Of Jews and Arabs: ‘Ethnic’ Violence and the Purview of International Law

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I. Introduction

a. Research question, subjects, and objects

This paper proposes to answer the question of how understanding the Israeli-Palestinian conflict as an 'ethnic' conflict rather than a situation of colonial military occupation has affected the responses of different international legal actors to the Israeli occupation and contributed to the uneven and, at times, failed application of international humanitarian law ('IHL') in the Occupied Palestinian Territories ('OPT'). As a category, ethnic conflicts are difficult to identify, and consequently occupy a legal status that is less clearly regulated by IHL. Efforts to frame the Israeli-Palestinian conflict as 'ethnic' have been made by a number of international actors to the effect of justifying a more permissive and less stringent interpretation of IHL as it applies to the conflict. Discourses characterizing the conflict as 'ethnic' shift the analytical focus away from the conflict's territorial and colonial elements, and instead centers it on the existing 'state' arrangements and ethnicities of the actors involved.

The following analysis applies a postcolonial theoretical perspective that interrogates the significance of colonialism in the formation and development of IHL's theory, codification, and praxis. It interprets relevant actors and rules with reference to the positions they occupy in the contemporary, state-based governing institutions and international public legal norms that mediate the complex network of power relations in the postcolonial world.

Generally, postcolonial theory attempts to understand how institutional and relational forms of governance developed during the era of imperial expansion between the sixteenth and twentieth centuries have persisted through the period of formal decolonization during the twentieth century. Despite undergoing *formal* decolonization, postcolonial territories and societies in Asia, Africa, and the Americas that were occupied and/or colonized by European imperial powers continue to be internally governed by colonial techniques of ruling and externally involved in neo-colonial relations with the West (Anghie, 749).[1]

In the case of contemporary international law, the Eurocentric and imperial context of its development justified colonial projects (Anghie, 739) and deployed a particular understanding and 'ethnicity' and 'self-determination' that contained legal implications. The colonial history of international law is highly visible in IHL, where colonial violence was (and remains) legally regulated by the wide-ranging exclusion of non-European 'others' from its protections (Mégret, 267, 308). To understand how these relations continue to place postcolonial states and societies in unequal and subordinate positions under the current international system, this paper draws extensively from the writings of international legal scholars Antony Anghie (2006), Frédéric Mégret (2006), and Mohammad Shahabuddin (2016).

The OPT are unique case study for analysis, since they are a site of both historical (*i.e.* British) and contemporary (*i.e.* Israeli) colonialism. The Palestinian subjects considered herein include academics and the general population living in the OPT and in diaspora. The Israeli subjects considered are predominantly formal state officials and academics. The oral and written interventions of these and other individuals involved in international legal forums and intergovernmental organizations are subjected to a discourse analysis. These analyses occur within an interpretivist epistemological framework in order to determine how (and why) the conflict is ascribed a variety of framing. It concludes with some final thoughts on how IHL could reimagine the conflict in order to be more effectively applied to the occupation and its violences.

[1] The 'West' refers to a cultural and ideological ensemble of predominantly comprised of European states as well as other politically similar states, *e.g.* British 'Commonwealth countries' (Mégret, 267, note 6).

b. Terminology and concepts

It is important to clarify the operational definitions of several terms and concepts since this paper is primarily concerned with questions of language, and the politics of ethnic and legal discourses. For the purposes here, the term 'ethnicity' refers to a malleable and constructed identity defined by its relation to a specific group that "cohere[s] around a belief in a common origin and a shared culture" (Wippman, 4). This is inclusive of ancestry, religion, language, and other 'cultural' indicators such as diet or dress (Shahabuddin, 14). Far from a neutral marker, ethnicity is the "product of specific power relations, human geographies and material conditions" (Kaufmann, 157).

Ethnic conflicts are considered to arise when two or more intrastate or interstate ethnic groups compete for economic and political goods that generally range from political participation and formalized equality within a state, to demands by an ethnic group for an official state of its own (Wippman. 5). International law takes state actors as its primary subjects that are both bound by and responsible for applying its rules and norms. Although membership in an ethnic group is not in itself a basis from which a specific claim under international law can be made, groups which make use of ethnicity in their claims to self-determination often challenge the legitimacy of states and the norm of territorial integrity so fundamental to the concept of state sovereignty (2, 8).

While ethnic conflict "potentially implicates virtually all of public international law" (*ibid*.), the two most relevant legal frameworks are international human rights law ('IHRL') and IHL. IHRL is considered to be in place at *all* times, while IHL is the *lex specialis* applicable to temporal and spatial situations of conflict. These two spheres of law were historically seen as mutually exclusive, with IHL overriding the application of IHRL, and obligations to apply the latter only existing within a state's own territory. This understanding changed over time, and despite the 2004 International Court of Justice (ICJ) ruling on the *Legal consequences of the construction of a wall in the occupied Palestinian territory* that affirmed the view that there is a normative relationship between the two bodies of law, the State of Israel has adhered to this traditional, bifurcated understanding of their interaction (Tilley, 11). Under IHL, Israel is a belligerent Occupying Power—a status that imposes various obligations upon Israel and prohibits a number of policies. Israel has violated a number of these prohibited actions, some of which will be elaborated on in the following (Tilley, 7, 10). In addition to its initial status as a military occupier, Israel has become a colonial occupier by engaging in a series of practices enumerated in the 1960 United Nations General Assembly's *Declaration on the Granting of Independence to Colonial Countries and Peoples* (Tilley, 2012, 14, 17).[2] This change in the occupation's nature also changes the legal framework(s) applicable to the OPT. The transition from Occupying Power—which concerns itself with IHL—to colonial power triggers IHRL as a second and additional applicable body of law introducing a new amalgam of relevant human rights law to be applied by Israel (Tilley, xii, 9). Thus, framing Israeli occupation as an ethnic conflict rather than one of colonialism discourages a discourse that would provide the language for identifying and addressing these colonial realities, and instead privileges one of war.

[2] Elements of Israel's occupation that are *prima facie* elements of colonialism include, but are not limited to: "unlawful mass transfer of settlers into occupied territory; discriminatory polices applied on the basis of ethnicity and religion; appropriation by the Occupying Power of the territory's natural resources; 'de-development' of the Palestinian economy and mergence with the Israeli economy; and, especially and fundamentally, denial of the Palestinian people's right to self-determination" (See: Tilley, 2012, 21).

c. Paper structure

The paper is divided into two main sections. The first section serves a dual function: First is to carry out a literature review of the existing scholarly debate over the status of 'ethnicity' and ethnic conflict under international law particularly as it pertains claims of self-determination on the basis of ethnicity. This entails a discussion of the historical understanding of conflicts, the use of violence, and its perpetrators. The second function is to lay the theoretical groundwork upon which the subsequent analysis and argument concerning the Israeli-Palestinian conflict will be made. The second section takes up the Israeli-Palestinian conflict as a case study where the colonial aspects of the international legal conceptualization of ethnicity have shaped the application of IHL in a situation often described as an 'ethnic conflict'. The discourses analyzed are drawn from the interventions of United Nations General Assembly (UNGA), United Nations Security Council (UNSC), the ICJ, legal and political science scholars, and national government and military officials that have explicitly characterized the conflict as 'ethnic' or as an 'occupation' within a broader consideration of IHL's application. The temporal limits of the analysis are broad and consider primary documents ranging from the pre-Israeli state era through to present day. Lastly, a clarification similar to that given by author Virginia Tilley (2012) must be made: while 'colonialism' has often been "slung around for years among activist circles" (xvii) as part of the polemical discourse on the conflict, its usage here is a deliberate reference to its form under international law.

II. Ethnicity, Self Determination, Conflict, & Colonial Law

This section introduces the concept of ethnicity, unpacks its colonial origins, and explores how ethnicity is understood within international law. The relationship between the 'ethnicity' and 'self-determination' and their shared development from political concept to legal status is given special attention. The concept of 'ethnicity' has influenced the development of international law because of its dichotomizing of 'self' and 'other' that pervaded European political philosophical traditions (Shahabuddin, 1, 2). Specifically, this section explores how this dichotomy informed colonialism's ontologies, self-understanding, and practice (Shahabuddin 4). Next, a similar analysis is extended to contemporary IHL and its roots in imperial rule and modes of thought. It then brings the conclusions reached in these two preceding sections to interrogate how the documents and texts of IHL have reflected a colonial understanding of ethnicity and ethnic conflict.

a. Colonialism and ethnicity

In his account of international law's framework for responding to ethnic conflict, author Daniel Wippman explains that there is no existing "principled or fully coherent legal or political response to ethno-nationalist claims" (7) among the international community. Instead, reactions have been both confused and confusing, and illustrate the need to rethink the fundamental norms of international law so as to better respond to the claims of states, ethnic groups, and individuals (*ibid.*). This confusion is partially a result of an inconsistent understanding of the concept of 'self-determination' and who can make claims to it. Wippman notes how the post-World War One international community comprised of European states and the freshly minted League of Nations organization ('League') embraced the rhetoric of self-determination but not its universal application (8-9). During this time, self-determination was considered something extended to ethnic groups by the War's victorious Allied state powers, rather than something these groups could independently claim. The Allied powers were not interested in changing the status of their

colonial possessions. Instead of granting self-determination or autonomy to those ruled by the defeated powers, they took over administering territories through the Mandate system that sought to provide tutelage to peoples the League thought unprepared for independent statehood (Tilley 15). Palestine was one such administered Mandate territory, and despite the League's anti-colonial stance it became a British colonial 'possession'.[3]

Even those ethnic groups the League considered worthy of self-determination had limits imposed on their claims. The League found it to be a political principle rather than a legal right, and, therefore, could not be exercised for the purposes of secession. Such a right to secession, the League believed, would introduce anarchy to the international system they had so carefully sought to craft and stabilize (Wippman, 9). It was not until decolonization movements following World War Two that self-determination was recognized as a legal right. Even here it functioned in strictly instrumental terms that did not compromise a state's territorial integrity through secession, since it assumed the territorial separation of the imperial power and its colony (10-11).

Authors Wippman and Mohammad Shahabuddin both identify a tension running through the Western theoretical foundation of ethnicity, the rights of ethnic groups, and the understanding of self-determination in international law. Wippman identifies two contrasting theoretical traditions: 'liberal' and 'communitarian' (6-7). Shahabuddin similarly suggests 19th century European 'liberal' and 'conservative' traditions informed international law's understanding of ethnicity and the discipline's development over time (7-8). Whereas the conservative tradition is fixated with national self-determination as a territorial state with sovereign equality, liberal self-determination is attentive to the rights of individual citizens within a state to participates in their own governance (*ibid.*) Both authors conclude that the dominant liberal tradition emerged victorious, but not without some capitulation to aspects of 'Romantic' (*i.e.* conservative/communitarian) theory that delivered the idea of minority rights under international law. However, liberalism's conservative compromises have not been explicit, resulting in an incoherent body of legal scholarship and jurisprudence ineffective at upholding and preventing ethnic group rights violations.

Contemporary international law is the creation of the European states ideologically situated in the Western 'self' (*i.e.* Great Britain, France, Germany, *etc*.) to the exclusion of all other non-European peoples that constitute the 'other'. It was these same Western states that carried out the bulk of colonial activity around the world—activity responsible for forming much of international law (Anghie, 742). This sovereign legal 'self' did not extend to non-European 'other's or their territories, thus imbuing international law with mechanisms for ongoing exclusion (741). The European 'self' and non-European 'other' was explicit in the quality of relationship between the League's Mandatory Powers and Mandate Territories, which ranged from the aforementioned 'tutelage' to indefinite administration.

This differentiation amongst non-European peoples was situated within a larger dichotomy of those located within "centres of civilization" and those without (Wippman, 38). The eventual extension of self-determination beyond 'civilized' European states to colonial and mandate territories did not involve reimagining state sovereignty and territorial integrity. Instead, it simply introduced what European imperial powers considered the inevitable decolonization of colonial possessions they no longer had the resources to maintain (Tilley, 15). Thus, the 'self'/'other' logic

[3] Colonialism has both a narrow and broad definition in international law, both of which accurately describe the situation in the British Mandate for Palestine and the Israeli occupation of Palestine. The narrow understanding requires a declaration of sovereignty by the occupying power, while the broader one is indicated by the occupied people's loss of control over their natural resources, labour, and markets.

of the state system endured, and it is subsequently impossible to understand international law outside of its colonial context that justified colonialism and its associated atrocities (Shahabuddin, 4).

Ultimately, then, the international legal regime surrounding ethnicity is grounded in colonial modes of thought that persisted from the nineteenth century European colonial policies through to contemporary legal understandings of self-determination. Following the global wave of formal decolonization, international law assumed that colonialism had become a historical artifact (Anghie, 740). Through decolonization, postcolonial states achieved the prevailing liberal manifestation of self-determination and the intra-state ethnic groups that remained were granted minority rights. When the Israeli occupation of Palestine is considered within this context, it becomes clear that Israelis enjoy the material reality associated with the aforementioned conservative understanding of self-determination. Contrastingly, Palestinians are limited to an existence in the image of a narrow, liberal conceptualization that does not entitle them to an official state (Shahabuddin, 7). The colonial origins of ethnicity and self-determination are significant for explaining how international law has regarded and regulated ethnic conflict, and the rights of those involved. As has been demonstrated the second section of this paper, this understanding has persisted in international responses to Israel's occupation of Palestine and Palestinian claims to self-determination.

b. Colonial IHL

As a subset of international law, IHL retains many of its original power arrangements. Globally, the laws of armed conflict were crafted so as to exclude non-European peoples from their protection (Mégret 268). Domestically, states retained a right to territorial integrity that permitted states to carry out extreme violence against their population. Given that colonialism relies heavily upon states' ability to institutionalize their use of violence and that IHL is the regulation of this very violence, it is readily apparent as to why this specific body of law emerged as (and remains) a colonial technology.

To appreciate the significance of this to ethnic conflict it is necessary to examine how this legal process historically emerged. The bulk of IHL is laid out in the Hague Conventions of 1899 and 1907, and four treaties and three Additional Protocol of the 1949 Geneva Conventions (Mégret, 269, 296). Like the ushering in of the United Nations, the signing of the Conventions and a series of subsequent treaties regulating certain types of weapons were a response to World War Two. The efforts of the War's Western victors to codify the laws of armed conflict also attempted to maintain the sovereign authority of past and present imperial *state* actors over colonized territories by excluding wars of national liberation from the Geneva Conventions (Mégret 270-1, 305, 310). Thus, it is no historical accident that the primary subjects of IHL are states. The failure to incorporate non-state actors such as irregular troops, guerrillas, 'terrorists', and populations engaging in spontaneous resistance to occupation into the legal framework was a deliberately exclusionary action rather than a sin of omission (305-6). Many colonial states had not yet achieved independence by the end of the War and were not considered states (*i.e.* legal subjects) in their own right. Under international law, only states are recognized as the 'legitimate authorities' possessing the legal right to resort to war. Such a stipulation presupposes a monopoly on the use of violence within a given territorial boundary required to satisfy the criteria of a 'state'. This renders any and all violence not sanctioned by the state unlawful to the point that external assistance of rebels within a state is prohibited (Wippman, 245). In essence, IHL excludes and fails to protect wars of self-determination and the subjects who wage it since they do not adhere to the

prevailing European idea of war and combatant (Mégret, 307). This is particularly relevant in situations where a group is seeking self-determination to the point of armed conflict.

Despite numerous international legal documents supporting the concept of universal self-determination, the hegemonic legal definition *denies colonial subjects legal pathways through which they could make claims to self-determination through decolonization*. This is because international law does not permit non-state actors to engage in armed resistance to colonial violence and occupation. International law is invested in the maintenance and reproduction of an international system consistent with the Western vision of states and resists challenges to it. However, this has not prevented other, non-European state actors from trying to extend international legal personality and its accompanying rights to non-state actors. In 1960, the United Nations General Assembly ('UNGA') passed Resolution 1514 on the status of colonized territories, which called for the self-determination of 'all peoples' with the aim of decolonizing international law's language and future deeds. Unfortunately, removing the formal, textual indicators of colonial thought from international law actually made identifying pervasive colonial policies of differential treatment more difficult than it previously was. Whereas former discourse included allusions to 'uncivilized' and 'savage' peoples, the amended language is 'neutral' and generalized, and thus masks the differential treatment of Western and non-Western subjects it enables (Wippman, 39). Following from a general right to self-determination is the question of what methods are legally available for its realization.

While international law prohibits interstate acts of aggression, it permits intrastate conflicts, including ethnic conflicts that occur within the boundaries of a single state. As mentioned, non-state actors are not permitted to wage war, and their violence can be legally 'put down' by the state in which they reside. This is reflected in the United Nations Charter, which states the "Security Council shall determine the existence of any […] act of aggression" (Ch. V, Art. 39). This right to recognize and—pursuant to Chapter VII of the UN Charter—militarily respond to acts of aggression is exclusive to the United Nations Security Council (UNSC) and its five, permanent, veto-wielding members: Great Britain, France, the United States, Russia, and China. This membership is directly reflective of the outcome of World War II and these states' military and economic influence. The exclusive powers afforded to these UNSC members to determine the legality of a state or non-state actor's use of force is not without contention. In 1974, the UNGA sought to address this institutional power imbalance and presented the UNSC with a resolution recommending the exception of acts otherwise defined as 'aggression' when taken by "peoples under colonial and racist regimes or other forms of alien domination" for the purposes of "self-determination, freedom and independence" (UNGA Res. 3314, Art. 7). This provision recognized the legal restraints placed upon colonized people in resisting and attempting to overthrow empire. The recommendation reflected the UNGA membership, which includes developing and postcolonial states. Yet the hierarchized United Nations institutional framework rendered this resolution a mere *recommendation* lacking any legally binding status. As a result, the 'state' as a territorially bounded legal entity retains a monopoly on the *legitimate* use of violence. As is consistent with this logic, groups engaging in anti-colonial resistance are often branded as 'rebels' or 'terrorists', and subsequently dismissed as both unethical and illegal. Consequently, international law is permissive of colonial states and their use of violence, making it extremely difficult for a colonized people to *legally* engage in armed resistance.

c. Ethnic conflict under IHL

Starting from the premise that 'ethnic conflict' is a unique type of conflict regardless of whether it is (in the language of the Geneva Conventions) 'international' or 'non-international' in scope, one must ask whether IHL is appropriate for regulating ethnic. Ethnic conflicts are generally intra-state, and civil wars often witness unusual levels of violence against noncombatants (Wippman, 247). Similarly, ethnic conflict is not a "natural category" of analysis in international law, since it predominantly defines conflict by the presence (or absence) of state actors (2). Thus, the rights of different actors have never been concretely defined, resulting in the inconsistent use in international legal discourse of "peoples" and "minorities", who are legally entitled to self-determination and protection, respectively (3). The legal framework(s) applicable to ethnic conflict remains equally as undeveloped, and international law did not move to establish an institutional architecture for international response to breaches of IHL in the context of ethnic conflicts until the International Criminal Tribunal for the Former Yugoslavia in 1993 (129). These ad hoc tribunals emerged as their conflicts reached concluded and were therefore a reactive and spontaneous mobilization of various members of the so-called 'international community' to pursue situation-specific war crimes. These rulings were significant for concretely locating instances of ethnic conflict in IHL. However, the conclusions reached in these rulings were highly contextualized, and thus not fit for universal application. As has been seen in this paper, such an inadequate treatment of ethnicity in international law is owed to European ideological traditions, namely, liberalism and conservatism, which shaped international law and justified colonialism.

III. Case Study: Israeli-Palestinian Conflict

This next section will explore how characterizations of the Israeli-Palestinian conflict as 'ethnic' carries with it implications for how the conflict is understood by external actors, what international law is thought to apply to it, and how and why certain legal principles are upheld while others are not. It concludes that framing the conflict as 'ethnic' rather than a situation of colonial occupation has *given primacy to Israeli territorial integrity over the self-determination of Palestinians*. This conceptualization permits the maintenance and defence of this territorial integrity at virtually any cost. Hence, Israeli obligations to uphold the territorial and human rights of Palestinians in the OPT as a belligerent and colonial occupier are either denied or placed secondary to the 'interests' and 'territorial integrity' of the Israeli state.

Determining IHL's spatial and temporal applicability demands a definition of 'belligerent occupation'. Defined as "a transitional period following invasion and preceding the cessation of hostilities," (Tilley, 7) belligerent occupations place obligations upon the occupying power that are enumerated in the Fourth Geneva Convention. To this day, the Israeli state denies that its presence in the OPT is an 'occupation' and thus rejects any obligation to apply the Fourth Geneva Convention (*ibid.*).

a. Correctly characterizing the conflict

A robust understanding of the Israel-Palestine conflict requires acknowledging that while the conflict *is* borne between two self-identified ethnic groups, it *is not* primarily 'ethnic' in character. Rather, it is a situation of territorial occupation and colonization, as demonstrated by both its material and discursive aspects. The conflict's material dimensions are consistent with modalities of colonial rule seen in previous centuries. Similarly, the official discourse of Israeli government representatives and scholarship of those sympathetic to it have deployed the language of ethnicity (and its accompanying colonial logic) by speaking of Israel as an ethnically 'Jewish'

state surrounded by those of 'Arabs'. This sentiment recently received constitutional status in the codified of a national *Basic Law: Israel - The Nation State of the Jewish People*. Before visiting the conflict's ethnic elements (explicit and implicit), it is necessary to provide a brief overview of Palestine's historical and contemporary colonization. This will also clarify precisely what it is about the Israeli occupation and state policies that renders them colonial.

Palestine was a province of the Ottoman Empire from the sixteenth century until the end of World War I (Sabbagh, 23). The War's victors subsequently dissolved the Ottoman Empire and Palestine came under the colonial administration of Britain as a Mandate Territory from 1922-1948 (Said, 242). UNGA Resolution 181 partitioned the territory to create a "Jewish" and "Arab" state (UNGA, 1947). Even as a British protectorate, Mandatory Palestine was nothing short of a colonial entity. As such, the future state of Israel directly emerged out of the reality of European colonialism in the Middle East. However, Israeli colonialism in Palestine is both qualitatively and quantitatively distinct from that under the British; beginning with Zionist thought. Establishing the Israeli state as a Jewish state is the Zionist project that continues to inform the Israeli government's logic of what Tilley refers to as "territorial-demographic domination" (xv).

Israeli colonization in Palestine expanded following the 1967 War, through which Israel annexed Jordanian controlled Jerusalem and West Bank territory, the Syrian controlled Golan Heights region, and Egyptian-controlled Gaza Strip territory and Sinai Peninsula—the latter of which was returned to Egypt in 1979, while the other three have been annexed and/or occupied by Israel. What is referred to as the OPT includes the areas referred to as the Gaza Strip Territory, the West Bank territory, and East Jerusalem (ICJ, 2004, para. 70-78; 102-113). Under the Geneva Conventions, Israel has violated a number of obligatory and prohibitory behaviours that apply to it as a belligerent occupier. Examples of this include the expansion of Israeli settlements in East Jerusalem and the West Bank, the construction of the West Bank border wall, and the siege-style blockade on the Gaza Strip territory. In particular, the border wall and settlements in the West Bank were found by the ICJ to be a breach of the Fourth Geneva Convention on the rights of populations under occupation and the obligations of Occupying Powers (ICJ, 2004, para. 154-159). Additionally, Israeli military conduct in the context of its numerous wars on Gaza Strip between the 2008-2014 have been found to involved numerous breaches of IHL due to high levels of collateral damage and civilian injury and death implicating both aerial bombardment campaigns and ground assaults. Much of the scholarship on the legal situation of the conflict has rightly focused on these breaches, however, as Tilley observes, it has often failed to understand Israeli violations of IHL within the larger context of its colonial project (Tilley, xii, xiv).

b. Whose colonialism?

Palestinian colonial history is unusual. While the territory was conquered by consecutive European powers, Zionist discourse around the establishment of the Israeli state tells a different story. Because some nationalist Jewish groups and militias in pre-1948 Palestine thought of their struggle as one against British colonial rule, it has been suggested that Jewish settlement activity in the territory was itself a 'throwing off' of colonial occupation, rather than its reconstitution. Indeed, the leaders of the future national Likud Party bloc saw themselves as "anti-colonial freedom fighters rather than as settlers" (Mitchell, 5). However, while there was a revolt by some Zionist groups against the British authorities in Palestine, the *movement* was aligned with British imperialism and received British support for establishing a Jewish state (*ibid*.) The 'Jewish' nature of the state is crucial to understanding Israeli identity and how it operates in the Israeli-Palestinian conflict, the occupation, and the ongoing territorial colonization.

c. Legal frames: where Eurocentrism meets state-centrism

Understanding how and why the Israeli-Palestinian conflict is described by the following authors as an ethnic conflict rather than a colonial occupation requires revisiting the concepts 'self-determination' and 'legitimate authority' in greater depth. International law has theorized both these concepts within the limits of traditional Eurocentric and state-centric thought that restricts the self-determination of sub-state and colonized populations and grants the status of 'legitimate authority' to only existing state actors. As suggested above, framing the occupation as an ethnic conflict has prioritized Israeli territorial integrity over the Palestinian self-determination provided as justification for its colonial policies. Both Zionist and Israeli government discourses have taken the *state* of Israel as their ontological priority and object of analysis. This was made explicit in the Jewish People's Council's 1948 declaration of the State of Israel (Ministry of Foreign Affairs) that the future state would embrace the liberal understanding of states within a Westphalian system of international relations. According to this understanding, states have a monopoly on the use of violence that permits them the sole authority to deploy it both internally and externally. International legal regulation of the use of violence is limited to state actors and prohibits acts of aggression (*i.e.* force) by non-state actors within or outside of their own territorial state (Wippman, 245). This state-centric attitude has been crucial for branding different forms of Palestinian armed resistance as 'terrorism'. Without a state, Palestinian violence is not capable of being considered legitimate and is therefore condemned as illegal. And without a state, the conflict is externally regarded as a civil war.

Intra-state conflicts are exclusively domestic legal jurisdiction such that foreign states supplying arms to combatants engaged in a civil conflict are potentially committing an act of war (Wippman, 245). This is indicative of how deeply engrained the principle of sovereign equality is within international law and IHL. The Western 'self' is assumed to be peace-loving and tolerant of its ethnic minorities, even during civil strife. According to the liberal theoretical framework within which international law and IHL developed, democratic states are less likely to go to war. But as author Anne-Marie Slaughter notes, "[l]iberalism assumes a polity. It offers little guidance for creating one—or holding one together" (Wippman, 144). Very few states are ethnically homogenous, including liberal democracies, and it is not at all obvious that they are more peaceful than non-democracies in responding to ethnic conflict. Slaughter observes that liberal democratic peace theory essentially falls apart when considering liberal democracies' responses to internal strife along ethnic lines (Wippman, 143). This is consistent with Israel's policies towards Palestinians, where Israel's liberal democratic constitution and ideological membership in the Western 'self' has in no way precluded its violations of international law. Thus, liberal international relations theory is committed to a Eurocentric, state-centric understanding of people residing without *and* within states.

The right to self-determination of national groups (including ethnic groups) was established in 1920 as part of League of Nations' Commission of Jurists Report on the Aland Islands dispute. However, contemporary international law still does not recognize a right to secession on the basis of ethnic status (Wippman, 14-15). Rather, colony-status introduced such a right, and unlike membership of a colonized population, membership in an ethnic group does not in itself carry a right to self-determination as independence. It is important to note here that a wide-scale recognition of the colonial situation in the Occupied Palestinian Territories ('OPT') by state actors and/or international legal institutions could strengthen Palestinian claims to self-determination and enable a corollary recognition of Israel's colonization as a crime against humanity.

Author Virginia Tilley explains the Israeli government's claim that its chief concern is a potential "Arab attack", and thus the primary foci in peace talks on the conflict have been addressing Israel's security the parties' presumed "mutual hatreds" (Tilley, xiii). She suggests that this is a flawed understanding of the conflict that washes over the reality of Israeli colonialism and has consequently contributed to a hitherto unsuccessful resolution to the conflict. Colonialism, she asserts, is a grabbing of land and resources enabled by superior military power. The domination inherent to all colonialism elicits resistance from the dominated group that can be armed, and its accompanying violence is often disproportionately regarded as an obstacle to peace. This resistance is perceived by the dominator as legitimizing the necessity for domination (xiii-xiv). Such is the case for Palestinian resistance to Israeli colonial domination, where Palestinian resistance is both unarmed and armed, with the latter manifesting as attacks with knives, vehicles, suicide bombs, and rockets.

d. The Israeli 'self' and Palestinian 'other'

In his historiography of ethnicity and international law, Shahabuddin describes how the self-perception of liberal West and conservative Eastern 'other' produced a minority rights regime during the World War I and II interwar period that imposed special minority protection obligations in Eastern and Central European states and left minorities in the Western sphere without international protection (Shahabuddin, 4). Given that central European states were considered to reside outside of the liberal West during the interwar period, it is evident that these 'self' and 'other' denominations are far less spatially (*i.e.* geographically) determined as they are ideologically. Because the liberal 'self' concept is purely abstract and possesses no absolute, material counterpart, its content is continually redefined and reproduced in fluid processes of inclusion and exclusion. Membership in a given side of the dichotomy is similarly negotiated and renegotiated depending on the given parameters and can therefore be extended and revoked to different subjects in a variety of spatial and temporal situations. Dichotomizing the 'self' and 'other' is particularly visible in colonial contexts where the consistent oppression of a colonized population requires a normative framework and logic that can be internalized by both the settler and colonized populations to justify the violent practices. In Israel's occupation of Palestine, the discourse that creates the Jewish 'self' and Palestinian 'other' is implicitly institutionalized in some policies and explicitly enshrined in others.

As a member of the fluidly defined Western liberal 'self', Israel can be trusted to ensure the rights of the ethnic (*i.e.* Arab-Israeli and Palestinian) minorities and has not been regarded as requiring an international minority protection regime like those established in the interwar period. However, in Israel—as in the rest of the so-called 'West'— the liberal tradition in operation has actually resulted in a policy of assimilation and exclusion along ethnic lines (Shahabuddin, 3). As discussed by author Thomas Mitchell (2000), Jewish Israelis have a dual identity that combines a religious and ethnic (*i.e.* Jewish) identity with a national one (*i.e.* Israeli). The Zionist ideology pre-dating the state and underpinning the establishment of Israel deployed ethnic discourses that conceived of the Jews not merely as a religious group but as a 'people' (21). Israeli state policy reflects this contention in its discourse and practice, which authors Oren Yiftachel and As'ad Ghanem (2004) identify with its function as the prototypical 'ethnocratic' regime. According to the authors, an ethnocracy "facilitates the expansion, ethnicization and control of a contested territory and state by a dominant ethnic group" (Kauffman, 157). While ethnicity is a crucial feature of Israeli occupation and colonialism, the authors deliberately identify the conflict as one over territory and not between ethnicities. From the state's founding, Israel pursued a concerted

strategy of 'Judaization' that undemocratically de-Arabized the territory. Essential to this process and the ethnocratic character of Israel is constructing 'ethnicity' as a social category for use as a tool of oppression in the context of territorial conflicts (*ibid.*).

The Israeli state has demonstrated a willingness to use the language of ethnicity in defining its 'self' against the Arab (and Palestinian) 'other'. Israeli government policies demonstrate how ethnicity in the state has, according to Yiftachel and Ghanem, "become an essentializing and stratifying mechanism, drawing on the ability of the state and dominant majority to shape and mobilize identities" (157). Israeli Basic Law holds Israel to be "the nation-state of the Jewish People" and Jewish settlements are a "national value" (Basic Law: Knesset). Connected to this is Israeli citizenship law, which regards any individual with a 'Jewish' mother to be Jewish themselves, and therefore entitled to Israeli citizenship regardless of their geographic location or place of birth (Law of Return, 1950). Israeli Supreme Court rulings state that citizenship flows from membership in the Jewish 'people' and clearly defined Israel as the State of the 'Jewish nation'. Similarly, land and property in the OPT must be administered in the interests of 'Jewish people' exclusively, regardless of whether they are Israeli citizens (Tilley, 119-120). Israeli exclusion of Palestinians as non-Jews is evident in how 'Jewish' functions as a group identity tied to religious and lineal descent from antiquity that entitles those it envelops to special rights and privileges (Tilley, 122). Correspondingly, the confined assigned living areas of Palestinians in the OPT is due to the cantonization of the Territories along lines that Tilley describes as "based entirely on ethnicity" (156).

e. Academic frames: Ethnicities in conflict

This final section examines scholarship written on the Israeli-Palestinian conflict that discusses the extent to which it may be accurately described as 'ethnic'. It begins by discursively analyzing the work of several authors who attempt to frame it as an ethnic conflict and concludes with a brief consideration of those who challenge this characterization.

Ethnicity above all else

In his book, *The Shift* (2010), author Menachim Klein explains how the Israeli-Palestinian conflict has transformed as an ethnic conflict in the years between 2000-10. As part of this effort, Klein examines Israeli political actions, with special attention being given to how they have or have not lined up with Israeli state discourse. The actions considered are mainly the structure of Israeli rule over Palestinians that has resulted in various costs and benefits for the 'Jewish state' (5). These structures are considered in the context of what Klein identifies as increased "Israeli settler expansion and security operations" that have disempowered negotiations and brought the conflict back to its *original*, 'ethnic' status (4). Klein places the Israeli state at the centre of his investigation "since Israel is the powerful actor in its asymmetric conflict," and insists he will only look at the "facts as they are on the ground" (2). Klein suggests that the conflict was, from its onset, an ethnic struggle, and rejects its characterization as a situation of apartheid regime by a colonial occupier (18-19). He argues this by looking at the language of the aforementioned 1948 declaration of the State of Israel and the 1988 Palestinian Liberation Organization's ('PLO') declaration of independence (A/43/827 and S/20278). The gap between these two declarations is significant in the context of the conflict's development, since one occurred at the formal onset of the conflict, while the other was made forty years later—a period of time that witnessed massive territorial annexation and settlement expansion by Israel, numerous wars between Israel and its neighbouring states, as well as the commencement of the first Palestinian Intifada. This fact is

completely misrepresented by Klein, who cites the PLO declaration as occurring in 1948 as a 'counter' to the Israeli declaration (144, note 4), and suggests the two occurred contemporaneously (10). Klein goes on suggest that despite Israeli efforts to "solve this ethnic conflict", the eventual failure of the Oslo agreements resulted in the conflict reverting back to an ethnic one (12).

In their 2002 book, *The Arab-Israeli conflict transformed: fifty years of interstate and ethnic crises*, authors Hemda Ben-Yehuda and Shmuel Sandler make a similar effort to Klein's to explain changes in the Arab-Israeli conflict as a result of various international crises using both institutionalist and realist schools of thought in classical international relations theory (2). They describe how the conflict transformed from an interstate dispute to a "Palestinian-Israeli ethnic-state struggle" (ix). The authors' use of mainstream international relations theorizing and state-based analysis is consistent with traditional theorizing in international law. The two share a language and ideological foundation that developed in similar historical contexts and produced state-centric and Eurocentric discourses. The authors attempt to introduce 'ethnic theory' to international relations theory which has historically ignored the 'ethnic factor' as an element of international politics and conflict (2, 20). The authors use the terms 'Jewish' and 'Arab' interchangeably with 'Israeli' and 'Palestinian' (24), thus, making clear their willingness to use ethnic discourse in understanding the conflict and how to best 'resolve' the conflict (125).

Oded Haklai's (2011) text, *Palestinian Ethnonationalism in Israel*, argues that the political mobilization of Palestinian citizens of Israel has transformed in both its character and scope as a result of institutional changes made to the Israeli state (7). This mobilization has created an opening for what the author calls 'ethnonationalist minority political activism' by Palestinian Israelis. However, Haklai is clear that these institutional changes are the result of internal contestation within the dominant Jewish majority in Israel, rather than independently formulated Palestinian action. Accordingly, Palestinian action and *reaction* is determined by and dependent upon Israeli action. The author's identification of Palestinian ethnonationalist claims as a recent phenomenon (emerging in the late 1960s and early 1970s) effectively defines Palestinian Israeli identity as one that only exists in contrast Jewish Israeli identity (4, 6). Thus, Palestinian Israelis are understood to be an ethnicity only insofar as there is a Jewish Israeli identity against and in response to which Palestinian Israelis exist. He outright rejects using the descriptor 'ethnocracy' to identify "Israel's lack of state neutrality," and is similarly dismissive of making 'moral evaluations' of Israel, stead appealing to a positivist epistemology like Klein's (10-11). The methodological commitments of Haklai's argument are connected to two points of ethnic discourse around the Israeli-Palestinian conflict. Firstly, Haklai's intervention displays how the subject formation of Israelis and Palestinians occurs in academic discourse. This is achieved in his giving account of the Palestinian Israeli 'other' as an imitative response to Jewish Israeli ethnonationalism. Secondly, Haklai ignores Israel's historical and ongoing colonial occupation in contextualizing the 'grievances' Palestinians have voiced in their political mobilization within Israel (7). Haklai's remarks on how Palestinian Israelis came to be ruled by the Israeli state completely washes over the violent circumstances and colonial project surrounding the state's founding. He describes how these Palestinians "found themselves in the territory of the new Jewish state" as if by some historical accident (5). Evidently, these future Palestinian Israelis were misled by Palestinian and surrounding Arab state leaders into believing no such Jewish state would come into being (*ibid.*)—giving the impression that the population fell under colonial rule through their own misplaced trust. The implication of this book for gaining understanding of international law's relevancy to the conflict is consistent with the Israeli state assertions: Israel is not an imperial occupier ruling over

a colonized population, but merely a democratic state governing over an ethnic minority located within its territorial boundaries.

Author Lea Brilmayer (Wippman, 1998) gives account of the conflict's origins is akin to Haklai's. In her examination of the international legal manifestation of nationalism and its value, Brilmayer examines what she considers a nationalist dispute in Israel (72). She evaluates current Israeli and Palestinian current territorial claims and attempts to explain their respective instrumentalist and institutionalist arguments. Brilmayer suggests that the instrumental objectives of claiming a territory for a people facing annihilation—as Europe's Jewish population did during the Holocaust—completely changes the nature of the dispute. Such is a rare 'argument of need' that disrupts the entitlement rights being claimed by Palestinians (72-73). While Brilmayer acknowledges and lists some alternative arguments made for Palestinian and Israeli positions, she does not attempt to situate these arguments within the historical context that witnessed the Israeli state's establishment, nor does she entertain the possibility that an 'argument of need' may no longer be an appropriate argument to make in the current situation. Brilmayer is similarly silent on the issue of Israel's status as a military and/or colonial occupier and how this change and challenges the relevancy of such nationalist claims to international law's application in Israel and the OPT.

Beyond ethnic conflict

In contrast to scholarship characterizing the Israeli-Palestinian conflict and as 'ethnic', several authors have offered alternative visions of the occupation. Many of these interventions are written from critical legal perspectives or have been voiced by Palestinians themselves. According to Tilley, Palestinian national identity is associated with 'national origin', rather than 'nationality', since millions of Palestinians are currently stateless or obtained citizenship of third states. Palestinian nationalist discourse has situated Palestinian identity within the broader 'Arab' identity of the region but maintains a unique Palestinian nationhood. In contrast to Zionist discourse, ethnicity as customary language, dress and cuisine has never been a "consistent factor" in Palestinian identity. Within the territory encompassed by Mandate Palestine, Palestinian identity is ethnic. However, Palestinians around the world do not necessarily share the traditional customs that could indicate 'ethnicity' (121). Similarly, religion is not a consistent feature of Palestinian identity, since 'Palestinian' is a title inclusive of Muslims, Christians, and Jews (A/43/827 and S/20278). This is a unique juxtaposition to Israeli state discourse which explicitly refers to Judaism as a marker of Israeli (and Jewish) identity.

Author Karl Sabbagh (2006) offers alternative perspectives on what (if any) role ethnicity has played in the identities of those involved in the conflict, their understanding of how the conflict came to be, and why the occupation continues today in its current form. In contrast to the Palestinian institutionalist claims anticipated by Brilmayer, Sabbagh does not appeal to what Brilmayer identifies as "usual rules of territorial sovereignty" (73). Rather, Sabbagh dismisses using ancient maps of Palestine as a "basis for granting sovereignty in the modern world" (16). Sabbagh rejects contrived historical pedigrees that attempt to trace ethnic continuity between Jews and the ancient Israelites, instead suggesting that the "peoples" who have lived in Palestine over the centuries were so diverse and overlapping in culture that no clear ethnicities can be accurately identified (13). He uses the language of ethnicity to describe contemporary hostilities between Arabs and Jews in Palestine but insists it is the product of the Mandate era rather than a "traditional enmity" (8). Palestinian anger at British sanctioned Jewish immigration and state-building was not motivated by racism, but by resistance to what was perceived as foreign rule and land theft (208-

9). While ethnicity is certainly relevant, the conflict is ultimately about territory and the legal rights of peoples located therein. Sabbagh identifies Zionist Israelis' unwillingness to accept that states "solely defined in ethnic terms are inherently undemocratic if they include citizens who are not from that favoured ethnic group" as the main contributor to the conflict's continuation (209). Sabbagh unpacks how the British perception of Palestinians as an uncivilized 'other' incapable of self-rule was promoted European Zionists wanting to "capitalize on the colonialism" fundamental to British identity in the early twentieth century (5). He draws parallels between contemporary championing of "Western-style" democratic ideals and the West's historical dismissal of Palestinian culture as one of 'natives' and lacking in merit (5-6).

Coupled with the Zionist slogan circulating at the time that Palestine was 'A land without a people for a people without a land' (6), such an understanding of the Palestinian 'other' would give credence to Zionist use of the imperialist claim that *terra nullius* ('empty land') created a legal right for annexation under international law. Of course, no colonized was ever 'empty', however, *terra nullius* was also understood to include an absence of government that did not adhere to Western ideas of governing (Tilley, 14, 120). In Palestine (as well as other colonized territories), its people were imposed a specific ethnic identity by the imperialist 'self' that had clear legal implications on their both their territorial claims and right to self-determination. The 1948 declaration of Jewish state in an existing British colonial possession was (and remains) consistent with the imperial logic of international law that prioritized the rights certain ethnicities over others.

VI. Conclusion

Starting with the assertion that international law developed as a tool for Western imperialism, this paper has argued that characterizations of the Israeli-Palestinian conflict as 'ethnic' have facilitated the continued application of colonial violences in the OPT. In making this argument, it has demonstrated that the current conceptual expressions of 'ethnicity' and 'self-determination' in international law have maintained their imperial logic and function, especially with regards to their relationship with the laws of armed conflict. The legal framework constituting IHL illustrates how the West's logic of ethnicity has enabled violence against colonized people to be institutionalized in legal texts and discourses.

In the case of the Israeli-Palestinian conflict, Israel's ongoing occupation and colonization of Palestine has denied Palestinians a right to self-determination and legally justified violations of IHL in the OPT. This has been supported by the efforts of the Israeli state and its academic allies who have deployed a discourse characterizing the conflict as one between disputing ethnicities, rather than an occupying power and colonized population. These discourses have been successful in shifting analyses of the conflict and applicable international law away from the rights and obligations of its colonial subjectivities and the conflict's historical context and centred it on the rights and obligations of dominant ethnic groups within the existing state-based arrangements.

In rupturing the false notion that international law has purged its colonial history, this paper hopes to encourage a reimagining of Israeli and Palestinian identities beyond a dichotomized 'self' and 'other', and in doing so reimagine IHL in such a way that it can identify and disrupt the colonial occupation. It is hoped that through this reimagining a more just and equitable outcome for all those involved can be realized in the future.

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