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# After Oslo, a Paradigm Shift? Redefining Sovereignty, Responsibility and Self-determination in Israel-Palestine

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# After Oslo, a Paradigm Shift?
# Redefining sovereignty, responsibility and self-determination in Israel-Palestine

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**Abstract:**

Since the Oslo Accords were signed in the mid-1990s, conflict resolution regarding the Arab-Israeli conflict has been guided by two conjoined premises regarding: (1) the identity and right to self-determination of the two 'peoples' involved, Jewish and Palestinian-Arab; and (2) Israel's sovereignty, or lack of it, in different portions of Mandate Palestine. Although these twin premises are now treated as givens, in tandem they have paradoxically proved ruinous to the well-being of civilians living under occupation by fostering futile notions that peace can be achieved through geographic partition to serve these two rival ethno-national state projects. This approach is fundamentally flawed in basing its goals on the purported legitimacy of the Jewish-settler ideology that ethnically dismembered the 'Palestinian people' as conceived by the League of Nations and the British Mandate; and (2) in endorsing a derivative form of Palestinian-Arab ethno-nationalism that, in stressing the Arab character of a Palestinian state, has also become anachronistic in light of demographic realities presented by the advanced settler-colonial society now embedded in the Mandate geography. This article accordingly argues that partition to accommodate two peoples in one land would paradoxically recognize ethno-nationalism as legitimate in ways that will sustain their inherent ethnic biases and so perpetuate conditions disabling to a stable peace. Drawing on comparative political theory regarding the periodic reconstruction of 'peoples' and constructivist international relations theory regarding the nation-state premise for state sovereignty, this article proposes that these premises must be reassessed to suit the current condition of advanced settler colonialism in Mandate Palestine, which compels full geographic and political unification.

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Since the war of 1967 brought additional Palestinian and Syrian territories under Israel's rule, international diplomacy regarding the Arab-Israeli conflict has been guided by two premises generally deemed incontestable on ethical and legal grounds. Both concern questions of Israel's sovereignty and both are connected to international norms that, in theory and practice, are understood to construct the rules and norms of the international system itself, rendering them sacrosanct. Now, twenty years after the Oslo Accords were signed in the mid-1990s, these very premises must arguably come into question, for one practical and compelling reason: sustaining them in this case has paradoxically proved actively damaging to international peace and security and to the welfare of civilians on the ground. Yet I propose that this situation is not as unique as it might appear: it has many precedents, involving histories elsewhere we can identify as *settler-colonial*, and employing that analytical lens makes immediate sense of a dramatically different approach.

The historical and theoretical framework for that paradigm shift is fleshed out in later sections, but the point of departure can be summarized briefly: the observed failure of the Oslo Accords. Although the 1995 Accord mapped out a peace process projected to culminate within five

years, twenty years later Israel's regime of control in the occupied Palestinian territories (OPT) retains the same or more grave character it had prior to the Accords. Israeli settlements continue to expand inexorably, following master plans drawn up long before the Oslo Accords, and have tripled in population and geographic scope. Draconian restrictions on Palestinian rights and freedoms, particularly on movement and trade, have confined Palestinian society to increasingly suffocating enclaves, such that daily conditions faced by Palestinians in the OPT—and polarization between Jewish and Palestinian populations—are demonstrably far worse than before the Accords. Occasional third-party initiatives regularly described as "fresh" (such as the Annapolis Agreement) have made no difference; the "peace process" remains stalled over the same final-status issues that have stalled agreements since 1948 (such as water, Jerusalem, final borders and the Palestinian right of return).. Continuing in this fashion is clearly untenable. Periodic convulsions—such as the 2014 Israeli military attack on Gaza that took nearly two thousand civilian lives and left over one-hundred thousand people homeless—destabilize the region and foster polarization and extremist political reaction globally. The human suffering and international insecurity generated by this scenario inspires the project proposed here: go back to basics to track what went wrong and explore whether abandoning core tenets will permit a more workable paradigm to be constructed from the bottom up.

The first premise to bring under the international spotlight is that, because Israel is recognized as sovereign inside its internationally recognized borders, anything to do with Israel's domestic affairs is considered to reside outside the remit of peace negotiations or international concern.[1] This essential norm of the Westphalian system—non-interference in the domestic affairs of states—is so basic a pillar of international law that it can be seen as constitutive of the modern state system itself.[2] But in this case, it has removed from analytical or diplomatic critique the most important factor steering this conflict: that is the doctrine, enshrined in Israel's Basic Law, establishing Israel as an ethnic (Jewish) state. Although this doctrine has gained much international sympathy in Israel's case, due to the ghastly history of anti-Semitism, it is a simple matter of observation to recognize that it has driven and continues to drive all Israeli policies relevant to the conflict: not least, expelling Palestinians to the OPT in the first place (in 1948 and 1967) solely on grounds that they are not Jews; rejecting any right of return for Palestinian refugees, again solely because they are not Jews; and imposing draconian measures to forcibly separate Jewish and Palestinian populations (in East Jerusalem and the West Bank by constructing the Wall and in Gaza by sealing the territory entirely). Since these policies actually define the Palestinian problem, and are certainly non-negotiable within the Palestinian national identity and discourse, bracketing the doctrine that drives them as falling outside the remit of international concern is ultimately futile. (A heuristic comparison to illustrate this point is the obvious futility of attempting conflict resolution in apartheid South Africa without addressing the underlying doctrine of racial division that drove apartheid's logics.) Precisely how to treat that doctrine is then the question, as explored below.

[1] Israel's internationally recognized borders are those established by the Armistice Agreement of 1949 but this point was never entirely settled. General Assembly Resolution 273 (1949) admitting Israel as a member state of the United Nations includes reference to 'declarations and explanations' which clarify that, at the time, Israel's borders were understood still to be under negotiation. In practice, international diplomacy has accepted Israel's sovereignty within the Armistice (green) line and not formally accepted it beyond that line.

[2] See especially the body of literature in constructivist international relations: for example, Thomas Biersteker and Cynthia Weber, *State Sovereignty as Social Construct* (Cambridge University Press, 1996).

The second premise is corollary to the first: that Israel is *not* the rightful sovereign in the Golan Heights, East Jerusalem, the West Bank and Gaza Strip. Israel has not contested this premise of non-sovereignty openly: in calling the OPT "disputed" territory, Israel's diplomatic position is that its legal status remains undetermined. For United Nations (UN) committees and the great majority of international lawyers, however, the legal situation is categorical: Israel is the belligerent occupant of the OPT and law applicable to Israel's role and responsibilities remains international humanitarian law (IHL), particularly the Fourth Geneva Convention, which establishes the obligations of the occupying power regarding civilians in time of war. In this view, Israel cannot lawfully annex any of the OPT unilaterally and must never be allowed to do so, however long the occupation might last, outside a territorial agreement with the Palestinians. To propose that Israel is actually sovereign in the OPT would therefore be seen by these authorities as inadmissible, most broadly because it could be interpreted to endorse Israel's acquisition of territory by force (violating a core norm of international law) and deprive Palestinians of the last territorial expression of their right to self-determination.[3]

These two premises have guided the current "vision" (as expressed in diplomacy and several UN resolutions) that the conflict must be resolved through partition: that is, a two-state solution.[4] "Ending the occupation" (the common pro-Palestinian activist slogan) is understood to require that Israel withdraw from the OPT, whether totally or with mutually accepted border adjustments. Operating in tandem, they entirely elide any question about Israel's discriminatory national ideology by holding that the proper solution to its impact is to confine its application to the sovereign state of Israel and remove Palestinians in the OPT from its scope by according full sovereignty to the Palestinian people.

I propose that these premises about sovereignty must now be reconsidered: not because they are unsound in a strictly legal sense but because they are actually functioning to perpetuate the Palestinian problem. Paradoxically, *not* recognising Israel as the juridical sovereign in the OPT has sustained the very conditions essential to Israel's continued hold on them and indeed to their ultimate annexation by Israel. The reason is simple. Constructing Jewish-only settlements in East Jerusalem and the West Bank is Israel's principal strategy for ensuring Israel's ultimate permanent control over these territories: the stated aim is to confine the Palestinian population to disarticulated and politically disabled ethnic enclaves surrounded by Jewish-only lands and cities, to the point that facts on the ground drive terms of the final peace agreement and convey most of the West Bank and all of East

[3] Security Council Resolution 242 (1967) clarified this in operative paragraph 1(a), which affirmed as a principle 'withdrawal of Israel armed forces from territories occupied in the recent conflict'. This expectation was reiterated by the International Court of Justice The prohibition on the acquisition of territory by force has been interpreted as common law since the prohibition on aggression was built into the United Nations Charter. For an overview of how the Palestinian right self-determination has been treated in international law, see analysis by the legal team that contributed to *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, Virginia Tilley, ed. (Pluto Press, 2012), pp. 65-75. The most authoritative expression of this right was by the International Court of Justice in its *Wall Advisory Opinion*, ICJ Rep, 2004, 136 at 182–183, para. 118.

[4] The formula "vision of two states, Israel and Palestine, live side by side within secure and recognized borders", was expressed in UN Security Council Resolution 1397 of 2002 and reiterated in UN Security Council Resolution 1515 of 2003. In both instruments, this phrase appears in the chapeau. In the latter instrument, operative paragraph #2 includes the phrase "and to achieve the vision of two states living side by side in peace and security". Operative paragraphs 2 and 3 both link this "vision" to the "Quartet Performance-based Roadmap to a Permanent Two-State Solution". Under terms of the Roadmap, Israel is not obligated to fulfil its commitments to withdraw until the Palestinian Authority accomplishes a set of deeds that, a priori, were impossible for it to achieve.

Jerusalem to formal Israeli sovereignty.[5] The key condition necessary to achieving this annexation goal is that Palestinians have no capacity, whether militant or civil, to impede the settlements' construction until Palestinians options are eliminated entirely by the comprehensive geography it will ultimately generate. Were Israel to annex the OPT formally, the Palestinian population could then demand full political rights as citizens, or as indigenous residents unjustly denied citizenship, rendering Israel's settlement policy unworkable from the pincer effect of a Palestinian civil rights struggle and international recognition that such ethnic "separate development" equates with apartheid. The answer was to design the Oslo Accords to cast the OPT (in foggy terms) as a proto-state, and through this fiction normatively to preclude a civil rights challenge by casting Palestinians as citizens-in-waiting of a Palestinian state to be established in the future. In this framework, the proto-government—the Palestinian Authority—can also be held responsible for suppressing Palestinian militancy. Hence Israel's not being formally sovereign in the OPT is a strategy vital to Israel's annexation goals at this stage, and so far has been effective: Palestinians have been left in a liminal condition, with no normative claim on equal civil rights from Israel, their rights being ascribed to some hypothetical state of the future whose actual creation Israel's settlement policies are designed firmly to preclude.

Recognizing this paradox raises a dilemma of what to do about it, however, for even questioning the premise of Israel's non-sovereignty in the OPT can trigger immediate alarm. As noted earlier, abandoning demands for Israel's withdrawal from the OPT and recognizing Israel as sovereign would effectively endorse the acquisition of territory by force. For the Palestinian people, more specific objections arise: not least, whether recognising Israel as sovereign throughout the OPT, even in order to hold it accountable for its violations of their human rights, would constitute a humiliating national capitulation and crush their own vision of a Palestinian state. But conditions on the ground suggest that both these views require interrogation. Is state responsibility for supporting the international rule of law satisfied simply by continuing to hold an occupying power accountable to withdraw if that state continually refuses? What happens when it remains in a territory for decades and the scale of its colonisation reaches a stage where its withdrawal becomes logistically unimaginable, as happened historically in other societies like the United States and Australia? Is it then legally admissible—even morally compulsory—to abandon a well-grounded legal position, even one considered a pillar of international law, that is demonstrably destructive to the rights and well-being of the people it was meant to protect? Is national self-determination for Palestinians locked into a model of classic decolonization or can it adapt with dignity to a different model?

These questions bring us to consider more closely how the norms of sovereignty are functioning for the protagonists in this case. Probed here is how Israel has manipulated them in the interest of annexing the West Bank and how international law might address this manoeuvre. International law has not often addressed cases where a state, although *empirically* sovereign in a territory, deliberately abjured a claim to be the *juridical* sovereign precisely in order to avoid the international obligations that would pertain if it were.[6] In such a case, what are the responsibilities of

[5] For a political and geopolitical analysis of this planning as a deliberate Israeli state strategy, see the author's *The One-State Solution* (2005), Chapter Two, 'The Immovable Object'; for a more legal analysis, see the analysis provided by the legal team contributing to *Beyond Occupation*, pp. 141-143 and especially 196-210.

[6] I do not mean to elide here those cases of hegemonic influence codified under special arrangements, such as those that frame United States relations with Puerto Rico and trusteeship territories in the Pacific. In these cases, legal status, rights and respective authority are specified through international treaties and instruments designed for them.

third-party states? The first duty would seemingly be to compel the offending state's withdrawal. But if withdrawal is beyond international collective capacity or will to compel, could international responsibility legitimately shift ground to hold the offending state accountable for all the legal obligations that accrue with the sovereignty it has peremptorily seized, including the onus of providing citizenship and equal civil rights to the entire territorial population? In short, should the international community insist that the offending state finally choose between withdrawal and full sovereignty—that is, go out or up? And if the occupying power rejects the former course—as we can anticipate in this case---is there any legitimate basis whatever in international law and norms for accepting the latter choice as legitimate?

It is unlikely, for reasons already given, that Israel will be required to announce its preferred course of action regarding the OPT, since the present murky state of affairs serves Israel's interests so strongly and Israel's allies, including some holding Security Council veto power, are unlikely to insist on it. Anticipating that Israel will not withdraw, however, I propose that Israel's assuming full sovereignty is not only admissible but imperative, and furthermore consistent with international precedent. First, I will briefly review the difference between empirical and juridical sovereignty in order to clarify how Israel is employing the difference to its strategic advantage in this case. Second, I propose a definitional difference between *classic colonialism* and *settler colonialism* in order to illustrate how conflicts arising from these two types of domination call for different solutions. This involves noting that both the international community and indigenous peoples living under maturing settler-colonial regimes have reacted to advanced cases of settler colonialism by holding the settler state accountable for human rights and non-discriminatory behaviour for its entire territorial population: the illustrative comparison offered here is black African resistance to apartheid in South Africa. These arguments are intended to suggest that Palestinian politics and international approaches to Israel's status in the OPT can legitimately shift ground, and should do so in the interests of a stable peace for both sides and the national rights of Palestinian people, including humanitarian concern for the population under Israel's authority.

**Empirical and Juridical Sovereignty in Israel-Palestine**

The distinction drawn here between juridical and empirical sovereignty derives from early work by Robert H. Jackson and Carl Rosberg, who pointed out what while all African states are legally sovereign in the sense of enjoying international recognition, many lack *empirical* sovereignty in the Weberian sense of monopolising the legitimate use of force and certainly in the Gramscian sense of enjoying hegemonic authority over the territory population.[7] Some states lack it simply because state capacity is constrained by low budgets and large distances, as in parts of the Democratic Republic of Congo. Other states confront rivals or secessionist movements that hold effective control over parts of the country: e.g., Polisario's ongoing challenge to Morocco in the Western Sahara and the attempted secession of Biafra from Nigeria in 1967. Where a state loses all empirical sovereignty, it becomes a "failed state," greatly worrisome to international affairs because its population cannot be held to account and ensuing instability spills across international borders: e.g., the regional spill-over effects of the anarchy in Libya after the fall of Qaddafy.

[7] 'Why Africa's Weak States Persist: the Empirical and the Juridical in Statehood', *World Politics* Vol. 35, No. 1 (1982); also see Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge, 1993).

The problem addressed here, however, is a more subtle one. Disputes about sovereignty normally involve rival claims between states or between states and non-state actors (like revolutionary movements) for *juridical* sovereignty: that is, international diplomatic recognition by other states that one or the other party has the legal right to govern a territory. This recognition is the prize for which conflicts are fought because, in the modern world system, sovereignty alone conveys the rights and privileges that accrue to statehood under international law: e.g., exclusive rights to administer natural resources, control borders, regulate trade, negotiate with other states to resolve regional issues, and so forth. (Hence Israel's gaining United States recognition within hours of its Declaration of Independence, a step that would lead to Israel's admission to the United Nations, was the triumph for which political Zionism had struggled since its inception, and full diplomatic recognition of a "State of Palestine" is presently a central tenet of the Palestinian Authority and much of the Palestinian national movement.) So vital is juridical sovereignty that states cling tenaciously to it even where empirical sovereignty – the capacity actually to govern the territory—is weak or missing.

But international law and relations are not commonly confronted by the reverse situation, where a state enjoys uncontested empirical sovereignty but eschews juridical sovereignty: that is, it deliberately does not legally annex a territory formally but nonetheless retains exclusive control over its borders, population and resources, and administers it in all ways indistinguishable from the normal perks and practices of sovereignty. This appears to be what Israel has done. It has not claimed sovereignty over the West Bank and Gaza Strip, continuing to call them "disputed" territories, unlike its policy in the Golan Heights and East Jerusalem. Yet Israel enforces—and insists on—exclusive or veto authority over all internal matters pertaining to sovereignty in East Jerusalem and the West Bank, including internal governance as well as all external trade, movement and security.[8] In sum, Israel is incontestably the sovereign power throughout Mandate Palestine in all ways but name.

This strange situation is now often described as a "prolonged military occupation" and drawing attention from scholars as a distinct legal oddity.[9] (Normally, military occupation is a temporary state of affairs that does not entail the extensive demographic and civil engineering that Israel has effected in the OPT and which are raising theoretical difficulties for IHL.) But a further question is raised here: if prolonged occupation is discovered to reflect not merely a stalled diplomatic process but a deliberate ploy designed to serve annexation, it can be recognised to fall into a new legal category. One such category, often raised in polemics on the conflict, is colonialism; another is apartheid.[10] A variant is *settler colonialism*, which would seem a mere subtype of colonialism especially in suggesting that it might be reversed. But settler colonialism has features which

[8] Despite the putative autonomy provided to the Palestinian interim Self-Government Authority, Israel has retained plenary power over all governance sectors in the OPT by arranging for matters falling under the PA's ambit to be governed by joint committees on which both sides hold a veto. Since the status quo favours Israel's interests, this allows Israel to prevent the PA from making changes that impede Israel's Master Plans for the OPT. For an analysis of how this policy replicates juridical arrangements for the South African Bantustans, see the author's 'A Palestinian Declaration of Independence: Implications for Peace', *Middle East Policy*, Vol. 17, Issue 1 (Spring 2010).

[9] See, e.g., Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' *The American Journal of International Law* Vol. 84, No. 1 (Jan 1990); Orna Ben-Naftali, Aeyal M. Gross, and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', *Berkeley Journal of International Law* Vol. 23, Issue 3; Special Rapporteur Richard Falk reflected this debate in a recommendation to the Human Rights Council in his final report of 13 January 2014: see A/HRC/25/67.

[10] The most exhaustive treatment of these questions from a legal perspective is presented in *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (Pluto Press, 2012).

distinguish it from other kinds of colonialism, have not proved reversible, and, in the past, have merited a strikingly different international response. Considering its special configuration and history will support the argument that this same historical response is now both appropriate and necessary in Israel-Palestine.

**Classic and Settler Colonialism in Israel and South Africa**

Although settler-colonialism is rightly treated as a subtype of colonialism, it should not simply be conflated with it. *Colonialism* is very broad term that has been used for a wide range of situations and practices, but is commonly understood as a state's claiming exclusive dominion over territory outside its internationally recognised borders and governing it through methods that deny self-determination to that territory's indigenous people. [11] As it was practiced by European powers between the sixteenth and twentieth centuries, such "classic" colonialism was motivated primarily by metropolitan quests for raw materials and markets. On this agenda, the colonising power administered the colony and its population in all respects with the home country's interests narrowly in mind. Claims of *terra nullius* usually authorised this legally, although "empty land" meant "empty of government" in the sense of European government (what the Spanish colonizers more frankly called *sín política*—without political order). Since few colonised lands were empty of government, being populated and governed by indigenous polities and states, this claim required that colonial doctrine develop discourses of superiority regarding race and/or civilisation in order to make moral sense of extinguishing colonised peoples' sovereignty. Decolonisation in cases of classic colonialism therefore involved the obvious remedy: withdrawal by the colonising power and return of independent governance to the territory's autochthonous people.

*Settler-colonialism* reproduces many features of classic colonialism: not least, the hallmark ideologies of domination and denigration of native peoples. But the term *settler* flags a distinct pattern in which an immigrant (usually European) population settled *en masse* in a territory outside its home country and ultimately establishes a government there whose institutions and politics reflect and serve its own cultural predilections and interests. Historically, this process has included permanently dispossessing and marginalising—even exterminating—the indigenous population. Some scholars have accordingly explored cases of settler colonialism as a variant of colonialism while others have treated it as a type of nation-state formation. But its status in international law remains almost entirely unexplored. The Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) denounced "colonialism in all its forms and manifestations", which would seem to cover settler colonialism, but did not address its distinct character. Other international law has ignored it, except in two carefully circumscribed legal instruments relating to indigenous peoples' social and cultural rights within existing states.[12] The reason for this lacuna is not mere neglect: many United Nations member states today are settler-colonial states in the sense described here, including every state in the Americas as well as Australia and New Zealand, and none of their governments wishes to find recidivist indigenous challenges to their sovereignty coming before international courts.

[11] By 'commonly' I mean primarily language and norms formulated by the United Nations Committee on Decolonisation, which was established to monitor cases of decolonisation, implementing UN Declaration on the Granting of Independence to Colonial Countries and Peoples.

[12] These instruments are principally the International Labour Organisation's Convention 169 on the Rights of Indigenous and Tribal Peoples (1989) and the United Nations Declaration on the Rights of Indigenous Peoples (2007).

The resulting silence in international law has arguably contributed to a strategic error in addressing settler-colonialism in the case of Palestine. Those who criticize Israel's policies in the OPT on grounds of colonialism routinely call for the remedy associated with classic colonialism: that is, Israel's withdrawal from colonised territory. But conflicts involving settler colonialism in the Americas, south Pacific and South Africa have not been resolved this way. To understand why a quite different remedy has been sought requires examining more closely how settler colonialism differs from classic colonialism.

The first and most obvious way that settler-colonialism is distinguished from classic colonialism is the evaporation of the home country from the political equation. The hallmark of settler colonialism is a comprehensive *indigenisation* of the settler population, in which the settler population detaches politically, psychologically and ideologically from any extra-territorial metropol that can be held accountable for its behaviour and to whose territory it can be expected to return. In conceptually re-attaching its (mythic) origins and destiny to the new territory, a settler-colonial society further develops a particularly tenacious understanding of its own rights to and needs for the territory, which extend to equating settler sovereignty with the settler society's physical survival. Iterated as doctrines that the settler society has natural rights to preserve its dominion over the settled country and human rights as individuals to be protected in doing so, this identification of the settler society with the land translates into a sense of moral entitlement that militates powerfully against the settlers accepting any notion that they should withdraw. At some point, withdrawal indeed becomes unimaginable to settlers, even (depending on how much power they hold) risible.

The second factor distinguishing settler colonialism is the settler society's normative appropriation of the right of self-determination. Classic colonialism was discredited in the twentieth century partly by its obvious denial of the right to self-determination, held by native peoples; the remedy was to restore this right by withdrawing the colonial government. By contrast, settler colonialists make moral sense of dispossessing indigenous peoples permanently of their land partly by claiming this right themselves. A canon of standard discursive devices is enlisted to this end: for example, locally tailored myths about why the native peoples lack any legitimate claim to land that settler mythology typically holds was *terra nullius* prior to the settlers' arrival; frontier myths, draped in heroic nationalist symbols, which cast indigenous resistance as cruel persecution of the innocent settler; and social-Darwinist logics proposing the native peoples' permanently inferior cultural status relative to the settler society, putatively evidenced by (among other things) their military defeat. Continuing resistance by indigenous peoples to settler invasions is then interpreted as the doomed irredentism of inferior if not obsolete cultures. Indigenous motives are derided as irrational, essentially racist in motive, and beyond any moral pale in targeting an innocent, idealistic and hard-working settler population that has reclaimed the land from wilderness. Any indigenous population remaining in the settler-colonial state's territory after its independence is therefore a cultural anachronism, tolerated if passive but still suspect for harbouring recidivist , if hopeless, seditious ambitions. Defeat and liquidation of such savage backward cultures is therefore seen as necessary in the short run but also inevitable over the march of time. Such people certainly do not merit, in settler imagination, a right to statehood; their loss of sovereignty itself was proof of that.

The third factor distinguishing settler colonialism from classic colonialism, and one clearly relevant to Israel-Palestine, is its success in permanently extinguishing indigenous sovereignty by converting indigenous politics into domestic concerns and removing them and their issues from the ambit of international diplomacy. This is done by recognizing the exclusive juridical sovereignty of the settler-colonial state. In modern world history, diplomatic recognition has been gained for settler

states when the settler population grew and embedded in the territory to the point of dissolving any idea by outsiders that it will ever withdraw (or can be compelled to do so) and the state it constructed is deemed to be incontestably in charge of the territory. The contrast with classic colonialism—where international norms in the twentieth century evolved to categorically reject foreign rule and require the colonizer to withdraw—may be alarming to principled minds but is intuitively reasonable, for at some tipping point in settler colonialism any idea of withdrawal simply becomes unimaginable. An obvious illustration is the present-day United States, which no one today expects to dismantle and hand over territory, even if now admitted to be unjustly acquired, to Native American nations who now comprise about one percent of the territorial population. Yet this tipping point was reached long ago, when the demographic balance was far less stark: probably, in the eastern United States, by the late seventeenth century and in the rest of the country by the early nineteenth.[13]

Many other cases illustrate this pattern, in Latin America, North America, and the South Pacific. For reasons of space, discussion here will focus on South Africa, arguably the comparison closest to the Israeli-Palestinian formula. First, indigenization in settler South Africa was well underway by the early eighteenth century, when the Dutch-speaking settler population reimagined itself as an "Afrikaner" (Dutch: African) people in distinguishing its interests and character from those of British rule. Especially after persecution by the British in the Boer Wars, Afrikaner nationalism formally proposed that Afrikaners were morally and culturally cut off from Europe and, in a classic blood-and-soil trope, could survive only on South African land. Second, Afrikaner nationalism drew on pioneer mythology to support what was, to Afrikaners, an unassailable moral claim to the right to self-determination. Black African peoples were argued to be incapable of modern governance and their sovereignty—if admitted ever to have existed—was considered obsolete (until the 1960s when black sovereignty was revived by the apartheid government in distorted form, as the Bantustan scheme, designed to save white supremacy). Resistance to white settler sovereignty was discredited in social-Darwinist terms as the irrational cruel attacks by savage and deceitful brutes on peaceful heroic pioneers. Third, black Africans were progressively deprived of international standing through their incremental redefinition as British subjects or South African citizens. By the late-nineteenth century, white settlement throughout modern South African territory was universally considered irreversible: the death throes of Black African sovereignty were in the Anglo-Zulu War (1879). The ruinous impact of conquest and colonialism on black African lives, cultures and polities did not prevent international recognition from flowed readily to the settler state as the country morphed through British imperial rule and Commonwealth membership to republicanism. By the time South Africa was reformulated as an independent state in the early twentieth century, any idea of black sovereignty or secession, although ardently sought by several polities such as the Zulu nation, could gain no international traction.

In a more compressed time frame, Israel's "prolonged occupation" fits the same mould. First, the Israeli Jewish population in Israel has thoroughly indigenised. While more Jews continue to live outside of Israel than live in it, a distinctly *Israeli* Jewish national culture has developed over the past century that is experienced and recognised by all who live there as unique, in the sense that Israel has a unique national language, social norms and culture that cannot be exported or reproduced outside of

[13] Debates between French and British colonial powers about the relative standing of North American Indian nations illustrate that the erosion of Native American sovereignty was gradual and contested through the nineteenth century: see, for example, Howard R. Berman, 'Perspectives on American Indian Sovereignty and International Law, 1600-1776', in Oren Lyons, et al, *Exiled in the Land of the Free: Democracy, Indian nations and the U.S. Constitution* (Santa Fe, NM: Clear Light Publishers, 1992).

the national geography that Zionism has reimagined and transformed in its own image. This collective national life goes far beyond the Holocaust narrative that the Jews "have nowhere else to go": generations of Israeli Jews now have no sense of any other home country and would experience departure as a kind of exile.[14] Ideologically, this indigenisation has extended into the West Bank settlements, particularly in the larger ones. For religious Zionists, it embraces all settlements.

Second, the Jewish-Israeli (Zionist) nationalist movement has appropriated the right to self-determination from the Palestinian people. As is usual for settler colonists, this claim builds from romantic mythologised doctrines: in this case, especially Biblical authority (whether treated as theological metaphor or objective history) that supports a claim of Jewish indigeneity and sovereignty in Palestine in antiquity, buttressed by the heroic twentieth-century Zionist settler myth and the post-Holocaust argument that the Jewish people require a state of their own for their very survival. The Palestinian people's claim to self-determination has also been rejected as absurd through the standard discursive devices of settler colonialism: e.g., Palestinian Arabs were a primitive people that never used the land productively (standard of civilisation); they were not present in the land anyway when Zionist settlers arrived, except as migrant labourers (*terra nullius*); they were defeated by Zionist forces due to their own intrinsic backwardness (social Darwinism); and they remain motivated solely by irrational hatred for the Jewish people who are only engaged in a heroic project of self-determination. Zionist doctrine has thus rendered Palestinian-Arab national rights as nonsensical and any notion of returning their sovereignty within the land of Eretz Israel as legally and morally inadmissible.

Yet international recognition has flowed similarly to this settler-colonial state. In 1947, the General Assembly rewarded Zionist settlement and state-building by voting to partition Mandate Palestine into a "Jewish state" and an "Arab state".[15] In 1949, Palestinian sovereignty was permanently extinguished within the Armistice (Green) Line when Israel was admitted to the United Nations, thus converting the problems of Palestinians living inside Israel into Israel's domestic affair and slotting all other Palestinians into Israel's penumbra as "the refugee problem". Fifty years later, this treatment was recognized as inadequate and corrected in new diplomacy favouring a two-state solution, as noted earlier, but Zionism's signal accomplishment as a settler colonial state has been to cultivate international consensus that the Palestinians have the right to self-determination only in disarticulated areas of Mandate Palestine. The Israeli government indeed proposes that sovereignty for Palestinians in the West Bank is admissible only if a Palestinian state is deprived of definitive qualities of sovereignty, such as any power to make an independent foreign policy, control over Palestinian movement in and out of Palestinian territory and control over air space, telecommunications, water management or any matter that crosses Israel's borders.

Recognising that Israel's policies in Mandate Palestine present us with case of settler colonialism explains why, after a certain tipping point in its advance, settler colonialism forces a different solution to the human rights violations it has generated. Still, how to recognize such a tipping point, and how to accept what this portends for national resistance and ambitions by the

[14] The remapping of Palestine as a Hebraised landscape is brilliantly described by Meron Benvenisti in his *Sacred Landscape: The Buried History of the Holy Land since 1948* (University of California Press, 2002).

[15] This observation is not intended to obscure the heavy-handed politics, driven particularly by the United States, that went into this majority vote of the General Assembly in 1947: simple recognition of Jewish settler demography was certainly not the only reason for recommending creation of a Jewish state. However, an exposition of those politics is beyond the scope of this paper.

colonized people, remains a thorny question. Naturally deep disagreements on this question exist. Some Palestinians may cling to the memory that such a dispute characterised Arab politics in French colonial Algeria in the mid-twentieth century, when many *pieds noires* had indigenised and could not imagine either leaving or turning the country over to Arab governance, yet were eventually compelled to do both. Such an eventuality cannot be anticipated in Israel, but even if it could, it would not be possible without a regional convulsion that would entail immense human suffering of great danger to international peace as well as to Palestinians living in the country.[16] Yet, absent such a catastrophe, how can justice for Palestinians now realistically be achieved? An answer is suggested, again, by the closely related case of settler-colonialism in South Africa.

**Seeking Justice in Settler-colonial States: Insights from South Africa**

The previous section explains why, in cases of advanced settler-colonialism, movements for indigenous rights have had to seek justice through modes other than the dominant society's physical withdrawal. Black African resistance confronted this precise dilemma in their resistance to apartheid. At the height of Africa's decolonisation era in the 1960s, several resistance parties—especially, the African National Congress (ANC) and South African Communist Party (SACP)—held lengthy internal debates about their national struggle against "colonialism of a special type". A 1962 thesis on the dilemma may strike a chord with Palestinians in the OPT:

> The indigenous population is subjected to extreme national oppression, poverty and exploitation, lack of all democratic rights and political domination… Typical too of imperialist rule is the reliance by the state upon brute force and terror…Non-White South Africa *is the colony* of White South Africa itself. It is this combination of the worst features of both imperialism and colonialism, *within a single national frontier*, which determines the special nature of the South African system and has brought upon its rulers the justified hatred and contempt of progressive and democratic people throughout the world. … "[17]

This understanding of colonialism "within a single national frontier" signals an adaptation in black South African political thought: that advancing white domination had altered not only in scope but in its essential quality and that resistance strategies had to adjust.[18] South Africa historian Pallo Jordan has mapped this political evolution as emerging through three historical stages. In the first stage, which began with European colonisation in the mid-sixteenth century and extended through the late-nineteenth century, southern African peoples fought to repel European assaults on their sovereignty. In the second stage, which lasted into the mid-twentieth century, most southern African peoples (the Zulu, Xhosa, Tswana and others) had irredeemably lost sovereignty to European advance. Their resistance accordingly shifted to defending their social order, traditional authorities and modes of production against full incorporation and subordination by the European society and its economy. In the third phase, Black Africans recognized that they had been fully absorbed into the settler state and its economy as a subordinated racial labouring caste and they could no longer

[16] This author's analysis of the permanency of Israel's settlement throughout Mandate Palestine is presented at length in *The One-State Solution* (U of Michigan, 2005), chapters 1 through 3. The same argument is summarised in 'The One-State Solution', *London Review of Books* Vol. 25, No. 21 (6 November 2003).

[17] South African Communist Party, *The Road to South African Freedom* (1962), emphasis in original.

[18] South African Minister of Arts and Culture Pallo Jordan, unpublished lecture, November 2008, Velmare Hotel, Pretoria, hosted by the Middle East Project of the Human Sciences Research Council.

anticipate withdrawal of a white settler society and state that had grown to such size and indigenised with such nationalist passion.. Their struggle for justice shifted to a discourse of anti-discrimination and equality: in other words, they appropriated the settler society's own human rights norms and civil rights in a bid for equal rights and privileges. This third and last stage was formulated as the programme of the ANC: it guided the language in the 1955 Freedom Charter and culminated in the 1994 elections that eliminated white rule and launched South Africa's landmark non-racial constitution (1995). Crucially, third-stage resistance gained universal international support and was ultimately victorious because it was consistent with post-World War II international human rights norms, which rejected racial discrimination and held that all citizens of a country must be accorded equal political, social, economic and cultural rights.

Applying this model to Palestine, we might conclude that Palestinians in the OPT are now engaged in all three stages of resistance at once (possibly reflecting the relatively compressed time frame of Zionist colonisation). The phase comparable to first-stage resistance may have been the early Arab revolts in the 1920s and 1930s. A few small Palestinian factions, citing the success of Hizbullah in expelling Israeli forces from southern Lebanon and remembering French Algeria, still cling to this model, hoping that militancy—whether local or in some unforeseeable concert of Muslim or Arab forces—can force the Jewish settler society to withdraw and ship back to the countries from whence it came. The great majority of Palestinians in the OPT, however, have shifted to second-stage resistance, in the form of *sumud* (steadfastness, endurance) in an attempt to resist the worst intrusions of Israeli military and economic penetration, seeking to preserve their families and society in a shrinking but still-distinct socio-political space lacking sovereign authority. A growing minority is shifting to third-stage resistance: viewing Israeli sovereignty as effectively complete and certainly irreversible and so leaning toward appropriating the liberal claims of Israeli democracy to demand full citizenship and equal rights in a non-ethnic state.[19] In this last manoeuvre, they would join (although greatly complicate) the same struggle now being revitalized by Palestinian citizens of Israel. Yet, for some Palestinians, formally endorsing third-stage resistance would only constitute an admission of defeat.

The comparison with South Africa also exposes the irony that this final move by the Palestinians, although clearly consistent with international human rights law and norms, would presently run counter to international consensus. In a striking reversal of the international position taken regarding apartheid South Africa, the international community supports Israel in remaining a state based on ethnic domination within its own borders: the question for international diplomacy is only where those borders should be. But as Israel extends its doctrine of ethnic supremacy into its governance of the OPT, the problem has become glaring: governing two populations in one territory by different laws, ensuring domination of one over the other through a complex of laws and policies, equates with apartheid. Whether international responsibility now requires imposing on the settler-

[19] Poll data shows widely varying results that appear to reflect the phrasing of the question. A 2007 survey by Near East Consulting that asked the question in the most specific terms, 'Support or opposition to a one-state solution in historic Palestine where Muslims, Christians and Jews have equal rights and responsibilities', found 70% support for this solution among Palestinians. The Jerusalem Media and Communications Centre has regularly found between 23-33 percent of Palestinians supporting a 'binational state' and about 12-13 percent supporting a 'Palestinian state', both not defined further in the survey conditions: polls are available on the JMCC website, available at: http://www.jmcc.org/publicpoll/results.html.. For an overview, see discussion in 'An Opening for Peace: Israelis, Palestinians and the Two-State Solution—Analysis', *Eurasia Review*, 22 February 2014: accessed on 25 February 2014 from http://www.eurasiareview.com/22022014-opening-peace-israelis-palestinians-two-state-solution-analysis/.

colonial government the obligations as well as privileges of full sovereignty—nondiscrimination, equal rights—is the question before us.

**Conclusion**

Israel now governs the OPT in all ways consistent with sovereignty except the formal claim to it. This restraint is not accidental or merely an impediment for Israel. Deliberately abjuring formal sovereignty over the Palestinian population in the territory it governs, Israel's latitude of action—its empirical sovereignty—is actually enhanced. By disenfranchising the Palestinian civilian population and ascribing their political rights to a fictional state of the future, Israel has rendered Palestinians helpless to resist the elaborate project of civil and demographic engineering that will confine Palestinian society to partial autonomy in a Bantustan. Viewing the conflict in this light suggests that the only way to alter it is by treating the conflict as a case of advanced settler-colonialism. With a half-million settlers now residing in the West Bank, Jewish settlement should indeed have been recognised to have passed the tipping point some time ago, were the international community not still wedded doggedly to the legal model of belligerent occupation.

Pointing out the deficiency of this argument is not meant to suggest that it is technically are wrong. It is considered here to be legally incontestable that Israel holds the territories under belligerent occupation and that its transfer of Jewish settlers into East Jerusalem and the West Bank is illegal under IHL. The well-meaning intent of sustaining this model has also been to help guard and preserve Palestinian national rights in the dwindling geographic sphere left to them. Yet the real-life consequences of this posture for the Palestinians have been disastrous. They are left in limbo, with neither IHL nor IHRL operating to protect them and excluded from domestic civil rights in the state that holds all empirical sovereign powers over their lives and society. This trap, so conducive to Israel's annexation strategy, must be corrected by requiring that Israel adopt the responsibilities as well as privileges of sovereignty and accord full citizenship, equal rights, and equal political voice to the indigenous Palestinian people.

Recognizing Israel's sovereignty throughout all of Mandate Palestine is not argued here to reflect historical justice. Everywhere, recognising the sovereignty of settler states requires that those indigenous peoples who have lost land, livelihoods, community, rights and collective dignity to a mass alien invasion finally abandon their hope of gaining certain types of redress. Rather, this step reflects recognition that power politics have irrevocably altered the terms in which justice and human rights can be pursued. The only real defeat of a settler colonial state, once it has passed the tipping point where withdrawal cannot be anticipated, is by eliminating its function as a vehicle for perpetuating settler myths and racial discrimination. This transformation is a tough and painful one on all sides, as the bitter struggle in South African attested. But the worst outcome for native peoples is a situation that has passed the tipping point yet closes off this one path to liberation from racist settler rule. When Palestinians decide to insist on this remedy, they will find—as did the ANC—that the international community is much more forcefully on their side. To date, that community has been remiss, rather than responsible, in not holding Israel juridically responsible for the privileges of sovereignty it has otherwise seized so openly in Mandate Palestine.