

Speech made by John Strawson during the ASF seminar about the role of human rights lawyers in Israel and the Palestinian Territories  
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## The International Community's legal responses to Apartheid South Africa and the Israeli Occupation of the West Bank, Gaza and East Jerusalem.<sup>1</sup>

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There are many coincidences in the history of the Palestinian-Israeli conflict and South Africa – the creation of the State of Israel and the electoral victory of the apartheid National Party both took place in May 1948. As curious is the fact the then defeated South African Prime Minister, Jan Smuts had been an architect of the Mandate system of the League of Nations and was a staunch supporter of Zionism. However, this apparent intertwining of destinies is perhaps superficial.

This article will offer a comparative analysis of how the international legal community has reacted to apartheid and to the occupation of Palestinian territories. It will argue that the radically different historical circumstances constituted major differences in the legal discourses – and legal doctrine. In the context of this paper the international legal community will be defined as the United Nations General Assembly, the Security Council and the International Court of Justice. International law it needs to be stressed is created by the states of the international community. As the Statute of the International Court of Justice specifies, treaties, customs and major legal systems are sources of international law. Each of these sources is produced by state action. Additional ways of determining sources of law are through judicial decisions of international courts and scholarly writing, although these sources are described as "subsidiary."<sup>3</sup> In the United Nations age the UN charter has become what Judge Bedjaoui called a "primary source of international law" and decisions of the Security Council<sup>4</sup> and certain resolutions of the General Assembly can give rise to legal norms.<sup>5</sup> However, the United Nations is a membership body for states and thus the norms of the Charter and the resolutions of the principal bodies are ultimately the collective will of states. International law therefore does not arise outside the international community but is a product of it. International law as we know it today has its roots in European colonialism and its doctrines and institutions bear the hall-mark of this heritage.<sup>6</sup> The international legal community must therefore be handled with care especially by those who have high expectations of it. Of particular concern in this paper is the doctrine of self-determination of peoples which developed into a legal norm in response to European colonialism in the 1960's and 1970's.<sup>7</sup> The right to self-determination grew out of the struggles against colonialism. However, the anti-colonial movement did not challenge the imperial boundaries but rather embraced as them as creating new nations. As a result the legal doctrine accepts the delimitations of colonial conquest and guarantees self-government within those boundaries.<sup>8</sup>

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<sup>1</sup> This paper was delivered at a workshop entitled, *Legal Analysis of the Applicability of the Apartheid Analogy to Israel and the Occupied Territories*, organized by Avocats Sans Frontieres, Al-Ram, December 15-16, 2005.

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<sup>3</sup> Statute of the International Court of Justice Article 38 (A).

<sup>4</sup> See: Stefan Talmon, The Security Council as a World Legislature, *American Journal of International Law*, Vol. 99, No. 1 (2005), 175-193.

<sup>5</sup> See: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon, 1994).

<sup>6</sup> See for example: Antony Anghie, Francisco de Vitoria and the Colonial Origins on International Law in Eve Darian-Smith and Peter Fitzpatrick (eds.) *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999), 89-107.

<sup>7</sup> See: Higgins (1994), and also: Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge: Cambridge University Press, 1995); Joshua Castellino, *International Law and Self-Determination* (The Hague: Martinus Nijhoff, 2000).

<sup>8</sup> See: Western Sahara Case, 1975, at: <http://www.icj-cij.org/icjwww/idecisions/isummaries/isasummary751016.htm> (last visited October 23 2005).

The article will address first the framework of the discussion and will then turn to discuss the legal responses to the occupied territories and apartheid.

### A Necessary Framework.

While I am going to focus on apartheid and the Post-1967 Israeli occupation, I am aware that behind this discussion is a broader ideological narrative of the comparison of apartheid and Zionism.<sup>9</sup> This discourse became widespread in the period after 1967 and was sustained in particular within the then socialist countries and much of the non-aligned movement. It argued that there was an essentialist colonialist and racist core to Zionism that had been cultivated in the interest of Imperialism - first by Britain and the then by the United States. This policy was in particular pursued by the Soviet Union and, which it has to be said, was associated with an anti-Semitic campaign against its Jewish citizens.<sup>10</sup> This was not of course the consistent view of the Soviet Union towards Zionism which had in 1947 supported the idea of a Jewish State, by arguing that;

During the last war, the Jewish people underwent exceptional sorrow and suffering....The total numbers of the Jewish population who perished at the hands of the nazi executioners is estimated at approximately six million....The fact that no western European state has been able to ensure the defense of the elementary rights of the Jewish people, and to safeguard it against the violence of the fascist executioners, explains the aspirations of the Jews to establish their own state. It would be unjust not to take this into consideration and to deny this right to the Jewish people to realize this aspiration. It would be unjustifiable to deny this right to the Jewish people, particularly in view of all it has undergone during the Second World War.<sup>11</sup>

In the General Assembly debate on the partition resolution 181 in November 1947, Gromyko made a very robust speech countering the opposition to the plan by arguing that, "The representatives of the Arab states claim that the partition of Palestine would be an historic injustice. But this view of the case is unacceptable, if only because, after all, the Jewish people as been closely linked with Palestine for a considerable period in history."<sup>12</sup>

Not only was the Soviet Union the first major power to recognize the State of Israel *de jure* (the United States at first only gave *de facto* recognition), but it also permitted significant arms sales to the Zionist movement and the newly created state through Czechoslovakia.<sup>13</sup> Nor was the view that Zionists were agents of Imperialism always the view of Palestinians and Arabs opposed to Zionism. From the early 1920's objections to Jewish immigration was often posed in terms of opposition to the spread of communism – on account of the Russian origin of many Jews and the widespread support for socialist

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<sup>9</sup> Works which attempt to make this comparison in are for example: Uri Davis, *Apartheid Israel: Possibilities for the Struggle Within* (London: Zed Press, 2003); Marwan Bishara, *Palestine/Israel: Peace or Apartheid – Occupation, Terrorism and the Future* (London: Zed Press, 2003); Roane Carey (ed.) *The New Intifada: Resisting Israel's Apartheid* (London: Verso, 2001) and, Uri Davis, *Israel: An Apartheid State* (London: Zed Press, 1987).

<sup>10</sup> See for example: Zionism: Instrument of Imperial Reaction: Soviet Opinion on Events in the Middle East and the Adventures of International Zionism (Moscow: Novosti Press Agency Publishing House, 1970). The tenor of this compilation can be sensed by statements such as, "In many ways the racist ideas of the Zionist resemble the racial "theory" of the Nazis." (page 88). This discourse continues into the 1980's. In a publication of the "Anti-Zionist Committee of Soviet Public Opinion," *Zionism Words and Deeds* (Moscow 1987), the then General-Secretary of the Communist Party of the Soviet Union, Mikhail Gorbachev, is quoted as saying in 1986, "I believe that there is no place in civilized society for anti-Semitism, Zionism or any other manifestation of chauvinism. The problem of eradicating these evils on a global stage is an urgent one." (Page 5).

<sup>11</sup> Speech by Andrie Gromyko, United Nations General Assembly, 77<sup>th</sup> Plenary Session, A/2/PV.77 (14 May 1947).

<sup>12</sup> United Nations General Assembly, 125<sup>th</sup> Plenary Session, A/PV.125 (26 November 1947)

<sup>13</sup> Avi Shlaim, *The Iron Wall: Israel and Arab World* (London: Penguin, 2000), 35.

and communist politics.<sup>14</sup> Indeed this argument continued during the 1947 United Nations partition debate where the Syrian delegate accused the United States being prepared to let half a million communists into the Palestine as the US would be "all the happier so long as Palestine was swarming with Jews."<sup>15</sup> In other words the history of ideological opposition to Zionism has been highly contradictory. In the wake of the 1967 war a coalition between the Soviet Union (and its allies) and the non-aligned movement created a majority in the UN General Assembly in favor of the 1975 resolution 3379 (XXX) which defined Zionism as a form of racism.<sup>16</sup> This one line resolution attached no consequences to the definition. It was rescinded by the General Assembly in 1991. The decision represented a widespread view that the resolution was not only highly ideological but also inaccurate.

The Palestine Liberation Organization (PLO) Covenant and the policy of the organization had proposed a Democratic Secular State in Palestine which sought the expulsion of Jews when had arrived after what was designated as the "Zionist invasion."<sup>17</sup> The latter phrase attempted to conjure up the image of outside settlers arriving in a foreign land and imposing by force their rule upon the local inhabitants. Undoubtedly this imagery sought to make a link between the position of Palestinians and others who at the same time were suffering from the denial of self-determination as a result of European settlement. In this context the continued suppression from the in the 1960's of the right to self-determination of non-white South Africans, who had been victims of earlier invasions and wars was also invoked. In part this no doubt stemmed from the fact that while most other peoples within colonies were attaining independence, apartheid was taking grip and the Palestinian question had yet to be solved. Both situations appeared to go against the grain of history. While both situations were waiting resolution the historical factor that had created them were different. The creation of the State of Israel had not been effected by an invasion. The Jewish population of Palestine was in place at the time and regarded itself as having a historical connection of the land – a position which had received the support of the international legal community in League of Nations Mandate for Palestine, which stated in the preamble that, "recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country."

Jewish immigration to Palestine had been slow after the adoption of the Mandate and the Jewish population grew from 80,000 in 1917 to 175,000 by 1931. The major increase in Jewish immigration took place as a result to Hitler's assumption of power in Germany in January 1933. It is at that point that

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<sup>14</sup> See: Laurence Davidson, *America's Palestine: Popular and Official Perceptions from Balfour to Israeli Statehood* (Gainesville: University of Florida Press, 2001), 48; see also: David Fromkin, *A Peace to End All Peace: Creating the Modern Middle East 1914-1922* (London: Andrew Deutsch, 1989), 515-516.

<sup>15</sup> Speech by Amir Arslan, United Nations General Assembly, 125<sup>th</sup> Plenary Session, A/PV.125 (26 November, 1947).

<sup>16</sup> This period produced a great many books purporting to be academic discussion of the issues, one, A. W. Kayyali (ed.) *Zionism, Imperialism and Racism* (London: Croom Helm, 1979) included a chapter by Fayez Sayegh, (A form Racism and Racial discrimination, 51-55) which amongst other claims argues, "This century has witnessed three perfect racisms: Aryan or Nazi Racism, Zionism Racism and Apartheid Racism" (page 53). A theme of this 1970's genre is that Jewish History and Judaism are the foundations of this racism, writing in Ibrahim Abi-Lughod and Baha Abu-Laban (eds) *Settler Regimes in Africa and the Arab World* (Wilmette II: The Medina University Press, 1974), Hassan Haddad, (The Biblical Bases of Zionist Colonization , 219) writes, The Bible (the Old Testament) [sic]....This collection of myths, legends, historical narratives, poems, and prophetic and apocalyptic pronouncements is primarily responsible for the beliefs, conditions, and attitudes that produced Zionism and eventually led to the occupation and transformation of Palestine. We can summarize the beliefs as follows. (1) The Jews are separate and exclusive people chosen by God to fulfill a destiny; the Jews of the twentieth century have inherited the covenant of divine election and historical destiny from the Hebrew (4) tribes that existed more than three thousand years ago. (2) This covenant includes definite ownership of the Land of Canaan (Palestine) as a patrimony of the ancient Israelites to be passed on to the descendants for ever: no other people can law rightful claim to that land. (3) The occupation and settlement of this land is the fulfillment of the duty collectively placed on Jews, to establish a state for the Jews; the purity of the Jewishness of the land is derived from a divine command and is thus a sacred mission" (Pages 3-4).

<sup>17</sup> See: Paul J.I.M. de Waart, *Dynamics of Self-Determination: Protection of Peoples as a Human Right* (Leiden, New York, Koln: E.J. Brill, 1994), 222-224.

there is a steep growth in immigration bringing the Jewish community to about 475,000 by 1939.<sup>18</sup> Far from an invasion by the Zionists, Jews by and large, arrived as refugees fleeing persecution. It should also be stressed that Jewish acquisition of land in this pre-1948 period was quite unlike that of settlement colonies where land was normally allocated at nominal prices to the settlers. As Kimberling has demonstrated the price of good agriculture land in Palestine in 1944 was \$1050 per acre whereas it was only \$45 an acre in the United States in the same year.<sup>19</sup> Jews despite amounting to about a third of the population of Palestine in 1948 only owned between 5.7-7% of the land.<sup>20</sup> It is worth pointing out that the term "Zionist invasion" does have a colonial origin in that it was first coined by Lord Delamere in 1903 as the leader of the British Settlers in Kenya objected to Joseph Chamberlain's suggestion of a Jewish settlement in that country.<sup>21</sup>

As the process of negotiations initiated by the Madrid conference in 1991, and especially the Oslo Agreements broke down in September 2000<sup>22</sup> so the faith that movement towards a viable two state solution to the conflict declined within Palestinian society. The PLO and the Palestinian National Authority, however, remained committed to resuming negotiations with the aim of creating a sovereign Palestinian state in the West Bank and Gaza with its capital in East Jerusalem. The cynicism over a the viability of the Palestinian state was underscored by the way in which Israeli governments, both Labor and Likud, had dramatically increased the number of settlers living in the West Bank – roughly doubling their number to 240,000 since 1992.<sup>23</sup> The increase in settlers was accompanied by the vast new road system linking the settlements in the West Bank both of which led to increasing land expropriations. After September 2000 Israeli armed forces began to re-conquer the areas of the West Bank it had redeployed from under the Oslo Agreements (about 22% was designated as area "A" under the 1995 Interim Agreement which was under exclusive Palestinian control).<sup>24</sup> In 2000 and 2001 the situation deteriorated as Palestinians were increasingly confined in their cities, towns and villages sometimes under curfew and always at the mercy of the Israeli checkpoints. The Israeli government, by February 2001 lead by Ariel Sharon, argued that it was responding to the *intifada* which had included attacks not only on the Israeli military but also on civilians especially through the terror attacks by suicide bombing. Counter-attacks by Israel, including "targeted assassinations", the siege of the Mukata, the late President Arafat's compound in Ramallah and the massive destruction of parts of Jenin appeared to confirm the view that peaceful negotiations were unviable. The Sharon government's decision to build the wall in the West Bank on the grounds that it would be "security barrier" to prevent suicide attacks ushered in a new round of land appropriations and increased restrictions for Palestinians.

These developments all saw a tendency for Palestinian discourses to return to the familiar themes of the 1970's, in particular the analogy between Zionism and apartheid. This was driven by three realities on the ground. The first was the increased dependency of Palestinians in acquiring passes in order to travel beyond areas of formal Palestinian control. The pass system naturally recalled the pass laws of

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<sup>18</sup> Jewish Agency statistics see: Ilana Shamir and Shlomo Shavit (eds.) *Encyclopaedia of Jewish History* (New York and Oxford: Facts on File Publications, 1986), 148.

<sup>19</sup> Baruch Kimberling, *Zionism and Territory: The Socio-Territorial Dimensions of Zionist Politics* (Berkeley: Institute of International Studies, University of California, 1983), 11.

<sup>20</sup> The first figure comes from Sami Hadawi who was a senior official in the British Mandate and latter is from the statistics of the United Nations Special Commission for Palestine. According to Hadawi, Jews owned 2% of the land before the British conquest in 1917. This means that level of Jewish ownership that can be attributed to the British Mandate period is between 3.7 and 5% of the total area, see: Michael R Fischbach, *Records of Dispossession: Palestinian Refugee Property and the Arab-Israeli Conflict* (New York: Columbia University Press, 2003) and Hanna Nakkara unpublished manuscript.

<sup>21</sup> See: Robert G. Weisbord, *African Zion: The Attempt to establish a Jewish Colony in the East Africa Protectorate 1903-1905*. (Philadelphia: The Jewish Publication of America, 5728-1968).

<sup>22</sup> See: Denis Ross, *The Missing Peace: The Inside Story of the Fight for Middle East Peace* (New York: Farrar, Straus and Giroux, 2004)

<sup>23</sup> See: Yossi Beilin, *The Path to Geneva: The Quest for a Permanent Agreement 1996-2004* (New York: RDV Books, 2004), 278-279.

<sup>24</sup> See: Raja Shedadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (London, The Hague, Boston: Kluwer Law International, 1997)

the apartheid regime. The second was the sense since the Camp David talks (July 2000/February 2001) that what was on offer far from being a genuine Palestinian state was in fact more like a Bantustan – indeed this had been foreshadowed by the map that accompanied the 1995 Interim Agreement which had divided the West Bank into small discontinuous areas of Palestinian control which looked like the maps of some of apartheid's Bantustans. Third the building of the wall was seen as the logical result of the process and rhetorically became known as the "apartheid wall." The apartheid analogy thus picked up on apparent contemporary similarities, while able to draw on an older discourse. This in turn meshed with the rise in interest amongst some Palestinian and foreign intellectuals in a one-state solution as Israeli settlement activity in the West Bank a Palestinian state seemed territorially compromised. This too, harked-back to a variant of the Palestinian national movements' original position that had been in favor of one state in all of British Mandate Palestine. This the twenty-first century saw a revival ideas and images that were rooted in a form of anti-colonial rhetoric favored by the Soviet Union and its allies in the 1960's and 1970's. Israel is constructed as an essentially racist and aggressive state, where the Jews are portrayed as superior caste ruling over Palestinians both in Israel and the occupied territories. Indeed the conflating of Israel with the occupied territories becomes an important part of the narrative. The definition of Israel as a "Jewish state" is seen a racist statement rather than an abstraction.<sup>25</sup> This view which suggests that the attempt to create an ethnic-national state is either inevitably racist or unique is highly problematic given any serious study of nationalism.<sup>26</sup> The argument then views the Jews as having constructed themselves as legally superior within Israel who then seek territorial expansion in the West Bank where they repeat the process – the visible settlements being given as evidence of this.<sup>27</sup> Thus Israel's existence is as illegitimate in the same way the apartheid regime was and thus the solution is the same, the creation of one non-racial society.<sup>28</sup> In addition to this thesis is an associated political question. There is an absence of a significant international movement in solidarity with the Palestinian people, unlike the Anti-Apartheid Movement. By shifting the paradigm of the Palestinians from occupation to apartheid, the argument seems to proceed that, maybe this would light a memory in the international public that might initiate popular support for Palestine. It was however, Edward Said who questioned this approach when he wrote:

unquestionably the moral dilemma faced by anyone trying to come to terms with the Palestinian-Israeli conflict is a deep one. Israeli Jews are not the white settlers of the stripe that colonized Algeria or South Africa; though they use similar methods. They are correctly seen as the victims of a long history of Western, largely Christian, anti-Semitic persecution that culminated in the Holocaust. To Palestinians, however, their own role is that of victims of the victims. That is why Western liberals who openly espoused the anti-apartheid movement... and many other causes of that kind have shied away from openly endorsing Palestinian self-determination.<sup>29</sup>

The argument in this article is in accord with Said's outlook. Zionism is not racism but a form of nationalism which along with other all other nationalisms is necessarily based on both inclusion and exclusion. Again as with other nationalisms there are various trends which in the case of Zionism, range from socialism through liberalism to outright racism. Nor is the idea of a Jewish state particularly exceptional in a region which includes Turkey where the constitution defines a citizen as a Turk (despite the 30% of the population who are Kurdish) and Egypt whose official title is the Arab Republic of Egypt (despite its Nubian, Berber and Coptic minorities). Nor unfortunately is the occupation unique given the

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<sup>25</sup> This does create in Israel as in other states major contradictions in law and politics over the place of minorities see for example: Nadim Rouhana and As'ad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel*, *International Journal of Middle East Studies*, Vol. 30, No. 3 (1998), 321-346.

<sup>26</sup> See for example: Homi K Bhabha (ed.) *Nation and Narration* (London: Routledge, 1990); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991) and Anthony D Smith, *Chosen Peoples: Sacred Sources of National Identity* (Oxford: Oxford University Press, 2003).

<sup>27</sup> See for example: Nur Masalha, *The Politics of Denial: Israel and Palestinian Refugee Problem* (London: Pluto Press, 2003)

<sup>28</sup> See for example: Virginia Tilley, *The One State Solution: A Breakthrough for peace in the Israeli-Palestinian deadlock* (Manchester: Manchester University Press, 2005).

<sup>29</sup> Edward W Said, *The End of the Peace Process: Oslo and After* (2000), 271.

prolonged occupations by China of Tibet, Turkey of Northern Cyprus and Morocco of the Western Sahara. In each case these occupations have been accompanied by the movement of settlers from the occupying power into the territory with the intent of changing the ethnic balance of the population.

Israel is not an apartheid state. The Palestinian, Druze and other minorities in Israel are guaranteed equal rights under the Basic Laws. All citizens of Israel vote in elections on an equal basis. There are no legal restrictions on movement, employment or sexual or marital relations. The universities are integrated. Opponents of Zionism have free speech and assembly and may form political organizations. South African apartheid denied non-whites the right to vote, decreed where they could live and work, made sex and marriage across the racial divide illegal, forbade opponents of the regime to express their views, banned the liberation movements and maintained segregated universities. This is not to say that there are not laws in Israel – particularly in the area of land rights – that are not discriminatory. There are. There are many contradictions between rights guaranteed in the Israeli Declaration of Independence, the Basic laws and other areas of the law - and indeed social practices. These are often glaring ones.<sup>30</sup> The Israeli human rights movement has been active in attempting to transform the rhetoric of the basic laws into a legally guaranteed reality. This is not unlike, for example, the role of the American civil rights movement in the 1960's and 1970's, or those who work for full equality between the Sinhalese and Tamil people of Sri Lanka today. These comparisons are not to prettify the Israeli state rather to point out that the essentialist critiques of Israel do tend to assume that other states are bastions of healthy, almost natural, nationalisms and havens of non-discrimination.

### **The Legal Status of Israel, the West Bank, Gaza and East Jerusalem.**

The International Court of Justice's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory<sup>31</sup> is the latest authoritative legal statement on the status of Israel, the West Bank, Gaza and East Jerusalem.<sup>32</sup> The opinion is important not only in establishing the illegality of the construction of the wall but also in the arguments that it uses to reach this conclusion – which recalls the legal history of the Palestinian-Israeli conflict. In establishing the issue the court began from the origin of Palestine as part of Ottoman Empire and how at the end of the First World War the League of Nations Covenant article 22 provided for the Mandate system for former Ottoman possessions and that Palestine was subject to such a mandate. It also pointed out that the boundaries of Palestine were established through the provisions of the Mandate through the 1922 British memorandum and the Anglo-Transjordanian Treaty of 1928 (see paragraph 70). It is important to note that the Mandate is regarded by the Court as a relevant source of law and therefore we should assume that the terms of the Mandate which included the "establishment in Palestine of a national home for the Jewish people" must also be part of the positive law in assessing the legal status of the territories we are discussing.

The Palestinian Arab community, in 1922 about 88% of the population, through their representatives objected the inclusion of the terms of the Balfour Declaration within the Mandate and had argued at the Peace Conference and then with the British Colonial Office against its inclusion. However, not only did this attempt fail but the text of the Mandate went beyond the terms of the Balfour Declaration. The latter referred to the "creation of national home" and did not mention the historical connection of the Jewish people to Palestine. The Mandate, as we have seen, gave recognition to the "historical connection of the Jewish People with Palestine and the grounds for the reconstruction of their national home in that country." This undoubtedly creates or confirms an international legal norm that contains the following

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<sup>30</sup> See for example: Hussein Abu Hussein and Fiona McKay, *Access Denied: Palestinian Land Rights in Israel* (London and New York: Zed Press, 2003)

<sup>31</sup> International Court of Justice, July 9 2004, General List 131, see: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited October 10 2005).

<sup>32</sup> For a scholarly discussion on the case see: Lori Fisler Damrosch and Bernard H Oxman (eds.) *Agora: The ICJ Advisory Opinion on the Construction of a Wall in Occupied Palestinian Territory*, *American Journal of International Law*, Vol. 99, No. 1 (2005), 1-141; see also: *Israel Law Review*, Vol. 38, Nos. 1-2 (2005) "Special Double Issue: Domestic and International Judicial Review of the Construction of the Separation Barrier."

principles: (a) the Jewish people are granted a degree of international legal personality and (b) that an aspect of that personality is derived from a historical connection with Palestine and (c) that the national home in Palestine will be a reconstitution. The concept of a national home was novel and its choice of term clearly sought to avoid the use of state – which was studiously avoided during the drafting of the Balfour Declaration.<sup>33</sup> Not only did the Palestinian Arab community object to the Mandate but sought to argue it was illegal.<sup>34</sup> This view that any action to recognize the Jewish People as a legal entity or that it has some degree of legitimacy in Palestine should be challenged has been a common thread in the Palestinian legal narrative.<sup>35</sup> This position has also been argued by non-Palestinian international lawyers believing that this argument assists the Palestinian cause.<sup>36</sup> This position, however, is highly problematic, as, in this argument, international law is transformed into an entirely abstract system quite unrelated to a definite international community and beyond its sources, doctrines and institutions. The suggestion that the Mandate was in some senses illegal and invalid would involve a challenge not to its validity *per se* but to the entire legal order that created it. The assumption that international law is based on an imperative of justice is as unfounded as the assumption that the legal systems of states are similarly based. Quite apart from the contentious assertion of what justice might be, legal systems – despite their claims to justice – operate in a sphere of sources, doctrines and institutions which is relative autonomous from it. Indeed the very idea of law reform motivated by concerns for justice (such as international movement against slavery or against racial and gender discrimination) indicates that legal doctrine is not the same as an ethical system of justice. The international legal order that produced the Mandate system was undoubtedly the product of a colonial order, just as the United Nations system was a product of the Great Power realities of the end of the Second World War. While we might have ethical and ideological critiques of the resultant legal orders it does not mean that such critiques themselves assume a legal character.

The International Court of Justice also referred to the United Nations partition plan (General Assembly resolution 181 (II), 1947). This resolution was the result of the majority recommendation of the United Nations Special Committee for Palestine (UNSCOP) which was established when the British announced that they would withdraw from Palestine in 1948. The Committee's report envisaged the creation of a Jewish State and Arab State in Palestine with an international regime for Jerusalem and the Bethlehem area – although within an economic union. The plan rejected any forced movement of populations and Jews and Arabs who found themselves on either side of the boundary were guaranteed their civil rights and property rights.<sup>37</sup> The Palestinian Arab representatives and the Arab world as a whole had opposed the creation of the committee and the Arab High Committee, the Palestinian Arab Leadership refused to give evidence to it. Interestingly the Arab League and the Jordanian government did meet with the committee. However, the Arab League announced in advance they would reject any decision of the United Nations General Assembly other than a unitary state of all of Palestine. In fact the committee made two recommendations but neither supported this position; the majority favoring partition and the minority a federal state. Before the adoption of the resolution the Political Committee of the Arab League issued a statement which included:

The Committee will regard the implementation of these recommendations as a certain danger menacing security in the Palestine, and security and peace all over the Arab

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<sup>33</sup> See: Leonard Stein, *The Balfour Declaration* (Jerusalem and London: Magnes Press, The Hebrew University and The Jewish Chronicle Publications, 1961, reprint 1983), 664.

<sup>34</sup> See for example: W.F. Boustany, *Palestine Mandate: Invalid and Impracticable* (Beirut: American Press, 1936).

<sup>35</sup> See for example: Henry Cattán, *Palestine and International Law: Legal Aspects of the Arab-Israeli Conflict* (London and New York: Longman, 1976).

<sup>36</sup> See for example: John Quigley, *The Case for Palestine: An International Legal Perspective* (Durham and London: Duke University Press, 2005). See also: W. Thomas Mallison and Sally V Mallison, The National Rights of the People of Palestine, *Journal of Palestine Studies*, Vol. IX, No.4 (1980), 119-130. In this article Mallison and Mallison argue that there is no legal conception of the Jewish People and suggest that the UN Partition plan (see below) is illegal so far as it affects Jews but legal in regard to the Palestinians. This highly contradictory argument is common in this genre. A further example is: Francis A Boyle, *Palestine, Palestinians and International Law* (Atlanta: Clarity Press, 2003).

<sup>37</sup> See: De Waart (1994), 112 – 143.

countries. Therefore it has determined by all practical and effective means to resist the implementation of these recommendations. They – the Palestinian Arabs – will launch a relentless war to repel this attack on their country especially so as they know that all Arab countries will back them and assist them, supplying them with men, funds and ammunitions”<sup>38</sup>

After the resolution was adopted Abdul Rahman Hassan Azzam, the Secretary-General of the Arab League formally announced on behalf of the organization that, “This war will be a war extermination and a momentous massacre which will be spoken of like the Mongol massacres and the Crusades.”<sup>39</sup> Thus it is clear that the Arab League not merely opposed the partition plan but sought to use force to prevent its implementation. Such action was specifically contrary to article 2.4 of the United Nations Charter which states that “members must refrain from the use of force against the territorial integrity or political independence of any state: or in any other matter inconsistent with the purposes of the United Nations.” The latter article would apply to both threatening and then using force to attempt to frustrate a General Assembly resolution.

There have been various arguments that have been deployed to suggest that the UN resolution is also illegal. The first is that the character of General Assembly resolutions is that they are merely “recommendations.”<sup>40</sup> However, the partition resolution was addressed in part to the Mandatory power as the ICJ reminds us (in paragraph 71) in its formulation that it “recommends to the United Kingdom...and to all other Members of the United Nations the adoption and implementation... of the plan of partition.” The intention is clear that the plan should be implemented by the members of the United Nations. The British response was clearly expressed in the British House of Commons by the Colonial Secretary Creech-Jones:

The decision of the Assembly is regarded by His Majesty's Government as the decision of a court of international opinion. This is not a grudging acceptance...we wish our authority to be transferred to our successors in an orderly manner. We can only express our hope...that the greatest respect will be shown for this decision of the international authority.<sup>41</sup>

It is also the case that as the United Nations has evolved, some resolutions of the General Assembly have, in any event become regarded as creating legal norms and obligations as evidenced by the International Court of Justice's discussion of this resolution in the case.<sup>42</sup>

The second argument for the illegality of the resolution is based on a view that the United Nations lacked the power to partition Palestine and that it could not act unless the people of Palestine as a whole gave their assent, on the grounds that the people possessed sovereignty. Cattan expresses the view that;

the UN possessed no power to decide the partition of Palestine, or to assign any part of the country to a religious minority of alien immigrants in order that they might establish a state of their own. The UN could not give what it did not possess. Neither individually, nor collectively

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<sup>38</sup> Al-Ahram, September 21 1947, as quoted in: Jewish Agency for Palestine, *Memorandum on Acts of Arab Aggression to alter by force the settlement of the future government of Palestine approved by the General Assembly of the United Nations*, submitted to the United Nations Palestine Commission by the Jewish Agency for Palestine (Lake Success, New York, February 2 1948), page 3.

<sup>39</sup> Ahkbar al-Yom, October 11 1947, quoted in *ibid*.

<sup>40</sup> See: Cattan (1976)

<sup>41</sup> December 11 , 1947 quoted in: Jewish Agency for Palestine, Before the Security Council of the United Nations, Statements submitted by Moshe Shertok, Head of the Political Department and Dr Abba Hillel Silver, Chairman of the American Section, February 27 1948. Not all Palestinian lawyers disagree with this approach see: Musa W. Mazzawi, *Palestine and the Law: Guidelines for the Resolution of the Arab-Israeli Conflict* (Reading: Ithaca Press, 1997).

<sup>42</sup> See generally: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon, 1994).

could the members of the UN alienate, reduce, or impair the sovereignty of the people of Palestine, or dispose of their territory, or destroy by partition the territorial integrity of their country.<sup>43</sup>

However, while in democratic theory the people might be endowed with sovereignty, in international law only states are. As all the peoples of Palestine had been living under a mandate created by the League of Nations and administered by the British Colonial Office – with the full approval of the League of Nations Permanent Mandates Commission – Palestine was not a state and did not possess sovereignty. It is also worth stressing that despite this the UN did attempt to consult both peoples of Palestine through the UNSCOP and the Palestinian Arab's representatives refused to recognize it. In addition the United Nations Charter in article 103 creates a hierarchy of sources of international law as it states that "in the event of a conflict between an obligation under the Charter and another international obligation, the obligation under the Charter shall prevail." Resolutions adopted by the United Nations principal organs are such obligations under the Charter as the Lockerbie Case (1992) clarified.<sup>44</sup>

When the British withdrew from Palestine on May 14 1948 the State of Israel was proclaimed. Palestine was already in the midst of an armed conflict between the Yishuv and Arab militias. The neighboring Arab states then formally added their weight to the irregular forces and attacked the new state. In the course of the war Israel extended the areas of its control from the 54% intended by the partition resolution to 78% of Mandate Palestine including West Jerusalem. During the war 700,000 Palestinians fled or were expelled by Israeli forces from this territory.<sup>45</sup> At the end of hostilities a general armistice agreement provided for clear lines of demarcation between the parties (the ICJ highlights the Rhodes agreement between Israel and Jordan, April 3 1949)<sup>46</sup> which became known as the Green Line.<sup>47</sup>

In June 1967 during the Six Day War Israel conquered the West Bank, Gaza and East Jerusalem. Again the ICJ refers to the key Security Council resolution passed in November of that year, resolution 242<sup>48</sup> that in the summary of the Court "emphasized the inadmissibility of acquisition of territory by force and called for the "withdrawal of Israeli armed forces from territories occupied in the recent conflict," and "termination of all claims or states of Belligerency"" (paragraph 74). As a consequence of the norms contained in this resolution the Security Council has regularly adopted resolutions which define as null and void acts that Israel has taken in the West Bank, Gaza and East Jerusalem to treat the territory as their own, through the building of settlements and the purported annexation of East Jerusalem and some adjacent West Bank areas. After the latter act the Security Council adopted resolution 478 (1980) which states that, "All legislative and administrative measures and actions taken by Israel, the Occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem... are null and void."

Taking the key three legal texts together, which the ICJ refers to, the Mandate, the Partition resolution and Security Council resolution 242, the status of the West Bank, Gaza and East Jerusalem are seen as occupied territories under international law and therefore the regime of Geneva Convention IV applies. Significantly the ICJ regards the area to the west of the Green Line as "the territory of Israel itself" (see: paragraph 67)." The Court's clarification makes a clear legal distinction between the area west of the Green Line (Israel) and the area to the east (Palestinian territory). The occupation is characterized as contrary to the right of self-determination of the Palestinian people which results in the logic that the building of the wall on occupied territory is illegal. The Court does not regard the building

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<sup>43</sup> Cattan, (1976), 75.

<sup>44</sup> See: Case Concerning the interpretation and application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahuriya v United Kingdom, General List 86 (1992) at: [http://www.icj-cij.org/icjwww/idocket/iluk/ilukjudgment/iluk\\_jjudgment\\_frame.htm](http://www.icj-cij.org/icjwww/idocket/iluk/ilukjudgment/iluk_jjudgment_frame.htm) (last visited December 9 2005).

<sup>45</sup> See: Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Cambridge: Cambridge University Press, 1987).

<sup>46</sup> Paragraph 72.

<sup>47</sup> See: Avi Shlaim, *The Iron Wall: Israel and the Arab World* (London: Penguin, 2000), 29-53.

<sup>48</sup> This position was confirmed by the Security Council in resolution 338 (1973) after the October Israeli-Egyptian/Syrian war of that year.

of the wall on Israeli territory as illegal (again see paragraph 67). Thus, it is worth underlining that in the jurisprudence of the court the area that was until 1948 Mandate Palestine is designated as two distinct territories, Israel and Occupied Palestinian Territory. This reflects the international community's view of the Palestinian-Israeli conflict since 1922 at least, that there are two legitimate peoples in the country. In 1947 the view was that the best way of dealing with this recognition was the creation of two states on the basis of territorial division. This view has been quite persistent and surfaced again in the international support for the Oslo Agreements in 1993 which implicitly promoted a two state solution and the Performance Related Roadmap for Peace, 2003 which explicitly envisages a Palestinian state living alongside Israel.<sup>49</sup> The roadmap was preceded of course by Security Council resolution 1397 (2002) that also puts the Council's *imprimatur* on this option.

In outlining its opinion on the legal consequences of the wall the International Court of Justice at no time makes an analogy with apartheid. The critical areas of law that the Court discusses are, self-determination, international humanitarian law, human rights law and the doctrine of self-defense. The references to human rights law are not framed in the context of apartheid or racism. Palestinian Occupied Territory is seen as the victim of colonial occupation that has now lasted for nearly four decades. The wall symbolizes not a record of the application of apartheid but attempts at the annexation of territory as the route of wall is dictated by the Israeli government's attempt to incorporate the many of the illegally built settlements on the western side of the wall alongside Israel. In addition the wall represents the super-security colonial regime. Beyond the wall on its eastern side Palestinians are intimately regulated through a system of checkpoints and passes. The attempt to change the ethnic population balance through settlements together with the massive land appropriations (for the settlements, the wall and the road system) are all contrary to the provisions of Geneva Convention IV (1949). These actions are also contrary to the United Nations General Assembly resolution 2625 (XXX) of 1970 which states that colonial regimes are not permitted to treat a colony as if it is their own territory.

The Court took the view thus, that the legal issue at stake is the occupation of Palestinian territory and it is this that constitutes a denial of the right to self-determination. In doing so quite clearly it turns to the next legal sources which are the texts of the Oslo peace process.<sup>50</sup> As the Opinion states,

as regards the principle of the right to self-determination, the Court observes that the existence of a "Palestinian people" is no longer in doubt. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, the Israeli Prime Minister. In that correspondence, the President of the PLO recognized "the right of the State of Israel to exist in peace and security" and made other commitments. In reply, the Israeli prime Minister informed him that, in the light of those commitments, "the government of Israel has decided to recognize the PLO as the representative of the Palestinian people." The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its "legitimate rights" (Preamble, paras 4,7, 8; Article II, para 3; Article III, paras 1 and 3; Article XXII, para 2). The Court considers that these rights include the right to self-determination, as the General Assembly has recognized on a number of occasions (see for example, resolution 58/163 of 22 December 2003).<sup>51</sup>

In concluding this section of the opinion the Court it says "That construction. [of the wall] along with other measures taken previously, [settlements] seriously impedes the right to self-determination, and is therefore a breach of Israel's obligations to respect that right."<sup>52</sup>

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<sup>49</sup> A Performance-based Roadmap to Permanent Two-State Solution to the Israeli-Palestinian Conflict, at: <http://www.un.org/News/dh/mideast/roadmap122002.pdf> (last visited, December 10 2005). The UN Security Council endorsed the roadmap in resolution 1515 (2003).

<sup>50</sup> For a discussion of the Oslo Agreements in a legal context see: Geoffrey R Wilson, *The Oslo Agreements: International Law and Israeli-Palestinian Peace Agreements* (Oxford: Oxford University Press, 2000).

<sup>51</sup> Paragraph 118.

<sup>52</sup> Paragraph 122,

The Court's Opinion has great significance in establishing the sources of law that determines the status of the territories on each side of the Green Line. Through its reading of the Mandate, the partition resolution, Security Council resolution 242, the Oslo peace agreements and the Roadmap constitute these sources. Many legal arguments that have challenged the validity of some or all of these sources are rejected by the Court. Its position is that we are dealing with two peoples, both of which have international legal personality and both of which are endowed with the right of self-determination. While all Israeli activity in Palestinian territory is confirmed as illegal and null and void – including the construction of the wall – the legitimacy of the State of Israel is also re-affirmed. The opinion also represents a development of legal doctrine in the conflict by talking of the territory to the west of the Green Line "as the territory of Israel itself" (paragraph 67). This has two important implications. The first is that the Green Line originally demarcated as an armistice boundary has acquired the status of international boundary. The second is that the status of Jerusalem which has been regarded since 1947 as indeterminate (due to its assigned international status under the partition resolution) has been altered. Under this new formulation, West Jerusalem is part of Israel and East Jerusalem part of Palestine – albeit occupied Palestine.

The Court's concluding paragraph outlines the international legal community's support for a two state solution which it stresses has to be seen within the framework of this legal lineage.

The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law....The Court considers itself bound to add that the construction must be placed in a more general context. Since 1947, the year when the General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize how both Israel and Palestine are under an obligation to scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through the application in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the attention of the General Assembly, to which the present Opinion is addressed, to the needs for this efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishments of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.<sup>53</sup>

The Opinion of the Court constitutes an authoritative clarification of the law on the status of Israel and Palestine. Both are regarded as legitimate. The absence of any reference to the jurisprudence of the Court to apartheid which had been an issue such cases as the South West Africa cases (1966)<sup>54</sup> and the Namibia (1971)<sup>55</sup> was striking. In those cases one of the issues at stake was the application of apartheid to a former mandated territory. The Court makes no comparisons with that situation, not does it suggest the character of Israeli occupation of Palestine constitutes a racist regime.

## South Africa and Apartheid

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<sup>53</sup> Paragraph 162.

<sup>54</sup> South-West Africa Cases (Ethiopia v South Africa, Liberia v South Africa, 1966, at: <http://www.icj-cij.org/ijwww/idecisions/summaries/ilsaesasummary660718.htm> (last visited October 23 2005).

<sup>55</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), June 1971, at: <http://www.icj-cij.org/ijwww/idecisions/summaries/inamsummary710621.htm> (last visited October 23 2005).

South Africa was a founding member of the United Nations and although the policy of apartheid was as yet to be adopted the Union of South Africa was based on a racist constitution which denied equality in terms of the vote and the right to own land to the majority non-white population. The South African 1910 Constitution (an Act of the British Parliament) provided for some representation of the non-white majority providing the candidate elected where white. The election of the National Party in May 1948 ushered in the new policy of apartheid. This policy was built on racial segregation which had characterized the law and politics of South Africa's first 38 years. A country, which itself, had been created out of a long history of racial oppression which had begun in 1652 with the arrival of the Dutch in the Cape. The Dutch ceded to the British in 1806, by which time a sizable Dutch-speaking white population had settled in the Cape. The new British colonial regime while racist was more paternalistic towards the non-white population than the Dutch settlers. As a result of conflicts between the British and the Dutch population the Great Trek took place where the latter moved into what is today KwaZulu Natal and then into the interior. They eventually established two independent racist republics, the Transvaal and the Orange Free State. The African population was assigned the status of slaves or servants and their land was seized from them and allocated to white framers. With the discovery of gold in the Transvaal British interest in the area increased which led to the Anglo-South African war of 1899-1902 (sometimes referred to as the Boer War in English accounts). The vicious conflict saw the British use concentration camps in an attempt to separate the civilian – mainly women, children and aged – from the Afrikaner militia fighters, where 26,000 of them died. After the war the British adopted a policy of reconciliation between the white populations – there now being a sizable English speaking community. This resulted in the creation of the Union of South Africa.<sup>56</sup>

The project to create a theoretical convergence between this history and that of Zionism became significant in the 1970's. Much was made of Britain's policy in Africa at the beginning of the twentieth century suggesting that in part it was animated by Zionist or Jewish interests. This analysis starts in 1902 when the British Colonial Secretary, Joseph Chamberlain, approached Theodor Herzl and the Zionist movement with a proposal to create a Jewish colony in East Africa.<sup>57</sup> The project for a Jewish colony is linked to the idea that this would buy Jewish support for the creation of the British-Afrikaner rapprochement in Southern Africa. Richard Stevens in various pieces, for example attempts to build this case.<sup>58</sup> In one article he argues the connections thus

A recent visitor to South Africa, Chamberlain realized that the ultimate success of his white conciliation policy in the post-Boer War era might turn on whether he received Jewish support. Faced with crushing financial burdens in the war's aftermath, the Colonial Secretary was aware that only the great industrial and mineral wealth of the Rand could bring about the reconstruction of South Africa. Yet of all the British Dominions, South Africa was the one in which Jews and Jewish capital were the most deeply interested. As Julian Amery, Chamberlain's biographer noted, "the Rand, in particular, was mainly in Jewish hands, and ...it was upon its prosperity that Chamberlain and Milner countered for the reconstruction and future progress of South Africa."<sup>59</sup>

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<sup>56</sup> See: Nigel Worden, *The Making of Modern South Africa: Conquest, Segregation and Apartheid* (Oxford: Blackwell, 1995).

<sup>57</sup> This is frequently referred to as the Uganda plan, although in fact the area that Chamberlain offered was in Kenya.

<sup>58</sup> See for example: Richard P Stevens, *Weizmann and Smuts: A Study of Zionist-South African Cooperation* (Beirut: Institute of Palestine Studies, 1975). The argument here is that as Jan Smuts, a former Boer general and then political leader and Prime Minister of South Africa was not only a Zionist but one of the architects of the Mandate system, this demonstrates the deep connection between apartheid and Zionism. As he was racist, the account goes, this demonstrates that the racist nature of Zionism. The dubious logic is also compounded by the fact that apartheid was only introduced after Smuts and his United Party were defeated by the National Party on May 27 1948.

<sup>59</sup> Richard P Stevens, *The Settler-Colonial Phenomenon in Africa and the Middle East: The Passing of an Era?* (Khartoum: University of Khartoum, n/d), 9-10.

In the argument being advanced Jews are portrayed as powerfully positioned and wealthy and have a critical influence in South Africa. However, any research on the connection of Jewish connections with the Rand in early twentieth century will yield the name of only one Industrialist of Jewish origin (Max Mangermann). The idea that the creation of the racist Union of South Africa turned on Jewish support must be part of the realm of conspiracy theory at its crudest. It is also significant that the source of Stevens "Jewish connection" comes from the arch-Imperialist British politician Julian Amery. This footnote of theory of the connections between apartheid and Zionism is to be noted I think, as this view and images of powerful "Jewish capital" has seeped its way into the discourse. It is also striking how the connection is made between Jews and the creation of racist South Africa and not Zionism as such. Stevens even claims that later, under apartheid, that "Afrikaaner Settler ideology could thus bend in favor of pragmatic gains (as witnessed in 1947-8 by shedding its anti-Semitic character and adoption of its pro-Israel policy to win the Jewish vote)."<sup>60</sup> Historically of course during the critical months of this period – November 1947-May 14 1948 – it was Smuts' United Party and not the apartheid National Party that was in power. Thus by the time that National Party assumed office Israel had already been recognized by South Africa. As for the point about winning the Jewish vote, the National Party leadership was even in the 1960's castigating Jewish voters for backing the anti-Apartheid Progressive Party, whose sole Member of Parliament at the time was Jewish, Helen Suzman.<sup>61</sup>

In 1948 the National Party government of F.D. Malan sought to transform the previous three centuries of racist colonial regimes it into a systematic institutional framework on a permanent basis. The pillars of the apartheid system took the form of two laws, the Population Registration Act, 1950 and the Group Areas Act 1950. The first classified all South Africa's population into White, African Colored and Indian. This was to be done at birth at all arguments as to which racial group a person belonged to would be decided by a Racial Classification Board. The Second zoned South Africa into areas in which the different races would then be compelled to live. Apartheid was thus based a rigid separation of the racial groups.<sup>62</sup> This was underlined by the Prohibition of Mixed Marriages Act 1949, and the Immorality Amendment Act, 1950 (as amended in 1957) made marriage and sexual relations across racial divisions illegal. Through employment and labor laws certain jobs were reserved for white people and wages for white were fixed on a far higher scale than for non-whites. At the political level all non-white influence was eradicated from state institutions. The few non-whites who could vote for Parliament were removed from the electoral roll and all power was securely placed in the hands of white people (Separate Representation of Voters Act 1951). Land ownership for Africans was restricted to the 13.5% allocated by the Native Land Act 1913. These areas were eventually reconceived as Bantustans which were to become the so-called homelands for the 80% of the population who were African. The consequence of this policy was that all Africans living outside of these areas were treated as if they were outside of their own country and were deprived of their South African citizenship (Bantu Homelands Citizen Act 1970). This reinforced the system of internal visas known as the pass laws. These passes allowed Africans to live outside the homeland (to which many had never even been) provided they had a job and were of course restricted to living in African-only townships. Failure to carry the pass was a criminal offense and many Africans who were held to be in contravention of the pass laws were effectively deported to the homelands. Education was strictly segregated and the syllabus was ideologically informed to provide "Bantu education" for Africans to teach an entire people that their role in society was subordinate (Bantu Education Act 1953) as opposed to "Christian-national" for whites which taught the opposite that they were superior. When Minister of Bantu Education, Verwoerd explained that the policy was to ensure that "the natives will be taught from childhood to realize that

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<sup>60</sup> Ibid, 28.

<sup>61</sup> See: Brian Bunting, *The Rise of the South African Reich* (Harmondsworth: Penguin, 1964), 65-66. In private letter made public in 1961, the Prime Minister Dr Verwoerd castigated Israel for voting against apartheid at the United Nations he drew attention to the fact that the large number of Jewish votes for the progressive party had not gone "unnoticed." Verwoerd latter defended the letter and when accused of issuing threats to Jewish votes who supported the progressives, replied, "If I want to threaten the Jews of South Africa, I will threaten the lot of them." (In Bunting, 66).

<sup>62</sup> Ibid., 142-159.

equality with Europeans was not for them.”<sup>63</sup> Universities were segregated on racial lines through the misnamed “Extension of University Education Act of 1959.” In addition to this grand racist design, many laws and by-laws that were introduced to enforce what became known as “petty apartheid” which created racial segregation for public transport, entrances to public buildings, park benches, beaches and restaurants (Reservation of Separate Amenities Act, 1953). The widely drawn Suppression of Communism Act 1950 curtailed free speech and by 1960 the African National Congress and other liberation movements had been banned.<sup>64</sup>

## The United Nations Response to Apartheid

The National Party government policy to classify all people according to race and then to allocate all rights on that basis was despite the provisions in the United Nations Charter promoting human rights without discrimination on the basis of “race, sex and religion” (article 1.3 UN Charter). South Africa nonetheless remained a member of the UN. However, as the United Nations matured especially with the admission of the newly independent states the application of the Charter changed significantly especially with the adoption of the UN General Assembly resolution 1514 on the granting of independence to colonial peoples and territories in 1960. In the early 1960’s there are a series of UN Security Council resolutions which condemned apartheid as being contrary to the United Nations Charter.<sup>65</sup> This collective view crystallized eventually into the International Convention on the Suppression and Punishment of the Crime of Apartheid (UN General Assembly resolution 3068 [XXVIII] in 1973 – it came into force in July 1976.)<sup>66</sup>

The Convention defined the crime of apartheid in article II as follows:

For the purpose of the present Convention, the term “the crime of apartheid”, which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person
  - (i) By murder of members of a racial group or groups;
  - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
  - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
- (d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial

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<sup>63</sup> Ibid., 205.

<sup>64</sup> See generally: *ibid.*

<sup>65</sup> See: Boutros Boutros-Ghali, *The United Nations and Apartheid* (New York: United Nations, 1994) and Louis B Sohn, *Rights in Conflict: The United Nations and South Africa* (Ardsley: Transnational Publishers, 1994)

<sup>66</sup> See: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/281/40/IMG/NR028140.pdf?OpenElement> (last visited December 10 2005).

- group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid

The Convention's definition of the crime of apartheid is set in the context of making illegal the racial system that the apartheid government introduced. The seven different crimes are clearly mapped on to the South African legislation. While the convention is drafted in such a way that the crimes could be committed by any government carrying out these policies they are placed in the context of "similar policies and practices of racial segregation and discrimination as practised in southern Africa." At the time of the adoption of the Convention the other similar regime was Smith's Rhodesia. This constitution of the crime of apartheid as a crime against humanity follows a long period in which the international community had opposed South African racist policies. It does need to be stressed, however, that despite over 100 ratifications the Convention was never used as the basis of the prosecution on any government, individuals or groups.<sup>67</sup>

The Bantustan policy was discussed by the General Assembly in 1976 when the South African government purported to recognize the independence of the Transkei, the United Nations declared it:

1. *Strongly condemns* the establishment of bantustans as designed to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights;
2. *Rejects* the declaration of 'independence' of the Transkei and declares it invalid;
3. *Calls upon* all Governments to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei or other bantustans;
4. *Requests* all States to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with the so-called independent Transkei or other bantustans.<sup>68</sup>

This clear position was based on the rejection of the argument of the South African government that their policies were the application of the principle of self-determination. The Bantustan policy had been introduced into an attempt to foster a divide and rule environment through an attempt to sub-divide the African population into separate groups based on language and ethnicity. Far from being the free choice of the people concerned it was imposed upon them by government diktat. The principle of self-determination is described as "right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development."<sup>69</sup> The Bantustan policy was the opposite of this.

The pattern of the international legal community's response is thus quite far reaching. Apartheid is not just a policy of a government that the international community disapproved of but it is regarded as illegal in itself on human rights grounds and as denying South Africans the right to self-determination. The regularity with which these norms are re-affirmed by both the General Assembly and the Security Council indicates that this is not an episodic or accidental view but one which is considered and constant. The Security Council formulated this forthrightly in its resolution 473 (1980) where it summed up the position that the Council;

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<sup>67</sup> Although within South Africa attempts were made to use the law to oppose apartheid where possible, see: Richard Able, *Politics by Other Means: Law and the Struggle against Apartheid* (London: Routledge, 1995).

<sup>68</sup> UN General Assembly resolution 31/6 A, 1976.

<sup>69</sup> UN General Assembly resolution 2625 (XXV), 1970.

3. Reaffirms that the policy of apartheid is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of man, the Charter of the United Nations and the Universal Declaration of Human Rights, and seriously disturbs international peace and security;
4. Recognises the legitimacy of the struggle of the South African people for the elimination of apartheid and for the establishment of a democratic society in which all the people of South Africa as a whole, irrespective of race, colour, or creed, will enjoy equal and full political and other rights and participate freely in the determination of their destiny.

### Israel and the Palestinian Occupied Territories

Many accounts of the legal comparison between Zionism and apartheid are long on rhetoric and short on law.<sup>70</sup> International law is reduced to platitudes and the opinions of academics and politicians are relied on rather than legal texts from authoritative institutions. The “legal discourses” of the comparison present injustices in Israel and by the Israeli government as the logical outcome of an ideology which are predetermined. These accounts also assume that international legal doctrine is timeless and has not drastically changed during the period of the conflict. It is also the case in presenting a legal case against an essentialized Zionism, the actual legal situation of the colonization of the West Bank, Gaza and East Jerusalem is ignored. In this short review of this much debated issue I have attempted to demonstrate through an engagement with the legal sources that there is not only a profound difference between Israel and apartheid South Africa historically but also legally. Superficial similarities especially in some of the time frames (the year 1948 and the peace processes in the early 1990’s) should not obscure these differences. To a great degree the legal issues of the Palestinian-Israeli conflict have been enframed by many on both sides in the ideological international law that was common at the height of the cold war.

It was perhaps not an accident that the end of the Cold War opened the path to negotiations between Palestinians and Israelis.<sup>71</sup> It was not just a new political moment but a new jurisprudential one as well. The Oslo agreements saw both the PLO leadership and the Israeli government move from pragmatic recognition of each other as parties to the conflict to legally recognized and legitimate persons of the international community. It is within this context that Palestinian self-determination became seen within the parameters set by the international legal community for most of the 20<sup>th</sup> century in which two peoples had to accommodate their aspirations within the territory of British Mandate Palestine. As the opinion of the International Court of Justice demonstrates this means the unconditional right of Palestinians to self-determination within the occupied territories and the right of Israelis to self-determination within Israel, west of the Green line. Israel’s legal duties to the Palestinians arise directly out of its sovereign existence. In South Africa the international legal community did not recognise that there were distinct peoples. The South African people, as a whole, were seen as possessing the right to self-determination and that the barrier to exercising that right was therefore the removal of discrimination. The African National Congress has since its foundation in 1909 argued for an inclusive South African nationalism whereas most Palestinian and Zionist organizations had argued for the recognition of distinct national identities.

A major problem for both parties has been the inability to grasp the new legal opportunities of the post-Cold War period. The old baggage has been brought into the new period. While the political and legal trajectory of the PLO has been towards the two-state solution, as seen in the Algiers’ Declaration

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<sup>70</sup> See for example: Nafeez Mosaddeq Ahmed, “Apartheid in the Holy Land: Racism in the Zionist State of Israel,” a paper prepared for the United Nations Conference against Racism, Racial Discrimination, and Xenophobia and Related Intolerance, August 7, 2001 at: [http://www.mediamonitors.net/mosaddeq11.html#\\_edv.11](http://www.mediamonitors.net/mosaddeq11.html#_edv.11) (last visited December 10 2005).

<sup>71</sup> See for example: Ahmed Qurie (‘Abu Ala’) *From Oslo to Jerusalem: The Palestinian Story of the Secret Negotiations* (London: I.B. Tauris, 2006).

of 1988,<sup>72</sup> the decision to sign the Oslo Agreements and support the roadmap, this has been marked by the attempt to cling a previous narrative. The position expressed in the Algiers Declaration is symbolic of this. In referring to the General Assembly partition resolution it says;

despite the historical injustice done to the Palestinian Arab people in its displacement and in being deprived of the right to self-determination following the adoption of General Assembly resolution 181 (II) of 1947, which partitioned Palestine into an Arab and a Jewish State, the resolution nevertheless continues to attach conditions to international legitimacy that guarantee the Palestinian Arab people the right to sovereignty and national independence.<sup>73</sup>

In this account the partition resolution is both historically unjust while at the same time it “attaches conditions of international legitimacy” to the Palestinians. It is difficult to see how both these positions can be maintained at the same time – or at least how, in the context of the resolution, what can be legitimate for the Palestinians is not equally legitimate for the Jews.<sup>74</sup> Thus what was a major political shift was accompanied by a more problematic legal discourse. As the Cold War drew to a close and the Soviet Union was re-evaluating its attitude towards international law.<sup>75</sup> The move from the ideological division within international law<sup>76</sup> towards common values between the political blocs had significant implications for the, then Third World (including national liberation movements) as well. Imperialism as a legal doctrinal category was removed from the lexicon. This meant that binary approaches to international legal narratives that were characterized by constructing “just” norms within the anti-Imperialist camp and “unjust” ones in the Imperialist one were no longer tenable. As a result historical accounts that were drawn from this methodology also became problematic. With the evaporation of the Soviet Union and the Eastern European political systems so, these approaches to international law became even more anachronistic. Nor is it only the Palestinian international legal narrative that has been constructed by it. Israel too has, in its dominant account of international law has been defensively ideological. The Israeli government’s rejection of the opinion of the International Court of Justice has been illustrative of this approach.<sup>77</sup> The result of these legal narratives is the often extremely tenuous and conditional acceptance of the legitimacy of other party – and its legal arguments.

The return to the apartheid analogy invokes this unhelpful legal history. As I have argued the comparison with apartheid and Israel or Israel’s occupation is not present within international legal doctrine. The rhetorical use the comparison acts as a barrier to serious legal and political engagement with what is actually taking place on the ground.

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<sup>72</sup> Adopted November 15, 1988, see: Paul J.I.M. de Waart, *Dynamics of Self-Determination in Palestine: Protection of Peoples as a Human Right* (Leiden, New York, Koln: E.J. Brill, 1994), 225-230, and see also: Francis A Boyle, The Creation of a Palestinian State, *European Journal of International Law*, Vol. 1 Nos. 1-2 (1990), 301-306; James Crawford, The Creation of a Palestinian State: Too Much too Soon? *European Journal of International Law*, Vol. 1 Nos. 1-2 (1990), 307-313.

<sup>73</sup> De Waart (1994), 227.

<sup>74</sup> See for example: Walid Khalidi, Revisiting the UN Partition Resolution, *Journal of Palestinian Studies*, Vol. XXVII, No. 1 (1997), 5-21. These views are reliant on Cattán, however, one response to Cattán (Nathan Feinberg, *On An Arab Jurist’s Approach to Zionism and the State of Israel* (Jerusalem: Magnes Press, 1971) makes exactly the same point although the other way around. In this account the Jew’s gain legitimacy and Palestinians do not. For a similar view from an Israeli standpoint see: Yoram Dinstein, “The United Nations and the Arab-Israeli Conflict” in John Norton Moore (ed.) *The Arab-Israeli Conflict* (Princeton: Princeton University Press, 1977), 556-594.

<sup>75</sup> See: Mikhail Gorbachev, *Address to the United Nations General Assembly* (Moscow: Novesti Press, 1988). In this speech the Soviet President called for an end to ideology in international law and for “an accord within the framework of the United Nations of a uniform understanding of the principles and norms of international law.”

<sup>76</sup> See for example: G.I. Tunkin, *Theory of International Law*, translated by William E Butler (London: George Allen & Unwin, 1974)

<sup>77</sup> Unofficial Summary of State of Israel’s Response Regarding the Security Fence, at: <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Summary%20of%20Israels%20Response%20regarding%20the%20Security%20Fence%2028-Feb-2005> (last visited December 10 2005).

The Israeli governments since Ariel Sharon's have attempted to impose a new territorial dispensation on the occupied territories. The wall in the West Bank is an attempt to annex territory to Israel while weakening the territorial contiguity of the future Palestinian state. The lesson of the Gaza disengagement process must be that the Israeli administration is determined force the Palestinians into accepting as a *fait accompli* a small, weak Palestinian state.<sup>78</sup> Whether this takes place within the context of negotiations with the Palestinians in the context of the internationally agreed roadmap or unilaterally (although probably in accord with the US government) is clearly uncertain.<sup>79</sup> Since the formation of the new Israeli Kadima-led government, Sharon's successor Ehud Olmert and his chief associates have officially and unofficially floated many territorial options. The features of this approach seem to amount to a plan to annex most the territory to the west of the wall (the settlement blocks) and the maintenance of Israeli control over all of Jerusalem and strategic areas of the Jordan Valley. This is not apartheid but rather territorial expansion. Now should be the time to concentrate on this reality and to insist on the legal starting point elaborated by the International Court of Justice in its opinion on the wall. Israeli's colonialism in the West Bank, Gaza and East Jerusalem has been found to be illegal and unacceptable by the international legal community. This may be late colonialism but the international community, including Israelis and Palestinians need to work together to end it.

Essentialist arguments that construct Zionism as only colonialist and expansionist have a paralyzing impact on the effort needed in both political and legal strategy to change the current situation.<sup>80</sup> Suggestions, that the apartheid analogy can arm Palestinians with strong legal positions to their advantage are erroneous for two reasons. First it has no resonance in the international legal community. Second it is based on an incorrect assumption that the South African liberation was able to use the doctrinal illegality of apartheid in a legal setting. This was not the case. Indeed with the end of apartheid far from pursuing this legal route the ANC was vigorous supporter of the peace and reconciliation process.<sup>81</sup> What the legal issue did offer the ANC in the struggle against the regime was a great deal of legitimacy both in motivating its own base and in building broad international support. This is perhaps the lesson for the Palestinian cause. The issue is then to address the most effective way to utilize the international legal characterization of Palestine as occupied territory.

A Palestinian state in the West Bank, Gaza and East Jerusalem on the basis of Security Council 242 is an attainable goal. Just because Israel has built settlements, the road system and the wall does not mean that these are either permanent or permanently assigned to Israeli control. The annexation plans of the present Israeli government need to be opposed through building on the arguments advanced at the International Court. As the French settlers of Algeria found in the 1960's colonial occupations do come to end – especially when faced by a united national movement and a supportive international community. The task is ending one of the last colonial regimes bequeathed by the last century. This means not dismantling Israel but liberating Palestine. The Israeli government's disengagement from Gaza was a small step but it does demonstrate the direction the events are moving. The legal implications must be to campaign for the Israeli government to end its boycott of the Palestinian National Authority, ends its attacks on Gaza and enter into real negotiations to end the occupation. Building support for a viable two-state solution has never been so important – or as the International Court of Justice indicates, so legitimate.

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<sup>78</sup> This in my view has been a policy of sections of the Israeli right for some time, see: John Strawson, Netanyahu's Oslo: Peace in the Slow Lane, *Soundings*, Issue 8 (1998), 49-60.

<sup>79</sup> See: Israel Ministry of Foreign Affairs, Israel's Disengagement Plan: Renewing the Peace Process, April 20, 2005 at: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israels+Disengagement+Plan-+Renewing+the+Peace+Process+Apr+2005.htm> (last visited December 10 2005)

<sup>80</sup> See for example: John Rose, *The Myths of Zionism* (London and Ann Arbor: Pluto Press, 2004), and for an account of personal nature see also: Susan Nathan, *The Other Side of Israel* (London: HarperCollins, 2005).

<sup>81</sup> See: Richard A Wilson, *The Politics of Truth and Reconciliation: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001).