

# U.C.L.A. Law Review

## Mimicry Without Mockery: On the Limits of Legal Frameworks for Palestine

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### ABSTRACT

This Article examines the role and limitations of international legal frameworks in advancing Palestinian liberation, arguing that while Palestine has achieved some victories through international law, overreliance on legalism risks perpetuating the oppression of the Palestinian people and limiting the formation of innovative political solutions. Through analysis of key moments in Palestine's engagement with international law—including recent proceedings at the International Court of Justice and International Criminal Court since October 7, 2023—this Article demonstrates how international law's historical development and institutional structure have shaped Palestinian advocacy in ways that often fail to address the underlying political and economic realities. Using the Russell Tribunal on Palestine as a case study and drawing on Homi Bhabha's concept of mimicry, this Article shows how even innovative civil society initiatives tend to work within rather than challenge existing legal paradigms. While acknowledging the strategic value of legal approaches, this Article suggests that international law's structural features and inherent limitations mean that appeals to law alone cannot secure Palestinian liberation. Instead, it proposes a comprehensive vision of decolonization through a framework that goes beyond questions of illegality and strategically deploys legal tools in service of political ends. This analysis contributes to broader scholarly discussions about the relationship between law and politics in anticolonial struggles while offering practical insights for Palestinian advocacy and solidarity movements.

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## TABLE OF CONTENTS

INTRODUCTION.....	1047
I. PALESTINE’S ENGAGEMENT WITH INTERNATIONAL LAW .....	1056
A. Palestine and the Possibilities of International Law .....	1056
B. Palestine and the Limitations of International Law.....	1066
II. THE RUSSELL TRIBUNAL ON PALESTINE AND INTERNATIONAL LAW .....	1071
A. The Russell Tribunal on Palestine: Five Sessions .....	1072
B. International Law as a Raison D’être .....	1075
C. Mimicry Without Mockery: The Failure of Legal Subversion.....	1077
III. THE LIMITS OF LEGALISM .....	1080
A. Law and Political Praxis .....	1080
B. Law and Politics: From Raison D’être to Legal Opportunism .....	1082
CONCLUSION: BEYOND LEGALISM.....	1086

*[...] I appreciate the fact that you reject bourgeois moralism and obedience to international law. These have been the cause of our tragedy.*

Ghassan Kanafani.<sup>1</sup>

*In our liberal and liberalizing time, emancipation has given way to accommodation, and reconciliation has displaced revolution as the language of social and political change where the future has been reduced to a mirror image of the present.*

David Scott.<sup>2</sup>

## INTRODUCTION

This Article considers the potential for emancipatory politics to effectively use international law without being overly constrained by its hegemonic allure. Specifically, it examines how Palestinian leadership, civil society, and solidarity movements frame the resistance against Israel's atrocities and the broader Palestinian liberation struggle in international legal terms: the illegality of occupation, allegations of war crimes, appeals to international criminal law institutions, and formal legal invocations of genocide and apartheid. These legal frameworks, however, are narrow and abstract, and overlook the underlying structures of the atrocities they aim to address. While Palestinians have achieved some progress by appealing to international law, doing so has largely failed to secure their freedom. This is primarily due to the failure of international law to address the settler-colonial structure of the Israeli state and its associated political and economic impacts. This Article raises the critical question: if international law is primarily perceived as a tool employed to achieve Palestinian freedom,<sup>3</sup> how

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1. Ghassan Kannafani, *On the PFLP and the September Crisis*, 1/67 NEW LEFT REV. 50, 50 (1971).

2. DAVID SCOTT, OMENS OF ADVERSITY: TRAGEDY, TIME, MEMORY, JUSTICE 131 (2013).

3. In this Article, I employ specific terms with distinct meanings: "Mandate Palestine" refers to the territorial region under British administration from 1920 to 1948, established by the League of Nations following World War I. "Palestine" refers to historic Palestine geographically. The *Nakba* (النكبة), meaning "catastrophe" in Arabic, refers to two main temporal understandings: First, the establishment of the State of Israel, a process that

can it be pragmatically applied without it becoming “a cage that overly constrains one’s actions?”<sup>4</sup>

This question is urgent. Israel’s ongoing assault on Gaza has been continuing for over a year at the time of writing,<sup>5</sup> and the debates about its

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entailed the ethnic cleansing of over 750,000 Palestinians from their homes and destruction of 531 Palestinian villages between 1947 to 1949. Second, the ongoing Nakba, which is the continuous Palestinian reality of subjugation and domination from 1948 to the present. Adel Manna, *The Palestinian Nakba and Its Continuous Repercussions*, 18 ISR. STUD. 86, 87–91 (2013); ILAN PAPPÉ, *THE NAKBA AND THE ETHNIC CLEANSING OF PALESTINE* (2018). The term “1948 Palestinian territories” refers to the lands that were originally part of historic Palestine before the establishment of the Israeli state in 1948 following the Nakba. Nadim M. Rouhana & Areej Sabbagh-Khoury, *Settler-Colonial Citizenship: Conceptualizing the Relationship Between Israel and Its Palestinian Citizens*, 5 SETTLER COLONIAL STUD. 205, 205–25 (2014). Some Palestinians remained in their homes within the ‘48 boundaries and were granted citizenship, although Israel never treated them as equal citizens. Between 1949–1966, they were governed by military rule and subjected to travel permits, curfews, and detentions. Some were expelled from their homes and lands, which were often given to Jewish settlers or state-backed bodies. The term “Occupied Territories” or “Occupied Palestinian Territories” or “OPT” refers specifically to the West Bank, including East Jerusalem, and the Gaza Strip. These areas came under the Israeli military occupation in 1967. RASHID KHALIDI, *THE HUNDRED YEARS’ WAR ON PALESTINE* 96–139 (2020). Since then, Israel has established settlements in the West Bank that are considered illegal under international law, displacing Palestinian communities, and altering the demographic and geographic landscape of the territory. This is widely recognized internationally as an occupation. More recently, in July 2024, the International Court of Justice (ICJ) affirmed its illegality. The West Bank is governed by the Palestinian Authority (PA) in certain areas (Areas A and B under the Oslo Accords), while Israel maintains military control over Area C, where most settlements are located. The Gaza Strip has been subjected to a strict Israeli blockade since 2007, which severely restricts the movement of people and goods and contributes to humanitarian crises, including shortages of food, medicine, and electricity. Since 2007, Israel has initiated several military operations against Gaza, with its most recent genocidal operation unprecedented in its scale and intensity (see discussion *infra*, note 5).

4. As noted by legal anthropologist Darryl Li. Darryl Li, *Roundtable on Occupation Law: Part of the Conflict or the Solution?*, JADALIYYA (Sept. 22, 2011), <https://www.jadaliyya.com/Details/24429/Roundtable-on-Occupation-Law-Part-of-the-Conflict-or-the-Solution-Part-VI-Darryl-LiHow> [https://perma.cc/7KK8-PFE5].
5. Since October 7, 2023, Israel, supported by the United States, has undertaken a sustained military campaign in Gaza. The Palestinian population in Gaza has endured an unprecedented and severe onslaught. As of this writing, Israeli military conducts have resulted in the deaths of over 43,391 Palestinians, while thousands more dead remain uncounted and buried under the rubble in Gaza. More than 102,347 individuals have been injured, though these figures are conservative estimates based on numbers verified by the Gazan Ministry of Health. See *Occupied Palestinian Territory*, UNITED NATIONS OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS., <https://www.ochaopt.org> [https://perma.cc/6R94-PN4Q]; *Israel Kills More Than 40,000 Palestinians in Gaza, 16,456 of Them Children*, AL JAZEERA (Aug. 15, 2024), <https://aljazeera.com/news/2024/8/15/israel-kills-more-than-40000-palestinians-in-gaza-16456-of-them-children> [https://

legality dominate public, political, and juridical discussions: the International Criminal Court (ICC) and its Prosecutor have faced intense pressure to act and sharp criticism for inaction;<sup>6</sup> the International Court of Justice (ICJ) has drawn unprecedented global attention for its ongoing proceedings brought by South Africa and Nicaragua;<sup>7</sup> and the ICJ advisory opinion, delivered in July 2024 declaring that Israel's occupation of the Palestinian Occupied

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perma.cc/6LYS-U6JF]. The war has displaced over 1.9 million Palestinians and destroyed over 70,000 residential units in Gaza. *See About 90% of People in Gaza Displaced Since War Began Says U.N. Agency*, THE GUARDIAN (July 3, 2024, 5:14 PM), <https://www.theguardian.com/world/article/2024/jul/03/about-90-of-people-in-gaza-displaced-since-war-began-says-un-agency> [https://perma.cc/3XD3-859C]. The Israeli government's gradual annihilation of Gaza's inhabitants through starvation, famine, and disease spread from the South is now being extended to include the population seeking refuge in the last standing city of Rafah, and a depopulated North. *See IPC, GAZA STRIP: IPC ACUTE FOOD INSECURITY SPECIAL SNAPSHOT* (2024), [https://www.ipcinfo.org/fileadmin/user\\_upload/ipcinfo/docs/IPC\\_Gaza\\_Strip\\_Acute\\_Food\\_Insecurity\\_Feb\\_July2024\\_Special\\_Snapshot.pdf](https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Gaza_Strip_Acute_Food_Insecurity_Feb_July2024_Special_Snapshot.pdf) [https://perma.cc/39D2-JEHE]. Public health experts estimate that a quarter of the Gazan population could die within a year due to starvation, famine, and disease. *See Helen Regan, Niamh Kennedy & Louis Mian, Famine in Northern Gaza Is Imminent as More Than 1 Million People Face 'Catastrophic' Levels of Hunger*, *New Report Warns*, CNN (Mar. 19, 2024, 12:15 PM), <https://edition.cnn.com/2024/03/19/middleeast/famine-northern-gaza-starvation-ipc-report-intl-hnk/index.html> [https://perma.cc/8KN7-Q3BA]; David Gritten, *'High Risk' of Famine in Gaza Persists, New UN-Backed Report Says*, BBC NEWS (June 25, 2024), <https://www.bbc.com/news/articles/cv22g81djdyo> [https://perma.cc/8UXF-G7ZM]; Jennifer Hansler, *Gaza Population at Risk of Famine as It Continues to Face Emergency Levels of Hunger*, *Report Finds*, CNN (June 25, 2024, 8:28 PM), <https://www.cnn.com/2024/06/25/middleeast/gaza-famine-ipc-report-intl-latam/index.html#:~:text=Nearly%20half%20a%20million%20are,%2C%E2%80%9D%20according%20to%20the%20report> [https://perma.cc/46FT-NVYU].

6. Criticism of the International Criminal Court's (ICC) inaction and biases in the context of Palestine is longstanding. *See* John Reynolds & Noura Erakat, *We Charge Apartheid? Palestine and the International Criminal Court*, 33 TWAILR REFLECTIONS 1 (2021) (suggesting that the ICC has been slow and hesitant in its approach to Palestine, taking twelve years to accept jurisdiction, and is still reluctant to investigate, despite extensive documentation and requests submitted by Palestinian human rights organizations); *see also* Ata R. Hindi, *A Cautious Note of Hope: The International Criminal Court's Office of the Prosecutor, The Global South/Third World, and Palestine*, 71 UCLA L. REV. 1090 (2024); Mat Nashed & Zena Al Tahhan, *'Alarming': Palestinians Accuse ICC Prosecutor of Bias After Israel Visit*, AL JAZEERA (Dec. 9, 2023), <https://www.aljazeera.com/features/2023/12/9/alarming-palestinians-accuse-icc-prosecutor-of-bias-after-israel-visit> [https://perma.cc/T4UP-4QHK].
7. Application Instituting Proceedings (S. Afr. v. Isr.), Pleadings, (Dec. 28, 2023), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf> [https://perma.cc/E9R5-CT6N]; Application Instituting Proceedings (Nicar. V. Ger.), Pleadings, (Mar. 1, 2024), <https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf> [https://perma.cc/J758-BPSB].

Territories is unlawful, was cautiously celebrated.<sup>8</sup> Meanwhile, Palestinian legal practitioners and scholars are actively developing legal arguments for Palestine, despite their skepticism of international law.

For their part, some scholars connect the situation in Palestine to past international law-recognized atrocities, such as genocide, apartheid, and occupation. By drawing these parallels, they construct legal arguments supporting the Palestinian cause by using established international legal frameworks and precedents.<sup>9</sup> Others argue for Palestine's uniqueness—*sui generis*—and advocate for the creation of new legal categories to address the ongoing violence committed by Israel against Palestinians. This includes calls to recognize the ongoing Palestinian Nakba as a distinct legal category.<sup>10</sup>

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8. The advisory opinion was delivered in July 2024, amidst Israel's ongoing assaults on Gaza, but the request for the advisory opinion was submitted by the General Assembly in January 2023, before the assaults on Gaza began in October 2023. *See* Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 186 I.C.J. (July 19, 2024) [hereinafter ICJ Advisory Opinion], <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf> [<https://perma.cc/MS2X-37XJ>]. The Palestinian Authority welcomed the opinion as “a triumph of justice.” *Presidency Welcomes ICJ's Ruling on Israel's Occupation of Palestine, Calls for Israel's Compliance*, Wafa News Agency (July 19, 2024, 6:25 PM), <https://english.wafa.ps/Pages/Details/147139> [<https://perma.cc/XM9S-7WND>]. *See* Press Release, Chrispin Phiri, Minister of Int'l Rels. & Coop. Spokesperson, South Africa Welcomes Advisory Opinion of the ICJ on Israeli Practices (July 19, 2024), <https://dirco.gov.za/south-africa-welcomes-advisory-opinion-of-the-icj-on-israeli-practices-19-july-2024> [<https://perma.cc/3VR-U3SE>].
  9. Some scholars draw parallels between the situation in Palestine and other contexts where international crimes have been recognized, including: the apartheid system in South Africa; genocides in Rwanda, Bosnia, and Namibia (against the Herero and Nama peoples); and Russia's invasion of Ukraine. *See, e.g.*, Victor Kattan, *The Implications of an ICJ Finding That Israel Is Committing the Crime Against Humanity of Apartheid, Just Security*, JUST SEC. (Mar. 20, 2024), <https://www.justsecurity.org/93403/the-implications-of-an-icj-finding-that-israel-is-committing-the-crime-against-humanity-of-apartheid-2> [<https://perma.cc/V472-LJ4E>] (analyzing legal mechanisms employed against South African apartheid and proposing their application to the Palestinian context, arguing for their potential effectiveness); *see also* Tafi Mhaka, *Namibia, Gaza, and German Hypocrisy on Genocide*, AL JAZEERA (Feb. 20, 2024), <https://www.aljazeera.com/opinions/2024/2/20/namibia-gaza-and-german-hypocrisy-on-genocide> [<https://perma.cc/BCZ6-ZWD8>]; City University of London, *Prof Vasuki Nesiah—Concerning Genocide*, CITY UNIV. OF LONDON (Apr. 10, 2024), [https://mediaspace.city.ac.uk/media/Prof+Vasuki+Nesiah+-+Concerning+Genocide/1\\_0kft4fvv/12819841](https://mediaspace.city.ac.uk/media/Prof+Vasuki+Nesiah+-+Concerning+Genocide/1_0kft4fvv/12819841) (discussing the Herero Genocide in German South West Africa while drawing parallels to the situation in Gaza; demonstrating how Gaza has influenced her perspective on historical genocides).
  10. *See, e.g.*, Rabea Eghbariah, *Toward Nakba as a Legal Concept*, 124 COLUM. L. REV. 887 (2024) (proposing the incorporation of the Nakba, the Palestinian experience of dispossession and displacement, into international legal frameworks).

In the opening of the Special Issue *On International Law and Gaza: Critical Reflections* published in the summer of 2024, Tor Krever observes that “few commentators today speak of Gaza or Palestine without invoking the language of il/legality.”<sup>11</sup>

Many legal scholars and practitioners advocating for Palestine and Palestinian rights approach international law with a healthy dose of skepticism even as they continue to engage with it. The Third World Approaches to International Law (TWAIL) tradition demonstrates how international law originated and continues to develop in response to the colonial encounter.<sup>12</sup> Historically, international law, with its genesis in European colonial and imperial contexts, functioned as a mechanism for advancing colonial and imperial agendas. Proponents of TWAIL emphasize how international legal frameworks perpetuate colonialism and imperialism. Rather than challenging these legacies, these legal frameworks remain deeply entwined with them, with contemporary doctrines often reflecting colonial and imperial agendas.<sup>13</sup> Building on the TWAIL tradition, scholarship emerging from the Palestinian context has shown how international law, both in its historical development and contemporary application, is profoundly implicated in the colonization of historic Palestine and the subjugation of the Palestinian people.<sup>14</sup> These analyses reveal the interplay between ostensibly neutral legal structures and the perpetuation of power imbalances rooted in colonial histories and present.

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11. Tor Krever, *Introduction to On International Law and Gaza: Critical Reflections*, 00 LONDON REV. OF INT'L LAW (SPECIAL ISSUE) 2, 2 (2024).
  12. Makau Mutua, *What Is TWAIL?* 94 AM. SOC'Y INT'L L. PROC. 31, 31 (2000); Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 742–45 (2006) [hereinafter *Evolution of International Law*]; James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL)*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 153, 155–60 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2022) [hereinafter *Agenda of TWAIL*]; James Thuo Gathii, *Twenty-Second Annual Grotius Lecture: The Promise Of International Law: A Third World View*, 114 AM. SOC'Y INT'L L. PROC. 165, 169–75 (2020); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 3–12 (2005); Laura Betancur-Restrepo, Amar Bhatia, Usha Natarajan, John Reynolds, Ntina Tzouvala, & Sujith Xavier, *Introducing the TWAIL Review (TWAILR)*, TWAILR (Aug. 30, 2019), <https://twailr.com/introducing-the-twail-review-twailr> [https://perma.cc/3SMH-DME9].
  13. See *Evolution of International Law*, *supra* note 12, at 742–45; *Agenda of TWAIL*, *supra* note 12, at 157–59.
  14. NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE 23–60 (2019); ARDI IMSEIS, THE UNITED NATIONS AND THE QUESTION OF PALESTINE: RULE BY LAW AND THE STRUCTURE OF INTERNATIONAL LEGAL SUBALTERNITY 1–25 (2023); Noura Erakat et al., *Roundtable: Locating Palestine in Third World Approaches to International Law*, 52 J. PALESTINE STUD., Issue 208, 2023, at 100 [hereinafter *Roundtable TWAIL & Palestine*].

More recently, a growing number of Palestinian critics have highlighted the neglect of settler colonialism in legal arguments about Palestine, arguing that these discussions often rely on narrow and abstract legal definitions of atrocities such as apartheid, genocide or occupation.<sup>15</sup> This critique has intensified, largely in response to human rights reports that describe Israeli policies as apartheid.<sup>16</sup> These critics contend that such reports employ limited legal frameworks that prioritize a liberal rights-based approach over addressing the colonial structure that undergirds Israel's policies and conduct. Consequently, they argue, this approach redefines the Palestinian struggle, which is a colonial issue, into what is merely another example of the liberal project of equality.<sup>17</sup> They also maintain that this perspective mistakenly assumes that simply naming events as specific forms of atrocities like apartheid, occupation, or genocide will be sufficient to resolve the broader issues at hand. They thus advocate for a more comprehensive approach that recognizes and addresses the fundamental colonial dynamics at play.

Even though Palestinian legal practitioners and scholars recognize international law's inherent limitations, its colonial origins, and its complicity in perpetuating colonial structures, they have historically relied on it as the

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15. See, e.g., Lana Tatour, *Amnesty Report: The Limits of the Apartheid Framework*, MIDDLE E. EYE (Feb. 8, 2022, 3:58 PM), <https://www.middleeasteye.net/opinion/israel-amnesty-apartheid-report-limits-framework> [https://perma.cc/N3FE-WHNNH]; Lana Tatour, *Why Calling Israel an Apartheid State Is Not Enough*, MIDDLE E. EYE (Jan. 18, 2021, 6:21 PM), <https://www.middleeasteye.net/opinion/why-calling-israel-apartheid-state-not-enough> [https://perma.cc/XFZ6-8RPW]; see also Nihal El Aasar, *Why Won't Amnesty Say 'Colonialism'?*, NOVARA MEDIA (Feb. 8, 2022), <https://novaramedia.com/2022/02/08/why-wont-amnesty-say-colonialism/> [https://perma.cc/U4RX-3DBP].
  16. *Israel's Apartheid Against Palestinians: A Cruel System of Domination and a Crime Against Humanity*, AMNESTY INT'L (Feb. 1, 2022) [hereinafter *Amnesty: Israel's Apartheid*], <https://www.amnesty.org/en/latest/news/2022/02/israels-apartheid-against-palestinians-a-cruel-system-of-domination-and-a-crime-against-humanity> [https://perma.cc/QS8M-M2EC]; *A Regime of Jewish Supremacy From the Jordan River to the Mediterranean Sea: This Is Apartheid*, B'TSELEM (Jan. 12, 2021) [hereinafter *B'Tselem: This Is Apartheid*], [https://www.btselem.org/publications/fulltext/202101\\_this\\_is\\_apartheid](https://www.btselem.org/publications/fulltext/202101_this_is_apartheid) [https://perma.cc/VD3T-MLPW]; Omar Shakir, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution*, HUM. RTS. WATCH (Apr. 27, 2021), <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution> [https://perma.cc/G8BF-DEQE].
  17. See, e.g., Mezna Qato & Kareem Rabie, *Against the Law*, JACOBIN (Apr. 21, 2013), <https://jacobin.com/2013/04/against-the-law/> [https://perma.cc/D5P4-LM38] (arguing that the emphasis on international law has reduced the Palestinian liberation struggle to a rights-based framework, shifting focus away from colonial structures toward liberal notions of equality, thereby risking the erasure of the struggle's anticolonial foundations).



primary avenue for advocating for Palestinian freedom, and to this day, they continue to emphasize legalism.<sup>18</sup>

In this Article, I question whether the heavy reliance on legalism might encourage Palestinian advocacy and mobilization towards less radical forms of resistance, thereby potentially weakening efforts at Palestinian liberation. I ask: Do international legal frameworks undermine the Palestinian people's own aspiration for their liberation and freedom, which may diverge from those advocated by their leadership, legal representatives, and the broader solidarity movement? What are the limitations of the legalist approach in the Palestinian liberation project, and what alternatives should be pursued to advance Palestinian liberation as it is envisioned and articulated by the Palestinian people?

I argue that a strong emphasis on international legal frameworks, grounded in a broader tradition of liberal legalism, abstracts the legal content from its political and economic contexts. This abstraction could potentially limit future possibilities, political strategies, and emancipatory avenues for achieving a liberated Palestine. International law's complicity in the colonization of Palestine, coupled with its inherent liberal framework that not only ignores settler colonialism but reinforces it, will not lead to a liberated Palestine. The freedom of Palestinians depends on processes of decolonization. Legalism, I argue, may yield incremental changes at best, while potentially becoming part of the problem itself.

This position does not reject legalism or the law. It also does not imply that Palestinians engaging with international law are indifferent to the

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18. Some scholars describe this tension as a recurring theme in the works of legal scholars in the field of international law and Palestine. Mohsen al Attar discusses this tension in the context of Palestine and TWAIL. See Mohsen al Attar, *Reimagining Palestine in TWAIL Scholarship*, OPINIOJURIS (Oct. 10, 2023), <http://opiniojuris.org/2023/10/10/reimagining-palestine-in-twail-scholarship-a-conversation-with-noura-erakat/#comments> [https://perma.cc/Q326-E4YD]. Richard Falk also addresses this paradox, referring to it as a “puzzle” wherein international law, despite its failure in protecting the basic rights of the Palestinian people, remains pivotal in shaping opposition to Israel's policies. *Roundtable TWAIL & Palestine*, *supra* note 14, at 101. For further discussion on this tension, see George Bisharat, Jeff Handmaker, Ghada Karmi & Alaa Tartir, *Mobilizing International Law in the Palestinian Struggle for Justice*, 18 GLOBAL JURIST 1, 1 (2018) (discussing the tension between relying on international law and recognizing its limitations in the Palestinian struggle for justice, they state “while we cannot afford to neglect law in envisioning alternative futures in Israel/Palestine (including statehood), justice always remains a guide”). It is important to mention that not all Palestinian lawyers view this as a tension. Diala Shamas, for example, notes: “The skepticism about international law and international legal mechanisms that critical legal scholars hold is not incompatible with efforts to invoke or deploy those same imperfect mechanisms to build power and pursue liberation.” *Roundtable TWAIL & Palestine*, *supra* note 14, at 106.

limitations of legalism or its inability to address broader issues such as Israel's settler colonialism, nor does it suggest a lack of commitment to extra-legal actions. Instead, it advances a critique of international legalism and its constrained political scope, calls for a thoughtful exploration of alternative pathways, and envisions what Palestine's liberation and freedom could look like if we move beyond conventional legal approaches.

In its current form, the Palestinian legal project is entangled in liberal language shaped by international, constitutional, and ordinary law of Western origins and a system that remains disconnected from its people. If the shift towards legal practices was initially intended to circumvent the ineffective peace process of the Oslo Accords and transcend the logic of negotiations,<sup>19</sup> it may now be time for yet another evolution in approach.

The Article proceeds in three Parts: Part I explores significant moments in Palestine's engagement with international law, including recent legal proceedings addressing Israel's ongoing assault on Gaza and Palestine since October 7, 2023. This Part explores some instances where Palestine has sought to leverage international legal frameworks. On one hand, it illustrates how Palestine has, at times, used international law to articulate and strengthen its resistance to Israel's atrocities as well as advance its pursuit of statehood and liberation. On the other hand, it highlights the limitations of international law, which abstracts international crimes from their broader contexts, neglects the analysis of settler colonialism, imperialism, and political economy, and functions as a tool to strengthen these structures.

Part II examines the Russell Tribunal on Palestine, a Palestinian civil society initiative established in 2009 in response to Israel's assaults on Gaza. This citizen-based tribunal aimed to condemn Israel and other complicit states and institutions, relying on the language of international law to make its case. Drawing on Homi Bhabha's concept of mimicry and expanding on Tor Krever's analysis of the tribunal's goals and findings, I argue that, while this citizen-based tribunal used international law to condemn Israel and complicit states, it failed to realize its own transformative potential. Despite its independence from formal legal institutions, the tribunal merely replicated existing legal frameworks instead of challenging them. In adopting the language of international law without questioning its

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19. Qato & Rabie, *supra* note 17 (explaining that while the legal strategy aimed to bypass the "bogus peace process" and move beyond negotiation frameworks, the West Bank and Gaza remain suspended within Israeli colonial logics, with legal victories achieving only minor changes that cannot be understood outside the context of Oslo).

limitations, the tribunal chose to remain within the constraints of liberal legalism—in short, it mimicked legal institutions without mocking them.

Building on the broader literature on legalism and its constraint on politics, Part III concludes by examining the potential political implications of a heavy reliance on international legal frameworks, arguing that an increased focus on legalism may come at the expense of other political solutions. While there is a wealth of international legal analysis regarding Palestine, few legal scholars, with the notable exception of Noura Erakat, have critically assessed how these frameworks impact political strategy.<sup>20</sup> The Article considers whether in the case of Palestine this focus might inadvertently limit broader political possibilities. It raises the question of whether these legal structures may be at odds with, or even hinder, Palestinian liberation as it is imagined by the Palestinian people.

## I. PALESTINE'S ENGAGEMENT WITH INTERNATIONAL LAW

### A. Palestine and the Possibilities of International Law

Since the United Nation's (UN) establishment in 1945, Palestine has been a central concern in international law. For its part, Palestine, primarily through its leadership, namely the Palestinian Liberation Organization (PLO),<sup>21</sup> has consistently resorted to international law in its pursuit of liberation and statehood.<sup>22</sup> As Palestinian political analysts Nadia Hijab and Diana Buttu wrote a decade ago, "Almost every day brings the announcement of a new international initiative by the Palestine Liberation

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20. ERAKAT, *supra* note 14 (examining how Palestinian leaders and advocates have deployed international law as a tool of resistance while demonstrating that law itself is not inherently emancipatory but rather a mean that can facilitate or hinder Palestinian liberation depending on its tactical deployment for a broader political project).

21. The Palestinian Liberation Organization (PLO), established in 1964, serves as the official representative of the Palestinian people at the international level. The PLO has no domestic legal authority and has no authority over local governance. On the other hand, the PA is a body that has municipal authority over the Palestinian territories and was established as an interim governing body in 1993. *See* PASSIA, PLO vs. PA (2014), [http://passia.org/media/filer\\_public/8a/e7/8ae7c030-ac1d-4688-b3f4-606fbd50cd41/pa-plo2.pdf](http://passia.org/media/filer_public/8a/e7/8ae7c030-ac1d-4688-b3f4-606fbd50cd41/pa-plo2.pdf) [https://perma.cc/948R-3P4S].

22. When the PLO was first founded in 1964, it initially sought to establish an Arab state over the entire territory of the Mandate Palestine. However, in 1993, the PLO recognized Israeli sovereignty with the Oslo Accords and now only seeks Arab statehood in the Palestinian territories (the West Bank and the Gaza Strip) that have been militarily occupied by Israel since 1967. *See* KHALIDI, *supra* note 3, at 220–25; EDWARD W. SAID, THE END OF THE PEACE PROCESS: OSLO AND AFTER 3–15 (2001); YAZID SAYIGH, ARMED STRUGGLE AND THE SEARCH FOR STATE: THE PALESTINIAN NATIONAL MOVEMENT, 1949–1993 100–105 (1997).

Organization . . . ”<sup>23</sup> This includes the international recognition of Palestine as a legal entity,<sup>24</sup> the acknowledgment of Palestinians’ fundamental human rights, and the global recognition of Palestinian territories as occupied, a status that was recently affirmed by the ICJ, challenging Israel’s claim to sovereignty over these territories.<sup>25</sup> Palestine also aimed to influence third-party states and garner support for measures intended to isolate Israel internationally.<sup>26</sup> The international community now largely considers these legal findings as self-evident.<sup>27</sup> As I show later, however, while these legal achievements are widely recognized, there have also been significant instances where international law has not realized its promises of liberation, but has instead acted as a tool of oppression and contributed to the ongoing colonization of Palestine.

I trace this history beginning in the 1970s, before the Oslo Accords, when the PLO opted to direct the Palestinian struggle towards appeals to the international community and recourse to international legal mechanisms. A key moment was Yasser Arafat’s historic address to the United Nations General Assembly (UNGA) on November 12, 1974, in which he emphasized the centrality of juridical principles, including the right to self-determination,<sup>28</sup> while pushing back against the way international juridical frameworks have shaped the narrative surrounding the question of Palestine.<sup>29</sup> During this period, the PLO achieved notable successes.

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23. Nadia Hijab & Diana Buttu, *PLO/Palestine: Time to Stop Buying Time*, AL-SHABAKA (Nov. 13, 2014), <https://al-shabaka.org/commentaries/plopalastine-time-to-stop-buying-time/> [<https://perma.cc/VLW3-TP3N>].

24. *The International Status of the Palestinian People*, UNITED NATIONS (1981), <https://www.un.org/unispal/document/auto-insert-204352> [<https://perma.cc/M8PQ-L7BV>].

25. ICJ Advisory Opinion, *supra* note 8.

26. *Roundtable TWAIL & Palestine*, *supra* note 14, at 102 (discussing public opinion and support of civil society).

27. In this regard, it is pertinent to observe the voting patterns at the United Nations General Assembly (UNGA) regarding Palestine following the South African argument at the ICJ. For instance, the UNGA passed a resolution calling for an “immediate humanitarian ceasefire in Gaza,” which was supported by 153 countries, opposed by ten countries, including the United States and Israel, and resulted in twenty-three abstentions. *See U.N. General Assembly Votes Overwhelmingly in Favor of Gaza Ceasefire*, AL JAZEERA (Dec. 12, 2023), <https://www.aljazeera.com/news/2023/12/12/un-general-assembly-votes-overwhelmingly-in-favour-of-gaza-ceasefire> [<https://perma.cc/6CM6-8K59>].

28. Yasser Arafat, Chairman, Palestine Liberation Organization, Address at the U.N. General Assembly (Nov. 13, 1974), [http://mideastweb.org/Arafat\\_at\\_un.htm](http://mideastweb.org/Arafat_at_un.htm) [<https://perma.cc/G8FY-AJUH>].

29. For further reading, see *Roundtable TWAIL & Palestine*, *supra* note 14, at 105 (Samera Esmeir discussing the PLO’s strategic shift towards international legal frameworks in the

It embedded the juridical status of Palestinians into international legal institutions, such as through UNGA Resolutions 3236 and 3237 in 1974, which affirmed the Palestinian right to self-determination.<sup>30</sup> The PLO also played a role in the adoption of UNGA Resolution 3379 in 1975, which condemned Zionism as a form of racism and racial discrimination. Resolution 3379 is reflected in, and contributed to the recognition of guerrilla warfare as a legitimate form of resistance in the context of the First and Second Additional Protocols to the Geneva Conventions in 1977.<sup>31</sup> These efforts laid the groundwork for Palestine's recognition by the international community, which was solidified through further engagement with international legal institutions. As Samera Esmeir recently remarked, "[I]f Palestine did not exist on the world map, it could exist in the world's international legal order."<sup>32</sup>

Issued on July 9, 2004, the ICJ advisory opinion concerning the legal consequences of the construction of the wall in the OPT marked a notable achievement for Palestine in international law.<sup>33</sup> The advisory opinion deemed the wall and its associated restrictions illegal, held Israel accountable for damages, and emphasized Israel's obligations as an occupying power.<sup>34</sup> Going further, it addressed Israel's international humanitarian and human rights violations in the Palestinian territories occupied by Israel since 1967.<sup>35</sup> The opinion also urged states to refrain from recognizing or supporting Israel's illegal settlements and its violations of international law.<sup>36</sup> While the ICJ stopped short of declaring the Israeli occupation of Palestinian territories illegal or altering the reality on the ground (the wall remains today), it did affirm the illegality of Israeli settlements and underscored the importance of the Palestinian people's right to self-determination.<sup>37</sup> Palestine has leveraged the ICJ's conclusion

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1970s, exemplified by Arafat's 1974 UN speech, which balanced adopting certain legal concepts while resisting others to maintain the Palestinian narration of the question of Palestine).

30. G.A. Res. 3236 and 3237 (XXIX) (Nov. 22, 1974).

31. G.A. Res. 3379 (XXX) (Nov. 10, 1975).

32. *Roundtable TWAIL & Palestine*, *supra* note 14, at 105.

33. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

34. *Id.* at 197.

35. *Id.* at 171.

36. *Id.* at 200.

37. *Id.* at 184 ("The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international

that settlements are illegal to call on third-party states to reconsider their involvement with the settlement enterprise.<sup>38</sup> Israel's political, economic, social, and cultural systems are inextricably intertwined with those of the settlements, which the ICJ's advisory opinion deems illegal. By highlighting how transactions with Israel's settlements breach international law, Palestine aimed to pressure states to cease commercial transactions related to these settlements.<sup>39</sup> The advisory opinion, therefore, has been widely viewed by Palestinians and their supporters as a significant legal victory, reflecting the culmination of extensive efforts by the PLO and its legal team.

Another significant legal achievement occurred shortly after September 23, 2011, when Mahmoud Abbas, the leader of the PLO, applied for full UN membership for Palestine.<sup>40</sup> On November 29, 2012, the UNGA adopted a resolution granting Palestine non-member observer state status. While Palestine's aspiration to full membership has yet to be realized, its observer status allows it to participate in all organizational proceedings of the United Nations, except votes on draft resolutions and decisions in its main organs and bodies.<sup>41</sup> Palestine remains actively engaged in pursuing full UN membership. Most recently, in May 2024, the UNGA supported Palestine's bid for full membership, recognizing its qualifications and recommending

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law."). On the right for self-determination, see *id.* at 197 ("Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law.").

38. For a deeper understanding of the implications of international law for third states in the context of Palestine, see Yussef Al Tamimi's analysis on the ICJ advisory opinion's impact on the E.U.-Israel Association Agreement. Yussef Al Tamimi, *Implications of the ICJ Advisory Opinion for the E.U.-Israel Association Agreement*, EJIL:TALK! (July 30, 2024), <https://www.ejiltalk.org/implications-of-the-icj-advisory-opinion-for-the-eu-israel-association-agreement/> [https://perma.cc/7U43-722R]; see also Yussef Al Tamimi, *Implications of the ICJ Order (South Africa v. Israel) for Third States*, EJIL:TALK! (Feb. 6, 2024), <https://www.ejiltalk.org/implications-of-the-icj-order-south-africa-v-israel-for-third-states> [https://perma.cc/K2MS-YUCB].
39. Hijab and Buttu point out that soon after the ICJ opinion, some countries, such as the United Kingdom (U.K.), began labeling products from Israeli settlements, enabling consumers to make informed choices; some have issued industry advisories cautioning against operating in settlements due to legal risks. See Hijab & Buttu, *supra* note 23.
40. Overarching benefits of UN membership, as set out in the UN Charter, include: gaining legitimacy and recognition; accessing a platform for dialogue and diplomacy, development, and humanitarian aid; and participating in global decision-making processes, mechanisms for conflict resolution, and frameworks for international law adherence and cooperation on global issues such as human rights, sustainable development, and peacekeeping efforts. U.N. Charter arts. 1, 2, 35, 55–56, 39.
41. See G.A. Res. 67/19 (Dec. 4, 2012); see also UN Affs., *Palestine: General Assembly Discusses Failed U.N. Membership Bid*, UN NEWS (May 1, 2024), <https://news.un.org/en/story/2024/05/1149231> [https://perma.cc/5LPP-TLZB].

that its bid be considered by the UN Security Council (UNSC).<sup>42</sup> However, the UNSC thwarted these efforts when the US vetoed the draft resolution in support of Palestine.<sup>43</sup>

Palestine has also joined international treaties to fulfill the Vienna formula, by which a state demonstrates its existence and legal personality by participating in international treaties and conventions.<sup>44</sup> For example, Palestine's membership in the UN Educational, Scientific and Cultural Organization (UNESCO), granted in October 2011,<sup>45</sup> denoted another significant victory spearheaded by the PLO.<sup>46</sup> UNESCO is an important forum for upholding international law in relation to the unlawful Israeli occupation and assault on the Palestinian Territories. Thus, its membership in UNESCO empowered Palestine to compel third-party states and different international actors to uphold their commitments and obligations under UNESCO treaties. To illustrate, in 2010, UNESCO reiterated that Israel's initiatives to include the Al-Haram Al-Ibrahimi (Tomb of the Patriarchs) in Hebron and the Mosque of Bilal Bin Rabah (Tomb of Rachel) in Bethlehem on Israel's national heritage list constituted a violation of international law, UNESCO conventions, and the UN resolutions.<sup>47</sup> In early 2012, these sites

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42. *United Nations General Assembly Backs Palestinian Bid for Membership*, AL JAZEERA (May 10, 2024), <https://www.aljazeera.com/news/2024/5/10/un-general-assembly-backs-palestinian-bid-for-membership> [<https://perma.cc/BL4W-6ZDU>].

43. Press Release, Security Council, Security Council Fails to Recommend Full United Nations Membership for State of Palestine, Owing to Veto Cast by United States, U.N. Press Release SC/15670 (Apr. 18, 2024), <https://press.un.org/en/2024/sc15670.doc.htm> [<https://perma.cc/D8ET-3BF7>].

44. The Vienna formula refers to a method used in international law to determine which entities qualify as "states" for the purpose of participation in multilateral treaties. It originated from the Vienna Convention on the Law of Treaties (1969) and allows entities to demonstrate their statehood by joining international treaties and conventions, even if they lack universal recognition as sovereign states. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331.

45. Christiane Ahlborn, *UNESCO Approves Palestinian Membership Bid—A Case for U.S. Countermeasures Against the Organization?*, EJIL:TALK! (Nov. 8, 2011), <https://www.ejiltalk.org/unesco-approves-palestinian-membership-bid-%e2%80%93-a-case-for-us-countermeasures-against-the-organization> [<https://perma.cc/VAX5-M85T>].

46. As Azarov and Sliman observed of this important milestone, membership offers a strategic avenue for asserting Palestinian sovereignty over both land and sea. By leveraging agreements such as the 2001 Convention on the Protection of Underwater Heritage, Palestine can establish jurisdiction over areas including Gaza's coast and the Dead Sea. See Valentina Azarova & Nidal Sliman, *Activating Palestine's UNESCO Membership*, AL-SHABAKA (Oct. 23, 2013), <https://al-shabaka.org/briefs/activating-palestines-unesco-membership> [<https://perma.cc/DL32-YWQS>].

47. UNESCO, *The Two Palestinian Sites of Al-Haram Al-Ibrahimi/Tomb of the Patriarchs in Al-Khalil/Hebron and the Bilal Bin Rabah Mosque/Rachel's Tomb in Bethlehem*, in the

were removed from an Israeli list of sites.<sup>48</sup> UNESCO membership could also involve enforcing domestic laws regarding the display of unlawfully obtained archaeological artifacts that were taken from occupied territory. After joining UNESCO, Palestine ratified UNESCO's constitution and joined eight conventions and related protocols.<sup>49</sup> These include the 1954 Hague Convention on Cultural Property Protection in the Event of Armed Conflict,<sup>50</sup> which, through its Second Protocol, emphasized individual criminal responsibility and sanctions under universal jurisdiction. This protocol enables states to prosecute perpetrators of the acts listed in the protocol in their domestic courts, regardless of the perpetrator's nationality.<sup>51</sup>

Another notable engagement with international law is the recent ICJ advisory opinion, which was delivered in July 2024.<sup>52</sup> It outlined the legal implications of Israel's occupation of Palestinian territories, including East Jerusalem, following the UNGA request in December 2022.<sup>53</sup> In its ruling, the court stated that Israel's occupation is unlawful and that Israel must withdraw from the OPT and evacuate all settlers "as rapidly as possible."<sup>54</sup> The court also found that Israel was obliged to provide full reparation for the damage caused by its fifty-seven-year military regime and observed that Israel's policies and practices in the Occupied Territories amount to the crime of apartheid according to Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>55</sup> The court called upon international organizations, including the United Nations, to not recognize the Israeli occupation of Palestinian territory as legal.<sup>56</sup>

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37th agenda item before the 184th Sess. of the UNESCO Executive Board, UNESCO Doc. 184 EX/37 (Mar. 19, 2010).

48. Reportedly due to financial considerations. *See supra* note 46.

49. *Palestinian Flag Flies at UNESCO to Mark Admission as New Member*, UN NEWS (Dec. 13, 2011), <https://news.un.org/en/story/2011/12/398102> [<https://perma.cc/ER8G-AZJZ>].

50. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, T.I.A.S. No. 09-313.1, 249 U.N.T.S. 240 [hereinafter 1954 Convention].

51. UNESCO, CLT-2010/WS/5 CLD-4625.9, THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO (1954 AND 1999) PROTOCOLS: BASIC TEXTS (2010).

52. ICJ Advisory Opinion, *supra* note 8.

53. Michelle Nichols, *U.N. Asks World Court to Give Opinion on Israel's Occupation*, REUTERS (Dec. 30, 2022, 3:40 PM), <https://www.reuters.com/world/middle-east/un-asks-world-court-give-opinion-israels-occupation-2022-12-30> [<https://perma.cc/4RYB-VMVW>]. The request, which was submitted in December 2022 by the United Nations General Assembly for an advisory opinion regarding Israel's occupation policies, spanned six days and closed on February 26, 2024.

54. ICJ Advisory Opinion, *supra* note 8, at 73.

55. *Id.* at 64–65.

56. *Id.* at 76.



This court opinion, described by many as a historic moment, was celebrated among the Palestinian community.<sup>57</sup> Unlike the 2004 advisory opinion, which addressed just the illegality of the settlements without considering the broader context of Israel's practices in the Occupied Territories, this new opinion explicitly declares Israel's occupation of Palestinian territories to be unlawful and states that Israel's discriminatory laws and policies against Palestinians violate the prohibition on racial segregation and apartheid. Soon after it was published, Palestinian legal advocates recalled the impact of the first ICJ opinion given in 2004, which launched the international Boycott, Divestment, and Sanctions (BDS) movement, to suggest that this new advisory opinion could be used to further pressure the international community to impose sanctions on Israel.<sup>58</sup> Yet, while the significance of this opinion cannot be denied, it is important to highlight the narrowness of its scope. Although the court recognized that Israeli practices in the Occupied Territories violate the prohibition against racial segregation and apartheid, it did not thoroughly explore these findings or address the specific acts that define apartheid. Additionally, the opinion narrowly focuses on the Occupied Territories since 1967, neglecting the partition of Palestine and the 1948 Nakba, and fails to analyze the legality of Israeli practices and policies within the 1948 territories, which affect Palestinian citizens of Israel.

Palestinians have also sought to use UN Security Council mechanisms to pressure Israel to end the occupation of Palestinian territories, since the Security Council is the principal international body responsible for maintaining international peace and security. Yet, these efforts have often been unsuccessful. In 2014, for example, the PLO approached the Security Council with the aim of passing a resolution to end the Israeli occupation of Palestinian territories.<sup>59</sup> The resolution, which was put to a vote in December 2014, called on Israel to withdraw from occupied Palestinian territories by

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57. *Presidency Welcomes ICJ's Ruling on Israel's Occupation of Palestine, Calls for Israel's Compliance*, *supra* note 8.

58. Ghousoon Bisharat, *Israel Always Sold the Occupation as Legal. The ICJ Now Terrifies Them*, +972 MAG. (July 23, 2024), <https://www.972mag.com/icj-israel-occupation-illegal> [<https://perma.cc/XAR3-EBAU>].

59. Maya Shwayder, *PLO Submits Resolution to UNSC to 'End Occupation'*, THE JERUSALEM POST (Oct. 29, 2014), <https://www.jpost.com/Arab-Israeli-Conflict/WATCH-LIVE-Emergency-UN-meeting-discussing-Jerusalem-tensions-380181> [<https://perma.cc/45JV-CAQB>]; *Palestinians to Submit U.N. Resolution on Occupation by End-Oct*, YNET NEWS.COM (Oct. 17, 2014, 6:24 PM), <https://www.ynetnews.com/articles/0,7340,L-4581247,00.html> [<https://perma.cc/95ZW-Z9TD>].

November 2016.<sup>60</sup> Though it received majority support, it fell short of the required votes to pass.<sup>61</sup>

The scope of Palestinian mobilization and engagement with international law extends beyond the United Nations and its mechanisms. In 2015, Palestine joined the ICC as its 123rd member, a landmark moment widely hailed by the international community as a significant step in the Palestinian people's pursuit of justice, freedom, and peace.<sup>62</sup> By joining the ICC, Palestine aimed to demand accountability for Israel's crimes,<sup>63</sup> bolster its political influence and diplomatic position, and create leverage by bringing charges against Israeli officials for international crimes in the Occupied Territories. Since joining the ICC, Palestinian leadership and human rights organizations have increasingly turned to the court, framing Israeli atrocities within a criminal justice framework, despite criticism from legal scholars<sup>64</sup>—including Palestinians—regarding the ICC's inefficiency, double standards, and institutional biases.<sup>65</sup> Recently, in response to Israel's ongoing assault on

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60. *Id.*

61. *Id.* The United States had indicated it would veto the resolution, which likely influenced the voting dynamic and ultimate outcome.

62. *Palestine joins the International Criminal Court*, MIDDLE E. POL'Y COUNCIL, <https://mepc.org/commentaries/palestine-joins-international-criminal-court> [<https://perma.cc/6WV8-EBTK>].

63. Bisharat et al., *supra* note 18.

64. This is also evident in events following October 7, 2023. On November 9, 2023, Palestinian human rights organizations Al-Haq, Al-Mezan, and Palestinian Center for Human Rights filed a lawsuit with the ICC under Article 15 of the Rome Statute. This follows previous submissions, including an open letter from 101 associations and academics on October 19, 2023, calling for accountability for Israeli actions. See *Three Rights Groups Rile ICC Lawsuit Against Israel Over Gaza 'Genocide'*, AL JAZEERA (Nov. 9, 2023), <https://www.aljazeera.com/news/2023/11/9/three-rights-groups-file-icc-lawsuit-against-israel-over-gaza-genocide> [<https://perma.cc/4S4B-6FYX>].

65. The Office of the Prosecutor has faced criticism for delays and, at times, a complete halt in its actions regarding Palestine, despite ample documentation of international crimes within the court's jurisdiction by human rights organizations and international bodies like the UN Human Rights Council. For instance, the UN Human Rights Council has established various investigative mechanisms relevant to the court's jurisdiction, including the UN Fact-Finding Mission on the 2008–2009 Gaza conflict, the UN Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory, and an open-ended independent international commission of inquiry on the OPT, including East Jerusalem and Israel. Each prosecutor has managed different stages of preliminary examinations, yet all have been marked by delays or terminations of investigations. Following the Pre-Trial Chamber's decision on February 5, 2021, affirming jurisdiction over Gaza, the West Bank, and East Jerusalem, the investigation officially commenced on March 3, 2021; however, it has faced persistent delays. In February 2023, thirty-five Palestinian civil society organizations sent a letter to ICC Prosecutor Karim Asad Ahmad Khan urging him to expedite the investigation into the situation in Palestine and to issue

Gaza, Palestinian human rights organizations have made several submissions to the ICC on alleged Israeli war crimes.<sup>66</sup> On May 21, 2024, seven months into Israel's ongoing assault on Gaza, the ICC Prosecutor, Karim Khan, announced that he is seeking arrest warrants for Israeli Prime Minister Benjamin Netanyahu, his defense chief, and three Hamas leaders over war crimes and crimes against humanity committed on and after October 7, 2023 in the Gaza Strip and Israel.<sup>67</sup> Six months later, on November 21, 2024, ICC Pre-Trial Chamber I unanimously issued arrest warrants for the Prime Minister of Israel, Benjamin Netanyahu, and former Defense Minister Yoav Gallant after finding reasonable grounds to believe that they bear criminal responsibility for multiple crimes.<sup>68</sup> Specifically, the Chamber found that both officials are allegedly responsible as co-perpetrators in the war crime of using starvation as a method of warfare as well as crimes against humanity, including murder, persecution, and other inhumane acts. The Chamber also determined that they bear responsibility as civilian superiors for the war crime of intentionally directing attacks against the civilian population.<sup>69</sup>

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a preventive statement in response to rising violence and punitive measures against Palestinians. Similarly, allegations of genocide, crimes against humanity, and war crimes arose from the latest onslaught on the Gaza Strip since October 7, 2023, but no arrest warrants had been issued by the time of this interview. Subsequently, increased pressure led to the issuance of a request for arrest warrants by the Prosecutor. For more on the ICC's Office of the Prosecutor and the situation in Palestine, see Hindi, *supra* note 6 and Reynolds & Erakat, *supra* note 6.

66. On November 9, 2023, Palestinian human rights organizations Al-Haq, Al-Mezan, and PCHR filed a lawsuit with the ICC under Article 15 of the Rome Statute. This follows previous submissions, including an open letter from 101 associations and academics on October 19, 2023, calling for accountability for Israeli actions. See *Three Rights Groups File ICC Lawsuit Against Israel Over Gaza 'Genocide'*, *supra* note 64; Letter from Al-Haq et al., to Karim A.A. Khan, Prosecutor, Int'l Crim. Ct., requesting Mr. Khan "Issue Arrest Warrants, Investigate Israeli Crimes and Intervene to Deter Incitement to Commit Genocide in Gaza" (Oct. 19, 2023), [https://www.alhaq.org/cached\\_uploads/download/2023/10/20/icc-letter-1697782247.pdf](https://www.alhaq.org/cached_uploads/download/2023/10/20/icc-letter-1697782247.pdf) [<https://perma.cc/7SU6-BVZM>]; See also *State of Palestine: Situation in the State of Palestine, Case No. ICC-01/18*, INT'L CRIM. CT., <https://www.icc-cpi.int/palestine>.
67. Josef Federman, *War Crimes Prosecutor Seeks Arrest of Israeli and Hamas Leaders, Including Netanyahu*, AP (May 20, 2024, 8:48 PM), <https://apnews.com/article/icc-khan-netanyahu-070941d21ccd1f2b9611032b88527575> [<https://perma.cc/83R9-74L6>].
68. Press Release, Int'l Crim. Ct., Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel's Challenges to Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant (Nov. 21, 2024), <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges> [<https://perma.cc/7GE3-QZK2>].
69. *Id.*

Palestinian legal scholars, human rights practitioners, and civil society organizations have also focused their advocacy and litigation strategies on Israel's violation of international humanitarian and human rights law. In territories occupied by Israel since 1967, they have invoked international humanitarian law to mitigate the impact of armed conflict by protecting noncombatants and regulating methods of warfare.<sup>70</sup> In areas occupied by Israel in 1948, human rights law has served as the primary framework governing Israel's conduct towards its population.<sup>71</sup>

In the past year, since Israel began its assault on Gaza following the Hamas-led attacks of October 7, engagements with international law, both by Palestinians and their supporters, have only intensified. At the ICJ, South Africa filed a case accusing Israel of committing genocide.<sup>72</sup> The court found the claim plausible and issued provisional measures against Israel.<sup>73</sup> Meanwhile, Nicaragua initiated proceedings at the same court against Germany, arguing that its financial and military support for Israel constitutes complicity in genocide.<sup>74</sup> Despite these proceedings and the provisional measures ordered by the court, the situation on the ground in Gaza continues to worsen. At the time of writing, the war has led to the deaths of 43,391 civilians and the ongoing displacement of over 1.9 million Gazans, who represent more than 90 percent of the territory's Palestinian population.<sup>75</sup> As a result of Israel's blockade of international aid, Palestinians in Gaza now make up 80 percent of people in the world experiencing famine or

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70. See, for example, the work of Palestinian human rights organizations such as Al-Haq, Al Mezan, and the Palestinian Centre for Human Rights, which extensively document and report on international humanitarian law violations in the occupied Palestinian territories. See Pub. Rels., *About Al-Haq*, AL-HAQ (Oct. 16, 2010), <https://www.alhaq.org/about-alhaq/7136.html> [<https://perma.cc/X3L8-GDJ2>]; *About Al Mezan*, AL MEZAN, <https://www.mezan.org/en/page/11/About-Us> [<https://perma.cc/CT4P-64KP>]; *About*, PALESTINIAN CTR. FOR HUM. RTS., <https://pchrghaza.org/about/> [<https://perma.cc/DXV7-8L67>].

71. For instance, Adalah, The Legal Center for Arab Minority Rights in Israel, focuses on using human rights law to advocate for the rights of Palestinians within Israel's 1948 borders. *About*, ADALAH (July 2017), <https://www.adalah.org/en/content/view/7189> [<https://perma.cc/2V2N-NG59>].

72. Application Instituting Proceedings (S. Afr. v. Isr.), *supra* note 7.

73. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order, (Jan. 26, 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf> [<https://perma.cc/3A2P-DUJW>].

74. Application Instituting Proceedings (Nicar. v. Ger.), *supra* note 7.

75. See text and sources accompanying *supra* note 5.

catastrophic hunger,<sup>76</sup> with UN Special Rapporteur on the Right to Food Michael Fakhri noting that “never in post-war history ha[s] a population been made to go hungry so quickly and so completely as [is] the case for the 2.3 million Palestinians living in Gaza.”<sup>77</sup>

Legal efforts since October 7 have extended across multiple national jurisdictions, involving legal actions and human rights advocacy aimed at holding Israeli actors and third-party states accountable, once again, by resorting to international legal frameworks. For example, on November 13, 2023, the Center for Constitutional Rights (CCR) in New York filed a case in the U.S. District Court for the Northern District of California against President Joe Biden, Secretary of Defense Lloyd Austin, and Secretary of State Antony Blinken, alleging their complicity in Israel’s genocide in Gaza.<sup>78</sup> The suit references the 1948 Genocide Convention, which mandates that governments prevent genocide, as well as the U.S. Genocide Convention Implementation Act of 1988, which incorporates this mandate into U.S. law.<sup>79</sup> In early March 2024, the case was dismissed on procedural grounds, with the court ruling that it fell outside its limited jurisdiction because it concerned political questions about Palestine/Israel not subject to U.S. judicial oversight.<sup>80</sup> The CCR appealed the decision to the Ninth Circuit Court of Appeals, which upheld the dismissal on July 15, 2024.<sup>81</sup>

## B. Palestine and the Limitations of International Law

While Palestine has achieved some significant legal victories, these have been sporadic and limited, or what Hilary Charlesworth has described as “bite-size pieces” that overlook the larger context.<sup>82</sup> This failure of justice stems from international law’s inability to emancipate the oppressed, address historical injustices, and ensure justice and accountability for perpetrators, which allows it to serve as a mechanism that perpetuates

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76. Michael Fakhri (Special Rapporteur on the Right to Food), *Starvation and the Right to Food*, 9–24, U.N. Doc. A/79/171 (July 17, 2024).

77. *Id.* at 3.

78. Complaint, Def. for Child. Int’l—Palestine v. Biden, 714 F. Supp. 3d 1160 (N.D. Cal. Nov. 13, 2023) (No. 3:23-cv-05829).

79. *Id.* at 74.

80. Order Granting Motion to Dismiss and Denying Motion for Preliminary Injunction, Def. for Child. Int’l—Palestine v. Biden, 714 F. Supp. 3d 1160 (N.D. Cal. Jan. 31, 2024) (No. 23-cv-05829-JSW).

81. Def. for Child. Int’l—Palestine v. Biden, 107 F.4th 926 (9th Cir. 2024).

82. Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 384 (2002).

oppression and upholds colonial interests. This dynamic sustains the prolonged occupation of Palestine and the oppression of its people. Moreover, the few gains that have been made through the international legal and institutional order have thus come at a considerable cost. What undergirds and sustains this order are deep-rooted structures that Palestinians have had limited opportunity to influence on their own terms but that nevertheless continue to shape their political reality and everyday lives. These structures impact both substantive representation (whose interests are considered) and procedural representation (whose voices are heard).

The adoption of the British Mandate of Palestine by the Council of League of Nations in 1922 is a prime example of how international law facilitated the colonization of Palestine. This mandate established the United Kingdom as the mandatory power over Palestine, which had been under British military governance since its occupation by the Ottoman Empire during World War I.<sup>83</sup> Further, the mandate legitimized the 1917 Balfour Declaration,<sup>84</sup> whose provisions were designed to support British governance and advance the establishment of a Jewish homeland,<sup>85</sup> thereby entrenching colonial control and shaping the ongoing challenges faced by Palestinians today.

Palestinian legal scholars have critically analyzed the United Nation's role in these settler-colonial processes in Palestine, highlighting how Palestinian reliance on international law's promises often falls short due to the inconsistent application of its principles. They consistently held that the United Nations and international law, both in their historical development and contemporary application, are profoundly implicated in the settler-colonial enterprise in Palestine and the consequent subjugation of the Palestinian people. This includes the acceptance of the Balfour Declaration, which created significant upheaval in the lives of Palestinians. Ardi Imseis points out how the United Nations received considerable praise from Western nations for supporting Jewish state-building efforts, which were framed as a humanitarian initiative to create a national refuge for Jews in the wake of their genocide in Europe.<sup>86</sup> This sanctuary, however, was largely created at the expense of Palestinians, who had no responsibility for the Nazi

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83. *Establishment of Occupied Enemy Territory Administration South (OETA-S) (1918)*, ECON. COOP. FOUND., <https://ecf.org.il/issues/issue/893> [<https://perma.cc/PB2Q-AQSU>].

84. *Mandate for Palestine*, League of Nations Doc. C.529M.314 1922 VI (1922).

85. Letter from Lord Arthur James Balfour, Brit. Foreign Minister, to Lord Lionel Walter Rothschild (Nov. 2, 1917), [https://ecf.org.il/media\\_items/297](https://ecf.org.il/media_items/297) [<https://perma.cc/53V5-6C7K>].

86. IMSEIS, *supra* note 14, at 52–109.

atrocities. For Palestinians, this situation constituted a national catastrophe, involving the destruction of hundreds of villages and the forced displacement of over 750,000 individuals, a tragedy that was further compounded by Israel's unlawful denial of their right to return.<sup>87</sup>

To understand how international law facilitated the colonization of Palestine, one must also examine the role of the United Nations partition plan. On November 29, 1947, the UN General Assembly passed Resolution 181, recommending the partition of Palestine into Jewish and Arab states.<sup>88</sup> The plan proposed allocating more than half of Mandate Palestine to a Jewish state, despite Jews constituting less than a third of the population and owning less than seven percent of the land.<sup>89</sup> By endorsing this partition plan, the United Nations effectively validated the division of historic Palestine in violation of international law. The passage of the UN partition plan, despite strong Arab opposition, is considered one of the most significant moments in Palestine's history, as it conferred international legitimacy on the Zionist colonization of Palestine through military means.<sup>90</sup> This is just one example of how the Zionist movement leveraged international law and its institutions to legitimize its ethnoreligious claims to territorial sovereignty in a predominantly non-Jewish society.

Ardi Imseis examines how Palestine and Palestinians embody a condition that he calls "international legal subalternity,"<sup>91</sup> which results from the United Nations presenting itself and the rules-based international legal order as the sole means of achieving justice for the global underclass, while paradoxically obstructing justice through its own actions. Examples of this obstruction include the British Mandate of Palestine in 1922, the 1947 UN partition plan, the distinctive institutional and normative regime established by the United Nations in 1949 to protect and assist Palestinian refugees, the United Nations' failure to definitively affirm the illegality of Israel's continued

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87. *Id.*

88. G.A. Res. 181 (II) (Nov. 29, 1947).

89. *Id.* at 142–46.

90. Alex Winder, *UN Partition Plan, 29 November 1947, Paving the Way to the Impending Nakba*, INTERACTIVE ENCYCLOPEDIA OF THE PALESTINE QUESTION, <https://www.palquest.org/en/highlight/159/un-partition-plan-29-november-1947> [<https://perma.cc/G98F-BDBL>].

91. 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, 4 (2021).

presence in the occupied Palestinian territory since 1967, and its failure to grant the state of Palestine full membership.<sup>92</sup>

Like Imseis, Erakat also critiques the United Nations for its ineffective protection of Palestinian rights, observing that, despite its numerous resolutions, the UN has failed to make any meaningful change on the ground.<sup>93</sup> She points to structural limitations within the United Nations, such as the influence of powerful member states and constraints imposed by the Security Council, which impede the effective responses to Israeli practices.<sup>94</sup> The United States' use of its veto power in the UN Security Council has repeatedly prevented the implementation of international laws when Israel violates them.<sup>95</sup> The lack of accountability for Israel's repeated breaches of international law—whether through state responsibility or individual criminal responsibility—allows it to act with impunity, prolonging the suffering of the Palestinian people.

Palestinian legal scholarship has long criticized the ICC. Critiques of the attempt to achieve accountability through the ICC emphasize international

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92. IMSEIS, *supra* note 14, at 52–107, 110–70, 172–214, 216–48 (analyzing the UN's role in Palestine over time through critical periods: the British Mandate and partition plan (pages 52–107), the establishment of the Palestinian refugee regime (pages 110–70), and the UN's approach to Israel's occupation of Palestinian territory since 1967 (pages 172–214), and its handling of Palestine's bid for UN membership (pages 216–48)).
  93. ERAKAT, *supra* note 14, at 1–22. The most obvious recent instance of this dynamic is the passage of a United Nations Security Council (UNSC) resolution on March 25, 2024, which ordered a ceasefire until the end of Ramadan. *See* S.C. Res. 2728 (Mar. 25, 2024). This resolution came after the United States finally agreed to abstain from, rather than veto, the ceasefire vote. However, it was never enforced, and Israel violated the ceasefire order within one day, with apparent impunity. *See* BBC News, *Fighting Continues Despite UN Security Council Resolution Calling for Ceasefire*, YOUTUBE (Mar. 26, 2024), [https://www.youtube.com/watch?v=\\_1oU1Y680ro](https://www.youtube.com/watch?v=_1oU1Y680ro); Matthew Mpoke Bigg, *Days After U.S. Cease-Fire Resolution, Has Anything Changed in Gaza?*, N.Y. TIMES (Mar. 29, 2024), <https://www.nytimes.com/2024/03/29/world/middleeast/un-ceasefire-resolution-israel-gaza.html> [<https://perma.cc/333F-77NB>]; Hiba Yazbek, *Israel Presses on With Strikes in Gaza After U.N. Cease-Fire Resolution*, N.Y. TIMES (March 26, 2024), <https://www.nytimes.com/2024/03/26/world/middleeast/israel-strikes-gaza-un-cease-fire-resolution.html> [<https://perma.cc/YE2N-SBNR>].
  94. ERAKAT, *supra* note 14, at 1–22. Some other Palestinian scholars have pointed out how the United Nations failed to support Palestinians in their pursuit of liberation and statehood, such as by granting full membership to the state of Palestine, because Israel consistently benefited from the unconditional support of the United States. *See, e.g.,* Richard Falk, *The United Nations and the Middle East: A Guide for the Perplexed*, in *THE INTERNATIONAL RELATIONS OF THE CONTEMPORARY MIDDLE EAST* 250–62 (Tareq Y. Ismael & Glenn E. Perry eds. 2013).
  95. MEE Staff, *The 94 Times the US Used Veto Power Against US Resolutions on Israel*, MIDDLE E. EYE (Nov. 20, 2024, 7:17 PM), <https://www.middleeasteye.net/news/49-times-us-has-used-veto-power-against-un-resolutions-israel> [<https://perma.cc/7RF3-474Y>].



law's entanglement with geopolitical structures and the racial biases inherent in international criminal law, thereby calling the feasibility and efficacy of such efforts into question.<sup>96</sup> Skepticism regarding the ICC's role in addressing Israel's crimes in Palestine stems from its procedural delays, limited jurisdiction, and susceptibility to political pressures, all of which defer accountability for Israel and justice for Palestinians.<sup>97</sup>

Palestinian legal scholarship underscores how international law has been stripped of its political force, revealing paradoxes in human rights frameworks, such as the fact that human rights discourse can sometimes obscure rather than illuminate underlying power dynamics. This scholarship examines the Palestinian situation as a "litmus test" for the ability of international law and human rights to properly address historical injustices.<sup>98</sup> Further, Palestinian legal scholarship sheds light on the shortcomings of sovereignty as a state-building endeavor;<sup>99</sup> the role of laws of war and human rights in sustaining systemic economic harms;<sup>100</sup> and the exclusionary aspects of settler-colonial constitutionalism, emphasizing how settler colonialism constitutes a fundamental feature of Israeli constitutional law.<sup>101</sup>

The inherent limitations of international law extend beyond the matter of substantive representation, or whose interests are considered; there is also a problem of procedural representation, or whose voices are heard. Even when the Palestine perspective is heard—such as through the PLO at

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96. Souheir Edelbi, *Making Race Speakable in International Criminal Law: Review of Lingaas' the Concept of Race in International Criminal Law*, 16 TWAILR REFLECTIONS 1 (2020); Reynolds & Erakat, *supra* note 6; Noura Erakat, Darryl Li, & John Reynolds, *Race, Palestine, and International Law*, 117 AM. J. INT'L L. UNBOUND 77 (2023); Noura Erakat, *Beyond Discrimination: Apartheid Is a Colonial Project and Zionism Is a Form of Racism*, EJIL:TALK! (July 5, 2021), <https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism> [<https://perma.cc/8RU7-5D74>].

97. Reynolds & Erakat, *supra* note 6.

98. Nimer Sultany, *The Question of Palestine as a Litmus Test: On Human Rights and Root Causes*, 23 PALESTINE YEARBOOK INT'L L. 1 (2022); Emilio Dabed, *Palestinian Legal Activism, Between Liberation and the 'Desire' for Statehood*, THE NABKA FILES (Feb. 17, 2023), <https://nakbafiles.org/2017/02/23/palestinian-legal-activism-between-liberation-and-the-desire-of-statehood> [<https://perma.cc/3TAF-8PFF>].

99. See, e.g., Amal Jamal, *State-Building, Institutionalization and Democracy: The Palestinian Experience*, MEDITERRANEAN POLS., Autumn 2001, at 1–30 (analyzing how the Palestinian Authority's state-building process, despite creating formal democratic institutions, was undermined by informal practices, personalized politics, and neopatrimonial authority structures that hollowed out democratic principles in favor of centralized control).

100. Shahd Hammouri, *Systemic Economic Harm in Occupied Palestine and the Social Connections Model*, 22 PALESTINE YEARBOOK INT'L L. 112 (2021).

101. MAZEN MASRI, THE DYNAMICS OF EXCLUSIONARY CONSTITUTIONALISM: ISRAEL AS A JEWISH AND DEMOCRATIC STATE (2017); Mazen Masri, *Colonial Imprints: Settler-Colonialism as a Fundamental Feature of Israeli Constitutional Law*, 13 INT'L J. L. CONTEXT 388 (2017).

the United Nations—it is often framed as being representative despite it not necessarily reflecting the interests of the people for whom it claims to speak.

Elsewhere, Reshard Kolabhai and I examined how the ICJ's institutional structure creates inherent limitations for advancing anti-colonial arguments.<sup>102</sup> We argued that the court's procedural framework, which requires states to bring claims through existing international legal categories like genocide and apartheid, structurally constrains the ability to present broader decolonial arguments.<sup>103</sup> Taking the ICJ genocide case brought by South Africa against Israel's conduct in Gaza as an example, we point out how the court's institutional parameters require reducing complex colonial relationships and histories into discrete legal violations. The court's framework means that cases must be argued through established legal categories that were not designed to address settler colonialism.<sup>104</sup> As a result, states "can abhor genocide without explicitly specifying which legal, institutional, or political-economic arrangements" would be necessary to fundamentally restructure colonial relationships and achieve genuine liberation.<sup>105</sup>

Despite their awareness of these broader structural issues within international law, Palestinian legal scholars and practitioners have chosen to prioritize the appeal to international law by using illegality as the primary language and framework with which to critique Israel's oppression of Palestinians. This approach treats Israel's actions as violations of international law that must be opposed through the very same legal channels that Israel uses to maintain its legitimacy. While recourse to law appears almost inevitable—legal contestation seemingly requires engaging with law on its own terms—the following sections show that there are ways to engage with international law without being confined by its traditional frameworks. These alternative approaches suggest that while legal engagement may be necessary, accepting law's terms as given is not inevitable—rather, law can be strategically deployed as part of a broader political project of Palestinian liberation.

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102. Alaa Hajyahia & Reshard Kolabhai, *The Two Faces of Palestinian Freedom*, 00 LONDON R. INT'L L. (SPECIAL ISSUE) 49–52 (2024).

103. *Id.*

104. Given the disconnect between state interests and the aspirations of their constituencies, whether states would attempt to raise anticolonial arguments at the ICJ remains an open question. *Id.* at 49–50.

105. *Id.* at 51.

## II. THE RUSSELL TRIBUNAL ON PALESTINE AND INTERNATIONAL LAW

Even in spaces free from institutional constraints, Palestinians have struggled to break free from the limiting framework of international law. The Russell Tribunal on Palestine—a citizen-based forum established in 2009 in response to Israel’s then-latest assault on Gaza—illustrates this paradox.<sup>106</sup> The tribunal, modeled after the Russell Tribunal on Vietnam (1966-1967),<sup>107</sup> aimed to document, judge, and condemn Israeli actions.<sup>108</sup> Though operating independently of formal legal structures and empowered to define its own terms of reference,<sup>109</sup> the tribunal chose to confine itself within the very legal paradigms it could have challenged. This decision reflects a broader pattern in Palestinian advocacy where even alternative forums for justice ultimately reinforce rather than reimagine the boundaries of international law.

Tor Krever’s work shows that legal frameworks were central to the tribunal’s mission, which treated law as an end in itself.<sup>110</sup> Despite its independence from formal legal structures, the tribunal neither challenged the narrow and abstract definitions of atrocities nor addressed the

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106. *About*, RUSSELL TRIBUNAL ON PALESTINE, <https://www.russelltribunalonpalestine.com/en/about-rto.html> [<https://perma.cc/G7KW-2KQ6>].

107. See Tor Krever, *Remembering the Russell Tribunal*, 5 LONDON REV. INT’L L. 483 (2017). The International War Crimes Tribunal for Vietnam, which was convened to address war crimes during the Vietnam War, served as a pivotal event that inspired subsequent people’s tribunals. Notably, the second Russell Tribunal on Latin America (1974–1976), organized by the Lelio Basso International Foundation for the Rights and Liberation of Peoples, was among the earliest tribunals influenced by the Vietnam precedent. This tribunal investigated human rights abuses in Latin America. Following these initiatives, numerous people’s tribunals emerged. *Id.* For instance, tribunals in West Germany (1978–1979) focused on rights violations, while another in the United States (1980) examined abuses against Native Americans. *Id.* at 489. Additionally, tribunals addressed the responsibility of Japanese authorities for wartime sexual slavery and violence in the Asia-Pacific region (2000). *Id.* Additional tribunals have continued to highlight various global issues. These include examining the 1965 Indonesian politicide and critiquing the Canadian mining industry’s operations in Latin America. *Id.* In 2005, the World Tribunal on Iraq challenged the United States’ intervention in Iraq. *Id.*

108. Frank Barat & Daniel Machover, *The Russell Tribunal on Palestine*, in *IS THERE A COURT FOR GAZA? A TEST BENCH FOR INTERNATIONAL JUSTICE* 527, 527–77 (Chantal Meloni & Gianni Tognoni eds., 2012).

109. *Supra* note 105.

110. Tor Krever writes: “Still, [the tribunal organizers] made a concrete choice, tactical or otherwise, to use and privilege the language of law and legality, and the juridical form of the tribunal, as those means to frame Israel’s aggression in Gaza, and the dispossession and oppression of Palestinians more generally, as foremost a spectacular violation of international law, and one to be opposed as such.” Tor Krever, *From Vietnam to Palestine: People’s Tribunals and the Juridification of Resistance*, in *MAKING ENDLESS WAR: THE VIETNAM AND ARAB-ISRAELI CONFLICTS IN THE HISTORY OF INTERNATIONAL LAW* 233, 248 (Brian Cuddy & Victor Kattan eds., 2023).

underlying structures and conditions that enable Israel's atrocities. Instead, the tribunal merely replicated international law frameworks without expanding their scope, choosing to remain within the constraints of liberalism even when it had the opportunity to broaden its framework and envision broader possibilities for justice.

### A. The Russell Tribunal on Palestine: Five Sessions

The Russell Tribunal on Palestine convened a distinguished jury of Nobel laureates, former UN leaders, heads of state, and prominent figures, such as writers, journalists, poets, actors, film directors, scientists, professors, lawyers, and judges.<sup>111</sup> From 2010 to 2014, the tribunal held sessions in Barcelona, London, Cape Town, New York, and Brussels. The tribunal's goal was to "examine the role and complicity of third parties (governments, institutions, and corporations) in violations of international law committed by Israel against the Palestinian people."<sup>112</sup>

The Barcelona session examined the European Union (E.U.) and its member states' complicity in Israel's occupation of Palestinian territories and its ongoing violations of international law.<sup>113</sup> Over two days, the jury heard testimony on key issues, including Palestinian self-determination, Israeli settlements, the annexation of East Jerusalem, the Gaza blockade, Israel's assault on Gaza in December 2008 and January 2009,<sup>114</sup> the construction of the wall in the Occupied Territories, and the E.U./Israel Association Agreement.<sup>115</sup> The tribunal concluded that the E.U. had failed to

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111. Such as Cynthia McKinney, former US congresswoman; Alice Walker, acclaimed American author and poet; John Dugard, Professor of International Law and former UN Special Rapporteur; Gisèle Halimi, lawyer and former UNESCO Ambassador; José Antonio Martín Pallín, emeritus judge; Angela Davis, American political activist and scholar; and Stéphane Hessel, French diplomat and Resistance member, among others. *The Jury*, RUSSELL TRIBUNAL ON PALESTINE, <https://www.russelltribunalonpalestine.com/en/about-rtop/jury.html> [https://perma.cc/4WH6-464R].

112. *Russell Tribunal on Palestine Closing Session*, RUSSELL TRIBUNAL ON PALESTINE, <https://www.russelltribunalonpalestine.com/en/sessions/final-session.html> [https://perma.cc/QV33-WGGE].

113. RUSSELL TRIBUNAL ON PALESTINE, CONCLUSIONS OF THE FIRST INTERNATIONAL SESSION OF THE RUSSELL TRIBUNAL ON PALESTINE (2010), <https://www.russelltribunalonpalestine.com/en/wp-content/uploads/2010/08/CONCLUSIONS-TRP-FINAL-EN-last.pdf> [https://perma.cc/BGW5-RYLQ].

114. *Id.*

115. *Barcelona Session*, RUSSELL TRIBUNAL ON PALESTINE (Mar. 1, 2010), <https://www.russelltribunalonpalestine.com/en/sessions/barcelona-session.html> [https://perma.cc/538H-FDHC].

enforce international and European law and urged the E.U. and its member states to impose diplomatic, trade, and cultural sanctions on Israel.<sup>116</sup>

The London session examined international corporate complicity in Israel's human rights and humanitarian law violations.<sup>117</sup> Key questions included: Which Israeli violations do corporations support? What are the legal consequences of corporate activities that support Israel? What remedies and state obligations exist regarding corporate complicity? To address these questions, experts and witnesses presented evidence on the supply of arms, bulldozers, and financial services to Israeli settlements.<sup>118</sup> The tribunal concluded that corporations like G4S, AIG, and Shamrock Holdings, among many others,<sup>119</sup> were complicit in these violations of international humanitarian and human rights law.<sup>120</sup>

In Cape Town, the jury examined whether Israel's actions against Palestinians constitute apartheid under international law. Global and South African experts and witnesses testified about the impact of Israeli policies and their legal implications.<sup>121</sup> The tribunal concluded that Israel's regime met the definition of apartheid in international law.<sup>122</sup> Those under military rule in the Occupied Territories experienced the harshest form of apartheid, while Palestinian citizens of Israel, despite having voting rights, faced systemic discrimination and were excluded from the full benefits of Israeli citizenship. The tribunal deemed Israel's control over Palestinians as a comprehensive apartheid regime operating in both the West Bank and Israel.<sup>123</sup>

In New York, the session addressed the United States' complicity and the UN's failures to hold Israel accountable for its violations of international

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116. *Id.*

117. RUSSELL TRIBUNAL ON PALESTINE, CONCLUSIONS OF THE LONDON SESSION (2010), <https://www.russelltribunalonpalestine.com/en/wp-content/uploads/2011/01/RTOP-London-Session-Findings.pdf> [<https://perma.cc/X26D-WAYZ>].

118. *Id.* at 21–25.

119. *Id.* Additional corporations were discussed, including Israeli corporations such as AFIGROUP, AVGOL, AHAVA, Tishbi Estate Wineries, Soda-Club, Alon Group, Leumi, Hapoalim, Carmel Agrexco. *Id.* at 21–23. Foreign corporations were discussed: Alstom, Dexia, Veolia Transport, Caterpillar, Cement Roadstone Holdings, Pensioenfonds Zorg en Welzijn, Society for Worldwide Interbank Financial Telecommunication. *Id.* at 23–25.

120. *Id.*

121. *Cape Town Session*, RUSSELL TRIBUNAL ON PALESTINE (Nov. 5, 2011), <https://www.russelltribunalonpalestine.com/en/sessions/south-africa.html> [<https://perma.cc/65CL-RWDU>].

122. RUSSELL TRIBUNAL ON PALESTINE, FINDINGS OF THE SOUTH AFRICAN SESSION (2011), <https://www.russelltribunalonpalestine.com/en/wp-content/uploads/2011/09/RTOP-Cape-Town-full-findings2.pdf> [<https://perma.cc/MD2Q-PRHZ>].

123. *Id.*

law.<sup>124</sup> The tribunal highlighted how U.S. economic, diplomatic, and military support facilitated Israeli oppression. It also criticized the United Nations for its inadequate response and failure in preventing these violations.<sup>125</sup> In its final session in Brussels in March 2013, the tribunal summarized findings from Barcelona, London, Cape Town, and New York. It reiterated Israel's violations of international law and evaluated the responsibilities of other parties, including the United States, United Nations, European Union and its member states, and private corporations, in supporting these violations.<sup>126</sup> Following Israel's 2014 assault on Gaza,<sup>127</sup> the tribunal convened a special session to investigate Israel's actions and third-state complicity,<sup>128</sup> in which it reaffirmed that these actions constituted war crimes, crimes against humanity, and genocide.<sup>129</sup> Israel's actions, the tribunal found, again constituted fundamental violations of international law.<sup>130</sup>

The tribunal's reliance on international legal frameworks exemplifies a broader pattern in Palestinian advocacy whereby historical, political and economic realities are reduced to legal questions: Does the situation in Palestine meet the legal criteria of apartheid or genocide? Can we apply legal definitions of war crimes? Are Israel's actions proportional according to international law's definition of proportionality? While these legal frameworks may enable the condemnation of specific violations, they ultimately constrain discourse within rights-based liberal paradigms that fail to address the reality of Palestinian oppression. In this process, the fundamental context of settler colonialism—the structural force that drives Israel's actions and policies in the region—remains largely intact. Thus, the continued oppression of the Palestinian people is all but guaranteed: even

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124. *Executive Summary of the Findings of the Fourth Session of the Russell Tribunal*, RUSSELL TRIBUNAL ON PALESTINE (Oct. 6, 2012), <https://www.russelltribunalonpalestine.com/en/sessions/future-sessions/new-york-session-summary-of-findings.html> [https://perma.cc/SB4Y-9RPB].

125. *Id.*

126. *Findings of the Final Session of the Russell Tribunal on Palestine*, RUSSELL TRIBUNAL ON PALESTINE (Mar. 16, 2013), <https://www.russelltribunalonpalestine.com/en/full-findings-of-the-final-session-en.html> [https://perma.cc/HT2V-DRQU].

127. *50 Days: More Than 500 Children: Facts and Figures on Fatalities in Gaza, Summer 2014*, B'TSELEM (July 20, 2016), [https://www.btselem.org/press\\_releases/20160720\\_fatalities\\_in\\_gaza\\_conflict\\_2014](https://www.btselem.org/press_releases/20160720_fatalities_in_gaza_conflict_2014) [https://perma.cc/C9E5-MTFV].

128. RUSSELL TRIBUNAL ON PALESTINE, EMERGENCY SESSION ON GAZA (2014), <https://www.russelltribunalonpalestine.com/en/wp-content/uploads/2014/09/TRP-Concl.-Gaza-EN.pdf> [https://perma.cc/4KMH-GYPW].

129. *Id.*

130. *Id.*

when the legal system is functioning as intended, crimes can never be prevented, but only retroactively addressed.

## B. International Law as a Raison D'être

Similar observations have been made by Tor Krever in his Article, *From Vietnam to Palestine: People's Tribunals and the Juridification of Resistance*.<sup>131</sup> Krever argues that Palestine treats international law as the tribunal's *raison d'être*, contributing to what he describes as the "juridification of resistance."<sup>132</sup> Juridification refers to the process of channeling political resistance and activism through legal mechanisms and international legal frameworks.

Krever identifies a structural tension, or "structural antinomy" within the tribunals themselves:<sup>133</sup> While the people's tribunals represent a form of political resistance to systemic injustice, they nevertheless continue to operate within the framework of law and legalism. The tension, then, is between the chosen form of resistance—the tribunal and its appeal to international law—and the tribunal's inherently political nature.<sup>134</sup>

In the context of the Palestine tribunal, Krever illustrates these tensions through the reflections of Frank Barat, one of the tribunal's coordinators: "We had this tension at every session, at every meeting . . . . If you have ten jurists talking for two days about international law, you won't reach the people . . . . [The fine line] between the tribunal as spectacle and as a legal proceeding . . . was very difficult to navigate."<sup>135</sup> Barat notes that "quite a lot of people complained to us that [the tribunal] is just a lawyers' initiative, that we have to be an activist initiative."<sup>136</sup> Krever further quotes Christopher Federici, another coordinator, who observed that "the Tribunal appeared conflicted by stark contrasts between the desire to project a sense of procedural legality and the inescapable underpinnings of activism that drove the very desire to organize."<sup>137</sup>

Krever attempts to show how this structural antinomy was manifested in the tribunal's relationship with international law.<sup>138</sup> Analyzing both the Vietnam and Palestine Tribunals, he highlights their reliance on international

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131. Krever, *supra* note 110, at 235.

132. *Id.*

133. *Id.* at 240.

134. *Id.*

135. *Id.* at 247.

136. *Id.*

137. *Id.*

138. *Id.* at 240.

law as the primary framework for condemning state atrocities. The Vietnam Tribunal's embrace of international law in the 1960s, Krever argues,<sup>139</sup> can be understood as an example of "principled opportunism."<sup>140</sup> This term is borrowed from Rob Knox and denotes using legalism to support a broader anti-imperialist resistance—it other words, using law to achieve strategic goals instead of treating it as an end in itself.<sup>141</sup>

In contrast, Krever suggests that the Palestine Tribunal treats international law as its *raison d'être*. Through a close analysis of its stated objectives, session discussions, and published findings, Krever illustrates how the Palestine Tribunal has focused intensively on legality as an end in itself.<sup>142</sup> For example, its stated objectives indicate that the tribunal aims "to examine the violations of international law . . . that prevent the Palestinian People from exercising its rights to a sovereign [s]tate"<sup>143</sup> and to address the "supremacy of international law as the basis . . . for resolving the Israeli Palestinian conflict."<sup>144</sup> This approach underscores that the main mission of the tribunal is upholding its commitment to international law and that legality remains its main concern.

Concerned about this narrow framing,<sup>145</sup> Krever argues that the Palestine Tribunal's findings reinforce this legalistic perspective by focusing on Israeli policies and practices primarily through the lens of illegality.<sup>146</sup> In so doing, it potentially obscures or even foreclosed a more substantive political-economic analysis that could contextualize the colonial structures that perpetuate these unlawful actions.<sup>147</sup> To illustrate, Krever refers to the Cape Town session, in which the tribunal meticulously examined the definition of apartheid in international law and the 1973 UN Convention on

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139. *Id.* at 235.

140. Robert Knox, *Strategy and Tactics*, 21 FINNISH YEARBOOK INT'L L. 193, 219-227(2010).

141. To support this argument, Krever refers to tribunal organizers' statements and goals and the tribunal sessions' findings and conclusions. In the case of Vietnam, the organizers clearly stated that deploying international legal arguments and the language of legality should not replace or overshadow politics, and that the scope of their work extended beyond legal judgment as an end in itself. For instance, Jean-Paul Sartre, one of the organizers, emphasized that the inquiry's outcomes should serve as a basis for organizing demonstrations, meetings, marches, and signature campaigns. From this perspective, law is viewed as merely one tool in a broader political movement. Krever, *supra* note 110, at 233-35.

142. *Id.* at 235.

143. *About*, *supra* note 109.

144. *Id.*

145. Krever, *supra* note 110, at 253-55.

146. *Id.*

147. *Id.* at 252-53.



the Suppression and Punishment of the Crime of Apartheid.<sup>148</sup> Its findings provide a detailed legal assessment of the Convention's relevance for addressing Israeli policies towards Palestinians, unequivocally stating that "Israel subjects the Palestinian people to an institutionalized regime of domination amounting to apartheid as defined under international law."<sup>149</sup> However, the tribunal's conclusions do not address why an apartheid regime exists in Palestine in the first place,<sup>150</sup> and do not discuss the broader factors driving Israeli apartheid, such as settler colonialism, imperialism, and political-economic influences, which makes Israeli apartheid appear as a crime devoid of context.<sup>151</sup> Krever warns that this focus on legalistic frameworks could undermine the potential impact of innovative initiatives like people's tribunals.<sup>152</sup>

### C. Mimicry Without Mockery: The Failure of Legal Subversion

What is striking about the Palestine Tribunal is that, despite operating free from institutional constraints—historically seen as a strength of people's tribunals—it failed to leverage this independence to challenge international law's narrow definitions and limitations.<sup>153</sup>

Who determines the definitions of genocide, apartheid, and occupation? Are the liberal interpretations of these concepts the only legitimate ones? The tribunal could have actively and creatively contested the narrow scope of legal vocabulary and its claims to universalism and neutrality. Yet, instead of pushing for a redefinition of the law and its terms, the tribunal adhered to existing definitions without question.

To understand the nature of the Palestine Tribunal's failure to challenge the existing narrow definitions and frameworks of international law, I turn to Homi Bhabha's concept of mimicry. Homi Bhabha's concept of mimicry involves the imitation of dominant structures while simultaneously exposing their limitations, creating a space for critique and subversion.<sup>154</sup> Through the

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148. *Id.* at 253.

149. RUSSELL TRIBUNAL ON PALESTINE, *supra* note 122.

150. Krever, *supra* note 110, at 255.

151. *Id.*

152. *Id.*

153. This perspective on the strengths of people's tribunals is reflected in various writings, including discussions of the Russell Tribunal on Vietnam. See AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 49 (John Duffett ed., 1968).

154. Homi Bhabha, *Of Mimicry and Man: The Ambivalence of Colonial Discourse*, 28 DISCIPLESHIP: SPECIAL ISSUE ON PSYCHOANALYSIS 125, 127 (1984).

act of mimicry, the colonized “appropriate and cannibalize colonial discourse” revealing its inconsistencies and “destabiliz[ing] the authority.”<sup>155</sup> In the act of mimicry, the colonial subject performs an act that is “almost [the] same, but not quite,”<sup>156</sup> skirting the line between “mimicry and mockery.”<sup>157</sup> Bhabha writes, “[t]he *menace* of mimicry is its *double* vision which in disclosing the ambivalence of colonial discourse also disrupts its authority.”<sup>158</sup>

In the case of the Russell Tribunal on Palestine, the organizers’ approach failed to fully realize the transformative potential of mimicry. Rather than using their platform to question and deconstruct the narrow, liberal definitions of international law—definitions that often abstract from the sociopolitical realities they aim to address—they instead adhered to established legal frameworks. By adopting the existing definitions of terms like such as genocide, apartheid, and occupation, without challenging their foundations or exploring alternative interpretation, the tribunal missed an opportunity to critically engage with the concept of universalism that these definitions purport to uphold. In short, the tribunal mimicked the language of international law without mocking it. The tribunal’s appeal to international law remained squarely within its limitations instead of interrogating its assumptions or exploring the relationship between international law and the political-economic context in which it is applied. Echoing the turn to formal legal channels discussed in Chapter I, the organizers of the Palestine tribunal chose to prioritize international law and illegality as the tribunal’s central concern.

Since October 7, 2023, several people’s tribunal initiatives have emerged. Most notably, the Gaza Tribunal was established in London on November 1, 2024,<sup>159</sup> bringing together academics, human rights defenders, and civil society representatives. The Gaza Tribunal has two distinct objectives as it appears on its official website: “The Gaza Tribunal has two main objectives: one particular and one universal. The particular goal is to assist in bringing the tragic events to an end as soon as possible and to hold the perpetrators accountable in the public conscience. The universal aim is

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155. TARIQ JAZEEL, *POSTCOLONIALISM* 130 (2019).

156. *Id.*

157. Bhabha, *supra* note 154, at 127.

158. *Id.* at 129 (emphasis in original).

159. ‘*Inspired by Conscience Courts*’: Gaza Tribunal Seeks Justice for Palestine, TRT WORLD, <https://www.trtworld.com/middle-east/inspired-by-conscience-courts-gaza-tribunal-seeks-justice-for-palestine-18232842> [<https://perma.cc/4DHY-DGQR>].

to issue a decision grounded in humanity's intellectual and moral values, one that can serve as a reference to prevent future atrocities worldwide."<sup>160</sup>

The tribunal will take place in five stages: the initial organization in London, United Kingdom (Stage I), the formation of three specialized chambers examining the legal, ethical, and cultural dimensions of the Palestinian situation (Stage II, October–November 2024); a public assembly with expert testimonies in Sarajevo, Bosnia and Herzegovina (Stage III, May 2025); final hearings with five to seven judges in Istanbul, Turkey (Stage IV, October 2025); and the publication of outcomes with the engagement of the international community (Stage V, end of 2025).<sup>161</sup>

While the Gaza Tribunal's objectives signal the potential for innovation, particularly in its explicit aim to ground its decisions in "humanity's intellectual and moral values," it remains unclear whether it will transcend the limitations of the 2009 Russell Tribunal on Palestine. The key question is whether this new tribunal will merely mimic or challenge and expand international legal frameworks, particularly when it comes to defining and applying concepts like genocide, apartheid, and occupation to the Palestinian context.

### III. THE LIMITS OF LEGALISM

#### A. Law and Political Praxis

In recent years, Palestinian legal scholars and advocates have been reflecting on the role of law in the Palestinian struggle for liberation and critically examining the ways in which international law might be instrumentalized to influence political praxis in Palestine. Key questions include whether Palestinians should continue presenting their claims to Israeli civil and military courts, whether occupation law (the body of international law governing military occupations under the Hague Regulations and Fourth Geneva Convention) exacerbates or mitigates the problem, and what claims should be made to international tribunals if they are pursued.<sup>162</sup> Many critical voices have challenged the liberal legal strategy

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160. *Who We Are*, GAZA TRIBUNAL, <https://gazatribunal.com/who-are-we> [<https://perma.cc/QW96-VWWH>] (emphasis omitted).

161. *Gaza Tribunal Launched in London to Initiate Its Process*, GAZA TRIBUNAL (Nov. 19, 2024), <https://gazatribunal.com/gaza-tribunal-launched-in-london-to-initialize-its-process/> [<https://perma.cc/XVL4-CBCP>].

162. Noura Erakat, *What Role for Law in the Palestinian Struggle for Liberation?*, AL-SHABAKA (Mar. 4, 2014), <https://al-shabaka.org/briefs/what-role-for-law-in-the-palestinian->

for Palestine, arguing that it fails to address Israel's settler colonialism and its broader implications.<sup>163</sup> A growing sentiment is that this strategy is inadequate for achieving Palestinian freedom and does not effectively tackle the underlying political issues.<sup>164</sup> Some argue that it converts the struggle for Palestinian liberation into a liberal struggle for rights. Others argue that international law can still be used strategically to advance the more radical cause of Palestinian liberation, in the form of what Noura Erakat calls "legal opportunism."<sup>165</sup>

In 2013, Mezna Qato and Kareem Rabie argued that organizing around international law has reduced the struggle for Palestinian liberation to a question of rights.<sup>166</sup> They noted that while international legal findings might bring minor institutional changes, they do not address the persistence of colonial structures.<sup>167</sup> Similarly, Lama Abu-Odeh shows how the legal system encourages the negotiation of claims by arbiters, which results in only marginal improvements for Palestinians rather than anything resembling real justice.<sup>168</sup> Nimer Sultany further argues that the law fails to deliver justice by treating Israeli violations as anomalies rather than clear and intentional expression of Israel's colonial agenda.<sup>169</sup> This is exacerbated, Sultany argues, by the territorial fragmentation of Palestinians, which creates fragmented legal claims under international law, undermining their ability to mount effective challenges to Israeli settler colonialism.<sup>170</sup>

Recent critiques of reports by Amnesty International, Human Rights Watch, and B'Tselem (published in 2021–2022), which accuse Israel of practicing apartheid from the Jordan River to the Mediterranean Sea,<sup>171</sup> raise similar concerns over focusing too narrowly on the liberal definition of

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struggle-for-liberation [<https://perma.cc/FDX8-SXBN>]; Noura Erakat, Lisa Hajjar, Dena Qaddumi, Ahmed Barclay, Asli Bali, Nimer Sultany & Darryl Li, *Roundtable on Occupation Law: Part of the Conflict or Part of the Solution?*, JADALIYYA (Sep. 11, 2012), <https://www.jadaliyya.com/Details/27041/Roundtable-on-Occupation-Law-Part-of-the-Conflict-or-Part-of-the-Solution> [<https://perma.cc/87TV-LGJD>].

163. See, e.g., Qato & Rabie, *supra* note 17.

164. *Id.*

165. ERAKAT, *supra* note 14, at 19.

166. Qato & Rabie, *supra* note 17.

167. *Id.*

168. Lama Abu-Odeh, *The Limits of International Law Legalese*, JADALIYYA (Dec. 5, 2012), <https://www.jadaliyya.com/Details/27552/The-Limits-of-International-Law-Legalese> [<https://perma.cc/4F7H-QBAW>].

169. Sultany, *supra* note 98.

170. *Id.*

171. Amnesty: *Israel's Apartheid*, *supra* note 16; B'Tselem: *This Is Apartheid*, *supra* note 16; Shakir, *supra* note 16.

apartheid at the expense of the broader issues of settler colonialism. These reports describe Israel's policies as having created a system of domination and apartheid.<sup>172</sup> The reports highlight discriminatory citizenship regimes, which are evident in the fragmentation of Palestinians into distinct groups and in the significant inequality and systemic disadvantages faced by Palestinians with Israeli citizenship compared to Jewish Israelis. Framing the issue primarily through the lens of unequal citizenship rights, however, risks reinforcing a liberal framework that fails to address the underlying issue: achieving formal equality for Palestinians within the existing state structure would do nothing to address Israel's refusal to acknowledge its colonial foundations.

Lana Tatour argues that emphasizing institutionalized forms of racial discrimination against Palestinian citizens of Israel fails to address the full extent of their oppression.<sup>173</sup> Apartheid is a central element of Israel's state structure: its purpose extends beyond mere segregation to function as a mechanism to further Zionist settler colonization. Apartheid, therefore, works in conjunction with occupation, with both serving as instruments of colonial control.<sup>174</sup> Because of this, addressing settler colonialism is crucial for understanding Palestinian subjugation and the focus should be on decolonization rather than on advancing equality. Similarly, Nihal El Aasar critiques Amnesty International's approach for failing to contextualize apartheid within the larger settler-colonial framework, portraying Palestinian oppression as a liberal matter of inequality.<sup>175</sup> Treating apartheid as a standalone issue, El Aasar argues that these reports reduce the Palestinian struggle to a civil rights issue, thereby limiting potential political solutions.<sup>176</sup>

These discussions highlight how legal frameworks alone are insufficient for achieving Palestinian liberation, as a rights-based approach often overlooks or minimizes the enduring impact of settler colonialism: given that international law is a relic of colonialism, the law itself is part of the problem.<sup>177</sup>

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172. Policies include land and planning restrictions, demographic engineering, targeted killings, movement restrictions, ethnic cleansing, forced displacement, institutionalized discrimination, and denial of citizenship. *Amnesty: Israel's Apartheid*, *supra* note 16; *B'Tselem: This Is Apartheid*, *supra* note 16; Shakir, *supra* note 16.

173. Tatour, *supra* note 15.

174. *Id.*

175. El Aasar, *supra* note 15.

176. *Id.*

177. These critiques align with global scholarship critical of legalism and constitutionalism in various contexts of international law, constitutional law, and beyond. *See, e.g.*, Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178–228 (Wendy Brown & Janet Halley eds., 2002); Ratna Kapur, *Human Rights in the*

## B. Law and Politics: From Raison D'être to Legal Opportunism

Although the law is generally a tool of the powerful, new analysis suggests that it can be strategically deployed to advance the project of Palestinian liberation as part of a broader political movement. Noura Erakat's work is a notable example of this approach, as she explores ways to apply legal frameworks to support the Palestinian people in their emancipatory project. In her 2019 book, *Justice for Some*, Erakat advocates for using the law as a tool within a larger political program. She argues that instead of letting legal strategies and frameworks define politics, political movements should instrumentalize the law towards counter-hegemony.<sup>178</sup>

To advance her approach to the relationship between law and politics, Erakat examines key historical moments in the Palestinian struggle for liberation. Drawing on Rob Knox's notion of "principled opportunism," she introduces the concept of "legal opportunities,"<sup>179</sup> which refers to using international law strategically to advance a broader political agenda.<sup>180</sup> In the context of Palestine, Erakat proposes movement lawyering, an approach that positions political movements as the driving force behind legal advocacy. If legal tools are the sails, then political movements are the winds that drive political change.<sup>181</sup>

Erakat argues that law and politics are inseparable and act on one another reciprocally: it is not only law that shapes politics; rather, interpretations of the law and its impacts can be shaped by the specific

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21st Century: *Take a Walk on the Dark Side*, 28 SYDNEY L. REV. 665 (2006); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002). While South Africa is often cited as a success story of using legal mechanisms to transition to a post-apartheid era, many scholars argue that this narrative oversimplifies the complex realities and ongoing challenges in the country. For critical perspectives on the limitations of legal mechanisms in South Africa's transition, see Joel M. Modiri, *Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence*, 34 S. AFR. J. HUM. RTS. 300 (2018); Tshepo Madlingozi, *Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution*, 28 STELLENBOSCH L. REV. 123 (2017); Patrick Bond, *Constitutionalism as a Barrier to the Resolution of Widespread Community Rebellions in South Africa*, 41 POLITIKON 461 (2014). For broader critiques of constitutionalism and legalism in postcolonial contexts, see MARTIN LOUGHLIN, *AGAINST CONSTITUTIONALISM* 168–76, 188–90 (2022) and John L. Comaroff & Jean Comaroff, *Law and Disorder in the Postcolony: An Introduction*, in *LAW AND DISORDER IN THE POSTCOLONY* 1, 1–57 (Jean Comaroff & John L. Comaroff eds., 2006).

178. ERAKAT, *supra* note 14, at 4.

179. *Id.*

180. Knox, *supra* note 140, at 433.

181. Erakat describes legal tools as the "sail of a boat." See ERAKAT, *supra* note 14, at 11.

strategies employed by legal actors in specific historical contexts.<sup>182</sup> For law to fulfill its emancipatory potential, it must be strategically aligned with political movements that redefine its application and challenge existing power structures.<sup>183</sup> What is novel about Erakat's approach is not simply that it highlights the dual nature of international law—something that Palestinian legal scholars and practitioners understand very well—but rather that it points to the need for a robust political movement to guide legal advocacy and leverage tactical gains. As Erakat herself notes, “there is no lack of good Palestinian lawyers.”<sup>184</sup> Nevertheless, due to the limitations of international law, their efforts will be insufficient to address the situation without a strong political movement to support and inform their emancipatory efforts.

Recent legal developments have demonstrated how Palestinian lawyers are actively embodying Erakat's theoretical framework linking international law and politics. At the Center for Constitutional Rights in New York, Dalia Shamas exemplifies this approach by evaluating legal strategies based on their ability to overcome Palestinian fragmentation and create space for political movements, rather than pursuing legal remedies in isolation. She argues that practitioners must critically assess whether their use of legal mechanisms serves broader political objectives or merely perpetuates an endless cycle of unfulfilled legal promises.<sup>185</sup>

It is still too early to assess how Erakat's approach will play out in practice and whether there will be a shift in how Palestinians perceive the relationship between international law and politics. Legal discussions and advocacy since October 7, 2023 evince an emerging strategic reorientation whereby international law is increasingly viewed as one tool among many rather than an end in itself.

The South African ICJ application against Israel for genocide in Gaza represents a significant shift from traditional lawfare frameworks to an explicit genocide framework. Even more, rather than pursuing a genocide

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182. *Id.* at 4–5.

183. *Id.*

184. *Id.* at xii.

185. Shamas states: “For Palestinian practitioners, a critical approach means rethinking, among other things . . . whether our legal strategies and tactics aim to overcome Palestinian fragmentation; and whether we are creating space for political movement(s) through our legal strategies or whether we are distracting from them. The sites for answering these questions are many . . . [a]nd how we answer them will determine whether our invocation of certain rules and norms is critical, whether it is in service of a broader political project, or whether it falls into the trap of endlessly seeking an unfulfilled promise.” *Roundtable TWAIL & Palestine*, *supra* note 14, at 106–07.

declaration as a standalone legal objective, the application strategically leverages the gravity of genocide claims to demand an immediate ceasefire and mobilize global public opinion.

This strategic deployment of international law aligns with Noura Erakat's view of the role of the ICJ in the broader Palestinian struggle. In a recent talk, she emphasizes how Palestinians have pragmatically leveraged the ICJ proceedings to advance political goals that lie beyond their formal legal scope:

The ICJ does not have this authority so we should not have expected it to do the work that it cannot do. We are the only ones that can do that work, as we have been doing. So consider how the ICJ has been used. The ICJ provided a tool to agitate for ceasefire, not to find genocide. In individual countries, it enabled those countries to impose weapon sanctions. Think Belgium, think Japan, think the Netherlands, think Colombia. It enabled countries to cut diplomatic ties. Think Bolivia, think Brazil, think the African Union and its entirety. It enabled countries to initiate criminal cases under universal jurisdiction in their national courts. Think of the lawsuits in Switzerland against Isaac Herzog, the standing Israeli president. In France, in the Netherlands and in Germany. This all continue to isolate the United States and Israel politically. So isolated that the US actually pivoted and now Israel is further isolated."<sup>186</sup>

Erakat further contextualizes this strategic approach by explaining the different legal standards at play. In the genocide case submitted by South Africa, the initial proceedings operated at the level of plausibility—a relatively low standard that does not require definitive proof.<sup>187</sup> However, the merits stage, which typically occurs years later (as exemplified by the *Bosnia v. Serbia* case, filed in 1994 and heard in 2006)<sup>188</sup>, demands a much higher evidentiary threshold.<sup>189</sup> This understanding of the ICJ's procedural timeline has informed Palestinians' strategic mobilization of the proceedings for the sake of making an immediate political impact rather than waiting for a final legal determination.

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186. Georgetown Univ. Qatar, *The Potential and Limits of International Law in Achieving Accountability in Gaza by Noura Erakat*, YouTube (Apr. 3, 2024), <https://www.youtube.com/watch?v=CSrCtQs1gxl> (quoting Erakat at the 28:30–30:00 timestamp).

187. *Id.* at 28:30–30:00.

188. *Id.* at 28:50.

189. *Id.* at 29:02.



Early responses to the ICJ's July 2024 advisory opinion declaring Israel's occupation illegal may also suggest an evolution in strategy. While it is still too early to draw definitive conclusions, initial evidence indicates that Palestinian advocates are approaching this legal opinion not merely as a victory in itself, but as a potential foundation for building international solidarity networks and pressuring states to fulfill their legal obligations through concrete actions against Israel's occupation. This emerging approach appears to prioritize leveraging legal achievements for tangible political outcomes, though its long-term effectiveness remains to be seen.

Similarly, Palestinian engagement with the ICC has evolved beyond seeking mere legal accountability.<sup>190</sup> The ICC's issuance of arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant in November 2024 illustrates this shift. Palestinian advocates are leveraging these warrants not only to pressure states to fulfill their legal obligations to arrest the Israeli officials, but also to build international solidarity networks that can transform legal developments into concrete political action.<sup>191</sup>

These developments suggest an emerging synthesis between legal and political strategies, where international law serves as one component of a broader struggle for liberation rather than a primary framework. However, whether this strategic reorientation will lead to more positive outcomes in the struggle for Palestinian rights and self-determination remains to be seen.

### CONCLUSION: BEYOND LEGALISM

Discussions on Palestine are often constrained and shaped by the narrow legal frameworks of international law. Palestinian leadership, civil society organizations, and the broader solidarity movement prioritize the language of international law to achieve Palestinian liberation and statehood. This approach is evident both within formal international institutions—the United Nations, international criminal justice system, and domestic courts—and in civil society initiatives like the Russell Tribunal on Palestine. What is particularly striking is that even civil society initiatives, which need not be bound by international law's liberal premises, rarely venture beyond them.

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190. *Id.*

191. Sharon Zhang, *ICC Issues Arrest Warrants for Netanyahu, Gallant for Crimes Against Humanity*, TRUTHOUT (Nov. 21, 2024), <https://truthout.org/articles/icc-issues-arrest-warrants-for-netanyahu-gallant-for-crimes-against-humanity/> [https://perma.cc/M62M-QHXM].

Despite being free from institutional constraints, these efforts often replicate rather than question the narrow scope of international law, thereby missing critical opportunities to challenge the very premises on which this framework is based. The resulting discourse remains fixated on questions of legality and illegality while overlooking the broader political force that is settler colonialism.

Relying solely on legal mechanisms to address Israel's atrocities risks confining the Palestinian struggle within a liberal paradigm that has historically yielded limited progress. The situation in Palestine cannot be adequately captured or addressed through legal frameworks alone; it demands engagement with the root causes of oppression and domination. Liberation requires moving beyond the pursuit of liberal equality toward decolonization as a comprehensive project. This involves not only challenging legal definitions and interpretations but reimagining new political, economic, and social realities. Such a decolonial approach requires a fundamental shift from merely seeking legal recognition to actively challenging and dismantling the structures and ideologies that underpin settler colonialism.

Palestinians have long been dedicated to the liberation of their homeland, guided by a steadfast commitment to anti-colonial and anti-imperial principles. This dedication has been evident since the 1960s, through the 1970s, and continues today. In the 1960s, PLO Chairman Yasser Arafat praised the alliance between the Arab and Palestinian national liberation movements and those in Asia, Africa, and Latin America, emphasizing that despite the unique aspects of each struggle, they were united in a broader confrontation with "imperialism, injustice and oppression."<sup>192</sup> His historic 1974 address to the UN General Assembly, discussed in Part I, is another example of rejecting narrow definitions of international law.<sup>193</sup> While the speech highlighted important juridical principles like the right to self-determination, it resisted allowing other international legal frameworks to dominate the narrative surrounding Palestine. Recent developments, particularly since October 2023, suggest an emerging synthesis between legal and political strategies. Palestinian advocates increasingly view international law as one component of a broader liberation struggle rather than its primary framework. This strategic reorientation is evident in Palestinians' mobilization of recent legal proceedings, from South Africa's genocide case at the ICJ to various proceedings underway at the ICC.

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192. Krever, *supra* note 110, at 245 (quoting Chairman Yasser Arafat).

193. Arafat, *supra* note 28.

This shift has also revealed critical tensions, particularly visible in the concurrent legal proceedings before the ICJ. While South Africa's genocide case explicitly addresses the ongoing Palestinian Nakba since 1948, the advisory opinion on occupation risks normalizing Israel's control within the 1949 Armistice Line by focusing on the 1967 territories. This illustrates a broader challenge: utilizing existing legal frameworks to build international consensus while avoiding the legitimization of historical injustices. In the end, whether these legal proceedings are read as complementary or in tension with one another, neither the contradictions nor the underlying legal issues will ultimately be resolved before the ICJ or any other court.

By working within these limited legal parameters, advocates risk constraining political solutions to ones that perpetuate Palestinian displacement, dispossession, and continued oppression rather than addressing the fundamental structures of settler colonialism. Building on Palestinian anticolonial movement—from the PLO's revolutionary stance in the 1960s and 70s to the current strategic shifts since October 2023—we must reimagine how legal advocacy can serve rather than hinder Palestinian liberation. This involves developing alternative frameworks that better address the unique conditions and needs of the Palestinian people in their struggle for liberation. The goal must be to move beyond the limitations of international legalism to embrace a more holistic and radical vision of justice and freedom. By doing so, the Palestinian movement can reclaim its agency, redefine its struggle on its own terms, and pursue a future that truly reflects the desires and rights of its people. Liberation can be achieved through decolonization, but it requires the eradication of settler colonialism, its institutions, and its underlying ideologies. Only by confronting and acknowledging this reality can there be hope for the genuine liberation of the Palestinian people.