

Voting as a Vehicle for Self-Determination in Palestine and Israel

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Through a study of the situation in Palestine and Israel, this Essay argues that collective self-determination can, in some circumstances, be realized through voting in the political system of an occupying power. More specifically, we contend that (1) a power exercising “indefinite occupation” has a duty to grant voting rights in its own domestic political system to those members of the occupied population who may wish to vote; (2) a demand for voting in the political system of an occupying power does not, in itself, constitute consent to acquisition of title by the occupier; and (3) a demand for voting under occupation can be a viable part of a struggle for decolonization, even without a preexisting social contract among members. The argument we set forth amounts to a paradigm shift in the way the international community should understand the international law of occupation both in the Palestinian territories and more broadly.

Introduction

This Essay reconceptualizes the individual right to participate politically, particularly the right to vote, as a vehicle for collective self-determination.¹ Through a study of the situation in Palestine and Israel,² we

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1. See generally Kevin Duong, *Universal Suffrage as Decolonization*, 115 AM. POL. SCI. REV. 412, 412 (2021) (evaluating universal suffrage as a “vector” for decolonization and self-determination).

2. We wish to provide some clarification of terminology on the populations of Israel/Palestine. The graded and differentiated regime of citizenship and political status in Israel/Palestine is a result of partition and the war of 1948 (what Israelis call the “War of Independence” and Palestinians call the “Nakba”), the territories occupied in 1967, and the annexation of East Jerusalem. This graded regime of citizenship created by Israel’s effective control of the entire territory from the Jordan river to the sea means that a person’s legal status affects their possibility for political participation, residency and mobility, or their prevention.

The most important differentiation is between Israeli Jews and Palestinians, because Jews enjoy an exclusive “right of return” from anywhere in the world, and significant privileges in access to resources, rights, and protection by the state. Palestinians who hold Israeli citizenship (also called the Arabs of 1948 because they are the remainder that survived the Nakba and remained within the borders of the nascent Israel) can vote in municipal and national elections, can hold a passport, have relative freedom of movement and have relative freedom of residency, compared to other Palestinian populations. Palestinian residents of Occupied East Jerusalem cannot vote in National elections, but are allowed to vote in municipal elections, they hold a Laissez-Passer, have restricted

argue that collective self-determination can, in some circumstances, be realized through voting in the political system of an occupying power. More specifically, we contend that (1) a power exercising “indefinite occupation” has a duty to grant voting rights in its own domestic political system to those members of the occupied population who may wish to vote;³ (2) a demand for voting in the political system of an occupying power does not, in itself, constitute consent to acquisition of title by the occupier, nor does it legitimize its sovereignty over occupied land; and (3) a demand for voting under occupation can be a viable part of a struggle for decolonization, even without a preexisting social contract among members.

The argument we set forth amounts to a paradigm shift in the way the international community should understand the international law of occupation both in the Palestinian territories and more broadly.⁴ The case of Palestine and Israel is admittedly a unique one, but it may also illuminate other debates around the world. In this specific area, we believe the argument has not only theoretical importance but also significant practical purchase, which makes it an urgent one in present circumstances.⁵ This is because it comes in the context of plans (frozen for now) to officially annex the West Bank, as well as the historic events in May 2021, in which Palestinians collectively protested and rose across the divisions of territory and political status.⁶

freedom of movement, and restricted possibility for residency due to a “slow transfer” policy. Many Palestinians of the West Bank, residents of the Occupied Territories, are refugees from 1948 and many are stateless, or hold Jordanian passports. They cannot vote in Israeli elections; their mobility is restricted by a harsh permit regime and they have no rights of residency. Palestinians of Gaza have a similar status to West Bank Palestinians, but their mobility is fully restricted by a siege established by Israel since 2007.

3. On “indefinite occupation,” see AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* 52–53 (2017) and Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 *BERKELEY J. INT’L L.* 551, 600–01 (2005). On voting rights under occupation, see Ariel Zemach, *The Emerging Right of West Bank Palestinians to Israeli Citizenship*, 42 *U. PA. J. INT’L L.* 271, 276–79 (2020).

4. IAN S. LUSTICK, *PARADIGM LOST: FROM TWO-STATE SOLUTION TO ONE-STATE REALITY* 106 (2019).

5. Cf. Itamar Mann & Yael Berda, *Annexation or Not, It’s Time All Palestinians Under Israeli Control Had the Right to Vote: Opinion*, *NEWSWEEK* (May 21, 2020, 11:42 AM), <https://www.newsweek.com/annexation-west-bank-right-vote-1505494> [<https://perma.cc/RCA2-3XMQ>] (discussing the necessity of voting rights for Palestinians in occupied territory until self-determination is achieved by agreement).

6. On the significance of the protests across divides, see Rashid Khalidi, *The Palestinians Will Not—and Cannot—Be Ignored*, *FOREIGN AFFS.* (June 30, 2021), <https://www.foreignaffairs.com/articles/middle-east/2021-06-30/palestinians-will-not-and-cannot-be-ignored> [<https://perma.cc/FB4C-UKYZ>].

The historical trajectory in the area—from Palestine during the British Mandate years to present-day Israel—entrenched a peculiar understanding of self-determination. This understanding is characteristic of a specific British colonial context in the interwar period.⁷ According to this understanding, separation into two ethnically homogenous states is a necessary condition for self-determination generally and specifically for both the Palestinian and the Israeli peoples.⁸ Call this the “separatist” paradigm, or “partition-thinking.”⁹ The separatist paradigm dominates the international community’s *nomos* (the perceived authority governing human behavior) when it comes to this area.¹⁰

We argue for a different understanding of self-determination and a different *nomos*. Self-determination can, in principle, be realized in multiple radically different political arrangements.¹¹ Neither a preexisting social contract among members of one nation nor the ability of a people to secede from such a social contract into a new political unit is a necessary condition for self-determination. While formally equal political participation through voting for all people under a permanent governmental authority is not a sufficient condition for self-determination to be realized, it is deeply relevant. Further, it can sometimes be a vehicle for achieving self-determination, especially when an occupying power nullifies other options such as the establishment of an independent state. To be sure, voting is not the only way to reach conditions in which a people can exercise self-determination. It is

7. Catriona Drew, *Remembering 1948: Who’s Afraid of International Legal History in the Israeli-Palestinian Conflict?*, in WHO’S AFRAID OF INTERNATIONAL LAW? 103, 105–07 (Raimond Gaita & Gerry Simpson eds., 2017); see also UMUT ÖZSU, *FORMALIZING DISPLACEMENT: INTERNATIONAL LAW AND POPULATION TRANSFERS* 13–15 (2015) (discussing the limited role of the notion of self-determination after 1919).

8. Drew emphasizes how the process to achieve self-determination was conceived as intertwined with population transfer. See Drew, *supra* note 7, at 113–14 (“[P]opulation transfer had become . . . ‘deep-rooted’ in mainstream international thinking as a means of implementing the principle of national self-determination . . .”).

9. We borrow the term “separatist” from PARTITIONS: A TRANSNATIONAL HISTORY OF TWENTIETH-CENTURY TERRITORIAL SEPARATISM 1–2, 27 (Arie M. Dubnov & Laura Robson eds., 2019) [hereinafter PARTITIONS].

10. We use a term that Orna Ben-Naftali draws from Robert Cover to describe Israel’s occupation of the Palestinian territories. See Orna Ben-Naftali, *Nomos*, in THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 277, 278 (2018) (“The relationship between the *nomos* inhabited by the international community and the *nomos* inhabited by Israel is the focus of this entry.”); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983) (explaining that *nomos* is our normative world).

11. Under principle five of the U.N. General Assembly Resolution 2625 of the Twenty-fifth Session, self-determination may be realized in multiple ways: “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.” G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States 121–23 (Oct. 24, 1970); see also KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW* 1–4 (2002) (discussing differing understandings of self-determination).

not even clearly the preferable one in all political contexts. It is simply one important way of exercising self-determination that the separatist paradigm has tended to eclipse, one that may be crucial in overcoming an impasse in Palestine and Israel¹² and in decolonizing the regime currently in place in this area of the world.¹³

The separatist paradigm, linking the right to collective self-determination to exclusively national terms, is not specific to Palestine and Israel. “Partition-thinking,” however, has been uniquely cemented into this area’s politics ever since it was introduced by British authorities in 1937 and developed in the 1947 United Nations (UN) partition plan, and especially by how the plan was thwarted in the aftermath of the 1948 war.¹⁴ It has come to monopolize the international community’s “normative universe”¹⁵ when it considers Palestine and Israel. No matter how firm it seems, if we want to end a status quo of indefinite occupation, people living in territories that Israel currently controls must shake off the sediment of partition-thinking. Contrary to other authors, we do not believe this necessarily means that ultimately both the Palestinian and the Israeli people should realize their self-determination in one state.¹⁶ We argue universal voting rights on a non-discriminatory basis can have a *procedural* role: they may help as a mechanism of negotiating the relationship between self-determination and statehood, on democratic and formally equal terms.

12. On contemporary Israel–Palestine (as situated in a lasting condition of political impasse), see THE POLITICS OF NIHILISM 16, 25–29 (Nitzan Lebovic & Roy Ben-Shai eds., 2014).

13. While it may be controversial to label Israel’s differential governmental system applying in the West Bank, Gaza, and “Israel proper” as “colonial,” we believe the label is accurate in key respects. For one, Israel has inherited many British-colonial legal mechanisms of governing the area. For a discussion on colonial features in Israel’s constitution making, see, for example, JOHN REYNOLDS, EMPIRE, EMERGENCY AND INTERNATIONAL LAW 197 (2017); MAZEN MASRI, THE DYNAMICS OF EXCLUSIONARY CONSTITUTIONALISM 101–02 (2017); and Markus Gunneflo, *Settler-Colonial and Anti-Colonial Legalities in Palestine*, in THE PALESTINE YEARBOOK OF INTERNATIONAL LAW 171, 172–73 (Ardi Imseis ed., 2019).

14. PARTITIONS, *supra* note 9, at 1; see also Leila Farsakh, *The “Right to Have Rights”:* *Partition and Palestinian Self-Determination*, J. PALESTINE STUD., Autumn 2017, at 56, 56–60 (examining the partition ideology and its shortcomings in protecting Palestinians’ rights).

15. Cover, *supra* note 10, at 4.

16. See, e.g., Ahmad Kilani, Mohammad Ali Alawieh, Mussau-Ulianishcheva E.V. & Ulyanishcheva L.V., *Peace to Prosperity Plan as a One State Solution*, 13 J. POL. & L., 2020, at 94, 99–100 (“Hence, the paper proposes . . . a one state solution that would be fair to both conflicting part[ies].”); George E. Bisharat, *Maximizing Rights: The One State Solution to the Palestinian-Israeli Conflict*, 8 GLOB. JURIST, 2008, at 1, 1 (“The principal aim of this article is to explore a ‘rights-based’ approach to . . . the ‘single state solution.’”); ALI ABUNIMAH, ONE COUNTRY 16–17 (2006) (“As difficult as it is to imagine these two peoples uniting to form a democratic state that includes and protects both, this is exactly what we need to do.”).

As we write, recent plans to annex parts of the West Bank—occupied since 1967—seem to have been suspended.¹⁷ Yet, the prospect of annexation, the historic events of May 2021, and the collective Palestinian protests across territorial divides, elucidate that the struggle against indefinite occupation involves an internal reconfiguration of our *nomos*, or our legal-political consciousness of this place.¹⁸ Such a shift requires a thorough reconsideration of the theory behind the right to self-determination and a better understanding of equal voting rights as a vehicle to its realization. As former Israeli Chief Justice Aharon Barak wrote (in a wholly different context): “[A] new reality sometimes requires a new interpretation” of familiar rules.¹⁹ The government’s attempt to turn its “creeping annexation” to annexation de jure, though suspended for now, is one such breaking point.²⁰ The common rising of Palestinians across both sides of the Green Line is another relevant moment to build from.²¹

As reflected most flagrantly by the many Jewish settlements, a de facto annexation of the West Bank and de jure annexation of East Jerusalem is already here.²² In order for applicable international law to be normatively defensible, it must change. An updated interpretation of those norms would help liberate Palestinians under occupation and ensure self-determination for Palestinians and Jewish Israelis. Changing the applicable international law may, thus, provide the scaffolding for a broader political program. In proposing such a new paradigm, one must carefully consider the illegality of

17. See, e.g., Daniel B. Shapiro, *Annexation Isn't Dead. A Desperate Trump Could Bring It Back to Life*, FOREIGN POL'Y (Aug. 11, 2020, 4:38 PM), <https://foreignpolicy.com/2020/08/11/annexation-israel-palestinians-trump-netanyahu/> [<https://perma.cc/CX6P-6LMB>] (explaining the Israeli public’s diminished motivation for unilateral annexation).

18. A “legal consciousness” may be defined concisely as “a vocabulary of concepts and typical arguments” that are available to competent lawyers and competent actors relying on the law. Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631, 634 (2003).

19. HCJ 769/02 Pub. Comm. Against Torture v. Gov’t 62(1) PD 459, 464, 489 (2006) (Isr.).

20. *Netanyahu: Palestinians in Israeli-Annexed Jordan Valley Won't Get Citizenship*, THE TIMES OF ISRAEL (May 28, 2020, 3:47 PM), <https://www.timesofisrael.com/rejecting-settler-fears-pm-says-annexation-plan-wont-mention-palestinian-state/> [<https://perma.cc/NU6W-AB65>].

21. Samer Anabtawi & Nathan J. Brown, *Palestine's Emerging National Movement: "Questions On My Mind,"* CARNEGIE ENDOWMENT FOR INT'L PEACE (June 10, 2021), <https://carnegieendowment.org/2021/06/10/palestine-s-emerging-national-movement-questions-on-my-mind-pub-84717> [<https://perma.cc/4HTT-385Y>].

22. HUMAN RIGHTS WATCH, BORN WITHOUT CIVIL RIGHTS 12 (2019); *The Potential Impact of West Bank Annexation by Israel on the Human Rights of Palestinian Residents*, YESH DIN (Apr. 20, 2020), <https://www.yesh-din.org/en/the-potential-impact-of-west-bank-annexation-by-israel-on-the-human-rights-of-palestinian-residents/> [<https://perma.cc/J7K3-8HD9>]; *Direct Legislation by the Knesset for the Territories: Annexation and the Weakening of the Laws of Occupation—Human Rights Ramifications*, THE ASS'N FOR CIV. RTS. IN ISR. (Aug. 2019), https://01368b10-57e4-4138-acc3-01373134d221.usrfiles.com/ugd/01368b_5c6659990e9b4481a6a1cec1a3bc47fc.pdf [<https://perma.cc/CCJ3-GYYQ>].

changes to occupied territory, including annexation.²³ Equally important are the effects of perpetual occupation on the exercise of individual political rights. If we are just able to drop the baggage we collectively carry on our backs and in our minds—the view that self-determination is dependent on separation—we will discover new potential in international human rights law. Without the dubious colonial inheritance of separatism, international human rights law can become not only the basis for the political participation of an occupied people, but also the basis for its liberation.

Part I briefly presents the need for a new paradigm in international law to displace the separatist *nomos*. Part II answers the question of “how did we get here?”—i.e., how did we become so unnecessarily committed to a separatist view of self-determination? Part III develops an alternative view of self-determination. This view builds upon the excess of Israeli control over Palestinian day-to-day life in the West Bank, and upon the history of voting among Palestinian citizens inside Israel. The latter’s self-determination is premised on the sovereignty of the people, not territorial sovereignty.²⁴ Part IV seeks to clarify how we understand the relationship between individual rights of political participation and collective self-determination—the key theoretical question this Essay addresses. Part V briefly addresses several important objections to our argument. Part VI concludes with the hope that this Essay encourages further discussion within a context that finally, after many years, seems to be more open to radical conceptual change.

I. A New Paradigm in International Law

On December 12, 2019, the UN Committee for the Elimination of Racial Discrimination (CERD) made a recommendation that surely surprised anyone that has been following the international legal discussion surrounding Palestine and Israel.²⁵ Addressing Israel, it suggested “that the State party ensure *equal treatment for all persons on the territories under its effective control and subject to its jurisdiction, including by guaranteeing equal access*

23. See Ben-Naftali, *supra* note 3, at 559 (“Occasioned by, and extending the use of force—regardless of its initial justification and notwithstanding the prohibition on this use—[an occupation] is to be viewed and monitored critically, lest the much necessary law of occupation becomes a shield for the violation of its own extrinsic purpose and intrinsic principles.” (internal citations omitted)).

24. Prosecution Response to the Observations of *Amici Curiae*, Legal Representatives of Victims, and States at ¶ 42, Situation in the State of Palestine, Case No. ICC-01/18 (Apr. 30, 2020) (quoting GROSS, *supra* note 3, at 18).

25. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, at 3, U.N. Doc. CERD/C/ISR/CO/17-19 (Dec. 12, 2019) [hereinafter CERD].

to citizenship, legal protection, [and] social and economic benefits.”²⁶ The Committee addresses what political scientist Ian Lustick and others have called a “one-state reality,” one in which Israel governs the entire territory.²⁷ Such unified control has been achieved by a regime of mobility restrictions and surveillance, characterized by a patchwork of diverse political actors (citizens, residents, infiltrators, and foreigners).²⁸

The recommendation that Israel grant citizenship to “all persons on the territories under its effective control and subject to its jurisdiction”—meaning the Palestinian residents of the West Bank—may raise eyebrows.²⁹ The proposal advanced by the Committee will likely surprise anyone who has studied the status of the Occupied Palestinian Territories, not just international lawyers. At first glance, the recommendation flies in the face of decades of UN pronouncements. Would granting Israeli citizenship to Palestinians under occupation mean the death of the struggle for Palestinian sovereignty, which has secured many landmark achievements for Palestine (such as joining UN bodies, acceding to treaties, and gaining some international recognition of Palestinian statehood)?³⁰ Would it undermine Palestinians’ right to self-determination as recognized by the International Court of Justice?³¹

To use the language of UN Security Council Resolution 2334, the recommendation seems to contradict the unequivocal UN condemnations of “all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967.”³² The international

26. *Id.* at 3 (emphasis added).

27. See LUSTICK, *supra* note 4, at 88 (discussing the one-state solution to the Israel–Palestine situation); see also ARIELLA AZOULAY & ADI OPHIR, *THE ONE-STATE CONDITION: OCCUPATION AND DEMOCRACY IN ISRAEL/PALESTINE* 18–19 (Tal Haran trans., 2013) (using the phrase “one-state condition” and writing: “Since the conquest of the West Bank and Gaza Strip, Israel–Palestine, the land between the sea and the river, has been ruled by one system of control, one set of state apparatuses, and two distinct systems of governance.”); YEHOUDA SHENHAV, *BEYOND THE TWO-STATE SOLUTION* 21 (2012) (“[P]resent-day Israel is, de facto, a bi-national entity which spans from the Mediterranean Sea to the Jordan River. This reality no longer allows a just two-state solution . . .”).

28. Yael Berda, *LIVING EMERGENCY: ISRAEL’S PERMIT REGIME IN THE OCCUPIED WEST BANK* 11–12 (2018).

29. CERD, *supra* note 25, at 3.

30. See *Diplomatic Relations*, PERMANENT OBSERVER MISSION OF THE STATE OF PALESTINE TO THE UNITED NATIONS N.Y. (June 19, 2020), <https://palestineun.org/about-palestine/diplomatic-relations/> [<https://perma.cc/G75Y-JZCV>] (“The State of Palestine currently enjoys bilateral recognition from 139 States.”). For an assessment of this strategy, see Victor Kattan, *A State of Palestine: The Case for UN Recognition and Membership*, ALSHABAKA: THE PALESTINIAN POL’Y NETWORK (May 27, 2011), <https://al-shabaka.org/briefs/state-palestine-case-un-recognition-and-membership/> [<https://perma.cc/P9LK-AD3U>].

31. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 118, 122, 149, 155, 159 (July 9).

32. S.C. Res. 2334, ¶ 4 (Dec. 12, 2019).

community overtly demanded that Israel should withdraw from the occupied territories under a peace deal, as evidenced by a series of General Assembly Resolutions including 70/224 and 73/338.³³ Granting citizenship to residents of the West Bank seems to encourage Israel's presence in occupied territories and may be held as consonant with Israel's annexation plan. Following Orna Ben-Naftali, who takes Robert Cover's cue, it may seem to contradict the *nomos* the international community inhabits, in which the partition of historic Palestine into two political units is a fundamental tenet.³⁴

The principle of self-determination in international law is ordinarily divided into external self-determination and internal self-determination.³⁵ External self-determination is supposed to provide people with protection from foreign domination, including by formation of their own independent state. Internal self-determination guarantees their right to govern themselves freely without outside interference. The seeming problem with the recommendation to ensure equal rights—including voting rights—to Palestinian non-citizens, can thus be restated: it sacrifices external self-determination in favor of individual human rights. It invites a condition of permanent foreign domination by Israel (for them, a foreign state).

However, such a rejection may be too quick. The CERD document clearly regards the Palestinian territories as *occupied*.³⁶ The Committee stresses the right to self-determination of all residents in territories under Israeli control.³⁷ It emphasizes that Israel's regime of separation between Palestinians and Jews, in which different laws apply to different populations in the same territory, is contrary to the Convention aimed at eliminating all forms of racial discrimination.³⁸ How should one understand the demand to provide citizenship, while maintaining international law's specific

33. G.A. Res. 70/224 Towards Global Partnerships: A Principle-Based Approach to Enhanced Cooperation Between the United Nations and All Relevant Partners, at 1 (Feb. 23, 2016); G.A. Res. 73/338, International Year of Peace and Trust, 2021, at 1 (Sept. 17, 2019); G.A. Res. 73/89, Comprehensive, Just and Lasting Peace in the Middle East, at 1 (Dec. 6, 2018); G.A. Res. 75/20, Committee on the Exercise of the Inalienable Rights of the Palestinian People, at 1 (Dec. 2, 2020).

34. Ben-Naftali, *supra* note 10, at 277, 293.

35. For an overview of the principle of self-determination in international law, see generally Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51 (1988).

36. See CERD, *supra* note 25, at 3 ("Furthermore, while Israeli settlements in the Occupied Palestinian Territory are not only illegal under international law but also an obstacle to the enjoyment of human rights by the whole population, the Basic Law constitutionally elevates them 'as a national value.'").

37. *Id.*

38. *Id.* at 4; G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 3 (Dec. 21, 1965).

protections for occupied populations, including the strict rule against annexation?

The answer lies in the reality of what Aeyal Gross has called “indefinite occupation,” one that may not end up being permanent, but can also no longer be called temporary.³⁹ In a paper from 2005, Ben-Naftali, Gross, and Keren Michaeli have argued that such an occupation is illegal.⁴⁰ Whether that is indeed the case is a difficult question, one we will not directly engage here. What is clear is that without the political participation of the occupied population, any remedy that might exist for such illegality is ineffective at best. And yet, such an occupation is so long-term that international human rights law simply cannot allow for the occupied population to be excluded from political participation.⁴¹ While the status of the territory remains occupied, those Palestinians who want a voice in choosing the government that has effective control over them must have individual voting rights. By accepting such rights—indeed, by demanding them—they would not forfeit their right to external self-determination, nor the path to *independent* statehood. Israel must offer citizenship to Palestinian non-citizens under indefinite occupation, unilaterally, as a “remedial measure,” so long as Palestinian self-determination remains unrealized.

It is hard to exaggerate how out of step such an interpretation is with mainstream international legal understandings of the area. While “[p]luralistic societies encompass divergent *nomoi*,” and each of these is, in principle, “equally valid,”⁴² our use of the word *nomos* signals deep and nearly immutable normative commitments. This is even more so the case when these normative commitments seem to be common across the international community (with the exception of the Israeli community).⁴³ For our purposes here, a *nomos* becomes synonymous with a “paradigm” when it is so hegemonic as to appear to be providing the *only* way to understand the law on a particular issue. This is precisely what happened to the separatist *nomos* in international law.

39. See GROSS, *supra* note 3, at 54.

40. See Ben-Naftali, *supra* note 3, at 555 (“Occupation is temporary. It may be neither permanent nor indefinite. . . . The violation of [this] principle[], therefore, unlike the violation of a specific norm that reflects [it], renders an occupation illegal *per se*.” (internal citations omitted)).

41. See Zemach, *supra* note 3, at 277–78 (arguing that even if an annexation is illegal or informal, “states must not be allowed to evade their human rights obligations by resorting to formal representations that do not reflect reality”); Sari Bashi, *Human Rights in Indefinite Occupation: Palestine*, 3 INT’L COMPAR., POL’Y & ETHICS L. REV. 801, 803–06, 810 (2020) (“Where an occupation is prolonged, the limited protections of [traditional international humanitarian law] became even more problematic.”).

42. Ben-Naftali, *supra* note 10, at 277.

43. *Id.* at 278.

Lustick explains that the “two-state solution” paradigm reached its apex during the Oslo years and has remained solid long after.⁴⁴ While some political commentators have since come around to endorsing a “one-state solution”—or simply recognizing a one-state reality—lawyers have generally not yet provided the legal vocabulary to buttress it.⁴⁵ For these reasons, the importance of our proposed shift in the separatist international legal paradigm goes far beyond CERD’s authority as an interpreter. As mentioned in the Introduction, if developed fully, this shift presents the kernel of a new paradigm, or *nomos*, for the area and a corrective to partition-thinking.

Yet, a caveat may be in order. This paradigm is indeed novel within the context of a still Eurocentric discussion of international law. But it is not that new once one considers voices that have conceptualized self-determination from the perspective of colonized nations.⁴⁶ Historically, the Palestine Liberation Organization’s (PLO) platform proposed one democratic Palestinian state in all of the territory of historical Palestine. In February of 1969, the fifth national council of the PLO passed a resolution confirming “that the PLO’s objective was ‘to establish a free and democratic society in Palestine for all Palestinians whether they are Muslims, Christians or Jews.’”⁴⁷ According to this position, both Jews that immigrated before and after the 1948 displacement of Palestinians should be able to stay and live in the area if they agree to live as Palestinians in a Palestinian society. This position counters an earlier Palestinian position, according to which Jews who immigrated after 1948 should not be allowed to stay.⁴⁸ During this period, a large variety of Palestinian leaders supported the idea of one democratic state as the means for achieving Palestinian self-determination.⁴⁹

44. LUSTICK, *supra* note 4, at 100.

45. *See generally* Bashi, *supra* note 41 (endorsing policies that require the two governments to treat their citizens as one unit without directly calling for “one state”); Zemach, *supra* note 3 (same).

46. *See generally* ADOM GETACHEW, *WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION* (2019) (analyzing the role that self-determination played in the decolonization of the West African empire); Duong, *supra* note 1 (discussing the role that the dream of universal suffrage played in decolonization after World War II).

47. Alain Gresh, *Problematic Partition of Palestine: A History of Conflict Between Opposing Ideals*, *LE MONDE DIPLOMATIQUE* (Oct. 2010), <https://mondediplo.com/2010/10/03binationalism> [<https://perma.cc/5W92-CRRM>] (citing *Resolution of the Fifth National Council of the Palestine Liberation Organization (PLO)*, reprinted in *INTERNATIONAL DOCUMENTS ON PALESTINE*, 1969, at 589 (Walid Khadduri ed., 1972)).

48. MOHAMMAD RASHEED, *ĀLTWRĪ ĀLFLSTNYĪ WĀLYHWD ĀZĀ’ ĀLMĠTM’ ĀLDYMQRĀTY FY FLSTYN ĀLGD* [TOWARDS A DEMOCRATIC STATE IN PALESTINE] 35 (1970).

49. *Id.*

These included Salah Khalaf (Abu Iyad), among others.⁵⁰ In a 1974 speech at the UN General Assembly—dedicated by and large to characterizing Zionism as a colonialist movement—PLO leader Yasser Arafat articulated the position clearly:

So let us work together that my dream may be fulfilled, that I may return with my people out of exile, there in Palestine to live with this Jewish freedom-fighter and his partners, with this Arab priest and his brothers, in one democratic State where Christian, Jew and Muslim live in justice, equality and fraternity.⁵¹

With the vanishing possibilities to conclude a negotiated peace agreement to establish a sovereign Palestinian state, some Palestinian leaders returned to this line of argument. From a vantage point closer to our own, in recent months, proposals for equal political participation in Palestine and Israel have emerged in legal literature, specifically. Particularly noteworthy are recent works by Ariel Zemach and Sari Bashi.⁵²

In his article titled *The Emerging Right of West Bank Palestinians to Israeli Citizenship*, Zemach explains: “The West Bank is a territory under Israeli occupation, and annexation by an occupier of any part of the occupied territory violates international law.”⁵³ The de facto annexation of the West Bank by Israel, he further says, renders “that territory *a part of Israel* for the limited purpose of the right to citizenship.”⁵⁴ This juxtaposition of “limited purpose” and “citizenship” is somewhat ironic because citizenship is often regarded as the very “right to have rights.”⁵⁵ While endorsing Zemach’s proposal, we do not seek to employ his rhetoric of legalist minimalism. On the contrary, we acknowledge the revolutionary potential of universal suffrage in this context, which connects it to earlier visions of decolonization.⁵⁶

50. ALAIN GRESH, *THE PLO: THE STRUGGLE WITHIN* 9, 251 (A.M. Berrett trans., 1983). See also Leila Farsakh, *The One-State Solution and the Israeli-Palestinian Conflict*, 65 *Middle E.J.* 55, 64–65 (2011) (“A number of senior Fatah figures, such as Saeb Erekat, Ahmad Qura’i, and Nabeel Shaath, have used the “one state” idea as a threat.”).

51. U.N. GAOR, 29th Sess., 2282d plen. mtg. at 72, U.N. Doc. A/PV.2282 (Nov. 13, 1974); see also Naseer Aruri, Seif Dâna, Karma Nabulsi & Sherene Seikaly, Roundtable on Palestinian Diaspora and Representation, *JADALIYYA* (Sept. 11, 2012), <https://www.jadaliyya.com/Details/26314> [<https://perma.cc/T5KW-EUVL>] (noting Arafat’s 1974 UN speech as an example of PLO’s willingness to compromise in the larger context of the Palestinian resistance and liberation movement).

52. See generally Bashi, *supra* note 41 (proposing equal political participation); Zemach, *supra* note 3 (same).

53. Zemach, *supra* note 3, at 271.

54. *Id.*

55. See ALISON KESBY, *THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW* 1 (2012) (asserting that the “right to have rights” is the right of citizenship).

56. See Duong, *supra* note 1, at 412 (discussing the role that the dream of universal suffrage played in decolonization after World War II).

Bashi, for her part, complements this picture with another important aspect of the scholarship, framing a new *nomos* for the area. Her “analysis is grounded in the factual circumstances of the occupied Palestinian territory (‘OPT’), given the duration of the occupation and the concerns about protections of civilians that it raises.”⁵⁷ This analysis of the facts leads her to conclude that under the law of occupation—when applied in tandem with human rights law—Israel is under a duty of non-discrimination between its citizens and Palestinian non-citizens under its control. Within this context, she grants attention to social and economic rights—including health and, especially, the freedom of movement.⁵⁸ Alongside citizenship as the basis for voting rights, all of these are key to our understanding of self-determination.

Both Zemach and Bashi begin their intervention from a strong assertion of individual rights. But what is the relationship between such proposals centered on individual rights and the principle of *collective* self-determination? And how should we be thinking about the relationship between external and internal self-determination in this context? Neither of the authors consider this view, developed below—that individual rights of political participation, particularly voting, can become a vehicle for Palestinian self-determination. We believe this argument about self-determination is the key for shifting the paradigm in international law.

A brief foray into the history of the area is helpful to show how voting in Israeli elections has indeed long functioned as a vehicle for Palestinian self-determination, as discussed in Part III. But before that, only by reassessing how we have become so committed to a separatist view of self-determination, as discussed in Part II, will we be able to see the way forward in overcoming it.

II. The Emergence of the Separatist Paradigm

The realization of collective rights through self-determination and the individual right to participate politically often appear to stand in binary opposition, or at least as strictly separate issues. But in the context of Palestine and Israel, it has become apparent that the bifurcation between these rights is simply a bias of the separatist *nomos*. This bifurcation is not an analytical truth. Moreover, the right to self-determination does not decree any particular order of preference in the realization of collective and individual rights.⁵⁹ The bifurcation of questions of individual rights and collective rights

57. Bashi, *supra* note 41, at 802.

58. *Id.* at 803–04.

59. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 58 (1992).

is the result of a specific history and path-dependency—one that we must learn, but one that we have no reason to adopt today as our own.⁶⁰

The 19th century concept of self-determination is closely related to the emergence of the nation-state, conceived in terms of an ethnically, culturally, and often racially homogenous group. Hannah Arendt expressed this idea when she wrote:

Nations entered the scene of history and were emancipated when peoples had acquired a consciousness of themselves as cultural and historical entities, and of their territory as a permanent home, where history had left visible traces, whose cultivation was the product of the common labor of their ancestors and whose future would depend upon the course of a common civilization.⁶¹

As the Max Planck Encyclopedia of Public International Law explains, “[t]his so-called ‘principle of nationalities’ provided the basis for the formation of a number of new States and finally, at the end of World War I, for the dismemberment of the Austro-Hungarian, Russian, and Ottoman empires,” that included the attempt at “unmixing” of populations.⁶²

In this view, “nations” or “peoples” are bound to territories, and specific social contracts should neatly divide between them to give individuals the opportunity to express their political will within the bounds of their own nation. The notion of self-determination, as reflected in a division between individual participation and collective self-determination, also arguably became dominant in international law. Yet it is worth noting that it was not the only way of seeing self-determination. Early socialist writings on self-determination did not bifurcate between an individual right to political participation and a collective right to self-determination; rather, both were parts of a single plan for emancipatory transformation of society.⁶³

60. For a classical critique of “traditionalism” in law (while at the same time defending *historical* legal thinking), see David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1058 (1991).

61. HANNAH ARENDT, ORIGINS OF TOTALITARIANISM 229 (1973).

62. Daniel Thürer & Thomas Burri, *Self-Determination*, MAX PLANCK ENCYCS. OF INT’L L. (Dec. 2008), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873?rskey=fSyk01&result=1&prd=MPIL> [<https://perma.cc/JE4Y-YLU4>]; Rogers Brubaker, *Aftermaths of Empire and the Unmixing of Peoples: Historical and Comparative Perspectives*, 18 ETHNIC & RACIAL STUD. 189, 203 (1995).

63. See, e.g., Vladimir Ilyich Lenin, *The Right of Nations to Self-Determination*, 4–6 J. PROSVESHCHENIYE 393, 395–96 (1914) (explaining the meaning of self-determination); Bill Bowring, *Marx, Lenin and Pashukanis on Self-Determination: Response to Robert Knox*, 19 HIST. MATERIALISM 113, 117 (2011) (examining socialist ideas of self-determination as a collective, continuing right).

In the colonial context, however, self-determination obtained yet another hue.⁶⁴ In that context, “the *mandates* system was devised as a compromise solution between the ideal of self-determination and the interests of the administrative powers.”⁶⁵ With the dissolution of the Ottoman empire, and specifically with British mandate demographic planning, partition emerged as a favored technology of governance.⁶⁶ It is this emphasis on partition which we label “separatist.” In Palestine, the desirability of partition was first assumed by the 1937 Peel Commission.⁶⁷

The political support for partition among Mandatory authorities was, from the outset, a response to conflict. The basic question the Commission was designed to answer was how to pacify “the Arab revolt”—known in Arabic as “Ṭwrī Flstyn Ālkrā,” lasting from 1936 to 1939—and thus obtain regional stability.⁶⁸ The Commission’s answer borrowed a page from an earlier project that the League of Nations had fostered.⁶⁹ The 1923 Lausanne Agreement, framed at the decline of the Ottoman empire, was designed to “unmix” Greek and Turkish populations and was a principal instrument of a violent population exchange.⁷⁰ Accordingly, the Peel Commission sought to demographically separate the Jews of Palestine from the Palestinian Arabs in the region (and even recommended the Greek–Turkish exchange).⁷¹ As empires were hammered into new nation states, partition was perceived as a means to achieve national self-determination for communities. And this solution, the Commission thought, necessitated carving up territory and transferring population, along perceived religious or ethno-national divides.⁷² In the Peel Commission’s own language, this was a “natural” solution, and

64. See Joseph Massad, *Against Self-Determination*, HUMAN. J. (Sept. 11, 2018), <http://humanityjournal.org/issue9-2/against-self-determination/> [https://perma.cc/R5CP-K65K] (elaborating on the meaning of “colonial nationalism”).

65. Thüerer & Burri, *supra* note 62 (citing League of Nations Covenant art. 22).

66. See PARTITIONS, *supra* note 9, at 1–2 (explaining that partition is a relatively recent solution to ethnic discord arising out of “[t]he wartime collapse of the old central European and Ottoman empires”).

67. This understanding was based on two historical moments. The first was the partition of Bengal in 1906, to separate Hindu and Muslim Bengalis, introduced by Lord Curzon. M.R.A. Baig, *The Partition of Bengal and Its Aftermath*, 30 INDIAN J. POL. SCI 103, 111–15 (1969). The second was the Treaty of Lausanne, which viewed population transfer to achieve ethnic homogeneity as compatible and, at times, necessary for achieving national self-determination. T.K. Vogel, ‘Ethnic Unmixing’ and the Quest for Stability in the Balkans, 56 INT’L. J. 481, 491–93 (2001).

68. PALESTINE ROYAL COMMISSION REPORT 24 (1937) [hereinafter PEEL COMMISSION REPORT].

69. See *id.* at 329 (referencing the 1923 Treaty of Lausanne).

70. ÖZSU, *supra* note 7, at 72.

71. PEEL COMMISSION REPORT, *supra* note 68, at 390.

72. *Id.* at 389.

indeed a necessary one. A bulletin summarizing the Report quotes it and aptly states:

“An irrepressible conflict has arisen between two national communities within the narrow bounds of one small country. . . . There is no common ground between them.” Their national aspirations are incompatible. The Arabs desire to revive the tradition of the Arab golden age. The Jews desire to show what they can achieve when restored to the land in which the Jewish nation was born.⁷³

After World War II, the outlines of this plan were adopted by the UN General Assembly in Resolution 181—“the partition plan.”⁷⁴ The Resolution envisaged, and indeed aimed, to ensure freedom of movement and economic integration between the Jewish and Arab states. The way the separatist model played out on the ground, alas, defeated these objectives. The main political representation of Palestinian Arabs at that time—headed by Hajj Amin-Al-Husseini—rejected the partition.⁷⁵ War broke out when neighboring Arab states sent their troops to intervene in Mandatory Palestine and to attack the Jews and their political presence in the area.⁷⁶ Yet, the effort was not only successful in defending the state-in-the-making, but also enabled military groups to occupy territories beyond those granted under Resolution 181.⁷⁷ On May 14, 1948, Israel declared its independence.⁷⁸

For most Palestinian Arabs, Israeli independence did not translate into citizenship in a newly mapped territory. Rather, it marked the moment at which they became foreigners, refugees, intruders, or stateless people.⁷⁹ As imaginary and ideological limits for the nation were articulated, physical lines mapped control over territory for the new state, with around 750,000 Palestinians officially outside its borders.⁸⁰ As the violence subsided, a state project to prevent their return gradually materialized by various means,

73. *The Report of the Palestine Royal Commission*, BULL. INT’L NEWS, July 24, 1937, at 3, 7.

74. G.A. Res. 181 (II), Resolution Adopted on the Report of the *Ad Hoc* Committee on the Palestinian Question, at 132–50 (Nov. 29, 1947).

75. Philip Mattar, *The Mufti of Jerusalem and the Politics of Palestine*, 42 MIDDLE E. J. 227, 238 (1988).

76. Office of the Historian, *The Arab–Israeli War of 1948*, U.S. DEPT. OF STATE, <https://history.state.gov/milestones/1945-1952/arab-israeli-war> [<https://perma.cc/TN7H-2U53>].

77. One Palestinian political commentator describes this as “the first illegal annexation.” Nasser al-Qudwa, *Once Again, the Palestinian State and Its Protection Is the Basic Issue*, MASARAT (July 26, 2020), <https://www.masarat.ps/article/5466/%D9%85%D8%B1%D8%A9-%D8%A3%D8%AE%D8%B1%D9%89> [<https://perma.cc/E9TV-BZGR>].

78. THE DECLARATION OF INDEPENDENCE (Isr. 1948).

79. See BERDA, *supra* note 28, at 16 (discussing how the military government following the Israeli War of Independence used colonial tools to “monitor the movements” of the Palestinians).

80. See SHIRA ROBINSON, *CITIZEN STRANGERS: PALESTINIANS AND THE BIRTH OF ISRAEL’S LIBERAL SETTLER STATE* 36 (2013) (discussing how there were 750,000 Palestinian refugees arriving in neighboring states).

including the erasure of Palestinian neighborhoods and villages.⁸¹ Those remaining came to be classified by population lists, identity documents, questionnaires, and executive regulations.⁸² Landscapes of paper shaped their daily lives, delineating the spaces and communities to which they belonged, and most significantly, to which they could not return. Authorities confiscated their properties by the force of a law that declared them “absentees”—a euphemism that ignores the bloody circumstances of this absence.⁸³

The war thus gave way to the demographic rationality of “otherness,” one that was reflected in the Jewish national movement’s existential goal of achieving and maintaining a majority.⁸⁴ Under the guise of a specific understanding of the principle of self-determination in international law—one closely tied with colonial peace-building in other regional contexts—partition contributed to the conditions for a forced displacement of Palestinian Arabs.⁸⁵ The Palestinian refugees were excluded from citizenship in Israel—the new state that was established within the armistice line agreed upon in the Rhodes Treaty.⁸⁶ And the plan left a phantom behind it—that of the unborn Palestinian State. These factors were crucial for the emergence of a separatist *nomos*, which gradually evolved into an overarching, hegemonic paradigm.

Indeed, the partition plan ended up cementing separation into reality, casting it ever since into the political commonsense in the area. Perceived as a territorial solution to the conflict, partition would shape citizenship as mutually exclusive. And it turned peoples’ location and their mobility capacities into determining factors in claiming citizenship. This is the view, often made explicit today, that Palestinian participation in the political framework that Israel put in place was incommensurable with the right to

81. Simha Flapan, *The Palestinian Exodus of 1948*, J. PALESTINE STUD., Summer 1987, at 3, 11.

82. See Yael Berda, *Managing ‘Dangerous Populations’: How Colonial Emergency Laws Shape Citizenship*, 51 SEC. DIALOGUE 557, 559–60 (2020) (discussing how the Israelis used “a set of bureaucratic practices of population control and surveillance” against the Palestinians).

83. Absentees’ Property Law, 5710–1950, § 4, 20 LSI 68 (1948–87) (Isr.).

84. Jeremy Forman & Alexandre Kedar, *From Arab Land to ‘Israel Lands’: The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948*, 22 ENV’T & PLAN. D: SOC’Y & SPACE 809, 810–11 (2004) (discussing how Israel used its independence to take land from the Palestinians in line with its larger state goals).

85. See Drew, *supra* note 7, at 113–14 (“[I]n the inter-war and World War II periods, population transfer had become . . . ‘deep rooted’ in mainstream international thinking as a means of implementing the principle of national self-determination.” (internal citations omitted)).

86. General Armistice Agreement Isr.-Jordan, art. V, Apr. 3, 1949, I.L.M.; see ÖZSU, *supra* note 7, at 15 (discussing how it was common in Europe throughout the nineteenth century to introduce “protective instruments for minorities.”).

self-determination for Jews.⁸⁷ Importantly, Jewish Israelis came to hold this view, in different versions, almost across the entire political spectrum.⁸⁸

As noted above, the PLO historically supported a plan to establish one democratic Palestinian state across all of historical Palestine.⁸⁹ In that regard, the Palestinian imagination aligned with the separatist paradigm much later—with the peace talks in the early 1990s—and even then, only partially.⁹⁰ The historical Palestinian plan for one state was, however, not to be realized through participation in the political structures established by Israel.⁹¹ Rather, it was premised on a refusal to recognize Israel as a state. The majority of Jews in Palestine believed, not unreasonably, that the PLO's plan sought their own expulsion.⁹² As one commentator observes, Hamas's position since its success in the 2006 Gaza elections is the main contemporary heir of this historical position.⁹³

III. An Excess of Control

While the logic underlying the partition plan was to advance stability, the conflictual structure between the two separate national groups generated instability from the outset. Within Israel proper, a large Palestinian Arab

87. *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution*, HUM. RTS. WATCH (April 27, 2021), <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution> [https://perma.cc/ARE6-PLFV]. This view is reflected, for example, in proposals to remove Palestinian citizens from Israel in the course of a “land swap,” which was included recently in Trump’s plan for a “Deal of the Century.” See Michael Crowley & David M. Halbfinger, *Trump Releases Mideast Peace Plan That Strongly Favors Israel*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/01/28/world/middleeast/peace-plan.html> [https://perma.cc/TX3Q-EW24].

88. See DANIEL EGEL, C. ROSS ANTHONY, SHIRA EFRON, RITA T. KARAM, MARY E. VAIANA & CHARLES P. RIES, *ALTERNATIVES IN THE ISRAELI-PALESTINIAN CONFLICT* 49 (2021) (showing through a two-year study that most Israeli Jews prefer continuation of the status quo).

89. Ghada Karmi, *The One-State Solution: An Alternative Vision for Israeli–Palestinian Peace*, 40 J. PALESTINE STUD., Winter 2011, at 62, 63.

90. *Id.* at 63–64.

91. See *id.* at 69 (outlining the death of the “imaginative vision” of a unitary secular democratic state); see also Bisharat, *supra* note 16, at 11 (discussing that the single-state plan involves the Muslims ruling over the Christians and Jews).

92. Karmi, *supra* note 89, at 63 (“[T]he aim of the newly formed PLO in 1964 was ‘the recovery of the usurped homeland in its entirety’ . . .”).

93. See John Quigley, *Self-Determination in the Palestine Context* 3 (Pub. L. & Legal Theory, Working Paper No. 101, 2007) (discussing how proponents of the one-state approach were likely to vote for Hamas’s candidates in 2006). See also Letter from Mohammed Zahar, Foreign Minister, Palestinian Authority, to Kofi Annan, U.N. Secretary-General (Apr. 4, 2006), <https://www.scoop.co.nz/stories/WO0604/S00158/palestine-fm-dr-mahmoud-zahhar-letter-to-unsg.htm> [https://perma.cc/ZY3P-KVV4] (addressing the aim of the Palestinian people as being “to establish their fully sovereign independent State, with Jerusalem as its capital, and the right of the Palestine refugees, including their right to return and compensation”).

population remained after 1948 and received voting rights almost immediately.⁹⁴

As Hassan Jabareen has argued, Israel granted such rights as part of a pattern of illiberal coercion, not in the context of free choice under an equal social contract.⁹⁵ Voting rights, he explains, were granted not as a measure of emancipation within a new state, but precisely as a means to extinguish these people's external self-determination.⁹⁶ This seems to be in direct contradiction with UN pronouncements, according to which self-determination must be "freely determined" by a people.⁹⁷ And yet, the history of Palestinian citizens in Israel reveals another, non-separatist notion of self-determination: one that is premised on the sovereignty of the people, not territorial sovereignty; one that is closely tied with the right to vote; and one that has come to constitute a modality of Palestinian self-determination.

To be sure, even after Palestinian residents of Israel obtained voting rights, the rationality of separation reflected in the partition plan prevailed. Indeed, as Lana Tatour explained: the relationship between citizenship and voting rights was often complicated.⁹⁸ When the Israeli Citizenship Law was enacted in 1952, it sometimes served to disenfranchise Palestinian voters.⁹⁹ In the state's first four years, "the question of suffrage was disassociated from that of citizenship, since the status of Israeli citizenship did not yet formally exist in domestic law."¹⁰⁰ "Some Palestinians thus held suffrage rights though formally they were not citizens," until "the enactment of the Citizenship Law denied citizenship to a significant number of Palestinians who voted in Israel's first elections in January 1948 and/or in the second parliamentary elections in July 1952."¹⁰¹

In the coming years, Israel effected separation by imposing movement restrictions on Palestinian towns and villages and by governing Palestinians

94. *A Threshold Crossed*, *supra* note 87.

95. Hassan Jabareen, *Hobbesian Citizenship: How the Palestinians Became a Minority in Israel*, in *MULTICULTURALISM AND MINORITY RIGHTS IN THE ARAB WORLD* 1, 7 (Will Kymlicka & Eve Pföstl eds., 2014).

96. *Cf.* Massad, *supra* note 64 (noting that the right to self-determination by Jewish settler colonists came at the expense of the right to conquest the Palestine).

97. *See* G.A. Res. 2625 (XXV), *supra* note 11, at 133–34.

98. *See generally* Lana Tatour, *Citizenship as Domination: Settled Colonialism and the Making of Palestinian Citizenship in Israel*, *ARAB STUD. J.*, Fall 2019, at 9–10 (describing the historical background of citizenship and rights of Palestinians in Israel).

99. *Id.* at 30.

100. *Id.* at 17.

101. *Id.*

by colonial emergency laws.¹⁰² Through systemic impediments on freedom of movement and practices of surveillance,¹⁰³ partition between Palestinians and Jewish Israelis was achieved by other means and ensured the two groups would remain distinct “nations.”¹⁰⁴ Palestinians generally held political rights with their citizenship status, while they were confined to the territory of the phantom Arab state on the other side of the partition line under U.N. Resolution 181. In 1966, the military government ended, but ethnic separation continued to prevail through a mixture of formal and informal limitations on planning and urban development, and through a separate education system for Palestinian Arabs.¹⁰⁵

A. *The Significance of Indefinite Occupation*

With the occupation of new territories that came under Israeli control after the 1967 war, significant legal changes were required. Without annexation—which at this point was already illegal under customary international law¹⁰⁶—the law that would apply to Palestinians in the West Bank and Gaza was international humanitarian law (particularly, the law of occupation). While Israel never formally accepted that the territories were “occupied,” it applied The Hague Regulation of 1907, as well as parts of the Fourth Geneva Convention.¹⁰⁷

The law of occupation is not a legal framework for governing a population over a long period of time. The Israeli Supreme Court characterized the occupation in 1982, opining that “[i]t is, of its essence, a

102. Sara Roy, *Reconceptualizing the Israeli–Palestinian Conflict: Key Paradigm Shifts*, J. PALESTINE STUD., Spring 2012, at 71, 78; Alison P. Brown, *The Immobile Mass: Movement Restrictions in the West Bank*, 13 SOC. & LEGAL STUD. 501, 520 (2004).

103. Orna Ben-Naftali, *X Rays*, in THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 475, 477 (2018); Helga Tawil-Souri, *Colored Identity: The Politics and Materiality of ID Cards in Palestine/Israel*, SOC. TEXT, Summer 2011, at 69; Andrew Stevens, *Surveillance Policies, Practices and Technologies in Israel and the Occupied Palestinian Territories: Assessing the Security State 1* (Soc. Sci. & Hum. Rsch. Council Can., Working Paper No. 4, 2011); Ismael Abu-Saad, *Separate and Unequal: The Role of the State Educational System in Maintaining the Subordination of Israel’s Palestinian Arab Citizens*, 10 SOC. IDENTITIES 101, 102 (2004).

104. This is the category specified on Israeli national identity cards. Helga Tawil-Souri, *Uneven Borders, Coloured (Im)mobilities: ID Cards in Palestine/Israel*, 17 GEOPOLITICS 153, 155 (2012).

105. Ilan Saban, *Theorizing and Tracing the Legal Dimensions of a Control Framework: Law and the Arab-Palestinian Minority in Israel’s First Three Decades (1948–1978)*, 25 EMORY INT’L L. REV. 299, 344 (2011).

106. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 1, ¶ 145 (Feb. 25).

107. Convention IV with Respect to the Laws and Customs of War on Land (With Annexed Regulations) art. 3, Oct. 18, 1907, 2 AJIL Supp. 90; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Orna Ben-Naftali, *Geneva Law*, in THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 141, 148 (2018).

temporary regime even if this temporariness is of long duration.”¹⁰⁸ But what had been held as temporary was becoming indefinite.¹⁰⁹ During the same year, former Deputy Mayor of Jerusalem, Meron Benvenisti, famously declared that with 100,000 Jewish Settlers in the West Bank, it was “five minutes to midnight” for the two-state solution.¹¹⁰ Realizing that the international law of occupation framework is inadequate under such circumstances, Ben-Naftali and Yuval Shany argued in a 2003 piece that the framework should be supplanted by international human rights law,¹¹¹ a framework applicable on the basis of the exercise of jurisdiction over a territory, regardless of its political status.¹¹²

The Palestinian popular uprising between 1987 and 1993, the “First Intifada,” led to the Oslo Peace Process.¹¹³ Yet over time it became clear that the failures of the Oslo process led to annexation de facto and the territorial, economic, and legal expansion of Israel’s control over every aspect of Palestinian life.¹¹⁴ This has not only left a vacuum of rights, it has also generated an excess of control: Palestinians are actively governed by the Israeli state apparatuses and markets but are denied political participation in decisions that affect their lives. The right to protection from discrimination, and indeed the right to vote, are central parts of the human rights framework. Yet even after the view Shany and Ben-Naftali espoused became more and more accepted,¹¹⁵ these two rights could not be engaged under a situation of occupation. The implicit assumption—one that no one seemed to question—

108. H CJ 393/82 *Jam’iat Iscan Al-Ma’almoun Al-Tha’auniya Al-Mahduda Al-Mauliya* [Cooperative Society v. Military Commander of Judea and Samaria Region], 37(4) PD 785, ¶ 23 (1983) (Isr.).

109. The difference being that the “temporary” definitely has an end while the “indefinite” may or may not have an end. Ben-Naftali, *supra* note 3, at 598.

110. Peter Beinart, *Yavne: A Jewish Case for Equality in Israel–Palestine*, JEWISH CURRENTS (July 7, 2020), <https://jewishcurrents.org/yavne-a-jewish-case-for-equality-in-israel-palestine> [<https://perma.cc/X2MB-M4DM>].

111. Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 24 (2003).

112. The term jurisdiction is often used in order to describe scope of application. G.A. Res. 14668, International Covenant on Civil and Political Rights, at 173 (Dec. 16, 1966); CERD, *supra* note 25, at 1; G.A. Res. 24841, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at 114 (Dec. 10, 1984); G.A. Res. 44/25 Convention on the Rights of the Child, at 1–2 (Nov. 20, 1989).

113. Khalid Farraj, *The First Intifada (Part II): The Road to Oslo*, 49 J. PALESTINE STUD. 93, 95–96 (2019).

114. Zemach, *supra* note 3, at 275.

115. *See, e.g.*, H CJ 3239/02 *Marab v. IDF Commander in the West Bank*, 57(2) PD 349, ¶ 8–9, 32 (2003) (Isr.) (declaring Orders for mass detentions without protections such as individual examination of each case, legal representation, and judicial review to be in conflict with the fundamentals of both international and Israeli law).

was that the *lex specialis* of the laws of war could still trump the right to participation in the political community.¹¹⁶ The time has come to question that assumption; as it is based on the separatist *nomos* which sought partition to foster stability, it defies its underlying rationale.

One cannot emphasize it enough: annexation de facto, or the “one-state reality,” has implications for every aspect of daily life.¹¹⁷ Indeed, as harsh, sophisticated, and violent as a military occupation can be, annexation de facto is different. It means that the organizations and apparatus of the state and its markets deeply infiltrate the occupied (Palestinian) society. Annexation de facto is not only a direct result of the settlement expansion project, but also of the economic dependencies and massive surveillance system that govern Palestinian mobility.¹¹⁸ It is the penetration of the Israeli state into Palestinian daily life, economy, and society that underscores the nature of this control—a nature that far exceeds the traditional scope of control exercised by an occupation regime. This excess requires that people subjected to this control participate in the decisions that affect every minute detail of their lives. The right to vote and be elected are the vehicles to effect this participation.

In a recent ruling, however, the Israeli Supreme Court, sitting in its capacity as the High Court of Justice, upheld the right to equality of everyone affected by Israeli legislation.¹¹⁹ The context for this holding was the Court’s striking down of a law that sought to expropriate private Palestinian property in the occupied territory for the purpose of Jewish expansionism.¹²⁰ The Court thus echoes, in an unexpected way, the above-mentioned CERD-based decision;¹²¹ paraphrasing Lustick, we start to see the evidence of the hegemonic legal paradigm crumbling with the imposition of equality by an Israeli court.¹²²

Alluding to the Palestinian displacement of 1948 and the “Absentee Property Law,” the Court says clearly that similar laws expropriated private

116. Jabareen, *supra* note 95, at 217.

117. LUSTICK, *supra* note 4, at 88–89.

118. Benjamin G. Waters, *An International Right to Privacy: Israeli Intelligence Collection in the Occupied Palestinian Territories*, 50 GEO. J. INT’L L. 573, 575 (2019); Cédric Parizot, *An Undocumented Economy of Control: Workers, Smugglers and State Authorities in Southern Israel / Palestine*, HAL: ARCHIVES-OUVERTES.FR 1, 3 (2012); Fadle M. Naqib, *Economic Aspects of the Palestinian–Israeli Conflict: The Collapse of the Oslo Accord*, 15 J. INT’L DEV. 499, 504–07 (2003); Amira Hass, *Israel’s Closure Policy: An Ineffective Strategy of Containment and Repression*, 31 J. PALESTINE STUD. 5, 6–7 (2002); Elia Zureik, *Constructing Palestine Through Surveillance Practices*, 28 BRITISH J. MIDDLE E. STUD. 205, 222–26 (2001).

119. Tamar Hostovsky-Brandes, *Silwad Municipality v. The Knesset: The Invalidation of the Settlement Regularization Law and Its Aftermath*, INT’L J. CONST. L. BLOG: I-CONNECT (Sept. 15, 2020), <http://www.iconnectblog.com/2020/09/silwad-municipality-v-the-knesset-the-invalidation-of-the-settlement-regularization-law-and-its-aftermath/> [<https://perma.cc/3EWT-X8HV>].

120. *Id.*

121. CERD, *supra* note 25, at 3.

122. LUSTICK, *supra* note 4, at 66–68.

Palestinian lands shortly after Israel's founding.¹²³ The comparison is indicative. It suggests that at that time, no solid protections existed for equality among the population of the newly founded state, but that this is no longer the case. Indeed, quoting famous words by former Chief Justice Dorit Beinisch, the Court reiterates that such a violation of equality can no longer be defended today.¹²⁴

While Beinisch is usually counted among the more “liberal” justices on the bench, this view is not confined to “liberal” judges. Thus, in a famous opinion seeking to legalize Jewish settlements in the West Bank, the late “conservative” Justice Edmond Levi asserted a similar position of equality among all those living under Israeli control.¹²⁵ As one commentator remarked on the pages of the Israeli newspaper, Ha'aretz: given the realities of racial hierarchy in the West Bank, this rhetoric of equality is “surreal.”¹²⁶ But the fact that the Court devises such a bizarre dream reflects, once again, the reality of excessive Israeli control that it confronts.

This excess of control comes with a legal lesson. And the descriptive account of facts on the ground that it relies upon suggests specific prescriptive conclusions. If we are just able to drop the baggage we collectively carry on our backs—the view that self-determination is *necessarily* dependent on separation—we will discover new potential in international human rights law. Without the dubious colonial inheritance from the interwar period and the separatist paradigm, it will become clear that international human rights law can indeed become the basis not only for the political participation of an occupied people, but also for its liberation. Constitutional law is arguably the most natural source for rights of political participation (including voting rights).¹²⁷ But when a people is occupied indefinitely, the rights to political participation and equality under international human rights law become an alternative source for voting rights.

123. HCJ 1308/17 Iryat Silwad v Haknesset, ¶ 72 (2020) (Isr.).

124. *Id.*

125. THE LEVY COMMISSION REPORT ON THE LEGAL STATUS OF BUILDING IN JUDEA AND SAMARIA 64–65 (Regavim trans., 2014) (2012), https://www.gov.il/BlobFolder/news/spokeedmond090712/he/documents_doch090712.pdf [<https://perma.cc/JN2A-E7QB>]; *but see* Ben-Naftali, *supra* note 10, at 279 n.11 (quoting Justice Levy's opinion that Israel “enjoys not only the historical right to hold and settle in [the Gaza Strip] . . . but also a right enshrined in international law.”).

126. Menachem Mautner & Joel Singer, *Hasurealism Shel Bagatz* [*The High Court's Surrealism*], HA'ARETZ (June 13, 2020), <https://www.haaretz.co.il/opinions/premium-1.8914436> [<https://perma.cc/U86J-SLT9>].

127. Eyal Benvenisti & Alon Harel, *Embracing the Tension Between National and International Human Rights Law: The Case for Discordant Parity*, 15 INT'L J. CONST. L. 36, 40 (2017).

The latter can be obtained even when a group is not tied together by a single political contract. In this construction, international human rights law functions in the interim period—that is, until self-determination is realized through new political institutions. This can happen either by separation from the occupying state or by a change in its basic structure. Voting rights obtained by a group under occupation realize a measure of internal self-determination, which is then ultimately granted the external aspect as well.

B. Palestinian Self-Determination Inside Israel

Despite its very different legal trajectory and political circumstances, the de facto annexation of the West Bank is not the first time that Palestinians face a situation where they are occupied indeterminately.¹²⁸ Indeed, Palestinians have an important experience of being under an excess control in a state they did not choose to be citizens of. Between 1948 and 1952, the Palestinian Arab population that remained in Israel after the “Nakba” participated in Israeli elections even while they were not yet citizens.¹²⁹ Governed by the military government that ruled between 1949 and 1966, Palestinians were granted citizenship only in 1952; but they had already participated in elections prior to the application of formal citizenship laws.¹³⁰

As Jabareen writes, when Palestinians within Israel first voted in Israeli elections, official Israeli definitions distinguished “The State of Israel” from the “occupied territories” or “administered territories” in which the majority of Palestinians lived.¹³¹ These were the territories designated as the Arab state in the partition plan. Ben-Gurion explained the governmental policy by the indeterminacy of the status of the occupied or administered territories: “It is not wise to announce that we will not cede captured territory, nor is it wise to announce that we will.”¹³² Such words strikingly echo the positions of Israeli governments regarding the West Bank from 1967 to this day. They reflect the logic of indeterminate occupation generating, eventually, de facto annexation. Participation in the 1948 census, which preceded the first Israeli elections for Palestinians inside of Israel, was critical. It was conducted amidst a campaign to exile “infiltrators,” the refugees attempting to return to their homes.¹³³ For Palestinians of “the inside” (Āl-Dāḥl), citizenship was

128. See al-Qudwa, *supra* note 77 (chronicling Palestine’s history of occupation).

129. Tatour, *supra* note 98, at 14, 17 (explaining that between the “Nakba,” which took place in 1948, and 1952, some Palestinians held suffrage rights even though they were not citizens).

130. Jabareen, *supra* note 95, at 193, 202.

131. *Id.* at 194.

132. D. Ben-Gurion, *Prime Minister’s Statement; Report of the Foreign Minister* (June 17, 1948), in 1 MAJOR KNESSET DEBATES, 1948–1981, at 108, 133 (Netanel Lorch ed., Dorothea Vanson-Shefer trans., 1993).

133. Anat Leibler & Daniel Breslau, *The Uncounted: Citizenship and Exclusion in the Israeli Census of 1948*, 28 ETHNIC & RACIAL STUD. 880, 880 (2005).

first and foremost a status of non-deportability under Israel's "anti-infiltration" law.¹³⁴ Very much like the Palestinians in the West Bank and Gaza, Palestinians were governed through emergency regulations and security laws. Rouhana and Sabbagh-Khoury have thus described the citizenship granted to Palestinians under the military rule of emergency regulations as "settler-colonial citizenship."¹³⁵

Most importantly, for the Palestinians inside Israel, political participation did not entail relinquishing their rights of self-determination. It was the product of the practical necessities instantiated by an indeterminate occupation of the lands that had been designated to be the Arab state. And indeed, the vision of "a state for all its people," which originated in thinking about Palestinian national self-determination, has transformed the scope of the public imagination of what Israel may become in the future.¹³⁶ What has allowed Palestinians to advance this vision into the realm of imaginable political reality, even without a sovereign Palestinian state, is the Palestinian citizens' exercise of an individual right to vote. Today, the Palestinian right to self-determination is exercised in Ramallah by the Palestinian Authority; in Gaza, by the Hamas authorities; and in Jerusalem, by Palestinian members of the Israeli Knesset.¹³⁷ In each place, the right takes a different form. But, there is no a priori judgment that one is better than the other. Indeed, they are not, or at least not necessarily, mutually exclusive; nor does each or any exclude the eventual realization of Palestinian collective right to self-determination.

The right to self-determination is often upheld as underwriting the connection between a people and its land.¹³⁸ However, "[u]nder current international law, and in view of the principle of self-determination, sovereignty remains vested in the occupied people."¹³⁹ Sovereignty and national rights are not embodied solely in the territory itself, or even in the previous sovereign state, but in the people. Further, self-determination is an enduring right, even if its material realization is delayed by occupation or

134. See BERDA, *supra* note 28, at 37 (identifying one's Palestinian identity as the primary reason they were likely to be excluded from Israel).

135. Nadim N. Rouhana & Areej Sabbagh-Khoury, *Settler-Colonial Citizenship: Conceptualizing the Relationship Between Israel and Its Palestinian Citizens*, 5 SETTLER COLONIAL STUD. 205, 206 (2015).

136. Shourideh C. Molavi, *Contemporary Israel/Palestine*, in THE OXFORD HANDBOOK OF CONTEMPORARY MIDDLE-EASTERN AND NORTH AFRICAN HISTORY 1, 13 (Amal Ghazal & Jens Hanssen eds., 2018).

137. *A Threshold Crossed*, *supra* note 87.

138. MARGARET MOORE, A POLITICAL THEORY OF TERRITORY 35 (2015).

139. Ben-Naftali, *supra* note 107, at 143.

conquest.¹⁴⁰ The whole premise, and most basic principle of the international law of occupation, is that the occupation does not transfer sovereignty. If self-determination is an inalienable right that is embodied in the people, why would individual participation in the political life of the occupying power, under conditions of an indefinite occupation, risk extinguishing it?

IV. Between Individual and Collective Rights

When, in the mid-1970s, Yasser Arafat presented a vision of one democratic state as part of a vision of decolonization, he was working within a larger historical-political context, one in which individual rights were not thought of as separate from collective rights. While their bifurcation has seemed to dominate the theory of self-determination, one should not simply assume it a priori. As Karen Knop has argued, the jurisprudence supporting the right displays “not a uniform judicial method, but a pattern of creativity that may be seen as responsive” to practical political challenges.¹⁴¹

Thus, for instance, midcentury Black Atlantic intellectuals have conceived of universal suffrage as decolonization. As political theorist Kevin Duong explains, they “figured suffrage expansion as a vector for political self-determination and cultural self-expression” and mass enfranchisement as “a Trojan Horse” and that universal access to the ballot box would explode rather than redeem the imperial institutions into which subject populations entered.¹⁴² Like the Marxist view of self-determination, these views do not reflect the dominant bifurcation between individual and collective rights. The “nation” is not a given reality, where every voter needs to fit within her preexisting box. Rather, voting is a vehicle to redefine and re-constitute the nation.¹⁴³ Voting and belonging to a nation are mutually constitutive, a performance of belonging by making a difference.

Yet the dominant bifurcation is not only a matter of political theory. As already mentioned above, it is also reflected in mainstream readings of international law. The right to vote is recognized under Article 25 of the International Covenant on Civil and Political Rights (ICCPR).¹⁴⁴ A distinction is drawn between the principle of collective self-determination and the right of individuals to participate in those processes which constitute the conduct of public affairs. As the UN Human Rights Committee explains:

The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by

140. *Id.* at 158–59.

141. KNOP, *supra* note 11, at 110.

142. Duong, *supra* note 1, at 412.

143. *Cf.* Jacques Derrida, *Declarations of Independence*, 7 *NEW POL. SCI.* 7, 9, 13 (1986) (describing the construction of the Declaration of Independence to effect voting and the development of the nation).

144. G.A. Res. 14668, *supra* note 112, at 12–13.

article 1 (1) [the right to self-determination], peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.¹⁴⁵

Even so, no single realization of the right to self-determination can prevail.¹⁴⁶ Far from necessitating a strict separation between collective and individual rights, the analytical distinction above can be read as defining their interconnectedness. In the present context, one can be fully respectful of the Palestinian right to self-determination, while also serious about the rights of individuals to participate in decisions that shape their current reality. Further, one might mistakenly conclude that voting rights in Israel may harm the measure of self-government that Palestinians have under the Palestinian Authority. This couldn't be further from reality. International law clearly allows dual citizenship.¹⁴⁷ While elections have not been held in the Palestinian Authority since 2006,¹⁴⁸ there is no reason why, in principle, Palestinians should not be able to both vote for representatives of the occupying state which controls their daily lives and for representatives of the Palestinian state currently under the occupier's control.

The Israeli government has used the theory of transformative occupation, developed first by its own High Court of Justice and later used to support the U.S.'s occupation of Iraq,¹⁴⁹ to circumvent prohibitions on the use of natural resources in the occupied territory for the benefit of the occupier. But, this objectionable decision, upheld by Israel's Supreme

145. *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, OFF. HIGH COMM'R FOR HUM. RTS. ¶ 2 (Dec. 7, 1996), <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2025.pdf> [<https://perma.cc/GDA4-WBKE>].

146. *See* G.A. Res. 2625 (XXV), *supra* note 11, at 124 (“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.”).

147. *See, e.g.*, Peter J. Spiro, *Dual Citizenship as Human Right*, 8 INT'L J. CONST. L. 111, 116–17 (2008) (“Where dual nationality was once highly disfavored, if not outlawed, it has become widely accepted. . . . Under the new majority practice, those who naturalize maintain their original citizenship as a default position.”).

148. Ben White, *Are Palestinian Elections on the Horizon?*, AL JAZEERA (Dec. 15, 2019), <https://www.aljazeera.com/news/2019/12/palestinian-elections-horizon-191211182354352.html> [<https://perma.cc/5FXM-WQE8>].

149. Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUROPEAN J. INT'L L. 721, 737 (2005). For the Israeli case, see generally H CJ 393/82 Jam'iat Iscan Almalmun Althaunia Almahduda Almesaulia v. Commander of IDF in the Judea and Samaria Area, 7(4) PD 738 (1983) (Isr.).

Court,¹⁵⁰ has a flipside. If the transformative nature of the occupation requires the recognition of long-term needs, it must recognize that political rights cannot be extinguished indefinitely. And as mentioned above, granting Palestinians the voting rights they deserve does not necessarily mean that we are looking at a one-state future. It remains a possibility, but once people have equal voting rights, they can use them to help establish any political framework they want, including one state, two states, or a confederation.¹⁵¹ Individual voting rights are thus not conceived as “the free association or integration with an independent State”—i.e., the state of Israel.¹⁵² They are conceived as a way of deciding just how to “emerge[] into any other political status” including “[t]he establishment of a sovereign and independent state.”¹⁵³

The right to citizenship—or “nationality” as it is more often called in international legal discussions—is at the heart of a state’s prerogative. Any interpretation of international law that assumes that a state has a *duty* to give particular people citizenship, may thus be regarded as highly problematic. Israel has no such duty and is free to withdraw from the occupied territories and disallow Palestinians there from political participation in its institutions. If it does not do so—whether while imposing formal annexation or not—the occupation cannot be an obstacle to individual political rights. A contemporary interpretation of international law—and one that couples the non-separatist idea of self-determination with the reality of excessive and indefinite control—presents a plausible solution. It is hard to see how Israel can otherwise avoid violating Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination, which bars “racial segregation and apartheid.”¹⁵⁴

V. A Few Important Objections

We have shown how voting rights may become a vehicle for self-determination for populations under indeterminate occupation, specifically Palestinians occupied by Israel. Before concluding, a few basic objections to the argument merit response.

150. See generally H CJ 2164/09 Yesh Din v. Military Commander in the West Bank, (2011) (Isr.) (upholding Israel’s use of natural resources).

151. See Dahlia Scheindlin, *An Israeli–Palestinian Confederation Can Work*, FOREIGN POL’Y (June 29, 2018), <https://foreignpolicy.com/2018/06/29/an-israeli-palestinian-confederation-can-work/> [<https://perma.cc/LV5P-43QZ>] (explaining the differences between the three alternatives).

152. G.A. Res. 2625 (XXV), *supra* note 11, at 124.

153. *Id.*

154. G.A. Res. 2106 (XX), *supra* note 38, art. 3. For a good review of sources on the argument that Israel is an apartheid state, see Noura Erakat, *Beyond Discrimination: Apartheid Is a Colonial Project and Zionism Is a Form of Racism*, EUROPEAN J. INT’L. L. BLOG: EJIL:TALK! (July 5, 2021), <https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism/> [<https://perma.cc/5BKZ-XYZK>].

First, a program for voting rights and citizenship is clearly not suitable for all peoples under protracted occupation. Their number may be too small to obtain any electoral weight in the occupying country, making it impossible to exercise self-determination through the electoral process. It should therefore be clear: an occupied people are not under the duty to accept voting rights offered by an occupying power. Nor can offering such rights, in and of itself, rectify a condition of indefinite occupation.¹⁵⁵ As we have emphasized, the voting patterns of a population under indefinite occupation do not, in themselves, establish title in an occupied territory. The decision on how to exercise self-determination remains for the people whose rights are to be realized. No realization of individual rights of participation can extinguish the collective claims.

Second, some readers will have surely asked themselves, “What about the right to self-determination of Israeli Jews?” While this is not our subject here, we remain deeply concerned about this issue as well. Yet, there is nothing within the proposal outlined above—to realize Palestinian self-determination by a demand to vote within Israel—that compromises Jewish-Israeli self-determination. Indeed, a condition in which Israel permanently controls a population of Palestinian non-citizens without voting rights is arguably destructive to Jewish self-determination. As others have shown, over the last years the need to preserve such control has skewed participatory processes for Jews inside Israel. It has eroded our own possibility of realizing political rights—both individual and collective—as well. To be sure, we reject any interpretation of self-determination for Jews which is premised on a claim of entitlement to a Jewish demographic majority. Although such a claim is deeply entrenched in Israeli constitutional law and has been asserted numerous times by the Israeli Supreme Court, we believe it is inimical to democratic principles; to use Joseph Massad’s words, it reveals how self-determination can become, in practice, a “right of conquest.”¹⁵⁶ In the latter condition, Palestinians are denied access both to their own sovereignty and to participation in the sovereign state controlling them.

A third question that may arise is how the model above influences important considerations of national security. The preservation of security and stability in the area is a condition of possibility for having and for making a life. This, too, is a condition international law seeks to realize. The

155. Orna Ben-Naftali, *Temporary/Indefinite*, in *THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY* 399, 410 (2018) (arguing that indefinite occupations inevitably result in apartheid).

156. See Massad, *supra* note 64 (“As in the rest of the settler-colonies, the ‘right of conquest’ of land in Palestine continues to be safeguarded as a ‘right of self-determination’ for the Jewish settler colonists and their descendants.”).

realization of this condition for both Palestinians and Jews under Israeli control has been hampered to the extreme by the indeterminate occupation. Universal suffrage as an interim measure that does not negate collective self-determination will only help the population choose rules that can truly provide it with safety.

A fourth and crucial issue that cannot go unaddressed here is the Palestinian refugee question. Palestinians who have called for one democratic state in historic Palestine have done so in the name of the entire Palestinian people, both inside and outside of the bounds of current Israeli control. They have called for one democratic state precisely to exercise the right to return of Palestinians displaced during 1948 and since then. It is therefore questionable whether any vision premised on the voting rights of those under Israeli control, and not Palestinians in the diaspora, can indeed be a vehicle for Palestinian self-determination.¹⁵⁷ While the issue is indeed a defining one for Palestinian self-determination, we believe that at present, the proposal to start from equal voting also provides the best path for realizing Palestinian return. Consonant with our approach towards voting as a procedural mechanism for negotiating deep normative questions, we believe here voting can have such a procedural role. By proposing legislative arrangements that will have to muster support among most voters between the river and the sea, Palestinians will have to translate return into concrete terms. The best possibility for allowing 1948 refugees to return to historic Palestine is through an immigration policy that would recognize the need to rectify historical wrongs. Such a policy, however, will have to be sensitive to the security and economic concerns of everyone living in the territory under Israeli control; it will have to reflect not only a moral position but also political feasibility.

Lastly, throughout the discussion, Gaza remained an elephant in the room. The current situation in Gaza is complex, both legally and factually. We therefore prefer to postpone a sustained treatment of Gaza. A few words are in order, nonetheless. The debate over the status of Gaza since the 2005 unilateral disengagement of Israel notwithstanding, Israel cannot unilaterally alter “the demographic composition, character and status of the Palestinian Territory occupied since 1967.”¹⁵⁸ The international legal framework includes Gaza in that territory. Thus, even if Gaza is not formally occupied, Gazans’ political participation in a Palestinian State is actively prevented by

157. Cf. Guy Goodwin-Gill, *Palestine, Statehood and the Challenges of Representation*, EUROPEAN J. INT’L. L. BLOG: EJIL:TALK! (Dec. 19, 2011), <https://www.ejiltalk.org/palestine-statehood-and-the-challenges-of-representation/> [<https://perma.cc/SWN6-SDGP>] (“It cannot be ignored that the majority of Palestinians are refugees living outside of Palestine, and that they have an equal claim to be represented . . .”).

158. See S.C. Res. 2334, ¶4 (Dec. 23, 2016) (condemning all Israeli settlement activities that alter the Palestinian Territory).

Israel. Given that Israel is still the state that determines most powerfully their basic conditions of life, they, too, should be invited to participate in the Israeli political process.

Conclusion

This Essay suggests a paradigm shift in international law, one that conceives voting rights under indeterminate occupation as a vehicle not only for the realization of individual rights, but also for collective self-determination. To make the case, it walks through the history and politics of one part of the world where the argument is particularly pertinent: Palestine and Israel. In doing so, we seek to draw a roadmap for overcoming what we call the separatist *nomos*.

We should start to imagine what it would mean, practically, for more and more Palestinians to demand voting rights in Israel. Initially, such demands may not be granted. But indeterminate occupation imposes upon Israel a duty to grant political participation to Palestinian non-citizens who want it. The pressure of Palestinian demands, and perhaps of foreign governments and social movements who will back them, may lead to their partial and gradual realization.

This will not happen without a sense of threat from the Israeli government and the mainstream of Israeli society. Both governmental and non-governmental Jewish-Israeli actors may respond to such demands with a measure of violence. The Palestinian struggle, too, may continue to have violent elements. It is not unlikely that Palestinian non-citizens objecting to such demands, as a form of “normalization,” may also respond with violence towards Palestinian non-citizens who will make them. Such forms of violence indeed present the most significant risk of the strategy we outline. But due to the sheer excess of Israeli control over all aspects of Palestinian life, it will be hard to stop the cascade once it starts.¹⁵⁹ The next thing you know, Palestinians gain larger political power within the Israeli system. They may even be able to vote for measures that realize their self-determination. One such measure could be secession from the Israeli state.

Once again, we have no illusion that such a program will go forward free of conflict. It is clearly against the interests of the Israeli government, and the Israeli government will try to shut it down. Yet, when compared to

159. See Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1, 4 (2001) (arguing that justice cascades like “the aftershock of an earthquake”); KATHRYN SIKKINK, *THE JUSTICE CASCADE* 5 (2011) (discussing how “there has been a shift in the *legitimacy of the norm* of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm”).

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other options, it might be a more secure form of conflict, which could save precious lives and win hearts around the world, including among Israeli Jews. Ultimately, whether to pursue such a reconfiguration of the law applicable during indeterminate occupation is up to the occupied people.