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**Israel-Palestine Through the Lens of
Racial Discrimination Law:
Is the South African Apartheid Analogy Accurate,
and What if the European Convention Applied?**

Robert Wintemute*

KEYWORDS:

apartheid, Israel, occupation, Palestine, racial discrimination, South Africa

ABSTRACT:

The dominant legal analysis of Israel-Palestine is that there is a temporary occupation, which explains why all Palestinian residents of Gaza and the West Bank (including East Jerusalem) are not offered Israeli citizenship and the right to vote in Knesset elections. But is a nearly 50-year-old occupation still temporary, or has it become permanent and a de facto annexation? If so, could racial discrimination law make a more useful legal contribution to the political debates about Israel-Palestine than international humanitarian law? The author argues that international law against racial discrimination in access to citizenship and the right to vote, applied to Palestinians living as expelled non-citizens in exile, as non-citizens under occupation, or as second-class citizens in Israel, supports the accuracy of the analogy with South African apartheid. The author then conducts a 'thought experiment', by imagining

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how the political issues related to Israel-Palestine might become legal issues under the European Convention on Human Rights, if Israel were to become a member state of the Council of Europe and a party to the Convention, subject to the racial discrimination case law of the European Court of Human Rights.

'His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, ... *it being clearly understood that nothing shall be done which may prejudice the civil ... rights of existing non-Jewish communities in Palestine ...*'

Balfour Declaration, 2 November 1917 (emphasis added)

'Justice cannot be for one side alone but must be for both.'

Court 2, United Kingdom Supreme Court, London¹

INTRODUCTION

The dominant narrative with regard to Israel-Palestine, generally supported by the governments of the European Union, the USA and Canada, is that the State of Israel was justly founded in 1948 (with United Nations approval),² in what had been British Mandate Palestine, and has been the innocent³ victim of the irrational hatred of Palestinians and other Arabs or Muslims since then. The Hamas rockets fired from Gaza in July-August 2014, and the knife attacks in the West Bank (including East Jerusalem) since October 2015, are the most recent manifestations of violent Palestinian opposition to the existence of Israel.

¹ Generally attributed to Eleanor Roosevelt: <http://www.gwu.edu/~erpapers/abouteleanor/er-quotes>.

² United Nations General Assembly (UNGA) Resolution 181 (29 November 1947) (emphasis added): 'The General Assembly, ... Recommends ... the adoption ..., with regard to the future government of Palestine, of the Plan of Partition with Economic Union ... 3. *Independent Arab and Jewish States* and the Special International Regime for the City of Jerusalem, ... *shall come into existence in Palestine ... not later than 1 October 1948.*'

³ See 'Netanyahu Lashes Out at Criticism of Israel', *New York Times* (1 June 2015): 'We have done nothing wrong, and we have not erred.'

European and North American governments support Israel because they share a common commitment to non-racial democracy. Palestinian claims that three groups have been excluded from Israel's democracy are groundless. The Palestinian refugees of 1948 were displaced by war and should be absorbed by the countries where they live. The Palestinian residents of Gaza and the West Bank (including East Jerusalem), who are living temporarily under military occupation (or external military control) that is necessary for Israel's security, will someday be citizens of a fully sovereign and viable State of Palestine. And the Palestinians who remained in the part of Palestine that became Israel, after the 1948-49 war, are equal citizens of Israel, with the right to vote in elections for the Knesset.

Especially since 2000 (the start of the Second Intifada and the collapse of the Oslo peace process), the dominant narrative has been challenged by an alternative narrative. The State of Israel was unjustly founded in 1948 in the Arab-majority territory of Palestine (without that majority's consent),⁴ established a Jewish majority through illegitimate means (denying the UN-supported right of expelled⁵ Palestinians to return to their homes in the part

⁴ Robert Wintemute, 'Europe's Last Colony: 1918 Palestine's [92%] Arab Majority, Jewish Immigration, and the Justice of Founding Israel Outside Europe', (2012) 21 *Social & Legal Studies* 121, 122 ('Palestine in 1918 was as Arab as the UK in 2001 was "white"'). On 28 November 1947, Zafrullah Khan (King's College London LLB 1914, first Foreign Minister of Pakistan, first Asian President of the International Court of Justice) warned the UNGA that the proposed partition of Palestine would 'forcibly driv[e] what in effect amounts to a Western wedge into the heart of the Middle East ... The Arabs and the Jews will have been set by the ears and never again will there be a chance of bringing them together.' See <http://unispal.un.org/UNISPAL.NSF/0/93DCDF1CBC3F2C6685256CF3005723F2>.

⁵ I will refer mainly to 'expelled Palestinians' rather than 'Palestinian refugees', because the term 'refugee' often implies that the government of the country of origin would allow the refugee to return, but that the refugee fears harm if they were to do so. As will be seen below, Israel's decision not to allow temporary Palestinian 'refugees' to return after the 1949 armistice turned them into permanently 'expelled' Palestinians.

of Palestine that became Israel),⁶ and has been operating a system of racial discrimination similar to South African apartheid since 1948, which it extended to Gaza and the West Bank (including East Jerusalem) in 1967. The Hamas rockets of 2014 and the knife attacks since 2015 are the most recent manifestations of violent⁷ Palestinian resistance to Israel's racial discrimination against them, which has its harshest effects in Gaza.⁸ European and North American governments should not support Israel because, like South Africa from 1948 to 1994, it has been operating a racial democracy,⁹ also since 1948 but with no end in sight.

⁶UNGA Resolution 194 (11 December 1948), para. 11 ('the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and ... compensation should be paid for the property of those choosing not to return ...').

⁷ The distinguishing feature of the situation in Israel-Palestine is not the terrible cycle of violence, which has left many innocent civilians dead or injured on both sides. Much higher death tolls are found in other armed conflict zones. This article asks whether the distinguishing feature is that racial discrimination is the underlying cause of the violence.

⁸ The majority of the people of Gaza were expelled from the part of Palestine that became 1949-67 Israel. They are neither citizens of the State of Israel nor citizens of a new State of Palestine, and cannot trade with the rest of the world as an independent entity (Israel's control of Gaza's air space and offshore waters precludes direct contact through an airport and a seaport, as in Dubai or Singapore). Indirect contact via the Gaza-Egypt border crossing is sporadic. See http://www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf (30 March 2015); International Committee of the Red Cross (ICRC), <https://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm> (14 June 2010): 'The closure ... constitutes a collective punishment [of Gaza's civilian population] imposed in clear violation of Israel's obligations under international humanitarian law [IHL].'; Parliamentary Assembly of the Council of Europe (PACE), Resolution 2142 (24 January 2017): the PACE calls on Israel to '9.2.1. lift the blockade of the Gaza Strip to ensure that the population of Gaza has access to basic and inalienable human rights'.

⁹ I prefer 'racial democracy' to 'ethnocracy', because 'racial' highlights the contradiction in terms. Cf. Oren Yiftachel, *Ethnocracy* (University of Pennsylvania Press, 2006). See also Amos Schocken, <http://www.haaretz.com/1.604349> (1 July 2014): 'Israeli rule ... over the Palestinians is flagrantly undemocratic.'

This racial democracy denies Israeli citizenship and the right to vote to the expelled Palestinians of 1948 and, since 1967, to the residents of Gaza and the West Bank, because they are not racially or ethnically Jewish. It has also denied (since 1948) fully equal rights and obligations to the Palestinian citizens of Israel, because they are not racially or ethnically Jewish.

The purpose of this article is to consider whether racial discrimination law can make a more useful legal contribution to the political debates about Israel-Palestine than international humanitarian law (IHL). If so, does the application of racial discrimination law suggest that the alternative narrative is a more accurate account than the dominant narrative of the reality on the ground in Israel-Palestine since 1948, which a South African Nobel Peace Prize laureate, retired Archbishop Desmond Tutu, has compared with apartheid since a 1989 visit?¹⁰ Or if it is not an accurate account, is it 'a false and malicious one', as

No democratic state exists in the territory ... under Israeli control, between the Mediterranean ... and the Jordan ... [W]hites ... had the right to vote ..., but South Africa was not a democracy.'

¹⁰ See Walter Ruby, 'Tutu says Israel's policy in territories reminds him of [SA]', *Jerusalem Post* (1 February 1989); Desmond Tutu, 'Apartheid in the Holy Land', *The Guardian* (29 April 2002): 'Israel will never get true security and safety through oppressing another people. A true peace can ultimately be built only on justice.' See also Uri Davis, *Israel: An Apartheid State* (Zed Books, 1987), *Apartheid Israel* (Zed Books, 2003); John Quigley, 'Apartheid Outside Africa: The Case of Israel', (1992) 2 *Indiana Int'l & Comp. L. Rev.* 221; Marwan Bishara, *Palestine/Israel: Peace or Apartheid* (Zed Books, 2001); Jimmy Carter, *Palestine: Peace Not Apartheid* (Simon & Schuster, 2006); Ben White, *Israeli Apartheid: A Beginner's Guide* (Pluto Press, 2009; 2d ed, 2014); Yves Engler, *Canada and Israel: Building Apartheid* (RED Publishing, 2010); Virginia Tilley (ed), *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories [OPT]* (Pluto Press, 2012); John Dugard & John Reynolds, 'Apartheid, International Law, and the [OPT]', (2013) 24 *European Journal of International Law* 867; Ilan Pappé (ed), *Israel and South Africa: The Many Faces of Apartheid* (Zed Books, 2015); Ghada Ageel (ed), *Apartheid in Palestine* (Univ. of Alberta Press, 2016).

retired Justice Richard Goldstone of the Constitutional Court of South Africa has described it,¹¹ that seeks to delegitimise¹² Israel's vibrant non-racial democracy?¹³

In assessing the accuracy of the South African apartheid analogy, I will also conduct a 'thought experiment', inspired by Israel's close ties with Europe (to be discussed below). I will imagine how the political issues related to Israel-Palestine might become legal issues under the European Convention on Human Rights (EConHR), if Israel were to become a member state of the Council of Europe and a party to the Convention. This 'thought experiment' will involve the application of the case law of the European Court of Human Rights (ECtHR) to hypothetical cases brought by Palestinians, especially residents of Gaza and the West Bank, against Israel.¹⁴

INTERNATIONAL HUMANITARIAN LAW OR RACIAL DISCRIMINATION LAW AS A LENS: OCCUPATION OR APARTHEID?

The dominant narrative with regard to Israel-Palestine is accompanied by a dominant legal analysis. Israel occupied Gaza and the West Bank (including East Jerusalem) during the 1967 war, and retained them after the 1973 war. Because of 'the inadmissibility of the acquisition of territory by war', Israel can never acquire sovereignty over these territories and

¹¹Richard Goldstone, 'Israel and the Apartheid Slander', *New York Times* (31 October 2011).

¹² See Robbie Sabel, 'The Campaign to Delegitimize Israel with the False Charge of Apartheid', <http://www.jcpa.org/text/apartheid.pdf> (2009).

¹³ See Theresa May's speech to the Conservative Friends of Israel, 12 December 2016, <http://www.conservativehome.com/parliament/2016/12/mays-speech-to-the-conservative-friends-of-israel-full-text.html>: "we have, in Israel, a thriving democracy, a beacon of tolerance ... Israel guarantees the rights of people of all religions, races and sexualities'.

¹⁴ Another version of this 'thought experiment' would be to imagine Israel-Palestine as the 51st state of the USA (and all residents as US citizens), and the potential application of the 14th Amendment, the Civil Rights Act of 1964, and other federal prohibitions of racial discrimination to the new US citizens.

must eventually withdraw from them.¹⁵ The ECtHR has described how occupation freezes the legal status quo: 'Occupation does not create any change in the status of the territory ..., which can only be effected by a peace treaty or by annexation followed by [international] recognition. ... [T]here is no change in the nationality of the inhabitants.'¹⁶

IHL imposes obligations on Israel as the occupying power, but does not set a deadline for withdrawal.¹⁷ IHL assumes that the legal impossibility of unilaterally acquiring sovereignty, and the cost of maintaining the occupation, will eventually create an incentive to withdraw. But IHL also assumes that the occupying power is complying with its obligation not to build housing for its own citizens on occupied land. Article 49(6) of the Fourth Geneva Convention (12 August 1949), which Israel signed on 8 December 1949 and ratified on 6 July 1951, provides that '[t]he Occupying Power shall not ... transfer parts of its own civilian population into the territory it occupies' (as Germany did during World War II,

¹⁵ United Nations Security Council (UNSC) Resolution 242 (22 November 1967). See also UNSC Resolution 298 (25 September 1971) ('all ... actions taken by Israel to change the status of ... Jerusalem ... are totally invalid'); *Zivotofsky v Kerry*, 576 U.S. ____ (8 June 2015): 'the United States does not recognize any country as having sovereignty over [West or East] Jerusalem'.

¹⁶ *Al-Skeini & Others v UK* (7 July 2011), [89]. See also Eyal Benvenisti, *The International Law of Occupation*, 2d ed (OUP, 2012), 6.

¹⁷ See Benvenisti, *ibid* 245; ICRC, Report of Expert Meeting, <https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf> (March 2012), 72 ('the participants agreed that IHL did not set any limits to the time span of an occupation'); <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10568&LangID=E> (29 Nov. 2010): (Richard Falk ... called for a new protocol of IHL on 'prolonged occupation', to impose 'some outer time limit after which further occupation becomes a distinct violation of international law'; Ben-Naftali, Gross & Michaeli, 'Illegal Occupation: Framing the [OPT]', (2005) 23 *Berkeley Journal of International Law* 551, 613 ('[t]he time has come for the international community to promulgate clear time limitations for the duration of an occupation ...').

especially in Poland).¹⁸ By building housing for over 500,000 Jewish-Israelis in the West Bank (including East Jerusalem),¹⁹ Israel is continuously breaching its IHL obligation.²⁰

The United Nations Security Council (UNSC) warned Israel about the illegality of the settlements when they were at an early stage. In 1979, the UNSC called upon Israel 'to desist from taking any action which would result in ... materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories.'²¹ The UNSC also noted that 'the policy of ... establishing settlements in the occupied Arab territories has no legal validity and constitutes a violation of the Fourth Geneva Convention'.²² The UNSC repeated these warnings in late 2016, stressing that 'the cessation of all Israeli settlement activities is essential for salvaging the two-State solution'.²³

The International Court of Justice (ICJ) confirmed the illegality of the settlements in 2004,²⁴ concluding that East Jerusalem and the West Bank are occupied territories (the status

¹⁸ The 1958 Commentary to the Fourth Geneva Convention explains the purpose of Article 49(6): 'to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or ... to colonize those territories.'

¹⁹ See <http://www.btselem.org/settlements/statistics> (at least 547,000 as of end of 2013).

²⁰ Theodor Meron warned Israel's Ministry of Foreign Affairs about this breach on 18 September 1967. See <https://www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf>.

²¹ UNSC Resolution 446 (22 March 1979).

²² UNSC Resolution 452 (20 July 1979). See also UNSC Resolution 465 (1 March 1980) (settlements are 'a flagrant violation of the ... Convention ... and ... a serious obstruction to achieving ... peace'); UNSC Resolution 476 (30 June 1980); UNSC Resolution 478 (20 August 1980). Cf. Benvenisti, n 16 above, 223-24 (refusal of Supreme Court of Israel to declare the settlements illegal under international law).

²³ UNSC Resolution 2334 (23 December 2016).

²⁴ *Legal Consequences of the Construction of a Wall in the [OPT]*, International Court of Justice (ICJ), Advisory Opinion of 9 July 2004.

of Gaza was not relevant),²⁵ that the Fourth Geneva Convention applies there,²⁶ that the Palestinian people exists and has a right to self-determination,²⁷ that 'the Israeli settlements in the Occupied Palestinian Territor[y] (including East Jerusalem) [OPT] have been established in breach of international law',²⁸ that the construction of the separation wall violates international law,²⁹ that 'Israel cannot rely on a right of self-defence or ... a state of necessity ... to preclude the wrongfulness of the construction of the wall' because 'construction ... along the route chosen was [not] the only means to safeguard the interests of Israel',³⁰ and that 'Israel is under an obligation ... to dismantle [the wall] forthwith' and 'make reparation for all damage caused'.³¹

It is likely that the occupation would have ended long ago (because it would have been much harder to justify a refusal to allow a State of Palestine in Gaza and the West Bank, including East Jerusalem), but for Israel's illegal and stubbornly-pursued policy of settlement-building. Although built with complete disregard for the United Nations and international law, the settlements make sense when it is understood that their purpose, from the beginning, was to prevent the establishment of a State of Palestine alongside the State of Israel in its May 1967 borders. This was spelled out in the 1978 'Drobes Plan'³² and in a 1980 document by the plan's author:

²⁵ *ibid* [78].

²⁶ *ibid* [101].

²⁷ *ibid* [118].

²⁸ *ibid* [120].

²⁹ *ibid* [134].

³⁰ *ibid* [140]-[142].

³¹ *ibid* [163(3)B.-C].

³² See Mallison & Mallison, *The Palestinian Problem in International Law and World Order*, Appendix 11 (Longman, 1986), 446.

the state-owned lands and ... uncultivated barren lands in Judea and Samaria [the West Bank] ought to be seized right away ... to reduce ... the danger of an additional Arab state being established ... The best ... way of removing every shadow of a doubt about our intention to hold on to Judea and Samaria forever is by speeding up the settlement momentum in these territories.³³

Raul Roa-Kouri, who drew the 1980 document to the attention of the UN Secretary-General, observed that it 'leaves one in no doubt of Israel's intention to annex the Arab territories it has illegally occupied'.³⁴ Mattiyahu Drobles, author of the 'Drobles Plan', could rightly claim 'mission accomplished' when Israeli Prime Minister Benjamin Netanyahu said at a press conference on 11 July 2014: 'there cannot be a situation, under any agreement, in which we relinquish security control of the territory west of the River Jordan'.³⁵ On the eve of his 17 March 2015 re-election, he promised that he would not allow a State of Palestine to be established.³⁶ This brings the dominant narrative and the dominant legal analysis to an impasse. Israel's occupation is temporary, and will end when a peace agreement is signed and Israel withdraws.³⁷ But Israel continues to benefit from the occupation by building housing in illegal settlements (and extracting water and other natural resources), and therefore has no incentive to negotiate a peace agreement that would permit withdrawal.³⁸

In 2017, as we mark the 100th anniversary of the Balfour Declaration, the 70th anniversary of the partition resolution of the UN General Assembly (UNGA), and the 50th anniversary of Israel's occupation, I would argue that it is time for an alternative legal analysis, flowing from the alternative narrative described above. The opening question for

³³ See <http://unispal.un.org/UNISPAL.NSF/0/3E5D731750EEB69E8525696600663AD0> (19 June 1981).

³⁴ *ibid*

³⁵ See 'Netanyahu finally speaks his mind', *Times of Israel* (13 July 2014).

³⁶ 'Israel election: ... Netanyahu rules out Palestinian state if he wins', *The Guardian* (16 March 2015).

³⁷ See Benvenisti, n 16 above, 16-27.

³⁸ See *ibid* 17, 224-238, 241, 245-246, 340 (on 'bad faith'), 241-244 (on the 'economic annexation' of the West Bank), 349 (no difference between 'hold[ing] out in bad faith' and 'outright annexation').

this analysis is: when does an occupation of territory become a de facto annexation³⁹ of territory? Although international law prefers an obligation to withdraw, to remove any incentive to attempt to acquire territory by military conquest, it must impose a residual obligation if withdrawal cannot be achieved. The following, tentatively suggested guidelines attempt to reconcile two apparently contradictory obligations in international law: the obligation to end a temporary occupation and not to declare a de jure annexation of territory (the annexation would be invalid under international law, even if it were valid under the national law of the annexing state); and the obligation not to subject the occupied population to racial discrimination (compared with the occupying power's citizens), if a temporary occupation becomes permanent (a de facto annexation of territory):

- (1) The occupying power must withdraw within a reasonable time⁴⁰ after it is clear that the occupied territory is not a threat to its security (or within 20 years of the start of the occupation at the latest), and must not declare a de jure annexation of any part of the occupied territory.
- (2) If the occupying power refuses to withdraw within a reasonable time (or 20 years at the latest), its occupation should be deemed to have become an illegal de facto annexation, triggering an obligation to offer citizenship and the right to vote in its elections to the residents of the occupied territory.⁴¹

³⁹ See the ICJ's Advisory Opinion, n 24 above, [121]: 'the construction of the wall ... could well become permanent, in which case, ... it would be tantamount to de facto annexation'; Ben-Naftali, n 17 above, 602-603: 'Israel ... has already effected a de facto annexation of a substantial part of the OPT.'

⁴⁰ See Ben-Naftali, n 17 above, 599-605.

⁴¹ To date, Israel has only allowed Palestinian residents of East Jerusalem, the subject of an illegal de jure annexation, to apply for citizenship. Most residents have declined to do so. See <http://www.theguardian.com/commentisfree/2014/jan/08/myth-undivided-jerusalem-israel-palestine-binyamin-netanyahu> (under 5% of East Jerusalem Palestinians are Israeli citizens).

(3) If the occupying power offers citizenship and the majority of residents accept it, this might (in some circumstances) signify the consent of the occupied population to the annexation and start the process of legalising it.⁴²

(4) If the occupying power offers citizenship and the majority of residents refuse it (preferring to insist on their right to self-determination), the de facto annexation remains illegal.

(5) If the occupying power refuses to offer citizenship, its de facto annexation remains illegal, and becomes aggravated by a flagrant violation of international human rights law banning racial discrimination in access to citizenship and the right to vote (the essence of apartheid, as I will argue below).

(6) If, for demographic or other reasons, the occupying power refuses to offer citizenship, and wishes to avoid accusations of racial discrimination or apartheid, it must withdraw and end the occupation that lasted more than a reasonable time (or 20 years) and became an illegal de facto annexation.

The following table illustrates the 'lesser of two evils' rationale for this alternative legal analysis:

Approach of international law	Consequences for occupied territory
(1) dominant legal analysis (in theory)	(1) withdrawal + self-determination for population of occupied territory (once peace agreement signed)
(2) alternative legal analysis opts for the lesser of two evils	(2) deemed de facto annexation (lesser evil) + obligation to grant citizenship (to prevent the greater evil of racial discrimination)

⁴² See Benvenisti, n 16 above, 163, 168. Citizenship might be accepted for practical reasons, especially to avoid statelessness, even if the majority still wish the occupying power to leave (eg, Indian Kashmir, Chinese Tibet). If the occupied territory is part of a larger state, the consent of the residents of the territory might be insufficient to legalise the annexation (eg, Kashmir is claimed by Pakistan, Crimea is part of Ukraine, Northern Cyprus is part of the Republic of Cyprus).

(3) dominant legal analysis (in practice) results in the greater of two evils	(3) permanent occupation without annexation + refusal to grant citizenship = status quo in Israel-Palestine (refusal to annex and grant citizenship avoids the lesser evil of acquisition of territory by force, but results in the greater evil of racial discrimination)
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This alternative legal analysis is intended to give the occupying power a stronger incentive to grant citizenship or withdraw than IHL is able to provide, by challenging the assumption that the occupying power 'can have its cake and eat it too' (occupy the territory indefinitely, while building housing for its own citizens on occupied land, and denying citizenship to the residents of the occupied territory).⁴³

In 2012, I wrote that 'the conquest of the territory of an indigenous people can only be "forgotten", or "swept under the carpet of history", if the surviving indigenous people or their descendants are belatedly being treated by the conquerors as equal citizens, with full voting and other rights.'⁴⁴ This article addresses that question with regard to Israel-Palestine. Its premise is that Israel, through superior military power, 'won fair and square' in 1948-49, 1967 and 1973, and achieved control over 100% of what was British Mandate Palestine. But Israel must take the people with the land. The alternative narrative mentioned in the Introduction, and the alternative legal analysis I will develop below, ask how Jewish-Israelis (mainly post-1918 immigrants to Palestine or Israel or their descendants) have been treating the

⁴³ See Ben-Naftali, n 17 above, 611: 'Israel enjoys both the powers of an occupant and a sovereign in the OPT, while Palestinians enjoy neither the rights of an occupied people [preservation of the status quo] nor the rights of citizenship.' See also 611, n 327: '[the] law of occupation ... does not incorporate a notion of an occupation becoming illegal when it turns into a de facto annexation'.

⁴⁴ Wintemute, n 4 above, 133.

Palestinians (the indigenous majority in 1918),⁴⁵ and compares this treatment with that of the indigenous peoples of the USA, Canada, Australia, New Zealand, and South Africa. Does exclusion of the majority of the Palestinians (living in 1949-67 Israel, Gaza, or the West Bank, including East Jerusalem) from citizenship and the right to vote make Israel and the OPT a racial democracy, similar to South African apartheid?

ANGRY REACTIONS TO THE APARTHEID ANALOGY: PROTESTING TOO MUCH?

Comparing the situation in Israel-Palestine with South African apartheid tends to trigger angry reactions. Three examples can be cited. First, on 25 February 2010, Ontario's Legislative Assembly approved a motion that '*the term 'Israeli Apartheid Week' [increasingly common on university campuses]*⁴⁶ is condemned as it *serves to incite hatred against Israel*, a democratic state that respects ... human rights, and ... diminishes the suffering of those who were victims of a true apartheid regime in South Africa ...'⁴⁷ Introducing the motion, Peter Shurman MLA said:

*'Apartheid' is an Afrikaans word that only applies to one single event in the history of humankind: ... pre-Mandela South Africa. There is no comparison with any other situation on earth. ... Israeli Apartheid Week ... labels supporters of Israel as racists and lessens their feelings of security. ... [T]his [is an] odious distortion of facts and language ... [T]here is no Israeli apartheid, and ... there should be no Israeli Apartheid Week suggesting anything to the contrary.*⁴⁸

Second, on 23 August 2012, California's State Assembly passed a resolution including the following recital: 'Over the last decade some Jewish students on ... campuses in California have experienced the following: ... (2) speakers, films, and exhibits ... that engage in *anti-*

⁴⁵ *ibid*, 122.

⁴⁶ See <http://apartheidweek.org/call-out>.

⁴⁷ See <http://hansardindex.ontla.on.ca/hansardeissue/39-1/1208.htm> (Israeli Apartheid Week) (emphasis added).

⁴⁸ *ibid* (emphasis added).

Semitic discourse...including that Israel is a racist, apartheid ... state, that Israel is guilty of heinous crimes against humanity such as ethnic cleansing ...⁴⁹ Third, on 20 January 2014, Canadian Prime Minister Stephen Harper spoke to the Israeli Knesset in West Jerusalem:

[S]ome openly *call Israel an apartheid state*. ... Think about the twisted logic and outright malice ...: a state, based on ... democracy ..., ... founded so Jews can ... seek shelter from ... the worst racist experiment in history ... is condemned ... in the language of anti-racism. It is nothing short of sickening. ... But, this *is the face of the new anti-Semitism*. It targets the Jewish people by targeting Israel and attempts to make the old bigotry acceptable ...⁵⁰

Angry denial is a common response to an accusation of racial discrimination, because of the social stigma it carries. As Lord Browne-Wilkinson observed in his dissent in *Swiggs v Nagarajan*, '[t]o introduce something akin to strict liability ... which will lead to *individuals being stamped as racially discriminatory* ... where these matters were not consciously in their minds ... is unlikely to recommend the [anti-discrimination] legislation to the public as being fair and proper ...'⁵¹ Apart from natural reluctance to accept the moral stigma society attaches to those who practise legally prohibited racial discrimination, accusations directed at Israel are a particularly sensitive matter for Jewish communities, because false claims of collective guilt were repeatedly used in the past to incite anti-Jewish violence. The South African apartheid analogy is seen as implying: (1) that Jewish-Israelis collectively (or their political leaders) have acted as racist criminals;⁵² and (2) that a just solution in Israel-Palestine will have to be the same as in post-apartheid South Africa. I do not intend my use of the analogy

⁴⁹ See http://leginfo.ca.gov/pub/11-12/bill/asm/ab_0001-0050/hr_35_bill_20120823_amended_asm_v98.html (emphasis added).

⁵⁰ See <http://www.cbc.ca/news/politics/stephen-harper-s-speech-to-the-israeli-knesset-1.2503902> (emphasis added).

⁵¹ [1999] UKHL 36 (emphasis added).

⁵² See Yaffa Zilbershats, 'Apartheid, International Law, and the [OPT]: A Reply to John Dugard and John Reynolds', (2013) 24 *European Journal of International Law* 915, 916, 928: 'the very gravity of the crime requires that accusations of apartheid be made with the greatest caution'.

to imply either conclusion because: (1) I treat apartheid as a tort rather than a crime, arising when white Europeans (Christian or Jewish) confront particular demographic circumstances; and (2) the geographic concentrations of the Jewish and Palestinian populations (each is a majority on its side of the the 1949 armistice line) make a just partition into two states a feasible option in Israel-Palestine, unlike in South Africa.

Some forms of racial discrimination (eg, access to employment or citizenship) are better viewed as an objective wrong, a tort not a crime,⁵³ which does not make any judgment about the perpetrator's state of mind or character, and does not always require a hostile or prejudiced intention or motive. This has been the approach of courts interpreting UK legislation, from the Sex Discrimination Act 1975 to the Equality Act 2010,⁵⁴ and similar anti-discrimination laws in the USA and Canada, which generally impose civil rather than penal sanctions. People who practise racial discrimination because they mistakenly see it as necessary for their self-defence (they are motivated by fear of an indigenous people), or believe for biblical or other reasons that they are entitled to practise it, are not necessarily 'evil'. The most constructive remedy is often to end the racial discrimination (possibly with some financial compensation for the past), not to demand that the perpetrators be tried for 'crimes against humanity'.

For this reason, my legal analysis relies on the International Covenant on Civil and Political Rights (ICCPR, 1966), and the more specific Convention on the Elimination of all forms of Racial Discrimination (CERD, 1965), rather than the International Convention on the Suppression and Punishment of the Crime of Apartheid (the Apartheid Convention,

⁵³ Other forms of racial discrimination (eg, in relation to the right to life or freedom from violence) must be treated both as crimes and torts at the national level. The ECtHR has required proof of discriminatory intent for racially motivated crimes of violence, but not for discrimination in access to education. See *Nachova v Bulgaria* (6 July 2005), [157]; *D.H. v Czech Republic* (13 November 2007), [194].

⁵⁴ *James v Eastleigh Borough Council*, [1990] UKHL 6 (1975 Act).

1973).⁵⁵ The parties to the Apartheid Convention do not include the USA, Canada, Australia, New Zealand, Israel, post-apartheid South Africa, or any Western European country, perhaps because it is seen as no longer relevant (it is too tailored to the specific features of South African apartheid), or because it is too dangerous (it could be applied to a signatory's treatment of its own indigenous peoples). To date, no one has ever been prosecuted for the international crime of apartheid,⁵⁶ not even in South Africa, which preferred a Truth and Reconciliation Commission to criminal trials.

Unlike the two legislatures and one prime minister quoted above, those who reject the South African apartheid analogy should respond to it in a rational way, pointing to the relevant objective facts that make it inaccurate,⁵⁷ rather than in an emotional way: dismissing the possibility of apartheid in Israel-Palestine because it is too painful to contemplate (survivors of genocidal racial discrimination could not possibly become perpetrators of racial discrimination), and attributing malice to the person making the claim. Should the South African apartheid analogy be used, even if it offends some people? In my view, it should be used if it is accurate and promotes better public understanding of the situation in Israel-Palestine, through comparison with a well-known example of racial discrimination in another part of the world.

⁵⁵ For a detailed and rigorous study, concluding that Israel is violating the Apartheid Convention in Gaza and the West Bank, including East Jerusalem (expelled Palestinians living outside the OPT and Palestinian citizens of Israel are not considered), see Tilley, n 10 above. See also the finding of apartheid in the OPT in Dugard, n 10 above, 867; Ben-Naftali, n 17 above, 586-87, 600 (noting possible apartheid in the OPT).

⁵⁶ See also Rome Statute of the International Criminal Court, Arts. 7(1)(j)-(k), 7(2)(h) ('crime against humanity' includes '[t]he crime of apartheid').

⁵⁷ See, eg, Zilbershats, n 52 above. Cf. 'The Apartheid Smear', <http://www.bicom.org.uk/analysis-article/18870> (13 Feb 2014); Benjamin Pogrand, *Drawing Fire: Investigating the Accusations of Apartheid in Israel* (Rowman & Littlefield, 2014); Sabel, n 12 above.

It could also replace the current concept of occupation, which is itself an analogy, inviting the public to compare the situation in Israel-Palestine with other occupations. The occupation analogy is misleading, because almost every occupation one can think of is or was of much shorter duration (eg, the USA's occupation of Japan, 1945-1952), or has become a de jure annexation (internationally recognised or not), with citizenship and the right to vote (if it exists) granted to the occupied territory's residents (eg, China-Tibet, Indonesia-West Papua, India-Kashmir, Russia-Crimea, Turkey-Northern Cyprus,⁵⁸ Morocco-Western Sahara,⁵⁹ etc). The reason why a shift from an occupation analogy to an apartheid analogy could make a difference, in generating international pressure on Israel to change, is that occupation is common and does not shock. Absence of genuine democracy (because there is one-party rule or the same party always wins) is common and does not shock. But racial discrimination in access to citizenship and the right to vote (apartheid) is rare, does shock, and has become taboo.

IS APARTHEID UNIQUELY SOUTH AFRICAN OR DOES IT HAVE A UNIVERSALLY APPLICABLE CORE?

As noted above, Ontario MLA Peter Shurman has claimed that "[a]partheid" is an Afrikaans word that only applies to one single event in the history of humankind [South Africa from 1948 to 1994] ... There is no comparison with any other situation on earth.' I respectfully disagree. *Apartheid* is an Afrikaans word meaning 'apartness' or 'separateness' that has been absorbed into English and other languages. Its Hebrew translation is *hafrada* ('separation'), as in *geder ha'hafrada* or 'separation fence', one of the Hebrew names for the West Bank wall. Apartheid serves as a useful (because it is well known) shorthand for the universally

⁵⁸ Instead of a de jure annexation, Turkey set up the (unrecognised) 'Turkish Republic of Northern Cyprus'.

⁵⁹ Morocco sees Western Sahara as its territory: <http://www.maroc.ma/fr/content/carte-du-maroc>. See also Benvenisti, n 16 above, 171.

applicable human rights violation that can be found at its core: racial discrimination in access to citizenship and the right to vote.⁶⁰

Apartheid may also involve systematic racial discrimination with regard to education, employment (including military service), housing, access to goods and services, freedom of movement (including access to roads, beaches and other public places), the right to marry, or immigration (including the right to sponsor a spouse or partner).⁶¹ But none of these potential aspects of apartheid is essential, and all are much easier to remove than discrimination with regard to access to the right to vote. In South Africa, the final, most important pillar of apartheid was only removed on 27 April 1994, when South Africa's first democratic (all-race) elections were held. The Apartheid Convention does refer, in Article II(c), to 'any ... measures calculated to prevent a racial group ... from participation in the political ... life of the country', but they appear in a long list of 'inhuman acts' and are not highlighted or prioritised in any way. Yet it is the belief that a particular racial or ethnic group is not equal in value to the dominant racial or ethnic group, and can justifiably be excluded from citizenship and the right to vote, that gives rise to all the other 'inhuman acts' in Article II (murder, serious bodily or mental harm, arbitrary detention, etc), which are means of maintaining the exclusion from citizenship.

⁶⁰ See UNGA Resolution 395(V) (2 Dec. 1950): 'a policy of "racial segregation" (*Apartheid*) is necessarily based on doctrines of racial discrimination'; Dugard, n 10 above, 883-85, conclude that the prohibition of apartheid has universal application, and must be a rule of *jus cogens*, like the prohibition of racial discrimination. See also Ran Greenstein, <http://mrzine.monthlyreview.org/2010/greenstein270810.html> (27 August 2010) (finding in Israel 'a form of generic apartheid').

⁶¹ For many examples, see Tilley and Dugard, n 10 above.

The ICCPR and CERD both ban apartheid, impliedly or expressly.⁶² In addition to Article 26 ICCPR, which prohibits discrimination based on 'race, ..., national ... origin, ... birth, or other status', Article 25 ICCPR provides that '[e]very citizen shall have the right ..., without any of the distinctions mentioned in article 2 ['race, ..., national ... origin, ... birth, or other status'] ... (b) To vote ... at genuine periodic elections which shall be by universal and equal suffrage ...' Article 3 CERD includes a prohibition of apartheid: 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.' And Article 5(c) CERD expressly refers to racial discrimination with regard to political rights: '... States Parties undertake ... to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, ... in the enjoyment of ... (c) Political rights, in particular the right[] ... to vote ... on the basis of universal and equal suffrage ...'

It is true that the right to vote in Article 25 ICCPR is confined to 'citizens'. Similarly, 'racial discrimination' is defined in Article 1 CERD as '(1) ... any distinction ... based on race, colour, descent, or national or ethnic origin ... [but] (2) This Convention shall not apply to distinctions ... between citizens and non-citizens [and] (3) Nothing in this Convention may be interpreted as affecting ... the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality'. Israel could argue that the exclusion of (most if not all) expelled Palestinians, and Palestinian residents of Gaza and the West Bank (including East Jerusalem),

⁶² See also *Namibia (South West Africa)*, ICJ, Advisory Opinion of 21 June 1971, [129]-[131]: South Africa's system of apartheid in Namibia was 'a flagrant violation of the ... [UN] Charter [especially Article 1(3)]'.

from the right to vote in Israeli elections is lawfully based on their not being citizens of Israel, and has nothing to do with their race or national or ethnic origin.⁶³

But the use of citizenship as the ground for unequal treatment is not conclusive. Any criterion (such as citizenship) that appears to be neutral with regard to a particular prohibited ground of discrimination (such as race) might, on further examination, be found to incorporate directly discriminatory requirements for access to that criterion. In *James v Eastleigh Borough Council*, the UK House of Lords ruled that 'pensionable age' was not a neutral criterion, because it incorporated direct sex discrimination (a lower age of 60 for women compared with 65 for men).⁶⁴ Similarly, both the UK Supreme Court in *Bull v Hall*,⁶⁵ and the Court of Justice of the European Union in *Hay*,⁶⁶ found that 'being a married couple' was not a neutral criterion, because it incorporated direct sexual orientation discrimination (the marriage laws of both England and France excluded same-sex couples at the relevant time).

As will be seen below, Israel's Law of Return of 1950⁶⁷ and Nationality Law of 1952 are not racially neutral. They discriminate on the basis of 'race, ..., descent, or national or ethnic origin' (potential forms of racial discrimination listed in Article 1(1) CERD) against Palestinian applicants for the right to reside in Israel, or for Israeli citizenship. The exception in Article 1(3) CERD does not apply to Israel's citizenship legislation (the Nationality Law), because it 'discriminate[s] against [a] particular nationality' (non-Jewish citizens of British Mandate Palestine and their descendants). Although post-1945 international human rights law

⁶³ See Zilbershats, n 52 above, 921: 'the separation is not along racial lines but between Israeli citizens and Palestinians. ... [T]he same law applies in the territories to an Israeli Arab ... and to an Israeli Jew'.

⁶⁴ [1990] UKHL 6.

⁶⁵ [2013] UKSC 73.

⁶⁶ Case C-267/12, *Frédéric Hay* (CJEU, 12 December 2013).

⁶⁷ See <http://www.knesset.gov.il/laws/special/eng/return.htm>.

permits a state to define who are its citizens, and to exclude persons from different racial or ethnic groups living in other states, who have no prior connection with the defining state (Israel may decide that citizens of Japan are not citizens of Israel), it does not permit 'racial gerrymandering' among the people whose permanent residence is in the state's territory when the state is founded.⁶⁸ It is prohibited racial discrimination to grant preferred access to citizenship to one racial or ethnic group (the Jewish diaspora), while denying access on the same terms to members of another racial or ethnic group (the Palestinians), whose connection with the new state's territory is equal to, or stronger than, that of many members of the preferred group (eg, birth in the territory or recent descent from an identifiable person born in the territory).⁶⁹

The Law of Return of 1950 provides that:

1. Every Jew has the right to come to this country as an *oleh* [immigrant]. ...

4A. (a) The rights of a Jew under this Law and the rights of an *oleh* under the Nationality Law, ... are also vested in a child and a grandchild of a Jew, ... except [if he] has been a Jew and has voluntarily changed his religion.

4B. ... 'Jew' means a person ... born of a Jewish mother or ... converted to Judaism and ... not a member of another religion.

⁶⁸ In some states, such as the UK, birth in the territory to non-citizen parents does not confer an automatic right to citizenship. This kind of rule (involving potential indirect racial discrimination that might be justifiable) generally affects the children of 'true immigrants' to the state, who were not residents at the time the state was founded, and are citizens of the state from which they came.

⁶⁹ See Mazen Masri, 'Love Suspended: Demography, Comparative Law and Palestinian Couples in the Israeli Supreme Court', (2013) 23 *Social & Legal Studies* 309, 325, 327 (Palestinian citizens of Israel, whose recent ancestors have never lived anywhere else, are seen as 'an immigrant minority', 'naturalized citizens who are not full and equal members of the political community', 'deemed foreigner[s]'). Cf. Christian Joppke & Zeev Rosenthal, 'Ethnic-Priority Immigration ... : Resilience [in Israel] Versus Demise [in Germany]', <http://ccis.ucsd.edu/wp-content/uploads/2012/08/wrkg45.pdf> (December 2001).

The Law of Return's excluding Palestinians might be justifiable if Israeli law offered an alternative path to citizenship, under the same conditions as Jewish immigrants. But the Nationality Law of 1952 contains a discriminatory condition: a physical presence test. Under s. 2, '[e]very [Jewish] *oleh* under the Law of Return ... shall become an Israel national [citizen]', from the establishment of the State on 15 May 1948, if they arrived or were born in the part of British Mandate Palestine that became Israel before that date. Under s. 3(a):

[a] person who, immediately before [15 May 1948], was a Palestinian citizen and who does not become a[n] Israel national under section 2 [because he is not Jewish], shall become an Israel national with effect from [15 May 1948] *if he was in Israel, or in any area which became Israel territory ..., from [15 May 1948] to [14 July 1952], or entered Israel legally during that period [when most Palestinians who had fled temporarily were not allowed to return].*⁷⁰

The physical presence test in s. 3(a) does not apply to Jewish applicants for Israeli citizenship, who are not required to have been present in, or have legally entered, Israeli territory between 1948 and 1952.

The Law of Return and the Nationality Law make it clear that an expelled Palestinian who was born in the part of Palestine that became Israel, or whose parent or grandparent was born there, will be denied Israeli citizenship ('nationality' in the cited translation of the 1952 Law), and the rights to reside, work and vote in Israel, because they or their parents or grandparents are not Jewish. A Palestinian resident of Gaza or the West Bank⁷¹ will also be denied these rights, because they are not Jewish and do not have a Jewish parent or grandparent.⁷² A person anywhere in the world who has a Jewish parent or grandparent, but

⁷⁰ See <http://www.israelawresourcecenter.org/israelaws/fulltext/nationalitylaw.htm> (emphasis added).

⁷¹ Exceptional access to Israeli citizenship for Palestinian residents of East Jerusalem (n 41 above) is politically unacceptable to most of them, because it means recognising Israel's illegal de jure annexation (and is not available to residents of Gaza or the West Bank).

⁷² Ostensibly race-neutral rules on freedom of movement in the West Bank highlight the discrimination in access to citizenship by adding, to the category 'Israeli citizen', the category 'those eligible to immigrate to Israel

has never set foot in Israel-Palestine and cannot point to any ancestor who has, is entitled to Israeli citizenship.⁷³ This is direct racial discrimination, ie, less favourable treatment because of racial, national or ethnic origin.⁷⁴

In *R. (on the application of E.) v Governing Body of JFS*,⁷⁵ the UK Supreme Court found direct discrimination, contrary to the Race Relations Act 1976, where a Jewish faith school used matrilineal descent (an unlawful racial criterion), rather than religious practice (a potentially lawful criterion),⁷⁶ to refuse admission to a prospective pupil. The school did not consider the boy's Italian mother to be Jewish, because her conversion before his birth was not recognised by Orthodox Judaism. Lord Phillips concluded that 'JFS discriminates in its admission requirements on the sole basis of genetic descent by the maternal line from a woman who is Jewish ... I can see no escape from the conclusion that this is direct racial discrimination.'⁷⁷ But he added that '[n]othing ... in this judgment should be read as giving rise to criticism on moral grounds of ... the policies of Jewish faith schools ..., let alone as suggesting that these policies are 'racist' as that word is generally understood.'⁷⁸ *JFS* confirms that the objective tort of racial discrimination does not require a guilty mind.

WHAT CAUSES APARTHEID TO DEVELOP AND WHERE HAS IT DEVELOPED?

in accordance with the Law of Return', from which West Bank Palestinians are excluded on racial or ethnic grounds. See, eg, the ICJ's Advisory Opinion, n 24 above, [85].

⁷³ See Engler, n 10 above, 6.

⁷⁴ See, eg, the Equality Act 2010, s. 13.

⁷⁵ [2009] UKSC 15.

⁷⁶ *ibid* [50].

⁷⁷ *ibid* [46].

⁷⁸ *ibid* [9].

In 1989, less than five months before the release of Nelson Mandela, South African commentator Andrew Kenny wrote:

Five countries outside Europe are today ruled by white men from northern Europe. Four ... acted with unspeakable inhumanity towards the native people ... employing ... systematic slaughter [and other means], to reduce them to powerless minorities. The indigenous peoples ..., who were 100 per cent of the population before the arrival of the white men, now form the following percentages: USA: 0.5 ...; Australia: 1 ...; Canada: 1.5 ...; New Zealand: 9 ...; South Africa: 81 ... These figures give a complete explanation why the white people of the first four believe in one man, one vote, and the white people of the fifth do not.⁷⁹

When I read his comment in 1989, I rejected any similarity between the four countries and South Africa, and felt morally superior to white South Africans. Many years later, I came to accept that Kenny was right, and that there is no moral superiority among the European founders of the USA, Canada, Australia, and New Zealand, and the European founders of South Africa and Israel. All established colonies without the consent of the indigenous peoples of these territories.⁸⁰ All recruited as many settlers from Europe as possible. Whether apartheid developed or not was, as Kenny argued, simply a matter of numbers, not greater respect for aboriginal persons. The racist attitude of white Europeans (Christian and Jewish), towards the indigenous peoples of Asia, Africa, the Americas and Australasia, was neatly summarised by Winston Churchill in his evidence to the 1937 Peel Commission:

I do not admit ... that a great wrong has been done to the Red Indians of America or the black people of Australia. I do not admit that a wrong has been done to those people by the fact that a stronger race, a higher grade race ... a more worldly-wise race ... has come in and taken their place.⁸¹

Although apartheid could develop anywhere and be perpetrated by any racial or ethnic group,⁸² historically it has occurred when white Europeans (Christian or Jewish),⁸³ living in

⁷⁹ Andrew Kenny, 'Right of Passage', *The Spectator* (30 September 1989), 9-10.

⁸⁰ See Wintemute, n 4 above.

⁸¹ See Michael Makovsky, *Churchill's Promised Land* (Yale University Press, 2007), 156.

⁸² One example is Buddhist-majority Burma's treatment of its small Rohingya-Muslim minority, who have been denied citizenship on racial grounds, even though they do not pose a 'demographic threat' to the majority. See

countries they have founded outside Europe, face the prospect of being outvoted by non-Europeans. White Europeans react by denying 'less civilised' non-Europeans the right to vote. In the USA, Canada, Australia and New Zealand, the indigenous peoples were belatedly given the right to vote (see the following chart), not because of any moral superiority compared with white South Africans or Jewish-Israelis, but because slaughter, disease and famine allowed the white European invaders to reduce the indigenous peoples to small minorities,⁸⁴ eventually making non-racial democracy possible.

Country	Right to vote for all indigenous persons
Canada	1960 ⁸⁵
USA	1962 ⁸⁶
Australia	1965 ⁸⁷

'The Rohingyas: The most persecuted people on earth?', *The Economist* (13 June 2015); Azeem Ibrahim, *The Rohingyas: Inside Myanmar's Hidden Genocide* (Hurst, 2016). See also the Dominican Republic's refusal to recognise as citizens, and its efforts to expel, the native-born descendants of illegal Haitian immigrants: *Yean & Bosico v Dominican Republic* (Inter-American Court of Human Rights, 8 September 2005); *Expelled Dominicans and Haitians v Dominican Republic* (IACtHR, 28 August 2014).

⁸³ Jewish refugees who fled to Israel from Muslim-majority countries after Israel's foundation are an exception, but Israel was founded primarily by and for Jewish-Europeans.

⁸⁴ See David Stannard, *American Holocaust: Columbus and the Conquest of the New World* (OUP, 1992).

⁸⁵ An Act to amend the Canada Elections Act, S.C. 1960, c. 7 ('Indians' living on reserves).

⁸⁶ Automatic citizenship by virtue of birth in the USA was granted to indigenous persons by the federal 'Act of June 2, 1924, which authorized the Secretary of the Interior to issue certificates of citizenship to Indians'. New Mexico was the last state to consider them 'residents' entitled to vote, while living on reservations: *Montoya v. Bolack*, 372 P.2d 387 (NM Sup Ct 1962). The federal Voting Rights Act of 1965 sought to enforce the Fifteenth Amendment (1870) right to vote of African-Americans, Native-Americans, and others. Section 2 provides: 'No voting qualification ... or standard, practice, or procedure shall be ... applied by any State or political subdivision to deny ... the right of any citizen of the United States to vote on account of race or color.' .

⁸⁷ See <http://www.aec.gov.au/indigenous/history.htm>.

New Zealand	1975 ⁸⁸
South Africa	1994 ⁸⁹
Israel-Palestine	20__? (whether in two states or one)

The role of numbers in the development of apartheid can also be illustrated by comparing three cities founded in the 1880s: Calgary, Alberta, Canada (1884) (where I grew up); Johannesburg, Gauteng, South Africa (1886); and Rishon LeZion, Greater Tel Aviv, Israel (1882). All three have an indigenous community living no more than 70 km to the southwest: the Tsuut'ina Nation is to the southwest of Calgary; Soweto (South Western Townships) is to the southwest of Johannesburg; and Gaza is to the southwest of Greater Tel Aviv. The populations of these three indigenous communities help to explain why apartheid developed in South Africa and (as will be argued below) in Israel-Palestine, but not in Canada. The City of Johannesburg has a population of 4.4 million (including Soweto's 1.3 million) of whom 76% are black; Gaza has 1.9 million people to Greater Tel Aviv's 3.5 million; but the Tsuu T'ina Nation has only 2258 people to the City of Calgary's 1.2 million.⁹⁰

⁸⁸ See <http://www.elections.org.nz/voting-system/maori-representation>.

⁸⁹ Constitution of the Republic of South Africa Act, No. 200 of 1993.

⁹⁰ See <http://census2011.adrianfrith.com/place/798> (Johannesburg and Soweto); <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html> (Gaza); http://www1.cbs.gov.il/reader/shnaton/templ_shnaton_e.html?num_tab=st02_25&CYear=2013 (Tel Aviv); http://pse5-esd5.aadnc-aadnc.gc.ca/fnp/Main/Search/FNRegPopulation.aspx?BAND_NUMBER=432&lang=eng (Tsuut'ina); <http://www.calgary.ca/CA/city-clerks/Pages/Election-and-information-services/Civic-Census/2014-Results.aspx> (Calgary). Although the small size of Tsuu'tina's population distorts the comparison, indigenous peoples clearly

IS THERE APARTHEID IN ISRAEL-PALESTINE?

As noted above, retired Justice Goldstone of the Constitutional Court of South Africa has rejected the analogy between the situation in Israel-Palestine and South African apartheid: 'The charge that Israel is an apartheid state is a false and malicious one that precludes, rather than promotes, peace and harmony.'⁹¹ He makes two main arguments: (1) South African apartheid was intended to be permanent, whereas Israel's occupation (or external control) of Gaza and the West Bank (including East Jerusalem) is intended to be temporary; and (2) some Palestinians (24% of those living in Israel-Palestine)⁹² are citizens of Israel with the right to vote in elections for the Knesset.

Are his arguments convincing? With regard to his first argument, South African apartheid began with the election of the National Party on 26 May 1948 and ended with the first democratic (all-race) elections of 27 April 1994. The period in which South Africa defied the post-1945 trend towards ending racial discrimination (including colonial rule by white Europeans from Europe, or rule by a minority of white settlers outside Europe) lasted just under 46 years. Can Israel's occupation be described as 'temporary', given that it has lasted longer than South African apartheid (it turns 50 in June 2017), and that there is no end in sight? As for the exclusion from Israeli citizenship of the expelled Palestinians of 1948, it turns 69 in 2017.

represent small minorities in Canada. The aboriginal population of Alberta is 6.2% of the total, and of Canada is 4.3% of the total. See <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/2011001/tbl/tbl02-eng.cfm>.

⁹¹ Goldstone, n 11 above.

⁹² By the end of 2015, it was projected that 1.47 Palestinians (24% of 6.22 million) would be living in 1949-67 Israel and 4.75 million in Gaza and the West Bank, including East Jerusalem. See <http://www.pcbs.gov.ps/site/512/default.aspx?tabID=512&lang=en&ItemID=1566&mid=3171&wversion=Staging>.

With regard to Justice Goldstone's second argument, it is true that a minority (24%)⁹³ of the Palestinians living in 1949-67 Israel, Gaza, or the West Bank (including East Jerusalem) under Israeli control are citizens of the State of Israel with the right to vote. However, from 1948 until 1966, they lived under military rule, with restrictions on their freedom of movement similar to those in the West Bank today.⁹⁴ Since then, they have remained second-class citizens in important ways. According to Adalah, the Legal Center for Arab Minority Rights in Israel, 'more than 50 Israeli laws ... directly or indirectly discriminate against Palestinian citizens of Israel in all areas of life, including their rights to political participation, access to land, education, state budget resources, and criminal procedures'.⁹⁵ A well-known example is the administrative practice of not requiring most Palestinian-Israelis to perform military service, but permitting them to volunteer.⁹⁶ It is hard to imagine post-1948 conscription to the United States Army not applying to African-Americans.⁹⁷ Equal citizenship means equal duties as well as equal rights. Apart from the stigmatising effect of the practice (most Palestinian-Israelis cannot be trusted to enforce the occupation against their fellow Palestinians?), it can lead to indirect racial discrimination, when employment, education and housing benefits are linked to prior military service.⁹⁸

⁹³ Ibid.

⁹⁴ See Ilan Pappé, *The Forgotten Palestinians* (Yale University Press, 2011).

⁹⁵ See <http://www.adalah.org/en/content/view/7771>.

⁹⁶ See <http://www.mfa.gov.il/mfa/aboutisrael/people/pages/society-%20minority%20communities.aspx> (emphasis added): 'Since ... [1948], Arab citizens have been exempted from compulsory service in the Israel Defense Forces (IDF) out of consideration for their ... affiliations with the Arab world (which has subjected Israel to frequent attacks), as well as *concern over possible dual loyalties*. ... Since 1957, at the request of their community leaders, IDF service has been mandatory for Druze and Circassian men ...'

⁹⁷ See Executive Order 9981 (26 July 1948), <http://www.trumanlibrary.org/9981a.htm> ('equality of treatment ... for all persons in the armed services without regard to race').

⁹⁸ See <http://www.adalah.org/en/content/view/7889> (19 Sept. 2010); Glaser, n 114 below, 408.

Palestinian-Israelis are a category with no equivalent in South African apartheid, which for most of its duration sought to exclude 100% of black South Africans from the right to vote.⁹⁹ For Israel, Palestinian citizen-voters have become a convenient 'democratic figleaf'. But granting the right to vote to a minority of Palestinians does not excuse a refusal to grant that right to all Palestinians living under Israeli control. South Africa would have remained an apartheid state even if it had not removed black and coloured voters from the common electoral roll.¹⁰⁰ The same was true when South Africa established a 'tricameral Parliament' (with white, coloured and Asian chambers) in 1983, because it excluded the black majority.¹⁰¹

Although the fact that a minority of Palestinians have the right to vote does not preclude finding apartheid in Israel-Palestine, Justice Goldstone's shining the spotlight on Palestinian-Israelis caused me to ask which Palestinians do not have the right to vote and why. The Palestinians excluded from Israeli citizenship and the right to vote are: (a) the 711,000 who were expelled in 1948¹⁰² and their descendants living in Lebanon, Syria, Jordan, the UK, Canada, the USA, Australia and other places outside Israel-Palestine, because they are not racially or ethnically Jewish; and (b) since June 1967, most Palestinian residents of Gaza and the West Bank (including East Jerusalem), because they are not racially or ethnically Jewish, unlike most residents of Israel's illegal settlements in the West Bank (including East Jerusalem).

⁹⁹ The Separate Representation of Voters Act, 1951 distinguished between 'white persons' or 'Europeans', 'non-Europeans' (Asian and coloured or mixed-race persons), and 'natives' (black persons).

¹⁰⁰ See Ian Loveland, *By Due Process of Law: Racial Discrimination and the Right to Vote in South Africa 1855-1960* (Hart Publishing, 1999), 197-202, 260-262.

¹⁰¹ See Republic of South Africa Constitution Act, No. 110 of 1983.

¹⁰² United Nations Conciliation Commission for Palestine (11 December 1949-23 October 1950 report), [15], <http://domino.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/93037e3b939746de8525610200567883>.

IF THERE IS APARTHEID IN ISRAEL-PALESTINE, WHEN DID IT BEGIN?

Some observers suggest that apartheid will not begin until the Palestinian population of Israel-Palestine is greater than the Jewish population, which the Palestinian Central Bureau of Statistics expects to occur by 2020 (7.13 million Palestinians to 6.96 million Jewish-Israelis).¹⁰³ But, as Henry Siegman has observed, apartheid does not exist only when a racial minority is denying citizenship and the right to vote to all or most of a racial majority, as in South Africa. A racial majority can also deny these rights to a racial minority that is considered too large:

the relative size of the populations is not the decisive factor ... [T]he turning point comes *when a state denies national self-determination to a part of its population ... to which it has also denied the rights of citizenship*. When a state's denial of the individual and national rights of a large part of its population becomes permanent, *it ceases to be a democracy*. When the reason ... is that population's ethnic and religious identity, the state is practicing a form of apartheid, or racism, not much different from ... South Africa from 1948 to 1994.¹⁰⁴

A two-state solution has been seen as the key to salvaging Israel's democratic character.¹⁰⁵ The collapse of negotiations in April 2014 suggests that the fears expressed by two former Israeli Prime Ministers have now been realised. In 2007, Ehud Olmert said: 'If the day comes when the two-state solution collapses, and we face a South African-style struggle for equal voting rights (also for the Palestinians in the territories), then, as soon as that happens, the State of Israel is finished.'¹⁰⁶ In 2010, Ehud Barak said: 'As long as in this territory west of the Jordan River there is only one political entity called Israel it is going to

¹⁰³See

<http://www.pcbs.gov.ps/site/512/default.aspx?tabID=512&lang=en&ItemID=1566&mid=3171&wversion=Staging>.

¹⁰⁴ 'Imposing Middle East Peace', *The Nation* (25 January 2010) (emphasis added).

¹⁰⁵ See 'Israel risks becoming apartheid state if peace talks fail, says John Kerry', *The Guardian* (29 April 2014).

¹⁰⁶ See <http://www.haaretz.com/news/olmert-to-haaretz-two-state-solution-or-israel-is-done-for-1.234201>.

be either non-Jewish, or non-democratic. If this bloc of millions of Palestinians cannot vote, that will be an apartheid state.¹⁰⁷

If apartheid in Israel-Palestine began before the collapse of the two-state solution in 2014, other possible dates include 2002 (construction of the West Bank wall starts), 1982 (withdrawal from the Sinai Peninsula but not Gaza, signalling an intention to retain the OPT), or 1967 (the occupation begins). But I would argue that apartheid began in Israel on 14 May 1948, when Israel declared its independence and appealed 'to the Arab inhabitants of the State of Israel to ... participate in the upbuilding of the State on the basis of full and equal citizenship',¹⁰⁸ while using violence and other methods sufficient to encourage around 80% of them to flee (and be denied the right to return).¹⁰⁹ Indeed, the 'founding injustice' of the State of Israel is its continuing refusal to allow Palestinians who fled the fighting in 1948-49 (and their descendants) to return to 1949-67 Israel, claim their land (or compensation for it), take up Israeli citizenship, and live, work and vote there. This refusal, in defiance of UN General Assembly Resolution 194 of 11 December 1948,¹¹⁰ is a continuing act of racial

¹⁰⁷ See <http://www.theguardian.com/world/2010/feb/03/barak-apartheid-palestine-peace>.

¹⁰⁸ <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>.

¹⁰⁹ See Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oneworld, 2006); Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (CUP, 2004), 591-92: 'If Jewish attack directly and indirectly triggered most of the exodus up to June 1948, a small but significant proportion was due to direct expulsion orders and to psychological warfare ploys ("whispering propaganda") designed to intimidate people into flight. Several dozen villages were ordered or "advised" by the Haganah to evacuate during April-June. '

¹¹⁰ n 6 above. This Resolution, adopted within months of the start of the problem, distinguishes the 1948 expulsion of the Palestinians from other expulsions, along with the fact that it involved expelling most of the majority of the population of the territory that became Israel, to states where they were often an unwelcome minority of non-citizens. All expulsions on racial grounds are wrong, but most send an unwelcome minority to another state where they are in the majority and are quickly granted citizenship (Greece and Turkey in 1923,

discrimination as to who was allowed to become a citizen of the new State of Israel. It is in effect a 'human rights debt' that 'accrues interest' as the number of descendants of the Palestinians expelled in 1948 increases.¹¹¹ Moral and legal debts of this kind can be renegotiated and restructured, but should not be ignored. Whether return is re-directed through negotiations to a new State of Palestine (as part of a two-state solution),¹¹² or is to the part of Palestine that became Israel (as part of a one-state solution), it is possible that a relatively small percentage of expelled Palestinians would want to exercise their right of return, as opposed to receiving an acknowledgment of the wrong done to them, an apology, and compensation.

Historians disagree as to whether the expulsion of the Palestinians was planned long before 1948, or was a spontaneous reaction to the events of 1948, and as to how many incidents of violence frightened them into fleeing. But I would argue that the existence of a plan and the number of incidents are irrelevant, because the Palestinians' precise reasons for fleeing are irrelevant. What is clear is that, by seeking temporary refuge outside an armed conflict zone (before or after the conflict began), they did not intend to abandon their homes and their right to live in them. What prevented their return was a deliberate decision by the new State of Israel not to allow their return, in effect to 'close the door and change the lock',

Germans in Eastern Europe after 1945, Hindus and Muslims in India and Pakistan in 1947, Jewish citizens of Muslim-majority countries after 1948, the former Yugoslavia in the 1990s). See Ran Greenstein, <http://mrzine.monthlyreview.org/2010/greenstein220810.html> (22 August 2010): 'The removal of the majority of the indigenous population by settler immigrants is unprecedented.'

¹¹¹ See https://www.unrwa.org/sites/default/files/content/resources/unrwa_in_figures_2016.pdf (5.27 million registered Palestinian refugees; 3.16 million in Jordan, Lebanon and Syria; the rest in Gaza or the West Bank).

¹¹² See 'Concept Paper: The Palestinian Refugee Problem and the Right of Return', (1999) 6 *Middle East Policy* 167, <http://onlinelibrary.wiley.com/doi/10.1111/j.1475-4967.1999.tb00334.x/pdf>.

while they were temporarily absent. After an exhaustive study of the historical evidence, Benny Morris concludes (emphasis added):

[T]here was nothing ambiguous about Israeli policy, from summer 1948, toward those who had ... become refugees ...: ... [T]he policy was to prevent a refugee return at all costs. And if, somehow, refugees succeeded in infiltrating back, they were routinely rounded up and expelled (though tens of thousands ... succeeded in ... becoming Israeli citizens). ... *[I]t may fairly be said that all 700,000 or so who ended up as refugees were compulsorily displaced or 'expelled'.*¹¹³

Israel's 'founding statistic'¹¹⁴ demonstrates the benefit of practising racial discrimination by refusing to permit return, the cost of practising equality by permitting return, and the consequent incentive to exclude most Palestinians from Israel in 1948:

Israel's population on 6 November 1948	Arabs	Jews	Total
benefit of denying return = a Jewish-majority state	156,000 (18%)	717,000 (82%)	873,000
cost of permitting return (711,000 expelled Arabs ¹¹⁵ added to 156,000 non-expelled Arabs) = a Jewish-minority state	867,000 (55%)	717,000 (45%)	1,584,000

In a hypothetical State of Israel with an Arab majority of 55% in November 1948, the legislature might have voted to change the name of the state back to Palestine, and to propose to Egypt and Jordan that the new state merge with Gaza and the West Bank (including East Jerusalem).

Did apartheid begin in both South Africa and Israel-Palestine, at the same time (May 1948) and for the same reason (the post-1945 trend against racial discrimination and white

¹¹³ Morris, n 109 above, 589.

¹¹⁴ Statistical Abstract of Israel 2016, Table 2.1, http://www.cbs.gov.il/reader/shnaton/templ_shnaton_e.html?num_tab=st02_01&CYear=2016.

¹¹⁵ n 102 above.

minority rule)?¹¹⁶ In May 1948, non-racial democracy was not possible in South Africa or what was to become 1949-67 Israel, because the majority of voters would have been black or Arab-Palestinian. As a result, two different versions of apartheid were implemented. Needing black labour, South Africa chose obviously racial democracy and made it clear that black South Africans would never be given the right to vote.¹¹⁷ This version might be called 'self-declared (and unapologetic) apartheid'. Wishing to appear to be a non-racial democracy, Israel chose expulsion (denying the right of Palestinians who fled temporarily to return to their homes),¹¹⁸ thereby using illegitimate means to turn a Jewish-minority territory (what was to become 1949-67 Israel) into a Jewish-majority territory. This version might be called 'disguised (and vigorously denied) apartheid'. Writing in 2003, Daryl Glaser reached the same conclusion:

Israeli and [South African] democracy emerged as alternative solutions to a common dilemma: how to run a settler state democratically in lands where non-settlers constitute a majority. Both democratic systems were made possible by the exclusion from the franchise of potential majorities of the ethnic other. In South Africa, ... 'democratic' white rule depended on the open disenfranchisement of blacks. In Israel it was made possible by the expulsion/flight and subsequent physical exclusion of Arabs from ... pre-1967 Israel. Through a combination of territorial partition and what is today called 'ethnic cleansing', Israel engineered the Jewish majority that is the precondition of its democratic life. ... *It is difficult to see how achieving a majority by expulsion and flight is morally superior to obtaining one by the simple disenfranchisement of people in situ.*¹¹⁹

¹¹⁶ *Shelley v Kraemer*, 334 U.S. 1 (3 May 1948) (courts must not enforce private agreements seeking to maintain racial segregation in housing) is an example of this trend. See also n 97 above.

¹¹⁷ On the close but secret ties between Israel and South Africa from 1948 to 1994, see Sasha Polakow-Suransky, *The Unspoken Alliance* (Pantheon Books, 2010).

¹¹⁸ Nur Masalha, *Expulsion of the Palestinians* (Institute for Palestine Studies, 1992).

¹¹⁹ Daryl Glaser, 'Zionism and Apartheid: a moral comparison', (2003) 26 *Ethnic and Racial Studies* 403, 411. See also Oren Ben-Dor, <http://www.counterpunch.org/2007/06/23/israeli-apartheid-is-the-core-of-the-crisis> (23 June 2007): 'The ... ethnic cleansing, in 1948, of 750,000 indigenous people was apartheid practice par excellence. It is apartheid which prevents the expelled and their descendants from returning ...'

By refusing to accept the ethnic composition of the permanent residents of the territory it carved out of Palestine, Israel tainted its foundation with racial discrimination. The UN General Assembly had approved a Jewish State with a large, mainly Arab, minority of around 45%.¹²⁰ In a speech on 3 December 1947, David Ben-Gurion said: 'This composition is not a solid basis for a Jewish state. ... Only a state with at least 80% Jews is a viable and stable state.'¹²¹ The only way to found Israel with a Jewish majority of 80%, while avoiding racial discrimination, was to limit the new state to an area smaller than that proposed by the UNGA, in which there was already a Jewish majority of 80%, or to achieve the 80% target within the UN-approved borders, but only through rapid immigration of Holocaust survivors from Europe. The war that began on 15 May 1948, after the armies of neighbouring Arab countries invaded what had been British Mandate Palestine (in their view, to defend its Arab population),¹²² led to the expansion of a victorious Israel beyond its UN-approved borders. Although this expansion could be considered defensive in nature and a reaction to the invasion,¹²³ it made the expulsion of a large number of Palestinians inevitable to achieve a Jewish majority of 80% or so within the expanded state, as the table above demonstrates.

¹²⁰ See United Nations Special Committee on Palestine, Report to the General Assembly (3 Sept. 1947), <http://unispal.un.org/UNISPAL.NSF/0/07175DE9FA2DE563852568D3006E10F3> (text accompanying footnote 166). The estimated population of 905,000 (based on 1946 figures) included 407,000 'Arabs and others'. Adding 90,000 Bedouins would make 497,000 out of 995,000 or almost 50%.

¹²¹ Pappé, n 109 above, 48.

¹²² Cf. Benvenisti, n 16 above, 188-191 (India's 1971 humanitarian intervention in East Pakistan/Bangladesh).

¹²³ Cf. Uri Avnery, <http://www.eurasiareview.com/22052015-who-will-save-israel-oped> (22 May 2015): 'In the founding declaration of the state, ... any mention of borders was deliberately omitted. Ben Gurion was not ready to accept the [UN's] borders ..., because they provided only for a tiny Jewish state. Ben-Gurion foresaw that the Arabs would start a war, and he was determined to use this for enlarging the territory of the state.'

Can expulsion (including denial of return) be described as a form of apartheid? If apartheid is racial discrimination in access to citizenship (including the rights to live and work in a particular territory) and the right to vote, then the umbrella term 'apartheid' could cover three methods of exclusion from citizenship: 'in-country apartheid' as in South Africa (residence without equal citizenship and the right to vote); 'exile apartheid' or ethnic cleansing as in the former Yugoslavia (no right of residence); and the most extreme method possible, 'extermination apartheid' or genocide as in Nazi Germany (no right to live, anywhere). In Israel-Palestine, there has been a combination of 'exile apartheid' and two kinds of 'in-country apartheid':¹²⁴

(1) denying Israeli citizenship to expelled Palestinians living in exile (a continuing act of racial discrimination since their expulsion in 1948);¹²⁵

(2) not offering the right to apply for Israeli citizenship to all Palestinians living in Gaza and the West Bank, including East Jerusalem (a continuing act of racial discrimination at least from the moment that Israel decided to build settlements and occupy or control these territories indefinitely); and

(3) granting second-class citizenship, de jure and de facto, to Palestinians living in 1949-67 Israel.¹²⁶

If (3) were Israel's only racial discrimination against the Palestinians, I would argue that it is not sufficient on its own to make it analogous to South African apartheid.¹²⁷ But (3) is

¹²⁴ Although many Palestinians have been killed by agents of the State of Israel since 1948, the percentage of the Palestinian population lost in this way is not sufficient to constitute 'extermination apartheid'.

¹²⁵ See Engler, n 10 above, 6: 'Refusing to allow [expelled Palestinians] to return is an ongoing form of apartheid.'

¹²⁶ With regard to (2) and (3), see Dugard, n 10 above, 872, n 27: 'there certainly are grounds for further inquiry into the question of apartheid as a single regime of domination over the Palestinian people as a whole, including the Palestinian population inside Israel'.

inextricably linked to (1). The Palestinian citizens of Israel only have the right to vote because denial of the right of return was used to limit their numbers.¹²⁸ Their second-class citizenship is therefore one of the three components of Israel's system of apartheid,¹²⁹ but is less serious than the other two, because second-class citizenship is better than residence as a stateless non-citizen, or exile.

IS ISRAEL'S RACIAL DISCRIMINATION AGAINST THE PALESTINIANS JUSTIFIED AS SELF-DEFENCE?

In international human rights law, a difference in treatment based on racial or ethnic origin is not discrimination if it has an objective and reasonable justification.¹³⁰ A common Jewish-Israeli response to claims of racial discrimination is therefore that most of the ways in which Palestinians are treated differently are justified as necessary for 'national security', ie, to protect Jewish-Israelis from violent attacks by Palestinians.¹³¹ The returning refugees would

¹²⁷ Glaser, n 119 above, 413-14, compares them with Northern Ireland's Catholic minority, who are UK citizens.

¹²⁸ See Morris, n 109, at 593: '[I]t was understood by all concerned that, ... politically, the fewer Arabs remaining in the Jewish State, the better.'

¹²⁹ See <http://www.badil.org/en/component/k2/item/72-applicability-of-the-crime-of-apartheid-to-israel.html?tmpl=component&print=1> ('Palestinian citizens of Israel, refugees, and those in the OPT are victims, albeit in different ways, of Israel's regime of apartheid').

¹³⁰ See, eg, *X v Colombia* (Communication No. 1361/2005) (14 May 2007), [7.2]; *X & Others v Austria* (ECtHR, 19 February 2013), [98].

¹³¹ See Zilbershats, n 52 above, 923, 928: 'Israel's actions are motivated by sincere considerations of security and not the wish to ... oppress other racial groups'; 'Israel is compelled to safeguard its citizens from acts of terrorism committed by the Palestinians'; Israel's 3 October 1991 derogation under Article 4 ICCPR from Article 9 ICCPR on arbitrary detention: 'Since [1948], the State of Israel has been the victim of continuous ... attacks on its very existence ... [T]he State of Emergency ... proclaimed in May 1948 has remained in force ever since ... [and] constitutes a public emergency ... [under] article 4(1) ... [making] it necessary ... to take measures ..., including ... powers of arrest and detention.'

have been hostile to the new State of Israel, so had to be expelled. The attacks from Gaza, since Israel's internal control was converted to external control in 2005, demonstrate that Israel cannot withdraw from the West Bank, from which rockets could be fired that would shut down Tel Aviv Airport.¹³² Most Palestinian-Israelis cannot be trusted to serve in the armed forces, so should not be compelled to do so.

The 'national security' defence faces two objections. First, international human rights law against racial discrimination generally requires that individuals be treated as individuals, and that no presumption about their character or future conduct may be made on the basis of their membership of a racial or ethnic group. Jewish-Israelis would rightly insist on strict observance of this principle for themselves and Jewish minorities around the world. The same principle must also protect Palestinians. Differences in treatment (compared with Jewish-Israeli individuals) must be made only with respect to Palestinian individuals for whom there is evidence establishing a likelihood of violent conduct in the future. Collective exclusion of Palestinians from particular opportunities can almost never be justified because it is not necessary: the alternative of individual assessment almost always exists.¹³³ It is implicit in the UNGA-recognised right of return for 'refugees wishing to return to their homes

¹³² Naftali Bennett, 'For Israel, Two-State Is No Solution', *New York Times* (5 November 2014).

¹³³ See *Korematsu v United States*, 323 U.S. 214 (1944), 235-242 (Murphy, J, dissenting: 'assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage'; 'this erroneous assumption of racial guilt'; 'to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that, under our system of law, individual guilt is the sole basis for deprivation of rights'; '[r]acial discrimination in any form ... has no justifiable part whatever in our democratic way of life. It is ... utterly revolting ...'). See also Masri, n 69 above, 330 n. 7 (of 130,000 Palestinian spouses from the West Bank and Gaza granted the right to reside with their Israeli-citizen spouses in Israel, only 54 had been 'involved' in a violent attack, of whom only 7 had been indicted and convicted).

and live at peace with their neighbours'.¹³⁴ Because of the existence of alternative means, the ICJ ruled in 2004 that 'Israel cannot rely on a right of self-defence or ... a state of necessity ... to preclude the wrongfulness of the construction of the [West Bank] wall'.¹³⁵

Second, national security cannot be a persuasive justification for racial discrimination, if it is the racial discrimination itself that causes the national security problem.¹³⁶ Palestinian violence against Jewish-Israeli civilians (like all intentional, reckless or negligent killing of civilians) is immoral and indefensible. But it is an ongoing reaction to Israel's racial discrimination against Palestinians since 1948.¹³⁷ There is no reason to believe that the violence would not end if Jewish-Israelis, very belatedly, decided to end their racial discrimination and treat Palestinians as equal human beings with an equal right to live in Israel-Palestine. Compared with Christian-Europeans, Palestinians and other Muslims or Arabs do not have an (imagined) pre-1918 historical or religious grievance against Jewish

¹³⁴ n 6 above.

¹³⁵ n 24 above, [140]-[142].

¹³⁶ See CERD Committee, [http://www.unhcr.org/refworld/publisher,CERD,,ISR,506189622,0.html](http://www.unhcr.org/refworld/publisher/CERD,,ISR,506189622,0.html) (3 April 2012): '3. The Committee recognizes the issues related to security ... in the region. [Israel] should, however, ensure that ... measures taken are proportionate, do not discriminate in purpose or in effect against Palestinian citizens of Israel, or Palestinians in the [OPT] ...' See also UN Committee on the Rights of the Child, <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-ISR-CO-2-4.pdf> (4 July 2013) (emphasis added): '7. The Committee takes into account the national security concerns of [Israel] ... [but] emphasizes that the illegal long-lasting occupation of Palestinian territory ..., the continued expansion of unlawful settlements and construction of the Wall ... *feed the cycle of humiliation and violence and jeopardize a peaceful and stable future* for all children of the region.'

¹³⁷ Political violence against white civilians in South Africa before 1994 was less common than in Israel-Palestine, but did occur. See, eg, '[20 May] 1983: Car bomb in [Pretoria,] South Africa kills 16 [and injures over 130]', http://news.bbc.co.uk/onthisday/hi/dates/stories/may/20/newsid_4326000/4326975.stm ('[t]he outlawed anti-apartheid group the African National Congress has been blamed for the attack').

people. Their grievance is the post-1918 UK-facilitated foundation of Israel in Palestine, against the will of the majority there, and the treatment of the Palestinians since then. Addressing that grievance should remove the motivation for violence. Insisting that the risk of future violence justifies a refusal to allow nearly 5 million Palestinians living in Gaza and the West Bank (including East Jerusalem) to become either citizens of a proper State of Palestine, or citizens of the State of Israel, makes Israel's control over their lives the world's longest-running and largest-scale 'hostage-taking'.¹³⁸ International law against racial discrimination does not permit one people to base its security on denying self-determination or equal citizenship to another people.

UNITED NATIONS AND EUROPEAN HUMAN RIGHTS LAW AGAINST RACIAL DISCRIMINATION

Do Palestinians affected by Israel's racial discrimination against them have any recourse under United Nations human rights law? Israel is a party to the ICCPR, but not to the Optional Protocol allowing individuals to take cases to the UN Human Rights Committee, and has not made the Article 41 declaration that would permit a complaint by another State Party against it. Israel is also a party to CERD, which it ratified on 3 January 1979, but has not declared under Article 14 that it recognises the competence of the CERD Committee to receive complaints from individuals. The ICJ ruled in 2004 that the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child all apply to the OPT, and would probably find that CERD also applies.¹³⁹

Although individual and inter-State ICCPR complaints and individual CERD complaints are not possible (an Article 11 CERD inter-State complaint, eg, *Palestine v*

¹³⁸ See Benvenisti, n 16 above, 245 ('illegal use of the occupied population as hostages').

¹³⁹ n 24 above, [110]-[111], [127].

Israel,¹⁴⁰ is possible),¹⁴¹ Israel is obliged to submit reports to the UN Human Rights Committee under Article 40 ICCPR, and to the CERD Committee under Article 9 CERD. In its 2012 Concluding Observations on Israel's reports, the CERD Committee wrote:

24. The Committee is extremely concerned at ... policies and practices which amount to de facto segregation, such as the implementation ... in the [OPT] of two entirely separate legal systems and sets of institutions for Jewish communities ... in illegal settlements ... and Palestinian populations ... The Committee is particularly appalled at the hermetic character of the separation of [the] two groups, who live on the same territory but do not enjoy either equal use of roads ... or equal access to ... water resources. Such separation is concretized by ... the Wall, roadblocks, ... and a permit regime that only impacts the Palestinian[s] ...

The Committee draws [Israel's] attention to its general recommendation 19 (1995) concerning ... racial segregation and apartheid, and urges [Israel] to take immediate measures to prohibit and eradicate any such policies or practices which severely and disproportionately affect the Palestinian population in the [OPT] and which violate ... article 3 of [CERD].¹⁴²

The United Nations has yet to establish an international court with compulsory jurisdiction, to which individual complaints may be submitted, and which is empowered to issue binding judgments. But such a court does exist for the 47 member states of the Council of Europe (CoE), including the 28 EU member states: the ECtHR. Israel enjoys a very close relationship with the EU,¹⁴³ especially with regard to trade¹⁴⁴ and funding for scientific

¹⁴⁰ The State of Palestine acceded to CERD on 2 April 2014. See <http://unispal.un.org/UNISPAL.NSF/0/262AC5B8C25B364585257CCF006C010D>.

¹⁴¹ See <http://www.ohchr.org/EN/HRBodies/TBPEtitions/Pages/HRTBPetitions.aspx>. See also Israel's declaration that it does not consider itself bound by Article 22 CERD, providing that disputes between States Parties 'with respect to the interpretation or application of [CERD]' may be 'referred to the [ICJ] for decision'.

¹⁴² <http://www.unhcr.org/refworld/publisher/CERD.ISR.506189622.0.html> (9 March 2012) (bold in original).

¹⁴³ Former EU foreign affairs representative Javier Solana said: 'There is no country outside the European continent that has this type of relationship that Israel has with the [EU]. Israel ... is member of the [EU] without being a member of the institution.' See <http://www.haaretz.com/news/solana-eu-has-closer-ties-to-israel-than-potential-member-croatia-1.5700> (21 Oct. 2009).

research,¹⁴⁵ and participates in all European sports championships¹⁴⁶ as well as the Eurovision Song Contest.¹⁴⁷ But Israel is *not* subject to the human rights obligations that every European country has accepted, including Russia and Turkey.¹⁴⁸ What if Israel were to become a member state of the CoE¹⁴⁹ and a party to the EConHR, Europe's 'never again' response to the Holocaust, perhaps as a condition of maintaining its relationship with the EU? What recourse would Palestinians have against racial discrimination under the case law of the ECtHR? This 'thought experiment' has to assume that the CoE would make a geographic exception for Israel, on historical, cultural, economic and political grounds, as in the cases of Armenia and Cyprus, which have Christian majorities but are entirely outside geographic Europe (like Israel, but unlike member states Azerbaijan, Georgia, Russia and Turkey, and non-member state Kazakhstan).

The ECtHR has ruled that 'the responsibility of a Contracting Party may also arise when as a consequence of military action ... it exercises *effective control* of an area outside its

¹⁴⁴ See the EU-Israel Association Agreement, [2000] OJ L 147/3 (21 June 2000). Article 2 provides that 'respect for human rights and democratic principles ... constitutes an essential element of this Agreement'.

¹⁴⁵ See 'EU, Israel sign Horizon 2020 association agreement' (8 June 2014), http://europa.eu/rapid/press-release_IP-14-633_en.htm: 'Israel will have the same access to the programme as EU Member States and other Associated Countries.'

¹⁴⁶ Israel is a member of UEFA (football), European Athletics, LEN (aquatics), UEG (gymnastics), etc.

¹⁴⁷ The Israel Broadcasting Authority is a member of the European Broadcasting Union.

¹⁴⁸ Only non-CoE-members Belarus and Kosovo have not done so.

¹⁴⁹ See Robbie Sabel, 'Israel Should Become a Member of the Council of Europe', <http://jcpa.org/article/israel-should-become-a-member-of-the-council-of-europe> (5 September 2007). Israel is already an observer state in the Parliamentary Assembly of the Council of Europe, a party to eleven Council of Europe treaties open to non-member states (unlike the EConHR), and a full member of the European Commission for Democracy through Law (Venice Commission). See <http://www.coe.int/en/web/portal/israel>.

national territory'.¹⁵⁰ 'In determining whether effective control exists, the [ECtHR] will primarily have reference to the strength of the State's military presence in the area.'¹⁵¹ The 'effective control' principle could allow Palestinians to lodge thousands of applications with the ECtHR against Israel (after exhausting any effective domestic remedies that might exist). The applications could claim violations of EConHR rights committed by Israel's armed forces in Gaza¹⁵² and the West Bank (including East Jerusalem), which are under Israel's 'effective control', even though they are not part of Israel under international law. The claimed violations could include the negligent killing of innocent civilians, especially from the air in Gaza. The ECtHR's reasoning, with regard to a counter-terrorism operation in Russia's Chechen Republic, could easily apply to the deaths of civilians in Gaza during Israel's operations against Hamas in 2008-09, 2012 and 2014:

247. ... [T]he Court takes into account [Russia's] arguments ... that the town had been occupied by a considerable number of well-equipped extremists, ... who were ... conducting large-scale military actions ...

248. ... [T]he Court may be prepared to accept that the Russian authorities had no choice other than to carry out aerial strikes ... It is, however, not convinced, ... that the necessary degree of care was exercised in preparing the operations ... in such a way as to avoid or minimise ... the risk of a loss of life ... for civilians ...

253. ... [U]sing [aerial bombs] in a populated area is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. ...

¹⁵⁰ *Loizidou v Turkey* (23 March 1995), [62], [89] (Northern Cyprus) (emphasis added).

¹⁵¹ *Al-Skeini v UK* (7 July 2011), [149]-[150] (south-east Iraq).

¹⁵² Israel's control of all movement in and out of Gaza by air or sea, and all land border crossings except the one with Egypt, might distinguish Gaza from *Banković v Belgium* (12 December 2001) (NATO bombing of Serbia). See, eg, CERD Committee, n 136 above, [10]: 'the territories under [Israel's] effective control, which not only include Israel proper but also ... the Gaza Strip ...'; Benvenisti, n 16 above, 51 ('sufficient that the occupying force can, within a reasonable time, send ... troops to ... the occupied area').

257. ... [T]he bombing with indiscriminate weapons of residential quarters ... inhabited by civilians was manifestly disproportionate ...¹⁵³

Similarly, Palestinians could challenge Israel's use of indefinite 'administrative detention' without trial,¹⁵⁴ which the ECtHR has found to violate Article 5 ECHR, even if Article 15 has been used to derogate from Article 5 because of a 'war or other public emergency threatening the life of the nation', such as the threat of terrorist attacks. Detention 'on reasonable suspicion of having committed an offence' generally violates Articles 5(1)(c) and 5(3), despite an Article 15 derogation, if it lasts for two weeks or more without the detained person being brought before a judge (to determine whether or not the evidence supporting the suspicion is sufficient to justify a trial).¹⁵⁵

With regard to the right to life and freedom from arbitrary detention, it is not necessary to argue racial discrimination, even though it is likely that Israel would take greater care with regard to the lives of Jewish-Israelis,¹⁵⁶ and would rarely subject them to 'administrative detention'.¹⁵⁷ But racial discrimination could be argued with regard to freedom of movement, citizenship and the right to vote, if Israel were to ratify Protocols Nos. 1 (elections) and 4 (freedom of movement) or 12 (general prohibition of discrimination), or if the ECtHR were to build on its recent generous approach to access to Article 14 through

¹⁵³ *Kerimova v Russia* (3 May 2011). See also *Isayeva, Yusupova & Bazayeva v Russia* (24 February 2005), [199] (firing of 12 air force missiles near a civilian convoy 'was [not] planned and executed with the requisite care for the lives of the civilian population').

¹⁵⁴ See http://www.btselem.org/topic/administrative_detention.

¹⁵⁵ See *Aksoy v Turkey* (18 December 1996); *A. & Others v UK* (19 February 2009); *Al-Jedda v UK* (7 July 2011), [109]; n 131 above (derogation).

¹⁵⁶ See Susan Sontag's 'Foreword' to Peretz Kidron (ed), *Refusenik! Israel's Soldiers of Conscience* (Zed Books, 2004), xii: 'It will always be unpopular ... [and] unpatriotic - to say that the lives of the members of the other tribe are as valuable as one's own.'

¹⁵⁷ See <http://www.nytimes.com/2015/08/05/world/middleeast/israel-palestinians-meir-ettinger.html>.

Article 8.¹⁵⁸ In 2005 in *Timishev v Russia*,¹⁵⁹ a Russian citizen of Chechen ethnic origin was stopped by officers at an internal border checkpoint and told that their instructions were 'not to admit persons of Chechen ethnic origin'. He was forced to make a 300-km detour. A unanimous Chamber observed that:

Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination ... [which] is a particularly invidious kind of discrimination and ... requires ... special vigilance ... [The authorities] must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment ...¹⁶⁰

In finding racial discrimination violating Article 14 combined with Protocol No. 4, Article 2, the ECtHR ruled that less favourable treatment on racial or ethnic grounds (that is not positive action)¹⁶¹ can almost never be justified: 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.¹⁶² In 2009, the Grand Chamber applied *Timishev* in *Sejdić & Finci v Bosnia-Herzegovina*. The case concerned Bosnian citizens, one of Roma and one of Jewish origin, ineligible to stand for election to the House of Peoples or the Presidency, because they did not wish to declare affiliation with one of the 'constituent peoples': Bosniacs, Croats and Serbs (who are mainly Muslim, Catholic Christian, and Orthodox

¹⁵⁸*I.B. v Greece* (3 October 2013) (employee dismissed for being HIV-positive could invoke Article 14 combined with Article 8; no need for Protocol No. 12); *Emel Boyraz v Turkey* (2 December 2014) (same where employee dismissed for being a woman).

¹⁵⁹ (13 December 2005), [10]-[13].

¹⁶⁰ [56].

¹⁶¹ *Sejdić & Finci v Bosnia-Herzegovina* (22 December 2009), [44]: 'Article 14 does not prohibit ... treating groups differently in order to correct 'factual inequalities' between them.'

¹⁶² *Timishev*, n 159 above, [58].

Christian).¹⁶³ The ECtHR held that their exclusion on ethnic grounds was discrimination violating Article 14 (with Protocol No. 1, Article 3) and Protocol No. 12, Article 1.¹⁶⁴

Of particular interest to expelled Palestinians would be *Kurić & Others v Slovenia*, in which the ECtHR found violations of Article 8 (respect for private or family life) and Article 14 combined with Article 8 (discrimination affecting private or family life). *Kurić* concerned 18,305 'erased persons', who lost their status as permanent residents of Slovenia after its independence, and in some cases became stateless, because of their national origins (in other republics of the former Yugoslavia).¹⁶⁵ The Grand Chamber ruled unanimously that, 'although the [1992] 'erasure' had been carried out before 28 June 1994, when the Convention entered into force in respect of Slovenia, the applicants had a private or family life ... in Slovenia ... at the material time, and that the 'erasure' interfered with their Article 8 rights *and continues to do so* [as of 2012].'¹⁶⁶ There was no justification for the 'erasure', nor for the difference in treatment based on national origin, compared with 'real aliens', eg, citizens of France, Italy, etc.¹⁶⁷

If Israel were a party to the EConHR, the reasoning in *Kurić* could be applied *mutatis mutandis* to the 'erased Palestinians' of 1948, who would (as an indigenous population generally not holding the citizenship of another state) compare their treatment with that of Jewish candidates for Israeli citizenship, rather than with that of 'real aliens'. As the ECtHR did in *Kurić*,¹⁶⁸ the 'erased Palestinians' could cite, as relevant to the interpretation of the

¹⁶³ *Sejdić*, n 150, [7], [9].

¹⁶⁴ *ibid*, [45], [50], [56].

¹⁶⁵ (12 March 2014), [32]-[33].

¹⁶⁶ *ibid* [339] (emphasis added).

¹⁶⁷ *ibid*, [358]-[359], [394].

¹⁶⁸ *ibid*, [219].

EConHR, the European Convention on the Avoidance of Statelessness in relation to State Succession.¹⁶⁹ Article 5 of this Convention provides that:

(1) A successor State shall grant its nationality to persons who, at the time of the State succession, had the nationality of the predecessor State, and who ... would become stateless ... if at that time: (a) they were habitually resident in the territory which has become territory of the successor State,¹⁷⁰ or (b) they ... had an appropriate connection with the successor State. (2) ... [which] includes ...: (b) birth on the territory which has become territory of the successor State ...

Article 4 prohibits discrimination 'on any ground such as ... race, ... religion, national ... origin, ...'¹⁷¹ Similarly, a Contracting Party to the UN Convention on the Reduction of Statelessness,¹⁷² which Israel signed on 30 August 1961 but has not ratified, 'shall not deprive a person of its nationality if such deprivation would render him stateless' (Article 8(1)), 'may not deprive any ... group of persons of their nationality on racial, ethnic, religious or political grounds' (Article 9), and 'shall confer its nationality on such persons as would otherwise become stateless as a result of the ... acquisition [of territory]' (Article 10(2)).

Kurić builds on the concept of a 'continuing violation of the Convention', which the ECtHR invoked in *Loizidou v Turkey*.¹⁷³ The continuing denial of access to a Greek-Cypriot woman's land in Northern Cyprus, after Turkey accepted the jurisdiction of the ECtHR in 1990, was a violation of her EConHR Protocol No. 1, Article 1 right to protection of her property in 1996.¹⁷⁴ *Loizidou* is also of interest to expelled Palestinians denied access to their land in Israel, although a distinguishing feature might be the ECtHR's finding invalid a

¹⁶⁹ CETS No. 200 (19 May 2006, in force on 1 May 2009).

¹⁷⁰ See Victor Kattan, 'The Nationality of Denationalized Palestinians', (2005) 74 *Nordic J. of Int'l Law* 67.

¹⁷¹ See also European Convention on Nationality, CETS No. 166 (6 November 1997, in force on 1 March 2000), Article 5(1): 'The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of ... religion, race, ... or national or ethnic origin.'

¹⁷² UNTS Vol. 989, No. 14458 (30 August 1961, in force on 13 December 1975).

¹⁷³ (18 December 1996), [41].

¹⁷⁴ *ibid* [64].

purported 1985 expropriation of Ms. Loizidou's land by the 'Turkish Republic of Northern Cyprus' which, unlike Israel, is not regarded as a State under international law.¹⁷⁵

There was no violation of Article 8 (respect for home), because Ms. Loizidou did not have her home on the land in question.¹⁷⁶ In *Cyprus v Turkey*,¹⁷⁷ however, the Grand Chamber did find violations of both Article 8 (respect for home) and Protocol No. 1, Article 1. The Cypriot Government had complained on behalf of over 211,000 Greek-Cypriots and their children, who were prevented by the Turkish army from returning to their homes in Northern Cyprus, and from having access to their property there (which Turkey treated as 'abandoned').¹⁷⁸ The Turkish Government's position was that '[u]ntil an overall solution to the Cyprus question, acceptable to both sides, was found, and having regard to security considerations, there could be no question of a right of the displaced persons to return'.¹⁷⁹ The ECtHR observed that: 'the inter-communal talks cannot be invoked in order to legitimate a violation of the Convention; ... [and that] the violation ... has endured as a matter of policy since 1974 and must be considered continuing'.¹⁸⁰ The ECtHR therefore found 'a continuing violation of Article 8 ... by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus'.¹⁸¹

In 2015, in *Chiragov & Others v Armenia*, the ECtHR applied its Northern Cyprus reasoning to Nagorno-Karabakh and other Azerbaijani territory occupied by Armenians:

¹⁷⁵ *ibid* [44].

¹⁷⁶ *ibid* [66].

¹⁷⁷ (10 May 2001).

¹⁷⁸ *ibid* [28], [32]. Cf. Israel's Absentees' Property Law of 1950, <http://unispal.un.org/UNISPAL.NSF/0/E0B719E95E3B494885256F9A005AB90A>.

¹⁷⁹ *ibid* [29].

¹⁸⁰ *ibid* [174].

¹⁸¹ *ibid* [175].

101. ... [Armenia] argued that the alleged violations of the applicants' rights had occurred [in] May 1992 ... as a result of an instantaneous act ... As the villages ... had been completely destroyed, so had their alleged houses ... Consequently, they could not have had ... any rights under the Convention since that time. ... However, the Court notes that the applicants referred ... also to the plots of land on which their houses had been situated. ...

103. ... The applicants were displaced from the villages ... in the context of an armed conflict. ... [T]hey had no access to their alleged homes ... since their flight in May 1992. ...

104. While the applicants' displacement in 1992 is to be considered as resulting from an instantaneous act ..., their ensuing lack of access to their ... homes is to be considered as a continuing situation, which the Court has had competence to examine since 26 April 2002.¹⁸²

In declaring the application admissible, the ECtHR noted that 'asylum-seekers are members of a particularly underprivileged and vulnerable population group ... The Court considers that the same applies to [internally] displaced persons.'¹⁸³

In its judgment on the merits,¹⁸⁴ the Grand Chamber found 'continuing violations' of the rights of the six applicants (out of an estimated 750,000 Azeris forced out of Nagorno-Karabakh, the seven surrounding Azerbaijani districts, and Armenia between 1988 and 1994),¹⁸⁵ under Protocol No. 1, Article 1 and Article 8 (respect for home). In particular, the ECtHR concluded that:

206. ... the applicants were born in the district of Lachin. Until their flight in May 1992 they had lived and worked there ... [T]heir ancestors had lived there. ... [T]hey had built and owned houses in which they lived. ... [T]he applicants had long-established lives and homes in the district ... [and] have not voluntarily taken up residence anywhere else, but live as internally displaced persons in Baku and elsewhere out of necessity. ... [T]heir forced displacement and involuntary absence ... cannot be considered to have broken their link to the district, notwithstanding the length of time that has passed since their flight.

¹⁸² *Chiragov & Others v Armenia* (admissibility decision of 14 December 2011), [102]. As in *Loizidou*, the ECtHR considered of no legal force an attempt by an internationally unrecognised 'state' to expropriate the applicants' property.

¹⁸³ *ibid* [146].

¹⁸⁴ *Chiragov & Others v Armenia* (merits judgment of 16 June 2015).

¹⁸⁵ *ibid* [25].

The Grand Chamber cited¹⁸⁶ a 2010 resolution¹⁸⁷ in which the Parliamentary Assembly of the CoE (PACE) considered: '4. ... that restitution is the optimal response to the loss of ... housing, land and property because, ... it facilitates choice between ...: return to one's original home in safety and dignity; local integration at the site of displacement [eg, in a new home near the original one]; or resettlement either at some other site within the country or outside its borders.' The PACE then invited member states, 'taking into account the [UN's] Pinheiro principles',¹⁸⁸ to:

- 10.1. guarantee ... redress for the loss of ... housing, land and property abandoned by refugees and [internally displaced persons] without regard to pending negotiations concerning ... armed conflicts or the status of a particular territory;
- 10.2. ensure that such redress takes the form of restitution ... Where restitution is not possible, adequate compensation must be provided ...

The Pinheiro principles effectively generalise the Palestinian right of return in UNGA Resolution 194 (1948):

- 10.1 All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity ... based on a free, informed, individual choice. ...
- 10.2 States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations.

The PACE Resolution, as applied by the ECtHR in *Chiragov*, would support the claims of displaced Palestinians, whether they were displaced outside of British Mandate Palestine (eg, to Lebanon), inside British Mandate Palestine (from the part that became Israel to Gaza or the West Bank, including East Jerusalem), or inside the part that became Israel. It is clear that their claims against Israel could not be 'cancelled' by the entirely separate, but often equally

¹⁸⁶ *ibid* [98]-[100].

¹⁸⁷ 'Solving property issues of refugees and displaced persons', Resolution 1708 (2010), 28 January 2010.

¹⁸⁸ UN Commission on Human Rights, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons', <http://www.unhcr.org/50f94d849.html> (28 June 2005).

valid, claims of post-1948 Jewish refugees (who fled to Israel from Muslim-majority countries) against their countries of origin.¹⁸⁹ The ECtHR adopted a 'mirror-image' judgment concerning one of 335,000 Armenian refugees from Azerbaijan that is virtually identical to its *Chiragov* judgment, concerning Azeris displaced from Armenia or territory seized by Armenia.¹⁹⁰

A further example of relevant ECtHR case law, if Israel were a party to the EConHR, is *D.H. v Czech Republic*, in which the ECtHR found discrimination against Roma children because of statistics demonstrating their disproportionate assignment to special schools, and raising a strong presumption of indirect racial discrimination in the application of race-neutral legislation.¹⁹¹ This judgment could be applied to the treatment of Palestinian land and homes in 1949-67 Israel and the West Bank (including East Jerusalem). Statistics could be produced to show that, compared with Jewish-Israeli owners or lessees of land, Palestinians (including Bedouins) are disproportionately likely to have their land expropriated, or to be denied a building permit, resulting in the demolition of unauthorised homes.¹⁹² During a 2012 visit, the UN Special Rapporteur on adequate housing 'witnessed a [housing] development model

¹⁸⁹ If Jewish refugees and their descendants are legally unable to return to their Muslim-majority countries of origin, they are also 'expelled' persons.

¹⁹⁰ See *Sargsyan v Azerbaijan* (admissibility decision of 14 December 2011; merits judgment of 16 June 2015). Of course, the ECtHR could not employ this mirror-image approach if Israel were a Council of Europe member state, but the Muslim-majority countries from which some Jewish-Israelis (or their ancestors) fled were not.

¹⁹¹ (13 November 2007), [195], [204], [209], [210].

¹⁹² See Israeli Committee Against House Demolitions, <http://icahduk.org>; Aeyal Gross, 'The Dilemma of Constitutional Property in Ethnic Land Regimes', (2004) 121 *South African Law Journal* 448.

that systematically excludes, discriminates against and displaces [Palestinian] minorities in Israel and which has been replicated in the occupied territory since 1967'.¹⁹³

The *D.H.* judgment could also be applied to Israel's rule, twice upheld by its Supreme Court, that prevents spouses from Gaza and the West Bank (who are almost exclusively Palestinian) from joining their spouses who are Israeli citizens living in Israel (and are almost exclusively Palestinian), in the same way as spouses from Argentina, Indonesia or Zambia. This rule, which does not use the word 'Palestinian', could be described as a form of *intentional* indirect racial discrimination.¹⁹⁴ As Mazen Masri has noted, 'the distinction affects the [Palestinian citizens of Israel] only, and ... it is very likely that it was made because it affects them only, as it provides the advantage of using a distinction that is neutral on its face but discriminatory in its effect ...'¹⁹⁵ The ECtHR has found that direct or indirect

¹⁹³ See http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-46_Add1_en.pdf (24 December 2012), [96]. See also http://www.ochaopt.org/documents/ocha_opt_special_focus_demolition_area_c.pdf

(94% of building permit applications by Palestinians in West Bank Area C, in 2000-2007, were rejected).

¹⁹⁴ In Case C-83/14, *CHEZ Razpredelenie Bulgaria* (16 July 2015), the Court of Justice of the EU found that intentional indirect racial discrimination (selecting neighbourhoods for less favourable treatment because they have Roma majorities) is in fact direct racial discrimination.

¹⁹⁵ See Masri, n 69 above, 326; Mazen Masri, *The Dynamics of Exclusionary Constitutionalism: Israel as a Jewish and Democratic State* (Hart Publishing, 2017). See also ss. 1(b)(1) and 27(1) of the Absentees' Property Law of 1950, n 178 above, which were carefully drafted so that the vast majority of 'absentees' would be Arab citizens or residents of British Mandate Palestine, and that the law would apply to few, if any, of the new State of Israel's Jewish citizens. The intention to discriminate indirectly on racial grounds is clearest in s. 27(a), which exempts the property of an 'absentee' who 'left his place of residence - (1) for fear that the enemies of Israel might cause him harm'. This exemption means that Jewish-Israeli flight from approaching soldiers in 1948 is understandable and does not trigger a loss of property rights, unlike Arab-Palestinian flight. Intentional indirect racial discrimination can also be found in the Admissions Committees Law of 2011 (upheld by Israel's Supreme Court on 17 September 2014 in H CJ 2504/11, *Adalah v The Knesset*), which 'in effect prevents

discrimination in immigration rules or decisions affecting spouses violates Article 14 combined with Article 8 (respect for family life),¹⁹⁶ and could easily extend its case law to Israel's rule.

I will close this 'thought experiment' with the most important hypothetical case. The claims of the Palestinians expelled in 1948 to return to their homes in 1949-67 Israel raise difficult questions, given the numbers involved, the 69 years that have elapsed since their right of return was first denied, and the subsequent destruction or reallocation of most of their homes. However, the right to vote in future elections for the Knesset does not raise any difficult issues regarding the past. Granting Israeli citizenship to all Palestinian residents of Gaza and the West Bank (including East Jerusalem, but putting aside, for the moment, expelled Palestinians living outside of Israel-Palestine who wish to return) would not deprive any Israeli citizen of their citizenship. Identity cards and ballot papers could easily be produced for all of the new citizens, without any Israeli citizen having to give up theirs. The ECtHR's *Timishev* principle, that 'no difference in treatment ... based ... on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society', was endorsed by the Grand Chamber in *Sejdić* and applied to the right to stand for election.

[Palestinian citizens of Israel] from moving to [Jewish] communities built on state land and scattered among regional councils that control more than 80 percent of Israel's territory' (Editorial, <http://www.haaretz.com/opinion/1.658232>, 27 May 2015). In *East African Asians v. UK* (Report of 14 Dec. 1973), paras. 207-209, the European Commission of Human Rights found that new immigration legislation, intended to strip Asian residents of Kenya, Tanzania and Uganda of their right to reside in the UK, involved racial discrimination that exceptionally amounted to degrading treatment violating Article 3 ECHR.

¹⁹⁶ See *Abdulaziz v UK* (28 May 1985) (direct sex discrimination against women); *Kiyutin v Russia* (10 March 2011) (direct discrimination based on health status, ie, being HIV-positive); *Biao v. Denmark* (24 May 2016) (indirect discrimination based on ethnic origin).

Clearly, it must also apply to the right to vote in elections,¹⁹⁷ given that the ECtHR has ruled repeatedly that the UK's blanket exclusion of all prisoners from the right to vote violates Protocol No. 1, Article 3.¹⁹⁸

Applying the *Timishev* principle to the right to vote, how can a 'difference in treatment ... based on a person's ethnic origin' that excludes them from citizenship and the right to vote, despite their having always lived under the control of the state organising the elections, and their having no connection with any other state, 'be[] objectively justified in a contemporary democratic society'? The hypothetical voting case I am proposing would require Israel to explain to the ECtHR, in a legal context, what it currently explains to the world only in a political context: why do Palestinians living in Gaza and the West Bank (including East Jerusalem) not have citizenship and the right to vote in Knesset elections after nearly 50 years of Israeli rule or control, given that they do not have the right to vote in the elections of a fully sovereign and viable State of Palestine?¹⁹⁹ Is it because they are of the wrong racial or ethnic origin?²⁰⁰

¹⁹⁷ See *Matthews v UK* (18 February 1999) (Gibraltar residents excluded from European Parliament elections).

¹⁹⁸ See *Hirst v United Kingdom* (6 October 2005); *Greens & M.T. v UK* (23 November 2010); *McHugh & Others v UK* (10 February 2015). See also *Frodl v Austria* (8 April 2010); *Scoppola (No. 3) v Italy* (22 May 2012); *Anchugov v Russia* (4 July 2013); *Söyler v Turkey* (17 September 2013).

¹⁹⁹ If the ECtHR were to find a violation in this hypothetical case, Israel could, unfortunately, follow the example of the UK, which (despite its Article 46(1) EConHR undertaking) has refused to comply with the *Hirst* judgment on prisoner voting for over 11 years. Despite its intransigence, which sets a very bad example for other CoE member states, the UK has yet to be threatened with expulsion from the CoE.

²⁰⁰ n 70 above. Although many Palestinians experience their daily humiliations as effects of the occupation, I would argue that it would be better to view them as racial discrimination. As each humiliation is inflicted, a Palestinian could ask the perpetrator: 'Would you do this to me if I were Jewish?'

IF APARTHEID IS A DIAGNOSIS OF SEVERE RACIAL DISCRIMINATION, WHAT IS THE CURE?

There are two ways of eliminating (what I have sought to demonstrate is) the apartheid that exists in Israel-Palestine. The first is a 'two-state solution', involving a just partition of Israel-Palestine into two separate states, which was supposed to be the final outcome of the 1993 and 1995 Oslo Accords. Despairing that a two-state solution will ever happen, some commentators have begun to call for a 'one-state solution', which would transform the racially discriminatory State of Israel (controlling Gaza and colonising the West Bank, including East Jerusalem) into a single, democratic, secular State of Israel-Palestine or Palestine-Israel, with equal citizenship and voting rights for all Jewish-Israeli and Palestinian residents without racial discrimination, under a new Constitution enforced by a new Constitutional Court (as in South Africa since 1994).²⁰¹

Any comparison of the situation in Israel-Palestine with South African apartheid, or any reference to a one-state solution or the Palestinian right of return, often triggers an accusation that the speaker or writer is 'calling for the destruction of the State of Israel'. This accusation assumes (like the dominant branch of Zionism) that the survival of the Jewish people depends on the existence of a Jewish-majority state, and that this end justifies the use of almost any means to maintain a Jewish majority among the citizens of that state. Equal

²⁰¹ See Virginia Tilley, *The One-State Solution* (Manchester University Press, 2005); Ali Abunimah, *One Country* (Henry Holt, 2006); Joel Kovel, *Overcoming Zionism: Creating a Single Democratic State in Israel/Palestine* (Pluto Press, 2007); Loewenstein & Moor (eds), *After Zionism: One State for Israel and Palestine* (Saqi Books, 2012); Peter Hain, 'Ending the Palestine Israel Impasse: Two State or Common State?', <http://www.swansea.ac.uk/media/PALESTINE%20ISRAEL%20LECTURE%2030%20JAN%202014.pdf> (30 January 2014); Pdraig O'Malley, *The Two-State Delusion* (Viking, 2015). Cf. Levine & Mossberg (eds), *One Land, Two States: Israel and Palestine as Parallel States* (Univ. of Calif. Press, 2014); Caroline Glick, *The Israeli Solution* (Crown Forum, 2014) (annex West Bank but not Gaza); Naftali Bennett, <https://www.youtube.com/watch?v=BeHT9TlrARc> (annex West Bank Area C, but not Areas A or B, or Gaza).

citizenship for all in Israel-Palestine would probably reduce the current Jewish majority among citizens to a minority, the size of which would depend on how many expelled Palestinians wish to return, but could be as large as 45%. As Judith Butler puts it:

... any 'reasonable' person now believes that the Nazi genocide against the Jews mandated the founding of the State of Israel ... [but that] founding ... was simultaneous with the Naqba, the catastrophic destruction of home, land, and belonging for the Palestinian peoples. ... Because the founding of the state on that basis is understood as a historical necessity for protecting the Jewish people, many now assume that any criticism of Israel [today or its founding in 1948] contributes to the delegitimation of the state and so seeks to reverse that historical causality and to open the Jewish people to a new destruction ...²⁰²

I am most certainly not 'calling for the destruction of the State of Israel', as opposed to its reform. First, concluding that the South African apartheid analogy is accurate does not mean that the only way to remove the apartheid is through a one-state solution, modelled on the South African version. A just partition of South Africa into a larger black-majority state, and a smaller white-majority state (with the sizes of the states reflecting the two groups' populations) was probably not considered a realistic possibility, because the white minority was not concentrated in one area, and owned farmland and mines all over the country. A just partition of Israel-Palestine into two states remains a possibility. Second, a one-state solution is not synonymous with the 'destruction' of Jewish-Israelis. White South Africans have survived and thrived since 1994, despite representing only 8.1% of the population today (a much smaller percentage than the likely Jewish-Israeli share of the population of a hypothetical single state). There has been substantial white emigration from South Africa, but the white population remains at 90% of its peak.²⁰³ While Jewish-Israelis have an absolute and unquestionable post-1945 human right to life, and no state or militant group has the power to 'destroy' them (given the strength of the Israel Defense Forces and the support of

²⁰² *Parting Ways: Jewishness and the Critique of Zionism* (Columbia University Press, 2012), 25.

²⁰³ See <http://www.statssa.gov.za/publications/P0302/P03022014.pdf>; (4.52 million in 2016); <http://www.nda.agric.za/docs/abstract04/Population.pdf> (5.04 million in 1990).

the USA), their fear is genuine, has a rational historical basis, and must be considered sensitively in all proposals for the future of Israel-Palestine. In particular, proposals for a one-state solution must reassure Jewish-Israelis that they will be welcome to live in the new state, as in post-1994 South Africa, rather than post-1962 Algeria.²⁰⁴

Apart from South Africa and Israel-Palestine, the only other case in which a white European population of one million or more was implanted in Asia or Africa (as opposed to the Americas or Australasia) was in French Algeria, beginning in 1830. After 1945, the white European minority faced the prospect of being outvoted by the indigenous Arab-Berber Muslim majority in an independent Algeria. Under France's Constitution of 4 October 1958, the indigenous majority was belatedly offered equal voting rights in French elections, as part of a 'one-state solution' under which Algeria would remain an integral part of France (consisting of 15 to 17 *départements*), but indigenous Algerians would be a minority outvoted by the combination of white European voters in France and Algeria.²⁰⁵ On 8 January 1961, 8 April 1962, and 1 July 1962, majorities in both Algeria and France voted in referendums to bring the Algerian war of 1954-62 to an end, by rejecting this 'one-state solution' in favour of a 'two-state solution', ie, independent states of Algeria and France.²⁰⁶ Sadly, violence against the French minority in Algeria in 1962 caused most to flee to France, despite the offer of dual Algerian and French citizenship for three years, before they would have to choose to be Algerian citizens or non-citizen permanent residents.²⁰⁷ But it is important to stress that this unfortunate outcome was the equivalent of a hypothetical future

²⁰⁴ See <http://mondoweiss.net/2012/09/our-vision-of-a-just-one-state-solution-jeff-halper-of-icaht> : 'A just peace must be inclusive.'

²⁰⁵ See Bernard Droz, 'L'élection législative du 30 novembre 1958 en Algérie', (2008) 95 *Outre-mers* 29, 30.

²⁰⁶ See Benjamin Stora, *Histoire de l'Algérie coloniale (1830-1954)* (La Découverte, 2004), and *Histoire de la guerre d'Algérie (1954-1962)* (La Découverte, 2006).

²⁰⁷ Stora (2006), *ibid*, 76-85.

return of Jewish-Israeli settlers in the West Bank (including East Jerusalem) to 'the mother country', ie, 1949-67 Israel, as part of a two-state solution.²⁰⁸

A future solution in Israel-Palestine might or might not resemble the one adopted in South Africa. If it does, it will have to have sufficient safeguards to reassure Jewish-Israelis that the world will not abandon them a second time, and that they will be treated with magnanimity by the new Palestinian majority, ie, like white South Africans rather than French-Algerians. These safeguards could include membership of the CoE (access to the ECtHR), the EU (freedom to work in other member states), and NATO (defence against external attack), and represent a form of reconciliation between Europe (the site of the Holocaust) and Jewish-Israelis.

But the status quo in Israel-Palestine does resemble 1948-1994 South Africa in two respects.²⁰⁹ First, the small size (in relation to population) and non-contiguity of the areas of Palestinian autonomy (Gaza and Oslo Areas A and B in the West Bank)²¹⁰ is strikingly similar to the ten 'homelands' or 'bantustans' to which South Africa sought to assign most of its black population.²¹¹ The 'homelands' were presented to the world as a 'multi-state solution', but were rejected because of their obvious unfairness to the black majority.²¹² Second, the reluctance of most Jewish-Israelis to discuss the Palestinian right of return or a one-state solution mirrors white South African resistance to 'one person, one vote'. In his

²⁰⁸ See Benvenisti, n 16 above, 313 ('the expectations of citizens who ... [knowingly] benefited from illegal acts ... do not merit respect').

²⁰⁹ See Henry Siegman, 'The Triumph and Tragedy of Greater Israel', <http://nationalinterest.org/commentary/the-triumph-greater-israel-7438> (6 September 2012).

²¹⁰ See http://www.ochaopt.org/documents/ocha_opt_area_c_map_2011_02_22.pdf.

²¹¹ See 'R.S.A. black homelands consolidation proposals, 1973', <https://www.loc.gov/resource/g8501g.ct001274>.

²¹² See UNGA Resolution 31/6 (26 October 1976) '[s]trongly condemns the establishment of bantustans'. See also Glaser, n 119 above, 411, 415, 417.

final broadcast before the 1953 election, in which his apartheid government sought a second mandate, South African Prime Minister Daniel Malan objected to the UN and others 'trying to force upon us equality which must inevitably mean to white South Africa nothing less than national suicide'.²¹³ His argument was later developed as follows:

... South Africa contains the only independent white nation in all Africa. [It]... has no other homeland to which it could retreat; [and] ... has created a highly developed modern state ... [T]his white nation is not prepared to commit national suicide ... The only alternative is a policy of *apartheid*, the policy of separate development. ... *Apartheid* is a policy of self preservation ... [for which] [w]e make no apology ... in a manner that will also enable the [black majority] to develop fully as a separate people [cf. the Oslo Accords].²¹⁴

In 1985, less than five years before Nelson Mandela's release from prison, President P.W.

Botha repeated the view that equal voting rights would mean 'suicide' for white South Africa:

... reasonable South Africans will not accept the principle of one-man-one-vote in a unitary system. That would lead to domination of one over the other and it would lead to chaos. ... I reject it as a solution. ... I am not prepared to lead White South Africans and other minority groups on a road to abdication and suicide.²¹⁵

CONCLUSION

Victims of centuries of terrible racial discrimination, culminating in attempted extermination, do not have the right to practise racial discrimination against another group.²¹⁶ The Zionist movement's claim that Jewish-Europeans had the right to a homeland and then a state, in 55% (1947 partition plan), then 78% (1949 armistice line), and now 90 to 100% of British

²¹³ *The Glasgow Herald* (14 April 1953), 7.

²¹⁴ Speech by the South African High Commissioner, London, 19 August 1953, quoted in Gordon & Talbot (eds), *From Dias to Vorster* (Cape Town: Nasou Limited, 1983), 409-10.

²¹⁵ Address of State President P.W. Botha, Durban, 15 August 1985, <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01600/05lv01638/06lv01639.htm>.

²¹⁶ Former President Barack Obama seems to think that Jewish-Israelis (not Palestinians) are the African-Americans of Israel-Palestine. Cf. <http://www.theatlantic.com/international/archive/2015/05/obama-interview-iran-isis-israel/393782> with <http://www.blackpalestiniansolidarity.com>

Mandate Palestine,²¹⁷ was based on racial superiority. And it was supported by Christian-Europeans for doubly racist reasons: (i) their own racial superiority vis-à-vis the Jewish beneficiaries of Zionism, whom they were happy to see emigrate from Europe; and (ii) their own racial superiority vis-à-vis the Arab-Palestinian victims of Zionism, on whom they were happy to impose the cost of compensating Jewish-Europeans for centuries of persecution by Christian-Europeans (not by Arab-Palestinians).²¹⁸ The first Zionist Congress was held in 1897, when European racial superiority was an unquestioned truth for Christian and Jewish Europeans, but was mainly implemented after 1945 (like 'Afrikaner-ism', but unlike its morally equivalent cousins, 'USAmerican-ism', 'Canadian-ism', 'Australian-ism', and 'New Zealand-ism'), when racial discrimination was gradually being challenged around the world.²¹⁹ As my 'thought experiment' sought to demonstrate, if Israel were to become a member state of the CoE and a party to the EConHR, there now exists ample case law of the ECtHR that would allow Palestinians to seek relief from Israel's racial discrimination against them.

²¹⁷ Jeremy Waldron's critique of the land claims of the indigenous peoples of Australasia and North America ('Superseding Historic Injustice', (1992) 103 *Ethics* 4) would apply *a fortiori* to the Zionist movement's claim to Palestine, because of the gap of over 1700 years between Jewish dispossession and the attempt to return.

²¹⁸ See Wintemute, n 4 above, 127.

²¹⁹ See also UNGA Resolution 3379 (XXX) (10 November 1975), revoked by UNGA Resolution 46/86 (16 December 1991) as a condition of Israel's participation in the 1991 Madrid peace conference: 'Taking note ... of [a 1975] resolution ... of the Organization of African Unity ..., which considered 'that the racist regime[s] in occupied Palestine and ... Zimbabwe and South Africa have a common imperialist origin, ... [and] the same racist structure ...', Determines that zionism is a form of racism and racial discrimination.' The harsh tone of the 1975 Resolution, supported by Brazil, China, India, Indonesia, Mexico, Nigeria, and Turkey, might have been softened by clarifying that it is Zionism 'as it has been implemented in what was British Mandate Palestine since 1948' (as opposed to the mere idea of a Jewish-majority state) that is a form of racial discrimination.

Human rights lawyers should strive to be as objective as possible, and to challenge injustice wherever it appears, regardless of who the perpetrator may be.²²⁰ This can mean being the bearer of upsetting news, or pointing out that 'the emperor's new clothes' do not exist (Israel's democracy has always been racial).²²¹ But a more honest and accurate assessment of the situation in Israel-Palestine is the first step towards finding a just solution. In response to retired Justice Goldstone of the Constitutional Court of South Africa, ('It is an unfair and inaccurate slander ...', 'The charge that Israel is an apartheid state is a false and malicious one ...'),²²² I would say no. The charge is true, not false, and is made in good faith, rather than with malice, to help Jewish-Israelis and their Christian, Jewish and other supporters understand the grave injustice of the status quo, and the need for changes to achieve a better future for all who live in Israel-Palestine. The State of Israel was supposed to be a post-Holocaust 'happy ending' for the Jewish people, after centuries of suffering. But Israel can never be a 'happy ending' for the Jewish people, until there is a 'happy ending' for the Palestinian people.

²²⁰ See the Nobel Prize acceptance speech of Holocaust survivor Elie Wiesel, 10 December 1986: 'I swore never to be silent whenever and wherever human beings endure suffering and humiliation. We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented.'

²²¹ See http://www.andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html.

²²² n 11 above.