

# POLICY PAPER

  
مؤسسة الدراسات الفلسطينية  
Institute for Palestine Studies

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**Nakba Peace:**

## Israel's Demand for Exception to the Prohibition on Genocide

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(Thilo Schmuelgen/Reuters)

Following the ICJ's ruling that it is plausible that Israel is committing genocide, Israeli Prime Minister Netanyahu doubled down <sup>1</sup> on his rejection of international legal authority, insisting that Israel "had an inherent right to self-defense." <sup>2</sup> Netanyahu's claims are not merely the demonstration of a lone, rogue state. To the contrary, Israel, along with its Western allies, are demanding an exception to the prohibition on genocide to defend and entrench Zionist settler sovereignty by any means necessary. Israel is pursuing a "Nakba Peace," the establishment of security achieved through the removal of native Palestinians who, by their very existence and refusal to disappear, challenge Zionist settler sovereignty. In the words of former Shin Bet Director and National Security Member Avi Dichter, "We are now rolling out a Gaza Nakba, Gaza Nakba 2023, that's how it will end". <sup>3</sup>

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The demand for exception has a legal basis in law. By demonstrating that a situation is *sui generis*, or unlike any other, a claimant argues that no existing legal precedent or analogy can properly remedy the situation. Such a unique fact pattern, the claimant argues, gives them the authority to create new law where, it insists, no appropriate framework exists. This demand for exception characterizes Israel's relationship to law <sup>4</sup> historically and, in the present.

Even before the state's establishment in 1948, Palestine has been a site of legal exception. When Britain designated Palestine as a site of European Jewish settlement in the 1917 Balfour Declaration and later incorporated it into the Palestine Mandate in 1922, it classified the mandate as *sui generis*. Unlike other Class A mandates, or the former territories of the Ottoman Empire, where mandatory powers had a duty to shepherd the native populations to self-determination, in the Palestine Mandate, the British Mandatory Power created a duty, through its own legislative efforts, to establish a Jewish national home. This exception enabled Britain to evade its duty under Article 20 of the League of Nations Covenant stipulating that the Mandatory Power not take on any commitments that are "inconsistent with the terms of this Covenant." This resulted in subverting the will of the native population as well as refusal to establish a representative embryonic government for fear that it would reject Britain's Zionist policy. The British Government and, later, the UN Special Committee on Palestine, justified these violations because of the *sui generis* nature of the Palestine Mandate.

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Today, the demand is an exception to the prohibition on the destruction of a people in whole or in part, to allow Israel to achieve what *it* deems necessary for its self-defense without external regulation owing to the uniqueness of its factual circumstances.

***Sui Generis : Israel’s Historical Deployment of Legal Exception to Advance its Settler Colonial Ambitions***

As a matter of law, Israel has no right to self-defense in law against territory that it occupies <sup>5</sup>. This prohibition was affirmed by the ICJ in its 2004 Advisory Opinion <sup>6</sup>, which explained that an “armed attack” that would trigger Article 51 must be attributable to a sovereign state. In the case of the Palestinian Territories, Israel usurped that sovereignty and has a duty and responsibility to protect the civilians under its occupation until the reversion of sovereignty. That means that any insecurity and disorder within the Occupied Territory is attributable to the Occupying Power itself, rather than a foreign state, and the proper level of force in that situation is regulated by law enforcement, rather than military, authority.

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However, because Israel desires Palestinian land without its people, it has insisted that no sovereign existed in the West Bank and Gaza in 1967. Egypt, it argues never laid claim to Gaza, no one besides the UK and Pakistan recognized Jordan’s claims to the West Bank, and Palestinians as a juridical people – or political community - do not exist, thus making Israel’s claims to sovereignty as valid as any other. Hence, the territory is disputed and not occupied, thus relieving Israel of the duty to adhere to the provisions of Occupation Law as a matter of law thus relieving it of the duty to preserve the juridical, political, and territorial status quo – including the prohibition on civilian settlement. In this instance, Israel is claiming that West Bank and Gaza, are *sui generis* <sup>7</sup>, and unlike any other territories that have been occupied.

Under this exceptional framework, Israel shifted from a framework of Occupation to warfare<sup>8</sup> at the start of the Second Intifada. Its military lawyers declared that the Palestinian uprising was more than a civilian disturbance, regulated by law enforcement authority, but not tantamount to an armed conflict – either against a nascent sovereign (IAC) or against a local population under its jurisdiction tantamount to civil war (NIAC). Instead, Israel insisted that it was facing an unprecedented challenge it called “armed conflict short of war,” to create new law where it insisted no appropriate analogy or precedent existed. Under this *sui generis* framework, Israel insisted it can be both usurp the policing authority of the civilians under its occupation subjecting them to martial law (i.e., administrative detention, curfews, restrictions on movement, collective punishment, restrictions on speech and assembly) and use lethal force against that population (i.e., extrajudicial assassinations, aerial missile strikes) wherein the Palestinian could not fight back. Any use of force by Palestinians, whether targeting military or civilian objects, is considered terroristic and criminal by the state.

Upon Israel’s unilateral disengagement from Gaza in 2005 – when it removed 9,000 settlers and the military infrastructure of settlement- Israel declared yet another exception in law. Gaza was *sui generis* – because it was not independent, with the right to have its own standing army, control its borders, its resources and its commerce- but neither was it occupied. Israel declared that Gaza was a new and unprecedented category that had no analogy or precedent in law: it was a “hostile entity.”<sup>9</sup> Notably, in 2014, the International Criminal Court in its dicta, concluded that because Israel maintained control over Gaza’s air space, sea space, electromagnetic sphere, population registry, and all points of ingress and egress of goods and people, together with the capacity to reestablish boots on the ground, Israel remained in “effective control” of Gaza and thus, the Occupying Power.<sup>10</sup>

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### **Israel is Pursuing a Nakba Peace**

As an Occupying Power, Israel does not have the right to self-defense in law to restore order and security within Gaza but does have the authority to use other means within the bounds of international humanitarian law to do so. Insisting that it can use military force to respond to threats emanating from the Palestinians in Gaza is tantamount to claiming a right to force to

protect its colonial holdings. Not only is Israel claiming that right today, as it has since the early 2000s, but it is making a bid for a new exception in law for genocide as necessary for self-defense.

Israel insists that its security challenge in Gaza, as embodied by Hamas's capacity to fire home-made rockets and more recently to penetrate the militarized perimeter to launch an operation aimed at capturing soldiers and kidnapping hostages, the latter in contravention of laws of war, is unique. Further, Gaza's character as an urban area featuring high population density and subterranean tunnels used for military operations makes its battle against Hamas unprecedented and necessarily disproportionate and indiscriminate.

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This, however, is hardly unique. Most of the armed conflicts since the Second World War have not been conventional, between two sovereign states, but rather between state and non-state actors. In 1977, the international community fleshed out Common Article 3 in the Geneva Conventions (1949)<sup>11</sup> precisely to account for this type of irregular combat. Those laws are enshrined in the First and Second Additional Protocols<sup>12</sup> regulate irregular warfare in urban areas featuring dense populations and guerrilla combatants recognized as soldiers with the right to fight. Israel's confrontation with Hamas is far from unprecedented. Notably, Israel and the United States are outstanding objectors to the Additional Protocols and thus rebuff the legitimacy of anti-colonial warfare be it by Palestinians today or the SWAPO, the Viet Cong, or the ANC, historically.

Even absent these “red lines”<sup>13</sup> for the past four months of warfare and counting, Israel is nowhere closer to achieving its stated military goals. Israel has said that it seeks to (1) extract its captive soldiers as well as retrieve its civilian hostages; (2) to turn the Palestinian population against Hamas in rebellion; and (3) to decimate Hamas. Israel has not extracted Israeli soldiers or retrieved its hostages through its military combat. In fact, the only way that they have done so was through diplomatic negotiations, and so its military battle has not yielded that<sup>14</sup> outcome. As to turning the Palestinian population against Hamas, not only have they failed to do that, but they've increased Hamas's popularity amongst Palestinians, the Arab world,<sup>15</sup> and, according to US intelligence, globally as well. As to decimating Hamas, not only does Hamas continue to fire rockets from the center of Gaza City, indicating that its capability has



not been diminished, according to military reports, only 20-30 percent of Hamas fighters have been killed.<sup>16</sup>

Nonetheless, Israel has dropped the equivalent of two atomic bombs, displaced 1.9 million Palestinians, destroyed all of Gaza's universities and hospitals, 247 mosques, 3 churches, 199 heritage sites, 1,690 factories, bulldozed 16 cemeteries and completely, or partially, destroyed 70 percent of all residential structures, killed 27,000 Palestinian deaths, forty percent of whom are children, or and yet failed to even approximate its stated military goals. That should at least raise the presumption that Israel has another, less explicit, military goal.

Israel is seeking to depopulate the Gaza Strip and ultimately to resettle it in the name of security. It cannot militarily destroy Hamas, or any other existing, latent, or potential manifestation of Palestinian resistance to their racial-colonial domination<sup>17</sup>. Instead, it is seeking to remove all Palestinians through a program of ethnic cleansing achieved through a genocidal campaign. Israel is "conducting mass killings of Palestinians in Gaza, causing them serious bodily or mental harm, creating conditions intended to destroy them, as well as imposing measures intended to prevent births among them," acts that if committed with<sup>18</sup> the intent to destroy a people in whole, or in part, are tantamount to genocide, for the purpose of removing them all together. On 26 January 2024, the ICJ found that, in fact, Israel was plausibly committing genocideterm security objectives through -Israel is pursuing its long.<sup>19</sup> the removal of Palestinians and the resettlement of their lands. A confounding framework I describe as Nakba Peace.

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Israel's precedence for such Nakba Peace took place between 1947 and 1949, when Zionist militias and, later, Israel's conventional army conducted military operations that targeted

Palestinian civilians and Palestinian civilian villages in the name of a defensive operation. In Plan Dalet, that plan including the destruction of villages,

“especially those population centers which are difficult to control continuously, mounting, combing, and control operations according to the following guidelines: encirclement of the village and conducting a search inside of it, in the event of resistance, the armed forces must be wiped out and the population expelled outside of the borders of the state.”<sup>20</sup>

The Nakba resulted in the removal of 750,000 Palestinians and the wholesale, ongoing, confiscation of their lands, homes, and properties.

The brazenness of Israel’s current policy is predicated on the normalization of the 1948 Nakba. The international community normalized the Nakba<sup>21</sup> and accepted Israel’s claim for legal exception from well-established law. The newly established United Nations had the opportunity to condition Israel’s UN membership on the return of Palestinian refugees but failed to do so. The international community treated “the new State of Israel as a *fait accompli* despite emerging through clear violations of the terms of resolution 181(II),” as well as<sup>22</sup> international humanitarian and human rights law, and transformed Palestinian refugees into a humanitarian issue whose fate would be determined through political negotiations.

The Nakba committed in the shadows of the drafting of the Genocide Convention was excluded from its scope. Palestinians, whose self-determination was forcefully thwarted, could not accede to the newly drafted Convention. And Israel, viewed as genocide’s canonical victims, could not be conceived as its first accused genocidaire. The international community further normalized Nakba in the following decades, particularly in UNSC Resolution 242 and the crystallized diplomatic consensus for a two-state solution predicated on the removal and forced exile of native Palestinians.

Today, Israel is continuing that tradition of exception, insisting that its military campaign, is justifiably pursued for the purpose of ethnic cleansing, and though it may seem genocidal, is necessary for its sustainable and long-term security. This logic says that the proximity of Gaza inhabited by 2.3 million Palestinians, two-thirds of whom are refugees seeking to return to their original homes in present-day Israel, makes the entirety of Gaza and its population, civilian and otherwise, a threat, that needs to be removed or permanently subdued. Accordingly, Israel has insisted that to achieve its military purpose of sustainable self-defense, it should not be subject to “red lines” of combat and it is within its sovereign right to remove the Palestinian population and prevent their return.

This goal has been captured in public at least three times to date. A leaked document, dated October 13<sup>th</sup> and penned by an Israeli government research agency detailed such removal as yielding, “positive, long-term strategic outcomes for Israel.” Another document penned by <sup>23</sup> Misgav Institute for National Security and Zionist Strategy, explained that the presented “a unique and rare opportunity ordination with the -to evacuate the whole Gaza Strip in co <sup>24</sup> Egyptian government.” This sentiment was echoed across Israel’s political echelons. The <sup>25</sup> Sinai Plan, as it has come to be known, is based on a proposal made in the early 2000s by <sup>26</sup> Giora Eiland, a retired major general who served as head of Israel’s National Security Council between 2004–2006. The Eiland plan proposed to hollow out Gaza and transfer Palestinians into the Sinai. Eiland’s vision was defeated in favor of unilateral disengagement pursued in 2005, but nonetheless planted seeds for today’s campaign. Most recently, a far-right coalition of Israeli ministers convened a conference titled, Settlement Brings Security and Victory, <sup>27</sup> advocating for the ethnic cleansing of Gaza and its resettlement by Israelis.

We are witnessing a Nakba and genocide framed as necessary for Israel’s security and battling against a demand that there be an exception for it in law. The recent ICJ decision is part of the effort to reject this exception. However, given the invisibility of Nakba in international law, <sup>28</sup> the law may ultimately prove inadequate in this regard.

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Responsibility for this task remains the purview of the critical mass of the world’s people, the millions who have echoed what Palestinians recognize viscerally, to not only charge Israel and its allies with genocide, but to say a resounding and unequivocal no to Nakba. Doing so is to wage a frontal challenge to Israel’s founding violence and the logic that it has a right to exclusive Zionist settler sovereignty. This is why the current global campaign for ceasefire and an end to genocide is absurdly controversial and has been met with acute repression. Rejection of Nakba 2023/24 is the rejection of Nakba, period.



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<sup>1</sup> <https://thehill.com/policy/defense/4431217-netanyahu-casts-off-genocide-case-vows-to-push-ahead-against-hamas/>

<sup>2</sup>

<file:///users/sherene/Library/Containers/com.apple.mail/Data/Library/Mail%20Downloads/13D6361D-9911-4BA8-838F-07D175895BD0/began%20bombarding%20the%20last%20remaining%20hospital.%20Nasser%20Hospital,%20in%20the%20south%20%E2%80%93%20in%20Khan%20Younis%20%E2%80%93%20the%20last%20functioning%20hospital%20as%20it%20has%20decimated%20now%20nearly%2035%20other%20hospitals.>

<sup>3</sup> <https://www.haaretz.com/israel-news/2023-11-12/ty-article/israeli-security-cabinet-member-calls-north-gaza-evacuation-nakba-2023/0000018b-c2be-dea2-a9bf-d2be7b670000>

<sup>4</sup> <https://www.sup.org/books/title/?id=26507>

<sup>5</sup> <https://www.jadaliyya.com/Details/27551>

<sup>6</sup> <https://www.icj-cij.org/case/131>

<sup>7</sup> <https://online.ucpress.edu/jps/article-abstract/47/1/18/54647/Taking-the-Land-without-the-People-The-1967-Story?redirectedFrom=fulltext>

<sup>8</sup> <https://www.sup.org/books/title/?id=26507>

<sup>9</sup> <https://www.gov.il/en/Departments/General/behind-the-headlines-israel-designates-gaza-a-hostile-territory#:~:text=In%20light%20of%20continued%20terrorist,area%20surrounding%20the%20Gaza%20Strip.>

<sup>10</sup> [https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-COM-Article\\_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf)

<sup>11</sup>

<http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html#:~:text=Article%203%20offers%20an%20international,protections%20offered%20under%20this%20provision>

<sup>12</sup> <https://www.icrc.org/en/doc/resources/documents/misc/additional-protocols-1977.htm>

<sup>13</sup> <https://www.reuters.com/world/us-not-drawing-red-lines-israel-white-house-2023-10-27/>

<sup>14</sup> <https://www.reuters.com/world/middle-east/secret-negotiations-that-led-gaza-hostages-deal-2023-11-22/>

<sup>15</sup> <https://edition.cnn.com/2023/12/21/politics/us-intelligence-analysis-hamas-influence/index.html>

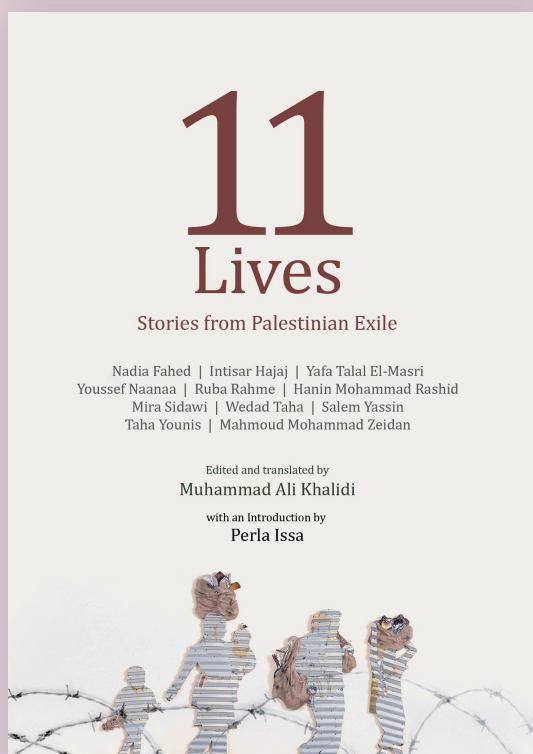
<sup>16</sup> <https://www.wsj.com/world/middle-east/hamas-toll-thus-far-falls-short-of-israels-war-aims-u-s-says-d1c43164>

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- <sup>17</sup> <https://www.amnesty.org/en/latest/campaigns/2022/02/israels-system-of-apartheid/>
- <sup>18</sup> <https://www.un.org/en/genocideprevention/genocide-convention.shtml#:~:text=The%20Genocide%20Convention%20was%20the,during%20the%20Second%20World%20War.>
- <sup>19</sup> <https://www.icj-cij.org/case/192>
- <sup>20</sup> <https://imeu.org/article/plan-dalet>
- <sup>21</sup> <https://www.youtube.com/watch?v=xtp1SAHoYSc>
- <sup>22</sup> <https://www.cambridge.org/core/books/united-nations-and-the-question-of-palestine/E8241B33B6C07028765E5E6785AF5CDE>
- <sup>23</sup> <https://www.cbc.ca/news/world/israel-gaza-palestinians-concept-paper-1.7015576>
- <sup>24</sup> <https://theintercept.com/2023/10/25/israel-hamas-opportunity/>
- <sup>25</sup> <https://carnegieendowment.org/sada/90869>
- <sup>26</sup> <https://www.madamasr.com/en/2023/10/25/feature/politics/the-sinai-solution-reimagining-gaza-in-the-post-oslo-period/>
- <sup>27</sup> [https://www.reuters.com/world/middle-east/israeli-settlers-hold-conference-resettlement-gaza-2024-01-28/#:~:text=JERUSALEM%2C%20Jan%2028%20\(Reuters\),of%20the%20Occupied%20West%20Bank.](https://www.reuters.com/world/middle-east/israeli-settlers-hold-conference-resettlement-gaza-2024-01-28/#:~:text=JERUSALEM%2C%20Jan%2028%20(Reuters),of%20the%20Occupied%20West%20Bank.)
- <sup>28</sup> <https://www.thenation.com/article/archive/harvard-law-review-gaza-israel-genocide/>

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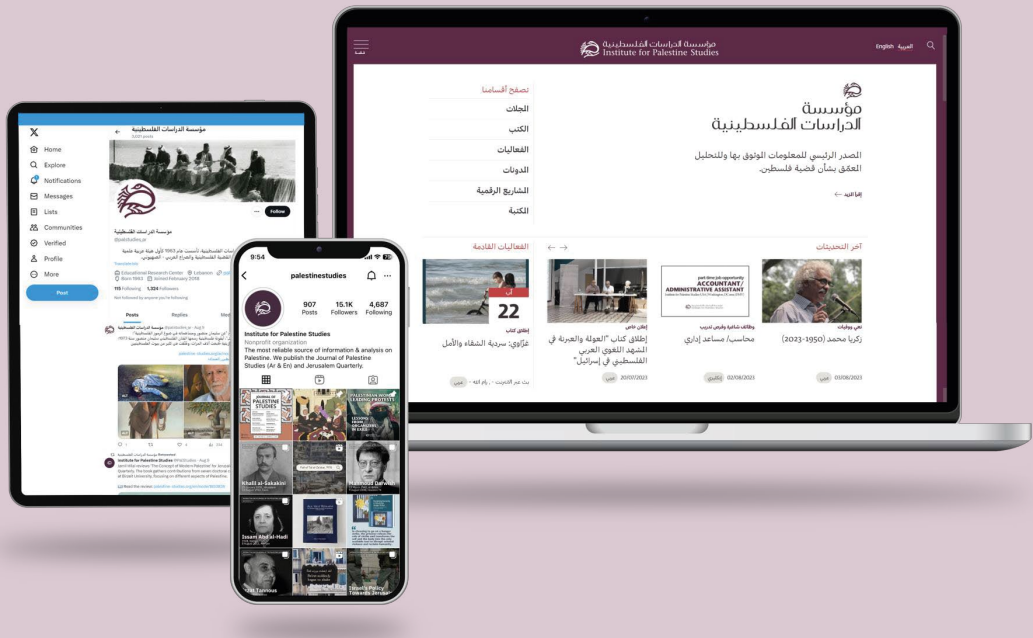
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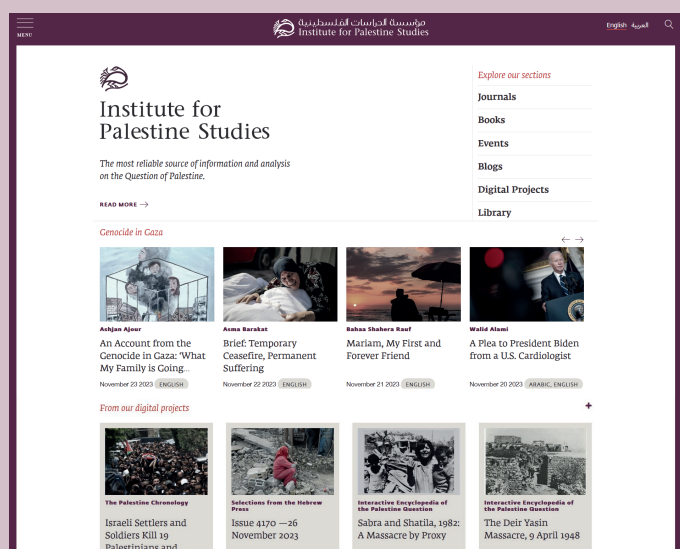
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