Palestine and the Meaning of Domination in Settler Colonialism and Apartheid

Palestina y el significado de la dominación en el colonialismo de asentamiento y el apartheid

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Abstract

Domination is inherent to both settler colonialism and apartheid. These two frameworks intertwine in the Palestinian context. Despite growing recognition and adoption of the apartheid framework in Palestine, Zionist settler colonialism, (which drives the ongoing displacement and dispossession of the Palestinian people) has not received the same attention. This study considers the meaning of domination in the context of the legal prohibitions of colonialism and apartheid. Taking into account the contributions of the field of settler colonial studies, the article situates domination within the framework of settler colonialism by considering the role of racialisation in settler colonial state formation. It then examines the law of apartheid, in particular its core element of domination. In doing so, this paper concerns itself with the situation in Palestine in order to demystify the meaning of domination as a matter of international law.

Keywords: Domination; Settler colonialism; Apartheid; Palestine; Zionism.

Resumen

La dominación es inherente tanto al colonialismo de asentamiento como al apartheid. Estos dos marcos se entrelazan en el contexto palestino. A pesar del creciente reconocimiento y adopción del régimen del apartheid en Palestina, el contexto más amplio del colonialismo de asentamientos sionistas, que impulsa el desplazamiento y desposesión en marcha de las tierras del pueblo palestino, no ha recibido la misma atención que el anterior. Este artículo considera el significado de dominación en el contexto de las prohibiciones legales sobre el colonialismo y el apartheid. En particular, basándose en las contribuciones en el campo de los estudios coloniales de asentamientos, el artículo sitúa la dominación en el marco del colonialismo de asentamiento, considerando el papel de la racialización en la formación del estado colonial de asentamientos. Después examina el marco legal del apartheid, en particular su elemento central de dominación. Al hacerlo, el artículo se ocupa de la situación en Palestina, para desmitificar el significado de dominación como una cuestión de derecho internacional.

Palabras clave: Dominación; Colonialismo de asentamiento, Apartheid, Palestina, Sionismo.
Summary
1. Introduction
2. Domination in Settler Colonialism
   2.1 The Colonial Underpinnings of Race
   2.2 The Prohibition of (Settler) Colonialism
   2.3 Articulating Domination in Settler Colonialism
3. Domination in the Law of Apartheid
   3.1 The Prohibition of Apartheid
   3.2 Defining Apartheid as an International Crime
4. Settler Colonialism and Apartheid: Intertwining in Palestine
5. Conclusion
6. Bibliography

1. Introduction

Recent years have seen growing recognition on Israel imposing apartheid over the Palestinian people\(^4\). The apartheid analysis is not new. It draws on decades of Palestinian scholarship\(^5\),


activism\(^6\), and advocacy\(^7\), which have sought to better characterise the nature of the Israeli regime and its continued oppression of the Palestinian people. Early, foundational literature on Zionist settler colonialism by Palestinian scholars\(^8\) and diverse Jewish authors\(^9\) identified Zionist ideology and its racial exclusiveness as the driving force behind Palestinian displacement, dispossession, and domination, which continue seven decades into the ongoing \textit{Nakba} (“catastrophe”)\(^10\) of 1948\(^11\).

For decades, Palestinians have been systematically fragmented\(^12\) throughout historic Palestine\(^13\) and in exile, denied their right of return to their homes,


\(^13\) Historic Palestine refers to “the whole land of Palestine before the \textit{Nakba}, when Palestine was still under the British Mandate… Mandatory Palestine is considered to be 1948 Palestine as well as the oPt [occupied Palestinian territory]”. See supra note 6.
lands, and properties\textsuperscript{14}. Similarly, Palestinians are subjected to multiple legal regimes in the areas to which they have been confined. This process of spatial and legal segregation is further facilitated and maintained by the fragmented nature of international law itself and the way it has been used to address the dispersed Palestinian people and the situation in Palestine to date. For example, international humanitarian law has been applied in the Palestinian territory occupied by Israel since 1967 but has not been considered applicable within the Green Line\textsuperscript{15}, even while Israel’s domination of the indigenous Palestinian people transcends this artificial geographic boundary\textsuperscript{16}.

Unencumbered by these limitations, an apartheid analysis allows for the plight of the Palestinian people as a whole to be addressed more holistically. By recognising the racial animus of Zionist ideology in its continued domination of the Palestinian people, the apartheid analysis challenges a fragmentation that “has come to be accepted as normative”\textsuperscript{17}. Despite growing recognition and adoption of the apartheid framework in Palestine, the broader context of Zionist settler colonialism has not enjoyed the same attention in legal and human rights


\textsuperscript{15} The Green Line refers to “The 1949 ceasefire line delineating the boundary between 1948 Palestine (what is today called Israel) and the West Bank, including east Jerusalem and Gaza Strip. The Green Line, also called the 1949 Armistice Line, is not an international border but is considered to be so for the purposes of distinguishing Palestinian IDPs [internally displaced persons] and refugees”. See supra note 6.


\textsuperscript{17} ESCWA Report. p. 37.
discourse\textsuperscript{18}. By conceiving of Israeli apartheid as devoid of racist ideology\textsuperscript{19}, the analysis results in “liberal readings of Israeli apartheid”\textsuperscript{20}, which fail to address the root causes of Palestinian oppression in Israel’s raison d’état.

Domination is “inherent to both settler colonialism and apartheid”\textsuperscript{21}, which intertwine in the Palestinian context\textsuperscript{22}. As institutionalised racism is increasingly addressed worldwide, it is recognised that structural violence\textsuperscript{23} is

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rooted in historical, and often–ongoing, forms of colonial oppression\textsuperscript{24}. The meaning of domination in the context of the legal prohibitions of colonialism and apartheid draws, in particular, on the contributions of the field of settler colonial studies. This article begins by situating domination within the framework of settler colonialism and considers the role racialisation plays in settler colonial state formation. It then turns to the legal prohibition of apartheid, including its core element of domination, and examines the situation in Palestine, in an effort to demystify the meaning of domination as a matter of international law.

2. Domination in Settler Colonialism

Building on longstanding antecedents, in particular the work of indigenous scholars\textsuperscript{25}, settler colonial studies as a field of inquiry emerged in the 1990s and 2000s as a paradigm through which to examine the continued oppression of indigenous peoples in settler societies, which are “primarily characterised by a determination to erase colonised subjectivities”\textsuperscript{26}. During previous decades, scholars of indigenous studies had already tackled the impacts and mechanics of settler colonial invasion. In the case of Palestine, Palestinian scholars began addressing Zionist settler colonialism from at least the 1960s onwards\textsuperscript{27}.

Scholars of settler colonial studies have compellingly argued that settler


colonialism must be seen as distinct from other forms of colonialism, in that settler colonial states continuously seek the transfer, dispossession, and replacement of indigenous peoples. Explaining this distinction in his seminal work, *Settler Colonialism and the Transformation of Anthropology*, Patrick Wolfe asked:

“But what if the colonizers are not dependent on native labour? —indeed, what if the natives themselves have been reduced to a small minority whose survival can hardly be seen to furnish the colonizing society with more than a remission from ideological embarrassment?”. Unlike “franchise” or “dependent” colonies, Wolfe argued:

“… settler colonies were not primarily established to extract surplus value from indigenous labour. Rather, they are premised on displacing indigenes from (or replacing them on) the land”.

In this sense, for Wolfe, the dominant feature of settler colonialism “is not exploitation but replacement”.

Similarly, Lorenzo Veracini has argued that “A focus on land and a relative neglect of the labour of the colonised set settler colonialism as a mode of domination apart”. Discussing present-day settler colonialism, Veracini has articulated a specific mode of domination, “where a community of exogenous settlers… eliminate or displace indigenous populations and sovereignties, and constitute an autonomous political body”. With reference to the transfer of


30 *Idem*. (emphasis in the original).

31 *Ibidem*, 163.


34 VERACINI, Lorenzo. “Settler Colonialism”. In: NESS, Immanuel. COPE, Zak. *The Palgrave Encyclopedia of*
the Palestinian people both within and outside of historic Palestine, Veracini has further argued:

“In the end, while the suppression of indigenous and exogenous alterities characterises both colonial and settler colonial formations, the former can be summarised as domination for the purpose of exploitation, the latter as domination for the purpose of transfer.”35

Settler colonialism has also been described as “an ongoing system of power” that perpetuates the oppression of indigenous peoples, which in turn “normalizes the continuous settler occupation” and exploitation of indigenous lands and other natural resources36. Tuck and Yang notably explain that:

“Settler colonialism is different from other forms of colonialism in that settlers come with the intention of making a new home on the land, a homemaking that insists on settler sovereignty over all things in their new domain”37.

Critically, through Wolfe’s conceptualisation of settler colonialism as a “structure not an event”38, we can begin to better understand what Wolfe has termed settler colonialism’s “logic of elimination.”39. For Wolfe, “elimination is an organizing principal of settler–colonial society”40 and includes not only physical destruction of indigenous life, but further constitutes an ongoing institutionalised process of colonial erasure and replacement41.

39 Idem.
40 Idem.
2.1 The Colonial Underpinnings of Race

Race has never been defined in international law. The concept of race has evolved over time and finds its roots in the long-refuted theories of racial superiority developed to justify and legitimise European colonial rule. Carola Lingaas describes the construction of racial identity as a process of “othering” and the establishment of a social hierarchy that justifies the subjugation of a group perceived as inferior. As she put it, “the history of race went hand in hand with the history of colonialism, slavery, and eugenics.” She advocates for an evolutive, subjective interpretation of race in international criminal law, including in examining the crime of apartheid. This subjective approach, Souheir Edelbi, argues however must encompass not only perpetrators’ perceptions but also those of victims of racialised violence, as well as address the colonial context within which structural racism materialises. This understanding is supported by General Recommendation VIII of the UN Committee on the Elimination of Racial Discrimination (1990).

This analysis complements the work of settler colonial scholars on the function of racialisation in settler colonial state formation. Wolfe, notably, has called race the “organizing grammar” of settler colonialism, which

48 CERD. CERD General Recommendation VIII Concerning the Interpretation and Application of Article 1, Paragraphs 1 and 4 of the Convention Identification with a Particular Racial or Ethnic Group. 1990.
is used as a way to justify the expropriation of indigenous peoples’ lands and their dispossession. Colonised peoples, Wolfe argues, “continue to be racialised in specific ways that mark out and reproduce the unequal relationships into which Europeans have co–opted [them].” His 2016 book, *Traces of History: Elementary Structures of Race*, makes it clear why settler colonialism, in preserving its logic of elimination, finds the need to construct—and constantly re–construct—the concept of race. He argues: “different racialising practices seek to maintain population–specific modes of colonial domination through time.”

### 2.2 The Prohibition of (Settler) Colonialism

International law establishes a prohibition against colonialism, distinguished from other forms of foreign domination, including military occupation, through claims of sovereignty that deprive indigenous peoples of their inalienable rights. The prohibitions on colonialism and foreign domination are in fact rooted in the collective right of peoples to self–determination, a principle that has evolved considerably since its early recognition in 1919 in the Covenant of the League of Nations. Article 22 of the Covenant established that the development of peoples under colonial and mandatory rule shall constitute “a sacred trust of civilisation.” It was only in 1971 that the International Court of Justice (ICJ) came to interpret this principle in its examination of South Africa’s presence in Namibia (South West Africa at the time), concluding that legal “developments leave little doubt that the ultimate objective of the sacred trust was the self–determination and independence of the peoples concerned.”

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54 HSRC Report. p. 44.
56 Covenant of the League of Nations, 28 April 1919, Article 22.
doing so, the ICJ thus recognised the right to self-determination of all peoples under colonial and mandatory rule\textsuperscript{58}.

In this regard, the Court made explicit reference to the prohibition of colonialism, as enshrined in the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the UN General Assembly on 14 December 1960\textsuperscript{59}. In reaffirming the right of all peoples to self-determination and the need to put an end to “colonialism and all practices of segregation and discrimination associated therewith”, the Declaration recognised that “The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights” and is contrary to the UN Charter\textsuperscript{60}. The Declaration is said to be constitutive of customary international law\textsuperscript{61}. Notably, in its 2019 Advisory Opinion on the Chagos Archipelago, the ICJ alluded to the evolution in the law on self-determination, which it held has become one of the “basic principles of international law”, since the adoption of the UN Charter and 1960 Declaration\textsuperscript{62}.

In stipulating that immediate steps needed to be taken to uphold the right to self-determination of colonised peoples, notably in territories that had “not yet attained independence”\textsuperscript{63}, the Declaration was equally applicable to territories under former League of Nations mandates, such as Palestine\textsuperscript{64}. Nabil Elaraby argued in 1968 that:

“The legal aspects of the 1947 partition resolution may today appear merely academic, outdated events of the past, fit for oblivion and without

\textsuperscript{58} Ibidem, para. 52.
\textsuperscript{59} UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV) of 14 December 1960. UN Doc A/RES/1514(XV).
\textsuperscript{60} Ibidem., Preamble, Articles 1–2.
\textsuperscript{61} HSRC Report. p. 42.
\textsuperscript{63} UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV) of 14 December 1960, UN Doc A/RES/1514(XV), Article 5.
\textsuperscript{64} HSRC Report. p. 43.
relevance to the future. The future, however, is determined by the accumulation of past events”.

He added that:

“The fate of the Palestinians was decided for them by the United Nations, to their detriment, without reference to the rule of law. No impartial observer could, in all fairness, deny that the United Nations was rushed into far-reaching actions affecting the lives of nearly two million Palestinians without having given careful and thorough examination to the legal implications involved”65.

Despite the League of Nation’s recognition of Palestine’s provisional independence, the UN violated the right of the Palestinian people to self-determination when it recommended the partition of Palestine in 194766. It in effect recommended the establishment of a settler colonial state in Palestine.

John Reynolds identifies “Settler colonialism [as] the core ideological project from which the derivatives of forced population transfer and apartheid flow”67. The Israeli settler colonial state has adopted population transfer as its raison d’état68 despite its legal prohibition69. Discussing the ideological roots of population transfer in Palestine, Joseph Schechla writes:

69 Ibidem, p. 19; Article 6(b)–(c), Charter of the International Military Tribunal (8 August 1945); Article 49(6), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287.
“The primary function of the Zionist Movement—and, thus, the state and government of Israel—is to create an exclusively Jewish state in a land (historic Palestine), which had already been inhabited consistently by a nation of people known as the Palestinian Arabs… The fulfilment of this project, political Zionism, requires the elimination or replacement of the indigenous population as an inevitable accompaniment to the development of the state of Israel”.

Seventeen years ago, the ICJ concluded in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory that Israeli settlements have been constructed in breach of Article 49(6) of the Fourth Geneva Convention prohibiting forcible transfer and that the Wall leads to the displacement and dispossession of the Palestinian people, thereby infringing upon their collective right to self-determination.

2.3 Articulating Domination in Settler Colonialism

Examining the situation in Tibet, Carole McGranahan has described settler colonialism as “Imperial territorial acquisition followed by ongoing dispossession and oppression through colonial administration and settlement”. She cites Glen Sean Coulthard, who sheds further light on what domination means in settler colonial contexts:

“A settler–colonial relationship is one characterized by a particular form of domination; that is, it is a relationship where power—in this case, interrelated discursive and nondiscursive facets of economic, gendered, racial, and state power—has been structured into a relatively secure or sedimented set of hierarchical social relations that continue to facilitate

70 Ibidem, p. 256.
71 ICJ. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (9 July 2004), paras. 120–124.
the dispossession of Indigenous peoples of their lands and self-determining authority”73.

This focus on dispossession is consistent with Wolfe’s structural analysis on settler colonialism, which recognises that “the primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory”, with territoriality constituting “settler colonialism’s specific, irreducible element”74. Once we accept that race is a product and tool of colonialism, and in particular settler colonialism, where “the colonizer comes to stay”75, then it becomes difficult to imagine how apartheid, the most egregious form of racial discrimination76, can arise outside of this context. This suggests that institutionalised and structural racism cannot be examined in isolation from the “settler colonial present”77 that continues to define the domination of indigenous peoples and other racialised groups in settler colonial societies.

Based on the above analysis on the concept of domination in settler colonial studies, we can establish domination to mean several things, including: a hierarchical relationship of power that privileges settlers over indigenous peoples, enshrined in the very structure of settler colonial states and the continued manifestation of settler colonial relationships; a process of ongoing “elimination” or colonial erasure of indigenous peoples, including through their displacement, dispossession, and replacement on the land, through population transfer; and ultimately, the denial of the right of indigenous peoples to self-determination and permanent sovereignty over their natural wealth and resources.

3. Domination in the Law of Apartheid

In 1955, Johannes Gerhardus Strijdom, the Prime Minister of apartheid South Africa, made the inextricability of domination to the maintenance of apartheid abundantly clear, stating: “I am being as blunt as I can. I am making no excuses. Either the White man dominates or the Black man takes over… The only way the Europeans can maintain supremacy is by domination…”78. Having developed a working understanding of domination for the purposes of settler colonialism, the second part of this article turns to the law of apartheid, which recognises domination as a core element of the crime against humanity of apartheid.

3.1 The Prohibition of Apartheid

Apartheid—meaning “apartness” in Afrikaans—emerged as a South African state policy in the 1940s and was largely codified in the Population Registration Act No. 30 of 1950, whereby the population were to be segregated based on their categorisation as “white”; “Bantu”, referring to black South Africans; or “coloured”, referring to persons of mixed descent79. The choice of the term “apartheid” was a calculated one, designed to portray apartheid not as a policy of institutionalised racial discrimination, but of “good neighbourliness”80. There could therefore be no misunderstanding as to the extent of international objection to South Africa’s conduct when the newly–signed International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1965 condemned in Article 3 policies and practices of racial segregation and apartheid, requiring states parties “to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction”81.

81 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December
In doing so, the drafters of the Convention drew an undeniable link between South African apartheid and the general prohibition of racial discrimination aspired to in the 1945 UN Charter and 1948 Universal Declaration on Human Rights, and ultimately made real with the entry into force of ICERD in 1969, and with the introduction of subsequent human rights instruments. This link was propounded in the ICJ’s 1971 Advisory Opinion on South Africa’s policies and practices in its administration of Namibia, wherein the Court identified the enforcement of “distinctions, exclusions, restrictions and limitations exclusively on grounds of race, colour, descent or national or ethnic origin” to be a “flagrant violation of the purposes and principles of the [UN] Charter”. Throughout the 1970s, South Africa’s conduct both internally and in modern-day Namibia drew increasing international attention and condemnation, including through the introduction of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter “Apartheid Convention”), the imposition of a mandatory arms embargo by the UN Security Council in 1977, and the listing of apartheid as a grave breach under Additional Protocol I to the 1949 Geneva Conventions. Already in the 1960s, the UN General Assembly adopted a series of resolutions, which condemned


82 Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI, Article 55(c).
88 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entry into force 7 December 1978) 1125 UNTS 3, Article 85(3)(c).
apartheid in increasingly stronger terms, ultimately recognising apartheid as a crime against humanity. It was only in 1976, however, following the violently suppressed Soweto uprising in South Africa, that the UN Security Council adopted Resolution 392 (1976), reaffirming that “apartheid is a crime against the conscience and dignity of mankind”. The recognition of apartheid as a crime against humanity was codified in treaty law with the adoption of the Apartheid Convention and reiterated in the 1998 Rome Statute. Lingaas makes a compelling argument for viewing the crime of apartheid as part of customary international law; noting the high rate of accession to ICERD, Additional Protocol I, the Apartheid Convention, and the Rome Statute, the lack of specific objection to their provisions on the crime of apartheid, and the context of the broader prohibition of racial discrimination and apartheid in general international law and human rights instruments, Lingaas concludes that the crime of apartheid “can therefore be asserted to have reached the level of customary status”.

The Apartheid Convention was accordingly relied upon in 2018 by the Pre-Trial Chamber I of the International Criminal Court (ICC) concerned


91 Apartheid Convention, Article I.


with the Situation in Bangladesh/Myanmar in identifying the prohibition of being “arbitrarily deprived of the right to enter one’s own country”\textsuperscript{94}. As only Bangladesh is party to the Convention, the Chamber appears to have proceeded on the basis that the content of the Apartheid Convention constitutes international custom, at least insofar as it identifies a right of return. The use of Article 7(1)(k) of the Rome Statute, providing the Court with jurisdiction over “other inhumane acts”, defined as those “considered as serious violations of international customary law and basic rights pertaining to human beings, drawn from the norms of international human rights law”\textsuperscript{95}, and the framing of an inhuman act within the meaning of the Apartheid Convention as such a norm corroborates this analysis.

Finally, it is necessary to note the view that the prohibition of apartheid constitutes a \textit{jus cogens} norm. While \textit{jus cogens} remains a contested concept within international legal discourse, the International Law Commission (ILC) in its 2001 Draft Articles on State Responsibility identified apartheid as among the primary candidates for such a status\textsuperscript{96}. Returning to this question in 2019 as part of a comprehensive study on \textit{jus cogens}, Dire Tladi, Special Rapporteur to the ILC, submitted that the inclusion of racial discrimination as an example of the “most cited norms of \textit{jus cogens} was justified”\textsuperscript{97}.

This is corroborated by the ICJ’s recognition of the general prohibition of racial discrimination as a \textit{jus cogens} norm, which moreover gives rise to obligations \textit{erga omnes}\textsuperscript{98}. John Dugard and John Reynolds, in their seminal piece on

\textsuperscript{94} ICC. Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” (6 September 2018) ICC–RoC46(3)–01/18–37, para. 77.


\textsuperscript{96} UN. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), commentary to Article 40. para. 3.


\textsuperscript{98} ICJ. Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), Final Judgement (5 February 1970). para. 34.
apartheid in the occupied Palestinian territory, induce from this general norm the presence of a more specific norm, arguing that “it follows that the prohibition of a particularly severe form of racial discrimination—apartheid—must amount to a peremptory norm”\textsuperscript{99}.

3.2 Defining Apartheid as an International Crime

The Apartheid Convention made several significant innovations to the international law on apartheid. First, it allowed for individual perpetrators to be prosecuted for their contribution towards the maintenance or establishment of an apartheid regime, including through universal jurisdiction—that said, however, to date no one has ever been prosecuted for this crime.

Second, although motivated by the practice in South Africa and Namibia, the Convention recognised the potential for apartheid to arise outside this context. This is evidenced by the fact that Article II of the Convention identifies that the crime of apartheid “shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa”, recognising in the first instance that apartheid as it existed in South Africa was not the sole form such a regime may take, but may include similar such policies and practices. Moreover, in the second instance, it recognised that even that particular regime extended beyond the territorial confines of South Africa to elsewhere in southern Africa, in particular modern–day Namibia\textsuperscript{100}. This broader applicability is evidenced by its inclusion in the 1998 Rome Statute, introduced four years after the official end of the apartheid regime in South Africa.

The Apartheid Convention provided a legal definition as to what constitutes apartheid: “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them”\textsuperscript{101}.


\textsuperscript{101} Apartheid Convention, Article II.
The crime assumed a similar but separate definition within the framework of the ICC, wherein it was defined as:

“… inhuman acts… committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime” 102.

Two primary distinctions between these definitions are immediately clear. First, the meaning of inhuman acts set out in Article II of the Apartheid Convention is different to inhumane acts under the Rome Statute. While the former may be of use in interpreting the latter 103, this in effect means that the ICC has a narrower jurisdictional reach over the crime of apartheid than criminal accountability mechanisms pursuing perpetrators under the Apartheid Convention. As Lingaas notes, this gap may be bridged somewhat through recourse to the open-ended provision of Article 7(1)(k) of the Rome Statute which, as noted above, allows for “other inhumane acts” amounting to customary law to be prosecuted 104.

Second, in an expert opinion commissioned by the Diakonia International Humanitarian Law Centre in Jerusalem, Miles Jackson avers that the necessary mental elements may differ between the Apartheid Convention and the Rome Statute. In short, reference to establishing or maintaining an apartheid regime is made in relation to the mens rea of the crime in the Apartheid Convention, suggesting that the regime does not need to have been brought into existence at the time of the inhuman act to nonetheless constitute the commission of the crime of apartheid. Conversely, the Rome Statute requires the conduct in question to have taken place in the context of an apartheid regime, suggesting that the regime must already be in place 105.

The element of domination in the abovementioned definitions of the crime

102 Rome Statute, Article 7(2)(h).
of apartheid has not been defined in international legal instruments. The literature generally refers to domination within the meaning of the crime of apartheid but forgoes a precise definition, apart from identifying domination as a severe form of control\(^{106}\). Given this gap in the understanding of domination for the purposes of applying the crime of apartheid, domination as analysed in settler colonial studies is particularly instructive in the Palestinian context.

4. Settler Colonialism and Apartheid: Intertwining in Palestine

Apartheid, as a product and tool of colonialism, does not happen by accident\(^{107}\). Nor does it emerge fully formed based on the policies of one single government\(^{108}\). In the case of Palestine, the establishment of apartheid went hand in hand with Israeli settler colonial state formation. As such, it would be inconsistent to suggest that the situation in Palestine has only now become one of apartheid, that a certain threshold has been crossed, or bar met\(^{109}\). Similarly, it would be short-sighted to read Israeli apartheid as only having materialised in recent years due to the policies and practices of successive right-wing Israeli governments, which have pushed for further *de jure* annexation of the occupied Palestinian territory and introduced the Basic Law: Israel – The Nation State of the Jewish People 5778–2018 into the state’s constitutional fabric\(^{110}\).

Tellingly, Zionist parastatal institutions, including the Jewish National Fund (JNF), enjoy quasi-governmental status under the World Zionist Organisation–Jewish Agency (Status) Law 5713–1952, which establishes Jewish settlement as


\(^{109}\) See, for example, HRW Report; B’Tselem Report.

“the central task of the State of Israel and the Zionist Movement”\textsuperscript{111}. This law was described by Israeli Prime Minister Ben Gurion as “one of the foremost basic laws”, and was considered to complete the Law of Return 5710–1950, which grants any Jewish person the exclusive right to settle the land\textsuperscript{112}. Together, these two pieces of legislation are complementary “in determining the Zionist character of the State of Israel”\textsuperscript{113}. Similarly, under its Memorandum of Association, the JNF is chartered to purchase land on both sides of the Green Line for the exclusive purpose of settling “persons of Jewish religion, race or descendancy” on the land\textsuperscript{114}. Israeli legislation and the discriminatory charters of Zionist institutions are rooted in a constructed concept of “Jewish nationality”, which distinct from citizenship works to exclusively privilege Jewish persons over all others, in particular the indigenous Palestinian people\textsuperscript{115}.

Palestinian scholars have questioned whether the apartheid characterisation is comprehensive enough to encompass the totality of the Palestinian experience, taking into consideration the broader context of Zionist settler colonialism\textsuperscript{116}. That being said, the apartheid analysis does not displace existing legal or political frameworks, including (settler) colonialism and occupation, which have been used for decades to analyse the plight of the Palestinian people\textsuperscript{117}. Crucially, existing


literature has considered the three frameworks of colonialism, apartheid, and occupation as concurrently applicable to the situation in Palestine.118

Building on this criticism articulated by Palestinian scholars, such as Lana Tatour and Yara Hawari119, it is important to incorporate discussions on settler colonialism into the discourse on apartheid as mutually reinforcing frameworks. By looking at both settler colonialism and apartheid, we are reminded of the purpose of racialisation and its underlying logic. Looking at apartheid alone, in the absence of the broader settler colonial state structure which informs and sustains it, instead leads to solutions based on liberal conceptions of equality that may at best achieve the aesthetics of civil rights, without addressing the substantive and institutionalised dispossession and domination inherent in the settler colonial and apartheid system.120 This ultimately leads to the false assumption that solutions may be found within the current system, for example by extending Israeli voting rights121 to Palestinians under occupation.122 This, in turn, disregards the need


for structural reconfiguration based on the realisation of the Palestinian people’s inalienable rights to return and self-determination, in light of Israel’s raison d’état of population transfer and apartheid. In this sense, the UN General Assembly has stressed “the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by all available means, including armed struggle”, with specific reference to the “peoples of Africa and the Palestinian people”.

Domination, therefore, should be viewed as a structure targeting the Palestinian people as a whole. Following the eliminatory logic conceptualised in settler colonial studies, Zionist domination can be identified as inclusive of, inter alia, territorial conquest, control over Palestinian land and other natural resources, population transfer, national erasure, fragmentation, and denial of the right of return. These colonial policies, which maintain domination over Palestinians wherever they reside, are facilitated by the legal architecture of Israeli apartheid. As Fayez Sayegh argued in 1965, the ultimate goal of the Zionist settler colonial movement in Palestine is one of “racial elimination” of the indigenous Palestinian people, which ultimately translates into apartheid over the “remnants of the Palestinian Arab people who have stubbornly stayed behind in their homeland in spite of all efforts to dispossess and evict them, and in defiance of the Zionist dictum of racial exclusiveness”.

Similar to Sayegh’s analysis, Wolfe has described Israel’s settler colonial political representation in the Israeli parliament and their inability to challenge the apartheid regime, see QUIGLEY, John. Op. Cit. p. 239–243.
125 UN General Assembly Resolution 45/130 (14 December 1990) UN Doc A/RES/45/130, paras. 2, 4.
126 This is facilitated by the fact that Israeli legislation, such as the Law of Return (1950) establishes one single legal order of colonial domination over Palestinians throughout historic Palestine. See JABAREEN, Hassan. “How the Law of Return Creates One Legal Order in Palestine”. Theoretical Inquiries in Law. 2020, vol. 21, no. 2. p. 459–490.
project as one of “deracination” and fragmentation of Palestinians, arguing that “a relationship premised on the evacuation of Native people’s territory requires that the peoples who originally occupied it should never be allowed back”129. This explains the Zionist rationale behind the categorical denial of the right of return of Palestinian refugees, displaced persons, and exiles since the beginning of the Nakba. Granting the right of return to Palestinians would not only constitute an “ideological embarrassment”130 for the Zionist movement, but further threaten to overthrow the fragmentation and domination imposed on the Palestinian people. Denying the right of return, as identified by Richard Falk and Virginia Tilley, ensures that Palestinians can never achieve the demographic weight that would allow them to challenge their domination; in short it “ensures that Palestinians will never be able to change the system”131. As such, Israeli apartheid must also be seen as imposed extraterritorially over Palestinian refugees and exiles abroad.

The intertwining of settler colonialism and apartheid in the Palestinian context reveals a clear and inextricable link between the two frameworks. Examining both in tandem provides a means to achieve a lucid understanding of the purpose of domination and the function of racialisation in Zionist settler colonialism. This allows for a more holistic understanding of the root causes behind the ongoing displacement, dispossession, and domination of the Palestinian people. Therefore, neither framework is sufficient in isolation; Israel is at once a settler colonial and apartheid state.

5. Conclusion

The law of apartheid omits a definition of its core element of domination, which is inherent in both apartheid and settler colonialism. As such, approaching the situation in Palestine through the lens of apartheid necessitates an appreciation of the wider context of settler colonialism and its intertwining with apartheid. The working understanding of domination, as articulated by

scholars of settler colonial studies, provides a basis to overcome the obscurity in the concept of domination as a matter of international law.

Settler colonial studies conceptualise domination as involving a hierarchical structure of power privileging settlers over indigenous peoples; a logic of elimination, which drives the displacement, dispossession, and replacement of indigenous peoples through population transfer; and the denial of indigenous self-determination and sovereignty. Such policies and practices of domination have long been recognised as present in historic Palestine. Given that Israeli apartheid has been established and continues to be maintained within the structure of Zionist settler colonialism, it follows that the meaning of domination should be established with reference to this context.

Discussing the situation in Palestine, Tilley has observed that:

“... colonialism is not ended by a withdrawal that still denies the people the full expression of their right to self-determination, nor is apartheid ended by moving a border. Both are truly ended only when the doctrine of domination that drives them is finally identified, opposed and ended”¹³².

By looking at both apartheid and settler colonialism imposed over the Palestinian people “as a unified whole”¹³³, we can finally begin the process of addressing the root causes of Palestinian oppression.

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