

THE ONGOING NAKBA: TOWARD A LEGAL FRAMEWORK FOR PALESTINE

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In the past two months, Israel has killed over 17,700 in Gaza. Two-thirds of those killed were women and children. As Rabea Eghbariah so chillingly observes, legal scholars writing in times of painful tragedy “tend to sharpen their pens after the smell of death has dissipated and moral clarity is no longer urgent.” Within the world of the legal academy, pens instead have sharpened towards those seeking to amplify the voices of Palestinian scholars and activists. This past November, after commissioning the following piece for the Harvard Law Review blog, that journal’s editorial board voted not to publish this work. Harvard Law Review’s editorial staff cited concerns about harassment, doxxing, or attempts to otherwise intimidate their membership over the publication of this piece.

As students at NYU Law, we understand the legitimacy of those fears, and have watched as members of our community faced those exact realities over the past months. Nonetheless, we cannot allow those seeking to silence Palestinians to obfuscate the scope and genocidal nature of this tragedy. As a journal, the Review of Law and Social Change is committed to solidarity with Palestinians collectively struggling toward liberation. We dream of a day where Palestinian students can play, learn, and rejoice freely; of an end to the occupation and colonization of Palestinian land; and of an end to the discrimination and denial of rights to Palestinians. We publish Rabea Eghbariah’s piece, “The Ongoing Nakba: Towards a Legal Framework for Palestine” to offer the piece the standing that it was denied in legal academia and amplify a necessary and astute analysis of the ongoing Israeli genocide of the Palestinian people, from 1948 to today.

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Genocide is a crime. It is a legal framework. It is unfolding in Gaza. And yet, the inertia of legal academia, especially in the United States, has been chilling. Clearly, it is much easier to dissect the case law rather than navigate the reality of death. It is much easier to consider genocide in the past tense rather than contend with it in the present. Legal scholars tend to sharpen their pens after the smell¹ of death has dissipated and moral clarity is no longer urgent.

Some may claim that the invocation of genocide, especially² in Gaza, is fraught.³ But does one have to wait for a genocide to be successfully completed

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¹ Mosab Abu Toha, *The Smell of Flesh is Everywhere: A Dispatch from Gaza*, Coffee House, Nov. 3, 2023, <https://www.spectator.co.uk/article/the-smell-of-flesh-is-everywhere-a-dispatch-from-gaza/>.

² Martin Shaw, *The Uses and Abuses of the Term "Genocide" in Gaza*, New Lines Magazine, Nov. 6, 2023, <https://newlinesmag.com/spotlight/the-uses-and-abuses-of-the-term-genocide-in-gaza/>.

³ Ishaan Thahoor, *Israel's War in Gaza and the specter of 'genocide'*, Washington Post, Nov. 7, 2023, <https://www.washingtonpost.com/world/2023/11/07/genocide-israel-gaza-palestine/>.

to name it? This logic contributes to the politics⁴ of denial.⁵ When it comes to Gaza, there is a sense of moral hypocrisy⁶ that undergirds Western epistemological approaches, one which mutes the ability to name the violence inflicted upon Palestinians. But naming injustice is crucial to claiming justice. If the international community takes its crimes seriously, then the discussion about the unfolding genocide in Gaza is not a matter of mere semantics.

The UN Genocide Convention defines⁷ the crime of genocide as certain acts “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” These acts include “killing members of a protected group” or “causing serious bodily or mental harm” or “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”

Numerous statements⁸ made by top Israeli politicians affirm⁹ their intentions. There is a forming consensus among leading scholars in the field of genocide studies that “these statements could easily be construed as indicating a genocidal intent,” as Omer Bartov, an authority in the field, writes.¹⁰ More importantly, genocide is the material reality of Palestinians in Gaza: an entrapped,¹¹ displaced,¹² starved,¹³ water-deprived¹⁴ population of 2.3 million

⁴ Nur Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, Pluto Press, 2003, <https://www.jstor.org/stable/j.ctt18dztmq>.

⁵ Sarah Minslow, John M. Cox, & Amal Khoury, *Denial: The Final Stages of Genocide*, Sept 21, 2021, https://www.google.com/books/edition/Denial_The_Final_Stage_of_Genocide/TyE-EAAAQBAJ?hl=en&gbpv=0.

⁶ Eric McDaniel, *Biden Accuses Putin of Committing Genocide in Ukraine*, April 12, 2021, <https://www.npr.org/2022/04/12/1092460473/biden-appeared-to-accuse-putin-of-committing-a-genocide-in-ukraine>.

⁷ United Nations, *Convention for the Prevention and Punishment for the Crime of Genocide*, Jan 12, 1951, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁸ Chris McGreal, *The Language Used to Describe Palestinians is Genocidal*, Oct 16, 2023, <https://www.theguardian.com/commentisfree/2023/oct/16/the-language-being-used-to-describe-palestinians-is-genocidal>.

⁹ Brett Williams, *Netanyahu Accused of 'Genocidal Intentions' in Gaza After 'Holy Mission' Speech*, Oct 16, 2023, <https://www.commondreams.org/news/netanyahu-genocide>.

¹⁰ Omar Bartov, *What I Believe as a Historian of Genocide*, Nov 10, 2023, <https://www.nytimes.com/2023/11/10/opinion/israel-gaza-genocide-war.html>.

¹¹ Bel Trew, *The Reality of Israel's 'Total Siege' on Gaza - Where Two Million Palestinians are Trapped in a 25 Mile Stretch of Land*, Oct 17, 2023, <https://www.independent.co.uk/news/world/middle-east/gaza-strip-palestine-evacuation-israel-siege-b2430912.html>.

¹² *4200 People Killed, Over One Million People Displaced in Just 10 Days - OHCHR briefing*, Oct 17, 2023, <https://www.un.org/unispal/document/4200-people-killed-over-one-million-people-displaced-in-just-10-days-ohchr-briefing/>.

¹³ *Israel is Waging an Extensive War of Starvation Against Gaza's Civilian Population*, Nov 5, 2023, <https://reliefweb.int/report/occupied-palestinian-territory/israel-waging-extensive-war-starvation-against-gazas-civilian-population-enar>.

¹⁴ Kaamil Ahmed, *Lack of Clean Drinking Water for 95% of People in Gaza Threatens Health Crisis*, Nov 4, 2023, <https://www.theguardian.com/global-development/2023/nov/04/lack-of-clean-drinking-water-for-95-of-people-in-gaza-threatens-health-crisis>.

facing massive bombardments and a carnage in one of the most densely populated areas in the world. Over 11,000 people have already been killed.¹⁵ That is one person out of every 200 people in Gaza. Tens of thousands are injured,¹⁶ and over 45% of homes in Gaza have been destroyed.¹⁷ The United Nations Secretary General said that Gaza is becoming a “graveyard for children,”¹⁸ but a cessation of the carnage — a ceasefire — remains elusive. Israel continues¹⁹ to blatantly violate international law: dropping white phosphorus²⁰ from the sky, dispersing death in all directions,²¹ shedding blood, shelling neighborhoods,²² striking schools,²³ hospitals,²⁴ and universities,²⁵ bombing churches²⁶ and mosques,²⁷ wiping out families,²⁸

¹⁵ Nidal Al-Mughrabi, *Gaza death toll tops 10,000; UN calls it a children's graveyard*, Reuters, Nov. 6, 2023, <https://www.reuters.com/world/middle-east/pressure-israel-over-civilians-steps-up-ceasefire-calls-rebuffed-2023-11-06/>.

¹⁶ Mary Kekatos, *Why women, children are disproportionately impacted by the conflict in Gaza: Experts*, ABC News, Nov. 7, 2023, <https://abcnews.go.com/International/women-children-disproportionately-impacted-conflict-gaza-experts/story?id=104655493#:~:text=More%20than%2010%2C000%20people%20have,Gaza%20Health%20Ministry%20said%20Monday>.

¹⁷ *Israel-Hamas War*, Wall St. J., Oct. 27, 2023, <https://www.wsj.com/livecoverage/israel-hamas-war-palestinians-news/card/at-least-45-of-housing-units-destroyed-or-damaged-in-gaza-ivl62BFnzTgT7qkzoeS1>.

¹⁸ Patrick Wintour, *Gaza becoming ‘a graveyard for children’, says UN secretary general*, The Guardian, Nov. 6, 2023, <https://www.theguardian.com/world/2023/nov/06/gaza-becoming-a-graveyard-for-children-says-un-secretary-general>.

¹⁹ Luigi Daniele, *A lethal misconception, in Gaza and beyond: disguising indiscriminate attacks as potentially proportionate in discourses on the laws of war*, Eur. J. Int'l L., Nov. 7, 2023, <https://www.ejiltalk.org/a-lethal-misconception-in-gaza-and-beyond-disguising-indiscriminate-attacks-as-potentially-proportionate-in-discourses-on-the-laws-of-war/>.

²⁰ *Israel: White Phosphorus Used in Gaza, Lebanon*, Hum. Rts. Watch, Oct. 12 2023, <https://www.hrw.org/news/2023/10/12/israel-white-phosphorus-used-gaza-lebanon>.

²¹ Bethan McKernan, *‘We’re focused on maximum damage’: ground offensive into Gaza seems imminent*, The Guardian, Oct. 12, 2023, <https://www.theguardian.com/world/2023/oct/10/right-now-it-is-one-day-at-a-time-life-on-israels-frontline-with-gaza>.

²² Mohammed Haddad, *Where are Gaza’s neighbourhoods destroyed by Israel?*, AlJazeera, Oct. 23, 2023, <https://www.aljazeera.com/news/2023/10/23/where-are-gazas-neighbourhoods-destroyed-by-israel#:~:text=On%20the%20outskirts%20of%20Gaza,rubble%20or%20awaiting%20medical%20care>.

²³ Ali Sawafta and Muhammad Al Gebaly, *At least 6 people killed in Israeli air strike on UNRWA school in Gaza*, <https://www.reuters.com/world/middle-east/least-6-people-killed-israeli-air-strike-unrwa-school-gaza-2023-10-17/>.

²⁴ *Impact of health attacks in the Gaza Strip*, WHO, Nov. 4, 2023, https://www.emro.who.int/images/stories/palestine/Impact_of_health_attacks_in_the_Gaza_Strip.pdf?ua=1.

²⁵ Kiara Alfonseca, *Palestinian student describes destruction and fear in Gaza amid Israel's siege*, ABC News, Nov. 1, 2023, <https://abcnews.go.com/International/palestinian-student-describes-destruction-gaza-amid-israel-siege/story?id=104474952>.

²⁶ *Israel bombs Greek Orthodox Gaza church sheltering displaced people*, AlJazeera, Oct. 20, 2023, <https://www.aljazeera.com/news/2023/10/20/war-crime-israel-bombs-gaza-church-sheltering-displaced-people>.

²⁷ *Before and after images show Gaza mosque devastation*, CNN, Oct. 18, 2023, <https://www.cnn.com/2023/10/10/world/gaza-mosque-before-after-images-dg/index.html>.

²⁸ *Damning evidence of war crimes as Israeli attacks wipe out entire families in Gaza*, Amnesty Int'l, Oct. 20, 2023, <https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza/>.

and ethnically cleansing²⁹ an entire region in both callous and systemic³⁰ manner. What do you call this?

The Center for Constitutional Rights issued³¹ a thorough, 44-page, factual and legal analysis, asserting that “there is a plausible and credible case that Israel is committing genocide against the Palestinian population in Gaza.” Raz Segal, a historian of the Holocaust and genocide studies, calls³² the situation in Gaza “a textbook case of Genocide unfolding in front of our eyes.” The inaugural chief prosecutor of the International Criminal Court, Luis Moreno Ocampo, notes³³ that “Just the blockade of Gaza — just that — could be genocide under Article 2(c) of the Genocide Convention, meaning they are creating conditions to destroy a group.” A group of over 800 academics and practitioners, including leading scholars in the fields of international law and genocide studies, warn³⁴ of “a serious risk of genocide being committed in the Gaza Strip.” A group of seven UN Special Rapporteurs has alerted³⁵ to the “risk of genocide against the Palestinian people” and reiterated³⁶ that they “remain convinced that the Palestinian people are at grave risk of genocide.” Thirty-six UN experts now call³⁷ the situation in Gaza “a genocide in the making.” How many other authorities³⁸ should I cite? How many hyperlinks³⁹ are enough?

²⁹ *UN expert warns of new instance of mass ethnic cleansing of Palestinians, calls for immediate ceasefire*, United Nations, Oct. 14, 2023, <https://www.ohchr.org/en/press-releases/2023/10/un-expert-warns-new-instance-mass-ethnic-cleansing-palestinians-calls>.

³⁰ Yuval Abraham, *Expel all Palestinians from Gaza, recommends Israeli gov't ministry*, +972 Mag., Oct. 30, 2023, <https://www.972mag.com/intelligence-ministry-gaza-population-transfer/>.

³¹ *Israel's Unfolding Crime of Genocide of the Palestinian People & U.S. Failure to Prevent and Complicity in Genocide*, Ctr. for Const. Rts., Oct. 18, 2023, https://ccrjustice.org/sites/default/files/attach/2023/10/Israels-Unfolding-Crime_ww.pdf.

³² Raz Segal, *A Textbook Case of Genocide*, Jewish Currents, Oct. 13, 2023, <https://jewishcurrents.org/a-textbook-case-of-genocide>.

³³ Adam Taylor, *Why the Israel-Gaza war represents a broader crisis for global justice*, Wash. Post, Oct. 20, 2023, <https://www.washingtonpost.com/world/2023/10/20/israel-hamas-war-crimes-gaza-justice-genocide-international-criminal-court/>.

³⁴ *Public Statement: Scholars Warn of Potential Genocide in Gaza*, Third World Approaches to Int'l L. R., Oct. 17, 2023, <https://twailr.com/public-statement-scholars-warn-of-potential-genocide-in-gaza/>.

³⁵ *Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity, call for prevention of genocide*, United Nations, Oct. 19, 2023, <https://www.un.org/unispal/document/gaza-un-experts-decry-bombing-of-hospitals-and-schools-as-crimes-against-humanity-call-for-prevention-of-genocide/>.

³⁶ *Gaza is 'running out of time' UN experts warn, demanding a ceasefire to prevent genocide*, United Nations, Nov. 2, 2023, <https://www.ohchr.org/en/press-releases/2023/11/gaza-running-out-time-un-experts-warn-demanding-ceasefire-prevent-genocide>.

³⁷ *Gaza: UN experts call on international community to prevent genocide against the Palestinian people*, United Nations, Nov. 16, 2023, <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>.

³⁸ Ed Pilkington, *Top UN official in New York steps down citing 'genocide' of Palestinian civilians*, Guardian, Oct. 31, 2023, <https://www.theguardian.com/world/2023/oct/31/un-official-resigns-israel-hamas-war-palestine-new-york>.

³⁹ *International Expert Statement on Israeli State Crime*, <https://docs.google.com/document/d/e/2PACX-1vQzms63riV5pMAJpCytdfIHtimNvdPwyMARo218NErcEUdnyPfSyH2oJ1pecd6mNv8B8jmGhzeaUxzK/pub>.

And yet, leading law schools and legal scholars in the United States still fashion their silence as impartiality and their denial as nuance. Is genocide really⁴⁰ the crime of all crimes if it is committed by Western allies against non-Western people?

This is the most important question that Palestine continues to pose to the international legal order. Palestine brings to legal analysis an unmasking force: It unveils and reminds us of the ongoing colonial condition⁴¹ that underpins Western legal institutions. In Palestine, there are two categories: mournable civilians and savage human-animals.⁴² Palestine helps us rediscover that these categories remain racialized⁴³ along colonial lines in the 21st century: the first is reserved for Israelis, the latter for Palestinians. As Isaac Herzog, Israel's supposed liberal President, asserts⁴⁴: "It's an entire nation out there that is responsible. This rhetoric about civilians not aware, not involved, it's absolutely not true."

Palestinians simply cannot⁴⁵ be innocent.⁴⁶ They are innately guilty; potential "terrorists" to be "neutralized" or, at best, "human shields"⁴⁷ obliterated as "collateral damage."⁴⁸ There is no number of Palestinian bodies that can move Western governments and institutions to "unequivocally condemn" Israel, let alone act in the present tense. When contrasted with Jewish-Israeli life—the ultimate victims⁴⁹ of European genocidal ideologies — Palestinians stand no chance at humanization.⁵⁰ Palestinians are rendered the contemporary "savages" of the international legal order, and Palestine becomes the frontier where the West redraws its discourse of civility and strips its domination in the most material way. Palestine is where genocide can be performed as a fight of "the civilized world"⁵¹ against the

⁴⁰ Aimé Césaire, *Discourse on Colonialism*, N.Y.U. Press, 2000,

<https://www.jstor.org/stable/j.ctt9qfkrm>.

⁴¹ Noura Erakat, *Justice for Some: Law and the Question of Palestine*, Stanford Univ. Press, 2019,

<https://www.sup.org/books/title/?id=26507>.

⁴² *Israeli defence minister orders 'complete siege' on Gaza*, Al-Jazeera, Oct. 9, 2023,

<https://www.aljazeera.com/program/newsfeed/2023/10/9/israeli-defence-minister-orders-complete-siege-on-gaza>.

⁴³ James Baldwin, *Open Letter to the Born Again*, Sept. 29, 1979,

<https://www.thenation.com/article/society/open-letter-born-again/>.

⁴⁴ Chris Doyle, *Western Silence over Israel's genocidal comments speaks volumes*, *Arab News*, Oct.

30, 2023, <https://www.arabnews.com/node/2400096>.

⁴⁵ Sky News, *Are you seriously asking me about Palestinian Civilians? What is wrong*, *Sky News*,

Oct. 12, 2023, <https://www.facebook.com/watch/?v=349340540820219>.

⁴⁶ Rabea Eghbariah, *An Unarmed Teen Was Shot During a Cease-Fire. Israel Was Never Held to*

Account., *The New York Times*, Nov. 3, 2023,

<https://www.nytimes.com/2023/11/03/opinion/unarmed-teen-israel-gaza.html>.

⁴⁷ Decolonize Palestine, *Palestinians use human shields*, Decolonize Palestine,

<https://decolonizepalestine.com/myth/palestinians-use-human-shields/>.

⁴⁸ NDTV, *Israel Vs Hamas | Ex PM Yair Lapid On What Israel Expects From Allies: "Need Our*

Friends' Support", NDTV, 2023, https://www.youtube.com/watch?v=Ph_jx5y8gN4.

⁴⁹ Raz Segal, *Israel must stop weaponising the holocaust*, *The Guardian*, 2023,

<https://www.theguardian.com/commentisfree/2023/oct/24/israel-gaza-palestinians-holocaust>.

⁵⁰ Hala Alyan, *The Palestine Double Standard*, *The New York Times*, Oct. 25,

2023, <https://www.nytimes.com/2023/10/25/opinion/palestine-war-empathy.html>.

⁵¹ Benjamin Netanyahu, *The Battle of Civilization*, *The Wallstreet Journal*, Oct. 30, 2023,

<https://www.wsj.com/articles/the-battle-of-civilization-in-gaza-israel-hamas-3236b023>.

“enemies of civilization itself.” Indeed, a fight between the “children of light”⁵² versus the “children of darkness.”

The genocidal war waged against the people of Gaza since Hamas’s excruciating October 7th attacks against Israelis — attacks which amount to war crimes⁵³ — has been the deadliest⁵⁴ manifestation of Israeli colonial policies against Palestinians in decades. Some have long ago analyzed⁵⁵ Israeli policies in Palestine through the lens⁵⁶ of genocide.⁵⁷ While the term genocide may have its own limitations to describe the Palestinian past, the Palestinian present was clearly preceded by a “politicide”⁵⁸: the extermination of the Palestinian body politic in Palestine, namely, the systematic eradication of the Palestinian ability to maintain an organized political community as a group.

This process of erasure has spanned over a hundred years⁵⁹ through a combination of massacres, ethnic cleansing, dispossession, and the fragmentation of the remaining Palestinians into distinctive legal tiers with diverging material interests. Despite the partial success of this politicide—and the continued prevention of a political body that represents all Palestinians—the Palestinian political identity⁶⁰ has endured. Across the besieged Gaza Strip, the occupied West Bank, Jerusalem, Israel’s 1948 territories, refugee camps, and diasporic communities, Palestinian nationalism lives.

What do we call this condition? How do we name this collective existence under a system of forced fragmentation and cruel domination? The human rights community has largely adopted a combination of *occupation* and *apartheid* to understand the situation in Palestine. Apartheid is a crime. It is a legal framework.

⁵² The New Arab Staff, *Netanyahu deletes 'racist' tweet on Palestinian 'children of darkness' after hospital massacre*, The New Arab, Oct. 18, 2023, <https://www.newarab.com/news/netanyahu-deletes-palestinian-children-darkness-tweet>.

⁵³ Adalah the Legal Center for Arab Minority Rights in Israel, *Adalah’s Statement following the Extreme Violence in Gaza and in Israel since Saturday 7 October 2023*, Oct. 11, 2023, https://www.adalah.org/uploads/uploads/Adalah_Gaza_Statement_English.pdf.

⁵⁴ OCHA, *Data on Casualties*, OCHA, 2023, <https://www.ochaopt.org/data/casualties>.

⁵⁵ Center for Constitutional Rights, *The Genocide of the Palestinian People: An International Law and Human Rights Perspective*, Center for Constitutional Rights, Aug. 25, 2016, <https://ccrjustice.org/genocide-palestinian-people-international-law-and-human-rights-perspective>.

⁵⁶ The Russell Tribunal, *Russell Tribunal Emergency Session on Gaza*, The Russell Tribunal, Sept. 24, 2013, <https://www.russelltribunalonpalestine.com/en/wp-content/uploads/2014/09/TRP-Concl.-Gaza-EN.pdf>.

⁵⁷ Mohammed Nijim, *Genocide in Palestine: Gaza as a case study*, The International Journal of Human Rights, April 22, 2022, <https://www.tandfonline.com/doi/full/10.1080/13642987.2022.2065261?scroll=top&needAccess=true>.

⁵⁸ Baruch Kimmerling, *Politicide: Ariel Sharon’s War Against the Palestinians*, Verso Books, 2003, <https://www.versobooks.com/products/1850-politicide>.

⁵⁹ Kaleem Hawa, *Present Absences: A century of struggle in Palestine*, The Nation, July 27, 2020, <https://www.thenation.com/article/world/hundred-years-war-on-palestine-rashid-khalidi/>.

⁶⁰ Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness*, Columbia University Press, 1997, <https://www.jstor.org/stable/10.7312/khal15074>.

It is committed in Palestine. And even though there is a consensus⁶¹ among the human rights community that Israel is perpetrating apartheid, the refusal⁶² of Western governments to come to terms with this material reality of Palestinians is revealing.

Once again, Palestine brings a special uncovering force to the discourse. It reveals how otherwise credible institutions, such as Amnesty International or Human Rights Watch, are no longer to be trusted. It shows how facts become disputable⁶³ in a Trumpist fashion by liberals such as President Biden.⁶⁴ Palestine allows us to see the line that bifurcates the binaries (e.g. trusted/untrusted) as much as it underscores the collapse of dichotomies (e.g. democrat/republican or fact/claim). It is in this liminal space that Palestine exists and continues to defy the distinction itself. It is the exception⁶⁵ that reveals the rule and the subtext that is, in fact, the text: Palestine is the most vivid manifestation of the colonial condition upheld in the 21st century.

What do you call this ongoing colonial condition? Just as the Holocaust introduced the term “Genocide” into the global and legal consciousness, the South African experience brought “Apartheid” into the global and legal lexicon. It is due to the work and sacrifice of far too many lives that genocide and apartheid have globalized, transcending these historical calamities. These terms became legal frameworks, crimes enshrined in international law, with the hope that their recognition will prevent their repetition. But in the process of abstraction, globalization, and readaptation, something was lost. Is it the affinity between the particular experience and the universalized abstraction of the crime that makes Palestine resistant to existing definitions?

Scholars have increasingly turned⁶⁶ to settler-colonialism as the lens through which we assess Palestine. Settler-colonialism is a structure⁶⁷ of erasure where the settler displaces and replaces the native. And while settler-colonialism, genocide,

⁶¹ Miriam Berger, *Amnesty International, joining other human rights groups, says Israel is ‘committing the crime of apartheid’*, Washington Post, February 1, 2022, <https://www.washingtonpost.com/world/2022/02/01/amnesty-international-joining-other-human-rights-groups-says-israel-is-committing-crime-apartheid/>.

⁶² Eve Geddie, *EU needs to acknowledge the reality of Israeli apartheid*, Amnesty International, March 20, 2023, <https://www.amnesty.org/en/latest/news/2023/03/eu-needs-to-acknowledge-the-reality-of-israeli-apartheid/>.

⁶³ Ryan Grim and Prem Thakker, *Biden's Conspiracy Theory About Gaza Casualty Numbers Unravels Upon Inspection*, The Intercept, October 31, 2023, <https://theintercept.com/2023/10/31/gaza-death-palestine-health-ministry/>.

⁶⁴ Sarah Gray, Erin Snodgrass, and Joshua Zitser, *The White House is walking back Biden's statement that he saw photographic evidence of beheaded children*, Business Insider, October 11, 2023, <https://www.businessinsider.com/biden-pictures-terrorists-beheading-children-white-house-2023-10>.

⁶⁵ *The Palestine Exception to Free Speech: A Movement Under Attack in the US*, Palestine Legal and Center for Constitutional Rights, September 30, 2015, <https://ccrjustice.org/the-palestine-exception>.

⁶⁶ Omar Jabary Salamanca, Mezna Qato, Kareem Rabie and Sobhi Samour, *Past is Present: Settler Colonialism in Palestine*, Settler Colonial Studies, 2012, <https://www.tandfonline.com/doi/pdf/10.1080/2201473X.2012.10648823>.

⁶⁷ Patrick Wolfe, *Settler colonialism and the elimination of the native*, Journal of Genocide Research, December 21, 2006, <https://www.tandfonline.com/doi/full/10.1080/14623520601056240>.

and apartheid are clearly not mutually exclusive, their ability to capture the material reality of Palestinians remains elusive. South Africa is a particular⁶⁸ case of settler-colonialism. So are Israel, the United States, Australia, Canada, Algeria, and more. The framework of settler colonialism is both useful and insufficient. It does not provide meaningful ways to understand the nuance between these different historical processes and does not necessitate a particular outcome. Some settler colonial cases have been incredibly normalized at the expense of a completed genocide. Others have led to radically different end solutions. Palestine both fulfills and defies the settler-colonial condition.

We must consider Palestine through the iterations of Palestinians. If the Holocaust is the paradigmatic case for the crime of genocide and South Africa for that of apartheid, then the crime against the Palestinian people must be called the Nakba.

The term Nakba, meaning “Catastrophe,” is often used to refer to the making of the State of Israel in Palestine, a process that entailed the ethnic cleansing⁶⁹ of over 750,000 Palestinians⁷⁰ from their homes and destroying 531 Palestinian villages between 1947 to 1949. But the Nakba has never⁷¹ ceased; it is a structure not an event. Put shortly, the Nakba is ongoing.

In its most abstract form, the Nakba is a structure that serves to erase the group dynamic: the attempt to incapacitate the Palestinians from exercising their political will as a group. It is the continuous collusion of states and systems to exclude the Palestinians from materializing their right to self-determination. In its most material form, the Nakba is each Palestinian killed or injured, each Palestinian imprisoned or otherwise subjugated, and each Palestinian dispossessed or exiled.

The Nakba is both the material reality and the epistemic framework to understand the crimes committed against the Palestinian people. And these crimes — encapsulated in the framework of Nakba — are the result of the political ideology of Zionism, an ideology that originated⁷² in late nineteenth century Europe in response to the notions of nationalism, colonialism, and antisemitism.

As Edward Said reminds⁷³ us, Zionism must be assessed from the standpoint of its victims, not its beneficiaries. Zionism can be simultaneously understood as a

⁶⁸ Padraig O'Malley, *Colonialism of a Special Type*, O'Malley the Heart of Hope, <https://omalley.nelsonmandela.org/index.php/site/q/031v02424/041v02730/051v03005/061v03132/071v03140/081v03144.htm>.

⁶⁹ Ilan Pappé, *The Nakba and the ethnic cleansing of Palestine*, Verso Books, May 15, 2018, <https://www.versobooks.com/blogs/news/3809-the-nakba-and-the-ethnic-cleansing-of-palestine>.

⁷⁰ *The Nakba did not start or end in 1948*, Al Jazeera, May 23, 2017, <https://www.aljazeera.com/features/2017/5/23/the-nakba-did-not-start-or-end-in-1948>.

⁷¹ Mohammed El-Kur, *Reflections on the 75th Anniversary of a Nakba That Never Ended*, May 15, 2023, <https://www.thenation.com/article/world/reflections-on-the-75th-anniversary-the-nakba/>.

⁷² Edward Said, *Zionism from the Standpoint of its Victims*, Duke University Press, Winter 1979, <https://www.jstor.org/stable/466405>.

⁷³ See *supra* note 72.

national movement for some⁷⁴ Jews and a colonial project⁷⁵ for Palestinians. The making of Israel in Palestine took the form of consolidating Jewish national life at the expense of shattering a Palestinian one. For those displaced, misplaced, bombed, and dispossessed, Zionism is never a story of Jewish emancipation; it is a story of Palestinian subjugation.

What is distinctive about the Nakba is that it has extended through the turn of the 21st century and evolved into a sophisticated system of domination that has fragmented and reorganized Palestinians into different legal categories, with each category subject to a distinctive type of violence. Fragmentation thus became the legal technology underlying the ongoing Nakba. The Nakba has encompassed both apartheid and genocidal violence in a way that makes it fulfill these legal definitions at various points in time while still evading their particular historical frames.

Palestinians have named⁷⁶ and theorized⁷⁷ the Nakba even in the face of persecution, erasure, and denial. This work has to continue in the legal domain. Gaza has reminded us that the Nakba is now. There are recurring⁷⁸ threats⁷⁹ by Israeli politicians⁸⁰ and other public figures⁸¹ to commit the crime of the Nakba, again. If Israeli politicians are admitting the Nakba in order to perpetuate it, the time has come for the world to also reckon with the Palestinian experience. The Nakba must globalize for it to end.

We must imagine that one day there will be a recognized crime of committing a Nakba, and a disapprobation of Zionism as an ideology based on racial elimination.⁸² The road to get there remains long and challenging, but we do not have the privilege to relinquish any legal tools available to name the crimes against

⁷⁴ Ella Shohat, *Sephardim in Israel: Zionism from the Standpoint of its Jewish Victims*, Duke University Press, Autumn 1988, <https://www.jstor.org/stable/466176>.

⁷⁵ Razviet, *The Iron Wall*, April 11, 1923, <https://en.jabotinsky.org/media/9747/the-iron-wall.pdf>.

⁷⁶ Constantin Zureiq, *Ma'na an-Nakba*, 1948, <https://archive.org/details/alnakbah/page/n5/mode/2up>.

⁷⁷ Fayez Seygh, *Zionist Colonialism in Palestine*, *Settler Colonial Studies*, 1965,

<https://www.tandfonline.com/doi/pdf/10.1080/2201473X.2012.10648833>.

⁷⁸ Meron Rapoport and Ammer Fakhoury, *How threats of a second Nakba went mainstream*, +972 Magazine, June 23, 2022, <https://www.972mag.com/second-nakba-mainstream-israeli-right/>.

⁷⁹ Yusuf Asif, *Israeli Knesset member calls for second 'Nakba' amid ongoing conflict with Hamas*, Al Arabiya English, October 8, 2023, <https://english.alarabiya.net/News/middle-east/2023/10/08/Israeli-Knesset-member-calls-for-second-Nakba-amid-ongoing-conflict-with-Hamas>.

⁸⁰ Ishaan Tharoor, *Israel presides over a new Palestinian catastrophe*, The Washington Post, November 13, 2023, <https://www.washingtonpost.com/world/2023/11/13/palestine-gaza-west-bank-nakba-displacement-israel-catastrophe/>.

⁸¹ Mark Landler, *'Erase Gaza': War Unleashes Incendiary Rhetoric in Israel*, The New York Times, November 15, 2023, <https://www.nytimes.com/2023/11/15/world/middleeast/israel-gaza-war-rhetoric.html>.

⁸² Noura Erakat, *Beyond Discrimination: Apartheid is a Colonial Project and Zionism is a form of Racism*, EJIL: Talk!, July 5, 2021, <https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism/>.

the Palestinian people in the present and attempt to stop them. The denial⁸³ of the genocide in Gaza is rooted in the denial⁸⁴ of the Nakba. And both must end, now.

⁸³ Eitay Mack, *Israel Is Not Committing Genocide in Gaza*, Haaretz, November 1, 2023, <https://www.haaretz.com/opinion/2023-11-01/ty-article-opinion/.premium/israel-is-not-committing-genocide-in-gaza/0000018b-8785-d055-afb-b7a75d450000>.

⁸⁴ Saree Makdisi, *Tolerance Is a Wasteland*, London Review, April 5, 2022, <https://www.londonreviewbookshop.co.uk/stock/tolerance-is-a-wasteland-palestine-and-the-culture-of-denial-saree-makdisi>.