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THE ONE-STATE AS A DEMAND OF INTERNATIONAL LAW: *JUS COGENS*, CHALLENGING APARTHEID AND THE LEGAL VALIDITY OF ISRAEL[1]

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ABSTRACT

This article provides the initial contours of an argument that uses International Law to challenge the validity of Israeli apartheid. It challenges the conventional discourse of legal debates on Israel's actions and borders and seeks to link the illegalities of these actions to the validity of an inbuilt Israeli apartheid. The argument also connects the deontological doctrine of peremptory norms of International Law (*jus cogens*), the right of self-determination and the International Crime of Apartheid to the doctrine of state recognition. It applies these to the State of Israel and the vision of a single democratic state in historic Palestine.

Let us imagine that a state[2] that resembles *apartheid* South Africa, one in which *apartheid* (separateness) was constitutionally inbuilt and explicit, were to emerge again. Let us imagine that its very *raison d'etre* would be to provide a polity with a preferential bundle of citizenship for the sake of one group and its members all over the world, this being the supreme principle of its written or unwritten constitution. Should such an *apartheid* state, as a matter of International Law, be recognised as a legal entity and as a member of the United Nations? Can there be a legal capacity to recognise such a political community? If recognition had been given long

1 I am most grateful to George Bisharat, Alexandros Ntovas and Matthew Nicholson for enlightening discussions and openings.

2 For the rest of article I am using the word 'state' but intend the notion of political community in a broader sense, one that means a union of people around a constitutional authority the justification of and limitation to which concern justice and aversion of harm. The article assumes that there will be law that governs the relationship between and within political communities according to the same rationale.

before *apartheid* became a legal issue in International Law, can and should this recognition be revoked? This article contends that the State of Israel is such a political community, which, despite its inbuilt *apartheid* is disguised in a façade of democracy (ethnocracy, see Yiftachel 2006). This article provides an argument as to why the first two questions should be answered in the negative and the third in the affirmative.

The depoliticised horizon of Palestine within International Law

When the term 'Palestine and International Law' is mentioned it is associated immediately with the conflict between the state of Israel and the Palestinian people and thus between two national movements that yearn for national self-determination, rather than with a case of dispossession, expulsion, occupation, internal displacement and discrimination of Palestinians that took effect all over historic Palestine (what is now the Jewish state and the 1967 Occupied Territories). The portrayal of equally legitimate national movements is conducted under the discourse of partition and has become a euphemistic de-politiciser of deeper legal issues that concern the legal validity in International Law of the Jewish state, that state which seemingly 'legitimately' provides for national self-determination for the Jewish People wherever they live in the world and in perpetuity. By and large, the hegemonic ambit of legal visibility that concerns Palestine has all to do with preserving the legal right of the Jewish State to exist, marginalising Palestinian memory and suffering as a result of the Palestinian *Nakba* (catastrophe) that befell them in the very manner the Jewish State was constituted. Observing the illegalities of Israeli actions is endlessly counterbalanced by Israel's right for security and self-defence to which all recognised states are entitled to which under the United Nation Charter Article 51. Thus legalism flourishes that can take the eyes and mind away from deeper issues.

By and large, legal scholarship about Palestine sustains, rather than challenges, the link made between the notion of self-determination of Jews and Palestinians and that of partition of Palestine. This now conventional wisdom gives International Law a seemingly pragmatic and reasonable progressive role, an enabler in the cooperation needed for a difficult 'peace process' aimed at a reasonable agreement about partition and borders, a much needed moderation towards a peaceful and reasonably just territorial compromise.

The misguiding ambivalence of the Balfour Declaration in 1917 that did allow for a Jewish National Home in Palestine but was silent as to whether it implied a Jewish State and hence Partition of Palestine, persisted into the 1922 British Mandate and gradually consolidated itself into a solid interpretation as to the necessity of Jewish state and partition. This

interpretation culminated in the UN General Assembly's (GA) Resolution 181 that proposed a partition of Palestine but which has been continuing to exert its political and legal dominance up to this day. Thus, egalitarian cohabitation within one Palestine moved outside the visibility of the legal/illegal dichotomy. However, once the law focuses on actual *suffering* rather than territoriality, sovereignty and national movements' narratives, it can be seen that the injustices that happened in Palestine cannot be partitioned: the whole of historical Palestine was occupied by Zionists, its non-Jewish Arab inhabitants ethnically cleansed between 1947–49, becoming refugees all over the world but also in the territories later occupied by Israel in 1967. Many Palestinians who stayed in that part of Palestine that became the Israeli State have been internally displaced (Masalha 2005) but crucially 'separated' as second class citizens in a Jewish State in which passing the test of Jewishness entailed a different kind of membership and stakes. It is partition thinking that has caused the injustice in Palestine and for that reason it is the kind of thinking which will never be able to bring justice and enduring peace to it. Palestinians who suffered injustice dwelled all over historic Palestine and cannot be territorially separated for the purposes of undoing these injustices. Only cohabitation under equal citizenship would stand any chance of responding to past injustices together with ensuring that present and future living persists in justice. International Law does not yet make central the fact that it is for the sake of the establishment and persistence of a state with a Jewish majority and character that the suffering to all Palestinians (those in the 1967 territories, the refugees and their descendants and the non-Jewish Arab citizens of Israel) was caused. It also does not make central the fact that Israel's constitutional life and interpretation is designed to sustain the Jewishness of the state, thus actively constraining genuine egalitarianism to function as foundational principle. Indeed it has become the litmus test of political moderation for International Law to *recognise* that Israel has the legal right to exist as a Jewish State in safe borders.

International Law, Weiler says, quoting Yoram Dinstein, is a good vehicle for achieving compromise. For Dinstein, the only role for International Law is to facilitate the framework for bringing about the only possible compromise, the partition of Palestine. The 'real' problem is conceived as the 'Palestinians' who, being 'extremists' find it so difficult to recognise Israel's right to exist (Weiler in Silverrburg 2002: 55–8, 71–2).

Uncritically accepting the link between self-determination and partition as the legal horizon, there are debates about the legality of the separation wall that Israel erected to protect itself, a debate that culminated in an ICJ advisory opinion that held it to be illegal (ICJ, 2003). The legality of the Israeli settlements is also a well-canvassed disagreement. Israel is constantly criticised for the *apartheid* situation of legal dualism

that it has established in the 1967 Occupied Territories, where different kinds of law apply to a person depending who they are – Jewish settlers are subject to the bundle of rights and protections of Israeli Law while Palestinians are in a legal limbo between Palestinian Authority rules and Israeli military law (see, e.g. Shehadeh 1985; Benvenisti 1989). The applicability of article 47 and 48 of the Fourth Geneva Convention that governs territory occupied by war is contested around the issue of whether these territories, not being annexed to Israel, constitute merely 'held' or genuinely 'occupied' territories. Israel's brutality in the territories are widely documented: the house demolitions, collective punishments, administrative arrests, deportations, day to day harassment, disturbance and hampering of everyday services, separation of families, surveillance, the remote controlling of movement in land, sea and air space.

The common denominator of this hyper-legality about the 1967 Occupied Territories that accepts partition uncritically (see, e.g., Strawson 2010) is the horizon of problem-construction that it manages and stabilises. This hyper-legality around Israel's actions in the territories it occupied in 1967 renders the legal validity of recognition given to Israel a non-issue and takes away the limelight from both the legal issue that concerns the recognition-challenge to Israel's very nature, and from the extent to which the whole discourse of 'occupied territories' is made possible by the unproblematic admission of an 'occupier' that otherwise is legitimately allowed to persist as a legal person in International Law.

Israel is accepted as a sovereign state which is held responsible in law for the grave breaches of International Law and Human Rights denying Palestinians self-determination and pursuing *apartheid* in the Occupied Territories. By holding Israel responsible in this way, Israel's actions that pertain to its very manner of constitution, as well as those actions that pertain to the legal reality within its existing and would-be borders, are marginalised in International Law. Like many political commentators who discuss nearly exclusively the Occupied Territories only (e.g. Adams 2005; Carter 2006) the nature and legal status of Israel itself is sophisticatedly side-lined from becoming the main focus of political struggle and in turn of viable legal disagreements. If Israel, it is believed, could just amend its actions/omissions in the Territories as well as its borders; finish this occupation properly and allow for a Palestinian state to exist in peace and security beside it, it could become a good, or at least acceptable, state in International Law.

How is the marginalisation of the nature of Israel carried out? The right of those who were ethnically cleansed in 1947–49 (see, e.g., Masalha 1992, 2003; Pappe 2004, 2006) and who constitute a considerable proportion of 'Palestinians' in the occupied territories is hailed as a practical additive legal 'problem' rather than a foundational issue that is linked to the nature

of the Jewish state, thus preventing this connection from becoming pivotal to the question of Palestine and International Law.

In its resolution 194 of 1948 the General Assembly did demand the return of the refugees but its weak, and in that sense poor, drafting did not relate the return of the refugees to the *apartheid* nature, and hence as I will argue, the necessity of non-recognition, of the Jewish state. Because the link is not made resolution 194 already allowed for the refugee question to be readily interpreted at later stages as a problem which would be sorted as an additional facet of the package offered to Palestinians once they got their state in a way that is compatible with the existence of a now legitimate Jewish *apartheid* state. In its Resolution 35/169 of 1980 the General Assembly still combined the refugees right of return with both a. the need for a sovereign Palestinian State in Palestine and b. the call for Israel to withdraw to the 1967 borders. By not linking the implementation of the return to the necessary replacement of the Jewishness of the Israeli state, both 194 and 35/169 have enabled all kind of interpretations that make compatible the right of return and the existence of the Jewish state by, for example, pointing at the necessity of compensation.

In this way these resolutions, for all their good intentions, make the refugee issue the very gate-keeper that ensures that the right of Israel to exist remains outside legal visibility. Some lawyers (Kattan 2010 and Guardian comment from 19th November 2009; Quigley 2006, 2010) seem to *diagnose* the relationship between Palestinian suffering and the existence of the Israeli State and the conceit that has managed to bring it about. However, never do Kattan or Quigley attempt to convert the diagnosis into an argument in International Law that demands the replacement of Israel because of the kind of state it is.

Because of the multi-layering and interdependence of illegalities and immoralities in Palestine that encompass both that which led to partition and to 1948 and the 1967 Occupation, it is now becoming possible, indeed necessary, to argue, as I will do, that the seemingly just and reasonable legal decisions on Palestine concerning 1967, for example the ICJ in *The Wall case* (ICJ 2003 especially paragraphs 155–7, see Scobie 2005), indeed even Resolution 194, become complicit – invisible behind their moral irrefutability – in the cloaking of such illegalities in a more fundamental sense.

What Kind of State is the State of Israel?

Why would one want to call Israel, the only democracy in the Middle East, an *apartheid* state? Israel has no laws that explicitly limit the education and possibilities of its non-Jewish Arab citizens nor does it list certain professions they are forbidden to take up as was the case in South Africa.

Looking at Israel you will see democratic elections and representation, occasional positive attempts at egalitarian investment in the country's non-Jewish Arab sector, and some joint Jewish/non-Jewish-Arab ventures; and you will find a Supreme Court that prides itself on consistently upholding a Basic Law of Human (as opposed to Jewish) dignity and freedom.

However, on closer look, a*partheid* in Israel is as constitutionally inbuilt as it was in South Africa and structurally limits, directly or indirectly, the ambit of possible egalitarian reforms. Central governmental investment turns out to be inherently biased in favour of the country's Jewish population, and official property law regimes and land policies push towards the 'Judaisation' of the land, meaning the transfer to Jewish citizens or institutions of lands expropriated from non-Jewish Arab citizens and/or institutions while discouraging, or even actually forbidding, non-Jewish Arabs from taking up residence in Jewish areas. The Absentees' Property Law 1950 declares 'absentees' property land belonging to Palestinians whom the Zionist forces had expelled from the areas it had succeeded in occupying by mid-1949. Curiously, the law affected not only more than 750,000 Palestinians, who had been ethnically cleansed, but also the 150,000 or so who somehow had remained within the borders of the new state of Israel. 'Emergency' Regulations caused many cases of uprootedness and internal displacements. Many housing projects in new development towns are not open to non-Jewish Arabs. Arab municipalities are given far less investment than their Jewish counterparts. Many welfare benefits such as higher education places, preferential loans, have purposely been made conditional upon army service so as to exclude non-Jewish Arabs who are generally barred from serving, and, of course, cannot be expected to have any great wish to serve, in the Israeli Defense Forces (IDF). 'Non-Jewish Arab second class 'citizens' are not entitled to compete for university scholarships that are given by the Jewish Agency. Many are refused admission to certain course on 'security grounds' and in many cases have to bear higher tuition fees (Quigley, 2006, pp. 142–3). Tax benefits are open to 'returning' Israeli Jews or to Israeli Jewish citizens who have spent a long time abroad thus tempting them to emigrate to Israel, while these are not open to non-Jewish Arabs (see generally, Davis 1987 and Yiftachel 2006).

The price Israeli non-Jewish Arabs are asked to pay for success in bureaucratic career terms is a readiness to show themselves as 'cooperative' and renounce any political involvement that has a stake for them. Although non-Jewish Arabs can vote for the Israeli Parliament, the *Knesset*, in practice the small numbers of their representatives are never allowed to form part of a government coalition because that would entail non-Jewish Arab voters having a say in determining the fate of the *Jewish* state. Their allegiance to a Jewish and democratic state is demanded as a condition

for any political organisation. Similarly, it is impossible for Israelis even to imagine having a non-Jewish Arab prime minister. Actually, non-Jewish Arab *Knesset* members who as such openly dare to contest the very notion of a Jewish state – which they and their constituents had forced upon them – and question its democratic nature will find their freedom of speech and of association severely compromised. Immigration policy gives all Jewish people in the world the right to settle in those very areas from where Palestinians were ethnically cleansed. Palestinians have no possibility of arguing for more egalitarian notion of membership and immigration. When wanting to move to Israel non-Jewish Arabs who wish to join relatives who are citizens of Israel face near impossible immigration criteria. Thus 'Israeli' non-Jewish Arabs are treated, not as part owners of the house, that is, as rightfully equal citizens of the state, but as tenants whose relatively 'generous' landlord for the time being agrees to let them stay.

Thus, the possibilities for genuine political struggles that contest political, social and economic inequalities are heavily managed so as to protect the *apartheid* premise for the sake of which the state was constituted. The injustices in it are not just a *de facto* durational injustice which are found and persist for some time in any political community and which may be more or less systematic until the narratives that give rise to them are overcome in a rapturous historical ethical moment that fuses the ever hide and seek relationship between law and justice (Derrida 2003). In Israel, *apartheid* (separateness) is rather inbuilt into the very constitutional life of the state, a sense of 'separateness; of Jews that has to be constantly rejuvenated and reinvented and reinforced by the state. Because the Zionist ideological doctrine of 'separateness' led to the *raison d'etre* of the state, this separateness embodies a pathological denial that surrounds Israel's apartheid, separateness which is disguised as 'democratic' practices. As such this denial is more entrenched in collective unconscious memory and thus more morally repugnant that the explicit *apartheid* of South Africa. The explicitness of latter shows that it was not repressed in the same way and was thus already open to reform, to sanctions, in a manner that still echoes from the notion of a political community that can be made responsible for its actions. In short, responding to different existential stakes, South Africa could reform and stay South Africa. Israel cannot reform and stay Israel.

Moreover and crucially, in Israel it is because of the need to create a state which is based on this *apartheid* premise that sustains Jewish majority and character that ethnic cleansing took place. Furthermore, it is for the sake of legitimising this kind of state that the question of the refugees must never be allowed take central stage in International Law and be made a gate keeper, thus being sophisticatedly rationalised as reasonable injustice that

has to be put up with. In the argument to follow I will argue that such a state should not be recognised and that it is the role of International Law to insist that in the case of Palestine national self-determination must not, under any circumstances, imply a *Jewish* state.

Current legal analysis which overcomes the legal *status quo*

As against the prevailing hyper legality and legalism that shows International Law can be captive of deep denial of core immoralities there are voices, those of Henry Cattan and George Bisharat that do touch the heart of the matter and see a role for International Law that challenges the validity of the Israeli State.

Cattan argues that the whole process which led to the partition of Palestine and the formation of the Israeli state is illegitimate, *ultra vires* (beyond assigned competence), and therefore the legal reality that stems from it should be void *ab-initio* – as if it had never happened legally. The thrust of Cattan's argument is that the very dealing with Palestine on the part of the League of Nations, the Balfour Declaration of 1917, the configuration of the British Mandate up to 1922, and the United Nation's partition resolution of 1947 were *ultra vires* as none of these bodies had the legal capacity confer any legally valid title to that state without allowing the inhabitants to determine their own future as was the spirit of this categories of Mandates – that of 'organic law' under the sacred trust of civilisation (Cattan 1973: 3–56). The second tack of Cattan's argument concerned the aggressive manner of Zionist acquisition of Palestine on the premise that conquest does not bring legal sovereignty (Cattan 1973: 60–2). Sovereignty rested solely with the people of Palestine which was classified as one of the near sovereign communities which were recognised by Article 22 of the Mandate as independent nations (Cattan 1973: 70–1).

Cattan argues that the State of Israel is indeed a recognised sovereign state, a political sovereign, but Israel's title to Palestine, its legal sovereignty, remains invalid and illegitimate. In that he arguably belittled the significance of recognition as that act that makes a state a member of the UN with rights and responsibilities with also the resultant belittlement of the fact that *de facto* reality of recognition can in time take over the question of title.

It is important to note that the core of Cattan's arguments related to the suffering inflicted on Palestinians and the invalidity of curtailing their self-determination. He constantly refers to Article 1 of the UN Charter that subjected International Law to the demands of Justice. This appeal to justice, however, does not characterise the arrogant, legalistic technical arguments against him, *inter alia* ridiculing his reliance on 'natural rights' of the Palestinians (Feinberg 1979: 515–616). This legalism

that is not able to look inward at the kind of suffering caused by the establishment of the Israeli State is itself indicative of the infinite supremacy and righteousness with which the whole of historic Palestine was occupied and its indigenous people ethnically cleansed, an important factor for the urgency of invoking the issue of recognition as I will argue shortly.

By not focusing on the *nature* of the state created but rather on the *manner* of establishment and the *capacity* to establish it, Cattan's approach, although morally irrefutable and extremely important, still plays to the hand of such legalism in that it invites the kind of argument that stems from competing claims for sovereignty. It is about 'whose land is it?' rather than linking this question to an ethos of egalitarian sharing and egalitarian cohabitation. The logic of partition is not very far from any language of sovereignty and Cattan's arguments have still an exclusionary tone, although I am sure exclusion was far from Cattan's mind.

George Bisharat advocates the 'right-based approach' with the ultimate aim of showing that replacing Israel with a single secular, democratic and non-sectarian state in Palestine is the kind of polity that will in effect serve both parties' interests and rights in the best way. Going over the 'right' claims that both sides are concerned about, Bisharat shows that only through achieving justice and adhering to Palestinian rights will there be an enduring peace that will serve Jews' best interest too (Bisharat 2008). However, he also claims that International Law cannot do more than be subservient to the desire of the parties involved, 'herding' them in the right direction. International Law, he argues, is an important input to a political process.

Although accepting that Israel is founded on an *apartheid* premise, Bisharat views International Law as dependent upon state sovereignty and, in turn, as a body of law that can only point towards state responsibility infringing the rights of other sides and indeed its own citizens. He accepts *legally*, all states too quickly in my view, that Israel 'is' a recognised sovereign state (Bisharat 2008: 28, 32).

To my mind Bisharat takes perhaps too modest and somewhat too cautious a view about the kind of argument that can be advanced in International Law and also about the manner in which International Law can exert normative force. While International Law cannot force its judgement directly in a sense that domestic courts and parliaments can, its normative force, as seen in the story of Southern Rhodesia, can serve a more active role than herding. It can and should demand a transformation of inbuilt constitutional *apartheid* by rescinding the recognition given to it, showing recognition to be an interpretative mistake of its own principles. While Bisharat does acknowledge that Israel does not have 'right' in international law to exist as a Jewish state (Bisharat 2008: 25) he does

not establish a duty on the part of International Law to hold *itself* to book with regard to its ongoing recognition of Israel.

International Law, I argue, can, indeed has an obligation to decide on matters that will add important effectiveness to the 'right-based approach' that Bisharat offers, not least from the practical point of view of moving from the situation now to the desired end. Neither Cattan nor Bisharat see the urgent need and the capacity for International Law to demand explicitly the rescinding of recognition given to the Israeli State because of the kind of state it is. In different ways, they both still think from 'state sovereignty' and 'state responsibility'. The legal strategy of non-recognition of a state that bears an *apartheid* nature should, I submit, become the explicit cornerstone of all legal challenges from which stem all others.

The changing nature of International Law: From mutual disinterestedness to community

Looking at the practice of International Law we can see that it has developed a *deontological* trend in which International law is not just a collective of mutually disinterested states but rather also a genuine principled community in its own sense of 'right' that pertains to the human family and whose normative source consists in more than the mere freedom of states to contract and state practice that gives rise to Customary International Law. The notion of good for people and in this sense the harm to be averted has been growing increasingly complex with enormous implications. There is a sense of primary good – good that implies a sense of rightness and wrongness – that is inherent – deontological – and as such is independent from and protects against suffering that ensues from a *teleological* approach (Rawls 1971: 22–7). As we shall see, the existence of peremptory norms in International Law and the development of International Criminal Law evidence such a deontological turn.

This awareness of International Law with certain higher norms creates a complexity and strife within International Law, one which considerably changes its character and the manner responsibility works within it and between it, political communities and people. These new deontological trends open up new ethical interpretative challenges and horizons of new kinds of legal disagreements and arguments in a manner that all doctrinal areas of International Law have to traverse.

Thus, the tension within International Law emerges between state sovereignty and state responsibility. Responsibility is no longer merely discharged as talk about compliance with customary norms or with Security Council Resolutions. A state can be held responsible for

infringing basic rights of its citizens because this basis of rightness does not depend on interest formation and pursuit and demands a different kind of political reflection and groundings. Viewed thus, however, the notion of state responsibility stays intact and just becomes woven into the deontological perspective. In other words, even if International Law protects people against breaches by their own states it is still the state which is held responsible.

The deontological challenge, however, goes much further than state responsibility and, as I will argue, transforms areas that would naturally stand in tension with state responsibility, namely the recognition of states. Although loosely a state can be said to be responsible for actions that stem from its configuration and thus call for 'not recognising itself' there are, as I will show, limits and deontological potentialities that go beyond this view.

jus cogens norms and *erga omnes* obligations

Jus cogens connotes peremptory norms of International Law that demand protections against basic wrongs that treaty making and unmaking and indeed customary international law may not necessarily provide. Because deontological, these higher norms are in force even if a state does not accept them. Although it is Article 53 of the Vienna Convention of the Law of Treaties 1969 that articulates the existence of peremptory norms, it is clear that this treaty makes a deontological ground for these norms that binds all political communities even if not members to the treaty.

The normative weight these norms possess outweighs any other practice-based normativity. International Law emerges as a community which *shares* some fundamental values and principles that provide normative hierarchy, namely outweigh the horizontal principle of state sovereignty. Article 53 confirms that these norms are *accepted* by the international community of states as a whole. The phrase *as a whole* in fact has a transformative deontological character of International Law.

Although Article 53 seems to relate the operation of these norms to treaty provisions, bearing in mind the rationale of the article it surely constrains the legal validity of any act in International law be it treaty or customary law including any act by a UN institution. The article entails the argumentative possibility that marks a genuine separation of powers in International Law, namely a judicial capacity to determine compatibility of treaties and customary law with *jus cogens* norms.

Jus cogens norms are obligation *erga omnes* (*Barcelona Traction* case Judgment, ICJ, 1970, para. 33). The difference between *jus cogens* and *erga*

omnes is that *jus cogens* relates to the normative weight of certain norms which point to their hierarchical nature. *Erga omnes* by contrast refers more to the range of application of a norm which may or may not imply their weightiness but which does not necessarily connote the normative hierarchy and priority of the *jus cogens* norms (Gowlland-Debbas 1990: 249–53, see Tams 2005).

Jus cogens norms operate in two important ways. First, they annul the capacity to produce legal norms in International Law that are in conflict with them. It *invalidates* any state act, or indeed any legal act by an institution that produces a transgression of them. No state can claim a sovereign jurisdictional immunity from them (case note on *Ferrini,* referred to in Orakhelashvily 2006: 284). Any contravening legal act is rendered *ultra vires* and that includes Security Council Resolutions (Orahelashvili 2006: 465–8, see Bernhardt, 1996) and by extension any other body including the ICJ as was intimated in the ICJ advisory opinion on *Admission of a State to the Membership of the United Nations* (*ICJ,* 1947–8) as confirmed by Judge Jennings opinion in the Lockerbie opinion, namely that that nobody can be above the law (*ICJ* Reports, 1998: 110, quoted in Orkhelashvili 2006: 417).

Both Articles 53 and 63 of the Vienna Convention (a convention which also applies to all the treaties that found International Organisations) show that the effect of conflict with *jus cogens* is invalidity, namely voidness *ab-initio*. Article 64 points to a very important temporal implication: with the emergence of new peremptory norms any *existing* treaty that is in conflict with it would be void – and that would hold surely true to the emergence of anti-*apartheid* in the context of *jus cogens* norm of self-determination. But interpretively, the rationale of this temporality-Article is that all previous resolutions, judgments that give effect to what the emerging norm would regard as invalid become, to that extent void with the resultant duty to declare them void.

Consequences of invalidity: Article 71(1) of the Vienna Convention: 'to eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with peremptory norm of general International Law; and bring their mutual relations into conformity with the peremptory norm of general International law'. The qualifying term 'as far as possible', does not make it dependable on party judgment (Orakhelashvili 2006: 144) and cannot be exploited to imply either implied permissible derogation or some pragmatic constraint. So the demand is both to undo the harm and damage in the creation of the offending injustice and its continuing effects. Article 71(2) makes it beyond doubt that voidness means voidness *ab initio*. That means that the legal *effect* of the *jus cogens* norm also has a peremptory status and so any *de*

facto legal act that has the effect, even if not explicitly, of derogation from it, direct or indirect would be void.

The overall effect of these provisions, then, is that if the existence of a state offends such a norm it is the validity of this state that must be questioned.

Secondly, the existence of *jus cogens* as ongoing and all-encompassing *interpretative challenge* enables International law constantly to re-politicise itself as having normative implied terms in any treaty construction (see, e.g., Cassese, 2005, p. 206). International Law has to invalidate its own previous acts if these are found wanting against peremptory norms especially, as I will argue, if the consequences of the original breach are a source of continuing new instances of suffering. It is crucial to see that it is not only states which are persons in International Law and thus not only states can be liable for the breach (see, the *Reparation for Injuries Suffered in the Service of the United Nations Opinion*, ICJ, 1949, ICJ reports: 178).

Article 53 of the Vienna Convention states that a *jus cogens* norm can only be modified by another subsequent *jus cogens* norm. A strong version of this might mean that modification means possible *replacement* of norms. But far more likely, given the equal normative status of these norms, they should be interpreted in a way that would bring them into harmony so that there is no breach of each. For example, if self-determination as a *jus cogens* norm is interpreted as such that its realisation brings ethnic cleansing for the sake of establishing an *apartheid* state, this would make the new state having no legal validity. Because of the nature of the normativity there is no derogation permitted from it (Orakhelashvili 2006: 325). No subsequent validation can be made through acquiescence, waiver or prescription (Orakhelashvily 2006: 147). There can be no claim that it is in the interest of 'peace and security' that a peremptory norm should be breached (see Orakhelashvili 2006: 42).

Importantly, also no *innocent* unintentional derogations are allowed. As we saw in section II, the multi-layering problem of the immorality in Palestine (up to 1947–9 and then again in 1967) means that the legal discussion which takes place criticising Israel for its actions in the 1967 Territories does itself, despite its moral irrefutability, cloak deeper immorality. Many of the actions in the territories do offend against *jus cogens* norms, their invalidation may be argued in such a way which takes the limelight away from the core breech of *jus cogens* norm that relates to the very existence of the Jewish State. This situation of two tiers of interrelated *jus cogens* breaches, one used to conceal the other is unique in Palestine and in effect constitutes a 'derogation' and can itself amount to rationalisation and facilitation of such a deeper breach.

Inbuilt *Apartheid* as an International Crime against peremptory norm of self-determination

All forms of Racial Discrimination are forbidden by the UN Covenant to which Israel is a party (Quigley 2005: 148). That applies to self-determination. The General Assembly Resolution 1514 (1960) that concerns the end of colonial rule and the meaning of self-determination states that 'the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism *and all practices of segregation and discrimination associated therewith'* [my emphasis].

Self-Determination of people can be seen as either *external*, when referring to matters between sovereign states but also, and crucial for this article, as *internal* relating to the manner in which members of the political community are treated politically. Internal self-determination invokes the notion of state responsibility in this internal sense. Plurality, non-discrimination and the prohibition of structured inbuilt segregation are pivotal to internal self-determination (Rosas 1993: 227). It follows that the prohibition of inbuilt *apartheid* would be of equal normative force, *jus cogens*, to the right for internal self-determination. That further means that under the spirit of Article 53 of the Vienna Convention the right of *external* self-determination that encompasses the recognition of states must be such that it does not offend in a structured way against internal self- determination. The right to be recognised as state and thus to self-determine externally must not structurally and in an inbuilt way inhibit or manage political conflict in a manner that differentiates political stake and hence participation in the polity. Structured *apartheid* in the formed of inbuilt ethno-nationalism, or any nationalism that relates common conception of good to differential citizenship, must feature as a morally invalidating criterion that bars recognition or, under Article 64 of the Convention, rescinds recognition if recognition was awarded at a time when anti-*apartheid* was not yet recognised as an essential aspect of internal self-determination. Polities that have had these fetters include South Africa and Southern Rhodesia, examples whose very configuration is contrary to the UN Charter and whose constitution were declared by the security council prevent the full exercise of internal self-determination (Security Council resolutions 554 and 556 (1984) and GA resolutions 38/11 (1983) and 39/2 (1984) (see Eide 1993; and Rosas 1993: 236–7).

The argument in International Law that I make links recognition criteria with the inbuilt *apartheid* fetter for the *jus cogense* status internal of self-determination. As bearing a *jus cogens* transgression the *apartheid* nature of a state and the prospective rationalisation of oppression and domination in civil liberties and social and economic rights constitutes a clear moral threshold for non-recognition. States should not be just

passive observers of historical processes of self-determination. There is a positive duty on states to be involved in guarding actively against inbuilt fetters for self-determination in the early stages of the emergence of political communities and to do it as a matter of importance to the world community as a whole (see Mullerson 1994: 128).

Relying on Resolution 1514, the General Assembly passed resolution 37/69 A of 1982 which could be read as one on historic Palestine containing a change of subject. It explicitly conceived *apartheid* as crime against humanity and refused to grant the legal validity of Bantustans in South Africa because these enshrined segregation and broke the territorial integrity of the country and its inhabitants (Gowlland-Debbas 1990: 263). The Bantustans were seen as mature instantiations of the general *apartheid* system, just as the 1967 Occupied Territories, within which many of the Palestinian refugees who were expelled in 1948 reside and were condemned to segregated bantustanisation could be the logical conclusion of the *apartheid* that pertains to the nature of the Jewish State.

In resolution 2636A, the General Assembly delegitimised South Africa's credentials in a way that might ground future expulsion from the General Assembly (Gowlland-Debbas 1990: 264) and in Resolution 3207 of 1974 reaffirmed how the policy of *apartheid* was a violation of the UN Charter and the prohibition of racial discrimination, thus asking the Security Council to review its relations with South Africa.

The discriminatory premise that constitutes the state of Israel leads to more than causal discrimination and was indeed denounced by the General Assembly resolution 3151 of 1973 and 3379 of 1975 saw unholy allegiance between Zionism and call it a 'form of racism'. This echoes the statement of the Organisation of African Unity and the African Charter on Human and People which saw Zionism as leading to a racist regime on a par with *apartheid* South Africa (Quigley 2005: 148). The International Convention on the Suppression and Punishment of the Crime of *Apartheid*, G.A. res. 3068 (XXVIII)) entered into force in July 18, 1976 with 101 signatories. The convention makes *Apartheid* a Crime against Humanity and against International Law.

Article 19 of the draft article on State Responsibility of the International Law Commission included *apartheid* in its definition of international crime. The crime is defined as a wrongful act by a state against international obligations essential to the protection of fundamental interests of the international community. The language of community is, again, significant (see Gowlland-Debbas 1990: 253). Section 3(c) includes *apartheid* as one of those crimes together with slavery and genocide. It is also crucially important that Article 14 of the draft ILC convention on State Responsibility proclaims that an international crime imposes an *obligation* on every state not to recognise any legal consequences

from it. In instances of international crime for which the notion of state responsibility is not suited (e.g. recognition of a Unilateral Declaration of Independence (UDI) of an *apartheid* state) the UN is responsible not to recognise the legal consequences of it. Further, the UN itself can be made responsible in case it did recognise the legal consequences of an *apartheid* polity, and has a continuing obligation to provide means substantively, procedurally and jurisdictionally, for rescinding this recognition. Finally it can be responsible itself for offending this norm if in any way to does not so rescind or aids some diversion that makes this crime invisible. Article 15 underlines a collective obligation on states to act to prevent the commission of international crime (see Gowlland-Debbas 1990: 270–1).

It is over cautious, therefore, for leading commentators like Cassese to not be confident that *apartheid* is an international crime although it can be seen as *State* delinquency (Cassese 2008: 13). As learnt from the nature of the crime, the South Africa story, *apartheid* Convention of 1973, the ICL draft code and Jurisdiction of the ICC, there is no doubt that together with genocide and slavery, the crime of *apartheid* is a peremptory norm of International Law.

It is not possible to say that there are good reasons for self-defence which are similar to self-defence which provides justification in a murder case under criminal law. There can be no appeal to right of self-defence by an invalid *apartheid* state. Indeed the violence that creates the idle chatter of self-defence stems from the denial and silencing that surrounds this *apartheid* nature and which sustains the violence in the first place.

State Responsibility and Recognition of *apartheid* states in International Law

The interpretation of the notion of recognition of states in the light of the *jus cogens* of self-determination and international crime of *apartheid* has to be applied to Palestine. Addressed to International Law, to members of the United Nations and its institutions, my argument links both *jus cogens* norm of self-determination and its twin international crime of inbuilt *apartheid* the prevention of which is *jus cogens* as forming a moral threshold to the recognition of states. It then applies recognition rather than 'state responsibility'/ 'reforming a state' to the case of Israel, thus assuming a direct link in responsibility between International Law and Palestinians.

Drawing on the story of Southern Rhodesia and South Africa, this essay in effect calls the General Assembly to suspend membership of Israel in General Assembly meetings as it did for South Africa and to put forward a motion that invalidates the recognition that was given to an Israel state which is founded on, and continues to rationalise an inbuilt *apartheid* premise and thus in effect rationalises the continuous suffering

of Palestinians and Israeli Jews alike. It also calls upon the GA to seek an advisory opinion of the ICJ that concerns the issue of recognition of states in relation to *apartheid* and its application to the State of Israel.

Because both 'persons' and 'political community' are human constructions, the question of recognition of states raises important philosophical questions that I cannot pursue here although I gesture their importance in the last sentences of this article. I would just like to point out what it can be easily misused to oppress difference. However this danger does not mean that there are no moral criteria for recognition that relate legal validity to legitimacy. Recognition is of crucial importance because it is through recognition that legal actors become valid and visible to international law enjoying rights, protections and responsibilities. It is through recognition that the manner International Law self-understands its capacities shows very clearly. It is with recognition that a political community acquires *locus standi* (right to participate, to be a party in court) in international institutions and in proceedings in the International Court of Justice (ICJ) and so the ability of International Law to question that status carries meaning as to how responsibility works between International Law and people. In this section I argue that International Law has a *duty* not to recognise a state if the very *raison d'etre* of that state entrenches a continuing breach of the *jus cogens*-international crime of *apartheid*. Such an *apartheid* community has no legal right to exist.

There are two interlinked arguments that I wish to make in relation to recognition of states. The first is that, from the spirit of comprehensive protection of *jus cogens*, we need to look not only at how a state came into being, namely the extent of aggression which it exercised on people in order to become what it is. Nor should we need to look of merely at numerical majority or minority. We have to look more broadly at the kind of state it is, namely to what extent its constitutional make-up allows for constitutional reflection and effective redress for those injustices of its coming into being and other constitutional matters. Many if not most states have been established through injustices but then there ought to be a constitution that does not categorically block the possibility of change, a blockage that intrinsically constitutes part of the makeup of the political community.

Arguments from 'State Responsibility' still held sway. Indeed, Boycott, Divestment and Sanctions there contributed a lot to South Africa's transformation. In the case of inbuilt *apartheid* of the Israeli kind, namely when the very reason for the state to exist is inbuilt *apartheid* (separateness) driven, the notion of state responsibility fades in its appeal. In a case like Israel, I argue, the existential fetters are such that it is much more incumbent on International Law to protect Palestinians abandoning any

direct appeal to the Israeli state, and embark on the strategy of non-recognition.

The criteria for recognition of states were laid down by Article 1 of the Montevideo Convention on Rights and Duties of States, 1933 and are: a permanent population; a defined territory; a government; capacity to enter legal relations with other states. It is noticeable that all those criteria are functional and are not morally evaluative in any way. Questions can be asked as to whether Israel answered the first and second criteria in light of both the expulsion of Palestinians (see Cattan 1973: 85–6) and in light of its always potential Jewish *demos* as membership is always potential – a matter of right to Jewish people all over the world. Here though, I would like to focus on how International Law as it stands today demands moral criteria as sufficient to constitute threshold for recognition.

There are two dominant theories of recognition in international law. One is dubbed 'constitutive', the other 'declaratory'. The constitutive doctrine holds that even if the four criteria are satisfied there still has to be an active constitutive act of recognition by states which will make the state a legally valid 'person' in international law and a viable member in the United Nation with rights and duties that come with that membership. The declaratory view is that legal validity is satisfied once the criteria are met and states merely declare them to have legal effect. The former really allows for some extra consent on behalf of states thus implying some kind of judgement the parameters of which are not articulated except for some notion of preponderance of states (Roth 2000: 125).

Both doctrines seem to have something missing in them. The constitutive theory does not explain what this residual judgment consists of. The declaratory view denies judgement altogether and thus makes recognition either too obvious or too *ad hoc*. Both doctrines leave open the moral challenge of what International Law tries to do in cases where claims for statehood are pressed in circumstances where principles of International Law might have been severely violated. Both theories are highly unsatisfactory in responding to this worry.

The constitutive view still leaves the reality of power to dominate the formation of some notion of preponderance of which the risk of subjecting the notion of recognition to oppression and sectional interest is obvious. The manner in which a majority was obtained for the Palestine Partition plan is 1947 is an example of that. There is no principled way of directing the judgment thus reducing it to what Crawford observes is merely diplomatic recognition (referred to in Ross 2000: 126).

The declaratory view seemingly opens up the possibility for International Law to remain morally non-comprehensive and free of sectional interest, thus opening up the possibility that cultural and traditional differences can give rise to very different states. From another

perspective, though, the declaratory view seems devoid of any legal criterion and would thus be overly permissive. As Crawford has observed, it takes away any principled normative legal judgement from recognition, reducing it to mere facts and functions on the ground (referred to in Ross 2000: 126).

The common problem of both doctrines seems to be that any notion of a *principled* way in which judgement could be invoked in refusing recognition on the basis of principles of International Law is unaccounted for (Roth 2000: 127). Both doctrines seem to leave the notion of recognition in some way to the reality of power of the recogniser or the reality of function of the potential recognisee. In detecting that common problem, H. Lauterpacht attempted to reconcile the two by claiming that states are compelled to recognise a state, once legal criteria have been satisfied (Lauterpacht 1947: 73). This is helpful in some ways because it opens up complexity that involves some legal judgment that principally distinguishes from either power or facts. Importantly, Lauterpacht went on to link recognition to a sense of international public order that had irreducibly evaluative content and highlighted constitutional consciousness in International Law (Lauterpacht 1970: 347). It is here that the notion of invalidity in International law, one that we saw exists in relation to *jus cogens* norms, connects itself to the notion of public order that reflects on whether or not to recognise a state. However, as Orekaneshvili observes, Lauterpacht still fell short of recognising the relevance of *jus cogens* and thus the notion of validity and legitimacy to recognition under this rationale.

Dugard has taken Lauterpacht's view further by enhancing the ethical dimension of legitimacy into recognition. In surveying the case-law he made this link between the judgement of recognition and *jus cogens* norms. Interestingly, even within what he did recognise to be relevant, he does not discuss the manner the State of Israel was created. He only discusses the 1967 occupation (Dugard 1987: 379).

As Roth correctly identifies in relation to the recognition of governments there seems to exist a tension between questions of legitimacy and mere functional and territorial criteria of effective control. Considerations of legitimacy apply to the recognition of states, to asking questions about how the state came into existence as well as the legitimacy of the government. Arguments about legitimacy can be about popular sovereignty and consent/acquiescence of the other side.

An instance of illegitimacy as a ground for non-recognition is where aggressive acquisition relies on *jus cogens* (the so called Stimson Doctrine). This was the principle behind the non-recognition of Turkish sovereignty over Cyprus for violating Cyprus' Territorial Integrity which again is very relevant for Palestine as the territorial integrity of the whole of the state

(Quigley 2010) of historic Palestine was violated. Yet others are the non-recognition of Indonesia's acquisition of East Timor and South Africa's occupation of Namibia. It is worth noting that many states came to be violently including the US and Australia *vis a vis* the native Americans and Aborigines.

By and large, Dugard still sees recognition in the light of the legitimacy of government and the aggression that characterises the constitutive actions and thus the initial illegitimacy of government. In arguing about legitimacy, recognition and *jus cogens* in this way, dwelling on the precise circumstances of the constitutive aggression and illegitimacy may still be subject to conflicting interpretations of interest-formation and narrative-construction that seeks to justify such circumstances. Such a connection between *jus cogens* of non-aggression and recognition, while absolutely right, still runs the risk of retaining the shortcomings that both the 'recognition' and the 'declaratory' view fall prey to, namely that International Law becomes a political battleground and an eventual decider on question of legitimacy which tends to follow dominant political powers rather than some independent commitment to justice.

Inbuilt constitutional *apartheid* has to be an additional moral factor for non-recognition. Instances of non-recognition where it was linked to legitimacy were that of Southern Rhodesia which, as Dugard observes, was about a non-recognition of the minority racist regime and not of the UDI itself (Dugard 1987: 93–4). The non-recognition of the UDI by an *apartheid* regime has to apply to the Israeli case. Similar to what Gowlland-Debbas argued in relation to the duty of non-Recognition in the case of Southern Rhodesia, I argue that the case of inbuilt *apartheid* carries a categorical duty not to recognise a state by looking at the separatist constitutional framework that determines the ambit of internal constitutional reflection of the established entity and also to consider the aggressive manner it came into existence *in the light of its apartheid nature*. The call by the Security Council not to recognise the UDI in Southern Rhodesia can be translated to a call not only for not recognising Israel but as a *demand* (see Gowlland-Debbas 1990: 279) for its replacement with a single egalitarian and non-sectarian polity over the whole of historical Palestine.

The UDI in Southern Rhodesia was not recognised. Security Council Resolutions 216 and 217 (1965), 232 (1966), 253 (1968) and 277 (1970), all called for its invalidity because of the minority racist regime. The effect of these resolutions did not just mean a withdrawal of official recognition but leaving the possibility of retaining some unofficial relations with Southern Rhodesia but rather holding its independence as invalid and thus void *ab initio* to the extent that practical relations were severed, as well

as suspending any membership in International Organisations and trade dealings including, exceptionally for International Law, non-cognizance of judicial acts (Gowlland-Debbas 1990: 297–319).

The Arbitration Commission on Yugoslavia opinion no. 10 of 4th July 1992 had the view that recognition has discretion that is subject only to compliance with imperatives of general international law and 'particularly those prohibiting the use of force in dealings with other states *or guaranteeing the rights of ethnic, religious or linguistic minorities* [my emphasis].' Thus as Cassese rightly interpreted, if there is a *systematic* denial of rights of minorities or human rights other states are *legally bound* to withdraw recognition (quoted in Cassese, 2005, p. 207).

Another case that points to the link between recognition and *apartheid*, is the South African homeland of Transkei, Bophuthatswana, Venda and Ciskei, because they constituted and consolidated *apartheid* – they were seen as the deprivation of eight million South Africans of their nationality and a continual of the practice of *apartheid*, perpetuating white minority domination, dispossessing blacks of their alienable rights, and destroying the unity and territorial integrity of the county (Orkhelashvili 2006: 375–7).

The complex question of legitimacy and validity as pertaining to recognition as linked to the right to self-determination and non-aggression involves, I would suggest, much more than just like notion of popular sovereignty and representativeness as the invalidity of the Southern Rhodesia UDI by the UN seems to suggest. A minority government in Southern Rhodesia as condemned by Security Council Resolutions 216 and 217 is not yet the kind of inbuilt *apartheid* that drives the *raison d'etre* of the Israeli state. The question of legitimacy also inhabits questions as to the structural and inbuilt internal transformative potential of the constitutional order of the state seeking recognition. No *apartheid* state should be recognised. However mistakenly recognised, the difference between South Africa and Israel becomes pronounced in that it was plausible to give South Africa a chance of reforming itself and pressures that appealed to its responsibility had their place. In Israel, the claim to rescind recognition has a more urgent basis.

As South Africa and indeed the UDI of Israel were recognised, *as a matter of International Law, what is the effect of a recognition given to an inbuilt apartheid regime?* The recognition of *apartheid* South Africa was not formally rescinded although its removal from the GA meetings was very close to so declaring. In the case of the already recognised state of South Africa there was some point of making it responsible for its actions *and*, clinging to the mentality of sanctions, demanding that it reformed and indeed transformed itself by becoming a non-*apartheid* polity, namely simply replacing its constitution, which South Africa did.

But in the case of Israel the situation is different. First, it was the UN which was responsible for partition-thinking culminating in 1947 because mistakenly or intentionally interpreted a Jewish national home as a Jewish state. The same intensity of stake for the UN in the problem-creation was not there with South Africa. That is linked to the second point, mentioned earlier, namely that to jettison *apartheid* is to the challenge the very *raison e'etre* of Israel's existence and in a manner that did not exist in South Africa. This *raison d'etre* makes the existence of Israel having stakes that can easily frustrate a different legal horizon. The UN may well ask that state to 'reform' as much as possible so that its inbuilt apartheid has minimal and hence 'reasonably tolerable injustice' (see the outrageous Gans 2008).

So in the case of Israel rescinding recognition would be a challenge for International Law to demonstrate categorically the illegitimacy of the outrageous thought that there can ever be good enough reasons to establish an *apartheid* polity. *The whole notion of demonstrating the deontological peremptoriness of jus cogens as part of international public order is at stake here.* The BDS should focus on the very right for Israel to exist as an *apartheid* state rather than merely about *its* actions (Ben-Dor 2007). In cases like South Africa, state responsibility to the very premise of its constitution and a demand for reform can still be attempted through diplomatic relations and if necessary through suspension from the UN. But in cases like Israel, inbuilt *apartheid* is so entrenched as to make non-recognition and thus replacement a more urgent priority that implies full expulsion.

The state of Israel was admitted to the UN by General Assembly Resolution 273 in May 11th 1949. This was after the General Assembly had passed resolution 194 of December 1948 that unconditionally demanded the return of the Palestinian refugees. Quoting from Resolution 273: 'Israel is a peace-loving state which accepts the obligations contained in the UN Charter and is able and willing to carry out those obligations'.

The argument of this article is that the very existence of the Jewish state; the recognition given to it; its legal validity in International Law; all the decisions, resolutions and cases that sustain the pseudo autonomy of legal problems of the 1967 occupation and finally, the omission on the part of the General Assembly to suspend Israel from the United Nations and to seek ICJ advisory opinion as to the validity of recognition given Israel's inbuilt *apartheid* nature, are all, *en bloc,* either committing, or complicit in, grave breaches of self-determination allowing the international crime of *apartheid* to hold sway in Palestine. This state of affairs brings International Law into serious disrepute. A GA resolution must be passed amending all previous resolutions in a manner that ejects categorically the logic of partition in Palestine, linking explicitly the implementation of the refugees; right of return to the necessity of non-discriminatory living in

a polity and in turn demanding, as a matter of International Law, the replacement of the *apartheid* state of Israel. It is in those insistences that my argument supplements that of Cattan and Bisharat.

No state can claim to have the uniqueness of predicament to its foundation to explain or justify a right to be an apartheid state. No state and international organisation is allowed, as a matter of International Law that is responsive to justice, to rationalise as reasonable, through legalism and technicalities, the persistence of such a state. Nor should it cross its fingers for such a state being replaced. A legal demand for one state over historic Palestine ought to embody a sense of duty to humanity to replace the Jewish state with a single state over the whole of historic Palestine, a state founded on egalitarian cohabitation and undoing injustice and suffering that the desire to found an *apartheid* Jewish state brought in its wake.

Finally, that Israel has managed to rationalise as reasonable its right to be an *apartheid* state and did it behind legalism about self-defence instead of listening to the cry of ethical mirroring points to deep places from where denial originates. The inconsistency of International Law on the matter, which makes it complicit in denial, points to deep issues that pertain to the West as a whole but these need to be kept for another occasion.

References

Adam, H. and Moodlay K. (2005) *Seeking Mandela: Peace Making between Israelis and Palestinians* (Philadelphia: Temple University Press).

Ben-Dor, O. (2007) 'Challenging Core Immorality in Palestine: Philosophical Reflections on the Anti-Apartheid Struggle and the Current 'Boycott of Israel' Debate', *Holy Land Studies: A Multidisciplinary Journal* 6, No.1: 75–105.

Ben-Dor, O. and O. Yiftachel (2007) 'Response, Debating Israel Ethnocracy and the Challenge of Secular Democracy', *Holy Land Studies: A Multidisciplinary Journal* 6, No.2: 177–95.

Benvenisti, E. (1989) *Legal Dualism: The Absorption of the Occupied Territories into Israel* (Jerusalem: The West Bank Date Project).

Bisharat, George E. (2008) 'Maximizing Rights: The One State Solution to the Palestinian Israeli Conflict', *Global Jurist*, 2: 1–36.

Carter, J. (2006) *Palestine: Peace not Apartheid* (New York: Simon & Schuster).

Cattan, H. (1973) *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* (London: Longman).

Cassese, A. (1995) *Self Determination of Peoples* (Cambridge: Cambridge University Press).

—(1986) 'Legal Considerations on the International Status of Jerusalem', *3 Palestinian Yearbook of International Law*, 3: 28–32.

—(2005) *International Law* (Oxford: Oxford University Press).

—(2008) *International Criminal Law* (Oxford: Oxford University Press).

Crawford, J. (1986) *The Creation of States in International Law* (Oxford: Oxford University Press).
Davis, U. (1987) *Israel: An Apartheid State* (London: Zed Books).
Derrida, J. (1993) '*Force of Law: on the Mystical Foundation of Authority*', in D. Cornel *et al.* (ed.), *Deconstruction and the Possibilities of Justice* (London and New York: Routledge): 3–67.
Dugard, J. (1987) *Recognition and the United Nations* (Cambridge: Cambridge University Press).
Eide, A. (1993) '*In Search of Construction Alternative to Secession*', in C. Tomuschat (ed.), *Modern Law of Self Determination* (Dordrecht: Martinus Nijhoff): 139–76.
Feinberg, N. (1979) *Studies in International Law* (Jerusalem: Magnes Press).
Feith, D.J. et al (1993) *Israel's Legitimacy in Law and History*, (New York: Center for Near East Policy Research).
Gans, C. (2008) *A Just Zionism: On the Morality of the Jewish State* (Oxford: Oxford University Press).
Gowland-Debbas, V. (1990) *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Dordrecht and Boston: Martinus Nijhoff).
Kattan, V. (2010) *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891–1949* (London: Pluto Press).
Lauterpacht, H. (1947) *Recognition in International Law* (Cambridge: Cambridge University Press).
Masalha, N. (1992) *Expulsion of the Palestinians: The Concept of 'Transfer' in Zionist Political Thought, 1882–1948* (Washington DC: Institute for Palestine Studies).
—(2003) *Politics of Denial: Israel and the Palestinian Refugee Problem* (London: Pluto Press).
—(ed.) (2005) *Catastrophe Remembered: Palestine, Israel and the Internal Refugees: Essays in Memory of Edward W. Said* (London: Zed Books).
Mullerson, R. (1994) *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (London: Routledge).
Orakhelashvili, A. (2006) *Peremptory Norms in International Law* (Oxford: Oxford University Press).
Pappe, I. (2004) *History of Modern Palestine: One Land, Two Peoples* (Cambridge: Cambridge University Press).
—(2006) *The Ethnic Cleansing of Palestine* (Oxford: One World Press).
Quigley, J. (1998) 'Displayed Palestinians and the Right of Return', *Harvard Journal of International Law*, 39, No.1 (Winter): 171–229.
—(2005) *The Case for Palestine: An International Law Perspective* (2nd ed.) (Durham: Duke University Press).
—(2010) *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge: Cambridge University Press).
Rawls, J. (1971) *A Theory of Justice* (Cambridge Mass: Harvard University Press).
Rosas, A. (1993) '*Internal Self-Determination*', in C. Tomuschat (ed.), *Modern Law of Self Determination* (Dordrecht: Martinus Nijhoff): 225–52.
Roth, B.R. (2000) *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press).

Scobie, I. (2005) 'Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine', *European Journal of International Law* 16, No.5: 941–961.

Silverburg, S.R. (2002) *Palestine and International Law: Essays on Politics and Economics* (Jefferson and London: McFarland & Co).

Shehadeh, R. (1985) *Occupier's Law: Israel and the West Bank* (Washington: Institute for Palestine Studies).

Strawson, J. (2010) *Partitioning Palestine: Legal Fundamentalism in the Palestinian-Israeli Conflict* (London: Pluto Press).

Tams, C.J. (2005) *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press).

Weiler, J.H. (2002) 'Israel and the Creation of a Palestinian State: The Art of the Impossible and the Possible', in Silverberg S. R. (ed.), *Palestine and International Law: Essays on Politics and Economics* (North Carolina and London: McFarland & Co.): 55–159.

Yiftachel, O. (2006) *Ethnocracy*: *Land and Identity Politics in Israel/Palestine* (Philadelphia: University of Philadelphia Press).