legitimating discourse is insufficient to defeat its material consequences. It is clear that Israel and its allies are effectively asking for "no scrutiny" when they complain about "disproportionate scrutiny." Their call for an "even-handed" approach to human rights is a smokescreen to prevent scrutiny of Israeli oppression and domination. Nevertheless, this appeal to neutrality echoes the apolitical posture of mainstream human rights discourse regarding aggression and self-determination. Unlike the human rights discourse, however, they show no interest in examining root causes.

This lack of interest is not incidental because these actors are part of the problem. In the UNGA debate on the Russian war in Ukraine, Germany's delegate stated: "Now, we all have to choose between peace and aggression, between justice and the will of the strongest, between taking action and turning a blind eye."[174] In light of these admirable statements, Palestinians and human rights advocates are left to wonder why states like Germany invoke the "might does not make right" approach in the case of Ukraine but not Palestine. Through their actions and policies, these states have enabled the "will of the strongest" to prevail over "justice" by shielding Israel not only from effective sanctions, but even from ineffective scrutiny. They are, therefore, complicit in the consolidation of apartheid, the advancement of colonization, and the increasing brutality of the occupation. They have no principled objection to the "will of the strongest," so long as the strongest is an ally they support. The charge of selectivity does not sufficiently capture their role and complicity. It does not capture law's complicity either, as the following discussion illustrates.

B. Accountability and Selectivity at the ICC

In contrast to this advocacy of impunity, Amnesty and HRW call upon the ICC to investigate Israel for committing apartheid. Other recent submissions to the ICC seek to hold Israel accountable for other crimes without invoking apartheid. One recent submission focuses on the violation on the prohibition of torture, which HRW includes as part of the "systematic oppression" of Palestinians in oPt,[175] and the UN Special Rapporteur and Amnesty include amongst the "inhumane acts" that Israel has committed in the context of apartheid.[176] A joint submission by FIDH and the Public Committee Against Torture in Israel requests that the ICC's Office of the Prosecutor investigate

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[174] Press Release, As Russian Federation's Invasion of Ukraine Creates New Global Era, Member States Must Take Sides, Choose Between Peace, Aggression, General Assembly Hears, U.N. Press Release GA/12406 (Mar. 1, 2022).
[175] HRW (2021), *supra* note 10, at 89-90.
[176] *See* U.N. Doc. A/HRC/49/87, *supra* note 8, ¶ 53; Amnesty Int'l (2022), *supra* note 3, at 240-248.

Israeli war crimes of "torture and inhuman and degrading treatment, unlawful deportation from the Palestinian territories into Israel for the purpose of such treatment and denial of the fundamental right to fair trial."[177] The ICC intervention is required, the organizations highlight, given "Israel's systematic lack of accountability."[178] Palestinian detainees submitted 1300 complaints against torture to Israel between 2001 and 2021, but only two resulted in an investigation and none resulted in an indictment.[179] In this context, the submission highlights that the Israeli judiciary is part of the problem and thus "justice for war crimes…is not available in Israel."[180]

Can the ICC be the "only and last resort" for accountability and adopt a "strictly legal" approach when powerful states oppose its investigation against Israel?[181] An attempt to investigate Israel for apartheid is harder to materialize in cases of extending the charge to all territory under Israel's effective control, *i.e.* including the treatment of Palestinian citizens, as in Amnesty's report. This is because the ICC has limited its jurisdiction to violations committed in the oPt and since 2014.[182] In light of this, Amnesty contemplates the option of a UNSC referral.[183] But this seems highly unlikely so long as Israel's allies, in particular the US and the UK, possess veto powers in the UNSC.

Another obvious difficulty is that selectivity and political considerations in the application of the law are also endemic in the ICC.[184] Whereas the US opposes the ICC investigation in the case of Israel,[185] and even sanctioned ICC officials,[186] it welcomed an investigation in the case of Russia's

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[177] FIDH & PCATI, *Communication to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute, Situation in the State of Palestine: War Crimes in the Interrogation Chamber: The Israeli Systematic Policy of Torture, Inhuman and Degrading Treatment, Unlawful Deportation, and Denial of Fair Trial of Palestinian Detainees* (June 2022), https://stoptorture.org.il/wp-content/uploads/2022/06/FIDH-PCATI_Art.-15-communication-June-2022.pdf.
[178] *Id.* at 7.
[179] *Id.* at 4.
[180] *Id.* at 7.
[181] Raji Sourani, *The Palestinian Case at the ICC Is Legal, Not Political*, AL JAZEERA (Dec. 5, 2020), https://www.aljazeera.com/opinions/2020/12/5/the-palestinian-case-at-the-icc-is-legal-not-political ("Abandoned by the international community, unable to access any Israeli, foreign or international tribunal, and subjected to a cruel occupation, the fate of the Palestinian people is now more than ever tied to that of the ICC."). *See also* Ardi Imseis, *State of Exception: Critical Reflections on the Amici Curiae Observations and Other Communications of States Parties to the Rome Statute in the Palestine Situation*, 18 J. INT'L. CRIM. JUST. 905, 911 (2021) [*hereinafter* Imseis (2021)] ("the ICC is literally the *only* forum within which Palestinian victims might seek justice") (emphasis in original).
[182] *See* Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine,' ICC-01/18-143, Majority Opinion (Feb. 5, 2021), https://www.icc-cpi.int/court-record/icc-01/18-143.
[183] Amnesty Int'l (2022), *supra* note 3, at 34.
[184] *See e.g.* Palestinian Centre for Human Rights, *Position Paper: ICC Prosecutor Ought Respond Immediately to Escalating IOF War Crimes against Palestinians* (Apr. 19, 2022), https://pchrgaza.org/en/position-paper-icc-prosecutor-ought-respond-immediately-to-escalating-iof-war-crimes-against-palestinians ("The standard for justice must be one for all peoples of the world; however, it is here proved to be—once again—a matter ruled by interests, and that political interests trump international law, and that the latter is used by politicians as a poly to serve their purposes.").
[185] *See* Press Statement, Ned Price, Department Spokesperson, *Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation*, U.S. Dept. State (Feb. 5, 2021), https://www.state.gov/opposing-international-criminal-court-attempts-to-affirm-territorial-jurisdiction-over-the-palestinian-situation; Press Statement, Anthony J. Blinken, Secretary of State, *The*

invasion of Ukraine.[187] Additionally, the US is not an ICC member; it has long objected to ICC jurisdiction over states that are not members of the court, and enacted a "Hague Invasion Act" to prohibit cooperation with the ICC and protect its military from prosecution.[188] Nevertheless, it welcomed such an application of ICC jurisdiction against Russia which is also not an ICC member.[189]

Unsurprisingly, then, critics highlight the politics of international criminal law during the 20 years since the ICC's establishment and the commencement of its work. Amnesty, for instance, points out that "the court's legitimacy risks being eroded by an increasingly selective approach to justice" and criticizes "recent decisions and practices which appear to demonstrate double standards and a willingness to be influenced by powerful states."[190] Indeed, whereas the ICC Office of the Prosecutor (OTP) launched a massive, swift, and well-funded investigation into Russian actions in Ukraine,[191] the OTP declined to investigate British crimes in Iraq or American crimes in Afghanistan. Moreover, Amnesty expresses its concern that

> the court and its principals have largely remained silent on the situation in Palestine and other investigations, in contrast to the publicity they have given to the Ukraine situation. This silence may have weakened the court's deterrent effect, and has left a void which has been filled with political attacks on the court's work, as well as attacks on human rights defenders.[192]

United States Opposes the ICC Investigation Into the Palestinian Situation, U.S. Dept. State (Mar. 3, 2021), https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation; Joseph R. Biden Jr. & Yair Lapid, *The Jerusalem U.S.-Israel Strategic Partnership Joint Declaration*, White House website (July 14, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/14/the-jerusalem-u-s-israel-strategic-partnership-joint-declaration ("The United States and Israel affirm that they will continue to work together to combat all efforts to boycott or de-legitimize Israel, to deny its right to self-defense, or to unfairly single it out in any forum, including at the United Nations or the International Criminal Court.").

[186] *See International Criminal Court Officials Sanctioned by US*, BBC NEWS (Sep. 2, 2020), https://www.bbc.com/news/world-us-canada-54003527; *U.S. Lifts Trump's Sanctions on ICC Prosecutor, Court Official*, REUTERS (Apr. 2, 2022), https://www.reuters.com/article/us-usa-icc-sanctions/u-s-lifts-trumps-sanctions-on-icc-prosecutor-court-official-idUSKBN2BP1GY.

[187] *See* Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, N.Y. TIMES (Apr. 11, 2022), https://www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html.

[188] Being the American Service-Members' Protection Act of 2002. Pub. L. No. 107-206, 116 Stat. 820 (2002).

[189] *See* Rebecca Hamilton, *Pressing US Officials on Russia and Int'l Criminal Court: The Interview We Should be Hearing*, JUST SECURITY (Apr. 6, 2022), https://www.justsecurity.org/80981/pressing-us-officials-on-russia-and-intl-criminal-court-the-interview-we-should-be-hearing.

[190] Amnesty Int'l, *The ICC at 20: Double Standards Have No Place in International Justice*" (July 1, 2022), https://www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice.

[191] *See* Press Release, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, Int'l Crim. Ct. (Mar. 2, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states.

[192] Amnesty Int'l, *supra* note 190.

Law's politics is not reducible to selectivity or externally imposed "politicization," however. Politics is evident not only in the ICC's foot-dragging in the Question of Palestine.[193] It is also palpable in its decision to open investigations against both Israel and Hamas,[194] as if they were identically situated and equally culpable agents of violence,[195] and ignoring the context of colonial apartheid. It is also clear in the internal disagreement amongst the ICC judges regarding what the law says and the limitations of their attempts to avoid politics when the ICC finally decided to open an investigation.[196] Moreover, lingering doubts persist regarding whether international criminal law can deliver accountability and justice, even at the level of individual responsibility in light of its low threshold regarding what counts as a national investigation of suspected crimes sufficient to preclude ICC trials.[197] In addition, its higher threshold of intent than in IHL makes the prospect of convicting commanders of advanced militaries challenging.[198]

Palestine, of course, is not the only instance of a "pandemic of impunity" and "acute accountability gap," as the case of the Western-backed and Saudi-led years-long war on Yemen illustrates.[199] In the case of Yemen too, the international community failed to show the same urgency and decisiveness shown in Ukraine's case. Powerful states like the US, UK, Germany, and France supplied Saudi Arabia and the United Arab Emirates with massive weapons and are thus implicated in the infliction of suffering on millions of civilians.[200]

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[193] *See* Luisa Giannini, *Non-Protection in the Name of International Law: The Principle of Self-Determination and the Situation in Palestine in the International Criminal Court*, 23 PALESTINE Y.B. INT'L L. __ (2021) (this volume).

[194] Int'l Crim. Ct., Office of the Prosecutor, *Report on Preliminary Examination Activities (2020)*, ¶¶ 55-58 (Dec. 14, 2020), https://www.icc-cpi.int/news/report-preliminary-examination-activities-2020.

[195] *See generally* Nimer Sultany, *Roger Cohen Sheds No Tears*, JACOBIN (July 16, 2014), https://jacobin.com/2014/07/roger-cohen-sheds-no-tears; 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); Rabbani (2014), *supra* note 82; FINKELSTEIN (2018), *supra* note 78.

[196] *See* Michelle Staggs Kelsall, *Between False Messiah and Symbolic Politics: The International Criminal Court & the "Situation in the State of Palestine",* 23 PALESTINE Y.B. INT'L L. __ (2021) (this volume).

[197] *See* Int'l Crim. Ct., Office of the Prosecutor, *Situation in Iraq/UK: Final Report* (Dec. 9, 2020), https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf; Anshel Pfeffer, *Israel Has Little to Fear From the International Criminal Court,* HAARETZ (May 20, 2014), https://www.haaretz.com/2014-05-20/ty-article/israel-has-little-to-fear-from-the-icc/0000017f-e7ed-dc7e-adff-f7ed41ef0000 (*citing* former ICC Prosecutor Luis Moreno-Ocampo's statement that there is a "rule of law" in Israel).

[198] *See* Kevin Jon Heller, *The ICC in Palestine: Be Careful What You Wish For*, JUSTICE IN CONFLICT (April 2, 2015), https://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for/.

[199] *See Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014*, *Report of the Group of Eminent International and Regional Experts on Yemen*, U.N. Doc. A/HRC/45/6 (Sep. 28, 2020).

[200] *See* Amnesty Int'l, *Yemen War: No End in Sight* (Mar. 24, 2020), https://www.amnesty.org/en/latest/news/2015/09/yemen-the-forgotten-war.

The overall effect of these policies is that international criminal law, in practice and in effect, is lopsided against persons of color and the so-called Third World.[201] They are treated differently than white Europeans and North Americans, whether as victims or perpetrators. The rules of the international order do not apply equally to all actors.

The problem, however, remains in the diagnosis of law's complicity. Even the phrase "pandemic of impunity" falls short of capturing international law's affliction because it invokes an image of momentary (even if widespread) surge in a dysfunction, rather than an endemic (and thus constant and predictable) condition. It thus implies that the pandemic can be treated, once the antidote is administered, and law cured to return to its natural role of imposing accountability on perpetrators and delivering justice for victims. Yet the persistence of the charge of selectivity and double standards suggests that selectivity may not be only recursive, but also an enduring property of the international legal order. It is pointless, therefore, to seek to represent law as it if were unaffected by its own conditions of possibility and refuse to incorporate these conditions into a normative understanding of the law's role.

VI. Conclusions

The human rights reports that charge Israel of committing apartheid are empowering because they provide a comprehensive legal account of the Question of Palestine, maintain a space for criticizing Israel in the face of attempts to silence it, and may have a mobilizing potential for activism and solidarity.[202] Nevertheless, a human rights discourse that assumes an apolitical posture falls short on identifying root causes. It demands the law's enforcement while ignoring its indeterminacy, complicity, and structural deficiencies. It thus risks legitimating an unjust international legal order that has sanctioned imperialism and colonialism.[203] It further risks reducing political opposition to questions of legality.[204] An anticolonial agenda, however, would resist this de-politicization and go beyond articulating its demands in a limited and limiting legal discourse.

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[201] *See* Souheir Edelbi, *The Framing of the African Union in International Criminal Law: A Racialized Logic*, VÖLKERRECHTSBLOG (Feb. 21, 2018), https://voelkerrechtsblog.org/the-framing-of-the-african-union-in-international-criminal-law-a-racialized-logic.
[202] *See* Reynolds (2015), *supra* note 109, at 25; Amnesty Int'l (2022), *supra* note 3, at 13.
[203] *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001).
[204] *See* Robert Knox, *International Law, Politics, and Opposition to the Iraq War*, 9 LONDON REV. INT'L L. 169 (2021).

Ultimately, law is Janus-faced. While applying the law may dismantle apartheid, it does not necessarily lead to decolonization. While it may hold violators of human rights accountable, it may also enable impunity. Whereas the emphasis on the need for accountability is empowering, it may obscure the complicity of the legal order in enabling endemic impunity. Whereas international criminal law's focus on individual responsibility is important, it may further obscure the role of international institutions and processes in enabling conflict and mass suffering.[205]

Liberal and realist approaches to international law wrongly presume that international law is a "neutral device," ignoring the ability of powerful interests to utilize law's indeterminacy to justify their actions, and overlooking international institutions' complicity in injustice.[206] The recognition of law's injustice-enabling features and human rights' limits and contradictions does not suggest that the political realist view of international relations in which the "strong do what they can and the weak suffer what they must" is acceptable.[207] It is one thing to describe the brutish reality and the injustice of international affairs; it is quite another to lend it a normative approval as the only one available to human relations.

It does, however, suggest that the oppressed should maintain a skeptical attitude towards existing legal pronouncements and the law's seductive capacity to deliver on the promise of vindicating rights, reducing suffering, and achieving accountability.[208] The Palestinian experience shows that a demand for better and consistent enforcement or the application of more law is insufficient because it ignores the structural problems in the international legal order that enable impunity and injustice. Israel's ability to weaponize the law is merely an instance of the fact that complicity in the maintenance of injustice is a structural property of the legal order. This weaponization is surely objectionable and self-serving.[209] Yet, this is not merely a question of abuse of the law or selectivity because the law as a site for contestation does not possess an inherent quality that makes it immune from this weaponization. A law free of politics is yet to be found and universal ideals that are free of exclusions are yet to be unearthed. The attempt to separate law from

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[205] *See* Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LEIDEN J. INT'L L. 701 (2013).
[206] *See* B.S. Chimni, *Legitimating the International Rule of Law*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 290, 297-298 (James Crawford & Martti Koskenniemi eds., 2012).
[207] *See* THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 337 (Richard Crawley trans, 2007).
[208] *See generally* LORI ALLEN, THE RISE AND FALL OF HUMAN RIGHTS (2013); ALLEN (2020), *supra* note 134; Nimer Sultany, *Activism and Legitimation in Israel's Jurisprudence of Occupation*, 23 SOC. & LEG. STUD. 315 (2014).
[209] *See e.g.* George Bisharat, *Violence's Law: Israel's Campaign to Transform International Legal Norms*, 43 J. PALESTINE STUD. 68 (2013); Lisa Hajjar, *Israel as Innovator in the Mainstreaming of Extreme Violence*, 279 MIDDLE EAST REP. (2016).

politics – by ignoring the role of politics in law and the role of law in politics – is bound to fail in comprehending the role of law in the Question of Palestine. In cases of fundamental injustice, the oppressed should not privilege the law as the primary site of action and struggle,[210] and the mobilization of human rights by radical movements for justice should avoid the pitfalls of displacing alternative avenues for struggle.[211] This requires understanding both the contradictory nature of human rights and "the centrality of social and political struggle in the formulation and defence of human rights."[212]

It is often said that there is a "Palestine exception" to legal guarantees of rights protections. It is certainly true that there are many other cases that are treated more fairly than, and prioritized over, Palestinian rights. Yet the "perennial exception" is an institutionalized and ever-present condition.[213] Palestine is not an exception to the intertwinement of law and politics. Nor is it an exception to law's selectivity and its ability to enable impunity. It can hardly be suggested that Palestine is an exception to an otherwise well-ordered and fair international legal system. It can hardly be suggested that the only cure needed is to remove the exclusion and include Palestine within law's kingdom. The problem is not merely of betrayal of ideals, lack of enforcement, and inconsistent application. Palestine exposes a generic and enduring problem in the international legal order. Not all cases resemble the Palestine case in its duration and intractability, but it is such hard cases that reveal law's limits and structural flaws. It thus seems more accurate to say that the Question of Palestine is a litmus test for international law and the human rights system.

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[210] *See* Reynolds (2015), *supra* note 109, at 36-37; Nimer Sultany, *Roundtable on Occupation Law: Part of the Conflict or the Solution? Part V*, JADALIYYA (Sep. 22, 2011), https://www.jadaliyya.com/Details/24424.

[211] *See* Paul O'Connell, *Human Rights: Contesting the Displacement Thesis*, 69 N. IR. LEGAL Q. 16 (2018).

[212] Paul O'Connell, *On the Human Rights Question*, 40 HUM. RTS. QUARTERLY 962 (2018).

[213] *See generally* Imseis (2021), *supra* note 181; NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE (2019).