

Historical Justice: On First-Order and Second-Order Arguments for Justice

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This Article makes three moves. First it suggests and elaborates a distinction—already implicit in the literature—between what I will call the first and second order of arguments for justice (hereinafter FOAJ and SOAJ). In part, it is a distinction somewhat similar to that between just war and justice in war. SOAJ are akin to the rules governing justice in war or rules of engagement, while bracketing the reasons and causes of the conflict. FOAJ on the hand are those principles of justice and arguments that derive their power from the distribution of entitlements, rights and duties of the parties prior to the conflict they are supposed to adjudicate. FOAJ aim in many ways to restore the distribution of entitlements that existed on the eve of the conflict. Thus, all arguments for corrective or historical justice could be viewed as FOAJ.

The second move in the paper associates FOAJ with the Palestinians and SOAJ with Zionism first and Israel later on. The more the settler Zionist project became a reality, the more the Palestinian population felt a threat to their national project and exercised resistance, including violent resistance. The more Palestinians showed resistance, the more appealing and more relevant SOAJ of self-defense, security, and emergency.

The third move in the paper is to ask questions regarding the relation between FOAJ and SOAJ offer a critique of the distinction itself, and offers a critique of the way the distinction is being deployed

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in the case of Israel-Palestine. The Israeli claims for self-defense and security(SOAJ) are becoming so pervasive that they threaten to suspend the claims for historical justice forever (FOAJ), to the point that everything, even the regime that is crystallizing in front of our eyes as an Apartheid regime, is being justified as a temporal necessity. Israel deployment of SOAJ is done in bad faith.

INTRODUCTION**

This Article tries to set out one argument that is simple and limited in scope. I will suggest a distinction—already implicit in the literature—between what I will call the first and second order of arguments for justice (hereinafter FOAJ and SOAJ). I will elaborate the distinction. In part, it is a distinction somewhat similar to that between just war and justice in war. SOAJ are akin to the rules governing justice in war or rules of engagement, those rules that emanate and derive their logic from the conflict itself, while bracketing the reasons and causes of the conflict and the question of who was just or wrong in initiating it. FOAJ are those principles of justice and arguments that derive their power from the distribution of entitlements, rights and duties of the parties prior to the conflict they are supposed to adjudicate. FOAJ aim in many

** I experienced difficulties writing this Article. The difficulties stem from four facts: one is that we are still in the middle of a process of settling Palestine and an ongoing occupation, and it is difficult to think of any writing about the topic as not being part of a political polemic, of an attempt to change reality, rather than to make sense of it or justify it. Second, I have a deep belief that while philosophy has something to offer to help us reach a better understanding of the problems facing us, I still think that these problems are first and foremost political, and what hinders justice (whatever that means) is political, and not philosophical. Third, I have too many audiences to address this Article to; in part it is an intervention in an internal Israeli debate, and in part it is an intervention in a Palestinian debate. On a third level, it is an attempt to say something to the bystanders in the rest of the world, who are not immediate participants in the “conflict”; lastly this is an intervention in a philosophical debate about the possibility of separating different spheres of argumentation and the limits of such separation. Thanks to those who read earlier drafts of this paper, and those whom I discussed with them the ideas of this paper, and offered insights and comments: Helen Frowe, Shai Lavie, Louis Michael Ziedman, Duncan Kennedy, and Gary Peller. Special thanks to the participants in the workshop on Historical Justice at Tel Aviv University May 2019, as well to the editor Alon Jasper and the other anonymous editors of the Journal Theoretical Inquiries in Law for their valuable comments. All mistakes are mine.

ways to restore the distribution of entitlements that existed on the eve of the conflict. Thus, all arguments for corrective or historical justice (I will use these interchangeably unless I specify otherwise) could be viewed as FOAJ.

After elaborating the distinction, in Part II of the Article I want to argue that there is a pervasive mode of argument within Zionism that is based on SOAJ (while there is widespread deployment among Palestinians of FOAJ that is based on historical and corrective justice¹). Examples of the deployment of SOAJ will follow in the body of the Article, but it is worth mentioning that the scale and intensity of these arguments have changed with the passing of time. Early Zionists deployed arguments on the right to self-determination, anti-Semitism and Jewish historical rights. The more the settler Zionist project became a reality and the more it expanded, the more the Palestinian population felt a threat to their national project. This feeling of threat brought with it modes of resistance, including violent resistance. The more Palestinians showed resistance, the more appealing and more relevant SOAJ of self-defense became. By their very nature, SOAJ, as something that regulates the rules of engagement, the conflict itself, are unthinkable as long as there is no conflict; the more the conflict develops, the more relevant they become.

In associating FOAJ with Palestinians and SOAJ with Zionists, I do not aim to argue that Palestinians do not or cannot make SOAJ, or that Zionists do not or are unable to produce FOAJ based on historical justice or entitlements. Palestinians can argue that regardless of the justness of the 1967 War or the partition plan of 1947, there now is a population of a few million Palestinians under occupation and that these people must be treated in a certain way—irrespective of the origins of, or reasons for, this conflict and whose cause is historically just or unjust. Many Zionists, on the other hand, can argue for historical rights in Palestine, whether on the basis of a Biblical promise or on the basis of the Balfour Declaration or the UN partition plan, or on the basis of the claim that as there was no sovereignty over the West Bank when it was occupied, sovereignty belongs to Israel.² I am not interested in these kinds of arguments in this Article and I proceed by associating FOAJ with Palestinians and SOAJ with Zionists. Furthermore, the Article assumes that the Palestinians have a good case in terms of historical justice, and that Israel and Zionists have a good case in terms of arguments based on rules of

1 This appears widely in the Palestinian literature. The clearest case is the Palestinian charter that speaks of “complete restoration of our homeland.” *THE PALESTINIAN NATIONAL CHARTER* (1968).

2 For an example of such an argument see *COMM. STATUS CONSTR. JUDEA & SAMAREA, REPORT ON THE LEGAL STATUS OF THE BUILDING IN JUDEA AND SAMARIA* (2012) (also known as the “Levy Report”).

engagement, security and self-defense that derive vaguely from rules of just war. Now both assumptions are far from being a matter of consensus or agreed upon. Many Zionists might think that the Palestinians do not have a good case for historical justice, and many Palestinians (I am one of them) might think that Israel does not have any case or any valid arguments in terms of rules of engagement, that it is not acting in self-defense and lacks any basis for arguing SOAJ, and that when it does attempt to do so, it does so in bad faith. I do not intend here to substantiate either side—and this Article will proceed on this assumption. It is aimed at sharpening and elucidating these modes of argumentation, their nature, the relation between them, the level of their independence, and the kinds of limits each can impose on the other.

In Part III of this Article, I want to locate the Zionist mode of argumentation and the deployment of SOAJ in a comparative framework, by comparing it to other settler-colonial societies. These other societies used the discourse of self-defense while expanding their settler projects. In part, I will borrow the term “defensive imperialism” in order to show the ways in which the language of self-defense was always invoked in expansion projects, and will focus on the Israeli use of the language of self-defense as well and show how it aligns with other cases and places in history.

In Part IV of the Article, I struggle with the philosophical-jurisprudential tool that is being deployed in order to shift the focus from FOAJ to SOAJ, by engaging with Ruth Gavison’s argument that before and during the British Mandate era, both parties, the Zionists and the Palestinians, were at liberty to follow their goals, and thus stood on an equal footing to pursue their ends of national self-determination. In this Part I contest this symmetry first, but most importantly I argue that this formulation posits both sides as being in a situation akin to a state of nature where the idea of right loses its meaning, and thus it suspends the priority of FOAJ and paves the way for the dominance of SOAJ.

In the last and fifth Part, I question the intuitive distinction between FOAJ and SOAJ that I worked hard to introduce: a distinction that aims to create a certain relative independence of the rules that regulate the conflict itself, bracketing the question of initial entitlements and historical justice. After separating them I want to reconnect them and put them together again. Here I want to argue for a certain—albeit limited—dependency of SOAJ on FOAJ. I will suggest that one should not absolutely separate these two modes of argumentation, given that they belong to the same family of arguments: both are arguments about justice and should be read and interpreted in tandem. (Something similar could be said about the relation of corrective justice and distributive justice. While these represent two ideas of justice, this independence is never complete, and corrective justice functions within a horizon of distributive justice.)

I will argue that there is an inherent limit built into SOAJ and in the final analysis they must be read together with FOAJ. Going back to the situation in Israel-Palestine, I want to argue that as we are in an ongoing conflict that has lasted for more than a hundred years, and to which there is no end in sight, the insistence on the “rules of engagement,” while postponing and deferring the discussion of the issue of historical justice, sovereignty and self-determination for the Palestinians, is made in bad faith with the aim of removing from the table the Palestinian demands for historical justice.

This Article continues, develops, and capitalizes on the work of many others—including the work of Adam Roberts,³ Oren Yiftachel,⁴ Orna Ben-Naftali,⁵ Hedi Virterbo,⁶ Noura Erikat,⁷ Aeyal Gross,⁸ and Hani Sayed,⁹ among others. Each of these writers has focused on the way the Israeli occupation has turned its temporal nature into a permanent one, turned exception into the norm, and shifted the nature of settlements from being a military/security issue into a civilian one. The Article appropriates these works, builds on them, and tries to identify a mode of argumentation that describes Israel’s policy and approach, not only in the occupied territories but inside Israel as well, before and after 1967.

Thus the overall purpose of the Article is fourfold: to examine the nature of the relation between these two modes of argumentation, to evaluate the way they have been deployed in the case of Israel-Palestine, to describe how Israel has attempted to bracket and shelve FOAJ, and—while acknowledging the validity of SOAJ—to ask whether and under what conditions either of them can trump, suspend and place limits on the other.

3 Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 AM. J. INT’L L. 44 (1990).

4 Oren Yiftachel, *Creeping Apartheid in Israel-Palestine*, 253 MIDDLE E. REP. & INFO. PROJECT 7 (2009).

5 Orna Ben-Naftali has written numerous articles on the subject. For the most up-to-date version of her take on the issue, see ORNA BEN-NAFTALI, MICHAEL SFARD & HEDI VIRTERBO, *THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY* (2018).

6 *Id.*

7 NOURA ERIKAT, *JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE* (2019).

8 AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* (2017).

9 Hani Sayed, *The Fictions of the ‘Illegal’ Occupation in the West Bank and Gaza*, 16 OR. REV. INT’L L. 79 (2014).

I. FIRST-ORDER AND SECOND-ORDER CLAIMS FOR JUSTICE: THE INTUITION AND THE DISTINCTION

Let me introduce the intuition first. Let us assume a moment when the conflict between two parties erupted, and assume that there was a certain distribution of entitlements and rights prior to its eruption, and ask the following question: To what extent, when and under what conditions can, or should, the conflict, in and of itself, change the original distribution of rights and entitlements?

The basic immediate intuition is that the conflict itself should not and need not be the source of distribution of entitlements or rights. In fact, things should be the other way around: the conflict should be judged and adjudicated and resolved according to a prior conception of the rights of the parties. The conflict should be subject to the requirement of justice; justice should not be subject to the conflict, for that would be tantamount to conceding that “might makes right.” Our conception of justice in this regard is guided by the distribution of entitlements that prevailed before the conflict erupted, and we judge it according to this distribution as the baseline. Imagine that I drop a one hundred dollar bill on the ground and someone puts his foot on it, refusing to give it back to me, offering to split it: I can have \$90, and he’ll take only \$10, because he needs the money to buy medication. I refuse to accept the deal and we fight. I try to push him away and he fights back. We go to court. It seems clear that in the last instance it was I who invited the conflict (by refusing the deal and trying to push him), but it is also clear that the fact I refused the deal is irrelevant when we go to court to decide who gets what. We resort to the distribution of rights prior to the moment when I dropped the \$100 and the aim of justice is to reinstate this equilibrium.¹⁰ The same holds as regards my attempt to push him away. It would likely ring hollow if he were to claim that he was actually defending himself when he then attacked me. Substantive justice rules supreme and the conflict itself is subject to its demands. The conflict and its management do not create, *sui generis*, its own entitlements and rights.

Now I want to start to destabilize and problematize this basic intuition. I want to do so by introducing two examples that are common in different spheres of law: the laws of war and property law. The aim here is only to establish the relative independence of what might be called “rules of engagement,” or

10 To refer back to Kant again, he argues that “nations can press for their rights only by waging war and never in a trial before an independent tribunal, but war and its favorable consequences, victory, cannot determine the right.” Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch*, 107 in *PERPETUAL PEACE AND OTHER ESSAYS* (1983).

the way we conduct the conflict, from issues and requirements of substantive corrective justice. (I use the term corrective justice as suggesting something along the lines of Jules Coleman's understanding of corrective justice as "the principle that those who are responsible for the wrongful loss of others have a duty to repair them."¹¹) Corrective justice is always responsive to some event in the past—some wrong, and that is why it is associated with historical justice). I will first explain the way I understand these distinctions, and then say what I take to be common to all of them. Having established this common ground, I want to present it as the basis for my distinction between FORJ and SORJ.

Let's start with the common distinction between just war (*jus ad bellum*) and justice in war (*jus in bello*). According to the "orthodox view," these are two separate questions, and as Walzer put it, "the two sorts of judgment are logically independent."¹² We do not only ask who started the aggression and initiated the war unjustly. We ask more than that, and we are interested in the way the war is conducted, so that

when we focus exclusively on the fact of aggression, we are likely to lose sight of that responsibility and to talk as if there were only one morally relevant decision to be made in the course of war: to attack or not to attack (to resist or not to resist).¹³

For Walzer, there is more to be asked, and we can't judge war only by its outer boundary, by its beginning and whether or not it was just war. There is always the question whether the war is fought justly. Thus, Walzer rejects the logic of the British prosecutor at Nuremberg who claimed that "the killing of combatants is justifiable ... only where the war itself is legal. But where the war is illegal ... there is nothing to justify the killing and these murderers are not to be distinguished from those of any other lawless robber bands."¹⁴ While rejecting this logic, Walzer stresses the distinction between *jus ad bellum* and *jus in bello*.¹⁵ Within this frame, one might fight justly in an unjust war, or unjustly in a just war. Soldiers might kill each other in the battlefield and

11 Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV 15 (1995).

12 MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (4th ed. 2006).

13 *Id.* at 33.

14 *Id.* at 38 (a quote of the British prosecutor).

15 Walzer finds the rationale for this distinction in the fact that we hold soldiers responsible for the conduct of the war itself given that they are the ones in the field, as opposed to the responsibility of the heads of state (the politicians) who decide on the waging of war (*jus ad bellum*). See *id.* at 38. For the purposes of this Article, I am not interested in arguing for or against Walzer's justification. I find it partially convincing.

be immune from any prosecution regardless of the question whether or not they were fighting a just war. When judging the question of *jus in bello*, we can and should “bracket” the question of the justness of the war itself—of *jus ad bellum*. According to this “orthodox view,” we are equipped with the moral tools to make a judgment regarding the justness of conducting war, regardless of the justness of the war itself.¹⁶

Let’s take my second example from property law as it relates to the general question of self-help.¹⁷ The law clearly puts limits on the ability of a wronged victim to pursue her own rights, the amount of self-help she can use to regain her property rights. Assume that someone trespasses on my land clearly unlawfully. The law in Israel, for example, gives me the right to use self-help in order to expel him from my land and to use reasonable force in doing so.¹⁸ Still, this has to be done under certain conditions: using limited and proportional force, and doing so while the trespass is still fresh and ongoing. Now, assuming that I use self-help but nonetheless breach the conditions stipulated by Article 18, I might find myself in a situation where the court evicts me from my own land, restoring the status quo before the use of force and placing possession back in the hands of the trespasser himself.¹⁹ Here again, we see that law stipulates certain rules of engagement that bracket momentarily the question of entitlements and ownership over the land. We simply zoom in on the immediate conflict here and now. First we have to restore order, and then we can deal with the conflict.

A third example that may be mentioned is the basic distinction between civil or criminal procedure, and substantive civil or criminal questions. My

16 This represents the “orthodox view.” Recent writings on the subject of the ethics of war have revised this orthodox view. I will return to these recent views when I offer my criticism of the distinction.

17 For a general overview of the debates regarding self-help and its justification, see Adam B. Badawi, *Self-Help and the Rules of Engagement*, 29 *YALE J. REG.* (2012); Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 *J.L. ECON. & POL.* 1, 2-3 (2005)

18 Land Law, 5769-1969, art. 18, SH No. 575 p. 259 (Isr.).

19 In order to have the full picture, one must add that according to Article 18 itself, the court has discretion to adjudicate both claims in the same hearing—those based on mere possession and those based on title—instead of splitting the hearing and the decision into two separate stages. In fact, this was the ruling in the famous Supreme Court case of *Rosenstein v. Solomon*, where the court ruled in favor of the owner. See CA 756/80 *Rosenstein v. Solomon* 38(2) PD 113 (1984) (Isr.). The court could have ruled otherwise according to Article 18. In any case, the court ruling is even more relevant to my critique of the distinction itself, and I will return to it in the last Part of the Article.

aim again is to show that we can distinguish between different levels of justice (or rather of fairness), so that we can speak of justice in war while bracketing the question of the justness of war; we can speak of the interest of public order in defense of possession of property while bracketing the issue of ownership; and we can focus on procedural justice in civic procedure while bracketing substantive justice. It is clear that despite the similarities there is a multiplicity of logics and rationales at work in each of these three examples. Thus, rules of justice in war are aimed—among other things—at minimizing the number of casualties and protecting soldiers from being prosecuted for the crime of murder, given that they were sent to war by their states. They are also aimed at allowing third parties like the Red Cross to do their job. In the case of property, the dominant argument is related to public order on the one hand, and a desire to maintain the status quo and keep the possession of property in the hands of those who already actually have it. It also relates to the goal of minimizing private violence and maintaining the monopoly of state violence—over and above the fact that we think that possession *per se*, and the continuation of possession in itself, is a value worth defending. To this we may add the fact that it is easier to adjudicate questions of mere possession as compared to questions of ownership, and that they therefore take priority. By contrast, in civil procedures we assume that we do not know where substantive justice lies and the aim of civil procedure in itself is to bring us as close as possible to discovering substantive justice.²⁰ Thus the homology between these examples should not obscure the fact that they involve different rationales for these distinctions. Still, a common thread of these distinctions is the bracketing of the original first question of substantive justice. It invites us to focus on the present, the here and now, while bracketing the past. The present, the conflict itself, becomes a reason for assigning all kinds of rights and gains a relative autonomy, creating its own logic of argumentation.

Before turning to the ways in which this distinction has been deployed, I want to distinguish it from other related and similar distinctions that are no less important in general, and of clear relevance in the case of Israel/Palestine, though differently. One other distinction is that between the original entitlements of the parties and the way these entitlements change over time, including

20 It is true that this epistemic uncertainty/indeterminacy is common to the three examples, yet there is no full symmetry between the rationales of the three examples. In this sense, civil procedure works in the service of substantive justice in a different manner from the relation of rules of justice in war to rules of just war. Rules of civil or criminal procedure are there in order to allow a court to reach its decision regarding substantive justice. Rules of just war do not aim at discovering whether or not the war is just.

through wrongful acts, trespass or other sorts of events that create a reliance on interests that the law deems fit to protect.²¹ A regards corrective justice, history is a main element given that there is always something historical about it, for it is aimed at restoring some equilibrium in the past. We aim to redress the injustice done to one party, through a claim against another party we hold responsible for the loss.²² Yet history is also the enemy of historic justice. The passing of time is what allows norm to become fact, and mere fact to become norm. This is in fact what the statute of limitations and the principle of adverse possession in property law do, together with other doctrines like estoppels, latches and similar legal doctrines.²³ What is common to all these doctrines is the fact that they turn the wrong—with the passage of time—into a merely historical event so that the wronged person is unable to claim her rights, thus turning norm to mere fact. On the other hand, they establish a right on the part of the wrongdoer, who gains a protected status in law, thus turning what started as mere fact—the wrongdoing itself—into something that has a normatively valid value. People, over the passage of time, develop certain reliance interests that the law wants to protect: thus, the original owner might find himself losing his land under certain conditions. History is the condition for and the enemy of corrective justice at the same time. Now these kinds of arguments on the part of the trespasser, or those claiming adverse possession, establish their claims on a reliance interest, not on the conflict itself, as the basis for their rights. For example, in the case of justice in war, or civil procedure, the mere passage of time is not relevant, but the management of conflict requires certain rules of engagement. However, in the case of adverse possession or statutes of limitation, the passage of time is a crucial element in establishing the rights or interests of the trespasser. Here the issue is less about rules of engagement and more about how the entitlements themselves originate and change. And here we do not bracket the question of original entitlements, but rather deal with it head on, claiming that with the passage of time these do change, and they are subject to the changing needs and emerging reliance interests. These kinds of arguments I will call “reliance interest arguments.”

21 On reliance interest in property relations, see Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

22 Coleman, *supra* note 11.

23 On the logic of adverse possession and its justification, see, e.g., Richard A. Posner, *Savigny, Holmes and the Law and Economics of Possession*, 86 VA. L. REV. 535 (2000); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1984-1985); JOSEPH W. SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (5th ed. 2010).

They clearly might be relevant in the case of Palestine-Israel, but my Article does not deal with these questions.

II. ISRAEL: MODES OF ARGUMENTATION

My claim is that Israel does deploy many modes of argumentation about justice, including arguments based on historical justice, arguments based on reliance interest, and SOAJ. While I might refer from time to time to the first two, my Article focuses on the third mode of argumentation, mainly those arguments that derive from the conflict itself and draw their rhetorical power from the fact that there is an ongoing conflict. In its more general form, this argumentation references security, at other drastic moments it is a question of self-defense, and in extreme cases it becomes a question of emergency or even existential threat. While there is a clear difference between these three concepts, and not every case of security is a case of self-defense or requires emergency measures, they still have something in common and share a certain quality despite the difference in quantity. For the purposes of this Article I will treat them under one name: arguments from security.

The argument from security can derive its rhetoric from the distinction between just war and justice in war. The question whether a war is just is separated from the question of what means and what weapons are allowed in war. We “bracket” the justness of the war and focus on the way it is being conducted, on the battlefield. Even the “bad guy” in war is “allowed” to use force in war and even to kill, and the good guys have no right to win the war at all costs, as it were.

If one wants to translate this logic to the case of Israel-Palestine, then the Israeli official argument will tend to bracket the distribution of rights before the war erupted, thereby presenting a case that is solely based on the fact that we are at war, in the middle of a conflict²⁴. And this fact in and of

24 For just one example—with more to come in the next Part—I will refer to the way retiring Judge Shtruzman justifies the recent Basic Law: Israel – The Nation State of the Jewish People, SH No. 2743 p. 898 (Isr.) passed in 2018, and the lack of equality between Jewish citizens and Palestinian citizens in Israel, claiming that “people on the left argue that according to the ideology of Jabotinsky everyone is an equal citizen within democratic Israel. But they ignore the fact that according to him, full and absolute equality is possible only after real peace prevails between Jews and Arabs, and after Arabs recognize the rights of the Jews to a Jewish state.” He concludes that “in the reality of our situation, the prohibition on the use and deployment of the principle of equality—a deployment that can erode and destroy the Jewish state—is clearly a necessity.”

itself can generate arguments from security. Now that we are enemies, that we are fighting, I have the right to defend myself regardless of the original entitlement and its distribution and regardless of the justness of the claims before the conflict. It is not difficult to imagine this line of argument starting from the events of 1947 and claiming that the Palestinians and Arabs in general started the war and attacked the Jewish Yishuv, and that it had the right to react in self-defense.²⁵ Later, after the establishment of the state, the argument continues, it was the Palestinian refugees who tried to infiltrate Israel and who posed security threats to Israel. As Moshe Dayan (who was to become military chief of staff and minister of defense) stated, all the territory of the state is a frontier suffering from security issues.²⁶ Later still, it was Israel that had to face Palestinian “terrorism” after the establishment of Fatah and the PLO;²⁷ and after the occupation of the West Bank and Gaza Israel also had

Uri Shtruzman, *Hok Hale'om Mutzdak* [The Basic Law is justified], HAARETZ (Aug. 21, 2018), <http://www.haaretz.co.il/opinions/letters/premium-1.6407592> (Hebrew). In another interview, dealing with the question whether Arab Knesset members should participate in decisions related to withdrawal from occupied territories, he concludes that “as long as the State of Israel is not living in peace and security, there is a need to grant privileges to Jews in existential issues like gathering of exiles and settlement.” Interview with Yochai Danino, Journalist, Kol Hazman (Apr. 17, 2016), www.kolhazman.co.il/105557 (Hebrew).

- 25 For the argument that the Yishuv was under threat in 1947-1948 and that Palestinians and Arabs started the war, see *Israel's War of Independence (1947-1949)*, ISR. MINISTRY FOREIGN AFF., <https://mfa.gov.il/mfa/aboutisrael/history/pages/israels%20war%20of%20independence%20-%201947%20-%201949.aspx> (last visited July 22, 2020).
- 26 For Israel's fight against refugees in the early 1950s as a security threat, see Moshe Dayan, *Israel's Borders and Security Problems*, 33 FOREIGN AFF. 250 (1955). Thus, the term “frontier security” has little meaning in the context of Israel's geography. The entire country is a frontier, and the rhythm of national life is affected by any hostile activity from the territory of neighboring states.
- 27 For years, Israel considered the PLO and other Palestinian factions as terrorist organizations according to law; even meeting with them was regarded as a crime. See Prevention of Terrorism Ordinance, 5708-1948, 1 LSI 76 (1948). The ordinance does not make a distinction between citizens and soldiers. The Israeli foreign ministry argues in fact that terrorism has always been there and that it existed long before the 1967 War. *Which Came First – Terrorism or Occupation – Major Arab Terrorist Attacks Against Israelis Prior to the 1967 Six-Day War*, ISR. MINISTRY FOREIGN AFF. (Mar. 2002), <https://mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/which%20came%20first-%20terrorism%20or%20occupation%20-%20major.aspx>.

to fight against the resistance in these occupied territories.²⁸ Some have even claimed that Palestinian resistance was not caused by and is not a result of the ongoing occupation, asserting that Israel needs the occupation to fight terrorism.²⁹ The logic that I am trying to develop here is one that argues that I am entitled to attack you because you attack me. When the original injustice and harm done to the Palestinians in 1948 is brushed aside, or disregarded or ignored, then the attack against Israel seems to have taken place for no reason, to have been simply an unexplained and unjustified act of evil. And all further resistance is mere terror, and I am allowed to attack you back because you are a “terrorist.”³⁰

Demography: In the case of Israel, the issue of demography plays a prominent role in shaping the conflict given its unique history and the fact that the Jews in Palestine started as a tiny minority at the time of the Balfour declaration³¹ and the whole project was aimed at becoming a majority (by various methods, including Jewish immigration, expulsion of Palestinians,³² reducing fertility rates of the Palestinians while raising fertility rates within

28 For Israel, any form of armed resistance—even directed at soldiers—is considered a terror attack. See *Victims of Palestinian and Terrorism Since September 2000*, ISR. MINISTRY FOREIGN AFF. (2019), <https://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/victims%20of%20palestinian%20violence%20and%20terrorism%20sinc.aspx>.

29 See Alan Dershowitz, *Terrorism Causes Occupation, Not Vice Versa*, HUFFINGTON POST (Aug. 11, 2006), https://www.huffpost.com/entry/terrorism-causes-occupati_b_27057.

30 See, e.g., *Tacit Consent: Law Enforcement towards Israeli Settlers in the Occupied Territories*, B’TSELEM: ISRAELI INFO. CTR. HUM. RTS. OCCUPIED TERRITORIES (Mar. 2001) (examples of Israelis claiming self-defense in the face of Palestinian “terrorism”).

31 In 1914 the number of Jews was no more than 94,000 (including the old Yishuv before Zionist immigration), but by 1931 it jumped to 175,000 and in 1947 it reached 630,000. The number of Palestinians respectively in those years was 600,000, 850,000, and 1,200,000. Thus the Jewish population within about thirty years grew from almost ten percent to one third of the population in Palestine. For the history of demographic change in Palestine, see Sergio Della Pergola, *Demographic Trends in Israel and Palestine: Prospects and Policy Implications*, 103 AM. JEWISH Y.B. 1 (2003).

32 NUR MASALHA, *THE EXPULSION OF THE PALESTINIANS: THE CONCEPT OF TRANSFER IN ZIONIST POLITICAL THOUGHT, 1882-1948* (1992).

the Jewish population,³³ preventing family unifications for Palestinians, etc.).³⁴ Issues of demography are thus associated with national security,³⁵ and given that Palestinians owned almost all the land on the eve of the Zionist project, then appropriating Palestinian lands becomes crucial and essential for the success of the project and is of high national strategic interest.³⁶

33 See Yoram Ettinger, *Dramatic Decline in Arab Fertility Rates*, Jerusalem Herald (May 26, 2019), <https://www.jerusalem-herald.com/single-post/2019/05/26/Dramatic-Decline-in-Arab-Fertility-Rates> (celebrating the decline in fertility rates within the Arab population and an increase within the Jewish population); See also SERGIO DELLA PERGOLA, JEWISH PEOPLE POL'Y INST., JEWISH DEMOGRAPHIC POLICIES: POPULATIONS TRENDS AND OPTION IN ISRAEL AND THE DIASPORA (Barry Geltman & Rami Tal eds., 2011), http://jppi.org.il/uploads/Jewish_Demographic_Policies.pdf. For the relation between fertility and conflict in the context of Jews and Palestinians in general, see Philippe Faragues, *Protracted National Conflict and Fertility Change: Palestinians and Israelis in the Twentieth Century*, 26 POPULATION & DEV. REV. 441 (2000).

34 See *Infra* note 77 (discussing family unification).

35 Demography has always been a central issue, first in Zionism and later on in the policy of the State of Israel. See Ian Lustick, *The Red Thread of Israel Demographic Problem*, 26 MIDDLE E. POL'Y 141 (2017); Endika Rodriguez Martin, *Settler Colonial Demographics: Zionist Land Purchases and Immigration During the British Mandate in Palestine*, 21 INT'L J. POSTCOLONIAL STUD. 486 (2019). First, Ruth Gavison elaborates on the ideological awareness of a demographic sensitivity at the outset of the Zionist project. See THE TWO-STATE SOLUTION: THE UN PARTITION RESOLUTION OF MANDATORY PALESTINE – ANALYSIS AND SOURCES (Ruth Gavison ed., 2013). Second, the enactment of the Citizenship Law on 31 July 2003 by the Israeli Knesset prohibited the extension of residency or citizenship status to Palestinians from the 1967 occupied Palestinian territories (OPT) to those who are married to Israeli citizens. Citizenship and Entry to Israel Law (temporary order), 1901 SH 544 (2003) (Isr.). Two petitions were brought against this law. HCJ 7052/03 Adalah v. Minister of Interior 61(2) PD 202 (2003) (Isr.); HCJ 466/07 MK Zahava Gal-On v. Attorney General 65(2) PD 44 (2012) (Isr.). Third, the presence of explicit plans to create specific majority groups in Israel in both the Negev and the Galilee. In a 2019 announcement, Israel decides to relocate 36,000 Bedouin citizens living in unrecognized Negev villages in the name of expanding military areas and implementing economic development projects. See, e.g., *Israel Announces Massive Forced Transfer of Bedouin Citizens in Negev*, ADALAH (Jan. 1, 2019), <https://www.adalah.org/en/content/view/9677>. In general, see Ghazi Falah, *Israeli 'Judaization' Policy in Galilee*, 20 J. PALESTINE STUD. 69 (1991).

36 For the issue of transfer of land from Palestinian hands to Jewish hands, see Alexander (Sandy) Kedar & Jeremy Forman, *From Arab Land to 'Israel Lands': The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of*

Given the multilayered nature of the conflict, the fuzziness of its borders, the ongoing expansion of settlements, and the ongoing negation of exile, all of this extends the concept of security to embrace many other fields not limited to armed struggle only.³⁷ Thus, in arguing for the Law of Return and arguing against the Palestinian right of return, the argument against the Palestinians' return need not go back to the original entitlement and face questions of historic justice. Rather, it can be developed through the deployment of the logic of war and demographic threat. One of the arguments against the right of return for the Palestinians might be that such a return would simply annul the results of the 1948 War and the achievements of Zionism that were won by war and blood and would pose a demographic threat to the Jewish state.³⁸ Given that we are

1948, 22 ENV'T & PLAN. D: SOC'Y & SPACE 809 (2004). The appropriation of land seems to be a natural necessity to build the newly born state. For an overview of the mandate period, see Jeremy Forman & Alexander Kedar, *Colonialism, Colonization, and Land Law in Mandate Palestine: The Zor al-Zarqa and Barrat Qisarya Land Disputes in Historical Perspective*, 4 THEORETICAL INQUIRIES L. 491 (2003).

- 37 Of course, there are different views in the literature as to what is considered to be security or self-defense and whether self-defense includes by definition the right of the majority to hegemony. For a more pervasive definition and understanding of what is to be a matter of security, see *Israel's National Security Doctrine*, HERZLIYA FORUM FOR RE-FORMULATING ISRAEL'S NATIONAL SECURITY DOCTRINE; *The Herzliya Insights, Conference Conclusions: 70 Years of Independence Israel at Critical Junctures*, HERZLIYA CONFERENCE: INST. FOR POL'Y & STRATEGY (2018). Among others, water was treated as a security issue. See Saul B. Cohen, *The Geopolitics of Israel's Border Questions*, 79 GEOGRAPHICAL REV. 370 (1989); Ze'ev Schiff, *Security for Peace: Israel's Minimal Security Requirements in Negotiations with the Palestinians*, (The Washington Institute, Policy Article No. 15) (1989); MARK ZEITOUN, *POWER AND WATER IN THE MIDDLE EAST* (2008). On the other hand, see the discussion about this point in CHAIM GANS, *A JUST ZIONISM: ON MORALITY OF THE JEWISH STATE* 53-80 (2008); Samira Esmer, *Hakdama: Beshem Habitahon [Intro: In the Name of Security]*, 4 MAKHBAROT ADALAH 1 (2004) (Hebrew); MENACHEM HOFNUNG, *DEMOCRACY LAW AND NATIONAL SECURITY IN ISRAEL* (1996); For Asaf Sharon's slippery-slope warning that under the slogan of security anything can be justified, see Asaf Sharon, *Etgar Haleumiyut: Al 'Teoriya Politit La'am Hayehudi' Me'et Chaim Gans [The Challenge of Nationalism: On 'Political Theory for the Jewish People' by Chaim Gans]*, in 55 MISHPAT, MI'UT VESIKHSUKH LE'UMI [LAW, MINORITY AND NATIONAL CONFLICT] 60-63 (Raef Zreik & Ilan Saban eds., 2017) (Hebrew).
- 38 Ruth Lapidot, a prominent legal scholar, argued that "If Israel were to allow all of them to return to her territory, this would be an act of suicide on her part, and no state can be expected to destroy itself." Ruth Lapidot, *Do Palestinian*

still at war, thus the argument might unfold, there is no reason to give up any achievement that was gained by war. This is the logic of war, regardless of the distribution of entitlements before 1948 or before 1917 or 1967. There are different groups in Palestine who hold different claims to the land, ownership, self-determination, statehood, for example, the Palestinians in Israel demand full equality, whereas Palestinian refugees demand return, and there is also a demand for self-determination and establishing an independent state, etc. Given that the parties (Palestinians and Jews Zionists) have not reached any agreement between them, and given that there is no international judge to reach a verdict and enforce it on the ground (unlike the local situation where there is a sovereign who adjudicates between the parties), then why not treat the results of war on the ground to adjudicate between us for the time being? The argument continues: “By rejecting the 1947 partition plan, you wanted war, and you got war, and there is no reason to complain about its results.³⁹ The argument can proceed as well: “The return of the Palestinian refugees means the end of the Jewish state and there is no reason why we should accept such political suicide on our part and allow the Palestinians to win by peace

Refugees Have a Right to Return to Israel, ISRAEL MINISTRY FOREIGN AFF. (Jan. 15, 2001), <https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/do%20palestinian%20refugees%20have%20a%20right%20to%20return%20to.aspx>.

For a discussion about how the notion of return is incompatible with the interests of a Jewish state, see YAFFA ZILBERSHATS & NIMRA GOREN-AMITAI, *RETURN OF PALESTINIAN REFUGEES TO THE STATE OF ISRAEL* (2011). See also Benny Morris, *Revisiting the Palestinian Exodus of 1948*, in *THE WAR FOR PALESTINE: REWRITING THE HISTORY OF 1948* (Eugen L. Rogan & Avi Shlaim eds., 2012).

39 Of course, all these assumptions are problematic as a matter of history, but I am trying here to present an argument that is based on second-order claims for justice in its best light. There is a controversy regarding what happened in 1948. Some think that expulsion was planned early on. See, e.g., ILAN PAPPE, *THE ETHNIC CLEANSING OF PALESTINE* (2006); MASALHA, *supra* note 32. Others think that even if there was no clear plan, this was nevertheless the spirit during the fighting and there was no need for a clear or written policy. See BENNY MORRIS, *THE QUESTION OF REFUGEES REVISITED* (2004). Hillel Cohen, on the other hand, makes a clear distinction between the first months of the fighting until May 1948 and the war afterwards, which clearly was not a war of self-defense in any sense. Hillel Cohen, *Shtey Hamilhamot Shel 48'* [*The two wars of 48'*], HAZMAN HAZE [THIS TIME] (Aug. 2018), <https://hazmanhazeh.org.il/1948-war> (Hebrew). What is not controversial at all, and is in my view the most important fact in the debate, is that following the war the State of Israel prevented the return of the Palestinian refugees to their homes.

what they were unable to gain by war.”⁴⁰ And the refugee can now be told: “Let’s put aside for the moment the justness of the 1948 War, for even if the deportation was not just, now we are at war and your claim for justice here and now threatens my existence.”⁴¹

III. THE PERSISTENCE OF SECURITY AND SELF-DEFENSE IN COMPARATIVE CONTEXT⁴²

In this Part, I want to locate Israel’s claims for security and self-defense in an historical framework. In many ways, framing things in this manner might seem to normalize Israel as non-exceptional. In some respects, indeed, it is

40 See, e.g., Roger Cohen, *Sitting Down With Amos Oz*, N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/opinion/global/roger-cohen-sitting-down-with-amos-oz.html> (Amos Oz says that the Palestinian right of return is “a euphemism for the liquidation of Israel”); on the “right” of return as tantamount to “making Jews a minority within Israel itself,” see Ruth E. Gavison, *The Jews’ Right to Statehood: A Defense*, 15 AZURE 70 (2003); On the right of return as a “nonstarter for Israel: too many returnees would end Jews’ demographic majority and therefore Israel’s status as both a Jewish and democratic state,” see Max Fisher, *The Two State Solution: What It Is and Why It Hasn’t Happened*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/world/middleeast/israel-palestinians-two-state-solution.html>. On the sentiment that absolute return is a “call for the end of Israel as a Jewish state.” see Luke Akehurst, *Absolute Return is Incompatible with a Peaceful Solution*, JEWISH NEWS BLOG (May 4 2019), <https://blogs.timesofisrael.com/absolute-return-is-incompatible-with-a-peaceful-solution>.

41 Recently one of the most prominent historians of the Holocaust, Yehuda Bauer, claimed in two articles published in *Ha’aretz* newspaper that Palestinians claiming the right of return are antisemitic, are aiming at the destruction of Israel, and that the demands for return are even genocidal. E.g., Yehuda Bauer, *Al Antishemiut Ve’Ivutim* [On Antisemitism and Distortions], HA’ARETZ (Jul. 4, 2019), <https://www.haaretz.co.il/opinions/.premium-1.7438296> (Isr.). For my reply to Bauer, see Raef Zreik, *Zchut Hashiva Zu Antishemiut? Nu Be’emet* [Is the Right of Return Antisemitic? Give Me a Break], HA’ARETZ (Jul. 10, 2019), <https://www.haaretz.co.il/opinions/.premium-1.7488660> (Isr.).

42 Elsewhere I have dealt with the issue of the “persistence of the exception” as the organizing theme of Israeli constitutional theory, given that the constituent power that is authorized to make the constitution *ex nihilo* is present indefinitely in the form of the Knesset of Israel. This means that each moment is a moment of creation. See Raef Zreik, *The Persistence of the Exception: The Story of Israeli Constitutionalism*, in 131 THINKING PALESTINE (Ronit Lentin ed., 2008).

not and it does fall within a norm—but I am not sure it wants to be within such a norm. Zionism shares much of the European imagination, outlook, and vocabulary. It combines within its discourse socialist, nationalist, colonial and liberal discourse at the same time. For this purpose, I want to have a look at another settler project as an example: Spanish colonialism, and its deployment of the discourse of self-defense.⁴³

Vitoria and Self-defense: The question regarding the nature of the relation—the rights and duties—of the settlers in America as compared to the rights of the Native Americans was a question that perplexed philosophers and lawyers of international law in Europe for a long time.⁴⁴ One of the first questions that faced Vitoria—a sixteenth-century Spanish theologian and jurist—regarding the status of the natives of America was whether or not they were rational. The answer to that question would determine the answer to the question whether they had dominion over their land and whether they could own property.⁴⁵

43 Most Israelis and Zionists, at least these days, avoid using the terms settlers or colonialists to describe the immigration to Palestine, because they think that their mere use comes with morally negative connotations of exploitation etc. See, e.g., Ruth E. Gavison, *The National Rights of Jews*, PROF. RUTH GAVISON (2012), <https://ruthgavison.files.wordpress.com/2015/10/the-national-rights-of-jews.pdf> (“Thus Zionism is not a colonial or an imperialist operation in the sense analyzed and condemned by modern political philosophy”). Here I am using the settler terminology in a descriptive sense: I am unable to find any other expression to describe the settling of Palestine by Zionist settlers, a term that they used for years—and even the term colonialism. See, e.g., Walid Khalidi, *The Jewish-Ottoman Land Company: Herzl’s Blueprint for the Colonization of Palestine*, 22 J. PALESTINE STUD. 30 (1993). The fact that Israel is a settler state can’t be denied even if one accepts in full the idea that the land of Israel belongs to the people of Israel. As a matter of descriptive sociology there is no way to deny this. See, e.g., Basic Law: Israel - the Nation State of the Jewish people, 5778-2018, SH No. 2743 P. 898 (Isr.) (declaring Jewish settlement a value to be pursued). One can discuss the justification and the moral political implications of this fact and here people may disagree, but I do not see how one can disagree on the descriptive aspect.

44 For such a survey I benefited mainly from, see S. JAMES ANAYA, *INDIGENOUS PEOPLE IN INTERNATIONAL LAW* (2000); A. Dirk Moses, *Empire, Resistance, and Security-International Law and Transformative Occupation of Palestine*, 8 HUMAN. 379 (2017).

45 Francisco de Vitoria, *On the Indians Lately Discovered* (John Pawley Bate trans., 1934) (c. 1532) reprinted in JAMES BROWN SCOTT, *SPANISH ORIGIN OF INTERNATIONAL LAW* 293 (2000). [hereinafter Vitoria] (“Irrational creatures cannot have dominion. This is clear, because dominion is a right . . . But irrational creatures cannot have a right, therefore they cannot have a dominion.”). *Id.* at § 329.

Vitoria, representing the most generous trend in the literature, answers both questions in the affirmative, concluding that these “aborigines were true owners alike in public and private law before the advent of the Spaniards among them.”⁴⁶ And he adds that they are “[j]ust like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners.”⁴⁷ Vitoria goes even further and makes it clear that any “refusal by these aborigines of any dominion of the pope is no reason for making war on them and for seizing their lands.”⁴⁸

But of course, that was not the whole story. The aboriginals have rights, but they have duties as well, and the Spaniards, while they do have certain duties toward the aboriginals, also have rights. What rights do the Spaniards have? They have “a right to travel to the lands of the Indians and to sojourn there so long as they do no harm, and they cannot be prevented by the Indians.”⁴⁹ Among the things the aborigines should allow the Spaniard to do is “[take] away gold and silver and other articles in which Indians abound; and the princes of the Indians cannot prevent their subjects from trading with Spaniards.”⁵⁰ Given the fact that the Spaniards have rights, this means that aboriginals are subject to certain duties. Among these duties are the duties not to resist this taking away of gold and not to obstruct trade. But what if the aborigines desire to prevent trade with the Spaniards? The answer is clear:

If after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, then they can make war on the Indians, no longer as innocent folk, but as forsworn enemies and may enforce against them all rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones.⁵¹

46 *Id.* at § 305. (Summary of the First Section, Conclusion no. 24).

47 *Id.* at § 334 (Proposition Twenty Forth).

48 *Id.* § 338 (Summary of Second Section conclusion 7).

49 *Id.* at § 382 (Summary of Third Section, Conclusion 2). Later on, Kant establishes a similar right of each person and each group to approach other people in the world offering them to engage in commerce. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 158 (Lara Denis ed., 2019).

50 Vitoria, *supra* note 45 at § 383 (Summary of the Third Section Conclusion 3).

51 *Id.* at § 394 (Third Section, Propositions 6-7). In the Sixth proposition he writes: “since it is now lawful for the Spaniards, as has been said, to wage defensive war or even if necessary offensive war, therefore, everything necessary to secure the end and the aim of war, namely obtaining of safety and peace, is lawful.”

The rest of the story of the Native Americans is well known and there is no need to recount the story of the ongoing expansion to the West and the simple removal of the Native Americans into tiny reservations. On the ground, as a matter of historical reality and record, nothing remained of Vitoria's doctrine apart from self-defense. It was this theory of self-defense that was taken up and deployed by the white colonialist settlers. The natives have the right to resist, so to speak, but the settlers have the right to suppress the resistance at the same time. Given that both have such a right, conquest becomes the basis of the new order and what justifies the expansion. Nobody need ask anymore whether or not the whole project from the start was just, and it becomes a matter of the rules within the war, the rules of engagement themselves, and here one can always find a justification to suppress the resistance of the natives supported by arguments of self-defense.⁵² In order for one nation, group, or empire to expand you do not need an intention or a plan; it could all take place by accident or in a "fit of absence of mind,"⁵³ as a war of what might be thought of as self-defense, and the concept of "defensive imperialism" explains that very well.⁵⁴

Now, this concept of self-defense of the settler and even of the occupying force was developed through international law in the eighteenth and nineteenth centuries (while the focus of its use shifted from *jus ad bellum* to *jus in bello*,

52 See Ian Hunter, *Vattel in Revolutionary America: From the Rules of War to the Rule of War*, in 24 BETWEEN INDIGENOUS AND SETTLER GOVERNANCE (Lisa Ford & Tim Rowse eds., 2012).

53 See SIR JOHN ROBER SEELEY, THE EXPANSION OF ENGLAND - TWO COURSES OF LECTURES 12 (1883). But most telling in this regard is Karel Capek's short letter written in the name of Alexander the Great to his teacher Aristotle in which he explains his expansion as "sheer political necessity." At first, he says, they faced a threat from the North by Thrace and thus had to conquer it. After that, however, he was faced with the Persian sphere of influence and the need to compete with them over the Hellespont and Bosphorus and thus again, he explains, "sooner or later there was bound to be a struggle between us and Persia over the Aegean and the passage through the Pontic straits ... in reality, as I see it today, it was of utmost necessity to drive the Persian from the Aegean Sea." Alexander goes on to describe this expansion in a very harmonic logic of necessity. KAREL CAPEK, APOCRYPHAL TALES 39-40 (1997) (thanks to Gadi Elgazi for this reference).

54 See, e.g., Eric Adler, *The Late Victorian and Edwardian Views of Rome and the Nature of Defensive Imperialism*, 15 INT'L J. CLASSICAL TRADITION 187 (2008); P. D. A. Garnsey & C. R. Whittaker, THE INTRODUCTION TO IMPERIALISM IN THE ANCIENT WORLD 2-3 (P. D. A. Garnsey & C. R. Whittaker eds., 1978). It is important to note that I find the term settler-colonial project is far more adequate than imperial project.

thus obscuring the original moment of the settler's project and ignoring it as an act of aggression in itself).⁵⁵ It is not only the natives who can claim self-defense, but the settlers, the occupying force as well.⁵⁶ Things have their own dynamics and reality always creates certain situations and facts on the ground that bring with them an imminent mode of argumentation that allows expansion under the banner of self-defense.

From Vitoria to Zionism: Several features of Zionism make the confrontation with the Palestinians almost total, one in which the Palestinians' mere existence becomes an impediment and a threat. First, the project is aimed at gathering exiles and all Jews in Palestine; the establishment of the state is thus not the end, but rather just one link in what is an unfinished project.⁵⁷ Second, Zionism represents a comprehensive revolution that is intended to change all aspects of life—culture, nature, and agriculture.⁵⁸ Third, given that on the eve of the establishment of the state, Jews owned only about seven percent of the land, it clearly would have been almost impossible to build a state and absorb new immigrants if most of the lands had remained in Palestinian hands. Land appropriation and confiscation thus seemed to be a necessary and

55 For an extended discussion of the ability of the colonizer to use force under the paradigm of IHL while strict limits are placed on the ability of indigenous people to do the same, leading to the repression of indigenous resistance movements, see Moses, *supra* note 44. See also Ellery C. Stowell, *Military Reprisals and the Sanctions of the Laws of War*, 36 AM. J. INT'L L. 643 (1942), wherein the occupier has the capacity to employ whichever "effective means of prevention or repression they may have at their disposal" to suppress indigenous resistance. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 181-84 (2004).

56 For the development of the idea of self-defense of the settlers and of the occupying force, see Moses, *supra* note 44. See also The Geneva Convention Relative to the Protection of the Civilian Persons in the Time of War art. 27, 49, 51, 53, Aug. 12, 1949, 75 U.N.T.S. 287 (this right also appears in the articles of the 4th Geneva Convention, mainly in the articles cited).

57 In 1951 Ben Gurion said:

Zionism is a dream while the state is a fact ... As a citizen of Israel, my relation to the people of Israel has a priority over my relation to my state because the state is just a tool, and at this point in time that state has absorbed only a small part of the nation ... the state is a tool and an instrument, but it is not the only tool.

David Ben-Gurion, Speech to the American Zionist Movement in New York (May 1951), in *COLLECTED ARTICLES: DAVID BEN GURION* (former Israeli Ministry of Information (Misrad Hasbara) ed., 1951) (Isr.).

58 Ben Gurion, *The Imperative of the Jewish Revolution*, in *THE ZIONIST IDEA: A HISTORICAL ANALYSIS AND READER* 606 (Arthur Herzberg ed., 1959).

almost natural policy.⁵⁹ Fourth, given that the state was established after a war against the Palestinians, who resisted its establishment, the imposition of a military regime on the Palestinian citizens of Israel might then be considered a “natural” measure for security reasons.⁶⁰ Fifth, as a settler state, Israel has a frontier that is never fixed; the borders are never settled and the project is always expanding.⁶¹ For example, Israel captured more lands in 1948 than were assigned to the Jewish state according to the partition plan of the UN. To protect those lands, it had to create facts on the ground by intensively establishing settlements in those areas.⁶² Thus, the construction of settlements, streets, factories and schools become part of the security mission itself, so

59 On the transfer of ownership from Palestinian owners to the state and other Jewish agencies, see Sandy Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT'L L. & POL. 923 (2001).

60 On the years of military rule, see, SABRI JIRYIS & INEA BUSHNAQ, *THE ARABS IN ISRAEL 9-35* (1976); Yair Bäuml, *Israel's Military Rule over Its Palestinian Citizens (1948-1968)*, in 103 *ISRAEL AND ITS PALESTINIAN CITIZENS: ETHNIC PRIVILEGES IN THE JEWISH STATE* (Nadim N. Rouhana & Sahar S. Huneidi eds., 2017).

61 On the nature of Israel as a settler project and the concept of frontiers and fuzzy borders, see OREN YIFTACHEL, *ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE* (2006); Oren Yiftachel, *'Ethnocracy': The Politics of Judaizing Israel/Palestine*, 6 *CONSTELLATIONS* 364 (1999) (discussing the settlement project as an ongoing process that expands the borders all the time); Helga Tawil-Souri, *Uneven Borders, Coloured (Im)mobilities: ID Cards in Palestine/Israel*, 17 *GEOPOLITICS* 153 (2012) (on the fact that Israel borders are never fixed); BARUCH KIMMERLING, *ZIONISM AND TERRITORY: THE SOCIO-TERRITORIAL DIMENSIONS OF ZIONIST POLITICS* (1983) (for a conversation about Israel as a colonial enterprise and an investigation of the effects of the Zionist project on the native Palestinian population). On the concept of frontier as a fuzzy concept that allowed the expansion of Western American settlerism, see GEORGE ROGERS TAYLOR, *THE TURNER THESIS CONCERNING THE ROLE OF THE FRONTIER IN AMERICAN HISTORY* (1972).

62 Building settlements and settling Jews in these new settlements (inside and outside the Israeli borders in the occupied territories) has always been a national project of top priority. See David Newman, *Civilian and Military Presence as Strategies of Territorial Control: The Arab-Israel Conflict*, 8 *POL. GEOGRAPHY* Q. 215 (1989). Even after its establishment, Israel continued to “Judaize the space.” On this aspect, see, Yiftachel, *supra* note 61; See also Falah, *supra* note 35. Some have referred to this process as “internal colonialism”. See ELIA T. ZUREIK, *THE PALESTINIANS IN ISRAEL: A STUDY IN INTERNAL COLONIALISM* (1979). In such a settlement project, where land, geography, and history are contested, even planting trees becomes a crucial security issue and part of the struggle

that depopulating Palestine of Palestinians and repopulating it with Jewish immigrants are two sides of the same coin and both are viewed as national missions. From its own perspective, Israel launched the 1967 War as one that it considered to be of self-defense.⁶³ The story goes that despite the fact that Israel delivered the first strike on the morning of 5 June, 1967, this was a war of self-defense given the military movements that Egyptian President Nasser had ordered in the preceding two weeks, which amounted to a threat of war against Israel.⁶⁴ On the other hand, following the occupation of the West Bank, Israel started to build settlements there.⁶⁵ The settlers in the West Bank needed roads to get to their houses, electricity, water, etc., and they needed protection from what the settlers considered to be hostilities on the part of the Palestinians,

for controlling the land and the landscape itself. See IRUS BRAVERMAN, *PLANTED FLAGS: TREES, LAND, AND LAW IN ISRAEL/PALESTINE* (2009).

- 63 In the literature there is a clear distinction between preemptive war and preventive war. In the first case, we can speak about an imminent danger to the state, and there is no reason to ask the state to wait until it is attacked in order to defend itself. The law allows the state to make the first move, and still considers this move to be defensive (if it meets many other conditions). On the other hand, preventive war does not assume the imminence or closeness of the threat; rather it is a more remote one. In such cases, we can speak of preventive war which aims to prevent the enemy from having the capacity to pose even a threat. While the first might be allowed in international law, the second is not. For more on this distinction, see, HELENE FROWE, *THE ETHICS OF WAR AND PEACE: AN INTRODUCTION* 77-82 (2011). For a different typology, see, Brian Massumi, *Political Threats and the Primacy of Preemption*, 10 *THEORY & EVENT* 5 (2007).
- 64 There are, of course, different accounts of the matter. Many think that Nasser, despite expelling the UN observers and closing the Straits of Tiran, never intended to go to war and that the Israeli military leadership knew that he had no such intention to go to war, but wanted to use the excuse to initiate the war. See, e.g., JOHN QUIGLEY, *THE SIX-DAY WAR AND ISRAELI SELF-DEFENSE: QUESTIONING THE LEGAL BASIS FOR PREVENTIVE WAR* (2013); Kurtulus N. Ersun, *The Notion of "Preemptive War": The Six Day War Revisited*, 61 *MIDDLE EAST J.* 220 (2007). For an opposite take that sees the war as one of clear self-defense, see, MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2002).
- 65 For the history of the over 200 Israeli settlements established in the West Bank from 1967 to 2017, including a population of almost 620,000, see, IDITH ZERTAL & AKIVA ELДАР, *LORDS OF THE LAND: THE WAR OVER ISRAEL'S SETTLEMENTS IN THE OCCUPIED TERRITORIES, 1967-2007* (2007). For an update on numbers of settlers and their location, see, *ANNUAL SETTLEMENT REPORT 2018 – A GLANCE AT 10 YEARS UNDER NETANYAHU REPORT*, PEACE NOW (May 14, 2019), <https://peacenow.org.il/en/annual-settlement-report-2018>.

which aggravated the need to expand more and more, and to confiscate and seize more land to create new safe zones to protect already settled zones *ad infinitum*.⁶⁶ This logic reached a certain climax in the recent decision of the Israeli Supreme Court, delivered by Justice Jubran, according to which the settlers are to be considered local inhabitants of the region for all purposes, with a status similar to that of the Palestinian inhabitants, and constitute part of the “public,” so that Palestinian private land can be confiscated in order to serve and supply their needs.⁶⁷

Furthermore, to protect its soldiers and its settlers and to prevent resistance to the occupation, Israel deploys two major tools: one, referred to as “targeted assassination,”⁶⁸ is more violent, while the other measure, known as “administrative detention,” takes place without criminal proceedings and is deployed as a preventive measure before any criminal act has taken place.⁶⁹ According to ACRI reports, even the way the army declares closed

66 For the recent Israeli High Court of Justice joint ruling, see, HCJ 676/17 Abu Tair v. Military High Commander (Jun. 11, 2019) Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 3246/17 Abu Tair v. Military High Commander (Jun. 11, 2019) Nevo Legal Database (by subscription, in Hebrew) (Isr.). The court rejected the petition submitted, and as a result permitted the demolition of 13 buildings within Jerusalem’s municipal boundary next to a two-lane patrol road, disconnecting Sur Baher from the homes in the Wadi al-Humos neighborhood, despite the fact that these homes were located within Area A, under the jurisdiction of the Palestinian Authority. The Supreme Court ruling, written by Justice Meni Mazuz, discusses the home demolitions as necessary for security considerations, as constructions near the fence might “provide hiding places for terrorists or illegal aliens” and facilitate “arms smuggling.” In general, for the growing natural needs of the settlers as the basis of the logic of expansion, see, Yehezkel Lien, *LAND GRAB: ISRAEL’S SETTLEMENT POLICY IN THE WEST BANK, B’TSELEM* (2002).

67 See HCJ 794/17 Ziada v. Commander of IDF Forces in the West Bank (Oct. 31, 2017) Nevo Legal Database (by subscription, in Hebrew) (Isr.). A petition for further hearing the judgment was denied. See HCJFH 9367/17 Ziada et al. v. Commander of IDF Forces in the West Bank (May 30, 2018) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

68 For the issue of targeted assassination, as a policy that was issued in certain conditions by the High Court of Justice, see, HCJ 769/02 Public Committee Against Torture v. Government of Israel 62(1) PD 507 (2006) . For an analysis of the case and the uses of the practice, see, Orna Ben-Naftali, *Combatants, in 60 THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY* (2018).

69 On administrative detention and the way it is used by Israel, see, Tim Stalberg & Henning Lahman, *A Paradigm of Prevention: Humpty Dumpty, the War on*

military zones and the method of shaping the movement in space are geared towards preventing a situation where Palestinians can gather and march in demonstrations.⁷⁰ This ongoing logic of preemption and prevention creates new needs all the time, and it supports a broad interpretation of the right to deploy preventive measures so that the mere existence of any Palestinian becomes a sort of threat,⁷¹ and every Palestinian act of resistance can be labeled as terrorism.⁷²

Returning to the case of the settlement project, it is natural and legal that the Palestinians under occupation will resist the takeover of their land.⁷³

Terror, and the Power of Preventive Detention in the United States, Israel, and Europe, 59 AM. J. COMP. L. 1051 (2011).

70 See Raghad Jaraisy & Tamar Feldman, *The Status of the Right to Demonstrate in the Occupied Territories*, ASS'N CIV. RTS. ISR. (ACRI) (2014).

71 See Hedi Vitorbero, *Future Oriented Measures*, in 118 THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 136 (2018).

72 Many public figures in Israeli politics and media have deployed the label terrorism in such a loose and relaxed manner: for example, teaching the poems of Mahmoud Darwish, not raising the Israeli flag, and the cancellation of a pop band concert under pressure from the BDS movement, have all been labeled as instances of cultural terror. See, e.g., Aviya Rish, *Terror Tarbuti: Darvish Ken, Degel Israel Lo* [Cultural Terror: Darwish Yes, Israel Flag No], CHANNEL 20 (Oct. 18, 2016) (Hebrew); Or Barnea, *Shuki Weiss: Terror Tarbuti Muf'al al Israel* [Shuki Weiss: Cultural Terror is Exercised Over Israel], YNET MUSIC (Jun. 06, 2010) (Hebrew), <https://www.ynet.co.il/articles/0,7340,L-3899807,00.html>. Former Minister of Education, Natftali Bennett, labeled the UNESCO declaration, which stated that the Temple Mount has nothing to do with the Jewish religion, as “diplomatic terror,” and asserted that the declaration supports terrorist groups. See Ariel Cahana, “*Terror Diplomati*”: *Bennett Hora Lehash'ot Peilut Im UNESCO* [“Diplomatic Terror”: Bennett Ordered to Suspend Activities with UNESCO], MAKOR RISHON (Oct. 14, 2016) (Hebrew), <https://www.makorrishon.co.il/nrg/online/1/ART2/840/432.html>; the Israeli foreign ministry claims that activists of the Palestinian nonviolent movement are in fact “terrorists in suits.” See ISRAEL MINISTRY OF STRATEGIC AFFAIRS & PUBLIC DIPLOMACY, MECHABLIM BEHALIFOT: AIRGUNIM HAMEKADMIM DE-LEGITIMACIA VE BDS BESHIRUT IRGUNEY TEROR MUCHRAZIM [TERRORISTS IN SUITS: ORGANIZATIONS THAT PROMOTE DELEGITIMIZATION AND BDS IN THE SERVICE OF DECLARED TERRORIST ORGANIZATIONS] (2019), https://www.gov.il/BlobFolder/generalpage/terrorists_in_suits/he/doch270219.pdf.

73 Clearly, this is not an axiom, and many think that the land of Israel—all of it—belongs to the Jewish people. To those people, this line of argument will certainly be irrelevant. For more on the right to resist occupation to secure universal and effective recognition under international law, see, Universal

These acts of resistance target the settlers at certain moments and it might be the case that they sometimes react in self-defense.⁷⁴ Thus, the argument of security/self-defense and the argument for the need to confiscate more lands alongside the roads leading to the settlements might sound coherent if viewed through these limited lenses.⁷⁵ Given that there might be cases where Palestinians attack settlers, there might be a need for a clear system of segregation in buses as well as to designate certain roads exclusively for Israeli citizens and settlers.⁷⁶ If we want to extend this logic, we can reach the point where the whole structure of the regime, be it called Apartheid or something less disagreeable, is considered a mechanism of self-defense. Almost anything might seem necessary to preserve the status quo, and anything that might resist the status quo could endanger the system, so the system might consider this, including any change in the demographic balance, to be a matter of security/self-defense.⁷⁷

Declaration of Human Rights, Res. 217 A (III), Dec. 10, 1948, A/RES/217(III); G.A. Res. 37/43 (Dec. 3, 1982); for more on wars of national liberation, see, Additional Protocol I to the Geneva Conventions of August 12, 1949 (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3. Historically, I do think that the Palestinians were entitled to resist the Jewish settlement project under the mandate, as long it aimed to establish a national project in Palestine while Palestine was inhabited by Palestinians, which could be viewed as an act of aggression. But when we speak of Israel proper, the kind of resistance that was considered legitimate and justified a century ago might not have the same status today.

74 However, according to most reports, settlers are the ones who attack first. *See e.g., State-Backed Settler Violence*, B'TSELEM (Nov. 14, 2019), https://www.btselem.org/topic/settler_violence. For examples of the undeclared state policy of lenience toward settler violence aimed at Palestinians, see, ISRAELI MINISTER OF FOREIGN AFFAIRS, COMMISSION OF INQUIRY – MASSACRE AT THE TOMB OF THE PATRIARCHS IN HEBRON, EXCERPTS FROM THE REPORT (Jun. 26, 1994).

75 *See* Vitorbero, *supra* note 71, at 139.

76 *See e.g.,* HCJ 3969/06 Elkharrow v. IDF Forces Commander in the West Bank (Oct. 22, 2009) Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 2150/07 Abu Safiyeh v. Minister of Defense PD 63(3), 331 (2009) (the decision to designate road 443 only for settlers and other Israeli citizens with the outbreak of the second Intifada). For a discussion of these two cases, see, Orna Ben-Naftali, *Geneva law*, in 141 THE ABC OF THE OPT: A LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 155 (2018). The state argued—and the court agreed—that this is a necessary and temporal measure for security reasons.

77 It is important to follow the debates surrounding the two Supreme Court cases regarding the law against Palestinian family unification across the Green Line. At first, it seemed that the justification of the ruling was an issue of security in the

That is not to say that I view all these arguments as equally persuasive, and arguments for security/self-defense at times sound more convincing than others. It is simply the case that I find it difficult to draw the line objectively, so there seems to be no limit to the power of justification. My aim here is not to judge a concrete deployment of security arguments, but rather to describe the dynamic that allows such a pervasive deployment of such arguments. If one zooms in and ignores the historical Palestinian narrative, many of the Israeli measures *might* appear logical and coherent. Thus, legal discourse can play a role of legitimization rather than limitation of Israel's expansionist policy.⁷⁸

My aim in invoking Vitoria was not to prove that he was morally wrong, and I do not see any serious value in passing such categorical moral judgment for or against him. My aim was first of all to show the manipulative nature of any discourse.⁷⁹ Second, I meant to show that the mode of argumentation in Israel's case is not unprecedented. Sometimes an obsession with finding a

military sense. But it later became evident that issues of demography stand at the heart of the ban on family unification. *See* H CJ 7052/03 Adalah, v. Minister of Interior 51(2) PD 202 (2006). For the debate it sparked, see, Daphne Barak-Erez, *Israel: Citizenship and Immigration Law in the Vise of Security, Nationality and Human Rights*, 6 INT'L J. CONST. L. 184 (2008); Mazen Masri, *Love Suspended: Demography, Comparative Law and Palestinian Couples in the Israeli Supreme Court*, 22 J. SOC. & LEGAL STUD. 309 (2013) (criticizing the court ruling); Yoav Peled, *The Evolution of Israeli Citizenship: An Overview*, 12 CITIZENSHIP STUD. 335 (2008); Ayal Gross, *In Love With The Enemy: Justice, Truth, Integrity and the Common Sense Between Israel and Utopia in the Citizenship Law Case*, 13 HAMISHPAT 141 (2009) (ISR.) (against the court's ruling); Uzi Rebhun & Gilad Malach, *Demographic Trends in Israel*, METZILAH CTR. ZIONIST, LIBERAL & HUMANIST THOUGHT (Ruth Gavison ed., 2009) (in favor of the court's ruling); Kobi Michael, *The Wright of Demographic Factor*, 17 STRATEGIC ASSESSMENT (2014). *See also* Ruthie Blum Leibowitz, 'I Didn't Suggest We Kill Palestinians': *Geostrategist Arnon Soffer: I only Said Israel Would 'Have to Kill Them'*, THE JERUSALEM POST (Oct. 10, 2007). <https://www.jpost.com/Features/I-didnt-suggest-we-kill-Palestinians>.

78 *See* Ronen Shamir, "Landmark Cases" and the Reproduction of Legitimacy: *The Case of Israel's High Court of Justice*, 24 L. & SOC'Y REV. 781 (1990).

79 For the manipulative nature of this discourse, see the works of Duncan Kennedy in general, but mainly the following three articles: Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991); Duncan Kennedy, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation*, in LEGAL REASONING (2008). All three articles were reprinted in his recent collection: DUNCAN KENNEDY, LEGAL REASONING: COLLECTED ESSAYS (2008). For the limits of this manipulative

moral justification for what we are doing prevents us from seeing what we are doing in fact *does*, and by this I mean that our obsession to find justifications for our actions, focusing on our intentions, can render us completely blind to the results, ramifications and catastrophic effects of these actions on the lives of other people. Moral reasoning can function as a practice that prevents us from doing things, but at the same time it can operate by allowing us, giving license, to do awful things. Part of what I want to argue here is that it is far easier to find moral support for what one is doing than we think. In fact, it is hard to imagine most of the political crimes that have been committed in recent history, be it expulsion, ethnic cleansing, or massacres, without the deployment of the security/self-defense argument.⁸⁰

IV. THE ISSUE OF ORIGINAL ENTITLEMENTS – LIBERTY OR RIGHT?

Up to now, I have tried to show that Israel can and does deploy what I call SOAJ. That is not to say that these arguments are fully convincing or that they meet the standards for self-defense in international law,⁸¹ or that the Palestinians can or cannot deploy these same arguments against Israel itself. It was not my aim, in fact, to show whether these arguments are convincing or to refute them, but rather to show how they derive their rhetorical power from: the continuation of the conflict itself. So far, I have not said much about the nature of FOAJ. What is the nature of the distribution of rights and entitlements prior to the conflict? What rights did the Palestinians have in Palestine and what kind of rights did the Jews as a national collectivity have?

In the following, I do not intend to make a full-fledged argument in support of the Palestinians' historical rights. I will simply assume that the Palestinians have such rights. Instead, I want to limit myself to discussing one argument put forward by Ruth Gavison regarding the symmetry between the Jewish Yishuv and the Palestinian community in Palestine, which places on an equal footing the FOAJ pertaining to both. Gavison argues that both groups,

nature, see, Raef Zreik, *Ronald Dworkin and Duncan Kennedy: Two Views on Interpretation*, 31 *CANADIAN J. JURIS.* 195 (2019).

80 See e.g., VICTORIA SANFORD, *BURIED SECRETS: TRUTH AND HUMAN RIGHTS IN GUATEMALA* (2003); MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* (2002); ISABEL V. HULL, *ABSOLUTE DESTRUCTION: MILITARY CULTURE AND THE PRACTICES OF WAR IN IMPERIAL GERMANY* (2006); MARK LEVENE, *THE CRISIS OF GENOCIDE VOL. 1: THE EUROPEAN RIMLANDS 1912-1938* (2013).

81 On self-defense, see, HELEN FROWE, *DEFENSIVE KILLING* 121-61 (2014).

Jews and Palestinians, had the *liberty* under both Ottoman and British rule to pursue their national projects, and this Jewish right was even vindicated after the Balfour Declaration and its adoption by the League of Nations in 1922.⁸² Liberty here means something akin to Hohfeld's concept of liberty in the sense of privilege,⁸³ or liberty in the sense that is used by Hobbes in *Leviathan*.⁸⁴ A state of liberty is a situation where one is not under a duty to others, but on the other hand one does not have a claim against others as well. And a state of privilege in Hohfeld's sense means being under no duty, and when it comes to property this means "The privilege of entering is the negation of a duty to stay off."⁸⁵ To be in a situation of having a privilege to do A means that the other party has no right to prevent me from doing A. For example, if we are walking along the seashore and there are benches on the shore, each and every one of us has the liberty to sit anywhere she chooses. None of us has a greater claim than any other to sit on any of those benches. In some sense, this situation of liberty is another way to describe the "state of nature," given that such liberty is meaningless. This is a reality that is devoid of any clear conception of justice,⁸⁶ with everyone free to do whatever one likes or desires. In the first place, in such a state of nature people do not

82 See Ruth Gavison, *The National Rights of the Jews, in 9 ISRAEL'S RIGHTS AS A NATION-STATE IN INTERNATIONAL DIPLOMACY* (2011). Gavison, supra note 39. For a different take on the question, which is closer to my reading, see, CHAIM GANS, supra note 36, at 47-51 (2008).

83 See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

84 See THOMAS HOBBS, *LEVIATHAN* 91 (1996) (Hobbes writes "The right of nature, which writers commonly call *Jus Naturale*, is the Liberty each man hath to use his own power, as he will himself, for the preservation of his own nature.").

85 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913).

86 Hobbes writes:

For they say, that *justice is the constant will of giving to every man his own*. And therefore where there is no own, there is no propriety, there is no injustice; and where there is no coercive power erected, that is, where there is no common wealth, there is no propriety; all men having rights to all things.

Id. at 101.

As for the impossibility that justice is also the result of radical moral subjectivism, he writes in page 39:

For these words of good, evil, and contemptible, are ever used with relation to the person that useth them: there being nothing simply and absolutely so; nor any common rule of good and evil, to be taken from the nature of objects themselves; but from the person of the man, or from the person

have any rights in terms of claim rights, and all they possess are desires and wishes. Thus, Hobbes in fact removes any meaning or residue of normative order from the state of nature. In Hohfeld sense, both sides are in a position where they have privilege, so that the Jewish Yishuv has no right to prevent Palestinians from pursuing self-determination, nor does the Palestinians have the right to resist the Jewish immigration and self-determination project.

Can we really say this about the relation between the Jewish Yishuv and the Palestinian inhabitants of Palestine, that both of them were situated in a semi-state of nature such that each of them was at liberty to pursue his national project? Were they situated morally in a symmetrical manner *vis à vis* their right to a national homeland and self-determination? Were they both free to pursue their respective projects, so there is no possibility of making *moral* judgments between more justified and less justified claims for national self-determination? Were Jewish immigrants under no moral duty not to interfere with the rights of Palestinians to pursue their national project?⁸⁷

Before I turn to evaluating such a claim and contemplating its significance, I want to set out the historical and conceptual ground that stands beneath such an argument. Here again, the argument is not new, but rather has a long European history, with its basis in international law of the nineteenth century, that is, in colonial European international law.

Some might have a romantic view of international law as some kind of moral law that resides in and hovers above states and nations. As a historical matter of fact, however, international law of the eighteenth and nineteenth centuries was a positivist form of law that reflected agreement between states, and not something imposed on states by a divine will or an international body.⁸⁸ The international law that emerged from the peace of Westphalia, following long and fierce civil wars in Europe, celebrated the rise of the state—the sovereign state that claims monopoly over the use of force within its own territory. The legal world was split into two major actors: citizens and states. All other mediating groups—tribes, clans, groups, races, guilds, and

that representeth it; or from an arbitrator or judge, whom men disagreeing shall by consent set up, and make his sentence the rule thereof.

87 It is no accident that I did not mention “legal.” According to the League of Nations, the Jews were allowed to immigrate to Palestine. For this reason, I focus on the moral aspect of building a national home in a land already populated by the Palestinians. Clearly, the needs of the Jews for a safe shelter must be weighed against Palestinian rights over their land.

88 For the structure of international law in the eighteenth and nineteenth centuries, see, Hirsch Lauterpacht, *The ‘Grotian Tradition’ in International Relations*, 23 BRIT. Y.B. INT’L L. 1 (1949); Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AMER. J. INT’L L. 477 (1982).

sects—were not allowed any standing whatsoever. The model of sovereignty was absolute, territorial, and assumed the homogeneity of space.⁸⁹ When Europe started its expansion to Africa and the Americas, it did not treat the modes of organization it found there as sovereign states, because they did not in fact resemble the European model; colonization therefore was not considered an act of aggression, given that aggression can only take place against a sovereign state.⁹⁰ This was the basis for the *Terra Nullius* doctrine.⁹¹ The native communities were considered to lack sovereignty and also to lack any right of self-determination. Thus, conquest in itself was to be considered the basis for gaining sovereignty over new territories in the colonies.⁹² The right of self-determination for colonized groups gained full force only toward the second half of the twentieth century.⁹³

89 On the modern concept of sovereignty, see, DAVID HELD, *DEMOCRACY AND GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995).

90 To date, acts of aggression that entitle self-defense are commonly described in terms of an attack on sovereignty. Thus, Helene Frowe writes “A just cause for war is usually defined as a military act that violates (or threatens to violate) a state’s sovereignty.” See FROWE, *supra* note 63, at 53.

91 For more on the doctrine of *Terra Nullius*, as a principle employed in international law to justify the acquisition of uninhabited or unsettled land, see, MALCOLM N. SHAW, *INTERNATIONAL LAW* 414-43 (8th ed., 2017).

92 See SHARON KORMAN, *THE RIGHTS OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 9 (1996).

93 The two Additional Protocols to the Geneva Conventions in the 1970s officially extended the rights and duties of international law to indigenous groups and self-determination movements in armed conflicts, while the UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States, affirmed an authoritative indication of customary international law’s provision of the right of self-determination. More particularly, art. 43 of the 1977 Protocols expanded the definition of belligerents to also include national liberation movements, and effectively included those armed conflicts fighting against colonial domination, alien occupation and racist regimes towards the aim of self-determination, as mentioned in art. 1(4), and also extended to these belligerents the rights and prisoner of war status set in art. 44(3). See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, Res. 2625 (XXV), Oct. 24, 1970; Protocols Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 17513, art. 1(4), 43, 44(3), 52(2). See also S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2000), for a further discussion of the legal developments of

Thus, when one argues that the Palestinians did not have a right to self-determination at the turn of the century; one is reproducing the European understanding of the rights of nations and the concept of sovereignty through the eyes of Europe; and when Zionists base their rights on the Balfour Declaration they also reproduce the colonial mindset that dominated that colonial era.⁹⁴ That, however, is not evidence of the moral soundness of the argument. Buying into such an argument requires a historical framework where one is willing to accept the European imagination and legal concepts as a yardstick for judging international relations.⁹⁵

If we accept the argument that before there was an established sovereign state (be it under the Ottoman Empire or under the British Mandate) all sides were at liberty to pursue their respective projects for statehood and self-determination, then we do not have any grounds to evaluate the moral soundness of the Balfour Declaration. It would seem that each had the liberty to pursue its project for nationhood on an equal footing, and within this logic the argument that war is the best arbiter can gain more credibility.

But against the assumption that it is only sovereign states that can have rights over territory, there is no reason—even from a liberal point of view—not to accept that even communities of people do have a vested interest in occupying certain territories and parts of the earth.⁹⁶ They have a legitimate interest in continuing to reside in the same place and maintaining the same social and economic relations, and in pursuing cultural life with other members of the community, whether or not this community of people is already organized as a nation state.

I agree that the events in Europe in the 1930s and 1940s exacerbated the distress of the Jews in Europe and the Holocaust created an extraordinary set of historical circumstances that culminated in the UN partition plan in 1947. All that is true, but my argument is that the ground had already been laid in 1917 with the Balfour Declaration and that the seeds of conflict to come were already planted then. While the Jews' dire need for a safe home in the 1940s

international law and the rights it extended to indigenous groups in the nineteenth and twentieth centuries.

94 See Orna Ben-Naftali, *Nomos*, in 277 THE ABC FOR OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 294 (2018). Ben-Naftali argues that the Levy Committee is implanted in such colonialist/orientalist conceptions of international law.

95 What is clearly true is that nationalism in itself, as we know it, is a European phenomenon that spread to other parts of the world.

96 See, e.g., the treatment by Ana Stiliz of this issue, in which she develops what she calls rights of occupancy. Anna Stiliz, *Occupancy Rights and the Wrong of Removal*, 41 PHIL. & PUB. AFF. 324 (2013).

is clear and posed a humanitarian question that demanded answers, it is not clear why the Palestinians had to pay the price for European anti-Semitism and to accept giving up more than half of their land.⁹⁷ Furthermore, saving Jewish lives is one thing, and establishing a Jewish ethnic state is another. The Zionist were not asking to be accepted or admitted as refugees or immigrants, rather they wanted to be settlers and to claim sovereignty over the land.

V. REVISITING THE DISTINCTION BETWEEN FOAJ AND SOAJ: TOWARD A COMPREHENSIVE APPROACH

I imagine that at times it may be hard to hold and sustain the distinction between FOAJ and SOAJ, be it in the case of property or just war. In the case of property, for example, we would find it strange indeed if the owner of a piece of land, who had regained possession of his land by using excessive force, or beyond the time limit allowing him to use self-help, were required to relinquish possession back into the hands of the trespasser. Though we understand the logic behind the prohibition on self-help, we still want to achieve substantive justice and to allow the rightful owner take hold of his property. No wonder that in the Israeli land law itself, the court is entitled to deal with both issues at the same time: the issue of temporal possession and the issue of rightful permanent possession.⁹⁸ The separation between the two stages—while necessary—seems to be problematic at the same time, for it allows trespassers to hold possession. Thus, the law grants the court the power to combine the discussion of FOAJ with SOAJ in an attempt to overcome the temporal gap when things are possible and thus subsume the two into one judgment.⁹⁹

Something similar—though far more complicated—has developed in the last two decades or so in relation to the distinction between just war and justice

97 I cannot do justice to all aspects of this debate. On the injustice entailed by the partition plan, see my article Raef Zreik, *Notes on the Value of Theory: Reading in the Law of Return – A Polemic*, 2 *LAW & ETHICS OF HUM. RTS.* 1 (2008). It is one thing that the partition plan was unjust, quite another to acknowledge that it created a reliance interest in and of itself for the Jewish community in Palestine. For an attempt to answer why the safe shelter should be Palestine and no other place, see, GANS, *supra* note 37, at 27, 33, 48-49.

98 Land Law 5729-1969, art. 19, 5 *LSI* 45 (Isr.).

99 See the ruling of the case in Rosenstein mentioned above in *supra* note 20, which actually preferred to deal with the question of entitlement *and* the question of possession and to render its judgment on both issues at the same time. *Supra* note 96, at art. 20.

in war, which casts doubt on this possibility of absolute separation between the two levels. This separation—though it might have a certain logic—is still very problematic, and many philosophers have launched an attack on the distinction.¹⁰⁰ One major argument that the revisionists raise is that there is no reason to assume symmetry between an army that is fighting a just war and an army that is fighting an unjust war.¹⁰¹ For many of us, the idea that a country can conduct an unjust war (in terms of *jus ad bellum* where the state has no justified reason to go to war) in a just manner (according to the rules related to the conduct in war, *jus in bello*) sounds jarring. If there is no reason to go to war and the war is not just in the first place, then how can we say the conduct of the war is just? Helene Frowe argues that if it is wrong and unjust to take another person's property then it is absurd to think that robbing that person is wrong but slickly deceiving him to get his money is just. She concludes that "if what one is trying to achieve is morally wrong, any methods that one employs to try to achieve it are similarly wrong."¹⁰² On the other hand, if one is clearly fighting a just war—say in a clear case of self-defense—then to many it may seem rather strange if that party is required to stick to the rules in war (*jus in bello*) and to refrain from inflicting incidental harm on noncombatants if this could help him win the just war. In this sense, just combatants—those conducting a just war—should not be *morally* constrained by the same rules of war that constrain those combatants fighting an unjust war. Others argue, following the same logic, that unjust combatants are not morally entitled to kill soldiers fighting a just war. McMahan writes: "So, even when unjust combatants confine their attack to military targets, they kill innocent people."¹⁰³ In this view, the justness or unjustness of the war colors the whole process of the war and affects our judgment regarding the conduct of the parties during the war itself, and we ought to view the whole war through these lenses. This

100 The major attack was launched by Jeff McMahan in a series of articles and books. See, e.g., Jeff McMahan, *The Ethics of Killing in War*, 114 *ETHICS* 693 (2004); Jeff McMahan, *On the Moral Equality of Combatants*, 14 *J. POL. PHIL.* 377 (2006); Jeff McMahan, *The Morality of War and the Law of War*, in 19 *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* (David Rodin & Henry Shue eds., 2008); JEFF McMAHAN, *KILLING IN WAR* (2009). I also benefited from the debates and discussion of the revisionist view, as presented in FROWE, *supra* note 63, and in specific, chapters 5 and 6 of the book. See also ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* (2017).

101 See McMahan, *The Ethics of Killing in War*, *supra* note 99, at 706; McMahan, *On the Moral Equality of Combatants*, *supra* note 99, at 379; HAQUE, *supra* note 99, at 20.

102 See FROWE, *supra* note 63, at 130-31.

103 McMahan, *The Ethics of Killing in War*, *supra* note 99, at 64.

approach rejects the independence thesis (sometimes called the orthodox view), which demands two separate and independent judgments: one for *jus ad bellum* and another for *jus in bello*.¹⁰⁴ The principle of judging the management of conflict on the basis of the initial moment and the justness of the parties regarding their initial rights has another side to it that bears the same logic. If I am attacked unjustly and I defend myself and use force to attack my assailant, I do not lose my right not to be attacked. The situation itself, the moment of conflict, cannot render what is wrong right, or justify the assailant then attacking me again.¹⁰⁵

As we see, this approach assigns crucial importance to the moment of inception, the moment the war started, asking whether the war is just or not in the first place. This approach may be highly relevant to our case in Israel-Palestine. But before returning to the local issues, I want to suggest connecting this theory of war with a theory from criminal law called *actio libera in causa*,¹⁰⁶ which could be translated to mean “free action in origin.” This doctrine describes a situation of free entry into a situation of self-defense where the agent acts un-freely in a manner that does not allow us to impute the action to him. The entry itself is free and the agent could have decided not to enter, but once the agent has entered the situation she might act spontaneously and without reflection, or even involuntarily defend herself in a way that causes harm to others. Here is an example: suppose that I hate my neighbor and wish to beat him badly. I hear my neighbor shouting extremely angrily at his children. I know that in these situations he can become extremely dangerous

104 Some think that there is nothing really new in McMahan’s approach, and that in fact, the approach has been that there is no moral symmetry between those fighting a just war and those fighting an unjust war, and that this asymmetry has been dominant all along from Augustine to Aquinas and Grotius. Thus, Walzer’s thesis on the independence between the two judgments can hardly be called an orthodox approach, and there is no reason to consider McMahan’s approach revisionist. See e.g., Uwe Steinhoff, *Rights, Liability, and the Moral Equality of Combatants*, 16 J. ETHICS 339 (2012).

105 See McMahan, *On the Moral Equality of Combatants*, *supra* note 99, at 379. He says “Suppose a malicious person attacks you unjustly. Would you lose your right not to be attacked by him simply by trying to defend yourself? No. People don’t lose moral rights by justifiably defending themselves or other innocent people against unjust attack.” This clearly stands in tension with the orthodox view and put limits on the distinction between the two levels.

106 For the doctrine itself, its meaning and application, see, Susan Dimock, *Actio Libera in Causa and Intoxication*, 7 CRIM. L. & PHIL. 549 (2013); Leo Katz, *Entrapment Through the Lens of the Actio Libera in Causa*, 7 CRIM. L. & PHIL. 587 (2013).

and violent. I decide to enter the house and to ask him to pay me back the thousand dollars that I claim I lent him. I know for sure that this will drive him mad and might cause him to use violence. Nonetheless, I enter the house: he attacks me with a stick, and I hit him back and beat him badly. The doctrine of *action libera in causa* is introduced precisely in order not to allow me to claim self-defense and to overcome the problem of imputation. What the theory does is not grant him immunity but prohibit me from deploying self-defense—given that I acted involuntarily and unreflectively at the moment of the event. As Susan Dimock puts it, “The *actio libera* doctrine allows us to impute un-free actions to persons, provided they were responsible for causing the conditions of un-freedom that characterizes those actions when performed.”¹⁰⁷ The idea is simple: given that you brought the danger upon yourself willingly, and entered of your free will into the dangerous situation, you are now not allowed to claim self-defense.

My aim in introducing the doctrine of *action libera in causa* is to show that we cannot and should not separate arguments related to the immediate moment of conflict from arguments and considerations related to the initial moment that invited or caused the conflict in the first place. It’s the same move I made by questioning the independence of rules pertaining to justice in war from the rules of just war, the total separation of laws of just war from the laws in war. My aim is to raise doubts regarding the independence of SOAJ from FOAJ, to recapture the importance of the “original” question—the distribution of entitlements that existed before the conflict erupted—and invite us to view the conflict through these lenses. This does not mean that second-order arguments are reducible to the first order, or that the only thing that matters is first-order arguments. Rather, it is to argue that second-order arguments, arguments about the rules of engagement, have only relative autonomy and need to be read and interpreted by reference to the first-order arguments dealing with substantial corrective justice and the original distribution of entitlements. Equipped with this kind of logic, the Palestinian can offer answers to those questions posed to him by Israel in Part II. When Israel argues that “I attack you because you attack me,” the Palestinian can argue that this is not a good enough reason and you have to show that you are fighting for a just cause. And when Israeli Jews claim in the face of the Palestinian refugee that his demand for return threatens their collective existence, then the Palestinian refugee can answer: “It might indeed be the case that my justice threatens your existence, but it might the case that your existence is based on injustice.” When the Palestinian makes such an assertion, he does not mean to end the

107 Dimock *supra* note 105, at 549.

discussion, but to start it; not that this argument trumps all the rest, but that it is an argument to be dealt with.

This is even more important in a reality like Israel-Palestine, where the conflict continues and the 1967 occupation of land seems like it may last forever.¹⁰⁸ Most of the laws of war are thought out and shaped through the image of war between two sovereign nation states, but are much less about a prolonged and ongoing process of settlement and colonization. In such a reality, the interminable nature of the conflict means that the only arguments that prevail are of a second order, while arguments of a historical nature—relating to historical justice, which ask questions about the past, about who started it all, and who interfered with the life of others and settled in the land of other nations—are always being delayed, deferred and postponed *ad infinitum*. The whole moral and political discourse becomes saturated with second-order arguments; and by claiming this exclusive nature; they perpetuate themselves and recreate new security questions.

In such a reality, there is a fear that Israel will become more and more invested in sustaining the conflict given that the conflict is in and of itself a source, an independent source, of moral arguments to justify Israel's policy of aggression and expansion, all under the rhetoric of security and self-defense, thus turning the exception into the norm.¹⁰⁹ Now clearly this does not mean that we can ignore SOAJ relating to security or self-defense, etc., as long they are sincere. Reaching a historical compromise can't take place in one fell swoop, so second-order arguments must be on the table as well. But for those to be genuine they must be addressed as part of historical questions about justice and original entitlements, and must be brought to the table in good faith, and by good faith in this regard I mean a genuine interest in bringing the conflict

108 On the prolonged nature of the Israeli occupation, see, Richard Falk, *Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank*, 2(1) J. REFUGEES STUD. 40 (1989). For more on the transformative nature of the prolonged occupation, see, ANDREA CARCANO, *THE TRANSFORMATION OF OCCUPIED TERRITORY IN INTERNATIONAL LAW* (Carsten Stahn, Larissa van den Herik & Nico Schrijver eds., 2015). On the prolonged occupation in the case of Palestine, see, Orna Ben-Naftali, Ayal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551 (2005); VALENTINA AZAROVA, *ISRAEL'S UNLAWFULLY PROLONGED OCCUPATION: CONSEQUENCES UNDER AN INTEGRATED LEGAL FRAMEWORK* (2017).

109 One of the conclusions of the Goldstone Report is that "what is fallaciously considered acceptable 'wartime' behavior has become the norm." United Nations, *The Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, U.N & RULE OF L. (2009).

itself to an end, and with it those arguments that feed on the continuation of the conflict. Refusing to deal with historical questions of justice can itself feed into the risks of security and self-defense, and thus Israel itself should be viewed as being responsible for this reality.¹¹⁰

These SOAJ should thus—by definition—only be of a temporal nature, so that they will disappear if a just historical compromise is reached. In fact, Chaim Gans has already pointed to the temporary nature of these arguments. For him there is no justification for Jewish privileges and no right to claim hegemony for the Jews over cultural, economic, and other resources within the State of Israel. Nevertheless, as Gans argues, the major justification for maintaining Jewish privileges is limited to the two fields of security and demography. The justification is based on the idea that *as long as the conflict continues* there is a good reason to keep these two in Jewish hands. As for the rest, he finds no justification for any Jewish privileges and argues that full equality must be granted to the Palestinian citizens of Israel.¹¹¹ Whenever the conflict ends, Gans believes that these privileges will have no further justification. In some sense, he thinks that they have a merely temporal aspect.

In principle, I agree with Gans's temporality approach.¹¹² Yet Gans seems to underestimate the level of investment in "war talk" in Israel that feeds on the continuation of the conflict. Furthermore, insistence on these privileges might in itself become a reason for the continuation of the conflict. The more the conflict goes on, the longer it lasts, the less secure the Jews in Palestine will feel in their future, despite the fact that they possess nuclear weapons and enjoy absolute military superiority. This insecurity—real or false, authentic or imagined—feeds a discourse of war that in itself justifies the holding of Jewish privileges forever and postpones indefinitely any serious discussion of historical justice or original entitlements, whether we take the watershed to be 1917, 1948 or even 1967. The discussion of corrective/historical justice is simply being delayed, eclipsed and taken off the table.

CONCLUSION

This Article assumes two facts that are very much in dispute, but still constitute part of the normative reality in Israel/Palestine: the first is that the Palestinians

110 On this inversion of reasons and results, see Vitorbero, *supra* note 71, at 118, 121.

111 See GANS, *supra* note 37, at Chapter 3, and particularly from page 73 onwards.

112 I agree with his temporality approach in the sense that one should understand the rules of engagement within a bigger picture of historical justice and that one cannot claim any permanence of these rules of engagement.

have a good case against Zionism in terms of historical justice; the fact that they were living in Palestine in the early twentieth century, owned much of the land, and were engaged in developing their country gives them a right to continue to live and develop their national project and not to be interfered with by other groups, including Jewish settlers who claim the land to be theirs. In other words, on this assumption the Palestinians have good FOAJ.

The second fact, although it is clearly very controversial, is that Israel and the settlers were and continue to be under attack by Palestinians and are thus in an ongoing reality of self-defense and lack of security, and they are therefore entitled to react to the Palestinian aggression in the mode of self-defense. On this assumption Israel has good SOAJ.

The Article has tried to elaborate a distinction that aims to separate the two levels of argumentation and to claim independence for the rules of engagement. Later in the Article I tried to scrutinize the independence thesis itself and to claim that it is problematic in general, in the case of Palestine in particular.

In the case of Israel, the claims for self-defense and security are becoming so pervasive that they threaten to suspend the claims for historical justice forever, to the point that everything, even the regime that is crystallizing in front of our eyes as an Apartheid regime, is being justified as a temporal necessity. But what we are witnessing is the transformation of temporality into something permanent. Furthermore, the suspension of substantive corrective justice, in and of itself, exacerbates the security threats and the feeling of insecurity.

Though I do think that any discourse about the future can't skip over second-order arguments, the latter cannot and should not trump first-order arguments or suspend them forever. There must be a way to bring them into the conversation, given that reconciliation is a process, not an event. This is what politics in the noble sense must be able to do.

