Introduction

Since 2008, I have had the distinct privilege of serving as the Editor-in-Chief of the *Palestine Yearbook of International Law*. As all good things must come to an end, this volume represents my last. Looking back, it is hard not to marvel at just how much has changed during the past decade, and across a multiplicity of landscapes, both legal and political.

At the local level, we bore witness during this period to a marked regression in the situation faced by the people of occupied Palestine. This included: the ongoing blockade and siege of the Gaza Strip, punctuated by a continuous series of armed aggressions by the Occupying Power, rendering the place “unlivable” according to the United Nations (UN),¹ to say nothing of the thousands killed and injured, and hundreds of thousands displaced;² the continued colonization of the West Bank, including East Jerusalem, through the ongoing settlement by the Occupying Power of its civilian population in the territory, now numbering between 620,000–670,000 people (or approximately 23–25% of the total population of the territory);³ and the ongoing physical and administrative fragmentation of occupied Palestine, whether through the reification of the ‘interim’ Oslo framework (*e.g.* the Palestinian Authority; Areas A, B, C; etc.), the wall and its associated regime, and the intensification of Israel’s

- 1 U.N. OCHA, *Gaza in 2020: A Livable Place?* (Aug. 2012), <http://gaza.ochaopt.org/2012/08/gaza-in-2020-a-liveable-place/>. See also, U.N., *Gaza ‘Unlivable’; UN Special Rapporteur for the Situation of Human Rights in the OPT Tells Third Committee – Press Release*, Seventy-Third Session, 31st and 32nd Meetings (AM & PM), U.N. Doc. GA/SHC/4242 (Oct. 24, 2018), <https://www.un.org/unispal/document/gaza-unlivable-un-special-rapporteur-for-the-situation-of-human-rights-in-the-opt-tells-third-committee-press-release-excerpts/>.
- 2 See, *e.g.*, *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009); *Report of the Independent International Commission of Inquiry Established Pursuant to Human Rights Council Resolution S/21-1*, U.N. Doc. A/HRC/28/79 (Mar. 26, 2015).
- 3 ICC-CPI, *Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine*, Situation in the State of Palestine, No. ICC-01/18 (Jan. 22, 2020), at n307, https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF [*hereinafter* ICC Prosecution Request].

system of racial segregation⁴ and apartheid;⁵ or the ongoing split between rival Palestinian authorities in the West Bank and Gaza Strip and the continued atrophy suffered by the Palestine Liberation Organization (PLO). The situation of that portion of the Palestinian people who remain inside Israel has become worse, as their civil, political, economic, social and cultural rights continue to be violated, as evidenced by the numerous laws that discriminate against them in all areas of life (*e.g.* equal access to land and property, social and economic benefits, citizenship and entry, and family unification),⁶ epitomized by the July 2018 passage by the Knesset of the *Basic Law: Israel as the Nation-State of the Jewish People*, through which racial and religious discrimination has been consolidated as a constitutional norm.⁷ At the same time, the plight of the Palestine refugees has continued to fester, both within the occupied Palestinian territory (oPt) and in the host States, with little promise that they will ever realize their inalienable rights under international law.

During the same period, the situation was hardly better at the regional level. Despite the initial hope wrought by the 'Arab Spring,' we have witnessed the virtual collapse of large portions of what was an already enfeebled Arab State system. Multiparty civil wars in Libya, Syria, and Yemen have produced human catastrophes that the world has not witnessed since the Second World War, with millions of civilians given no quarter from the effects of armed conflict. Early success stories in Tunis and Cairo have also not borne the fruit promised by the revolutions that once took hold of them. All of this has resulted in an even greater exposure of the Arab world to geo-political intervention from without. As a result of its political implosion, the Arab region remains a laboratory for regional and international superpowers, including for the 'progressive development' of international laws shaped by them and their proxies (think, for example, the ostensibly 'legal' justifications for the 'war on terror,' 'preemptive' self-defense, and autonomous drone warfare). In this context, while ordinary people in the Arab street have been increasingly alienated from those who purport to rule in their name, public perceptions of the value of international

4 U.N. CERD, *Concluding Observations of the Committee for the Elimination of Racial Discrimination, Israel*, U.N. Doc. CERD/ISR/CO/14-16 (Apr. 3, 2012), para. 24 [*hereinafter* CERD Concluding Observations].

5 U.N. ESCWA, *Israeli Practices Towards the Palestinian People and the Question of Apartheid*, U.N. Doc. E/ESCWA/ECRI/2017/1 (2017), https://www.middleeastmonitor.com/wp-content/uploads/downloads/201703_UN_ESCWA-israeli-practices-palestinian-people-apartheid-occupation-english.pdf. See also John Dugard & J. Reynolds, *Apartheid, International Law and the Occupied Palestinian Territory*, 24 EUR. J. INT'L. L. 867 (2013).

6 CERD Concluding Observations.

7 Adalah – The Legal Center for Arab Minority Rights in Israel, *Position Paper: The Basic Law: Israel – The Nation State of the Jewish People* (Nov. 2018), https://www.adalah.org/uploads/uploads/Final_2_pager_on_the_JNSL_27.11.2018%20.pdf.

law have never been as low. For Palestine refugees, the complete disarray that has engulfed the region has understandably resulted in even greater levels of insecurity, vulnerability, and despair, whether in Lebanon, Syria, Jordan, or farther afield.

Internationally, the past decade has also witnessed a gradual decline in respect for the primacy of the international rule of law. In addition to the expanding number of regional wars and growing socio-economic gaps between North and South, this has been most apparent in an increase in the antagonistic policies adopted by the United States (US) under the Trump administration in areas as wide-ranging as climate change and protection, nuclear non-proliferation, the World Trade Organization, the International Criminal Court (ICC), and the UN. Nor has Palestine been spared in this concerted attack on the multilateral order, once championed by Washington. In its case, this attack has taken a particularly cruel turn, as the US has unashamedly turned its back on the two-state framework it once sponsored, severing diplomatic ties with the PLO, ceasing all funding of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA), questioning the very existence and legal status of the Palestine refugees, recognizing Israeli sovereignty over Jerusalem and the occupied Syrian Golan, and declaring Israeli settlements in these occupied territories to be 'legal.'⁸

A rather dismal state of affairs, one might say. But all is most certainly not lost. Given the façade of the claim of the US as the 'honest broker' for Middle East peace, one might be forgiven for feeling relieved at the emperor's clothes having finally been removed by none other than Washington itself. There can be no doubt, if there ever was one, that the US today stands not only in the position of underwriter of Israel's internationally wrongful acts in Palestine, but also as co-conspirator to those acts. If anything, this has provided Palestine with an opportunity to recalibrate its positions and tactics. The most obvious of these rests in the PLO's strategic decision to utilize the multilateral order as a means both for seeking redress for the ongoing and systematic victimization of its people, as well as for asserting the international legal personality of the State of Palestine. One of the great highlights of this period, therefore, has been the series of moves made by the State of Palestine to impose a cost on the occupation by making creative use of the multilateral system. This began with Palestine's upgrade by the UN General Assembly to non-member Observer State in November 2012,⁹ followed accession to over

8 U.S. White House, *Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People* (Feb. 2020), <https://www.whitehouse.gov/peacetoprosperity/>.

9 G.A. Res. 67/19 (Nov. 29, 2012).

90 multilateral treaties and membership in a number of international bodies whose membership is reserved only for States. This included accession to the Four Geneva Conventions of 1949 and their Additional Protocols of 1977, most major international human rights treaties, the Vienna Convention on Diplomatic Relations (VCDR), and the Rome Statute of the ICC.¹⁰ These accessions have allowed Palestine to commence a number of actions on the international plane aimed at protecting its rights. Foremost of these has been an April 2015 referral of the situation in Palestine to the ICC Prosecutor, an April 2018 inter-state communication against Israel for breaches of its obligations under the International Covenant on the Elimination of All Forms of Racial Discrimination (a precedent, as the mechanism had hitherto never been invoked by any State party), and a September 2018 institution of proceedings against the US in the International Court of Justice (ICJ) on the basis that the US has violated its obligations under the VCDR by moving its embassy to Israel from Tel Aviv to Jerusalem in May 2018. Perhaps most significantly, as at the time of writing, over 138 states (of 193 Members of the UN) recognize the State of Palestine.¹¹

For many, the above noted developments taken by the State of Palestine have brought to a head a debate that has gained strength over the past decade, one that has taken on existential proportions for those vested in the Palestinian liberation struggle. The debate demands participants to take one or the other side of a number of related binaries: Are you for one or two States? Do you believe in a top-down, statist approach at all? Or is it better to focus on a bottom-up grassroots approach to achieving justice?

For those who continue to work within a statist, two-State framework, Palestinian moves at the UN and other international organizations and tribunals have been the last line of defense for the realization of Palestinian national rights on the international plane. The value of these developments rests in a fundamental acceptance of the legitimacy of the multilateral rules-based international order, as established by and at the UN, despite the glaring inequities of doing so. Among these is the historic compromise by the PLO in 1988 to accept the 1947 partition UN General Assembly Resolution 181(II) and the two-State framework, recognize Israel within 78% of mandate Palestine, and acquiescing to a just and agreed resolution of the Palestine refugee problem. This position was/is rooted in a realist approach to the Palestinian situation, one that recognizes that in the face of overwhelming military, economic, and political odds of hegemonic actors, the only way to salvage at least a modicum of

10 For a summary of Palestine's treaty accessions and membership in international organizations, see ICC Prosecution Request, paras. 124–134.

11 *Id.*

justice for the subaltern Palestinians is to be found within the multilateral statist framework at the UN and other international organizations and tribunals.

Those who prefer to work within a bottom-up grassroots, one-State framework regard the two-State protagonists as people who are caught in a “sovereignty trap.”¹² In the face of the cold hard facts on the ground faced by the Palestinians – which signify an increase, not a decrease, of Palestinian precarity in the material world – they rightfully question the value of the statist frame of reference. Despite high sounding principles of international law that purportedly underscore the “temporariness” of Palestine’s festering predicament (*i.e.* occupation, forced exile, etc.), they beseech us to accept that the likelihood of the establishment of an independent sovereign State of Palestine in the oPt has long been dead, that fate having been sealed by over half a century of unimpeded Israeli colonization. In this material world, the ‘bantustanization’ of the oPt, and the fragmentation of the Palestinian people as a whole, has been the result of the false hope placed by the PLO in the two-State framework and the multilateral order. The facts on the ground reveal that in fact one State already exists, they argue, only that it is an apartheid State in which the indigenous people of Palestine have but one obvious path toward freedom and dignity – a civil, as opposed to a people’s, rights movement, aimed at the establishment of an old idea: one democratic State for all of its citizens, Palestinian, Israeli, Jewish, Christian, Muslim.

Without purporting to pick a side, as it were, I take the liberty to try to briefly note the merits and demerits of these positions.

Those considerations that mitigate in favour of the statist, two-State approach have to do with the fact that that it provides the Palestinians with the moral high-ground of international legitimacy. This legitimacy is located in the countless resolutions of the principle political and judicial organs of the United Nations, as informed by well-established international law, including international humanitarian law, human rights law and general principles of law. In this respect, three particular factors stand out as things that are now axiomatic in how the world understands Palestine and its people on the international legal plane. The first of these is the existence, as a matter of international law, of the Palestinian people as such. When one considers the long and sordid history of the imperial and neo-imperial effort to deprive this people of its international legal standing, this achievement is no small matter. As affirmed by the ICJ in 2004, “the existence of the Palestinian people is no longer in issue.”¹³

12 See NOURA EREKAT, *JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE* (2019).

13 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, para. 118 (July 9).

The second factor concerns the legal corollary of peoplehood, namely that its existence necessarily implies a right to self-determination. In the context of the international law on decolonization, including as it pertains to Palestine, this right entails the license to political and territorial independence to the exclusion of all others in a State of one's own. Again, given the experience of Palestine as a place long-coveted by others without regard to the interests of its indigenous people, this achievement is not insignificant. Related to these is the third factor, namely the international community's universal acceptance of the oPt as the self-determination unit within which the Palestinian people are legally entitled to exercise its self-determination.¹⁴ The status of the territory as occupied has particularly important normative value, as Occupying Powers are barred under international law from legitimately claiming rights of sovereignty over such territory. Being so barred, international law requires the Occupying Power (and all other States) to do nothing to permanently impede the right of the people of the territory to exercise its self-determination right, and indeed must take positive steps to protect and ensure the exercise of that right. The problem with all of this, of course, is that without an effective means of law enforcement on the international plane, these international legal norms continue to be honored only in their breach. As such, they have remained in the realm of the discursive, shaping the contours of what is regarded as legitimate, until such time as the requisite political will can be summoned by the relevant stakeholders to bring them to fruition.

Those considerations that mitigate in favour of the grassroots one-State approach are also rooted in international legal norms and a realism, only of a different sort. Its proponents argue that, in the face of the unrealized promise of the international law underpinning the two-State approach, the only way to maximize the realization of rights for both Israelis and Palestinians is within the framework of one democratic state encompassing the whole of the former mandate of Palestine (*i.e.* what is today Israel and the oPt). The legal norms underpinning this vision rely more on the wide array of the civil, political, economic, social, and cultural rights vested in individuals under human rights law – *i.e.* one person, one vote – and the re-imagination of the collective right of peoples to self-determination, Israeli or Palestinian, in such a manner that envisions both existing in the same space simultaneously. Whether this comes in the form of a binational or federal set up is not important. Rather what this viewpoint envisions is a different way to understand both group and peoples' rights in mandate Palestine that guards against the xenophobic, exclusivist, and racist foundations of the settler-colonialism that presently reigns in the

14 G.A. Res. 67/19 (Nov. 29, 2012).

land. For its adherents, the realism that underpins this view accepts Israeli colonization of the oPt as having been so thorough, so complete, so successful, that any effective rights-based approach must acknowledge this fact and begin afresh. At best, they argue, a 'two-State' solution would offer the Palestinians a rump-State, unable to defend itself, forever beholden to Israel. But therein lies the problem: for all of its appeal, the one democratic State ideal, whether in the federal or binational form, offers no realistic way to ensure that any relinquishment of the above-mentioned international legitimacy gained by the Palestinian people over the decades will be met with an equally historic concession on the part of Israel. Quite the opposite. With the exception of a negligible number of Israeli Jews (and supporters in the diaspora) who reject settler-colonialism's imperative of the 'elimination of the native,' to borrow from Patrick Wolfe's classic formulation,¹⁵ there is little in today's world to suggest that the powers that be in Tel Aviv will ever relinquish their superiority, which they equally regard as a thing no less hard fought for and won. What we would be left with in such a circumstance would be more, not less, apartheid; only the principles advanced in support of this view would find less adherents in a State-centric world that, for good or ill, still predominates and has shown itself easily given to looking the other way when it comes to the 'internal affairs' of States.

It is clear that this introduction is no place to take a firm position on one or the other of these positions in the debate now raging. I set them out here because they are going concerns, which I am certain will increasingly shape the debate on Palestine's engagement with international law in years to come. Rest assured, no matter how things evolve in this respect, the *Palestine Yearbook of International Law* will continue to serve as a forum for debate on these and other issues. Uncertain though the future may be, what is clear is the imperative for all who care about international law to ensure that justice be given its appropriate due, and placed at the forefront of our engagement with the discipline. Law and justice are far from the same thing. In this regard, I have every confidence that under its new leadership, the *Yearbook* will continue to serve as a site for critical engagement with international law, with an emphasis on ensuring that new and fresh voices are heard, particularly from the global south.

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15 Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, J. Genocide Res. 387 (2006).