

Beyond Liberal Zionism: International Law, Political Liberalism, And The Possibility Of A Just Zionism

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Hamas's assault on Israel on October 7 and Israel's response thereto has recentered discussions on the need for a peaceful solution to the Israel-Palestine conflict. The Article begins with a critique of liberal Zionism through an extended engagement with the well-known public intellectual and New York Times podcaster, Ezra Klein, and the recently deceased Israeli liberal Zionist legal theorist Ruth Gavison. The Article argues that liberal Zionism does not seek a just solution to the Israeli-Palestinian conflict, only a humane solution. Rather than recognizing Palestinians as rights bearers, Palestinians represent a moral crisis for Jewish nationalism that requires a humane response. Because liberal Zionism does not take Palestinian equality seriously, it lacks sufficient moral resources to address the crisis facing Israelis and Palestinians emerging from more explicitly chauvinistic strands of Zionism and the structural domination the historical practices of Zionism have imposed on Palestinians. The Article criticizes liberal Zionism for ignoring (1) the relevance of international law to determining the content of a just settlement, (2) the colonial history of Zionist settlement in Palestine and the ideologically-motivated violence used to establish the State of Israel, and (3) the discriminatory structure of the Israeli state. The Article then argues that the principles of political liberalism offer a way forward by distinguishing the politically legitimate claims of Zionism from those that require permanent domination of Palestinians. It concludes with specific proposals regarding how to reform Israel's basic structure to produce a conception of Zionism that is consistent with Palestinian equality.

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I. LIBERAL ZIONISM AND THE PALESTINIANS: BETWEEN HUMANITY AND EQUALITY

In the wake of Hamas’s October 7th attack on Israel, noted New York Times columnist and podcaster, Ezra Klein, initiated a series of conversations on the Israel-Palestine conflict. Despite the breadth of topics Klein had explored over his career, first at VOX, and now at the New York Times, and his readiness to engage with thinkers across the political spectrum, Klein does not appear to have ever hosted an episode on Israel-Palestine until after October 7.¹ The magnitude of October 7’s violence, and the violence that Israel unleashed in its wake, catalyzed him into initiating an eleven-part series on the conflict, consisting of Klein’s introduction;² nine individual podcasts with various American-Jewish, American-Palestinian, Palestinian and Israeli interlocutors;³

¹ See generally The Ezra Klein Show, N.Y. TIMES (2023), <https://podcasts.apple.com/us/podcast/the-ezra-klein-show/id1548604447>.

² The Ezra Klein Show, *Israel Is Giving Hamas What It Wants*, N.Y. TIMES, (Oct. 18, 2023), <https://podcasts.apple.com/us/podcast/israel-is-giving-hamas-what-it-wants/id1548604447?i=1000631712100>.

³ The Ezra Klein Show, *The Jewish Left is Trying to Hold Two Thoughts at Once*, N.Y. TIMES (Oct. 24, 2023), <https://podcasts.apple.com/us/podcast/the-jewish-left-is-trying-to-hold-two-thoughts-at-once/id1548604447?i=1000632417963> [hereinafter *Jewish Left Thoughts*]; The Ezra Klein Show, *If Not This, Then What Should Israel Do?*, N.Y. TIMES, (Oct. 31, 2023), <https://podcasts.apple.com/us/podcast/if-not-this-then-what-should-israel-do/id1548604447?i=1000633197565>; The Ezra Klein Show, *She Polled Gazans on Oct. 6. Here’s What She Found*, N.Y. TIMES, (Nov. 3, 2023), <https://podcasts.apple.com/us/podcast/she-polled-gazans-on-oct-6-heres-what-she-found/id1548604447?i=1000633572018>; The Ezra Klein Show, *An Intense, Searching Conversation With Amjad Iraqi*, N.Y. TIMES, (Nov. 7, 2023), <https://podcasts.apple.com/us/podcast/an-intense-searching-conversation-with-amjad-iraqi/id1548604447?i=1000633979325>; The Ezra Klein Show, *What Israelis Fear the World Does Not Understand*, N.Y. TIMES, (Nov. 10, 2023), <https://podcasts.apple.com/us/podcast/what-israelis-fear>

and a concluding podcast that included his answers to listener questions on what he learned from the series.⁴ Klein’s listeners were unlikely to come away with the impression that Klein was anything but a sympathetic listener and interlocutor with all his guests. In the end, however, he concluded his series in an all-too-familiar place: that Israel-Palestine is an intractable conflict with no way forward.⁵ This Article argues that Klein’s inability to imagine a different future reveals the inherent limitations of liberal Zionism and that only a thoroughgoing application of the principles of political liberalism to the conflict can point the way to a more optimistic and just future.

While Klein was at least willing to listen to Palestinians, his practical politics, based on his own comments throughout this series on the substantive issues animating the conflict, are consistent with what has broadly come to be known as “progressive except for Palestine.”⁶ His “progressive except for Palestine” stance was most evident in his casual dismissal of the Palestinians’ right of return.⁷ Although none of these episodes included a guest with expertise on public international law who could have commented on this issue, Klein called the right of return in his December 19 episode, “a lie international law is telling you.”⁸ In reaching this conclusion, he uncritically recited standard Israeli talking points: no one gets the right of return—the Indians and the Pakistanis didn’t; Germans living in Eastern Europe did not; Middle Eastern Jews did not—so why should the Palestinians?⁹ And, without any meaningful deliberation, he

the-world-does-not-understand/id1548604447?i=1000634362224 [hereinafter *World Does Not Understand*]; The Ezra Klein Show, *The Sermons I Needed to Hear Right Now*, N.Y. TIMES, (Nov. 17, 2023), <https://podcasts.apple.com/us/podcast/the-sermons-i-needed-to-hear-right-now/id1548604447?i=1000635157164>; The Ezra Klein Show, *The Best Primer I’ve Heard on Israeli-Palestinian Peace Efforts*, N.Y. TIMES (Nov. 21, 2023), <https://podcasts.apple.com/us/podcast/the-best-primer-ive-heard-on-israeli-palestinian/id1548604447?i=1000635528181> [hereinafter *Best Primer I’ve Heard*]; The Ezra Klein Show, *This Is How Hamas Is Seeing This*, N.Y. TIMES, (Dec. 5, 2023), <https://podcasts.apple.com/us/podcast/this-is-how-hamas-is-seeing-this/id1548604447?i=1000637540381>; The Ezra Klein Show, *A Different Path Israel Could Have Taken – And Maybe Still Can*, N.Y. TIMES, (Dec. 8, 2023), <https://podcasts.apple.com/us/podcast/a-different-path-israel-could-have-taken-and-maybe-still-can/id1548604447?i=1000637918937> [hereinafter *A Different Path*].

⁴ ‘The Ezra Klein Show’, *How My Conversations on Israel-Gaza Have Shaped My Thinking*, N.Y. TIMES, (Dec. 19, 2024), <https://podcasts.apple.com/us/podcast/how-the-israel-gaza-conversations-have-shaped-my-thinking/id1548604447?i=1000639058221> [hereinafter *Shaped My Thinking*]. Since that December 18th episode, Klein has hosted another seven episodes in which he discussed various aspects of the Israel-Palestine conflict: January 19, February 9, March 1, March 5, May 17 and January 14.

⁵ *Id.*

⁶ MARC LAMONT HILL & MITCHELL PLITNICK, EXCEPT FOR PALESTINE: THE LIMITS OF PROGRESSIVE POLITICS 10 (2021); see generally The Ezra Klein Show, N.Y. TIMES (2023), <https://podcasts.apple.com/us/podcast/the-ezra-klein-show/id1548604447>.

⁷ *Shaped My Thinking*, supra note 4.

⁸ *Shaped My Thinking*, supra note 4, at 9:35 (noting he finally hosted an expert on public international law on his May 17 episode, but he did not broach the issue of the right of return with the guest); see The Ezra Klein Show, *The Disastrous Relationship Between Israel, Palestinians and the U.N.*, N.Y. TIMES (May 17, 2024), <https://podcasts.apple.com/us/podcast/the-disastrous-relationship-between-israel/id1548604447?i=1000655897690> [hereinafter *Disastrous Relationship*].

⁹ *Shaped My Thinking*, supra note 4 at 9:46. Klein’s assertions included some factual errors, but these aren’t relevant for the purposes of this essay.

accepts the claim that recognition of the Palestinians' right of return would destroy Israel.

This Article does not seek to contest Klein's empirical claims about the practical relevance of international law to the claims of the Palestinian refugees.¹⁰ It is rather motivated by his approach to the question of Palestinians themselves, on the theory that his views are broadly representative of what this Article calls "liberal Zionism"; defined as, a recognition that Palestinians are, in an important and morally significant way, victims of something, but that their victimhood demands only a *humane* response, not a legal response in line with general liberal principles of justice. Klein states that "There are a lot of people who want to see a *humane* outcome."¹¹ That outcome would involve something like a Palestinian "state" that is "functionally" in "the West Bank and Gaza" where Palestinians would have "actual authority and *autonomy*."¹²

The choice to employ the word *autonomy*, rather than *sovereignty*, is telling. He eschewed the term *sovereignty* because the Israeli state rejects the possibility of a Palestinian state with genuine *sovereignty*. More importantly, from that perspective, it is clear that Klein and other liberal Zionist commentators merely require a *humane* solution to the conflict; there is no imperative to seek a solution that would approximate what justice requires. And, further, the thinking goes, the horizons of even this limited solution must be achievable in a reasonably foreseeable time frame. No where does Klein seem to acknowledge that Palestinians may be *entitled* to these things as a matter of legal right.

This Article is a critical engagement with liberal Zionism from the perspective of the principles of political liberalism as described by John Rawls. It critiques liberal Zionism on the grounds that it fails to take Palestinian equality seriously. It then engages with the arguments of Ezra Klein, and Ruth Gavinson, a liberal Zionist Israeli political theorist. This Article shows that liberal Zionism's failures to take Palestinian equality seriously manifest across three dimensions: the historical, by ignoring Palestine's history prior to the founding of the State of Israel; the legal, by ignoring the legal norms that existed in Palestine prior to the founding of the State of Israel; and the political, by

¹⁰ The literature on the rights of refugees, including, whether refugees have a right to repatriation is vast. The same is true of the literature on forced expulsion of populations and population transfers. See, e.g., Emily Haslam, *Population, Expulsion and Transfer*, MAX PLANCK ENCYC. INT'L L., <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e861?prd=MPIL> (last visited Jan. 2, 2024); Alfred de Zayas, *Forced Population Transfer*, MAX PLANCK ENCYC. INT'L L., <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-kj9780199231690-e802?prd=MPIL> (last visited Jan. 2, 2024); Alfred de Zayas, *Repatriation*, MAX PLANCK ENCYC. INT'L L., <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e868?prd=MPIL> (last visited Jan. 2, 2024) (noting specifically part C on the repatriation of refugees); Francesca P. Albanese & Lex Takkenberg, *PALESTINIAN REFUGEES IN INTERNATIONAL LAW* (2nd ed. 2020) (addressing comprehensively the rights of Palestinian refugees, including, their right to return to their homes in Palestine); Ruth Lapidot, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees* 16 ISR. Y.B. HUM. RTS. 103, 114 (1986). (presenting an Israeli perspective rejecting the existence of a Palestinian right of return).

¹¹ *Shaped My Thinking*, *supra* note 4 (emphasis added).

¹² *Shaped My Thinking*, *supra* note 4, at 10:57 (emphasis added).

showing that Israel, since its founding, has intended to establish and maintain a system of Jewish ethnic domination over Palestine and non-Jewish, Arab Palestinians. This Article also shows that liberal Zionism cannot succeed in achieving its modest goals of arriving at a *humane* solution to the Palestinian-Israeli conflict, precisely because it fails to take Palestinian equality seriously. It further argues that liberal Zionists must embrace a version of Zionism that accepts liberal principles of justice as politically prior to the claims of Zionism if it truly seeks even a humane peace with Palestinians. In contrast to the historical practice of political Zionism, a Zionism committed to the principles of political liberalism would place moral restraints on the demands of political Zionism and limit the permissible form that a Jewish state could take. International law, from the perspective of a Zionism committed to the principles of political liberalism, will be indispensable in determining the relevant content of the rights of Palestinians that political Zionism, if it is to be just, must respect.

This Article proceeds as follows. After this introduction, Part II argues that liberal Zionism conceives of Palestinians as non-rights' bearing subjects.

Part III critically examines liberal Zionism's elision of Palestine's history in the 20th Century prior to Israel's establishment. It explores the historical circumstances of Zionist settlement of Palestine during the first half of the 20th Century; the legal and institutional regime that simultaneously enabled the Zionist program to proceed and restrained it; and, the violence that resulted from the Zionist movement's fateful decision to achieve its aims through force rather than negotiated settlement with the Arabs of Palestine.

Part IV grapples with Ruth Gavison's claims regarding the historical practice of Israel as both a legitimate expression of Jewish self-determination and as a regime that only minimally impairs the rights of its non-Jewish, Arab citizens.

Part V builds on the argument that liberal Zionism not only lacks the normative resources to achieve its own aims, but also that it wrongly dismisses the prospects of a just settlement.

Part VI sets forth a critique of the basic structure of the Israeli polity. It argues that elements of the Jewish state that liberal Zionists particularly find valuable can be secured in constitutional arrangements that respect the political equality of non-Jewish Arab Palestinians. It goes on to identify those features of the Israeli state that must be reformed in order to establish a basic structure that respects the political equality of Palestinian Arabs as a pre-condition for a just peace in Palestine.

Part VII concludes with proposals concerning how to overcome the legacy of structural subordination that political Zionism imposed on Palestinian Arabs through its history of ethnic cleansing, expropriation of property and denationalization of non-Jews.

II. LIBERAL ZIONISM AND THE CONSTITUTION OF PALESTINIANS AS NON-RIGHTS BEARERS AND VIOLENT

Anti-Palestinian animus is not a plausible explanation for Klein's indifference to the claims of justice in the Israel-Palestine conflict. Anyone who listens to his series on Israel-Palestine will recognize him to be genuinely interested in what his Palestinian interlocutors have to say, that his concern for the Palestinians is sincere, and that his fear of Jewish chauvinism is real. But what is also clear from the far-ranging discussions he had over the nine-parts of his series is his failure to view Palestinians as a rights-bearing people, whether collectively in the form of self-determination that can be asserted in the international arena, or as individuals with just claims against the Israeli state.¹³ In short, Klein, and liberal Zionists generally, consider Palestinians to be an internal problem for the Jewish people to resolve exclusively among themselves. Finding a *humane* solution for the Palestinian problems is perhaps a *moral* challenge to Jews, but it is *not* a problem either of international or domestic justice that requires arriving at a common understanding with Palestinians about how to live together in historical Palestine.

Klein's failure to entertain the notion that Palestinians are rights bearers with equal standing to Israeli Jews is evident in his discussions with the two Israeli interlocutors who appeared in his series: Nimrod Novik¹⁴ and Yossi Klein Halevi.¹⁵ While both agree that a two-state solution is needed, they both approach this question primarily from the perspective of what is good for the Israeli state. While Novik and Halevi have radically different conceptions of the kind of Jewish state each seeks, they seem united that Palestinians have no voice in determining the contours of that state¹⁶. Both adopt a paradigm of peace based on separation of Jew and non-Jew, or at least demand that separation be carried out in a fashion that produces an overwhelming demographic majority of Jews without any regard for the impact that separation would have on Palestinian well-being.¹⁷

To borrow a phrase from the liberal philosopher John Rawls, Novik's and Halevi's political aims may be *rational*, but they are not *reasonable* because their proposals do not seek a common basis for reciprocal cooperation with non-Jewish Palestinians on the basis of the mutual recognition of the equal standing of all.¹⁸ Neither Novik¹⁹ nor Halevi²⁰ are ready to entertain a constitutional order that vindicates Rawlsian ideals of reasonableness. It is surprising, however, that Klein takes at face value Novik's claim that Israelis would never accept a state

¹³ See generally The Ezra Klein Show, N.Y. TIMES (2023), <https://podcasts.apple.com/us/podcast/the-ezra-klein-show/id1548604447>.

¹⁴ *A Different Path*, *supra* note 3.

¹⁵ *World Does Not Understand*, *supra* note 3.

¹⁶ *Id.*; see also *A Different Path*, *supra* note 3.

¹⁷ *A Different Path*, *supra* note 3.

¹⁸ JOHN RAWLS, *POLITICAL LIBERALISM* 48–51 (2nd ed. 2005).

¹⁹ See *Shaped My Thinking*, *supra* note 4.

²⁰ See *A Different Path*, *supra* note 3.

in which they are not the overwhelming demographic majority as would be the case under a one-state solution based on equal citizenship that secures the conventional rights of a liberal democracy.²¹ One might have expected a liberal commentator like Klein to at least raise the possibility that a well-crafted constitution could protect all *legitimate* claims of both Jews and non-Jews in Palestine, but this possibility is never raised.

Klein's reticence to push back against Israel's demographic politics was evident in his discussion with Halevi about Israel's responses to Palestinian non-violent strategies, such as Boycott, Divestment and Sanctions ("BDS")²² and The Great March of the Return.²³ Halevi responded, essentially, with a demand that Palestinians effectively accept their expulsion from their historical homeland by abandoning their right to return to make room for a Jewish state with a demographic Jewish majority.²⁴ Klein, perhaps surprisingly, did not push back, nor question why it would be reasonable to expect Palestinians to acquiesce to such a demand.

Halevi's demand of the Palestinians is consistent with the policies of Israel's first prime minister, and the pre-independence leader of the Jewish community in Palestine, the Yishuv, David Ben-Gurion, who sought to establish a Jewish state with an 80% majority of Jews.²⁵ This goal, however, could be met only through ethnic cleansing.²⁶ It is not clear why, however, Palestinians were under any moral obligation to accede to Ben Gurion's demographic politics in the period leading up to the creation of Israel, nor why they should be deemed morally blameworthy or unreasonable for refusing Zionist demands that they ratify, ex post, their own ethnic cleansing in order to provide legitimacy for a state that could not have come into existence without expelling them. Yet again, despite the unreasonableness of Halevi's demands, Klein does not ask him whether such a demand is morally justified. One possibility to make sense of Klein's indifference to this obvious question is that he does not conceive of Palestinians as having the political standing to demand a right to reasonable political arrangements. From the perspective of Klein's political imagination, rightlessness is *constitutive* of being a Palestinian.

The rightlessness of Palestinians also looms large in his November 21 episode with Aaron David Miller.²⁷ That episode focused on the collapse of the Oslo process in the aughts. Miller explains that the Palestinian leader, Yasir

²¹ The Ezra Klein Show, *supra* note 1.

²² *What is BDS?*, BDS, <https://bdsmovement.net/what-is-bds> (last visited Jan. 3, 2024).

²³ *What Is "The Great Return March?"*, AM. FRIENDS SERV. COMM., <https://afsc.org/news/what-great-return-march> (last visited Jan. 3, 2024).

²⁴ *A Different Path*, *supra* note 3 (stating that the demand for the right of return, which is endorsed by the BDS movement, is no different than the violence of October 7, even if BDS is peaceful, because giving effect to the right of return would entail destroying the demographic basis for a Jewish state, which itself is the prerequisite for the Jewish people's survival).

²⁵ VICTOR KATTAN, FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949 190 (2009).

²⁶ ILAN PAPPÉ, THE ETHNIC CLEANSING OF PALESTINE 48 (2007).

²⁷ *Best Primer I've Heard*, *supra* note 3.

Arafat, agreed to attend Camp David only on condition that he would not be blamed if the talks failed. However, after hearing Miller state that neither Arafat nor any other Palestinian leader could have accepted what was on offer at Camp David, Klein nevertheless blamed Arafat and the Palestinians for failing to produce a counter-offer to an Israeli offer that *all* Palestinians, as Miller explained, believed was inadequate. Klein never once suggested that Israelis were unreasonable in refusing to accept peace on the terms that were minimally acceptable to the Palestinians. From Klein's perspective, the onus was on the Palestinian to make even *more* concessions to mollify the Israelis.

In addition, Klein, uncritically, repeated Israeli talking point that contrasted Israel's sincere offers of peace with Palestinian violence in the form of suicide bombs. He conveniently omitted the role that Ariel Sharon played in destroying peace talks. In an intentionally provocative move, Sharon visited the Aqsa Mosque on September 28, 2000, the third holiest shrine in Islam.²⁸ Sharon, it should be remembered, was no ordinary Israeli leader. He had shown throughout his long military and political career a particular brutality in his approach to the Palestinians. He had been personally involved in several massacres of Palestinians, beginning in the 1950s, and had overseen the notorious 1982 massacre of Sabra and Shatila.²⁹ In response to his provocation, Palestinians, predictably, engaged in widespread demonstrations. Although no deaths resulted on the day of his visit, Israel used overwhelming force to put down the widespread demonstrations that broke out in response to Sharon's provocation. Israeli forces fired 1.3 million rounds of ammunition in the first few days of what would turn into the Second Intifada.³⁰ Israel's decision to use overwhelming and lethal force in the days following Sharon's visit resulted in the killing of 47 Palestinians, and the wounding of another 1,885.³¹ But Klein fails to provide his listeners with these facts at all, and instead presents the violence of the Second Intifada as exclusively the responsibility of the Palestinians and conclusive evidence of their bad faith and the danger they present to Jews if a humane solution is not achieved.

The Palestinian is thus constituted both by his rightlessness and his propensity for violence. But the proposed solutions to the problem of the Palestinian is *not* the conventional liberal answer of equal citizenship; rather, it is the proper mixture of *humane* treatment combined with appropriate security measures. This leads Klein at one point in the series to declare that the Israel-

²⁸ Ali Adam, *Palestinian Intifada: How Israel Orchestrated a Bloody Takeover*, AL JAZEERA, <https://www.aljazeera.com/news/2020/9/28/palestinian-intifada-20-years-later-israeli-occupation-continues> (last visited Jan. 4, 2024).

²⁹ IMEU, *Atrocities & Bantustans: The Legacy of Ariel Sharon*, IMEU, <https://web.archive.org/web/20240302162232/https://imeu.org/article/atrocities-bantustans-the-legacy-of-ariel-sharon> (last visited Jan. 3, 2024).

³⁰ Adam, *supra* note 28.

³¹ *Id.*

Palestine conflict could be boiled down to how to reconcile Israeli security with Palestinian freedom.³²

III. CENTERING PALESTINE'S HISTORY: PUBLIC INTERNATIONAL LAW DURING THE INTERWAR PERIOD, THE NAKBA AND COLONIALISM

Klein's understanding of the conflict, and by implication, that of liberal Zionism, is blind to the history of Palestine, or at least its history between the destruction of the Hebrew kingdom in late antiquity and the creation of the State of Israel in 1948. This indifference, however, is not incidental. It is an essential entailment of his refusal to see Palestinians as bearers of political rights. Only when the Palestinians are constituted as lacking any legal entitlements grounded in their historical presence in Palestine does it become possible to imagine that the solution of the Palestinian-Israeli conflict can be brought about by free bargaining unconstrained by normative limits other than humanity. Klein's blindness to Palestinian history is mirrored by his ahistorical conception of the birth of the State of Israel in 1948. He views the conflict between Zionists and non-Jewish Palestinians as taking place, essentially, in a *terra nullius*. The argument goes along the following lines: although the conflict is tragic, the Palestinians lost, and the Zionists won, and the Palestinians should just move on.³³

Part III of this Article highlights how liberal Zionism's indifference to pre-1948 Palestinian history manifests itself along three different, but related, dimensions. The first is the omission of the existence of a legal framework within public international law that created the State of Palestine after World War I and that regulated the rights and obligations of this international person in the international arena and the rights and obligations of the nationals of that international person. The second is the nature of the armed conflict that concluded in the creation of the State of Israel and the expulsion of the majority of Palestine's non-Jewish citizens, what Palestine's Arab population calls the Nakba. The third is the attempt of liberal Zionism to deny the relationship of the Zionist project to colonialism. I will treat these three themes below.

A. *Palestine and International Law in the Interwar Period*

Liberal Zionists such as Klein usually provide a version of Israel's birth that erases the existence of Palestine as a recognized international legal person prior to 1948 whose nationals also enjoyed rights under principles of public international law by virtue of being citizens of a recognized state.³⁴ Article 22 of

³² The Ezra Klein Show, *Why Palestinians Feel They've Been 'Duped'*, N.Y. TIMES, (Nov. 7, 2023), <https://www.nytimes.com/2023/11/07/opinion/ezra-klein-podcast-amjad-iraqi.html> [hereinafter *Palestinians Feel Duped*].

³³ "Israel was a place where different peoples had settled on that land and had a claim on that land going far back. . . . So the U.N. does try to partition, but the U.N. doesn't enforce that. . . . So instead there is a war. And the Arab countries try to wipe out this new state of Israel. Israel tries not to be wiped out and Israel wins." *Shaped My Thinking*, *supra* note 4.

³⁴ See, e.g., Noah Feldman, *The New Antisemitism*, TIME, (2024), <https://time.com/6763293/antisemitism/> (last visited Mar 17, 2024) (stating that Israel came into

the Covenant of the League of Nations recognized that those territories, “formerly belonging to the Turkish Empire,” due to their relatively advanced development, had reached a stage “where their existence as independent nations can be provisionally recognized.”³⁵ Article 22 declared that the principle of the “well-being and development of such peoples [i.e., under mandates] form a sacred trust of civilisation,” and only on that basis was the mandatory’s exercise of power justified.³⁶ Palestine, although it would become subject to the authority of Great Britain under the Palestine Mandate, had been a territory “formerly belonging to the Turkish Empire,” and therefore was indisputably a beneficiary of Article 22’s provisional recognition of its independence.³⁷ But unlike the other former Ottoman territories that were also subject to a mandate, such as Lebanon, Iraq, Syria, and Jordan, Palestine never achieved the independence Article 22 of the Covenant of the League of Nations promised it.³⁸

The preamble of the Palestine Mandate, it is true, required the British to facilitate “the establishment *in* Palestine of *a* national home for the Jewish people”; however, it also made clear that “nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities *in* Palestine.”³⁹ That the Jewish National Home, whatever it ended up being, had to be consistent with rights of non-Jews was an obvious entailment of the duties Article 22 imposed on mandatory powers to exercise their powers as a “sacred trust of civilisation” for the benefit of the people subject to the mandate.⁴⁰ Were it read otherwise, the Palestine Mandate would arguably have been invalid as *ultra vires* the Covenant of the League of Nations itself.⁴¹

Article 2 of the Palestine Mandate required Great Britain to establish institutions of self-government and “safeguard[] the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.”⁴² Article 5 of the Palestine Mandate established the legal unity of the territory of Palestine and forbade the Mandatory from ceding any part of its territory to a foreign

existence by virtue of a United Nations resolution in 1947 without discussion of its status as a recognized state in the interwar period).

³⁵ League of Nations Covenant art. 22.

³⁶ *Id.* (“To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves . . . there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.”).

³⁷ *Mandate for Palestine*, League of Nations Doc. C.529M.314 1922 VI (1922).

³⁸ *Id.* (noting the former territories of the Ottoman Empire were known in the parlance of international law as having “Class A” mandates to distinguish them from other territories of the defeated Central Powers which, in the colonial language of the time, had not reached a stage of development that entitled them to provisional recognition of their independence).

³⁹ The Palestine Mandate, *supra* note 38 (emphasis added).

⁴⁰ *Id.*

⁴¹ Ralph Wilde, *Tears of the Olive Trees: Mandatory Palestine, the UK, and Reparations for Colonialism in International Law*, 25 J. HIST. INT’L L. 387, 418 (2022).

⁴² The Palestine Mandate, *supra* note 38.

government.⁴³ Article 6, while it required Great Britain to facilitate Jewish immigration to Palestine, also required it to “ensure[] that the rights and position of other sections of the population are not prejudiced” as a result of such immigration.⁴⁴

Article 7 of the Palestine Mandate required Great Britain to promulgate a nationality law for Palestine, again, to facilitate Jewish immigration to Palestine by offering immigrating Jews a means to acquire Palestinian citizenship.⁴⁵ Neither Article 7 of the Palestine Mandate, nor the citizenship law Great Britain enacted pursuant to it, contemplated limiting Palestinian citizenship to Jews: the Palestine Citizenship Order⁴⁶ recognized Palestine’s non-Jewish Arab population as nationals of Palestine in conformity with the then prevailing norms of customary international law⁴⁷ regarding nationality in the context of state succession. Because Palestine was the legal successor of the Ottoman Empire, persons who had been Ottoman nationals and resided in Palestine, simply became Palestinian nationals, *ipso facto*, by virtue of their presence in the territory.⁴⁸ Article 30 of the 1923 Treaty of Lausanne that officially brought the state of war between Turkey, as the successor to the Ottoman Empire, and the Allied Powers, to an end,⁴⁹ expressly incorporated what by that time had already been the prevailing international custom regarding the *ipso facto* transfer of nationality to the residents of successor states.⁵⁰

Persons who became naturalized citizens of Palestine, almost all of whom were Jewish immigrants, swore an oath of loyalty to “the Government of Palestine,” not to the Jewish Agency.⁵¹ Courts and other legal institutions during the interwar period recognized the existence of a distinctively Palestinian

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Palestine Citizenship Order*, NAT’L LIBR. ISREAL, <https://www.nli.org.il/en/newspapers/plb/1925/08/30/01/article/6/?e=-----en-20--1--img-txIN%7ctxTI-----1> (last visited, Dec. 13, 2024) (giving details of the law organizing citizenship during the Palestine Mandate).

⁴⁷ Oliver Dörr, *Nationality*, OXFORD PUB. INT’L L. (Aug. 2019),

<https://opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e852?prd=MPIL> (noting this customary norm later became codified in international law); see Convention on the Reduction of Statelessness, art 10(2), Aug. 30, 1961, 989 U.N.T.S 175.

⁴⁸ Mutaz Qafisheh, *Genesis of Citizenship in Palestine and Israel. Palestinian Nationality during the Period 1917-1925*, 11 J. HIST. INT’LL. 1, 31–32 (2009).

⁴⁹ Lausanne Peace Treaty art. 30, Jul. 24, 1923, 28 L.N.T.S. 11 (“Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become ipso facto, in the conditions laid down by the local law, nationals of the State to which such territory is transferred.”).

⁵⁰ See JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 433–36 (8th ed. 2012) (noting the overview of the general principles of international law governing nationality in the context of state succession); see also Qafisheh, *supra* note 42, at 35–36.

⁵¹ JOHN QUIGLEY, THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT 56 (2010).

nationality in recognition of the existence of Palestine as a state, albeit one that was under a mandate.⁵² Palestinians, moreover, were legally foreigners with respect to the other successor states to the Ottoman Empire, such as Transjordan.⁵³ Throughout the Mandate, despite substantial Jewish immigration, much of it illegal, the vast majority of Palestine's citizens were and remained Arab. Indeed, out of Palestine's population of almost 2,000,000 in 1947, Jews were a little more than 600,000, and of these only one-third had acquired Palestinian citizenship, despite the ease with which the Palestine Citizenship Order made it possible to obtain Palestinian citizenship.⁵⁴

Palestine's existence as a recognized international legal person was undisputed in the interwar period: although Great Britain exercised sovereignty, it was on *behalf* of Palestine and not in service of itself in accordance with Article 12 of the Mandate. On that basis, Palestine entered numerous multilateral and bilateral international treaties. These included, for example, a 1929 treaty between Egypt and Palestine for the mutual recognition of legal judgments; a multilateral treaty with Syria, Turkey, Iraq and Transjordan establishing the International Bureau of Intelligence on Locusts; and treaties with the United States, Switzerland, Italy, France and Greece regarding postal service.⁵⁵ Great Britain appeared on behalf of the government of Palestine in 1924 to defend a suit brought by Greece in the International Court of Justice.⁵⁶ Palestine was recognized as a "foreign state" in an international trade dispute that arose with respect to preferential tariff rates that Great Britain considered giving Palestine.⁵⁷

The legal framework provided by the Covenant of the League of Nations and the Palestine Mandate did not disappear when the League of Nations was dissolved in April 1946. The Charter of the United Nations incorporated the terms of existing mandates, and if anything, strengthened the standing of the peoples then under mandates and colonial rule.⁵⁸ Article 73 of the Charter of the United Nations affirmed the principle that, in cases where states were administering territories that had not yet attained self-government, e.g.,

⁵² *Id.* at 56–58.

⁵³ Qafisheh, *supra* note 49, at 5–6 (discussing the *Jawdat Badawi Sha'ban* case of the Supreme Court of Palestine decided in December 1945 that held that nationals of Palestine and nationals of Transjordan were foreigners to one another).

⁵⁴ Qafisheh, *supra* note 49, at 35–36 (calculating the number of naturalized Palestinian citizens during the Mandate period, 99% of whom were Jewish, as 132,616 persons); VICTOR KATTAN, FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949 141 (2009). To obtain Palestinian nationality, a person had to live in Palestine with the intention of residing there permanently for a period of two out of the three years prior to naturalization and speak either Hebrew or Arabic.

⁵⁵ QUIGLEY, *supra* note 52, at 53–54.

⁵⁶ *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30).

⁵⁷ QUIGLEY, *supra* note 52, at 61–64 (showing that other powers, such as the United States, deemed Palestine to be a state such that if Great Britain granted it preferential tariff rates, other states would be entitled to the same preferential tariffs pursuant to most-favored-nation obligations of Great Britain in its treaties with those other states).

⁵⁸ *See generally* U.N. Charter.

Palestine, “that the interests of the *inhabitants* of these territories are paramount, and [that such states] accept as a sacred trust the obligation to promote to the utmost . . . the well-being of the *inhabitants* of these territories.”⁵⁹

Subparagraph b of Article 73 specifically singled out the duty of the state administering such territories to take the aspirations of the people subject to foreign rule into account, imposing on such states duties, such as: “to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.”⁶⁰

The U.N. Charter did contemplate the creation of a system of trusteeship for non-self-governing territories that could replace existing mandates, but in such a case, Article 77 of the U.N. Charter provided that a U.N. sponsored trusteeship could not alter any existing rights of the peoples concerned prior to an agreement with respect to the terms of the proposed trusteeship.⁶¹

Whatever one wishes to say about the Israel-Palestine dispute, in no way can Palestine during the interwar period be thought of as having been a *terra nullius*.⁶² Public international law in the interwar period in no way supports Klein’s implicit assumption that the conflict over Palestine was taking place over a territory that existed outside of international law and whose status, in the absence of an agreement between the parties, could therefore be properly resolved by a resort to arms.⁶³ To the contrary, the conflict between Zionists and non-Jewish Palestinians took place within a well-established framework of public international law that assumed the existence of the State of Palestine that was awaiting independence. Only by eliding the existence of Palestine as a state in the interwar period can liberal Zionists such as Klein discuss the conflict in Palestine without acknowledging that public international law granted rights to the State of Palestine and to the nationals of that state.

The vast majority of Palestine’s citizens during the interwar period were non-Jews, Arabs.⁶⁴ Article 22 of the Covenant of the League of Nations recognized Palestine’s right to self-government.⁶⁵ The Palestine Mandate, after its adoption by the League of Nations, became incorporated into public international law, and pursuant to the that instrument, Great Britain, as the Mandatory power, was obligated to prepare Palestine for independence as a unitary state. In that capacity, Great Britain was under an obligation to protect the interests of all Palestinians, regardless of religion, and promote institutions

⁵⁹ *Id.* at art. 73 (emphasis added).

⁶⁰ *Id.* at art. 73(b).

⁶¹ *Id.* at art. 77.

⁶² JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 432 (2007) (rejecting the view that Palestine was a *terra nullius* because, among other things, that “category . . . does not apply to any territory inhabited by an organized population.”).

⁶³ *Shaped My Thinking*, *supra* note 4.

⁶⁴ Qafisheh, *supra* note 49, at 32-33; *see also* Rep. of the U.N. Special Comm.on Palestine (UNSCOP), at 54, U.N. Doc. A/364 (1947).

⁶⁵ League of Nations Covenant, *supra* note 35.

of self-government that would protect those interests. The U.N. Charter reaffirmed those duties. Both Great Britain and the United Nations failed in that task in the face of a political movement—Zionism—that refused to accept as legitimate the constraints international law placed on its ambitions, even as it was prepared to use international law to grant legitimacy to its aspirations.

Zionists' strategic use of international law is perhaps best evidenced in their approach to the aborted U.N. Partition Plan of 1947: rather than using that as an opportunity to negotiate with the Palestinians, the Yishuv used it as justification to launch a war of conquest.⁶⁶ Not only did it not feel bound to respect the proposed territorial limits of the Partition Plan, the Yishuv also showed itself to be indifferent to the Partition Plan's substantive requirement that the Jewish state adopt a written constitution that fully protected minority rights.⁶⁷ Its indifference to these substantive requirements were most clearly manifested in the Yishuv's ethnic cleansing of the Arabs of Palestine.⁶⁸ The Yishuv practiced ethnic cleansing both in the territory that had been proposed to be allocated to the Jewish state *and* in the territories of the proposed Arab state that it conquered in the weeks *prior* to the declaration of statehood and the intervention of the military forces of Egypt and Transjordan. For the Zionists, international law was legitimate only to the extent that it was consistent with their subjective assertion of the Jewish people's natural rights to dominion in historic Palestine, which they called Eretz Israel.⁶⁹ Whenever international law contradicted those understandings, they were willing to violate international

⁶⁶ *Id.* at 431 (concluding Resolution 181 was only a "recommendation"). The bindingness of Resolution 181 proposing the partition of Palestine was itself controversial. See Ardi Imseis, *The United Nations Plan of Partition for Palestine Revisited: On the Origins of Palestine's International Legal Subalternity*, 57 *STAN. J. INT'L L.* 1, 44–50 (2021); VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949* 155 (2009) (quoting the noted American scholar of international law and International Court of Justice judge, Phillip Jessup, as describing Resolution 181 as merely a "recommendation").

⁶⁷ G.A. Res. 181 (II), at 133 (Nov. 29, 1947) ("B. STEPS PREPARATORY TO INDEPENDENCE. . . . The Constituent Assembly of each State shall draft a democratic constitution for its State . . . [g]uaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association."). Israel has yet to adopt a written constitution. The same section of Resolution 181 also contemplated that the constituent assembly charged with writing the constitution would itself be elected through a process involving universal suffrage of electors ("The Provisional Council of Government of each State shall, not later than two months after the withdrawal of the armed forces of the mandatory Power, hold elections to the Constituent Assembly which shall be conducted on democratic lines. . . . Qualified voters for each State for this election shall be persons over eighteen years of age who are (a) Palestinian citizens residing in that State; and (b) Arabs and Jews residing in the State, although not Palestinian citizens, who, before voting, have signed a notice of intention to become citizens of such State.").

⁶⁸ *Id.* at 137 (noting Partition Plan's Chapter 2, titled "Religious and Minority Rights," prohibited discrimination on "the ground of race, religion, language or sex," guaranteed "equal protection of the laws," and prohibited the expropriation of property except for a "public purpose" and accompanied by "full compensation.").

⁶⁹ *Declaration of Israel's Independence, 1948*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/truman-israel/> (last visited Jan. 3, 2024) (Jewish National Council asserting its authority to act based on both the United Nations' implicit recognition of the Jewish State by virtue of the Partition Plan and "by virtue of the natural and historic right of the Jewish people").

law and act according to their self-declared natural right whenever they had the effective power to do so.

B. The Nakba and the Creation of the State of Israel

Klein's failure, like that of most liberal Zionists, to recognize that Palestine was a legal person in international law in the inter-war period, and that Palestinians—Jews and Arabs—were citizens of that state under a government that was obliged to work for the independence of that state, is paralleled by his understanding of the violence that led to the creation of Israel. For proponents of liberal Zionism, the violence in Palestine began in 1948 when neighboring Arab states intervened, in Klein's words, "to wipe out this new state of Israel."⁷⁰ Although he nods to the role of the *failed* United Nations partition plan set out in United Nations General Assembly Resolution 181,⁷¹ he ultimately attributes the existence of the state to its success in the battlefield, "as do most other states in the world."⁷² Klein does not consider whether public international law has any relevance to understanding either how this new "state of Israel" came into existence, or whether any consequences in public international law arise out of the violence used to establish it. Both omissions serve to reinforce the erasure of Palestine as a recognized international legal person and the rightlessness of Palestinians as citizens of that state.

The Yishuv, the Jewish community in Palestine, had begun to militarize in the 1930s with the tacit approval of the British, who partnered with them to suppress the Great Arab Revolt of 1936–39.⁷³ The Palestinian Jews, who partnered with the British in what was a brutal campaign against Palestine's Arabs, came to form the core of the Haganah, which later became the Israeli army. Alongside the Haganah, Jewish "extremist" groups—the Irgun and Lehi—advocated the use of terrorism and violence to further the project of a Jewish state in Palestine.⁷⁴ While the Yishuv allied with Great Britain to suppress the

⁷⁰ *Shaped My Thinking*, *supra* note 4.

⁷¹ G.A. Res. 181 (II), at 181 (Nov. 29, 1947).

⁷² *Shaped My Thinking*, *supra* note 4; see also JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 61 (1981) (asserting that Israel's independence did not derive from the United Nations' partition plan but by the success of its arms "as do most other states in the world." Of course, it is not true that most states came into existence by force of arms in the post-World War II era. Post-World War II states in fact came into existence largely as a result of state-building exercises of imperialist powers, and the newly-independent post-colonial states, in the name of preserving peace, accepted the boundaries drawn by the imperialist powers, "unless those States decide to adopt different boundaries" by consent. Giuseppe Nesi, *Uti Possidetis Doctrine*, OXFORD PUB. INT'L L., <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1125?prd=MPIL> (last visited Dec. 13, 2024).

⁷³ For an overview of this Palestine-wide revolt, see Alex Winder, *Great Arab Revolt, 1936-1939* INTERACTIVE ENCYC. OF THE PALESTINE QUESTION, <https://www.palquest.org/en/highlight/158/great-arab-revolt-1936-1939> (last visited Dec. 13 2024). For details of the wide-scale repression the British used to put down the revolt, see generally MATTHEW HUGHES, *BRITAIN'S PACIFICATION OF PALESTINE: THE BRITISH ARMY, THE COLONIAL STATE, AND THE ARAB REVOLT, 1936-1939*, 35 (2019).

⁷⁴ For the principles of the Lehi, see *Lohamei Herut Israel (Lehi or Stern Gang)*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/lo-x1e25-amei-x1e24-erut-israel>. (last visited Jan. 1,

Arabs in the 1936–39 revolt, they turned against Britain when the British acceded to the demand of the Palestinians to limit Jewish immigration to Palestine and rejected the creation of a Jewish state in Palestine. The British instead took the view that it had fulfilled its duty under the Palestine Mandate to create a Jewish National Home in Palestine as evidenced by the existence of a vibrant community of Palestinian Jews, the existence of a Jewish economy, and the revival of the Hebrew language.⁷⁵

The Yishuv knew that if Britain quit Palestine, it could use its superior military forces to establish what it could not establish through legal mechanisms: a Jewish state.⁷⁶ The Yishuv's campaign of terrorism and violence that was intended to force the British to abandon Palestine and its responsibilities under the Mandate⁷⁷ only makes sense, after all, if the Yishuv was confident that it could accomplish through violence what it could not accomplish through law and diplomacy.

Because Klein repeats the common assumption of liberal Zionism that it was only the refusal of the Arabs to accept Resolution 181's proposal to partition Palestine that war broke out, a brief review of the legal status of Resolution 181 against the framework of public international law is in order.⁷⁸ It is telling that the British did not solicit the views of the United Nations on the question of Palestine generally, but only as to *its* future government, a fact consistent with the idea that Palestine was a unitary state recognized as such in international law.⁷⁹ The relevant public international law that governed Palestine—the Mandate itself and the U.N. Charter—did not contemplate partition of mandated territories, and certainly not without the consent of the people of that mandated territory. Finally, the terms of the proposed partition plan were almost preposterously disadvantageous to Palestine's Arab population, and in manifest contradiction to the principles of the United Nations: the plan proposed to give almost 60% of Palestine, consisting of its most desirable and productive lands, to the Jewish minority.⁸⁰ At that time the Jewish population of Palestine was only one-third of the population and it barely owned 10% of the land.⁸¹

2025). For the Irgun, see *Irgun Tz'va'i Le'umi (Etzel): Background & Overview (1931 - 1948)*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/background-and-overview-of-the-irgun-etzel>. (last visited Jan. 1, 2025); see also, S. Shamir Hassan, *Zionism and Terror*, 62 PROC. INDIAN HIST. CONG. 866, 867-68 (2001).

⁷⁵ *The Avalon Project: British White Paper of 1939*, AVALON PROJECT, https://avalon.law.yale.edu/20th_century/brwh1939.asp (last visited Jan 4, 2024).

⁷⁶ KATTAN, *supra* note 67, at 179.

⁷⁷ *Id.* at 200 (quoting from Henry Cattán's speech before the U.N. General Assembly describing the Yishuv's campaign of terrorism against the British in the years prior to the proposed partition in an effort to force the British to leave Palestine).

⁷⁸ *Shaped My Thinking*, *supra* note 4.

⁷⁹ G.A. Res. 181 (II), at 131 (Nov. 29, 1947) (“*Having met* in special session at the request of the mandatory Power to constitute and instruct a special committee to prepare for the consideration of the question of the *future government of Palestine*”) (emphasis added).

⁸⁰ UNSCOP, *supra* note 85.

⁸¹ KATTAN, *supra* note 25, at 151–52.

Moreover, the partition plan was impracticable if its aim was to create a Jewish state along the lines the Zionists envisioned: the population of the contemplated “Jewish” state would have only had a slim Jewish majority, and that slim Jewish mathematical majority was itself only obtained through the fiction that the Bedouin population were not part of the Arab population.⁸² The fundamental problem facing any proposed partition was that Jews only constituted a clear demographic majority in one of Palestine’s sixteen districts, the Tel Aviv-Jaffa district.⁸³ The Partition Plan, however, even resorted to demographical engineering in favor of the Jewish state with respect to the Tel Aviv-Jaffa district when it carved out Jaffa from the Jewish state and placed it—despite it being the designated port of the “Arab state”—entirely within the borders of the proposed Jewish state in an effort to reduce the number of Arabs in the proposed Jewish state. In no district of Palestine, moreover, not even in Tel Aviv-Jaffa where Jews were a demographic majority, did they own most of the land that was to form their state.⁸⁴

Yet, according to the liberal Zionist narrative, which Klein adopts, it was the Arab rejection of the proposed U.N. plan to partition Palestine that caused the war and allowed the dispute to be settled by a resort to arms.⁸⁵ For this to be true, however, the Palestinian rejection of the Partition Plan would have had to amount to a *de jure* abrogation of the entire framework of public international law that had governed Palestine since the end of World War I. I am aware of no public international law authority, however, who advances such a claim.

As a practical matter, moreover, Palestinian Arab rejection of partition did not propose wiping out the Yishuv as their preferred alternative to partition. Rather, the Palestinian Arabs proposed a democratic state that would have granted the Jewish community in Palestine equal citizenship rights and constitutionally entrenched minority rights.⁸⁶ Arabs’ rejection of partition,

⁸² KATTAN, *supra* note 25, at 151–52.

⁸³ U.N. Geospatial Info. Section, Map dated Nov. 1947, Palestine: Distribution of Population by Sub-districts with Percentages of (a) Jews and (b) Arabs, U.N. Map H212/11/1947 (Nov. 1947).

⁸⁴ U.N. Geospatial Info. Section, Palestine [cartographic material]: land ownership by sub-districts (1945) = Repartition de la propriete agraire par sous-district (1945), U.N. Map H212/2/1947 (Aug. 1950).

⁸⁵ *Shaped My Thinking*, *supra* note 4.

⁸⁶ Albert Hourani, *The Case Against a Jewish State in Palestine: Albert Hourani’s Statement to the Anglo-American Committee of Enquiry of 1946*, J. PALESTINE STUD. 80, 81 (2005) (“The Arab people, speaking through its responsible leaders, has again and again emphasized that the only just and practicable solution for the problem of Palestine lies in the constitution of Palestine, with the least possible delay, into a self-governing state, with its Arab majority, but with full rights for the Jewish citizens of Palestine.”); GEORGE ANTONIUS, *THE ARAB AWAKENING: THE STORY OF THE ARAB NATIONAL MOVEMENT* 410–11 (Routledge ed., 1st ed, 2010) (writing in 1938 that “There seems to be no valid reason why Palestine should not be constituted into an independent Arab state in which as many Jews as the country can hold without prejudice to its political and economic freedom would live in peace, security and dignity, and enjoy full rights of citizenship. . . . A solution on those lines would be both fair and practicable. It would protect the natural rights of the Arabs in Palestine and . . . would enable the Jews to have a national home in the spiritual and cultural sense, in which Jewish values could flourish and the Jewish genius have the freest play to seek inspiration in the land of its ancient connexion. . . . No other solution seems practicable, except, possibly at the cost of an unpredictable holocaust of Arab, Jewish and British lives.”).

therefore, cannot be reasonably interpreted as a declaration of war against Palestinian Jews but rather an invitation to co-exist as equal citizens in a unitary, democratic state.

While strife broke out between the Arab and Jewish communities in the wake of the failed partition plan in November 1947, a full-fledged war was by no means inevitable.⁸⁷ Indeed, the United States, even though it had voted in favor of partition, when it discovered that partition was impracticable, began to lay the foundations for a U.N. trusteeship for Palestine, efforts that the Yishuv rejected out of hand.⁸⁸ The Yishuv consciously *chose* to pursue war to achieve its goal of a Jewish state. In furtherance of that goal, it launched an all-out offensive in April 1948, six weeks before it declared independence on May 15, 1948. In the six weeks between the beginning of the Yishuv's offensive and declaration of the State of Israel, the Zionists, through a combination of atrocities, including mass killing, rape, biological warfare in at least one case,⁸⁹ and psychological terror directed against Arab residents of Palestine,⁹⁰ expelled or caused to flee approximately 350,000 Arabs living in the territory that the U.N. partition plan had proposed for the Jewish state.⁹¹ Zionist forces captured Haifa *before* the Palestine Mandate expired and before the intervention of any Arab state, with the majority of Haifa's Arab population being forced to flee as a result of Zionist shelling. Zionist forces during this offensive also launched operations into the territory designated for the Arab state, including Jaffa, which was to serve as the Arab state's principal port.⁹² During this offensive they also conquered another port that had been designated for the Arab state, Acre.⁹³

The Arab states, therefore, only entered the conflict *after* Zionist militias had already initiated large-scale military hostilities and engaged in widespread ethnic cleansing, both in territory designated for the Jewish State under the 1947 Partition Plan and in territory assigned to the Arab State. The essentially defensive nature of the Arab states' intervention is confirmed by the fact that all fighting between the two sides—with the exception of East Jerusalem and an Egyptian battalion that attempted to cross territory allocated to the Jewish state to join Transjordan's Arab Legion in the West Bank—took place on territory allocated to the Arab state under the 1947 U.N. Partition Plan. Although the interventions of the Egyptians and Jordanians failed to prevent the ethnic cleansing of other Arab towns that had been designated for the Arab state, such as Lydda and Ramle, towns that Israeli military forces seized in July 1948,⁹⁴ it would not be an exaggeration to conclude that, but for the military interventions

⁸⁷ KATTAN, *supra* note 25, at 177–78.

⁸⁸ KATTAN, *supra* note 25, at 166–68.

⁸⁹ Benny Morris & Benjamin Kedar, 'Cast Thy Bread': Israeli Biological Warfare During the 1948 War, 59 MIDDLE E. STUDIES 752 (2023).

⁹⁰ KATTAN, *supra* note 25, at 191–92.

⁹¹ KATTAN, *supra* note 25, at 177.

⁹² KATTAN, *supra* note 25, at 185.

⁹³ *Id.*

⁹⁴ KATTAN, *supra* note 25, at 195–97.

of Egypt and Transjordan in 1948, Israel would have been able to conquer the entirety of Mandatory Palestine and would have likely expelled the entirety or a substantial majority of its Arab population.⁹⁵

Liberal Zionists' omission of the relevant public international law background to the fighting in 1948 allows them to erase from consideration two fundamental questions: the *de jure* grounds for Israeli statehood, *and* the legal consequences that resulted from the fighting in 1947–49. If Israeli statehood does not rest on Resolution 181, then its status as a state is either a function of successful conquest of territory, or successful secession from a pre-existing state. Both theories as applied to the Yishuv in 1947 or Israel in 1948–49 are highly problematic. Public international law had already prohibited the acquisition of territory by force in 1947.⁹⁶ The post-World War II international order also rejected the validity of unilateral secession in favor of upholding the territorial integrity of states, except in circumstances where the seceding population was denied the right of internal self-determination. Given the Palestinian Arab majority's willingness to grant Palestinian Jews full rights of internal self-determination, it would be very difficult to argue that the Yishuv had a *de jure* right to secede from Palestine in the name of Jewish self-determination in 1947–49.⁹⁷

The violence the Zionists and the Israelis used to create their state is reflected in the manner by which the United States recognized it: when Truman initially recognized Israel in 1948, he did so on a *de facto* basis, and on the expectation, given by the representative of the *de facto* government of Israel at the time to President Truman, that Israel would respect the boundaries of the U.N. Partition Plan.⁹⁸ The *de facto* nature of Israel's existence was also reflected in U.N. General Assembly resolution 194(III).⁹⁹ That resolution reflected the international community's expectation that the Palestinian refugees would be allowed to return to their homes as part of an Arab-Israeli peace settlement¹⁰⁰. Meanwhile, the United Nations took responsibility to care for the Palestinian refugees in the interim through the creation of the United Nations Relief and Works Agency ("UNRWA").¹⁰¹ Because of the expectation of the international community that Palestinian refugees would be repatriated to their homes—after all Israel claimed to have accepted the 1947 Partition Plan pursuant to which

⁹⁵ KATTAN, *supra* note 67, at 180.

⁹⁶ General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 94 L.N.T.S. 57; U.N. Charter art. 2, ¶ 4.

⁹⁷ Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 at ¶ 126 ("the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases").

⁹⁸ KATTAN, *supra* note 67, at 233-34. Ironically, it was the Soviet Union that first recognized Israel as a *de jure* state..

⁹⁹ See G.A. Res. 194 (III) (Dec. 11, 1948).

¹⁰⁰ *Id.*

¹⁰¹ *Who We Are*, <https://www.unrwa.org/> (last visited Sept. 16, 2024).

would have had approximately 500,000 Arab citizens—Art. I(D) of the U.N.’s 1951 Convention and Protocol Relating to the Status of Refugees included an express carve out for Palestinian refugees.¹⁰²

The failure to recognize the Nakba as a violation of contemporaneous principle of public international law, and not just a humanitarian tragedy, is liberal Zionism’s second fundamental omission. First, the Haganah’s and then Israel’s tactics of intentionally targeting civilians, ethnic cleansing, and even rape had already been recognized as violations of customary international law by 1947.¹⁰³ Second, Israel’s refusal to repatriate Palestinian citizens, and then its decision to strip them of nationality, were also violations of contemporaneous principles of public international law.¹⁰⁴ Both omissions with respect to the Nakba reinforce liberal Zionism’s assumption of the rightlessness of Palestinians and make incomprehensible the international community’s response to the Nakba as the fighting was taking place.

That the international community recognized the Nakba as a violation of public international law is reflected in the proceedings that accompanied Israel’s admission to the United Nations. Indeed, the resolution admitting Israel as a member of the U.N. specifically noted the November 1947 United Nations General Assembly resolution for the partition of Palestine and the December 1948 United Nations General Assembly resolution on the rights of the Palestinian refugees to return to their homes *and* that Israel had represented that it “unreservedly accepts the obligations of the United Nations Charter and undertakes to honour them.”¹⁰⁵ Whether Israel expressly undertook to abide by the terms of U.N. General Assembly Resolutions 181 and 194 in connection with its admission to the U.N. is up to debate, but transcripts of debates from the time make clear that Israel admitted that the issues set out in those resolutions were not simply a matter of Israel’s internal sovereignty. In short, it admitted that the question of its frontiers, its internal constitution (the partition plan required the Jewish state to have a written constitution guaranteeing minority rights, for example) and the rights of the refugees were all proper questions for the international community and were not to be immunized from international scrutiny under paragraph 7 of Article 2 of the United Nations, the provision of the U.N. Charter that prohibited the U.N. from interfering in the internal affairs of its members.¹⁰⁶ The subsequent steps Israel took—its 1950 law confiscating

¹⁰² U.N. Refugee Agency, Convention and Protocol Relating to the Status of Refugees (July 28, 1951), <https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees>.

¹⁰³ KATTAN, *supra* note 25, at 203-208.

¹⁰⁴ *See infra* notes 333–365.

¹⁰⁵ U.N. GAOR, 3d Sess., 207th plen. mtg. at 18, U.N. Doc. A/RES/273(III) (May 11, 1949).

¹⁰⁶ Report Of The Committee On The Exercise Of The Inalienable Rights Of The Palestinian People, at ¶¶ 39–40, U.N. Doc No. A/33/35 (1978) (“The representative of Israel had given an assurance that, if that country were admitted as a Member, such matters as the settlement of frontiers . . . and the Arab refugee problem would not be regarded as within its domestic Jurisdiction and protected from intervention under the terms of Article 2, paragraph 7. He noted that those matters were being considered by the Conciliation Commission and that the admission of Israel would not change that situation.”) (“Nothing contained in the present Charter shall authorize the United Nations to

Palestinian refugees' property, even of those Palestinian refugees who managed to remain in Israel and obtain Israeli citizenship (the so-called "present absentees"),¹⁰⁷ entering into arrangements with the Jewish National Fund to administer those confiscated properties for the exclusive benefit of Jews,¹⁰⁸ and denationalizing Palestinian refugees¹⁰⁹—were all in violation of the spirit, if not the letter, of its representations to the U.N. when it gained admission to that body and became a *de jure* state.

Whether or not international law recognizes a general right of return for all refugees, the international community has never considered the Palestinian refugees to be a matter wholly within Israel's prerogative as a sovereign state, as Ezra Klein and other liberal Zionists would have it. To compare Israel's rejection of the Palestinian right of return with other states' immigration policies shows a shocking ignorance of the international context which created the Palestinian refugee crisis, indifference to the international context grounding Palestinians' claims, or both. As between Israel and Palestine, Klein treats the Nakba as if it were the equivalent of a natural disaster,¹¹⁰ not an event that demands legal or moral analysis.

Klein fails to note perhaps the most important international aspect of the Israel-Palestine conflict: the attempt by "the international community," which consisted primarily of Euro-American states at the time, to force Palestine's Arabs to bear the costs of Euro-American antisemitism that manifested itself most monstrously in the Holocaust and its aftermath, a crisis of European Jewish refugees who could find no state in the global north willing to take them.¹¹¹ By this sleight of hand, Klein transforms the Palestinian right of return from a question of fundamental international justice into an ordinary course bargaining demand, the functional equivalent of a labor union seeking increased health care benefits from its employer. Klein's recognition of the Nakba, while

intervene in matters which are essentially within the domestic jurisdiction of any state"). See Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, ¶¶ 33, 35 (July 19, 2024), <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf> (noting the recent Advisory Opinion of the International Court of Justice confirmed the ongoing international character or Israel's relations with Palestine and Palestinians. Also, international law's entanglement with the question of Palestine since the end of World War I has issues prompting the Advisory Opinion to implicate the *erga omnes* obligations of the international community.).

¹⁰⁷ Absentees' Property Law, 5710-1950, LSI 4 68-82 (1948-1987), as amended (Isr.).

¹⁰⁸ Sabri Jiryis, *The Legal Structure for the Expropriation and Absorption of Arab Lands in Israel*, 2 J. PALESTINE STUDIES 82, 89 (1973).

¹⁰⁹ Nationality Law, 5712-1952, LSI 6 50 (1952), as amended (Isr.).

¹¹⁰ *Shaped My Thinking*, *supra* note 4; see also *Jewish Left Thoughts*, *supra* note 4.

¹¹¹ The injustice of requiring Palestine to absorb European Jewish refugees over the objections of its Arab population in the wake of World War II was not lost on contemporaries. See, e.g., W. T. Stace, *Zionist Illusion*, ATLANTIC MONTHLY Feb. 1947, at 82, 86; President Roosevelt, before his death, contemplated a proposal for the solution of the European Jewish refugee crisis by encouraging various countries in the western hemisphere, along with the United Kingdom, to open their borders to these refugees. He never moved forward with the proposal, in part, because American Zionists were opposed to it. See Morris Ernst, *F.D.R.'s International Immigration Plan for Jewish Refugees*, in FROM HAVEN TO CONQUEST: READINGS IN ZIONISM AND THE PALESTINE PROBLEM UNTIL 1948 489, 492 (Walid Khalidi ed., 1971).

welcome, is ultimately self-serving: it functions exclusively to affirm Klein's humanity rather than as an event bearing any legal significance, much less demanding a remedy from both Israel and the "international community" that abetted it.¹¹²

C. *Zionism and Colonialism*

The third move Klein makes in disparaging Palestinian claims is to dismiss the colonial nature of the Zionist settlement project. For Klein and other liberal Zionists, the religious/historical/emotional connection of Jewishness to Palestine, or the indisputable fact of Jews being a historically marginalized group, is sufficient to exonerate the Zionist project from the charge of colonialism,¹¹³ or to warrant caution in using the term with respect to Israel.¹¹⁴ Whatever the merits of the Zionist project to the well-being of the Jewish community, it is indisputable that Zionist settlement was radically different from the history of Jewish immigration to Palestine in the centuries that preceded the Zionist project. Zionist settlement can be meaningfully distinguished from historical forms of Jewish immigration to Palestine along at least three dimensions that render the framework of colonialism relevant: the institutional structure of Zionist settlement, its political goals, and its political alliances, each one of which reinforced the Zionist construction of Palestinians as rightless.

Taking these dimensions in reverse order, Zionism from its origins attempted to ally itself with a great power. Theodore Herzl, the founder of political Zionism and author of *The Jewish State*,¹¹⁵ actively sought a great power patron for the Zionist project.¹¹⁶ Although he failed in his task, the Zionists, shortly after Herzl's death, succeeded in winning Great Britain to its cause, resulting in the promulgation of the Balfour Declaration on November 2, 1917.¹¹⁷ The terms of the Balfour Declaration were later incorporated into international law through the terms of the Palestine Mandate.¹¹⁸ The principal effect of the Palestine Mandate, in addition to facilitating Jewish immigration to Palestine and legitimating the idea of Palestine as a national home for Jews, was its suppression of Palestinian self-determination. Unlike the populations of the other Class A mandates, the Palestinian Arabs' rights to self-determination were rendered secondary to the creation of a Jewish national home. While Great Britain in its role as Mandatory, facilitated the development of institutions within the Yishuv to further its political aims, it took no comparable steps for the Palestinian Arabs. Indeed, it took great steps to crush Palestinian demands

¹¹² *Shaped My Thinking*, *supra* note 4; see also *Jewish Left Thoughts*, *supra* note 4.

¹¹³ *Shaped My Thinking*, *supra* note 4.

¹¹⁴ Feldman, *supra* note 34 (stating that while a person in good faith could accuse Israel of colonialism, to do so "run[s] the risk of perpetuating antisemitism" and ignores "Israel's status as the only homeland for a historically oppressed people who have nowhere else to call their own.").

¹¹⁵ See generally THEODOR HERZL, *THE JEWISH STATE* (Alex Bein & Louis Lipsky eds., 2008).

¹¹⁶ See e.g., . at 16, 45–47.

¹¹⁷ *Balfour Declaration: Text of the Declaration (November 2, 1917)*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/text-of-the-balfour-declaration> (last visited Dec. 14, 2024).

¹¹⁸ League of Nations Covenant, *supra* note 35.

for self-determination during the inter-war period.¹¹⁹ Great Britain was never able to establish any representative institutions for the Palestinian Arabs because of the seemingly contradictory demands of the Palestine Mandate itself: to create a national home for the Jews while respecting the equal rights of its non-Jewish population.¹²⁰ Whether or not Britain could have better reconciled these two seemingly contradictory aims of the Palestine Mandate, it is uncontroversial that without the protections of, and the opportunities granted by, the Palestine Mandate, backed by the military power of Great Britain, one of great world powers of the time, the Zionist project could not have sought to create a Jewish state in Palestine, much less have succeeded in realizing that ambition.¹²¹

Zionism's relationship with colonial powers, however, was not merely born of necessity: Zionism, or at least many Zionists, shared with colonial powers a dim view of Palestine's native Arab population. Their claim to civilizational superiority justified the Zionist plan to supplant the natives in favor of the newly arriving Jewish immigrants. Herzl, for example, described his imagined Jewish state in the following terms:

Palestine is our ever-memorable historic home. The very name of Palestine would attract our people with a force of marvelous potency. . . . We should there form a portion of a rampart of Europe against Asia, an outpost of civilization as opposed to barbarism. We should as a neutral State remain in contact with all Europe, which would have to guarantee our existence.¹²²

The neutrality that Herzl imagines in this passage relates to the Jewish State's stance in inter-European conflicts. It would of course *not* be a neutral state vis-à-vis Asiatic, i.e., Arab and Muslim, barbarism, against which it would stand as a bulwark protecting Europe.

While Herzl makes no mention of the Arabs already resident in Palestine in *The Jewish State*, or what is to be done with them in order to make room for the Jewish state he envisioned, the language he used to describe the modern methods of state-building the Zionists would pursue evokes a willingness, if not an inevitability, to kill the natives *en masse* in order to achieve the colonizers' goals:

If we wish to found a State today, we shall not do it the way which would have been the only possible one thousand years ago. It is foolish to revert to old

¹¹⁹ See generally D. K. Fieldhouse, *Palestine: The British Mandate, 1918–1948*, in WESTERN IMPERIALISM IN THE MIDDLE EAST 1914–1958 151, 170 (2008) (describing "draconian measures" Great Britain took in 1938–39 to suppress Arab revolt); Hughes, *supra* note 64, at 35 (concluding that the British crushed the Palestinian revolt through a system of "'lawfare' [that] pacified the country through quotidian application of a crafted, all-encompassing legal system that restrained, detained, and impoverished Palestinians, hanged and killed them, and demolished their homes.").

¹²⁰ Balfour Declaration, *supra* note 118.

¹²¹ Fieldhouse, *supra* note 120, at 219 (describing Britain's role as facilitating a "Zionist invasion" of Palestine).

¹²² HERZL, *supra* note 116, at 96.

stages of civilization, as many Zionists would like to do. Supposing, for example, we were obliged to clear a country of wild beasts, we should not set about the task in the fashion of Europeans of the 5th Century. We should not take spear and lance and go out singly in pursuit of bears; we would organize a large and active hunting party, drive the animals together, and throw a melinite bomb into their midst.¹²³

The subjective connection of Jews to Palestine could therefore easily co-exist with 19th Century theories of white supremacy that underwrote colonialism.¹²⁴ Chaim Weizmann, for example, in a letter to Lord Balfour shortly after the British captured Palestine from the Ottomans, described Palestine's Arabs as unworthy of democratic self-government because of their economic, political, and moral inferiority.¹²⁵ Weizmann contrasted the "reality" of Jerusalem, which he described as "a city of dirt and squalor, a home of physical and moral disease, the sorry domain of a corrupt Arab municipality" to the new "epoch" for Jerusalem that the Zionists promised to bring if only the British would give them the chance.¹²⁶

Not only did many Zionists such as Herzl uphold colonial world views, Zionism benefited from colonial theories of white supremacy and racial hierarchies to win the support of European powers in their efforts to justify suppressing Palestinians' right to self-determination. Winston Churchill, for example, in his secret testimony before the 1937 Peel Commission¹²⁷ tasked with understanding why Palestine's Arabs had revolted, dismissed Palestinian demands for the right of self-government, comparing them, infamously, to "the dog in a manger," who is not entitled to the final say on the use of the manger "even though he may have lain there for a very long time."¹²⁸ He went on to compare Palestinians to Native Americans and the Australian Aborigines, neither of whom, in his view, suffered a wrong "by the fact that a stronger race,

¹²³ *Id.* at 93–94.

¹²⁴ THOMAS MCCARTHY, RACE, EMPIRE, AND THE IDEA OF HUMAN DEVELOPMENT 69 (2009). There is no contradiction between European Jews being both the victims of white supremacy in the form of antisemitism *and* believers in white supremacist ideology in their relations with non-Europeans.

¹²⁵ CHAIM WEIZMANN, THE LETTERS AND PAPERS OF CHAIM WEIZMANN: SERIES A VOLUME VIII Nov 1917 - Oct 1918 198–199, 201–2 (Meyer W. Weisgal et al. eds., 1977) (stating that Arabs worship only "power and success" and that they are "treacherous," that the fairness of the English only makes the Arab more "arrogant" and results in the English being manipulated, and that the democratic principle which the English apply out of a sense of fairness is unfair to the Jews because they are "superior" to the Arabs despite their numerical inferiority, and its effect is "to level down the Jew politically to the status of a native" and risks transforming the Jews in the eyes of the British "as so many natives," and arguing that the present state of affairs, if allowed to continue, would lead to "the creation of Arab Palestine if there were an Arab people in Palestine," but there is not "because the fellah is at least four centuries behind the times, and the effendi . . . is dishonest, uneducated, greedy and as unpatriotic as he is inefficient.")

¹²⁶ *Id.* at 206.

¹²⁷ See generally SECRETARY OF STATE FOR THE COLONIES, PALESTINE ROYAL COMMISSION REPORT, 1937, Cmd. 5479 (UK).

¹²⁸ Karen Attiah, *The Colonial History of Israel-Palestine: Bringing the Receipts*, WASH. POST, (Nov. 3, 2023), <https://www.washingtonpost.com/opinions/2023/11/03/colonial-history-britain-israel/>.

a higher-grade race, or, at any rate, a more worldly-wise race . . . has come in and taken their place.”¹²⁹

The Guatemalan representative to the United Nations Special Committee on Palestine, Mr. Garcia Granados, which recommended partition without conditioning it on the consent of Palestine’s Arab majority, explicitly appealed to principles that we now recognize as white supremacy in rejecting the right of Palestine’s Arabs to self-determination. He compared favorably the relationship of Jews to Arabs in Palestine to that of Spanish settlers to native Americans in the New World. He praised the Jews for having “transformed the deserts” and for the “democratic character” of their farms.¹³⁰ He then expressly pointed to the civilizational superiority of the Jews to justify ignoring the wishes of Palestine’s Arabs:

The Jews had made a pleasant and healthy country out of a land in which a sparse and rachitic population [i.e., the Arabs] had merely vegetated. . . . The Arab population with its simple religiousness and rudimentary political sense [would harm the Jews]. . . . An ignorant majority should not be allowed to impose its will. . . . There was a certain order in the world which helped to maintain the necessary equilibrium. If the United Nations wished to save that order it must consolidate it.¹³¹

Two things can be true at once: Jews, relative to Christian Europeans, could have been a powerless, marginalized group, yet, relative to Palestine’s Arabs, they could be privileged (white) Europeans enjoying rights superior to the natives, who were marked as civilizationally inferior. Zionism could therefore be, simultaneously, a self-defense mechanism for European Jewry with respect to their position in Europe, while also being a colonial movement with respect to its relationship to Palestine’s Arabs. What ought to be decisive in judging the colonial character of political Zionism vis-à-vis its relationship to Palestine’s Arabs was the fact that it, like other European colonial movements, relied on a presumption of civilizational superiority to dispense with the need of consent to their political project.¹³²

Zionist settlement also differed from prior Jewish immigration and presence in Palestine with its overtly political goal of establishing a Jewish state that either excluded non-Jews entirely or marginalized them.¹³³ One strategy was to expel non-Jews from Palestine—what Zionists euphemistically referred to as “transfer.” Herzl himself wrote about removing the Arab population of Palestine

¹²⁹ *Id.*.

¹³⁰ Imseis, *supra* note 67, at 40.

¹³¹ Imseis, *supra* note 67, at 40.

¹³² See UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT 77–83 (1999).

¹³³ Henry Churchill King & Charles R. Crane, *The King-Crane Report* ECON. COOP. FOUND. (Aug. 28, 1919), https://ecf.org.il/media_items/951 (noting that the Zionist program needed substantial modification if it were to be consistent with the rights of non-Jews and that “the Zionists looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine”).

to neighboring countries in his personal diary as early as 1895.¹³⁴ Zionist leaders of the Yishuv, including Ben Gurion, regularly reiterated this possibility during the Mandate in the lead-up to Israeli independence.¹³⁵

The other option Zionists pursued was to deny non-Jewish Palestinians the right to have any say in how they would be governed until such time as Zionist settlement successfully attained an overwhelmingly Jewish majority in Palestine.¹³⁶ The prominent German-American Jewish historian of nationalism, Hans Kohn, abandoned the Zionist movement after it became apparent to him that Zionists were indifferent to coming to an understanding with Palestine's Arabs and preferred to rely on force to achieve their goals.¹³⁷ Ben Gurion expressly argued to the United Nations Special Committee on Palestine ("UNSCOP") that Palestine's Arabs right of self-determination should be indefinitely deferred until such time as Jews had formed a solid majority in Palestine.¹³⁸ He also made clear to the UNSCOP that the Yishuv was willing to use force to create a Jewish state if the Arabs rejected the "decision" of the UNSCOP.¹³⁹ Zionism can therefore be fairly described as colonial insofar as it denied any normative weight to the consent of the non-Jewish, Arab natives who were the vast majority of the people inhabiting Palestine.

Finally, the internal structure of the institutions of Zionist settlement and its political economy were founded on the systematic exclusion of non-Jews, a feature that is also consistent with describing Zionism as a form of colonialism. As Gershon Shafir has shown,¹⁴⁰ the creation of a Jewish-only economy was necessary to induce Jewish immigration to Palestine, where standards of living were substantially lower than that in the European countries from which Jews were expected to immigrate. The sustainability of a Jewish-only economy, however, required subsidization from an external source, and that came from the rank-and-file Zionist movement living abroad in the wealthier and more

¹³⁴ BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED 41 (2004).

¹³⁵ *Explainer: Plan Dalet & the Ethnic Cleansing of Palestine*, INST. MIDDLE E. UNDERSTANDING (Mar. 8, 2023) <https://imeu.org/article/explainer-plan-dalet-the-ethnic-cleansing-of-palestine>.

¹³⁶ Vladimir (Ze'ev) Jabotinsky, *The Iron Wall*, RAZVIET, (Apr. 11, 1923) <https://en.jabotinsky.org/media/9747/the-iron-wall.pdf> (expressing his willingness to come to an agreement with Palestine's Arabs, but only after a Jewish majority is secured, but that until that time, force would have to be used to implement Zionism's plans).

¹³⁷ Adi Gordon, "Nothing But a Disillusioned Love"? Hans Kohn's Break with the Zionist Movement, in *AGAINST THE GRAIN: JEWISH INTELLECTUALS IN HARD TIMES* 117, 117 (2014).

¹³⁸ Imseis, *supra* note 67, at 27, 35–36.

¹³⁹ *Id.* at 47. Of course, the General Assembly, even in voting for partition, was making only a "recommendation," not a decision.

¹⁴⁰ Gershon Shafir, *Theorizing Zionist Settler Colonialism in Palestine*, in *THE ROUTLEDGE HANDBOOK OF THE HISTORY OF SETTLER COLONIALISM* 339 (Edward Cavanagh & Lorenzo Veracini eds., 2016) [hereinafter Shafir, *Settler Colonialism*]; Gershon Shafir, *Zionism and Colonialism: A Comparative Approach*, in *ISRAEL IN COMPARATIVE PERSPECTIVE: CHALLENGING THE CONVENTIONAL WISDOM* 227, 234 (Michael Barnett ed., 1996) [hereinafter Shafir, *Comparative Approach*] (arguing that the political economy of Zionist settlement, beginning around 1905, depended on the creation of an exclusive Jewish economy internally, and external support from foreign Zionist organizations organized around the principles of "German internal colonization practices.").

developed economies of Europe and North America.¹⁴¹ Driven by socialist ethos, Zionist settlements, sought to avoid exploitative labor relations by *excluding* non-Jews.¹⁴² If anti-Semitism and persecution forced Jews into the ghettos in Europe, it was the relative poverty of Palestine, not the threat of persecution, that drove the new Jewish immigrants to separate from them in order to create an exclusionary economy limited to themselves that required external support for its own viability.

The institutional expression of the Jewish-only, exclusionary political economy that Zionism promoted, is most clearly seen in the policies of the Jewish National Fund (“JNF”). The JNF, a limited company incorporated under the laws of the United Kingdom,¹⁴³ acquired land for the purpose of holding it, in perpetuity, in the name of the Jewish people.¹⁴⁴ Its Memorandum of Association (the equivalent of its articles of incorporation) permitted such land to be used only by Jews or businesses controlled by Jews.¹⁴⁵ The terms of the model JNF lease agreement prohibited the JNF from leasing any of its property to any person or company in violation of the terms of its Memorandum of Association.¹⁴⁶ If a Jew who leased land owned by the Jewish National Land employed non-Jewish labor, the leaseholder was subject to a fine, with repeated violations of this provision resulting in the termination of the lease.¹⁴⁷

The exclusionary land use policies of the JNF were mirrored by the exclusionary labor policies of the Histadrut. While ostensibly a labor union, it was actually a state-building institution, organized around the principles of creating a Jewish state, rather than pursuing the class interests of labor against capital.¹⁴⁸ Accordingly, it too excluded Palestine’s Arab population.¹⁴⁹ As noted in the 1930 Hope Simpson Report, the Yishuv’s exclusionary land and labor policies were the principal cause of friction between the new Jewish arrivals and Palestine’s Arabs.¹⁵⁰ The institutions of Zionist settlement, therefore, were

¹⁴¹ See generally Shafir, *Settler Colonialism*, *supra* note 142.

¹⁴² Shafir, *Comparative Approach*, *supra* note 121, at 234 (noting the economic model of Zionist settlement beginning in the early 20th century that laid the foundations for the Israeli state transformed “the Jewish workers into militant nationalists who sought to establish a homogenous Jewish society in which there would be no exploitation of Palestinians, nor will there be competition with Palestinians, because there would be no Palestinians.”).

¹⁴³ *SPECIAL REPORTS: The Jewish National Fund Basic Documents*, 2 PALESTINE Y.B. INT’L. L. 193, 194 (1985).

¹⁴⁴ KATTAN, *supra* note 67, at 23.

¹⁴⁵ *Jewish National Fund Basic Documents*, *supra* note 145, at 195.

¹⁴⁶ *SPECIAL REPORTS: Lease Contract*, 2 PALESTINE Y.B. INT’L. L. 222, ¶17 (1985).

¹⁴⁷ *Id.* at 223.

¹⁴⁸ Michael Shalev, *The Histadrut*, in *LABOUR AND THE POLITICAL ECONOMY IN ISRAEL* 22, 27 (1992).

¹⁴⁹ Michael Shalev, *Accounting for Exclusivism: The Histadrut and the Palestinians*, in *LABOUR AND THE POLITICAL ECONOMY IN ISRAEL* 32, 32–44 (1992).

¹⁵⁰ SIR JOHN HOPE SIMPSON, *PALESTINE: REPORT ON IMMIGRATION, LAND SETTLEMENT AND DEVELOPMENT*, 1930, Cmd. 3686, at 54 (UK) (recognizing Simpson also noted that these policies of the Zionists expressly violated Article 6 of the Mandate which required Britain to ensure that Jewish immigration did not prejudice the interests of the Arab population) [hereinafter HOPE SIMPSON REPORT].

designed to create a separate economy that would ensure the well-being of Jewish immigrants while taking steps to exclude, if not immiserate, the native Arab population by depriving them of economic opportunities.

Finally, the Zionists themselves expressly analogized their activities to the great colonial companies of the Age of Exploration. Chaim Weizman, a leader of the Jewish Agency, in his testimony before the UNSCOP, expressly compared the work of the Jewish Agency to that of the East India Company, even as he recognized that, given the political realities of the 20th Century that had come to recognize the right of peoples to self-determination, it would have been awkward to say so openly.¹⁵¹

While political Zionism cannot be simply labeled as a colonialist movement like European expansionism, it did adopt both the methods and dismissive attitudes of European imperialists toward non-European natives, despite being motivated by the persecution of Jews in Europe. Although Klein's suppression of the colonial dimension of the Zionist enterprise may simply be the result of ignorance of the history of the Zionist movement, this Article argues that eliding political Zionism's colonial dimension is epistemically essential for Klein's argument and indeed the argument of all liberal Zionists. Without it, the common liberal Zionist view of the conflict as tragic, as something that necessitates a *humane* response, but does not implicate justice, is unintelligible. If, on the other hand, Zionism *is* a colonial movement in important respects, than this is a political conflict involving the rights of Palestinians, and least from a liberal perspective, claims of justice should take deliberative priority over doctrines of truth, such as Zionist claims of a "natural right" of the Jewish people to historical Palestine.¹⁵² The language of humanity and sympathy that liberal Zionism deploys reveals the limits of liberal Zionism *and* conceals the abandonment of liberal political principles precisely at the moment when they are most desperately needed.

IV. RUTH GAVISON'S DEFENSE OF THE IDEA OF A JEWISH STATE AND THE POLITICAL COSTS OF LIBERAL ZIONISM

An implicit assumption regarding liberal Zionism is that the creation of Israel was fundamentally just, and the costs incurred by Palestinian Arabs were incidental and therefore tolerable. This allows liberal Zionists to believe that Palestinian Arab resistance to the Zionist project is not rooted in good faith political principle, but in something more malevolent, i.e., anti-Semitism. At various points throughout his series of podcasts, Klein referenced a rise in anti-Semitism which he took as an obvious fact, despite the contested nature of this claim among American Jews themselves.¹⁵³ Klein's evidence-free acceptance of

¹⁵¹ ARDI IMSEIS, *THE UNITED NATIONS AND THE QUESTION OF PALESTINE: RULE BY LAW AND THE STRUCTURE OF INTERNATIONAL LEGAL SUBALTERNITY* 49 (2023).

¹⁵² RAWLS, *supra* note 18, at 173–211.

¹⁵³ See, e.g., Anemona Hartocollis et al., *Feeling Alone and Estranged, Many Jews at Harvard Wonder What's Next*, N. Y. TIMES, <https://www.nytimes.com/2023/12/16/us/jews-harvard-antisemitism-israel-war.html> (Dec. 18, 2023) (describing conflicted reactions of Harvard Jewish students to claims

an explosion in anti-Semitism, whether intentional or not, reinforces the perception that he believes at least some, if not all, advocacy for Palestinian freedom, is suspect as anti-Semitic, or is at least anti-Semitic adjacent. Noah Feldman, in his recent essay, “The New Antisemitism,”¹⁵⁴ makes this claim explicitly: opposition to Israel in many cases may not actually be anti-Semitic but it can easily lead to anti-Semitic sentiments.¹⁵⁵

Klein’s assumption, shared by many liberal Zionists, that opposition to Israel is anti-Semitic at its root, is maintained both by turning a blind-eye to the colonial means by which the state came into existence *and* to the state-imposed conditions of domination that maintains Israel as a Jewish state. For example, although Klein included the voice of one Palestinian Arab with Israeli citizenship in his podcast series, Amjad Iraqi, he failed to explore the conditions of domination under which Palestinian citizens of Israel suffer.¹⁵⁶

Part 2 of this Article argued that liberal Zionism’s legitimacy requires constituting Palestinians as rightless. Here, this Article turns its attention to the domestic Israeli legal order and the costs that it imposes on its non-Jewish, Palestinian Arab citizens. Ruth Gavison’s defense of Israel as a Jewish state provides a good place to interrogate liberal Zionism’s understanding of these costs and whether they can be justified.¹⁵⁷ The necessity of Zionism as a condition for the flourishing of the Jewish community, or its relationship to individual Jews, does not, in the first instance, raise any questions that a politically liberal theory of justice needs to answer.¹⁵⁸ But from the perspective of political liberalism, accepting Gavison’s argument that a Zionist Jewish state furthers the rational good of Jews only resolves the question of whether it is “rational” for Jews to desire a Jewish state.¹⁵⁹ It does not settle the question of whether establishing such a state would be consistent with the principles of justice as conventionally understood from the perspective of political liberalism.

From the perspective of political liberalism, a constitutional order, what Rawls calls a state’s “basic structure”, to be just, must be viewed as “reasonable”

of anti-Semitism); Bernie Steinberg, *For the Safety of Jews and Palestinians, Stop Weaponizing Antisemitism*, THE HARVARD CRIMSON (Dec. 29, 2023), <https://www.thecrimson.com/article/2023/12/29/steinberg-weaponizing-antisemitism/> (former executive director of Hillel at Harvard decrying the “weaponization” of anti-Semitism).

¹⁵⁴ Feldman, *supra* note 34.

¹⁵⁵ Feldman, *supra* note 34 (noting, for example, that accusations against Israel of committing genocide in Gaza are not inherently antisemitic but run the risk of “veering into antisemitism.”).

¹⁵⁶ *Shaped My Thinking*, *supra* note 4.

¹⁵⁷ See generally Ruth E. Gavison, *The Jews’ Right to Statehood: A Defense*, 15 AZURE 70 (2003); HEBREW JERUSALEM, <https://en.law.huji.ac.il/people/ruth-gavison> (last visited Dec. 5, 2024) (noting Ruth Gavison joined the Faculty of Law of Hebrew University in 1974 where she specialized in human rights law.); *Leading Israeli Legal Scholar Ruth Gavison Dies at 75*, TIMES OF ISRAEL, <https://www.timesofisrael.com/leading-israeli-legal-scholar-ruth-gavison-dies-at-75/> (Aug. 15, 2020, 9:01 PM) (noting she died in 2020).

¹⁵⁸ MICHAEL STANISLAWSKI, ZIONISM: A VERY SHORT INTRODUCTION 1–10 (2016), (discussing controversies regarding Zionism within the Jewish community).

¹⁵⁹ Gavison, *supra* note 159, at 72.

from the perspective of all its citizens.¹⁶⁰ A basic structure is just when its rules are reasonably acceptable to all reasonable persons who are subject to such rules. In determining whether the rules of the basic structure can be reasonably acceptable to others, we must treat them as political equals, acting under conditions that are free from domination or manipulation. As a practical matter, a political order from a Rawlsian perspective is “reasonable” when the principle of reciprocity of citizens’ rights and obligations undergirds the fundamental political and economic institutions of a polity.

In the case of a Jewish state, then, political liberalism requires that its basic structure, to be just, be viewed as “reasonable” not only from the perspective of its Jewish citizens, but also from that of its non-Jewish citizens. Gavison’s defense of Israel, however, lies entirely in the advantages Israel, as a Jewish state, provides Jews: securing the existence of a Jewish public culture,¹⁶¹ protecting Jews from state-sponsored anti-Semitism, and providing a bulwark against assimilation of Jews into non-Jewish cultures.¹⁶² Only after summing up the advantages Israel offers Jews does Gavison turn to the question of justifying a Jewish state to non-Jews.¹⁶³ She does not ask, however, whether Israel’s basic structure can satisfy the criterion of reciprocity that animates liberal principles of political justice. Instead, she attempts to justify the legitimacy of Israel by minimizing the costs that a Jewish state imposes on its non-Jewish population. She makes clear from the outset of her defense of the idea of a Jewish state that she rejects the liberal premise of the neutrality of the state as the touchstone for a state’s legitimacy and the principle of reciprocal freedom that underwrites it.¹⁶⁴ She instead believes that it is possible, in certain cases at least, to justify subordinating one group to another based on “the competing interests of the different parties, as well as their relative size and the political alternatives available to each of them.”¹⁶⁵ In other words, she attempts to justify the subordinate status of non-Jews in a Jewish state by arguing that the costs of their subordination are relatively minor, at least in comparison to the great advantages gained by Jews from having a Jewish state.

Gavison’s argument transfers, implicitly, a certain kind of claim arising in debates about distributive justice that are common in welfare economics to the political context of fundamental political justice. Her argument is essentially an application of the Hicks-Kaldor justifications for the provision of controversial public goods to questions of fundamental political justice. Without saying so expressly, Gavison applies Hicks-Kaldor criteria to the basic structure of Israel and concludes that Israel’s basic structure can be justified because the increase

¹⁶⁰ RAWLS, *supra* note 18, at 48–54.

¹⁶¹ Gavison, *supra* note 159, at 74.

¹⁶² Gavison, *supra* note 159, at 78.

¹⁶³ Gavison, *supra* note 159, at 75.

¹⁶⁴ Gavison, *supra* note 159, at 78.

¹⁶⁵ *Id.*

in welfare experienced by its Jewish citizens is sufficiently large to offset the corresponding decrease in welfare of its non-Jewish citizens.¹⁶⁶

Hicks-Caldor justifications are controversial even in the ordinary course of public policy making. They are generally not deployed to justify inequality in the political realm where such arguments can quickly lead to dangerous conclusions. Rawls of course denies that principles of distributive justice take priority over the individual rights of citizens, to which he assigns a “special status” having “absolute weight.”¹⁶⁷ If a Rawlsian would appeal to principles of distributive justice to justify the basic structure of a state, however, he would not appeal to Hicks-Kaldor criteria, but rather to the difference principle: inequality is justified only when it is of “the greatest benefit of the least advantaged members of society.”¹⁶⁸

But even accepting Gavison’s questionable frame, her calculation of the costs of Zionism ignores the political and material dimension of Zionism entirely.¹⁶⁹ She admits that the Arabs of Palestine had a “liberty” to resist Jewish immigration and attempts to further Zionist colonization of Palestine,¹⁷⁰ provided they did so without violating the rights of others, i.e., the Jewish community in Palestine and without violating applicable laws.¹⁷¹ The “tragedy of Jewish-Arab relations” in her view, however, began because Arabs resorted to violence in an attempt to stop or hinder the Jewish project of settlement in Palestine.¹⁷²

The irony in her argument, however, is that the terms of the Palestine Mandate were consciously designed, in collaboration with the Zionist movement, to preclude Palestine’s Arabs from exercising effective self-determination, particularly with respect to setting the conditions of Jewish immigration and settlement within Palestine.¹⁷³ Palestine’s Arabs, despite being the overwhelming majority of Mandatory Palestine, were constitutionally disabled from pursuing through lawful means the very goal, which Gavison herself admits, they were at a liberty to pursue. Gavison fails to wrestle with the fact “the infrastructure of Jewish settlement” that transformed Palestine, and that in her view *now* justifies the existence of a democratic Jewish state, could only be achieved through the *autocratic* suppression of the Palestinian Arabs’ own

¹⁶⁶ Julian Reiss, *Public Goods*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE (July 21, 2021), <https://plato.stanford.edu/archives/fall2021/entries/public-goods/>.

¹⁶⁷ RAWLS, *supra* note 18, at 294.

¹⁶⁸ RAWLS, *supra* note 18, at 291.

¹⁶⁹ See Nimer Sultany, *The Wrongs of Zionism*, 24 PALESTINE Y.B. INT’L L. 3, 3–23 (2023) (noting a partial accounting of those costs.).

¹⁷⁰ *Id.* at 80.

¹⁷¹ *Id.* at 81.

¹⁷² *Id.* at 80–81.

¹⁷³ Fieldhouse, *supra* note 120, at 153–57 (describing impossibility of establishing a legislative council in Palestine given British refusal to permit proposed legislative council to have supervision over Jewish immigration and land purchases).

rights to self-government until such time as the sociological bases of a Jewish state could come into existence.¹⁷⁴

She likewise ignores the fact that “the infrastructure of Jewish settlement” that laid the foundations for the Jewish state was itself exclusionary. As demonstrated earlier, the institutions of Zionist settlement during the Mandate were consciously designed to create a Jewish-only economy that excluded the possibility of either Arab ownership, or beneficial use of, land and the participation of Arabs in the labor market. This discriminatory structure of the Jewish economy in Palestine was a necessary material condition to attract further Jewish immigration to Palestine instead of other, more economically desirable destinations. It was also facially inconsistent with the provisions of the Palestine Mandate that prohibited discrimination based on race and religion.¹⁷⁵ It is therefore hard to take seriously Gavison’s claim that Jews were, in fact, at “liberty” to pursue Jewish settlement despite its facial inconsistency with the terms of the Mandate, but Palestinian Arabs could express their opposition to the Zionist program only through means that “did not violate the laws of the land.”¹⁷⁶ Finally, her empirical claims about the success of Jewish settlement in Palestine are just wrong: Jews were only a demographic majority in Tel Aviv and its environs, perhaps justifying a Jewish city-state limited to Tel Aviv on her theory, but hardly the nearly 60% of Palestine under the United Nations’ proposed partition plan, or the 78% of historical Palestine that it eventually conquered in the fighting that broke out in Palestine after 1947.¹⁷⁷

In terms of the present Israeli state, Gavison is similarly indifferent to material and political discrimination against non-Jews. She characterizes the injury experienced by Israel’s Palestinian Arab citizens as fundamentally *cultural*; the loss of a distinctively Arab public culture and the concomitant alienation from a *Jewish* public culture. By characterizing the primary injury that Israel’s Jewishness inflicts upon Palestinian Arabs as cultural, she thus compares their situation favorably to the situations of other national

¹⁷⁴ Fieldhouse, *supra* note 120, at 151 (“[Palestine] was ruled by the British through the most autocratic of colonial systems – governor, executive council, nominated advisory council, and no legislative council”); Hughes, *supra* note 74, at 35–36 (describing the all-encompassing legal regime of autocratic repression by which the British governed the Palestinian Arabs, pursuant to which the British authorities “restrained, detained, and impoverished Palestinians, hanged and killed them, and demolished their homes. It banned newspapers, interned people, fined and exiled them, censored their mail and telephone calls, took away livestock and crops, whipped them, imposed curfews and police posts, exacted corvée, and restricted travel. It made singing, shouting, and waving flags illegal, alongside processing the wrong way down a street, buying a toy children’s gun, or meeting in a cafe. People paid financial bonds to ensure their good behavior. If they had a nice house, the authorities marked it for destruction if a stranger in the neighborhood broke the law. Photographs in regimental archives show soldiers painting big numbers on buildings for future destruction. Whole village populations walked miles and back every day to report their presence at a police station.”).

¹⁷⁵ *Mandate for Palestine*, *supra* note 38; HOPE SIMPSON REPORT, *supra* note 152, at 54 (noting that while the Jewish Agency’s discriminatory policies were rational from the perspective of Zionist aims, they were in direct contravention of the terms of the Mandate).

¹⁷⁶ Gavison, *supra* note 159, at 8

¹⁷⁷ Gavison, *supra* note 159, at 82.

minorities.¹⁷⁸ She does nod to discrimination with respect to concrete tangible interests, without defining what those are.¹⁷⁹ Indeed, she flags them merely to point out that they are real and significant, but essentially *unavoidable*: “We must recognize that the needs of Jewish nationalism do, in some cases, justify certain restrictions on the Arab population in Israel, particularly in areas such as security, land distribution, population dispersal, and education.”¹⁸⁰

Although equality with respect to these goods would seem to be fundamental to the basic structure of any state claiming to be a liberal democracy, she fails to explain why *any* discrimination in these domains is acceptable. Nor does Gavison describe the nature of these deprivations in any meaningful detail. Suppressing the nature of these deprivations allows her to avoid confronting the actual realities of the structural subordination Palestinian citizens of Israel face in “security, land distribution, population dispersal, and education.”¹⁸¹ Her indifference to the impact of political discrimination on non-Jews is perhaps most clearly manifested in her argument about the territorial limits of a Jewish state: while she rejects maximalist claims to the entirety of the “Land of Israel,” she does not do so because Arabs have any inherent political rights that Jews must respect. Rather, these claims should be abandoned because, from a demographic perspective, the condition precedent for a Jewish state—a Jewish majority—is absent.¹⁸² But as Albert Hourani pointed out in his testimony before the 1946 Anglo-American Committee of Inquiry, violence can be used to change the demographic balance.¹⁸³ Hourani’s 1946 testimony proved tragically prescient of course, and in its light, one can take no comfort in Gavison’s willingness to allow for a Palestinian state in some part of historical Palestine. The logic of her own argument—which recognizes as morally relevant “facts on the ground”—is not a robust endorsement of a Palestinian state through recognition of Palestinians’ right to self-determination. It is also consistent with an invitation for further “demographic engineering” through a combination of increased Jewish settlement and renewed ethnic cleansing.¹⁸⁴

The recent Human Rights Watch report, *A Threshold Crossed* gives some idea of the extent of the discrimination she accepts as necessary for the sake of Jewish nationalism: 93% of the land of Israel is effectively reserved for the

¹⁷⁸ Gavison, *supra* note 159, at 86-87, 94.

¹⁷⁹ *Id.*

¹⁸⁰ Gavison, *supra* note 159, at 92.

¹⁸¹ *Id.*

¹⁸² Gavison, *supra* note 159, at 86 (noting that while Jews did not have a right to establish a state in Palestine at the turn of the 20th century, by the middle of the 20th century, as a result of Zionist settlement, they did obtain that right).

¹⁸³ Hourani, *supra* note 87, at 86 (noting that “responsible Zionists have talked seriously about the evacuation of the Arab population, or part of it, to other parts of the Arab world.”).

¹⁸⁴ Gavison, *supra* note 159, at 78; Bezalel Smotrich, *Israel’s Decisive Plan*, HASHILOACH (Sept. 7, 2017), <https://hashiloach.org.il/israels-decisive-plan/> (rejecting a two-state solution and offering Palestinian Arabs instead the option to accept permanent subordination, immigration or violence); Ben Reiff, *Smotrich Wants One Million West Bank Settlers. That’s Not so Far-Fetched*, +972 MAG. (Jul. 12, 2023), <https://www.972mag.com/settlements-roads-infrastructure-smotrich/>.

exclusive use of Jews;¹⁸⁵ virtually no public investment in Arab towns that survived the Nakba;¹⁸⁶ and an effective confinement of Palestinian Arabs to 3% of pre-1967 Israel.¹⁸⁷ She also omits the fact that for the first 17 years of Israel's existence as a state, its Palestinian Arab citizens were subject to military rule.¹⁸⁸ The political differences between Palestinian Arab citizens of Israel and Jewish citizens of Israel are so stark that Israeli law distinguishes between citizenship and nationality: while Palestinian Arabs are Israeli "citizens," by nationality they are "Arabs" and are legally inferior to Israelis with "Jewish" nationality.¹⁸⁹ Of course, the discriminatory legal regime in the Palestinian Occupied Territories of East Jerusalem, Gaza and the West Bank is much more dire.¹⁹⁰

Contrary to Gavison's description of the problems faced by Palestinian Arab citizens of Israel, the discrimination is much more profound than alienation from the Jewish "public" culture of Israel. Rather, they are subject to a legal system that enshrines a system of ethnic domination, even if it does not rise to the level of the "systematic oppression . . . and inhumane acts" that were documented in East Jerusalem, Gaza and the West Bank.¹⁹¹ The systematic political subordination of the Palestinian Arab citizens of Israel is perhaps best captured in Yoel Peled's observation that, while Palestinian Arab citizens of Israel can enjoy "liberal rights," such as non-discrimination and private freedoms, they are excluded from the possibility of enjoying "republican rights, which are reserved for Jews alone."¹⁹²

V. LIBERAL ZIONISM AND THE (IM)POSSIBILITY OF PEACE

Part II of this Article argued that liberal Zionism's desire for a humane outcome rather than a just one fails to take Palestinian equality seriously. This Part of the Article also argues that liberal Zionism as articulated by figures such as Ezra Klein and Ruth Gavison fails for its own self-stated reasons: a *humane* solution is clearly not *achievable*, given the current configuration of the Israeli government. Seth Ackerman, in a recent piece, recounts at least fifty years of

¹⁸⁵ OMAR SHAKIR & HUMAN RIGHTS WATCH, A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PROSECUTION 54 (2021) [hereinafter A THRESHOLD CROSSED].

¹⁸⁶ *Id.* at 152–54 (stating that since the establishment of the Israeli state, the government has established more than 900 "localities" for Jews but virtually none for Israel's Palestinian Arab citizens and has adopted planning and land use policies that make it virtually impossible for already-existing Arab towns to grow).

¹⁸⁷ *Id.* at 10–11 (stating that Israeli policy with respect to land use is driven by the imperative of "seeking maximal land with minimal Palestinians").

¹⁸⁸ *Id.* at 146.

¹⁸⁹ A THRESHOLD CROSSED, *supra* note 187, at 149 (noting that Israel "structurally discriminate[s] between citizens based on their nationality" and that Israeli law, affirmed by the Israeli Supreme Court, denies the existence of a common Israeli nationality, with the result that "Israeli law relegates Palestinians at birth to an inferior status by law.").

¹⁹⁰ A THRESHOLD CROSSED, *supra* note 187, at 10 (concluding that with regard to the situation faced by Palestinian Arabs in East Jerusalem, the West Bank and the Gaza Strip, the government of Israel has committed "the crime of apartheid").

¹⁹¹ A THRESHOLD CROSSED, *supra* note 187, at 10.

¹⁹² Sammy Smooha, *Ethnic Democracy: Israel as an Archetype*, 2 ISR. STUD. 198, 204 (1997).

failed attempts to convince Israel to agree to any accommodation with the Palestinians that could be minimally acceptable to them.¹⁹³ Having adopted an ideology that makes it impossible for it to compromise with the Palestinians, Israel has, according to Ackerman, left itself with no choice other than to negate even their physical existence.¹⁹⁴ Liberal Zionism, precisely because it refuses to grant Palestinians equal political and legal standing as Israeli Jews, simply lacks the internal resources to resist the genocidal policies of chauvinistic and messianic strands of Zionism, strands that are undoubtedly ascendant in contemporary Israel.¹⁹⁵

The incapacity of liberal Zionism to defend even a decent settlement with the Palestinians is on display in the war Israel has been waging against the Gaza Strip since October 7. The Gaza Strip is a tiny sliver of historical Palestine—1% of the territory of Mandatory Palestine—that, as a result of the Nakba, came to house 25% of Palestine’s 1947 Arab population.¹⁹⁶ More than two-thirds of its population were Palestinian refugees whom Zionist militias (and later the Israeli army) had either driven out of their homes, or terrorized into fleeing their homes.¹⁹⁷ Gaza’s population on October 6, 2023 was approximately 2 million, or 14%, of the total 14 million persons—Israeli Jews, Palestinian Arab citizens of Israel and Palestinians living in the Occupied Palestinian Territories (East Jerusalem, the West Bank and Gaza)—who currently call historical Palestine their home.¹⁹⁸ Israel is fighting a war against a 75-year old refugee camp using World War II carpet bombing tactics¹⁹⁹ against an enemy over whom it has an overwhelming quantitative and qualitative military superiority.²⁰⁰ Given the scale of destruction Israel unleashed in the wake of the October 7 attack, and its capacity to continue such violence

¹⁹³ Seth Ackerman, *There Was an Iron Wall in Gaza*, JACOBIN (Jan. 4, 2024), <https://jacobin.com/2024/01/iron-wall-gaza-israel-defense-forces-realpolitik-palestine-history>.

¹⁹⁴ *Id.* ("Repelled by the thought of security without conquest, terrified of 'talking borders,' and encircled by enemies of its own making, a cornered Israel has finally absolved itself of its last moral obligation. It no longer feels bound to accept its neighbors' physical existence.")

¹⁹⁵ *I don't think there should be life in Gaza on the day after": Clip from 'Israel's Reel Extremism,'* YOUTUBE, <https://www.youtube.com/watch?v=OSnHCCTFYIs> (last visited Aug. 12, 2024); see also, The Ezra Klein Show, *Ta-Nehisi Coates on Israel: I Felt Lied To*, N.Y. TIMES (Oct. 18, 2023), <https://www.nytimes.com/2024/10/11/podcasts/transcript-ezra-klein-interviews-ta-nehisi-coates.html>.

¹⁹⁶ JEAN-PIERRE FILIU, *GAZA: A HISTORY* 71–72 (John King tran., 2014).

¹⁹⁷ *Id.*

¹⁹⁸ Thomas Piketty, *In Israel and Palestine, It Is High Time to Support the Side of Peace and Penalize the Side of War*, LE MONDE.FR (Oct. 14, 2023), https://www.lemonde.fr/en/opinion/article/2023/10/14/thomas-piketty-in-israel-and-palestine-it-is-high-time-to-support-the-side-of-peace-and-penalize-the-side-of-war_6172074_23.html.

¹⁹⁹ Evan Dyer, *Israel's Gaza Bombing Campaign Is the Most Destructive of This Century, Analysts Say*, CBC NEWS (Dec. 30, 2023), <https://www.cbc.ca/news/politics/israel-gaza-bombing-amas-civilian-casualties-1.7068647> (stating that by December 5, 2023, "the percentage of Gaza's buildings that had been damaged or destroyed already had surpassed the destruction in Cologne and Dresden, and was approaching the level of Hamburg," the three German cities most completely destroyed by Allied bombing during World War II).

²⁰⁰ *The Israel-Hamas military balance*, FRANCE 24 (Oct. 16, 2023, 6:27 PM), <https://www.france24.com/en/live-news/20231016-the-israel-hamas-military-balance>.

indefinitely into the future without effective military resistance from Hamas, it is not surprising that scholars of genocide studies issued a statement warning of the risk of genocide in Gaza,²⁰¹ or that a formal charge against Israel has now been brought under the Genocide Convention.²⁰² The International Court of Justice, meanwhile, has already issued a series of orders granting provisional measures against Israel²⁰³ after it concluded that the Palestinians of Gaza were facing a plausible risk of imminent genocide.²⁰⁴ A federal district court judge agreed with the legal and factual findings of the International Court of Justice and called on the Biden administration to live up to its obligations under the Genocide Convention and cease support for Israel.²⁰⁵

While Israel's conduct undoubtedly troubles liberal Zionists, their political commitments do not provide them with the requisite moral resources to resist the Israeli policy choices they ostensibly reject. This produces a response of despair, which is reflected in Klein's low expectations for a solution. Whether this despair is a result of indifference to the rights of Palestinians, resignation regarding the nature of Israeli politics, or both, Klein specifically, and liberal Zionists generally, do not interrogate the etiology of Israeli Jews' political choices. They treat Israeli political choices as if they are fixed points of reference, impervious to change, whether for endogenous or exogenous reasons. This despair in turn precludes liberal Zionists from articulating a credible strategy to achieve even their limited, modest aims of a "decent" outcome.

The solidity of Israel's ethnonational drift, however, should not be taken for granted. Most Israeli Jews, as a historical matter, were not ideologically committed Zionists.²⁰⁶ It is indisputable that the Israeli state cultivates a form

²⁰¹ Raz Segal, *Statement of Scholars in Holocaust and Genocide Studies on Mass Violence in Israel and Palestine since 7 October*, *CONTENDING MODERNITIES* (2023), <https://contendingmodernities.nd.edu/global-currents/statement-of-scholars-7-october/>.

²⁰² See generally *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.)*, Advisory Opinion, (Dec. 29, 2023), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>.

²⁰³ *Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.)*, (Jan. 26, 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-pre-01-00-en.pdf> [hereinafter *Jan. Gaza Genocide Convention*]. The ICJ has subsequently granted two additional orders in support of provisional measures to protect the Palestinians in Gaza from the risk of genocide. *Application of the Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.)*, (Mar. 28, 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-pre-01-00-en.pdf>; *Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.)*, (May 24, 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-pre-01-00-en.pdf>.

²⁰⁴ *Jan. Gaza Genocide Convention*, *supra* note 205, at ¶¶ 60–61, 66, 70, 74.

²⁰⁵ See generally *Def. for Child. Int'l–Palestine v. Biden*, 714 F. Supp. 3d 1160, 1167 (N.D. Cal.) (“Yet, as the ICJ has found, it is plausible that Israel’s conduct amounts to genocide. This Court implores Defendants to examine the results of their unflagging support of the military siege against the Palestinians in Gaza.”); *Def. for Child. Int'l–Palestine v. Biden*, 107 F.4th 926 (9th Cir. 2024) (upholding dismissal of the case under the political question doctrine).

²⁰⁶ Samuel Farber, *A Zionist State at Any Cost*, *JACOBIN* (Apr. 21, 2020), <https://jacobin.com/2020/04/david-ben-gurion-state-at-any-cost-review>.

of Zionism in its citizenry that is incompatible with Palestinian equality.²⁰⁷ It is also true that the state's ideology successfully transformed most Jews into ideologically committed Zionists;²⁰⁸ however, it is equally true that this ideological project could not have achieved its aims without the truly staggering amount of foreign assistance Israel has received over the years from western governments and sustained support from the Jewish diaspora.²⁰⁹

Great power support for the Zionist project, while it began with the Balfour Declaration and continued throughout the British Mandate over Palestine, did not cease upon the creation of Israel. According to the United States Congressional Research Service, for example, "Israel is the largest cumulative recipient of U.S. foreign assistance since World War II. . . . To date, the United States has provided Israel \$158 billion . . . in bilateral assistance."²¹⁰

The United States has also regularly provided diplomatic cover for Israel in the United Nations, where it has exercised its veto power to protect Israel on at least 34 occasions.²¹¹ There are 60,000 U.S. citizens living in illegal Israeli settlements in the West Bank, and many of them are deeply involved in the most violent settler movements involved in attacking Palestinians and attempting to drive them off their land.²¹² Israel's export-oriented economy is highly-dependent on its preferential access to the U.S. market,²¹³ to which it exports a little more than a quarter of all its exports.²¹⁴ Israel also enjoys preferential access to the European Union market, with which it signed a free trade

²⁰⁷ *Israel's Jewish Nation-State Law*, ADALAH (Dec. 20, 2020), <https://www.adalah.org/en/content/view/9569>.

²⁰⁸ SHAY HAZKANI, DEAR PALESTINE: A SOCIAL HISTORY OF THE 1948 WAR 77 (Stanford University Press ed., 2021) (describing Haganah's ideological indoctrination of rank-and-file Jews in Palestine to convince them to bear arms against Palestine's Arabs, including, by associating them with Israel's Biblical enemy, Amalek and encouraging Arabic-speaking Jews to view fighting with Arabs as an opportunity for revenge for "persecution" in their home countries).

²⁰⁹ Shafir, *Comparative Approach*, *supra* note , at 231 (noting that the success of the Zionist settlement program required "both great power support and massive financial subsidies.").

²¹⁰ JEREMY M. SHARP, CONG. RSCH. SERV., RL33222, U.S. FOREIGN AID TO ISRAEL (2023).

²¹¹ Shakeeb Asrar & Mohammed Hussain, *How the US Has Used Its Veto Power at the UN in Support of Israel*, AL JAZEERA (Oct. 26, 2023), <https://www.aljazeera.com/news/2023/10/26/how-the-us-has-used-its-veto-power-at-the-un-in-support-of-israel>.

²¹² Chris McGreal, *How American Citizens Are Leading Rise of 'Settler Violence' on Palestinian Lands*, GUARDIAN (Dec. 15, 2023), <https://www.theguardian.com/world/2023/dec/15/biden-extremist-jewish-settlers-travel-ban-loophole> (noting there are credible reports that the likely killers of Alex Odeh, an Arab-American activist who was assassinated in 1985, are two US citizens who currently live openly in an illegal Israeli settlement in the West Bank); *see also* David Sheen, *Alex Odeh Was Assassinated. Two Suspects Live Openly in Israel*, INTERCEPT (Feb. 6, 2020), <https://theintercept.com/2020/02/06/alex-odeh-bombing-israel/>.

²¹³ *See Israel Free Trade Agreement*, Off. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/israel-fta> (last visited Jan. 8, 2024); *Israel Exports of Goods and Services (% of GDP)*, TRADING ECON., <https://tradingeconomics.com/israel/exports-of-goods-and-services-percent-of-gdp-wb-data.html> (last visited Jan. 8, 2025) (noting that exports are 30.6% of Israel's GDP).

²¹⁴ *Israel*, THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/countries/israel/#economy> (last visited Jan. 8, 2024).

agreement in 2000,²¹⁵ and to which it sells slightly over 25% of its exports.²¹⁶ U.S. military assistance to Israel has also enabled it to become one of the largest exporters of arms in the world.²¹⁷ Israel, therefore, is uniquely vulnerable to pressure from the United States and the EU to change course, if either the United States, the EU, or both, ever chose to exercise that power.²¹⁸

It is not implausible to believe that in the absence of this virtually unlimited U.S. economic, military and diplomatic support, as well as the economic support of the EU, popular support in Israel for the annexationist, if not genocidal, agenda of its current government would recede. Conversely, such a change in U.S. or EU policy would also likely favor the political fortune of those movements in Israel that favor living in equality with Palestinians. It is surprising that Klein failed to explore whether Israel would continue its violent policies toward the Palestinians were it required to internalize fully the costs of those policies. This failure is particularly striking because in the very first instalment of his Israel-Palestine series, Klein, Peter Beinart and Spencer Ackerman all agreed on the need to support those actors in Israel-Palestine who could contribute to a virtuous cycle that would reinforce peace, rather than supporting actors who have no such interest.²¹⁹

VI. LOOKING PAST LIBERAL ZIONISM TOWARD THE HORIZON OF A ZIONIST LIBERALISM

Liberal Zionism of the sort assumed by Klein and defended by Gavison is clearly inadequate to meet the challenge of the moment. Despite its shortcomings, however, it is a far cry from the outright genocidal

²¹⁵ *Euro-Mediterranean Agreement Establishing an Association Between the European Communities and their Member States, of the One Part, and the State of Israel, of the Other Part*, at 3, Nov. 20, 1995, O.J. (L. 147).

²¹⁶ *EU trade relations with Israel*, EUR. COMM'N, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/israel_en (last visited Feb. 7, 2024).

²¹⁷ Bureau of Mil.-Pol. Aff., *U.S. Security Cooperation with Israel*, U.S. DEP'T. OF STATE (Oct. 19, 2023), <https://www.state.gov/u-s-security-cooperation-with-israel/>.

²¹⁸ Karim Bitar, *Nassim Nicholas Taleb: Israel Is a Fragile State*, L'ORIENT TODAY (Jan. 2, 2024), <https://today.lorientlejour.com/article/1362814/is-israel-a-fragile-state-interview-with-nassim-nicholas-taleb.html>; Oddly, Klein does not consider whether the failure of the United States to adhere to its own laws with respect to Israel degrades the United State's own commitment to the rule of law and must inevitably corrode the quality of its democracy. Nicole Narea, *Sending Unrestricted Aid to Israel May Flout Existing US Law*, VOX (Dec. 22, 2023), <https://www.vox.com/world-politics/24011316/us-aid-israel-biden-human-rights-leahy-law>; Stephanie Kirchaessner, *'Different Rules': Special Policies Keep US Supplying Weapons to Israel despite Alleged Abuses*, GUARDIAN (Jan. 18, 2024), <https://www.theguardian.com/world/2024/jan/18/us-supply-weapons-israel-alleged-abuses-human-rights>; Katherine Hearst, *Israel Shut down NGO for Reporting Rape of Teenager, Ex-US Official Says*, MIDDLE EAST EYE (Dec. 5, 2023), <https://www.middleeasteye.net/news/israel-palestine-war-ngo-shut-down-reporting-sexual-assault-ex-us>; *Euro-Mediterranean Agreement*, *supra* note 193 (noting that Article 2 of the *Euro-Mediterranean Agreement* grants Israel preferential trading access to the EU expressly requires the parties to maintain "respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.").

²¹⁹ *Jewish Left Thoughts*, *supra* note 3.

ethnonationalism espoused and pursued by the current Israeli government.²²⁰ It is significant that Klein included important Palestinian voices such as Amjad Iraqi²²¹ and Tareq Baconi,²²² and dissident American Jewish voices, such as Beinart and Ackerman.²²³ At the same time, however, Klein's choice of Israeli voices to include in his series—Novik and Halevi—is indicative of the constrained political horizons of Klein's liberal Zionism.

Had Klein built on what he had learned from Iraqi, Baconi, Beinart and Ackerman, he would have included in his series bolder voices from the progressive Israeli left who take Palestinian equality seriously. These include the Israeli journalist Haggai Matar, one of the founders of the progressive Israeli magazine, *+972*;²²⁴ Hagai El-Ad,²²⁵ former director of the Israeli human rights organization, B'teslem;²²⁶ Yuli Novak, founder of the Israeli dissident group Breaking the Silence;²²⁷ or, the Israeli human rights lawyer and current Program Director at Human Rights Watch, Sari Bashi.²²⁸ Klein could have engaged new progressive political initiatives, such as *A Land for All*, that is bringing Israelis and Palestinians together to propose visions of a peaceable future based on living together, not separately.²²⁹

It is possible, that Klein, as a liberal Zionist, was not interested in engaging with that strand of Israeli politics because he believed it to be both too marginal—and therefore politically irrelevant—and a positive hindrance insofar as claims of justice distract from achieving the only thing that Klein believes is politically plausible: a *humane* existence for Palestinians with some *autonomy*, a formula that in all likelihood would not amount to actual sovereignty. From this perspective, dissident Israeli voices that seek a just settlement with Palestinians are at best a distraction, and at worst destructive, insofar as they undermine what Klein terms an “achievable” outcome.

²²⁰ Smotrich, *supra* note 186; Ackerman, *supra* note 195.

²²¹ *Palestinians Feel Duped*, *supra* note 32.

²²² *Disastrous Relationship*, *supra* note 8.

²²³ *Jewish Left Thoughts*, *supra* note 3.

²²⁴ *Our Story*, *+972 MAGAZINE*, <https://www.972mag.com/our-story/> (last visited Dec. 13, 2024).

²²⁵ *Hagai El-Ad*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Hagai_El-Ad&oldid=1191159149 (last visited Jan. 8, 2024).

²²⁶ See generally ISRAELI INFO. CTR. HUM. RTS. OCCUPIED TERRITORIES, <https://www.btselem.org/> (last visited Oct. 12, 2024) (noting Israeli organizations such as this website with a different vision for the future).

²²⁷ Shany Littman, *Labeled a Traitor, She Fled Israel. Now She Wants to Deconstruct Zionism*, HAARETZ (Jan. 28, 2022), <https://www.haaretz.com/israel-news/2022-01-28/ty-article-magazine/.highlight/labeled-a-traitor-she-fled-israel-now-she-wants-to-deconstruct-zionism/0000017f-db7f-d3a5-af7f-fbfff9d0000>.

²²⁸ Daniel Drake & Sari Bashi, *Basic Principles of Humanity*, N.Y. REVIEW OF BOOKS (Nov. 18, 2023), <https://www.nybooks.com/online/2023/11/18/basic-principles-humanity-sari-bashi/>; Sari Bashi, HUM. RTS. WATCH, <https://www.hrw.org/about/people/sari-bashi> (last visited Sept. 19, 2024).

²²⁹ *A Land For All: Two States One Homeland*, A LAND FOR ALL (Apr. 19, 2019), <https://www.alandforall.org/english/>; see generally *From Conflict to Resolution: A new vision for Palestinian-Israeli peace*, A LAND FOR ALL, <https://www.alandforall.org/wp-content/uploads/2021/02/booklet-english.pdf> (last visited Sept. 19, 2024).

As discussed above, however, without challenging the political realities that currently sustain Israeli policies, the modest but “humane” solution Klein seeks seems just as distant as the principled solution based on the political equality of Palestinians for which Klein seems to lack patience. Neither a just solution, nor even the more modest, humane solution Klein imagines, is conceivable without a sustained political struggle in the liberal polities whose support sustains Israel, i.e., the United States and the European Union. But only a just solution has the capacity to generate the kind of broad-based, multi-ethnic, multi-religious coalition that has any hope to dislodge the status quo that is thoroughly indifferent to Palestinian welfare.

Does such a political struggle inevitably require the repudiation of Zionism as such, with the attendant, scurrilous charges of anti-Semitism that will inevitably follow in its wake,²³⁰ or is it conceivable to imagine a reformed Zionism that is consistent with the political equality of Palestinians? It is here that liberal principles offer important suggestions. Far too often, public intellectuals like Klein who are opposed to Israeli policies, and have genuine sympathy for the Palestinians, but are committed to Israel as a Jewish state, wring their hands at the “tragic” incommensurability of Zionist and Palestinian claims. But resolving conflicts about incommensurate claims are precisely what gives liberalism, according to its advocates like Rawls, its unique claims to legitimacy. The next part of this Article considers whether political liberalism can point to a politically just conception of Zionism that would render peace possible.

VII. POLITICAL LIBERALISM AND A CONJECTURAL CASE FOR A JUST FORM OF ZIONISM

A. *Zionism from the Perspective of Political Liberalism*

Rawls, writing against the backdrop of the cataclysmic violence of the two world wars in the 20th Century, wrote *Political Liberalism* in part to defend the proposition that a political world governed by just principles rather than “power and coercion alone” was possible, not just from a theoretical perspective, but also from a practical one.²³¹ Political Zionism, by contrast, or at least the dominant tradition of political Zionism that traces its origins to Herzl, takes as its starting point not hope in justice, but rather despair at its possibility. For Herzl, anti-Semitism was an indelible feature of social life wherever Jews were a minority. Emancipation, far from freeing Jews of anti-Semitic prejudice, only produced a more modern, and perhaps more virulent strain of anti-Semitism.²³² But Herzl recognized that hatred of Jews was also part of a more general, structural problem rooted in the nature of the 19th Century international order. Jews felt this problem more acutely than any other national group, given their universal

²³⁰ Feldman, *supra* note 34 (concluding his essay by suggesting that while many criticisms of Israel, including, its war in Gaza, are not inherently anti-Semitic, the deep-rooted history of anti-Semitism requires such criticisms to be subjected to special and heightened scrutiny).

²³¹ RAWLS, *supra* note 18, at ix.

²³² HERZL, *supra* note 116, at 75–76 (arguing that anti-Semitism cannot be erased).

existence as a minority, but the real source of the problem according to Herzl was that the world was one in which “[t]he majority may decide which are the strangers; for this, as indeed every point which arises in the relations between nations, is a question of might. . . . In the world as it now is and for an indefinite period will probably remain, might precedes right.”²³³ In a world in which international relations is governed by might, and in which rights of individuals and groups within nations is determined by unconstrained majorities who can determine, by fiat, who is a “stranger,” and therefore not entitled to rights, it is clear why Jews are structurally vulnerable. In such a world it is not hard to conclude that Jews can only protect themselves if they too have a state that can defend them: one capable of defending itself against external threats from other “nations,” and having a sufficient majority to ensure that Jews could never be declared “strangers.”

The justice of Zionism is not based on the consent of non-Jews; rather, it is based on a claim of what is necessary for the survival of the Jewish people in a world order dominated by ethnic nation states that lack meaningful protections for national minorities. The indifference of Zionism to the consent of non-Jewish is made most stridently in Vladimir Jabotinsky’s famous essay, “The Iron Wall.”²³⁴ There, he argued that given the colonial nature of the Zionist project, it was inconceivable that Palestine’s Arabs could ever consent to the Zionist project.²³⁵ Therefore, like all colonial movements, Zionism could only succeed by coercing the native population into accepting the colonizers.²³⁶ The inevitability of violence to make the Zionist project succeed, however, did not deter Jabotinsky or render the morality of the Zionist project suspect in his eyes. Instead, he argued that having resolved that the political aims of Zionism were just, the consent of both non-Zionist Jews and Palestinian Arabs was superfluous:

[I]f anyone objects that this point of view is immoral, I answer: It is not true: either Zionism is moral and just, or it is immoral and unjust. But that is a question that we should have settled before we became Zionists. Actually we have settled that question, and in the affirmative. *We hold that Zionism is moral and just. And since it is moral and just, justice must be done, no matter whether Joseph or Simon or Ivan or Achmet agree with it or not.* There is no other morality.²³⁷

²³³ HERZL, *supra* note 116, at 76.

²³⁴ See generally Vladimir Z. Jabotinsky, *The Iron Wall*, JABOTINSKY INST. ISR. (April 11, 1923), <https://en.jabotinsky.org/media/9747/the-iron-wall.pdf>.

²³⁵ *Id.* at 5 (“Colonisation carries its own explanation, the only possible explanation, unalterable and as clear as daylight to every ordinary Jew and every ordinary Arab. Colonisation can have only one aim, and Palestine Arabs cannot accept this aim. It lies in the very nature of things, and in this particular regard nature cannot be changed.”).

²³⁶ *Id.* at 6 (arguing that the only disagreement between Zionists regarding the use of violence was who would deploy it, the British on behalf of the Zionists, or the Zionists themselves).

²³⁷ *Id.* at 7 (emphasis in original).

From the perspective of Rawlsian political liberalism, Jabotinsky's formulation of Zionism is clearly unreasonable. It may be rational—insofar as it is calculated to advance the rational good of Zionists—but it is unreasonable insofar as it is indifferent to seeking fair terms of cooperation that are reasonably acceptable to non-Zionists, be they Arab Palestinians or non-Zionist Jews. While Rawlsian political liberalism makes a distinction between ideal theory and non-ideal theory, the principles of liberal justice are still relevant to guiding political practice in non-ideal circumstances.²³⁸ Indeed, a political conception that depends on the permanent ethnic domination of the state by one group and the permanent subordination of another ethnic group, is plainly inconsistent with the terms of any plausibly liberal constitution, even in non-ideal conditions. Such a constitution, from Rawls' perspective, is necessarily “political in the wrong way,” insofar as it seeks to anchor political stability through maintenance of a particular balance of power in society rather than through agreement on shared political principles capable of garnering the moral support of all reasonable citizens. Rawls calls such an arrangement a “modus vivendi,” and by its nature, it is highly unstable.²³⁹ All parties in a modus vivendi are aware of the omnipresent risk of renewed political violence whenever the balance of social forces underwriting the modus vivendi changes or appears that it might change.²⁴⁰ Israeli politics has attempted to address the perpetual fear that arises out of a political settlement that is only a modus vivendi by striving for demographic domination of Palestine.

B. From Domination to Equality Secured by Law: Reforming Political Zionism

As Ackerman's recent article suggests,²⁴¹ seeking a permanent state of ethnic domination in a territory where Jews throughout much of the Zionist project were a distinct ethnic minority inexorably led to a logic of “absolute security” that could only be obtained through ethnic cleansing, which Zionists euphemistically refer to as “transfer,” or worse.²⁴² In the case of Israel, this quest for absolute security manifests itself most clearly in its policies of demographic engineering designed to keep the Arab citizenry of the state below a certain threshold,²⁴³ while controlling access to land and water for the near exclusive benefit of the Jewish population.²⁴⁴ Neither the material goals of Zionism, nor its demographic goals, can be achieved without a combination of periodic

²³⁸ Mohammad Fadel, *The Challenges of Islamic Law Adjudication in Public Reason*, in PUBLIC REASON AND COURTS 120, 120–21 (2020) (arguing that the ideal of public reason should guide the conduct of citizens in their practice of politics under non-ideal conditions).

²³⁹ RAWLS, *supra* note 18, at 147

²⁴⁰ *Id.*

²⁴¹ Ackerman, *supra* note 195.

²⁴² Ackerman, *supra* note 195 (quoting Henry Kissinger for the proposition that the quest for “absolute security” leads to a situation of “absolute insecurity” for everyone else).

²⁴³ SHIRA N. ROBINSON, CITIZEN STRANGERS: PALESTINIANS AND THE BIRTH OF ISRAEL'S LIBERAL SETTLER STATE 22–23 (2013) (attributing to Ben Gurion the view that Israel could not survive as a Jewish and democratic state unless Jews were at least 80 percent of the citizenry).

²⁴⁴ Sari Hanafi, *Spacio-Cide: Colonial Politics, Invisibility and Rezoning in Palestinian Territory*, 2 CONTEMP. ARAB AFFAIRS 106, 106 (2009).

spectacular violence, in the form of kinetic security operations such as that which has been unleashed on Gaza with predictable regularity since 1948, and structural violence, in the form of a legal regime that reinforces the legal subordination of non-Jews.

On the other hand, other aspects of a Jewish state, such as the promotion of the Hebrew language, recognition of at least some Jewish holidays as official holidays, and the establishment of Judaism as a state religion, if adopted in the context of an otherwise liberal constitution, does not require deploying either kinetic violence or systematic racial domination.²⁴⁵ Even if establishment of Judaism and other elements of Jewish cultural life violate liberal ideals of neutrality, such deviations—while perhaps unreasonable from the strict perspective of Rawlsian liberal ideal theory—can nevertheless be acceptable from the perspective of liberal non-ideal theory if they are not part of a basic structure that entails the systematic political and material subordination of non-Jews.²⁴⁶ Significantly, leaders of the Palestinian Arabs made proposals to the British and the Zionists during the Palestine Mandate along precisely these lines in an attempt to reach a fair solution to the conflict between the Zionists and the Palestinian Arabs.²⁴⁷

One strategy a Zionist liberal might pursue is to disentangle those aims of Zionism that can be pursued consistently with the equality of non-Jews from those that cannot. Gavison, for example, in her defense of the idea of Jewish state, relies primarily on the cultural and religious benefits a Jewish state gives to Jews, both as individual Jews and as a collective,²⁴⁸ but without advocating a thick conception of state-backed, Jewish perfectionism.²⁴⁹ Indeed, it seems that the modern Israeli state, unlike the socialist Zionist pioneers of the Second Aliya who laid the foundations for the Israeli state's exclusionary institutions as part of a perfectionist project to fashion the "new Jew,"²⁵⁰ has eschewed any perfectionist aims *except* compelling Palestinian Arabs to abandon their Palestinian identity by affirming the justness of Zionism as the basis of the state of Israel.²⁵¹

²⁴⁵ *Right to Statehood*, *supra* note 159, at 76 (noting that the existence of a Jewish state allows for a much "richer Jewish life than could ever be found in the diaspora").

²⁴⁶ Shakir, *supra* note 187, at 10 (writing "the Israeli government has demonstrated an intent to maintain the domination of Jewish Israelis over Palestinians across Israel and the [Occupied Palestinian Territories]").

²⁴⁷ Hourani, *supra* note 86, at 81; ANTONIUS, *supra* note 86, at 410–11 (writing in 1938 that a constitutional state, with secure rights for Jewish Palestinians, was the only reasonable solution to the conflict in Palestine).

²⁴⁸ *Right to Statehood*, *supra* note 159, at 76–77.

²⁴⁹ *Right to Statehood*, *supra* note 159, at 74, 89 (noting although the public culture of Israel is Jewish the state should not seek to impose a specific conception of Jewishness on the people, "Israel should also be a liberal state, allowing individuals and groups to pursue their own vision of the "good life").

²⁵⁰ Reuven Firestone, *The New Jew*, in *HOLY WAR IN JUDAISM: THE FALL AND RISE OF A CONTROVERSIAL IDEA* 186–87. (Reuven Firestone ed., 2012).

²⁵¹ Hassan Jabareen, *The Future of Arab Citizenship in Israel: Jewish-Zionist Time in a Place with No Palestinian Memory*, in *CHALLENGING ETHNIC CITIZENSHIP: GERMAN AND ISRAELI PERSPECTIVES*

The practical abandonment of the ideological perfectionism of pre-World War II Zionism, along with the obsolescence of the exclusionary political economy that midwived the creation of Israel, both suggest that the logical nexus that required the exclusion of non-Jews from the ideal of a Jewish state has been severed. From this perspective, a Zionist liberal could argue that Israel should accept liberalism's restraints on the aims of political Zionism and endorse a basic structure that accepts the political equality of Palestinian Arabs. Indeed, Gavison seems to admit that a binational state would be more consistent with the principles of justice than either the status quo or a partition of Palestine into a Jewish state and an Arab state.²⁵² As a practical matter, however, Gavison, like other liberal Zionists, rejects what Rawls calls the "priority of the right," at least with respect to non-Jews. Accordingly, she dismisses the very real, material costs the Zionist public order imposes on Palestinian Arabs as "necessary" without any meaningful attempt to reckon with those costs.

A Zionist liberal state, instead of a liberal Zionist state, could not glibly dismiss the political inequality of Israel's non-Jewish population as the necessary cost of Jewish nationalism.²⁵³ It would instead accept that Zionism must pare down its political aims by virtue of the duty to respect the political equality of non-Jews. Jewish Israeli intellectuals like Gavison, however, seem to believe that the only way to secure the "Jewishness" of Israel—even one that is as diluted and pluralistic as exists today—is through structural subordination of non-Jewish citizens secured by permanent demographic dominance.²⁵⁴

But demographic majorities are not the only way to secure fundamental political interests. A written constitution, enforceable through a judiciary, can also secure fundamental political interests by removing them from ordinary democratic contestation. Theoretically, it ought to be possible to secure the legitimate aims of Zionism that Gavison identifies—physical security for Jews and a privileged space for the articulation of a Jewish public culture—through express provisions in a written constitution. As for the former goal, every constitution seeks to secure the physical security of its citizens by establishing a fair and effective system of law to protect citizens' rights. Moreover, it is not unusual for constitutions to privilege some cultural/religious formations through moderate forms of religious, linguistic and cultural establishment without enshrining the political and economic subordination of other groups.²⁵⁵

ON IMMIGRATION 196, 210 (Daniel Levy & Yfaat Weiss eds., 2002) (noting that while Jewish Israelis are politically free to adopt any ideology they wish, including, an identity that rejects Zionism, the Palestinian Arab must "act like a conservative Zionist" to avoid suspicion of disloyalty).

²⁵² *Right to Statehood*, *supra* note 159, at 88 ("a binational state between the Mediterranean Sea and the Jordan River might be easier for many people to justify than a two-state solution").

²⁵³ *Right to Statehood*, *supra* note 159, at 92.

²⁵⁴ *Right to Statehood*, *supra* note 159, at 86 (stating that a necessary condition for a Jewish state is "the maintenance of a Jewish majority within its borders.").

²⁵⁵ See, e.g., British North America Act 1867, SS 1867, c 3, s. 93 (guaranteeing parochial education on an equal basis to Catholics and Protestants in the provinces of Ontario and Quebec); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (setting out various language rights in Canada at the federal and provincial levels); Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

A supermajority of Jewish citizens is not required, for example, to secure a flourishing, secular Jewish public culture. A written constitution, providing expressly for a moderate form of establishment of Judaism as a religion, and Hebrew as an official language, and perhaps other cultural rights as well, would be sufficient to create a framework for a flourishing Jewish religious and secular public culture. These provisions of the constitution could be protected from amendment through supermajority provisions that would effectively give Israeli Jews a veto over any changes to their terms. Other conventional features of modern constitutions, such as federalism and bicameralism, could also be included in the state's constitutional structure to provide greater security to whatever national rights both Palestinian Arab and Jewish communities agree should be immune from ordinary democratic procedures. Palestinian Arabs and Jewish Israelis could, in the alternative, pursue a consociational constitutional structure designed to secure the particular national interests of each community.²⁵⁶ Such an arrangement would preserve the cultural distinctiveness of both national communities, but it would not require their juridical and physical separation or the subordination of one to another.²⁵⁷

A federal or consociational structure to the state, while it would allow for the possibility of Jewish public culture to flourish, and could provide state support to assist it flourish, could not, however, eliminate the risk of assimilation.²⁵⁸ Of course, an exclusivist Jewish state reduces the risk of assimilation to virtually zero, but requires the complete denial, or near complete denial, of Palestinian political rights. Moreover, the risk of assimilation is attendant to the very nature of free institutions that democracy promotes. The risk that Jews might assimilate into a wider, Arabic speaking culture if Israel were to become a binational democratic state—whether on a federal or a consociational model—cannot justify, from a liberal perspective, a political system constructed on a principle of ethnic domination, even from the perspective of non-ideal theory.²⁵⁹

C. *Israel's Basic Structure: The Legal Basis for Ethnic Domination*

Israel does not have a written constitution, although as previously mentioned, the U.N. Partition Plan proposing the creation of a Jewish State as a solution to the Palestine Question conditioned the legitimacy of that state on its adoption of a written constitution that secured the equal rights of non-Jewish

²⁵⁶ See generally Rudy B. Andeweg, *Consociational Democracy*, 3 ANNU. REV. POLIT. SCI. 509 (2000).

²⁵⁷ Smooha, *supra* note 194, at 199.

²⁵⁸ The example of the Quebecois in Canada is perhaps illustrative of this point. See Charles Castonguay, *French in Free Fall: The Failure of Canadian and Quebec Language Policies*, HOUSE OF COMMONS OF CANADA (March 9, 2021), <https://www.ourcommons.ca/Content/Committee/432/LANG/Brief/BR11249912/br-external/CastonguayCharles-e.pdf> (describing increasing attraction of the English language to Francophone Canadians).

²⁵⁹ See RAWLS, *supra* note 18, at 195–98 (noting that a just democratic constitution cannot guarantee the survival of ways of life that can only survive by establishing a system of domination); cf. HERZL, *supra* note 116, at 75–76 (justifying the idea of Jewish state in part by arguing that it is *impossible* for Jews to assimilate).

minorities.²⁶⁰ It does, however, have a basic structure that establishes an ethnic conception of sovereignty. The basic structure of the Israeli constitution is found in three early Israeli statutes, the Law of Return of 1950,²⁶¹ the Absentees' Property Law of 1950,²⁶² and the Nationality Law of 1952.²⁶³ This ethnic conception of sovereignty that underwrites the basic structure of the Israeli state marks Palestinians as a perpetual demographic threat to the state rendering political cooperation on the basis of equality an impossibility.²⁶⁴

The Law of Return is not simply a statute about immigration that affords every Jew wherever located the right to immigrate to Israel and become an Israeli citizen; it also is intended to reinforce the exclusive sovereignty of the Jewish people over Palestine by denying any political significance to any legal order that predated the establishment of Israel.²⁶⁵ One way it does this is by severing any historical connection between citizenship in the State of Israel and the pre-existing State of Palestine. Under the Law of Return, even Jews who were citizens of Palestine by birth, or were naturalized citizens of Palestine during the Mandate, become citizens of Israel *only* by virtue of the Law of Return, which deems them to be immigrant returnees.²⁶⁶ Jewish citizens of Mandatory Palestine, however, by virtue of the Law of Return were by operation of law renationalized, thus avoiding the baneful effects of the 1952 Nationality Law's express denationalization provisions.²⁶⁷ The Nationality Law of 1952 reinforces the exclusive sovereignty of the Jewish people by making Israeli citizenship for non-Jews contingent on whether they successfully avoided expulsion during the

²⁶⁰ See generally G.A. Res. 181 (II) (Nov. 29, 1947).

²⁶¹ See The Law of Return, 5710–1950, SH 51, 159 (Isr.), <https://www.refworld.org/docid/3ae6b4ea1b.html>.

²⁶² See Absentees' Property Law, 5710-1950, LSI 4 68–82 (1948–1987) <https://www.un.org/unispal/document/auto-insert-209845/>.

²⁶³ See Nationality Law, 5712-1952, SH 984, 222 (Isr.), <https://www.refworld.org/docid/3ae6b4ec20.html>; Susan M. Akram, *Palestinian Nationality and "Jewish" Nationality: From the Lausanne Treaty to Today*, in *RETHINKING STATEHOOD IN PALESTINE* 192, 201–202 (Leila H. Farsakh ed., 1 ed. 2021) (noting that Israel's "Nationality Law" is in fact a citizenship law).

²⁶⁴ Hassan Jabareen, *How the Law of Return Creates One Legal Order in Palestine*, 21 *THEORETICAL INQUIRIES* L. 459, 463 (2020) ("The Law of Return, together with the value of 'preserving a Jewish majority,' constitutes the very essence of this Constitution that targets the Palestinians as such.").

²⁶⁵ *Id.*

²⁶⁶ See The Law of Return, 5710–1950, SH 51, § 4 (Isr.), <https://www.refworld.org/docid/3ae6b4ea1b.html> ("Every Jew who has immigrated into this country before the coming into force of this Law, and every Jew who was born in this country, whether before or after the coming into force of this Law, shall be deemed to be a person who has come to this country as an oleh under this Law.").

²⁶⁷ See Nationality Law, 5712-1952, SH 984, 222 (Isr.), <https://www.refworld.org/docid/3ae6b4ec20.html> (repealing Palestine Citizenship orders issued under the authority of the Mandate and replacing all references to Palestinian citizenship in law to Israeli citizenship).

fighting that took place between 1947–49,²⁶⁸ while the Law of Return allowed Jews, wherever located, and whatever their relationship to Palestine, to obtain citizenship simply by arriving in Palestine and declaring their intent to immigrate.²⁶⁹

The Absentees' Property Law provided a legal mechanism for the state to expropriate the tangible and intangible property of Palestinian individuals and businesses. These confiscated assets provided the nascent state with the economic resources necessary to make exclusive Jewish sovereignty effective and deprive the Palestinians that remained with sufficient resources to give them a modicum of independence from the state.²⁷⁰

Clearly, the same reasoning that led Israel to adopt this basic structure at the time of its founding makes it impossible for Israel to make peace with the Palestinians. As long as its political structure is based on demographic control, it cannot allow Palestinian Arabs genuine sovereignty.²⁷¹ From the perspective of the ideology of the Israeli state, such a scenario, by definition, threatens the security of the Jewish state by denying the state's foundational myth: that Palestine is the exclusive homeland of the Jewish people. Whether one conceives of peace arriving in the form of a two-state solution, a unitary Palestine/Israel, a federal Palestine/Israel or a consociational Palestine/Israel, none of these outcomes can be achieved without dismantling the basic structure of the Israeli

²⁶⁸ See Nationality Law, 5712-1952, SH 984, § 3 (Isr.), <https://www.refworld.org/docid/3ae6b4ec20.html> (noting while the law does not facially denationalize the Palestinian refugees, that was its obvious intent and effect. Section 3 of the law only grants nationality to non-Jews if they had been citizens of Palestine *and* were registered with the state of Israel in 1949, was present in territory controlled by the State of Israel as of the date of its formation, and was in Israeli territory or territory that came to be Israeli territory continually from the time of the state's establishment to the date of the law's promulgation, or lawfully entered Israeli territory during that period. Because they were forced to leave their homes to the territories of neighboring states, and not allowed by the Israelis to return, they obviously could not satisfy the requirements for nationality).

²⁶⁹ The Law of Return, 5710–1950, SH 51, § 1 (Isr.), <https://www.refworld.org/docid/3ae6b4ea1b.html>.

²⁷⁰ See Absentees' Property Law, 5710-1950, LSI 4 68–82 (1948–1987) <https://www.un.org/unispal/document/auto-insert-209845/>; Jiryis, *supra* note 108, at 89; Peter Beinart, *Teshuvah: A Jewish Case for Palestinian Refugee Return*, JEWISH CURRENTS (May 11, 2021), <https://jewishcurrents.org/teshuvah-a-jewish-case-for-palestinian-refugee-return> ("The scale of the land theft was astonishing. When the United Nations passed its partition plan in November 1947, Jews owned roughly 7% of the territory of Mandatory Palestine. By the early 1950s, almost 95% of Israel's land was owned by the Jewish state."); MICHAEL R. FISCHBACH, RECORDS OF DISPOSSESSION PALESTINIAN REFUGEE PROPERTY AND THE ARAB-ISRAELI CONFLICT xxii, 26 (University Press ed., 2003) (describing the "windfall" Israel received as a result of its acquisition of refugee properties) (noting even Palestinians who were not expelled, but who fled their properties as a result of the fighting that took place between 1947-49, had their property confiscated, and are referred to by the Orwellian term of "present absentees.").

²⁷¹ Najib Jobain et al, *Netanyahu says he told the US that he opposes a Palestinian state in any postwar scenario*, AP NEWS (Jan. 18, 2024), <https://apnews.com/article/israel-hamas-war-news-01-18-2024-73d552c6e73e0dc3783a0a11b2b5f67d> ("[Netanyahu] said Israel "must have security control over the entire territory west of the Jordan River," adding: "That collides with the idea of sovereignty. What can we do?")."

state, built on the principle of ethnic domination and the claim that Palestine is the exclusive homeland of the Jewish people.²⁷²

VIII. TOWARDS A JUST BASIC STRUCTURE IN PALESTINE

As Shira Robinson explains in *Citizen Strangers: Palestinians and the Birth of Israel's Liberal Settler State*, the aim of Israel's founders was to establish a political system that allowed them "to rule over (rather than with) the Palestinians."²⁷³ This desire followed naturally from the founding premise of Herzl's political theory: that the internal security of a group can only be achieved through an internationally recognized state that entrenches that group as the dominant majority in that state's territory. In the case of Israel, its basic structure was derived from the uniqueness of its genesis as "the first modern settler-colony to reverse its minority status through the mass displacement, but not annihilation, of the native majority."²⁷⁴ Even as fighting was taking place during 1948, authorities of the nascent Israeli state moved to take advantage of the mass-expulsion of the Palestinians by issuing military decrees authorizing Jewish Palestinians to take lands belonging to Palestinian Arabs who fled the fighting.²⁷⁵ Transforming Israel's present basic structure – which is based on relative degrees of ethnic domination that is most acute in East Jerusalem, Gaza and the West Bank, and less so inside the Green Line – into a state where Jews and Palestinians rule *with* one another rather than *over* one another must therefore confront the two most distinctive features of Israel's public order: the Jewish monopolization (or near monopolization) of control of land, and the demographic imperative to maintain a supermajority of Jewish citizens.

As discussed previously, different proposals have been made to achieve a just resolution to the conflict between Jews and Arabs in Palestine, the most common being a two-state solution, one for Palestinian Jews and one for Palestinian Arabs. A distinct minority, by contrast, advocates for a single democratic state, which itself could take different forms, i.e., unitary, federal, consociational, etc. However, the principle problem within either solution is how to overcome the entrenched system, and history, of Jewish domination. This part of the Article raises possibilities for replacing this relationship of domination with a system of governance that respects the political equality of both national communities. It begins with a discussion of partition as a possible solution to the problem of ethnic domination. It will then turn to what would be entailed in a

²⁷² Shafir, *Comparative Approach*, *supra* note 142, at 235 (noting that all strands of Zionists were "territorial maximalists," but that Labor Zionism prioritized demographic dominance over a limited portion of Palestine in view of Palestinian demographic predominance, in contrast to other strands of Zionism that prioritized territory).

²⁷³ ROBINSON, *supra* note 243, at 33 (noting this was the logic that drove the Yishuv's decision to expel hundreds of thousands of Palestinians from the territory that it controlled. But even after establishing a firm Jewish-majority for their state, the Palestinian Arabs that remained in Israel, although nominally citizens, were subject to martial law for approximately the next twenty years); Shafir, *Comparative Approach*, *supra* note 142, at 233-55 (describing the institutionalization of martial law over the Palestinians that remained and the devastating effects it had on their lives).

²⁷⁴ ROBINSON, *supra* note 243, at 9-10.

²⁷⁵ ROBINSON, *supra* note 243, at 35-36. These war time measures presaged the passage of the Absentees' Property Law by the Knesset in 1950.

one-state solution. It argues that whether a two-state or a one-state solution is the preferred outcome, common principles of justice must be respected in both cases.

A. Partition as a Just Solution to the Question of Palestine?

Since the 1937 Peel Commission, the international community has believed that some sort of territorial partition based on this formula is the most feasible means for resolving the conflict between Palestinian Arabs and Jews. It resolves the problem of ethnic domination by separating the two national communities present in Palestine. Attempts at territorial partition have consistently failed, however, for various reasons, some ideological and some practical. Ideologically, neither Zionists nor Arabs believed that they should be forced to give up a portion of their homeland.²⁷⁶ But ideological objections might have been overcome insofar as some elements of the Zionist movement, e.g., Labor Zionism, were willing to accept Jewish sovereignty on only a portion of Palestine.²⁷⁷ As a practical matter, however, the demographic dominance of Arabs in Palestine made partition of Palestine into a Jewish state with a large Jewish majority impossible without large-scale ethnic cleansing. While the U.N. Partition Plan imposed the obligation to respect minority rights on both the contemplated Jewish State and the Arab State, only the Jewish State would have had a substantial minority population.²⁷⁸ Many leaders of the Yishuv viewed the obligation to respect minority rights as not only one-sided and contradictory to the idea of Jewish state, but also inconsistent with European practice at the time, which had witnessed mass-transfers of ethnic minorities across international borders.²⁷⁹ The contradiction between the normative demands of the United Nations and the practice of European powers throughout the first half of the 20th Century no doubt facilitated the Yishuv's willingness to resort to forced transfer of Palestinians to make their plans for a Jewish state effective.

Demography, however, was not the only factor that complicated a consensual partition: British officials involved in the Peel Commission that first proposed partition recognized that the proposed Arab state was not likely to be economically viable. The Peel Plan contemplated giving the richest and most productive parts of Palestine to the proposed Jewish State, despite the fact that Palestinian Arabs owned most of that land and which represented the most important source of income for the Arab economy.²⁸⁰ The drafters of the Peel Plan also believed that the Arab state that resulted from partition, because of

²⁷⁶ Thomas Reid, *Reservations on the Plans for the Partition of Palestine 1938*, in FROM HAVEN TO CONQUEST 409, 410–11 (noting that substantial portions of the Jewish community, as well as the Palestinian Arabs, were opposed to partition).

²⁷⁷ Shafir, *Comparative Approach*, *supra* note 142, at 235.

²⁷⁸ ROBINSON, *supra* note 220, at 22–23 (noting that while under the terms of the Partition Plan, the Jewish State would have barely had a majority Jewish population, the Arab state would have a Jewish minority of little over than 1%, that this demographic reality, along with the requirement to respect minority rights, largely precluded the benefits of a Jewish state in the view of the leaders of the Yishuv).

²⁷⁹ ROBINSON, *supra* note 243, at 23.

²⁸⁰ Reid, *supra* note 278, at 415.

its precarious economic position, would be perpetually dependent on subsidies from the British treasury to survive.²⁸¹ The member states of UNSCOP were also concerned that the Arab state they proposed would not be economically viable, a risk it attempted to mitigate through an economic union between the two states.²⁸²

Partition of Palestine into two states, one Jewish and one Arab, remains the official position of the international community as the solution to the Palestine-Israel conflict.²⁸³ Yet, the same demographic and economic concerns that bedeviled attempts at a consensual partition during the Palestine Mandate persist to this day. Indeed, under the most common formula in which the 1949 Armistice Lines would become formal international boundaries between Israel and Palestine, the demographic problems become at least as acute as they were during the Mandate and in 1947, at least if the partition is to respect ethnicity as the dominant principle. This is largely because over 700,000 Israelis have now settled in East Jerusalem and the West Bank²⁸⁴ in violation of the Geneva Conventions prohibition against the settling of an occupant's civilian population in occupied territory.²⁸⁵ According to a United States government report, the Palestinian population of the West Bank is 3 million.²⁸⁶ The same report mentions another 363,000 Palestinians living in East Jerusalem.²⁸⁷ Accordingly, assuming a Palestinian state came into existence along the 1949 Armistice Lines, its Jewish population would represent a little more than 15% of the combined population of East Jerusalem and the West Bank, and approximately 11.5% of the population of Palestine (East Jerusalem, Gaza and the West Bank).²⁸⁸

Because of the practical difficulties entailed in a partition that respects the principle of ethnic separation, many commentators have argued that the two-

²⁸¹ Reid, *supra* note 278, at 422.

²⁸² G.A. Res. 181 (II), at 181 (Nov. 29, 1947) (providing for a customs union, a joint currency, joint operation of highways, ports, airports and telecommunications facilities; joint economic development; and non-discriminatory access to water and power); Hiba I. Hussein, *Challenges and Reforms in the Palestinian Authority*, 26 *FORDHAM INT'L L.J.* 500, 521–30 (2003) (describing one-sided customs union Israel imposed on Palestinians after the 1967 War and the deleterious effects of the Oslo Accords on Palestinian development in the absence of real sovereignty).

²⁸³ IMSEIS, *supra* note 151, at 259 ("the UN plan of partition imposed, in both normative and discursive legal terms, the two-state paradigm that has underpinned the Organization's position on the question of Palestine to this very day.").

²⁸⁴ Christopher Heaney, *Human Rights Council Hears That 700,000 Israeli Settlers Are Living Illegally in the Occupied West Bank - Meeting Summary (Excerpts)*, QUESTION OF PALESTINE, <https://www.un.org/unispal/document/human-rights-council-hears-that-700000-israeli-settlers-are-living-illegally-in-the-occupied-west-bank-meeting-summary-excerpts/> (last visited Feb. 9, 2024).

²⁸⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Geneva art. 49, Aug. 12, 1949, 75 U.N.T.S. 287 ("The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.").

²⁸⁶ *Israel, West Bank and Gaza*, U.S. DEPT. STATE, <https://www.state.gov/reports/2022-report-on-international-religious-freedom/israel-west-bank-and-gaza/west-bank-and-gaza/> (last visited Feb. 9, 2024).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

state solution has either become impracticable,²⁸⁹ and if implemented, would perhaps lead to cataclysmic violence,²⁹⁰ or that to make it work hundreds of thousands of Israelis would need to be removed from Palestinian territory, even at the risk of prompting a civil war among Israelis.²⁹¹

If, on the other hand, partition was based solely on territory, and not demography, the demographic “facts on the ground” might work in *favor* of a successful partition today. The fact that a partition along the 1949 Armistice Lines would result in substantial minority populations in both Israel and Palestine could incentivize both sides to abandon the ethnic principle as the organizing basis for their respective states and instead adopt liberal constitutions that enshrine minority rights in conformity with the original terms of UNSCOP’s partition proposal in 1947.

The Palestinians had already proposed a constitution for a unitary Palestine with protections for minority rights as a solution to the conflict between Palestine’s Arabs and Jews in the last decade of the British Mandate.²⁹² While the post-Nakba Palestinian national movement took a harder-line against the Zionist presence in Palestine,²⁹³ the present constitution of the State of Palestine has adopted a more liberal conception of citizenship.²⁹⁴ It is certainly plausible that Palestine would agree to recognize special protections for its Jewish citizens beyond the guarantees of equality and non-discrimination already set forth in Palestine’s constitution in order to secure for Palestine’s Jewish citizens the right to a flourishing Jewish and Hebrew public culture.²⁹⁵ The fact that partition cannot function as a solution if it constitutes a separation between the two national communities means that a better approach would be to consider the general principles that would allow for any of the various proposals for

²⁸⁹ Marc Lynch & Shibley Telhami, *The Two-State Mirage*, FOREIGN AFFAIRS (Feb. 20, 2024), https://www.foreignaffairs.com/israel/two-state-mirage-gaza-palestinians-lynch?fbclid=IwAR2IejDzCwHdft6B5Aia33hsLgphdLR3FzGm7SBYiuxitnCRsfdLeh_LNXE.

²⁹⁰ Manlio Graziano, *The Two-State Solution Is a Recipe for Carnage*, FOREIGN POLICY (Feb. 12, 2024), <https://foreignpolicy.com/2024/02/05/israel-palestine-two-state-solution-partition-carnage-ethnic-cleansing/>.

²⁹¹ Sayla Benhabib, *An Open Letter To My Friends Who Signed "Philosophy for Palestine"*, MEDIUM BLOG (Nov. 4, 2023), <https://medium.com/amor-mundi/an-open-letter-to-my-friends-who-signed-philosophy-for-palestine-0440ebd665d8> (“the close to 500,000 Israeli settlers will need to be withdrawn from the occupied territories. And this may result in a civil war in Israel.”)

²⁹² See generally Hourani, *supra* note 87.

²⁹³ *The Palestinian National Charter: Resolutions of the Palestine National Council July 1-17, 1968*, THE AVALON PROJECT, https://avalon.law.yale.edu/20th_century/plcov.asp (last visited Dec. 12, 2024) (noting Article 5 recognizes Palestinians as “those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there”) (noting Article 6 recognizes Palestinians as “the Jews who had normally resided in Palestine until the beginning of the Zionist invasion”).

²⁹⁴ CONSTITUTION OF THE STATE OF PALESTINE Mar. 25, 2003, art. 12 (recognizing as a Palestinian anyone who had lawfully acquired Palestine nationality prior to May 10, 1984).

²⁹⁵ *Id.* at Art. 5, Art. 8 (noting Article 5 guarantees equality of citizens in rights and duties regardless of religion. It also establishes Islam as the religion of the state, and Arabic as its language, while providing that “Christianity and all other monotheistic religions shall be equally revered and respected.”) (noting Article 8 guarantees “the rights and liberties of all citizens . . . without discrimination on the basis of political opinions, sex, or religion.”).

resolving the Palestine-Israel conflict to succeed. I divide these general principles into three broad categories: the public culture/identity of the state(s); control of land; and, citizenship.

B. The Public Culture of Israel-Palestine

Regardless of whether a two-state or one-state solution is pursued, public policies respecting the cultural rights of both Arabs and Jews as equal constituent communities must be respected. Accordingly, Israel's recently adopted law which declares that "the right to national self-determination in the State of Israel is exclusive to the Jewish People" must be amended to recognize the equal standing of Palestinian Arabs to "national self-determination in the State of Israel."²⁹⁶ This law only makes official what had been Israeli state practice from its inception, and indeed, is fully consistent with the arguments expressed by Ruth Gavison: that non-Jews are only entitled to those rights that the Jewish state determines is consistent with *Jewish* self-determination. Accordingly, Arabic is given "special" status, but that status is regulated by ordinary law. Whatever opportunities Palestinian citizens of Israel possess to pursue their interests in a public Arabic culture or Muslim or Christian culture is a matter of legislative grace rather than constitutional duty as is the case for Israel's Jewish citizens.

The failure to give equal recognition to Palestinian Arabs as constituent members of Israel's public does not result merely in subordinating Arabic to Hebrew, or Islam and Christianity to Judaism. It often manifests itself in positive denigration of Palestinian culture, that approaches state-sponsored racism. According to the Israeli author Nurit Peled-Elhanan, Israel's public education system systematically denigrates Palestinians, both by the express language it uses to describe them, and in its systematic omissions about Palestinians:

[N]one of the textbooks studied here includes, whether verbally or visually, any positive cultural or social aspect of Palestinian life-world: neither literature nor poetry, neither history nor agriculture, neither art nor architecture, neither customs nor traditions are ever mentioned. None of the books contain photographs of Palestinian human beings and all represent them in racist icons or demeaning classificatory images such as terrorists, refugees and primitive farmers – the three 'problems' they constitute for Israel.²⁹⁷

Indeed, according to Peled-Elhanan, the discourse of Israeli public school serves the ideological goal of reinforcing Jewish domination by, among other things, maintaining a systematic distinction between Jews, as the "in-group,"

²⁹⁶ Art. 1(c), Basic Law - Israel the Nation State of the Jewish People, SH 547, 67, 68 (Isr.).

²⁹⁷ NURIT PELED-ELHANAN, *PALESTINE IN ISRAELI SCHOOL BOOKS: IDEOLOGY AND PROPAGANDA IN EDUCATION* 49 (2012).

and identifying Palestinians as the non-Jewish “out-group.”²⁹⁸ Ironically, substantial resources have been poured into identifying alleged instances of Palestinian “incitement” in their text books, with almost no concern for what Israel teaches Jewish children about Palestinians.²⁹⁹ This is despite the fact that as early as the Peel Commission in 1937, observers point out that the Yishuv’s nascent educational system was intensely nationalistic with scant concern for cultivating in its students a sense of a shared political identity with Arabs.³⁰⁰

It follows, therefore, that public education in Palestine/Israel, whatever configuration its final form takes, must enshrine the principle of equal respect for Jewish and Arab presence in historical Palestine from the outset of the curriculum, including, mandatory bilingual education for all children. There are examples of states with numerous ethnic and linguistic groups that have successfully adopted and implemented bilingualism in their educational policies.³⁰¹ In Singapore, for example, all students are required to study English in addition to their mother tongue (Chinese, Malay or Tamil). In Palestine/Israel, all students should study, in addition to their mother tongue, Hebrew or Arabic, as applicable, a task that is made easier by the fact that Hebrew and Arabic are both Semitic languages and share many common features. As is the case in Singapore and much of the world, many Palestinians and Israelis will also study English, so as a practical matter, the public will be effectively trilingual, but from a constitutional perspective, it is only Arabic/Hebrew bilingualism that must be enshrined as a constitutional norm. So too, both Palestine and Israel will need to teach the history of Palestine as a geography of shared space, not a space that belongs exclusively to one group or another.

C. *Right to Land*

While Gavison emphasized cultural rights alongside physical security as the primary benefits to Jews of a Jewish state, this Article has argued that the actual source of conflict, the principal source of conflict, has not been control over public culture, but rather control over land. The Zionist settlement project was initially limited in its ability to pursue its ambitions because of its political

²⁹⁸ *Id.* at 50 (“The distinction between Jews and non-Jews helps establish the Jewish in-group not only as dominant but as more real – for it has a distinct name – and to marginalize and subjugate the Palestinian citizens as an out-group which is defined only negatively as non-in-group. [T]he differentiation between Jews as the dominant in-group and non-Jews as the marginal out-group of Israeli society pervades all areas of investigation.”).

²⁹⁹ Nathan Brown, *Going Back to School on Palestinian Textbooks*, MIDDLE EAST INSTITUTE, <https://www.mei.edu/publications/going-back-school-palestinian-textbooks> (last visited Feb. 11, 2024).

³⁰⁰ PALESTINE ROYAL COMMISSION, PEEL COMMISSION FULL REPORT, 1937, Cmd. 5479, at 335–36 ¶¶ 7-8 (UK) (“The idea that they are to share their life in any way with the Arabs, that they are growing up to be fellow-citizens with Arabs in a common Palestinian State, is only recognized in the teaching of a little Arabic in the secondary schools; and that provision, excellent in itself, is wholly insufficient as long as the rest of the teaching is inspired by a purely Jewish rather than Palestinian objective. So far, in fact, from facilitating a better understanding between the races, the Jewish educational system is making it more and more difficult, as year by year, its production of eager Jewish nationalists mounts up.”).

³⁰¹ Chin Leong Patrick Ng, *Language Planning in Action: Singapore’s Multilingual and Bilingual Policy*, 30 RITSUMEIKAN J. ASIA PAC. STUD. 1, 1 (2011).

weakness. As a result, it was forced it to acquire land for settlement exclusively through consensual land purchases.³⁰²

However, the Jewish National Fund, on the cusp of the creation of the State of Israel in 1948, only managed to acquire 3.55% of the land of Mandatory Palestine through purchase.³⁰³ Of this total, only 9.4% had been acquired from small Palestinian farmers, the rest being acquired either from absentee owners (52.6%) or large Palestinian absentee owners (24.6%) and the remainder (13.4%) from “the government, churches and foreign companies.”³⁰⁴ Of the land acquired from small Palestinian farmers—the sector of the population representing the majority of Palestinians—40% had been acquired in the last decade of the 19th Century before the JNF had come into existence, and before its exclusionary land and economic practices had become institutionalized.³⁰⁵

The inability of the JNF to persuade small Palestinian cultivators to sell their land to Zionists was the primary obstacle in furthering Zionist settlement plans during the period of the British Mandate, and fueled talk of “transfer” of the Palestinians to neighboring Arab countries to make a Jewish state viable. Yosef Weitz, a senior JNF bureaucrat, had come to the firm conclusion that “transfer” of the Arab population of Palestine would be the only effective means to create a Jewish state in Palestine. He wrote in his diary in 1940 that:

It should be clear to us that there is no room in Palestine for these two peoples. No ‘development’ will bring us to our goal of independent nationhood in this small country. Without the Arabs, the land will become wide and spacious for us; with the Arabs, the land will remain sparse and cramped. . . . The only solution is Palestine, at least Western Palestine [i.e., Palestine without Transjordan], without Arabs. There is no room here for compromises!³⁰⁶

Israeli military success in the 1948 War gave them the ability to acquire land through the “totally ungodly means” of conquest that an earlier generation of Zionists had dismissed as utterly impractical.³⁰⁷ The Absentees’ Property of

³⁰² Shafir, *Comparative Approach*, *supra* note 142, at 230–31 (noting that an early Zionist observed in 1903 that there were only three methods for acquiring land -- force, i.e., conquest, expropriation via government decree (eminent domain), and purchase -- and that Zionists were too weak to acquire land except via the third method).

³⁰³ Walter Lehn, *The Jewish National Fund*, 3 J. PALESTINE STUD. 74, 94 (1974).

³⁰⁴ *Id.* at 94–95.

³⁰⁵ The importance of the JNF in laying the foundations for the State of Israel should not be limited to the quantity of land it purchased. It also pursued its settlement policy with a view to establishing a state, a logic that led it after 1937 – the year partition was first suggested – to establish Jewish settlements located at a distance from the main areas of Jewish settlement with a view to creating facts on the ground that could justify their inclusion in a future Jewish state if and when partition took place. This strategy was vindicated in the 1947 Partition Plan and the ensuing armed conflict, in which the presence of Jewish settlements was decisive in assuring Israeli military success. *Id.* at 90–91, 95).

³⁰⁶ FISCHBACH, *supra* note 270, at 7.

³⁰⁷ Shafir, *Comparative Approach*, *supra* note 142, at 230–31.

Law of 1950³⁰⁸ effectively ratified the decision to acquire land by conquest as state policy, and by giving control over much of this land to the JNF, Israel was able to pursue a policy that ensured that land would be reserved for the exclusive benefit of Israel's Jewish population.³⁰⁹ The Supreme Court of Israel, in *Ka'adan v. Israel Land Administration et al.*, attempted to force the state to afford access to land controlled by the state directly, or indirectly through the JNF, on a non-discriminatory basis.³¹⁰ Subsequent Knesset legislation, however, authorized communities to exclude transfer of property to individuals who are deemed to be culturally incompatible with the community in which they are seeking to live. The adoption of discriminatory by-laws by hundreds of Israeli communities in the years since has substantially diluted even the limited potential of *Ka'adan* to weaken the Zionist foundations of Israel's public order.³¹¹ Indeed, five years after the petitioners won their landmark case, they had still been unable to move to the community that had originally excluded them.³¹²

Despite the limited nature of the Palestinian claimants' in *Ka'adan*,³¹³ Gavison found the ruling troubling in its "implication that there is no basis for permitting the creation of separate communities for Jews and Arabs."³¹⁴ Palestinian Arab citizens of Israel, meanwhile, recognized the decision's logic as entrenching their erasure as an indigenous, national community in Palestine by treating their presence and their right to access land as the equivalent of a claim brought by a foreign immigrant to a new state.³¹⁵ The promise of *Ka'dan*, therefore, has gone unfulfilled. The Court noted that "the State of Israel only allocates land for Jewish communal settlements."³¹⁶ As described in fulsome detail by Human Rights Watch, this unfortunate reality continues unremedied until this day.³¹⁷

³⁰⁸ Absentees' Property Law, 5710-1950, LSI 4 68-82 (1948-1987) <https://www.un.org/unispal/document/auto-insert-209845/>.

³⁰⁹ Jiryis, *supra* note 108, at 86-88.

³¹⁰ HCJ 6698/95 *Ka'adan v. Israel Land Administration*, 40 PD 30, ¶34 (2000) (Isr.) (holding that the State of Israel engages in unlawful discrimination based on nationality when it allocates land to a third party, e.g., the JNF, that in turn allocates land based on discriminatory norms).

³¹¹ *Israel's Judaization and Exclusion Law*, HAARETZ (Jun. 6, 2023), <https://www.haaretz.com/opinion/editorial/2023-06-06/ty-article-opinion/israels-judaization-and-exclusion-law/00000188-91df-df21-a1b8-b3df0e230000> (noting that these bills have been adopted with the explicit aim of legalizing discrimination against Arabs).

³¹² Tom Segev, *A Decade of Dreams Down the Drain*, HAARETZ (Sep. 29, 2005), <https://www.haaretz.com/2005-09-29/ty-article/a-decade-of-dreams-down-the-drain/0000017f-f54d-d47e-a37f-fd7dd08e0000>.

³¹³ HCJ 6698/95 *Ka'adan v. Israel Land Administration*, 40 PD 8, ¶ 7 (2000) (Isr.) (observing that the petitioners' claim did not challenge the Jewish identity of the state or its settlement history but only sought application of the norm of non-discrimination *prospectively* nor did petitioners challenge the right of communities characterized by "a high degree of solidarity and cooperation between its members" to exclude applicants like themselves from membership).

³¹⁴ *Right to Statehood*, *supra* note 157, at 96.

³¹⁵ Jabareen, *supra* note 251, at 197.

³¹⁶ HCJ 6698/95 *Ka'adan v. Israel Land Administration*, 40 PD 25, ¶ 30 (2000) (Isr.).

³¹⁷ Shakir, *supra* note 185, at 135.

Israel's legal regime regarding land as set forth in the Absentees' Property Law amounts to an attempt to characterize the transfer of the property interests of Palestinian refugees as resulting from an abandonment by their true owners of their property to the State of Israel, via transfer to a "custodian" who held the property in trust for the true owner until such time as its custodian sold it to a permitted purchaser. While the law provided a mechanism, however inadequate, to compensate the true owner, the most noxious feature of the law was that it operated to expropriate Palestinian property, both tangible and intangible, for the exclusive benefit of Israel's Jewish citizens rather than as a general exercise of the power of eminent domain. Singapore again offers a useful contrast to Israel in this respect: like Israel, the overwhelming majority of the land—almost 90%—is state owned, yet unlike Israel, Singapore used the land it expropriated from a relatively small land-holding elite for the general benefit of the entire population,³¹⁸ while consciously pursuing public housing policies that insured integration of national communities rather than their segregation.³¹⁹

Expropriation by states of the private property of aliens is uncontroversially lawful under international law if undertaken for a public purpose, is non-discriminatory, and is accompanied by fair compensation.³²⁰ On the assumption that Palestinian refugees who were never entitled to Israeli nationality were legally aliens, the Absentees' Property Law almost certainly constitutes an expropriation of the property in violation of the minimum standards required by international law.³²¹ Likewise, the fact that the Absentees' Property Law also expropriated the property of any Palestinian who became an Israeli citizen, if he fled at any time during the fighting that established the state, also establishes the discriminatory intent of the law. The fact that Israel used confiscated land solely for the benefit of its Jewish citizens also confirms the lack of a "public purpose" for the confiscations insofar as the benefits of the expropriation were limited to a section of the community.

Israel's policy of land expropriation, combined with the discriminatory terms on which it made that land available to its citizens, provides strong circumstantial evidence explaining Israel's failure to adopt a written constitution in conformity with the requirements of U.N. General Assembly Resolution 181. The proposed partition plan required the Jewish State, among other things, to adopt a written constitution guaranteeing minority rights and prohibiting expropriation of property except for a "public purpose" and upon

³¹⁸ Michael Byrne, *The Singapore Solution Part I: Decommodifying Land Markets*, WEEK IN HOUSING (Oct. 29, 2024), <https://theweekinhousing.substack.com/p/the-singapore-solution-part-i-decommodifying> ("Although compulsory acquisition of land was politically contested, the policy eventually won legitimacy, in part because it proved to be effective in terms of the provision of housing, and in part because the main losers were a small minority of landowners.").

³¹⁹ Beng-Huat Chua, *Race Relations and Public Housing Policy in Singapore*, 8 J. ARCHITECTURAL PLAN. RSCH. 343, 351–352 (1991) (whatever resentment minority Malays experienced as a result of these policies was offset by access to better housing opportunities and better national integration).

³²⁰ Hollin Dickerson, *Minimum Standards*, OXFORD PUB. INT'L L., <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e845> (last visited Feb. 11, 2024).

³²¹ *Id.*

payment of “full compensation” as determined by a judge *prior* to expropriation.³²²

While the rights of the Palestinian refugees whose properties Israel expropriated and never became Israeli citizens are entangled with the right of the return – a question to which this Article will turn below – Israeli courts could theoretically provide effective remedies to Israel’s Palestinian citizens, who are known as “present absentees,”³²³ and their descendants, by applying well-recognized constitutional and equitable principles. Indeed, it could do so without implicating any issue related to the demographics of the Jewish state. Palestinian citizens of Israel suffered two distinct deprivations under the Absentees’ Property Law: first, deprivation of their property without due process of law,³²⁴ and second, exclusion from the benefits of what had become state owned property.³²⁵ Israeli courts could easily remedy the first deprivation by using their equitable powers to provide meaningful compensation for the taking of Palestinian citizens’ property in the early days of the state.³²⁶ They could remedy the second deprivation by declaring the constituent documents of the JNF, insofar as they are inherently discriminatory,³²⁷ to be contrary to Israeli public policy as declared in *Ka’dan*.³²⁸ Israeli courts, using the equitable doctrine of *cy pres*, could order the reformation of the discriminatory JNF terms to bring them into conformity with the principle of equality as the Ontario Court of Appeal did in the case involving the infamous Leonard Trusts.³²⁹

Remedy of the second deprivation would include both a prospective and a retrospective element. The prospective element requires incorporation of Palestinian citizens of Israel into the institutional decision-making structure of the JNF and other Israeli institutions involved in land use decisions to ensure that Palestinian citizens of Israel have equitable access to future development projects. The remedial measures would entail an affirmative obligation to

³²² G.A. Res. 181 (II), at 137–139 (Nov. 29, 1947) (“No expropriation of land owned by an Arab in the Jewish State . . . shall be allowed except for public purposes. In all cases of expropriation full compensation as fixed by the Supreme Court shall be said previous to dispossession.”).

³²³ Absentees’ Property Law, *supra* note 107.

³²⁴ Present absentees had no opportunity, for example, to contest either the existence of a public purpose justifying the loss of their property, or to have a court determine the value of their property at the time it was taken.

³²⁵ Jiryis, *supra* note 108, at 93.

³²⁶ Jiryis, *supra* note 108, at 93, 100 (describing compensation paid by the Israeli state to Palestinian citizens whose land was expropriated as substantially below fair value due to extreme depreciation of Israeli currency between the time expropriation occurred in 1950 and time compensation was paid).

³²⁷ See *supra* text accompanying notes 124–128.

³²⁸ *Our History*, JEWISH NAT’L FUND U.S.A., <https://www.jnf.org/our-history> (last visited Sept. 29, 2024) Indeed, the JNF’s narrative of its own history in Palestine effectively erases the existence of Arab Palestinians entirely from Palestine.

³²⁹ *Can. Tr. Co. v. Ontario Hum. Rts. Comm’n*, [1990] 69 D.L.R. 321 (Can. Ont. C. A.). The Leonard Trusts were a charitable trust established to fund university scholarships that expressly endorsed notions of white supremacy in conformity with widely accepted notions among British elites in the first quarter of the 20th century.

redirect resources under the control of the JNF and other relevant governmental or non-governmental organizations involved land use to the development of Palestinian towns and communities in view of the over 75 years of systematic institutional neglect and exclusion of the Palestinian sector in Israeli development plans.

D. Palestinian Nationality, Statelessness and the Right of Return

Ezra Klein and Ruth Gavison, as liberal Zionists, both acknowledge that the creation of Israel imposed severe costs on the Palestinians.³³⁰ Leaving aside Gavison's questionable interpretation of the historical causes of the Palestinian refugee crisis, she also argues that, even if one accepts the Palestinian view of history, the costs of allowing Palestinians to return to what is now Israel would be too high for both Israelis *and* Palestinians. As she puts it, "The need to recognize the trauma of Palestinian refugees does not justify a massive uprooting of these Jews, nor does it justify the restoration of the demographic *status quo ante* between Jews and Arabs, or otherwise restoring the state of vulnerability which both communities endured."³³¹

Gavison's final argument – that a binational state would make both Arabs and Jews vulnerable³³² – is a morally problematic assumption, because it attributes intolerance and an inability to live together equally to substantial numbers of Jews and Arabs. This section of the Article does not engage in further critique of this troubling assumption, but rather focuses on what international law says about Israel's treatment of the Palestinian refugees in light of political liberalism's commitment to the priority of the right over the good. Only after determining the baseline of rights that Palestinians enjoy does it then make sense to discuss the practical constitutional arrangements that can be made to secure the rights of *all*.

The right of Palestinian refugees to return to historical Palestine derives from the legal concept of nationality.³³³ As set out in Part III.A above, prior to the creation of the state of Israel, Palestinian Arabs were nationals of Palestine. Nationality has two dimensions, one in domestic law, in which case it is customarily described using the term "citizenship," and in international law. Under international law, states enjoy a great deal of latitude in defining who is a "citizen" for purposes of that state's domestic law. The two conceptions of nationality, therefore, might not overlap: a person might not be a citizen for purposes of the domestic law of a state, yet be that state's national for purposes of international law.³³⁴

³³⁰ Gavison, *supra* note 157, at 83–84.

³³¹ *Id.* at 86.

³³² *Id.*

³³³ Akram, *supra* note 263, at 209 ("From an international legal point of view, Palestinian nationality remains intact today, and [Palestinians'] right of return is based squarely on their rights as *nationals* of Palestine, not only as refugees.").

³³⁴ Victor Kattan, *The Nationality of Denationalized Palestinians*, 74 *NORDIC J. INT'L L.* 67, 71-72 (2005) (quoting Schwarzenberger for the proposition that a state may deny some of its residents

Nationality is the link between a person and a particular state. Denationalization destroys that relationship and its effect is broader than simply depriving a particular group of people the rights of citizenship, particularly when denationalization results in the statelessness of the persons affected.³³⁵ As Victor Kattan describes denationalization:

As nationality is the link between the individual and the State, denationalization often results in breaking that link. A person without nationality would have no civil or political rights. Such persons would not be entitled to diplomatic protection, nor would they be entitled to a passport making it virtually impossible for them to travel outside the territory where they reside. Their rights to reside and work would be severely curtailed as these would be at the discretion of the host country. It is a most unpleasant phenomenon.³³⁶

Whether a state, as a matter of international law, could lawfully denationalize sections of its population and render them stateless, was already in substantial doubt prior to World War II. Hersch Lauterpacht, the noted British international lawyer, wrote in his treatise on international law in 1933, that while

[t]here is no clear rule of international law at present which limits the freedom of action of States in this respect, but it is submitted that the indiscriminate exercise by a State of the right of denationalizing its subjects, when coupled with the refusal to receive them when deported from a foreign country, constitutes an abuse of rights which could hardly be countenanced by an international tribunal.³³⁷

The 1955 edition of *Oppenheim's International Law*, edited by Lauterpacht, described denationalization, especially when resulting in statelessness, as "regressive," and inconsistent with the legitimate interests of states, as evidenced "from the fact that, subject to certain insignificant exceptions, it finds no place in the laws of other States."³³⁸ Palestinians, as a matter of international law, were nationals of Palestine by express terms of Article 30 of the Lausanne Treaty.³³⁹ For purposes of Palestine's domestic law, Palestine's Arabs were citizens of Palestine.³⁴⁰ Equally important, by the very same terms of the Lausanne Treaty, Palestine's Arabs were not, as a matter of international law,

some or all the privileges of citizenship for purposes of its domestic law but recognize them as its nationals in the international context).

³³⁵ *Id.* at 71.

³³⁶ *Id.*

³³⁷ *Id.* at 71; HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 309 (1933).

³³⁸ Kattan, *supra* note 334, at 71; LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 658 (Hersch Lauterpacht ed., 8th ed. 1955).

³³⁹ See Lausanne Peace Treaty, *supra* note 49.

³⁴⁰ See *Palestine Citizenship Order*, *supra* note 46.

nationals of any other of the successor states to the Ottoman Empire. As the U.N. mediator for Palestine, the Count Folke Bernadotte noted in a report to the U.N., “the Arab inhabitants of Palestine are not citizens or subjects of Egypt, Iraq, Lebanon, Syria and Transjordan.”³⁴¹

Israel, of course, was a new state and it did not adopt its citizenship law until 1952.³⁴² That law, by its terms, excluded Palestinian Arabs from Israeli nationality unless they met very strict requirements for continuous physical presence in the territory that became the State of Israel from the date of its founding until the date of the adoption of the Law of Nationality, July 14, 1952, and had been registered with the state as of March 1, 1952.³⁴³ Most Arab Palestinians, even though they had been citizens of Palestine, could not meet these requirements of continual presence because they were victims of the Yishuv’s (and later Israel’s) policy of ethnic cleansing.³⁴⁴ Although the language of Section 3 of Israel’s Nationality Law is facially neutral concerning race, it comes immediately after Section 2 of the Law of Nationality, which recognizes as Israeli nationals all returnees under the Law of Return of 1950.³⁴⁵ Of course, a “returnee” for purposes of Israel’s Law of Nationality must be Jewish because only Jews are eligible to be “returnees” under that law.³⁴⁶ Accordingly, the Law of Nationality discriminates on the basis of religion, race, or both, even if it makes no express mention of any of these factors.³⁴⁷ Section 18 of the Nationality Act then expressly cancels all references to Palestinian citizenship in Israeli law, replacing it with “Israeli citizenship.”³⁴⁸

Israel’s Nationality of Law on its face represents a significant legal paradox: taken literally, it suggests that for four years after it came into existence as a

³⁴¹ KATTAN, *supra* note 25, at 216.

³⁴² See generally Nationality Law, 5712-1952, SH 984 (Isr.), <https://www.refworld.org/docid/3ae6b4ec20.html>.

³⁴³ *Id.* (conditioning nationality by residence on the following factors, among others: (a) Palestinian citizenship prior to the establishment of the State of Israel; (b) registration with the state by March 1, 1952, pursuant to the Registration of Inhabitants Ordinance of 1949; (c) continual physical presence in Israel, or territory that became part of Israel, from the date of the state’s establishment until the date of the Nationality Law’s adoption, or lawful entry into Israel during this period; and (d) a person born to someone qualifying for Israeli nationality by residence as set forth in previously mentioned conditions).

³⁴⁴ Kattan, *supra* note 332, at 74–83 (describing Israel’s history of expulsion of Palestinians in the fighting that took place between 1947-49 and in 1967); KATTAN, *supra* note 25, at 190–202 (describing the violence Israel used to effect the expulsion of the majority of Palestine’s Arab population as part of its military campaign to establish a Jewish state beginning in April 1948).

³⁴⁵ *Id.* at § 2(a) (“Every ‘oleh [returnee]’ under the Law of Return, 5710-1950, shall become an Israel national by return unless Israel nationality has been conferred on him by birth under section 4.”).

³⁴⁶ See The Law of Return, 5710–1950, SH 51, § 1 (Isr.), <https://www.refworld.org/docid/3ae6b4ea1b.html> (“1. Right of ‘aliya’ Every Jew has the right to come to this country as an ‘oleh’. ‘aliya’ means immigration of Jews. ‘oleh’ (plural ‘olim’) means a Jew immigrating into Israel.”).

³⁴⁷ See generally Nationality Law, 5712-1952, SH 984 (Isr.), <https://www.refworld.org/docid/3ae6b4ec20.html>.

³⁴⁸ See Nationality Law of 1952, 5712-1952, SH 984, §18 (Isr.) <https://www.refworld.org/docid/3ae6b4ec20.html>.

state, Israel lacked nationals. Indeed, early case law from Israel had to tackle the question of Israeli nationality in the absence of a nationality law. Decisions of Israeli courts prior to the promulgation of the Nationality Law of 1952 were confused regarding the continued vitality of Palestinian citizenship following the establishment of the State of Israel in 1948 and the withdrawal of Great Britain as the Mandatory. One case, *Oseri v. Oseri*, held that with the expiration of the British Mandate over Palestine, Palestinian citizenship disappeared and did not, *ipso facto*, devolve into Israeli citizenship.³⁴⁹ Another case, however, took a different view, citing the prevailing norms of public international law that apply in cases where there is a change of sovereignty.³⁵⁰ The judge noted that, unless the court assumed that all persons in Mandatory Palestine who were resident in territory that became parts of Israel, became, *ipso facto*, nationals of Israel, it would be forced to conclude that Israel came into existence as a state *without* nationals, a conclusion the judge dismissed as “absurd.”³⁵¹ The Supreme Court of Israel, in *Hussein v. Governor of Acre Prison*, however, subsequently overruled the Tel Aviv district court’s decision.³⁵² It concluded that with the end of the British Mandate, Palestinian citizenship ceased to exist, and that former citizens of Palestine had not automatically become citizens of the State of Israel.³⁵³

Why would Israel adopt an interpretation of law that effectively denationalized the entire population of Mandatory Palestine? The answer, of course, lay in the policy of the nascent state to maximize the territory under its control while minimizing the number of Arab Palestinians. It did not, however, want to adopt laws that were facially discriminatory or expressly denationalized *only* non-Jews. Taking advantage of its successful campaign of ethnic cleansing, the Knesset was able to adopt a nationality law that effectively denationalized Palestine’s Arabs without using explicit racial categories by creating two different modes of acquiring nationality: Section 2’s concept of “return” and Section 3’s concept of “residence.” Under the latter, nationality by residence was drafted to be racially neutral. Palestinian Jews who fled the fighting or otherwise did not satisfy all the residency requirements set forth in Section 3 were ineligible for Israeli nationality under Section 3 to the same extent as Palestinian Arabs.³⁵⁴ This exclusion, however, was meaningless, because the

³⁴⁹ Kattan, *supra* note 334, at 83 (quoting *Oseri v. Oseri* (1953) and reasoning that with the end of the Mandate’s government, the ties of citizenship between the inhabitants of the territory and the government necessarily came to an end, and that it cannot be assumed that this same tie devolves to the State of Israel).

³⁵⁰ Kattan, *supra* note 334, at 83–84 (quoting *A.B. v. M.B.* 17 ILR 110 (1950) and noting “The prevailing view [based on Oppenheim, Schwarzenberger, and Lauterpacht] is that, in the case of transfer of a portion of the territory of a State to another State, every individual and inhabitants of the ceding State becomes automatically a national of the receiving State.”).

³⁵¹ Kattan, *supra* note 334, at 83–84.

³⁵² HCJ 174/52 *Hussein v. Governor of Acre Prison* 6 PD 897 (1952) (Isr.).

³⁵³ Kattan, *supra* note 334, at 84.

³⁵⁴ See Nationality Law of 1952, 5712-1952, SH 984, §13 (Isr.) <https://www.refworld.org/docid/3ae6b4ec20.html>.

Law of Return guaranteed them the right to immigrate to Israel,³⁵⁵ whereupon Section 2 of the Law of Nationality granted them Israeli nationality.³⁵⁶

The universal denationalization of Palestine's citizens is the key legal premise behind Israeli legal arguments denying Palestinians' right to return: by claiming that Palestine's Arab citizens were never nationals of Israel, Israel has no obligation to repatriate them.³⁵⁷

Citing various post-World War II international agreements, Yaffa Zilbershats argues "The right to citizenship (or the right to nationality) is an ambiguous and under-developed right in international law."³⁵⁸ She deals with the question of the citizenship rights of Palestinian Arabs as a matter of international human rights law as it developed in the post-World War II era, assuming that the proper framework is the rights of individual stateless Palestinians against the State of Israel. In framing the discussion in this way, however, she ignores both the well-established practice of states with respect to nationality of persons in the context of a change in sovereignty, *and* the interstate character of the wrong involved in denationalization. Public international law with respect to these matters was already clear and well-established before the adoption of international instruments attempting to secure the rights of *individuals* to nationality.

As stated in *Brownlie's Principles of International Law*, "the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality."³⁵⁹ James Crawford states the principle of the transfer of nationality *ipso facto* to the new sovereign is especially strong given the universality of these provisions in the various treaties concluded at the end of World War I and the international deliberations that had accompanied them.³⁶⁰ Many treaties from this period also gave the new nationals an option to reject the new nationality that had been thrust upon them as a result of the change in sovereignty, but as Crawford notes, this option does not defeat the principle that nationality of the population is transferred *ipso facto* to the new sovereign: "Only when the option is exercised does the nationality of the successor state terminate: there is no statelessness."³⁶¹

³⁵⁵ See The Law of Return, 5710-1950, SH 51, § 1 (Isr.), <https://www.refworld.org/docid/3ae6b4ea1b.html>.

³⁵⁶ See Nationality Law, 5712-1952, SH 984, § 2 (Isr.), <https://www.refworld.org/legal/legislation/natlegbod/1953/en/14615>.

³⁵⁷ See LAPIDOTH, *supra* note 10 (noting Palestinians were never nationals of Israel); YAFFA ZILBERSHATS, *International Law and the Palestinian Right of Return to the State of Israel*, in ISRAEL AND THE PALESTINIAN REFUGEES 191, 204-05 (2007) (noting Palestinian citizenship expired with the end of the British Mandate and Israel had no obligation to extend citizenship to Palestinians).

³⁵⁸ ZILBERSHATS, *supra* note 357, at 205.

³⁵⁹ CRAWFORD, *supra* note 62, at 433.

³⁶⁰ *Id.* at 434 ("The precedent value of such provisions is considerable in view of their uniformity and the international character of the deliberations preceding the signature of these treaties.")

³⁶¹ *Id.*

Crawford also points out that the domestic legislation of states at the time confirm the obligatory character of this rule of public international law. Citing the example of the law of the United Kingdom, Crawford quotes another authority as saying:

The normal effect of the annexation of territory by the British Crown, whatever may be the source or cause of the annexation, for instance, a treaty of cession, or subjugation by war, is that the nationals of the State whose territory is annexed, if resident thereon, become British subjects; in practice, however, it is becoming increasingly common to give such nationals an option, either by the treaty of cession or by an Act of Parliament, to leave the territory and retain their [original] nationality.³⁶²

Needless to say, the option to forego the nationality of the new sovereign is exercised by the individual national, not the new sovereign. This principle according to Crawford is immanent in the idea of sovereignty itself:

Sovereignty denotes responsibility, and a change of sovereignty does not give the new sovereign the right to dispose of the population concerned at discretion. The population goes with the territory: on the one hand, it would be unlawful and a derogation from the grant for the transferor to try to retain the population as its own nationals (though the right of option is another matter). On the other hand it would be unlawful for the successor to take any steps which involved attempts to avoid responsibility for conditions on the territory, for example by treating the population as *de facto* stateless.³⁶³

Even if the pre-World War II principle that states had considerable freedom to define who constitutes their own nationals³⁶⁴ were applied to Israel's foundational laws, there are other reasons to believe that Israel's conduct would still be illegal because of their international effects. A denationalization, even in the pre-World War II era, would have been illegal under international law if it included a breach of an international duty, such as denationalization *combined with* expulsion.³⁶⁵ Even assuming that Israel had the right to denationalize Palestine's Arab citizens as part of its domestic legal order, public international law in the interwar period prohibited it from then unilaterally expelling

³⁶²*Id.* at 420 (quoting McNair, 2 Opinions 24. Also Parry, Nationality and Citizenship Laws of the Commonwealth (1957) 274–5. Cf British Nationality Act 1948 (repealed by the British Nationality Act 1981).

³⁶³*Id.* at 435–36.

³⁶⁴Kattan, *supra* note 334, at 72 (citing the 1923 decision of the Permanent Court of International Justice, *Tunis and Morocco Nationality Decrees*, for the proposition that denationalization decrees having wholly domestic effects are not illegal in international law).

³⁶⁵Alfred de Zayas, *Forced Population Transfer*, OXFORD PUB. INT'L L, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e802> (last visited Dec. 13, 2024) (noting that Art. 46 of the Hague Regulations, annexed to the 1907 Hague Convention Concerning the Laws and Customs of War on Land, prohibited forced population transfers and explaining the absence of an express prohibition to the drafters' assumption that the practice had "fallen into abeyance."); Kattan, *supra* note 334, at 72.

Palestinians from its territory and forcing them to seek shelter in the territories of neighboring states.³⁶⁶ By 1947, it had already been settled as a matter of international law that Palestinian nationality was distinct from the nationalities of the neighboring states that had also been carved out of the former Ottoman Empire. By expelling Palestinian nationals to these states without their consent, Israel therefore committed an international wrong in addition to the wrongs suffered by the individual Palestinians expelled.

There is little doubt that the Yishuv, in the period between the U.N.'s adoption of the Partition Plan and the establishment of Israel in May 1948, and the state of Israel thereafter, engaged in widespread expulsions of Palestine's Arabs.³⁶⁷ Nor is there doubt that the Yishuv and later Israel conducted these expulsions in defiance of the international community, which expected Israel to repatriate them.³⁶⁸ Even President Truman, despite his decision to recognize Israel, rejected Israel's expulsion of the Palestinians as violating international expectations of the Jewish state.³⁶⁹

Although the Permanent Court of International Justice affirmed in 1923 that states had a wide latitude in defining who their nationals were, it also held in that same decision that these principles were subject to the evolving norms of international law. On the plausible assumption that Israel's refusal to repatriate the Palestinians it expelled in 1948–49 and again in 1967 constitute an ongoing international wrong, Israel's conduct should be judged based not on the state of law when the expulsions first occurred in 1948, but on the state of the law at the time the rights are vindicated.³⁷⁰ There is little doubt that the international prohibition against race-based denationalization,³⁷¹ and the right of individual refugees to return to their place of origin, have only strengthened with the passage of time.³⁷²

When Israel's Law of Return and its Law of Nationality are evaluated in view of the prevailing norms of international law in the immediate aftermath of World War II, to say nothing of how the norms of public international law, including, international human rights law, have evolved in the wake of World War II, it is impossible to view them as ordinary pieces of legislation reflecting a state's sovereign power to define its citizenry or regulate its immigration policies. The only way to understand these laws is that they were intended to establish within the state of Israel a system of ethnic domination entrenching

³⁶⁶ *Id.*

³⁶⁷ Kattan, *supra* note 334, at 74–83 (describing Israel's history of expulsion of Palestinians in the fighting that took place between 1947–49 and in 1967); KATTAN, *supra* note 25, at 190–202 (describing the violence Israel used to effect the expulsion of the majority of Palestine's Arab population as part of its military campaign to establish a Jewish state beginning in April 1948).

³⁶⁸ KATTAN, *supra* note 25, at 218–20, 222–27.

³⁶⁹ Kattan, *supra* note 334, at 202–3 (quoting Truman as expressing concern that Zionist aggression against Palestine's Arabs would arouse *international* indignation).

³⁷⁰ Kattan, *supra* note 334, at 213–17 (discussing the principles of intertemporal law and its application to Palestinian refugees).

³⁷¹ Kattan, *supra* note 334, at 72–73.

³⁷² Haslam, *supra* note 10.

Jews over the remaining Arab population of Palestine. These two laws, moreover, work in combination to further this end by racially including Jews through the Law of Return, while excluding those Palestinians whom the Yishuv and later Israel successfully expelled from the nascent state's territory in 1948-49 and again in 1967 from the possibility of acquiring Israeli nationality despite their historical ties to Palestine and their prior status as citizens of Palestine. Israel's legal regime of ethnic domination has been further entrenched with its adoption in 2003 of its *Nationality and Entry into Israel Law*, which suspends the right to family reunification between Palestinian citizens of Israel and their Palestinians spouses living in the Occupied Palestinian Territories.³⁷³

As this section of the Article shows, these Israeli policies were most likely in contravention of prevailing international law at the time they were adopted and are certainly violative of international law today. A just conception of Zionism would have to reform these laws to bring them into conformity with the rights Palestinians enjoyed as of 1947 in their capacity as citizens of Palestine. Under applicable norms of international law, citizens of Palestine would have *ipso facto* become nationals of Israel as the successor to the State of Palestine. These new citizens would have then had the *right* to reject this new citizenship and leave to another state. But Israel did not have the right to denationalize Palestine's Arabs, expel them and refuse to allow them to return, thereby rendering them stateless. When it did so, it violated the rights of the Palestinian Arabs as nationals under international law, *and* the rights of Israel's neighbours who were compelled to take responsibility for them.

While much has been written on the right of return entailing displacing subsequent rights of third parties who are now in occupation of property that formerly was the property of Palestinians, the previous section argued that refugee property claims can be resolved relatively simply by reforming Israel's Absentees' Property Law by bringing it in conformity with international principles surrounding the exercise of the sovereign prerogative of eminent domain. Remedying the statelessness of Palestinian refugees is a much thornier problem because it touches the core understanding of what Zionism has historically understood to be the conditions precedent to a Jewish state. Israelis' objections to the right of return are not grounded in well-reasoned arguments in international law as much as they are grounded in what they perceive to be a demand that is incompatible with what has historically been the dominant creed of political Zionism: that only a state with a demographic supermajority of Jews can secure the aims of Zionism. This Article has argued that such a conception is both unnecessary – insofar as the legitimate interests of Jews as a national

³⁷³ Kattan, *supra* note 334, at 89–90 (as originally adopted, the law was temporary, but it has been regularly renewed since 2003); Aaron Boxerman, *New 'Citizenship Law' Advances, Months after Ban on Palestinian Spouses Lapsed*, TIMES OF ISRAEL (Jan. 9, 2022, 5:40 PM), <https://www.timesofisrael.com/new-citizenship-law-advances-months-after-ban-on-palestinian-spouses-lapsed/>; *Knesset Plenum Passes Citizenship and Entry into Israel Bill into Law*, KNESSET, <https://main.knesset.gov.il:443/EN/News/PressReleases/pages/press10322w.aspx> (last visited Feb. 17, 2024); Amb. Alan Baker, *Israel's "Citizenship and Entry into Israel" Law*, JERUSALEM CTR. SEC. PUB. AFF., (Aug. 10, 2021), <https://jcpa.org/article/israels-citizenship-and-entry-into-israel-law/> (describing history of the law, its being narrowly upheld by the Israeli Supreme Court, and defending it as necessary for Israel's security).

community can be secured through a liberal constitution that enshrines cultural and religious rights – and incompatible with peace because it requires the permanent subordination of Palestinians.

But even on the most restrictive view of the right of return – that Palestinians should only be entitled to return to a future state of Palestine³⁷⁴ pursuant to an internationally recognized partition of Palestine into two states, one Jewish and one Arab – the viability of such a territorial division will be cast into doubt in the absence of a close economic relationship between the two states along the lines that the General Assembly first envisaged in Resolution 181. This necessarily entails recognition of the freedom of movement between Israel and Palestine for residents and citizens of each, subject only to reasonable security concerns.³⁷⁵ It also follows that whether peace is ultimately achieved via a two-state solution, or a unitary, federal or consociational one state solution, political Zionism must abandon its quest for a demographic supermajority as the prerequisite of a Jewish state and instead look to conventional constitutional guarantees. The right of return, from this perspective, is not in any way incompatible with the *legitimate* demands of Jewish self-determination.

Moreover, even on the assumption of a two-state solution with returnees initially limited to the Palestinian state, the interests of both parties will require the two states to take steps that move them, practically, toward federation and greater equality of citizenship. This will likely mean that Israel would eventually allow Arab Palestinians to take up residence in Israel and assume Israeli citizenship, and Palestine would allow Jewish Israelis to do the same, in each case, on the assumption that the immigrating person accept the legitimate authority of the local government. It may be the case that the impetus behind partition is separation, but the only glue that will make it succeed is integration. Again, it is useful to consider the experience of southeast Asia in this respect: despite the troubled history of Singapore with Malaysia,³⁷⁶ and the vast differences in the standards of living between Singapore and its neighbours in Southeast Asia, the Association of Southeast Asian Nations (“ASEAN”) is actively working toward economic integration among the states of the region.³⁷⁷ This has resulted, among other things, in fourteen day visa-free travel for all nationals of member states,³⁷⁸ and provisions for visa-free travel for skilled

³⁷⁴ ZILBERSHATS, *supra* note 357, at 197 (stating that Palestinian refugees can exercise the right of return through repatriation to the territory of the Palestinian state in the Gaza Strip and the West Bank).

³⁷⁵ See G.A. Res. 181 (II), at 132–133 (Nov. 29, 1947) (requiring both the proposed Jewish and Arab states to “[p]reserv[e] freedom of transit and visit for all residents and citizens of the other State in Palestine”).

³⁷⁶ WALID JUMBLATT ABDULLAH, *ISLAM IN A SECULAR STATE: MUSLIM ACTIVISM IN SINGAPORE* 14 (Amsterdam Univ. Press ed., 2021) (describing the “unceremonious circumstances” that led to the expulsion of Singapore from the Malaysian Federation in 1965).

³⁷⁷ *About us*, ASEAN, <https://asean.org/about-us/> (last visited Sept. 30, 2024).

³⁷⁸ ASEAN Framework Agreement on Visa Exemption, Art. 1(1), July 25, 2006, <https://agreement.asean.org/media/download/20160831072909.pdf>.

labor.³⁷⁹ Indeed, the states of ASEAN have the ambition to create a common economic area that would be similar to that of the European Community, the ASEAN Economic Community.³⁸⁰ Significantly, and in marked contrast to the exclusivist claims of Zionism to Palestine, Singapore's constitution provides that "it is the duty of the [Singapore] government . . . to 'protect, safeguard, support, foster and promote [Malay] political, educational, religious, economic, social and cultural interests and the Malay language.'"³⁸¹ This is despite the Chinese fear of being absorbed into the wider Malay-Muslim world.³⁸²

Once the inevitability of regional integration between Jews and Arabs as a necessary incident to any reasonable conception of peace is understood, demographic objections to the right of return lose their force. It is likely that Israelis who reject the two-state solution intuitively grasp that the creation of an independent Palestinian state will introduce structural momentum for greater integration between the two states. The demand for integration will be difficult to resist because it will obviously be in the interests of both Israel and Palestine, and successful integration will require freedom of movement and immigration between the two states. That partition itself is likely to create a dynamic toward the reintegration of Palestine and Israel may explain the vehemence with which Israel's rejectionists dismiss out of hand the possibility of an independent Palestinian state with actual sovereignty.³⁸³ But the vehemence with which the unreasonable refuse just demands do not undermine the justness of the demands advanced.

IX. CONCLUSION

This Article has argued that liberal Zionism is incapable of achieving even its own modest goals: that of a humane peace with the Palestinians. As the Article's engagement with Ezra Klein and Ruth Gavison shows, despite the genuineness of their sympathy with Palestinians, neither has any demonstrable commitment to the political equality of Palestinians. Accordingly, their liberal Zionism ultimately rests on a conception of what is good for Jews as a people, not in the conventional liberal ideal of reciprocal freedom. This strain of liberal Zionism, which this Article takes as paradigmatic of liberal Zionism generally, lacks the internal resources required to resist overtly chauvinistic strains of Zionism, whether secular or religious, that are openly and unapologetically committed to structuring Israel's relationship with the Palestinians on permanent domination. The need to resist these chauvinistic strains of Zionism has been made apparent not only by the International Court of Justice's findings that Palestinians in Gaza face a plausible risk of genocide, but also its more

³⁷⁹ ASEAN Framework (Amendment) Agreement for the Integration of Priority Sectors, Art. 9, ASEAN, <https://asean.org/asean-framework-amendment-agreement-for-the-integration-of-priority-sectors/> (last visited Sept. 30, 2024).

³⁸⁰ *About AEC*, INVEST IN ASEAN (Dec. 14, 2024, 7:49AM), <https://investasean.asean.org/asean-economic-community/view/670/newsid/755/about-aec.html>.

³⁸¹ ABDULLAH, *supra* note 376, at 19.

³⁸² ABDULLAH, *supra* note 376, at 15, 17–18.

³⁸³ Jobain et al, *supra* note 271.

recent Advisory Opinion in which it concluded that Israel's occupation of Palestinian territories acquired in the 1967 war is illegal under principles of public international law because it has the intent and effect of depriving Palestinians of their right to self-determination.³⁸⁴ Liberal Zionism can only overcome its weakness and play a positive role in resisting chauvinistic Zionism by embracing fundamental principles of political liberalism, such as the priority of the right over the good.

Jabotinsky may be correct when he argues that Zionism is true and just, and that accordingly it can be imposed without the consent of "Joseph or Simon or Ivan or Achmet."³⁸⁵ Palestinians may also be correct when they assert that Zionism is an illegitimate, colonial movement. But political liberalism demands that we abandon pursuit of the whole of the truth in favor of political principles that can be reasonably justified to others viewed as free and equal and abandon a politics based on the friend-enemy distinction in the hope of achieving a shared basis for political life that can be sustained for its moral attractiveness to reasonable citizens, not out of a potentially transient balance of power.³⁸⁶

The ultimate aim of political liberalism can be said to establish a constitutional structure that is productive of, and sustained by, civic friendship, despite irreducible sociological and ideological differences within the citizenry.³⁸⁷ Political Zionism, at least in its dominant strain that derives from Herzl's political theory and provides the ideological justifications for the basic structure of the Israeli state, however, derives from a rejection of the *possibility* of civic friendship in sociologically differentiated communities, particularly when those differences are "national," i.e. related to language, culture, religion, history, etc. Herzl and the Zionists of the late 19th and early 20th Centuries can hardly be criticized for their pessimistic political theory, given the circumstances in which it was formulated. Indeed, Zionists were not the only non-Christian political theorists in the age of liberal imperialism to have formulated their political theories in response to the social Darwinist theories of white supremacy that dominated their time.³⁸⁸

But the world has moved on from the two principles that Herzl rightly recognized as rendering not just Jews but all minorities permanently vulnerable:

³⁸⁴ See *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion*, ¶ 261 (July 19, 2024), <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>.

³⁸⁵ Jabotinsky, *supra* note 234 at 7.

³⁸⁶ John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 766–67 (1997) ("Those who reject constitutional democracy with its ideal of reciprocity will of course reject the very idea of public reason. For them the political relation may be that of friend or foe, to those of a particular religious or secular community . . . The zeal to embody the whole truth in politics is incompatible with an idea of public reason that belongs to democratic citizenship.").

³⁸⁷ RAWLS, *supra* note 18, at xlix (linking reciprocity and public reason to the possibility of realizing the goal of civic friendship).

³⁸⁸ See ADEEL HUSSAIN, *LAW AND MUSLIM POLITICAL THOUGHT IN LATE COLONIAL NORTH INDIA* 155–56 (2022) (discussing the political theorizing of north Indian Muslims in the interwar period in response to the collapse of the Ottoman Empire which assumed that an independent, Hindu-dominated India would have relegated Muslims to a permanently degraded caste).

the legality of the use of force to settle disputes in the realm of international law and the absolute sovereignty of states over their own citizens. Ironically, there is no better evidence that the international order has moved on from the Herzlian world of “might makes right” to one that tries to give effect to legal right than Israel, despite its crushing of Palestinian political aspirations, has been unable to destroy Palestine as a legal actor in the international system.³⁸⁹ Both the State of Israel and the State of Palestine are parties to the fundamental treaties establishing democratic constitutionalism as a shared universal basis for governance in the post-World War II-era: the International Covenant on Civil and Political Rights (“ICCPR”)³⁹⁰ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).³⁹¹ Adherence to the provisions of these treaties by both Israel and Palestine would provide a practical basis for settling the Palestine/Israel conflict on just terms for both Jews and Palestinian Arabs.

This Article has adopted a liberal framework to critique liberal Zionism in an attempt to show that it is possible to separate the politically reasonable claims of Zionism, for example, the desire to establish a flourishing Hebrew language culture and a moderate form of religious establishment, from Zionist claims that are politically unreasonable, such as the right to establish a state in which Jews enjoy a demographic supermajority, a goal that could only be achieved through the use of arms, and requires ongoing violence to maintain the relationships of subordination that political Zionism believes is required for a Jewish state to exist. The Article also argues that unless liberal Zionism makes liberalism its central reference rather than Zionism, peace with the Palestinians will be impossible. In the absence of a normative recognition of Palestinians as bearers of equal rights, the only limitations on the conduct of the Jewish state toward the Palestinians are exogenous, determined internally by the constraints of Israeli military might and the Jewish population in Israel and externally by the international context.

Notable western liberals, such as John Rawls, have traditionally treated liberal Zionism as a form of political liberalism, despite liberal Zionism’s rejection of the premise of reciprocity with respect to Israel’s relations to Palestinian Arabs.³⁹² The post-World War II liberal consensus about the legitimacy of Zionism is breaking down, however, as the details of the history of Zionist settlement in Palestine and the violent displacement of the Palestinians are replacing popular Zionist mythology embodied in iconic works of public

³⁸⁹ See generally U.N. Secretary General, *Status of Palestine in the United Nations: Rep. of the Secretary-General*, U.N. Doc. A/67/738 (Mar. 8, 2013).

³⁹⁰ Israel signed the ICCPR in 1966 and ratified it in 1991. See *Status of Ratification Interactive Dashboard*, U.N. OFF. HIGH COMM’R FOR HUM. RTS., <https://indicators.ohchr.org/> (last visited Sep. 29, 2024) (noting the State of Palestine ratified the ICCPR in 2014).

³⁹¹ G.A. Res. 2200A (XXI), (Dec. 16, 1966) (Israel signed the ICESCR in 1966 and ratified it in 1991); see *Status of Ratification Interactive Dashboard*, U.N. OFF. HIGH COMM’R FOR HUM. RTS., <https://indicators.ohchr.org/> (last visited Sep. 29, 2024) (noting the State of Palestine ratified the ICESCR in 2014).

³⁹² Rawls, *supra* note 386, at 766 (grouping Israel with India and western constitutional democracies who are committed to the ideal of public reason).

culture such as the 1960 movie *Exodus* that starred Paul Newman.³⁹³ Debates about the legitimacy of political Zionism have now spread to North America where they are, in many cases, threatening the cohesiveness of many communities, particularly, universities.³⁹⁴

Adopting a liberal perspective on these debates also sheds light on how the seemingly insoluble campus wars about Israel and Palestine can be resolved. While for most Jews and their supporters, Zionism simply means the right of Jews to exercise self-determination in Palestine, for Palestinians and their supporters, Zionism refers to a historically specific set of political practices that entail creating and maintaining a political order based on racial or ethnic domination *over* Palestinian Arabs.³⁹⁵ This Article has highlighted those political practices of Zionism that are incompatible with Palestinian equality. Criticism of Zionism will be better distinguished from anti-Jewish animus when it is articulated clearly as directed against a discrete set of political practices. A liberal constitutional order in Palestine, whether in the form of two states or one, satisfies both the desire for Jews to exercise self-determination in Palestine *and* recognizes the equal rights of Palestinians to the same. It is reasonable to assume that most Jewish-Americans and Palestinian-Americans share commitments to the liberal ideals that underwrite the public political culture of the United States, and that neither supports the pursuit of genocide against either side in this conflict.³⁹⁶

But to arrive at such a solution requires recognition of the reality of Israel as *both* a national expression of Jewish collective aspirations *and* a settler-

³⁹³ Aviva Halamish, *Exodus, the Movie—Half a Century Later: The Interplay of History, Myth, Memory, and Historiography*, 5 JEWISH FILM NEW MEDIA 123, 127–28 (2017) (noting that the movie, itself based on Leon Uris' best-selling novel of the same name, was the first popular introduction of the Arab-Israeli conflict to the American public and it portrayed Palestinian Arabs as "villains" and at least some of whom are linked to the "Nazis").

³⁹⁴ Gabriel Diamond et al., *What Is Happening on College Campuses Is Not Free Speech*, N.Y. TIMES (Nov. 3, 2023), <https://www.nytimes.com/2023/11/03/opinion/antisemitism-jews-campus.html>; Vimal Patel & Anna Betts, *Campus Crackdowns Have Chilling Effect on Pro-Palestinian Speech*, N.Y. TIMES (Dec. 17, 2023), <https://www.nytimes.com/2023/12/17/us/campus-crackdowns-have-chilling-effect-on-pro-palestinian-speech.html>.

³⁹⁵ Dov Waxman (@DovWaxman), X (Jan. 5, 2024, 2:23 PM), <https://x.com/DovWaxman/status/1743367651571937282?s=20>.

³⁹⁶ *Slogan: 'From the River to the Sea Palestine Will Be Free'*, ANTI-DEFAMATION LEAGUE (OCT. 26, 2023), <https://www.adl.org/resources/backgrounders/slogan-river-sea-palestine-will-be-free> (interpreting this slogan as anti-Semitic and call for Jews to be removed from Palestine); Maha Nassar, *'From the River to the Sea' – a Palestinian Historian Explores the Meaning and Intent of Scrutinized Slogan*, CONVERSATION (Nov. 16, 2023), <http://theconversation.com/from-the-river-to-the-sea-a-palestinian-historian-explores-the-meaning-and-intent-of-scrutinized-slogan-217491> (explaining the origin of the slogan as an expression of Palestinians' connection to the land from which they were forcibly expelled); Noah Zatz, *Palestinian Freedom, Antisemitism Accusations, and Civil Rights Law*, L. POL. ECON. BLOG (NOV. 20, 2023), <https://lpeproject.org/blog/palestinian-freedom-antisemitism-accusations-and-civil-rights-law/> (noting the incongruence of "turn[ing] so quickly to an inflammatory charge of murderous hatred while eschewing the interpretation actually offered, one coherent with the values of a multi-racial, multi-religious, democratic society widely affirmed in the U.S.); *see also* University of Toronto (Governing Council) v. Doe et al. No. 24-00720977, 2024 ONSC 3755, at §§ 89–98, 106-108 (rejecting claims that slogans advocating for Palestinian freedom such as "From the River to the Sea, Palestine Will Be Free" are facially anti-Semitic or genocidal).

colonial movement that has historically sought to dispossess Palestinians and replace them with Jews, aims that are foundational to the state's basic structure, and continue to be pursued assiduously today.³⁹⁷ This dual nature of Israel led Shira Robinson to call Israel a "liberal settler state" that renders its Palestinian citizens into "strangers."³⁹⁸ All political action that works toward a liberal settlement of the Israel-Palestine conflict will inevitably be controversial as it must confront entrenched popular conceptions and political interests that resist recognition of Israel's reality as a "liberal settler state."³⁹⁹

Despite the bleak political realities supporters of peace and equality face, including the current genocidal war Israel is waging against Palestinians in Gaza,⁴⁰⁰ it is the responsibility of liberal political theory to provide grounds for reasonable hope in the prospect of achieving a more just future. As explained in Part VI, there are pockets of Israeli Jews who support a settlement with Palestinians based on equality, and whose understanding of Jewish self-determination is not predicated on the subordination of Palestinians. Even if they do not seem to be numerically significant, there are good reasons to believe that their positions could become more popular if Israel could no longer depend on unquestioning support from the United States and Europe. Recent polling data produced in Israel in the midst of the Gaza war seems particularly distressing for the prospect of a liberal solution to the Israel-Palestine conflict.⁴⁰¹ Despite the bleak polling, however, majorities of both communities agree that the conflict is causing great harm to their country.⁴⁰² It is precisely in these circumstances that bold action on the part of external powers, such as the United States, could produce results. By focusing on the liberal political ideals that both Israel and Palestine have accepted as binding international law, new formulations for either the two-state solution or the binational solution could be formulated and pursued. But to do so requires a broad coalition among political actors in states such as the United States which have underwritten the Zionist project to agree to pursue these different policies. Liberal Zionists will necessarily have to be an element of this coalition if it is to succeed. This Article critical of liberal Zionism is offered in this spirit: to help establish the conditions

³⁹⁷ Yair Wallach (@YairWallach), X (Feb. 16, 2024, 10:10 AM) <https://x.com/YairWallach/status/1758524157266903394?s=20> (arguing that peace requires dismantling the logic of Jewish settlement that predated the formation of the State of Israel and continues to this day).

³⁹⁸ ROBINSON, *supra* note 243, at 153–93.

³⁹⁹ *Id.*

⁴⁰⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order, 2024 I.C.J 192 (Jan. 26) (concluding that the Palestinians in Gaza face a plausible risk of genocide as a result of Israeli military actions and ordering provisional measures to prevent that imminent risk from materializing).

⁴⁰¹ *Peace Index - January 2024*, TEL AVIV UNIV., <https://en-social-sciences.tau.ac.il/peaceindex/archive/2024-01> (last visited Sep. 29, 2024).

⁴⁰² *Id.* (reporting that only 15% of Israeli Jews support a two-state solution, and only 2% support a binational solution, while 33% of Israel's Palestinian citizens support a two-state solution and 14% support a binational solution (question 7), but that vast majorities of both Israeli Jews and Israeli Palestinians believe the conflict with the Palestinians is either very harmful or harmful to Israel (question 8)).

of a just conception of Zionism that can co-exist with Palestinians on the basis of equality rather than domination.