DECOLONIZING SANCTIONS: THE EMANCIPATORY POTENTIAL OF SANCTIONS IN "BOYCOTT, DIVESTMENT, AND SANCTIONS" (BDS) CAMPAIGNS

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ABSTRACT

Critical legal scholars and transnational solidarity movements have increasingly decried the United States' deployment of unilateral economic sanctions towards the Global South as devastating to humanity and effectively neoimperial warfare by other means. Indeed, rather than serving as a humane alternative to war, such sanctions have created harms worse than many battlefields. Despite mounting criticism, proponents of using sanctions as a legitimate foreign policy tool also rightly point out sanctions' effectiveness in helping dismantle South African apartheid. As such, sanctions remain part of the "BDS" trio of "boycott, divestment, and sanctions," critical to transnational solidarity campaigns today. Contemporary solidarity movements thus face an apparent tension between (1) calling for a cessation of sanctions by the United States and European Union due to their role in precipitating humanitarian disasters around the world, and (2) upholding the legacy of the BDS

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campaign against apartheid South Africa in supporting contemporary anticolonial and anti-apartheid struggles.

The different resolutions of this tension that critical scholars and solidarity movements have proposed fall short of offering a full analytical framework for determining when sanctions are emancipatory or oppressive, and, perhaps more importantly for the purposes of legal scholarship, lawful or unlawful. Additionally, in their attempts at resolving this question, they have overlooked how anticolonial resistance movements in the era of decolonization recast fundamental principles of international law—through what I term "anticolonial lawmaking"—in ways that address this very question. This Article locates an analysis of economic sanctions in anticolonial lawmaking's development of a right of self-determination within its two distinct aspects: an "independence" aspect, seeking freedom from colonial domination in all its manifestations, and a "non-domination" aspect, seeking to safeguard this independence from non-colonial forms of imperial control. While the non-domination aspect prohibits the deployment of sanctions by former colonizing powers and their settler states against formerly colonized states, the independence aspect of self-determination requires the imposition of sanctions to dismantle colonial structures in all its varying forms. Viewing sanctions through anticolonial lawmaking's independence aspect of self-determination shows how sanctions are necessary to prevent international complicity in colonial structures. Colonial structures seek to extract wealth—often in the form of land—by dispossessing a people of the land to which they belong. International trade and investment play a significant role in facilitating that extraction of wealth. Thus, in order to avoid being complicit in such relations, third-party states must refrain from engaging in trade and investment specific to those colonial relations. It is this requirement of unilateral economic sanctions that forms the legal basis of BDS campaigns.

Further, this Article shows how anticolonial lawmaking situated struggles against settler apartheid as anticolonial struggles because of the origins and operations of settler apartheid. Viewing settler apartheid through a decolonization framework, rather than the commonly held human rights framework, shows why unilateral economic sanctions are required against settler apartheid just as against traditional forms of colonialism, even when such sanctions against other forms of human rights violations found in the formerly colonized world would be illegal.

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INTRODUCTION

> US-backed economic sanctions are causing massive suffering to more than one-third of humanity by blocking their access to global markets and damaging their countries' ability to provide basic human essentials for their people.[1]

> Without sanctions, Nelson Mandela would not [have been] free[d]. Without sanctions, Namibia would not yet be independent.[2]

Transnational solidarity movements have a complex relationship with economic sanctions imposed by one state against another. The United States' unilateral economic sanctions against the Global South are increasingly criticized as more harmful to civilian populations than war.[3] At the same time, economic sanctions remain part of the "BDS" trio of "boycott, divestment, and sanctions" critical to transnational solidarity campaigns today.[4]

This apparent paradox of economic sanctions is nothing new. It became visible in the United States during the 1980s at the peak of two of the most significant transnational solidarity movements this country has known. Both movements arose in the context of situations that became key narratives in the international legal analysis of sanctions. One movement was in support of Nicaragua's Sandinista government, which was resisting a U.S.-backed coup orchestrated through a hybrid warfare scheme that included economic sanctions.[5] The Nicaraguan solidarity movement expressly

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1. *Progressive International Calls for End to US-Imposed Unilateral Sanctions*, PEOPLES DISPATCH (Dec. 18, 2020), https://peoplesdispatch.org/2020/12/18/progressive-international-calls-for-end-of-all-us-imposed-unilateral-sanctions/ [https://perma.cc/WXF7-U6F3].

2. Joseph Hanlon, *Successes and Future Prospects of Sanctions Against South Africa*, 47 REV. AFR. POL. ECON. 84, 84 (1990).

3. Aziz Rana & Aslı U. Bâli, *Sanctions Are Inhumane—Now, and Always*, BOSTON REV. (Mar. 26, 2020), https://www.bostonreview.net/articles/aziz-rana-asli-u-bali-sanctions-are-inhumane-now-and-always/ [https://perma.cc/94HT-W85H].

4. *See What Is BDS?*, BDS MOVEMENT, https://www.bdsmovement.net/what-is-bds [https://perma.cc/R43N-PUFT] (describing the goals and principles of the Boycott, Divestment, and Sanctions movement).

5. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 21–22 (June 27).

denounced the U.S. trade embargo against the leftist government.[6] The other movement was against the apartheid state of South Africa, organized under a BDS campaign.[7] Rather than *opposing* an economic blockade, this movement *sought and secured* not only consumer and labor boycotts and private divestment, but also unilateral economic sanctions imposed by the U.S. government against South Africa.[8] These sanctions prohibited imports from South Africa, corporate investment in South Africa, and deposits from South African government agencies in U.S. banks.[9] U.S. investments in South Africa were ultimately reduced by more than half from 1983 to 1985, and eighty multinational corporations withdrew their operations from South Africa by 1987.[10]

Conventional legal analysis views unilateral economic sanctions as permissible under international law, and thus unproblematically "a core component of the diplomatic toolkit of States."[11] Going further, relying on the South African example, many policymakers and human rights advocates have insisted on sanctions as not simply permitted but a *necessary* tool to protect human rights.[12] Scholars have provided support for their use, asserting that

6. Héctor Perla, *Heirs of Sandino: The Nicaraguan Revolution and the U.S.-Nicaragua Solidarity Movement*, 36 LATIN AM. PERSPS. 80, 91 (2009).

7. Robert Zebulun Larson, The Transnational and Local Dimensions of the U.S. Anti-Apartheid Movement 1 (2019) (Ph.D. dissertation, Ohio State University) (on file with the *Columbia Human Rights Law Review*); Simon Stevens, Boycotts and Sanctions against South Africa: An International History, 1946-1970, at 1 (2016) (Ph.D. dissertation, Columbia University) (on file with the *Columbia Human Rights Law Review*); Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1509–10 (1995); Donald R. Culverson, *The Politics of the Anti-Apartheid Movement in the United States*, 1969-1986, 111 POL. SCI. Q. 127, 146 (1996).

8. Larson, *supra* note 7, at 1; Stevens, *supra* note 7, at 1–2; Gassama, *supra* note 7, at 1509–10; Culverson, *supra* note 7, at 146.

9. Gassama, *supra* note 7, at 1509–10; Culverson, *supra* note 7, at 146.

10. Culverson, *supra* note 7, at 146.

11. Rebecca Barber, *An Exploration of The General Assembly's Troubled Relationship with Unilateral Sanctions*, 70 INT'L & COMPAR. L.Q. 343, 343 (2021).

12. *See, e.g.*, U.N. GAOR, 60th Sess., 68th plen. mtg. at 8, U.N. Doc. A/60/PV.68 (Dec. 22, 2005) (quoting a U.S. representative as arguing that "[u]nilateral and multilateral economic sanctions can be an effective means to achieve legitimate foreign policy objectives" and citing sanctions against South Africa and Rhodesia as examples); see also generally Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1 (2001) (arguing that unilateral economic sanctions are a crucial tool for the promotion of human rights norms).

sanctions "helped cripple the machinery that undergirded [South African] apartheid."[13] Others have hypothesized that: "Without sanctions, Nelson Mandela would not [have been] free[d]. Without sanctions, Namibia would not yet be independent."[14] Indeed, when *Time* magazine asked Nelson Mandela if economic sanctions against South Africa helped dismantle apartheid, he replied, "Oh, there is no doubt."[15]

Since the 1990s, U.S. officials have pushed sanctions by arguing that they help end human rights abuses.[16] But as a tool that "by definition . . . target[s] many of the economic resources that civilians rely on," both the purpose and long-studied impacts of these sanctions defy this narrative.[17] Even with the rise of "humanitarian exemptions" and "targeted" or "smart" sanctions, the United States' unilateral imposition of sanctions have led to indiscriminate suffering among civilian populations by triggering or exacerbating financial crises, contributing to severe contractions of the target state's gross domestic product (GDP), and worsening economic inequality.[18] The devastating impact of U.S. sanctions challenges claims of their humanitarian nature, and, as some critical scholars argue, instead reveal their necropolitical character.[19] This is perhaps best

13. Joseph F. Jordan, Opinion, *Sanctions Were Crucial to the Defeat of Apartheid*, N.Y. TIMES (Nov. 19, 2013), https://www.nytimes.com/roomfordebate/2013/11/19/sanctions-successes-and-failures/sanctions-were-crucial-to-the-defeat-of-apartheid (on file with the *Columbia Human Rights Law Review*).

14. Hanlon, *supra* note 2, at 84.

15. Jonathan Zimmerman, *Mandela's South Africa Makes Case for Potency of Economic Sanctions*, WHYY (Dec. 19, 2013), https://whyy.org/articles/mandelas-south-africa-makes-case-for-potency-of-economic-sanctions [https://perma.cc/JN4K-LCMU].

16. Barber, *supra* note 11, at 343–44.

17. Nathanael Tilahun & Obiora Okafor, *Economic Sanctions and Humanitarian Principles: Lessons from International Humanitarian Law*, YALE J. INT'L L. ONLINE (June 26, 2023), https://www.yjil.yale.edu/economic-sanctions-and-humanitarian-principles-lessons-from-international-humanitarian-law/ [https://perma.cc/Y9KT-M7N8].

18. *See* Jeena Shah, *Imperialist Anatomy of Sanctions*, 46 U. PENN. J. INT'L L. 65, 78–85 (2024) (discussing the devastating harms of economic sanctions).

19. *See* Vasuki Nesiah, *The Fog of Peace: Who Profits from Economic Sanctions?*, YALE J. INT'L L. ONLINE (June 27, 2023), https://www.yjil.yale.edu/the-fog-of-peace-who-profits-from-economic-sanctions/ [https://perma.cc/SV4T-5R6Gh] (arguing that although "the quotidian rhythm of sanctions' necropolitical impacts lacks the drama of war and seldom provokes mass demonstrations," the U.S. sanctions against Iraq imposed immense human suffering and served to normalize the "outcasting" of the regime in advance of its

exemplified in former U.S. Secretary of State Madeleine Albright's callous retort that the half-million deaths of Iraqi children due to economic sanctions were "worth it."[20]

Contemporary solidarity movements thus face an apparent tension between two countervailing trends: (1) calling for the end of the United States' use of sanctions (and to a lesser extent, the European Union's) against the Global South, even those ostensibly imposed to protect human rights, due to their role in causing humanitarian disasters around the world; and (2) upholding the legacy of the BDS campaign against apartheid South Africa in supporting contemporary anticolonial and anti-apartheid struggles. The different resolutions that critical scholars and solidarity movements have proposed fall short of offering a full analytical framework for determining when sanctions are emancipatory or oppressive. More importantly, they overlook how anticolonial resistance movements in the era of decolonization transformed fundamental principles of international law in ways that provide much-needed clarity: requiring sanctions to facilitate decolonization, while condemning all other sanctions imposed by former colonizing powers and their settler states against the formerly colonized world as disciplinary tools of neoimperialism. They further overlook how this lawmaking by anticolonial resistance movements firmly situated the struggles against settler apartheid within decolonization struggles, rather than within the contemporary commonly held frame of human rights. This distinction is necessary to understand why sanctions against apartheid are entirely different from sanctions seeking to protect human rights more generally.

In this Article, I use the term "anticolonial lawmaking" to refer to the efforts of anticolonial resistance movements during the era of decolonization (roughly from the 1950s to the Third World Debt Crisis[21] of the 1980s) to transform international law from a structure

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2003 invasion); Noura Erakat et al., *Deadly Iran Sanctions: Lessons Learned from Iraq and Palestine*, YOUTUBE (Mar. 18, 2021), https://youtu.be/LVOjWjwsC6I [https://perma.cc/974Z-XTS8] (arguing that economic sanctions should be lifted because they disproportionately impact innocent people in practice); Rana & Bâli, *supra* note 3 (arguing that comprehensive U.S. economic sanctions are inhumane and citing examples from Iraq and Venezuela).

20. 60 Minutes, *Madeleine Albright - 60 Minutes*, YOUTUBE (Jun. 28, 2008) https://www.youtube.com/watch?v=FbIX1CP9qr4 [https://perma.cc/FEX8-AECR].

21. A combination of oil price hikes and the raising of interest rates on the dollar from 1979–1982 led to a global debt crisis that threatened to destroy formerly colonized economies. To understand how the debt crisis came to be and the role of the United States in orchestrating it, see Shah, *supra* note 18, at 92–94

whose *raison d'être* was justifying and managing imperialism to one that centered on the self-determination of peoples.[22] Hence, the title of this Article employs the term "decolonizing" to signal the recovery of the specific (albeit limited) efforts of anticolonial resistance movements to "decolonize" international law, as "a distinct project from other civil and human rights-based social justice projects," even if this decolonization of international law did not go far enough.[23] The anticolonial lawmaking discussed in this context advocated for the articulation of a specific right of self-determination that I argue consists of two aspects: first, as freedom from colonial domination in all its manifestations, including settler apartheid, and second, as safeguarding this independence from non-colonial forms of imperial control. I refer to these two aspects of self-determination as the "independence" and "non-domination" aspects, respectively. Moreover, this right of self-determination should be understood as not simply a new standalone norm of international law, but rather a framework through which to transform the very purpose of international law. As such, an array of norms, such as those relevant to assessing the legality of unilateral economic sanctions, should be understood through this dual-aspect conception of self-determination.

Independence and non-domination are a helpful lens through which to reconcile when and why sanctions are both prohibited and required under international law. I have explored in prior scholarship how the *non-domination* aspect of self-determination *prohibits* the use of sanctions to coerce formerly colonized states to make decisions that serve the interests of former colonizing powers and their settler states—namely the European Union and the United States—even when these sanctions are imposed for the ostensible purpose of protecting human rights.[24] By contrast, as explored in this Article, unilateral economic sanctions imposed against colonial structures,

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n.97, and to understand how it paved the way for neoimperialism, see *id*. at 87–101.

22. *See generally* ADOM GETACHEW, WORLDMAKING AFTER EMPIRE 71–106 (Princeton Univ. Press 2019) [hereinafter GETACHEW, WORLDMAKING AFTER EMPIRE] (discussing the "reinvention of self-determination" by anticolonial resistance movements).

23. Eve Tuck & K. Wayne Yang, *Decolonization is Not a Metaphor*, 1 DECOLONIZATION 1, 1 (2012).

24. *See generally* Shah, *supra* note 18 (exploring the concept of "non-domination" as a key aspect of self-determination and arguing that it "prohibit[s] the unilateral deployment of economic sanctions by former colonizing powers and their settler colonial states against formerly colonized states in the contemporary neo-imperial global order").

including in their forms of indefinite belligerent occupation and settler apartheid—i.e., the sanctions called for by a BDS campaign like that mounted against apartheid South Africa—are *required* by the *independence* aspect of self-determination. Colonial domination, in all its forms, relies on the core mechanism of inequality to facilitate one-way extraction of land or other forms of wealth from a subjugated people.[25] The tremendous benefits colonizing powers gain from this extraction are made possible through support from the international community via trade, investment, and finance.[26] Anticolonial lawmaking thus understood that the independence aspect of self-determination necessitated a specific duty of non-recognition to prevent against international complicity in colonial domination.[27] This *anticolonial* duty of non-recognition requires that states cease all relations, including economic relations, that specifically help the colonial power benefit from their colonized territory. Unlike the sanctions prohibited by the non-domination aspect of self-determination, which serve as a form of coercive intervention in the acts of once colonized but now sovereign states, sanctions in the context explored in this Article serve to end the economic intervention of a colonial structure in the territory of a should-be sovereign state.

Part I of this Article addresses the conventional assessment of the legality of unilateral economic sanctions under customary international law. It then identifies proposals by critical scholars for assessing the utility and harm of sanctions to civilian populations, which have arisen in response to the documented harms of U.S. and E.U. sanctions over the past several decades. As Part I elucidates, each proposal encounters its own obstacles, including risks of obscuring the imperialist frameworks within which sanctions are enforced. To address this dilemma, Part II delves into the international legal norm of self-determination as established by anticolonial lawmaking. It clarifies the distinction made in international law between the independence aspect of self-determination and self-determination as a human rights concept and shows how liberation from settler apartheid sits firmly within the realm of the former. This analysis challenges conventional understandings of apartheid as a human rights issue internal to a sovereign state, and instead shows how settler apartheid is a form of colonialism that evaded decolonization by maintaining colonial

25. *See* discussion *infra* Section II.A.
26. *See* discussion *infra* Part III.
27. *See* discussion *infra* Part III.

relations. This exploration of the legal definition of an apartheid state recovers the radical, emancipatory potential of anti-apartheid struggles as compared to human rights struggles. The analysis is thus critical to understanding why sanctions against settler apartheid structures are *required*, unlike sanctions against a state for human rights violations, which could violate the non-domination aspect of self-determination. Part III explains how anticolonial lawmaking identified a crucial obligation to refrain from recognizing all variants of colonial structures, thereby realizing the independence aspect of self-determination. I argue that this anticolonial duty of non-recognition *necessitates* the imposition of unilateral economic sanctions to thwart international complicity—be it through trade, public or private investment, or economic assistance—*specifically* in the colonial structure's exploitation of appropriated land and oppressed peoples.

The analysis set forth in this Article is intended to apply to all existing colonial situations, including in their forms of indefinite belligerent occupation and settler apartheid, whenever and wherever they are found. The examples employed herein to illustrate this analysis are merely a sampling. There are many other situations to which this analysis could also potentially apply.[28]

I. EXISTING CONVENTIONAL AND CRITICAL LEGAL ANALYSES OF UNILATERAL ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW

Conventional legal analysis has blanketly determined that unilateral economic sanctions are lawful under customary international law.[29] This analysis largely relies on the International Court of Justice's (ICJ) 1984 ruling in *Nicaragua v. United States*, where Nicaragua contested U.S. measures aimed at overthrowing the

28. Some examples of potential situations where this Article's analysis could apply that are not explored here include the United States' colonization of Puerto Rico and Hawai'i; India's colonization of Kashmir; Indonesia's colonization of West Papua; and Britain's colonization of Northern Ireland.

29. *See* Dapo Akande et al., *Economic Sanctions, International Law, and Crimes against Humanity: Venezuela's ICC Referral*, 115 AM. J. INT'L L. 493, 500–01 (2021) (asserting that "a rule of customary international law against economic sanctions does not exist" despite recent declarations to the contrary); Cleveland, *supra* note 12, at 53 ("Customary international law traditionally has allowed states to use economic coercion for a wide range of purposes, and the relatively frequent use of economic sanctions by the United States and other[s] . . . makes it difficult to conclude that a customary international norm exists against the practice.").

leftist Sandinista government, including economic sanctions, on the grounds that they violated customary international law.[30] The ICJ, without stating its rationale, deemed the U.S. sanctions lawful, thus confirming for conventional legal scholars that unilateral economic sanctions are a permissible tool of foreign policy.[31] This conventional legal analysis is under-theorized,[32] especially because it insufficiently accounts for the series of U.N. General Assembly resolutions long adopted by coalitions among Global South countries to condemn U.S. and E.U. sanctions against them.[33] Instead, the conventional analysis of economic sanctions generally dismisses such resolutions altogether as "high-minded statements" irrelevant to determining the lawfulness of economic sanctions.[34]

To the extent scholars have paid attention to these General Assembly resolutions, they have had difficulty deciphering them. On the one hand, they acknowledge that the General Assembly has "consistently asserted" the illegality of unilateral economic sanctions, each time by large majorities.[35] On the other hand, they note that the General Assembly has, itself, called on states to impose such unilateral measures to support "struggles for self-determination and independence in Africa, South African aggression and apartheid, and Israeli aggression in the 1980s and 1990s."[36] Unable to resolve this contradiction, scholars often view the General Assembly's actions in purely practical terms: the Global South's success in having sanctions deployed against colonial and apartheid structures in Africa in the 1970s and 1980s was a momentary deployment by colonized peoples of an otherwise imperialist weapon.[37] This analysis, however, still

30. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 22, 244 (June 27).

31. *Id*. ¶ 245.

32. *See* Shah, *supra* note 18, at 73–76, 134–40 (describing the ICJ's ruling on sanctions in *Nicaragua v. United States* and explaining how conventional scholarship insufficiently comprehends the court's reasoning).

33. For a list of such resolutions, see Off. of the High Comm'r for Hum. Rts., *Resolutions and Decisions on the Mandate: Special Rapporteur on Unilateral Coercive Measures*, UNITED NATIONS, https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/resolutions-and-decisions-mandate [https://perma.cc/5JKK-PR77].

34. Akande et al., *supra* note 29 at 501.

35. Barber, *supra* note 11, at 370.

36. *Id.* at 345.

37. Eva Nanopoulos, *The Antinomies of "Peaceful" Economic Sanctions*, YALE J. INT'L L. ONLINE (June 28, 2023), https://www.yjil.yale.edu/the_antimonies_of_peaceful_economic_sanctions/ [perma.cc/534J-5S5N].

assumes the legality of sanctions when used as an imperialist weapon.[38]

Other scholars have argued that the General Assembly's resolutions generally allow for sanctions unless they negatively impact human rights.[39] Proposals that call for individual human rights assessments of sanctions effectively require a cost-benefit analysis of sanctions in terms of their harms to civilian populations compared to their potential positive impact enforcing selected human rights norms.[40] This approach is vulnerable to several criticisms. First, it is often difficult to show how sanctions cause specific human rights violations given their complex macroeconomic impacts and the narrow understanding of causation under human rights law.[41] Second, when the sanctions at issue are deployed in the name of *enforcing* human rights norms, such assessments run into a sort of battle of human rights, such as whether the economic rights violations caused by the sanctions *are worth* the civil and political rights that the sanctions seek to vindicate.[42] These battles of human

38. *Id*.

39. *See, e.g.*, Barber, *supra* note 11, at 366 (asserting that unilateral sanctions violate international law under certain circumstances including where they "negatively impact the human rights of the target State's population, in violation of the sanctioning State's treaty obligations").

40. For an example of an analysis that implicitly adopts such a "cost-benefit" approach, see Alena Douhan (Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment on the Enjoyment of Human Rights), *Secondary Sanctions, Civil and Criminal Penalties for Circumvention of Sanctions Regimes and Overcompliance with Sanctions*, ¶¶ 1–4, U.N. Doc. A/HRC/51/33 (July 15, 2022).

41. *See, e.g.*, Aaron Fellmeth, *Unilateral Sanctions Under International Human Rights Law: Correcting the Record*, YALE J. INT'L L. ONLINE (Sept. 6, 2023), https://www.yjil.yale.edu/unilateral-sanctions-under-international-human-rights-law-correcting-the-record/ [https://perma.cc/D7GX-FZDQ] (arguing that the Special Rapporteur on unilateral coercive measures failed to demonstrate a causal relationship between overcompliance with sanctions and negative human rights outcomes and acknowledging that such causal links "will frequently be very difficult to prove in an autocratic country, in which government oppression and corruption tend to create insurmountable obstacles to the realization of human rights"); Dany Bahar et al., *Impact of the 2017 Sanctions on Venezuela: Revisiting the Evidence*, BROOKINGS (May 14, 2019), https://www.brookings.edu/articles/revisiting-the-evidence-impact-of-the-2017-sanctions-on-venezuela/ [https://perma.cc/X95A-XQUA] (arguing that a different report had failed to adequately demonstrate a causal connection between sanctions and negative human rights impacts in Venezuela).

42. For a more detailed analysis of the economic and social rights violations caused by sanctions imposed by former colonizing powers and their settler states against formerly colonized states, see Shah, *supra* note 18, at 79–80.

rights norms obscure the imperial structures within which economic sanctions operate—structures that often serve as the root cause of the sanctions-triggering human rights violations or atrocities.[43] And when sanctions are targeted at groups that are labeled as "terrorists" but are in fact engaging in armed struggle against their oppression, it creates a false "equivalence between the violence of the oppressed and the violence of the oppressor."[44]

Other similar proposals call for an assessment of sanctions under the laws of armed conflict.[45] This set of proposals specifically focuses on the principle of distinction between military and civilian targets by calling on sanctions-imposing states to exclude critical economic infrastructure from the targets of their sanctions.[46] Yet given how sanctions impact an economy as a whole even when they are intended to be limited, excluding harms to infrastructure that vulnerable populations rely on is often practically impossible.[47] This set of proposals also focus on the principle of proportionality, which weighs the harms created by the sanctions against the advantages secured by the sanctions by calling for *ex ante* and *ex post* impact assessments of sanctions.[48] However, balancing foreign policy necessities with civilian needs risks leading us back to Secretary Albright's approach of determining what lives, how many lives, and what quality of life are "worth it."[49]

Finally, some scholars have argued that the relevant touchstone for determining when sanctions should be deployed is who is calling for the sanctions: the states imposing them or people from within the target states.[50] But this is often difficult to ascertain given

43. *See, e.g.*, Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L.J. 443, 459 (1997) (arguing that international institutions were partially responsible for the genocide and armed conflict in the former Yugoslavia due to their intervention designed to produce economic restructuring).

44. Nimer Sultany, *The Question of Palestine as a Litmus Test: On Human Rights and Root Causes*, 23 PALESTINE Y.B. INT'L L. 3, 22 (2023).

45. Tilahun & Okafor, *supra* note 17.

46. *Id.*

47. *See* Shah, *supra* note 18, at 81–85 (arguing that sanctions with humanitarian exemptions and "smart" sanctions still impact nearly all economic sectors and thus create obstacles for financing critical infrastructure and essential services as well as cause the price of goods to rise).

48. Tilahun & Okafor, *supra* note 17.

49. 60 Minutes, *supra* note 20.

50. *See, e.g.*, Michael Fakhri, *Situating Unilateral Coercive Measures Within a Broader Understanding of Systemic Violence*, YALE J. INT'L L. ONLINE (June 23, 2023), https://www.yjil.yale.edu/situating-unilateral-coercive-measures-within-a-

the competing voices that emerge from a target state's population and their respective relationships with the states imposing sanctions.[51]

All these approaches overlook how anticolonial lawmaking acted through the U.N. General Assembly to develop the right of self-determination in a way that considers whether sanctions *maintain* or *dismantle* imperialism. Those efforts inscribed into international law a distinction between sanctions necessary to prevent the consolidation of colonial relations and sanctions that further non-colonial forms of imperial control under the guise of human rights concerns. This distinction arises from anticolonial lawmaking's development of a novel right of self-determination that focused on dismantling imperialism in all its forms, as explored in the next Part.

II. ANTICOLONIAL LAWMAKING AND ITS FRAMEWORK FOR SELF-DETERMINATION

Conventional legal scholarship relies on the conception of self-determination prevailing during the age of empire, treating the decolonization era "as a historical footnote."[52] Under this conventional account, decolonization consisted of anticolonial resistance movements simply "appropriating" the principle of self-determination as it was understood in the United States and Western Europe—notably in racialized terms, under which colonial empires were considered legitimate—in order to don the mantle of sovereign

broader-understanding-of-systemic-violence/ [https://perma.cc/CK7Q-2UN7] ("[U]nilateral coercive measures are not the same as people calling from within their own countries for international boycotts, divestment, or sanctions against the government that rules them and people from abroad joining the campaign in solidarity with the struggle.").

51. *See*, *e.g.*, Carlos Camacho, *Venezuela Opposition Adds Drag to Sanction Talks*, ARGUS (Oct. 20, 2022), https://www.argusmedia.com/en/news-and-insights/latest-market-news/2382694-venezuela-opposition-adds-drag-to-sanction-talks [https://perma.cc/G2ER-LVFP] (reporting that Venezuela's political opposition adamantly rejected the possibility of easing of U.S. sanctions because they believed doing so would extend "a financial lifeline" to the current government); Arash Karami, *Zarif: Some in Iran Don't Want Sanctions to End*, AL-MONITOR (Feb. 2, 2015), https://www.al-monitor.com/originals/2015/02/zarif-accuses-iran-groups-opposing-nuclear-deal.html [https://perma.cc/26WG-P2W8] (reporting that Iran's then-foreign minister had accused "some inside the country and some outside [as being] in a group that is opposed to the end of sanctions and see the continuation of sanctions as to their benefit").

52. Miriam Bak McKenna, *Contesting Self-Determination in the Wake of Empire: Sovereignty, Human Rights and Economic Justice*, 89 NORDIC J. INT'L L. 67, 68 (2020).

statehood in the existing legal order.[53] Even scholars who take the era of decolonization more seriously "largely confine self-determination to its articulation as a human rights concept,"—i.e., the fulfillment of individuals' civil and political (as well as to a lesser extent, economic, social, and cultural) rights—"rather than a broader international legal idea."[54] These understandings of self-determination ignore the radical reconceptualization of the term by "anticolonial lawmaking."

As I have used it in other scholarship, "anticolonial lawmaking" refers to the specific U.N. General Assembly resolutions produced and informed by anticolonial resistance movements in the era of decolonization—roughly from the 1950s until the Third World Debt Crisis of the 1980s.[55] Those that conducted this lawmaking were by no means homogenous in their aspirations following decolonization.[56] Thus, this phrase does not refer to the lawmakers themselves. Rather, it refers to their *united* lawmaking efforts in the General Assembly challenging ongoing European imperialism.[57] As a form of jurisprudence, anticolonial lawmaking considers the practice and *opinio juris* of anticolonial resistance movements, which were essentially "states in waiting."[58] As ICJ Judge Fouad Ammoun has framed it, the conduct of anticolonial struggles should be viewed as a "general practice as accepted by law" (a source of international law) since self-determination was "not granted but won in bitter struggle . . . written painfully, with the blood of the peoples, in the finally awakened conscience of humanity."[59] Their collective views, as reflected in deliberations and decisions made in conferences such as those held by the Non-Aligned Movement (NAM) and the All-African

53. GETACHEW, WORLDMAKING AFTER EMPIRE, *supra* note 22, at 14.

54. McKenna, *supra* note 52, at 68–69.

55. Shah, *supra* note 18, at 107–08.

56. For a description of the contrasting positions of Third World jurists during this era, see Robert Knox, A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law 87–107 (2014) (Ph.D. thesis, London School of Economics) (on file with the *Columbia Human Rights Law Review*).

57. Shah, *supra* note 18, at 107–08.

58. Jessica Whyte, *The "Dangerous Concept of the Just War": Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions*, 9 HUMANITY 313, 317 (2018) (quoting GEOFFREY BEST, WAR AND LAW SINCE 1945, at 227 (Oxford Univ. Press 1994)).

59. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia Advisory Opinion), Advisory Opinion, 1971 I.C.J. Rep. 16, 67, ¶ 5 (June 21) (separate opinion by Ammoun, J.).

Peoples' Conference, constitute *opinio juris*, particularly since the determinations made at these convenings were expressly brought into General Assembly debates and resolutions.[60]

Substantively, anticolonial lawmaking was conducted in response to what Adom Getachew frames as the "problem of empire."[61] Empire, as perceived by those subjugated by European imperialism, was understood as colonialism *in all its forms* as well as indirect means of imperial control, most predominantly on the economic plane.[62] Thus, rather than appropriate the principle of self-determination under which European imperialism could be and was in fact maintained, anticolonial resistance movements used their growing majority in the General Assembly to inscribe *their* conception of a right of self-determination, that of being free from empire, into international law.[63] As Judge Ammoun has further observed, anticolonial lawmaking's development of this right of self-determination formed not a single isolated norm, but a "reshaping of international relations" altogether.[64]

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60. *See* Jack Basu-Mellish, *UN Resolution 1514: The Creation of a New Post-Colonial Sovereignty*, 44 THIRD WORLD Q. 1306, 1316–18 (2023) (discussing the conference that led to the anticolonial "Bandung Communique" and concluding that the "[a] comparative textual analysis of both UN Resolution 1514 and the Bandung Communique shows a continuity of language, goals and ambitions"); *All-African People's Conferences*, 16 INT'L ORG. 429, 429–34 (1962) (summarizing the proceedings from the first three All-African Peoples' Conferences and noting that all three conferences adopted several anticolonial resolutions); *see also* G.A. Res. 2131 (XX), pmbl., ¶ 6 (Dec. 21, 1965) (citing decisions and resolutions from multiple conferences of African, Asian, and Non-Aligned states and declaring that "[a]ll States shall respect the right of self-determination and independence of peoples and nations"); Rep. of Special Comm. on Principles of International Law Concerning Friendly Relations and Co-operation Among States, ¶ 313, U.N. Doc. A/6799 (Sept. 26, 1967) [hereinafter Report on Friendly Relations Among States] (reporting that several representatives had supported their contention that the principle of non-intervention "was one of the foundations of the political and legal system created by the [U.N.] Charter" by pointing to the declarations issued by the conferences at Bandung, Belgrade, and Cairo).

61. GETACHEW, WORLDMAKING AFTER EMPIRE, *supra* note 22, at 77.

62. Second All-African Peoples' Conference, *Economic and Social Resolution*, pmbl. (Jan. 30, 1960); *see also* GETACHEW, WORLDMAKING AFTER EMPIRE, *supra* note 22, at 108 (highlighting that economic dependence can be used as a weapon against state sovereignty as it is another means of asserting control in an era of neocolonialism).

63. *See generally* GETACHEW, WORLDMAKING AFTER EMPIRE, *supra* note 22, at 37–106 (describing the historical development of self-determination by the anticolonial movement in the League of Nations and the United Nations).

64. Namibia Advisory Opinion, 1971 I.C.J. ¶ 5 (separate opinion by Ammoun, J.).

This anticolonial lawmaking began with the seminal *Declaration on the Granting of Independence to Colonial Countries and Peoples*, adopted in General Assembly Resolution 1514 in 1960.[65] The right of self-determination was further elaborated upon through a series of implementing resolutions, as well as in the later *Friendly Relations Declaration* adopted in General Assembly Resolution 2625 in 1970.[66] Through these resolutions, anticolonial lawmaking specifically defined self-determination to mean both immediate independence from colonization and the "maintenance and preservation" of this independence from non-colonial forms of imperialist domination[67]—what I refer to as the *independence* and *non-domination* aspects of self-determination, respectively.[68] The independence aspect seeks emancipation from direct foreign rule in all its manifestations, including colonialism, indefinite occupation, and settler apartheid. The non-domination aspect, which I explore in greater depth in other scholarship,[69] understands sovereignty in the European-conceptualized form of statehood as a shield from non-colonial forms of imperial rule by former colonizing powers and their settler states over the decision-making of self-determined peoples.[70]

Both aspects have different implications for unilateral economic sanctions. The independence aspect of self-determination

65. G.A. Res. 1514 (XV) (Dec. 14, 1960).

66. Both Resolutions 1514 and 2625 are now indisputably considered to be articulations of binding customary international law. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos Advisory Opinion), Advisory Opinion, 2019 I.C.J. Rep. 95, ¶¶ 152, 155 (Feb. 25). They may also be viewed, in the words of Henry Richardson, as "authoritative interpretation[s] and implementing measure[s]" of Article 1(2) of the U.N. Charter. Henry J. Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185, 203 (1978).

67. McKenna, *supra* note 52, at 76–77; *see also* Basu-Mellish, *supra* note 60, at 1316 (describing leaders at Bandung's "recognition of a unique character of European colonial rule which separated it from the question of Eastern Europe").

68. This formulation draws from how delegates discussed the right of self-determination in drafting the *Friendly Relations Declaration* (Resolution 2625). *See* U.N. GAOR, 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 21st Sess., ¶ 480, U.N. Doc. A/6230 (June 27, 1966) (explaining that the principle of self-determination requires both decolonization and internal autonomy).

69. *See* Shah, *supra* note 18, at 117–23 (arguing that the non-domination aspect of self-determination "transformed the legal principles that help define the protections that statehood offers to sovereignty, namely sovereign equality and non-intervention").

70. Adom Getachew, *The Limits of Sovereignty as Responsibility*, 26 CONSTELLATIONS 225, 234 (2018).

requires the imposition of unilateral economic sanctions to dismantle colonial relations. In contrast, the non-domination aspect *prohibits* such sanctions as imposed by former European colonizing powers and their settler colonial states (primarily the United States) against formerly colonized states, even when they are deployed (ostensibly) to enforce norms of international human rights law.[71]

To understand the independence aspect of self-determination and why sanctions to enforce this aspect are distinct from sanctions enforcing human rights norms more generally, this Part explains how the independence aspect conceives of freedom from colonial control. It also explains how this conception of self-determination is distinct from the human rights conception of this right. It ends by showing how "settler apartheid," contrary to conventional understandings of the term as a human rights violation, is a form of colonial control against which the independence aspect of self-determination applies.

A. The Independence Aspect of Self-Determination: Freedom from Colonialism

As a response to the problem of European empire, the independence aspect of the right to self-determination was created to facilitate freedom from colonialism.[72] Thus, understanding this aspect of self-determination requires an understanding of European colonialism. This Section first explains how such colonialism operated, and then explains how anticolonial lawmaking, informed by European colonialism, defines colonial relations and the process for their dismantling under international law. To further understand this conception of self-determination, this Section shows how the independence aspect of self-determination was inscribed into other fundamental areas of international law—namely, the legal frameworks governing states' use of force (*jus ad bellum*) and belligerent occupations (*jus in bello*)—to protect against future attempts to reestablish such colonial relations in less apparent ways.

"Colonialism" is the process by which a state unilaterally annexes a territory to which a people belong without taking on the

71. *See generally* Shah, *supra* note 18, at 124–40 (explaining the argument that the non-domination aspect of self-determination prohibits sanctions imposed by the United States and European Union against formerly colonized states in the contemporary neo-imperial global order).

72. *See, e.g.*, G.A. Res. 1514, *supra* note 65, pmbl., ¶¶ 1–2 (proclaiming the need to bring a speedy and unconditional end to colonialism and declaring both that colonial subjugation "constitutes a denial of fundamental human rights" and that "[a]ll peoples have the right to self-determination").

responsibility to govern and provide for that people on par with the state's own citizens.[73] As a unilateral annexation, colonialism is seen as destroying the territorial integrity of the colonized landmass.[74] The political-economic function of colonialism is to achieve a one-way transfer of wealth in the form of land, and often with it money or labor, which flows from the colony and colonial subjects to the metropole and its citizens—a process commonly referred to as the "colonial drain."[75] The colonial drain may take many forms in isolation or in combination: through access to the territory itself and natural resources from land;[76] through super-exploited or expropriated labor;[77] or through one-way monetary transfer via mechanisms such as colonial taxation (which does not provide any significant benefits to the colonial subjects in return) or the creation of a captive market (by which the colonial subjects are forced to consume the metropole's goods without the benefits of a trading

73. *See, e.g.,* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1517 n.26 (2019) (defining colonialism as "a practice that involves both the subjugation of one people to another and the political and economic control of a dependent territory (or parts of it)") (citing Lea Ypi, *What's Wrong with Colonialism*, 41 PHIL. & PUB. AFF. 158, 162 (2013)); Lorenzo Veracini, *Introducing*, *Settler Colonial Studies*, 1 SETTLER COLONIAL STUD. 1, 3 (2011) (distinguishing between colonialism and settler colonialism and concluding that colonialism is defined by its reinforcement of the distinction between colony and metropole where "the freedom and equality of the colonised is forever postponed").

74. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 131 (Can.); *see also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 79 (July 22) (collecting authorities supporting the proposition that "the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation" during the latter half of the twentieth century).

75. Gurminder K. Bhambra, *Colonial Global Economy: Towards a Theoretical Reorientation of Political Economy*, 28 REV. INT'L POL. ECON. 307, 313 (2021).

76. *See, e.g.*, Lorenzo Veracini, *The Other Shift: Settler Colonialism, Israel, and the Occupation*, 42 J. PALESTINE STUD. 26, 30 (2013) [hereinafter Veracini, *The Other Shift*] (describing Israel's colonial relationship to the occupied territories as including "appropriation of Palestinian land"); Orna Ben-Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 586 (2005) (describing the "hallmark" of colonial regimes as "the exploitation of the resources of the territory for the benefits of the home country and its citizens").

77. Nancy Fraser, *Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson*, 3 CRITICAL HIST. STUD. 163, 169–70 (2016).

relationship).[78] To ensure the colonial drain, the colonizing power must separate a people from the land to which they belong in order to ensure the colonizing power's access to the land and to destroy the colonized people's ability to sustain themselves from that land.[79]

To illustrate, European colonization operated heavily through colonial taxation.[80] The imposition of colonial taxes required colonized subjects to earn European currency to pay these taxes and thus work for European capital.[81] This process forced colonized people to work in the sectors that served European economic interests.[82] In this way, taxes allowed European powers to dictate how the colonized landmass would be used[83] and super-exploit or expropriate local labor (sometimes supplemented or replaced with imported labor) for production from this landmass.[84] Additionally, by forcing colonized

78. UTSA PATNAIK & PRABHAT PATNAIK, CAPITAL AND IMPERIALISM: THEORY, HISTORY, AND THE PRESENT 115–72 (Monthly Review 2021).

79. *Id.* at 75–79; *see also* Ndongo Samba Sylla, *Modern Monetary Theory in the Periphery*, ROSA-LUXEMBURG-STIFTUNG (Feb. 26, 2020), https://www.rosalux.de/en/news/id/41764/modern-monetary-theory-in-the-periphery [https://perma.cc/2RG3-U743] (explaining how those subject to European colonial rule were forced to participate in the colonial economy).

80. PATNAIK & PATNAIK, *supra* note 78, at 75–79; *see also* Sylla, *supra* note 79 (describing the central role of colonial taxation in the economic exploitation of European powers' colonies).

81. PATNAIK & PATNAIK, *supra* note 78, at 75–79; *see also* Sylla, *supra* note 79 (explaining how under European colonial rule, "[i]n order to be able to pay [colonial] taxes and thus have access to metropolitan currency, African populations had to work, willingly or unwillingly, in the sectors on which the colonial administration was ready to spend").

82. PATNAIK & PATNAIK, *supra* note 78, at 75–79; *see also* Sylla, *supra* note 79 (describing the process of colonial powers reorganizing labor to meet metropolitan needs).

83. PATNAIK & PATNAIK, *supra* note 78, at 75–79; *see also* Sylla, *supra* note 79 (explaining the role of colonial taxation to "reorient the structures of production, consumption, and exchange" in the colony to serve the interests of the colonial power).

84. JOHN SMITH, IMPERIALISM IN THE TWENTY-FIRST CENTURY: GLOBALIZATION, SUPER-EXPLOITATION, AND CAPITALISM'S FINAL CRISIS 240 (Monthly Review 2016); MARIA MIES, PATRIARCHY & ACCUMULATION ON A WORLD SCALE: WOMEN IN THE INTERNATIONAL DIVISION OF LABOUR 112 (6th ed. 1998) (1986); *see also* SMITH, *supra*, at 216–17 (discussing Ruy Mauro Marini's work on the role of super-exploitation in the peripheries using Marx's value theory); Walter Daum, *In Defence of Walter Rodney: Workers, Imperialism & Exploitation*, REV. AFR. POL. ECON. (June 11, 2020), https://roape.net/2020/06/11/in-defence-of-walter-rodney-workers-imperialism-exploitation/ [https://perma.cc/5GRV-GEDW] (describing Walter Rodney's analysis of how European colonial capitalists subjected African labor to "absolute super-exploitation").

peoples to work for a European power, colonial taxation simultaneously separated peasants from their land and opened it up for the European power's access to the land itself and its natural resources.[85] Colonial taxation further put local artisans out of work since the local economy that supported their businesses was replaced by colonial taxation that drained the colony of its wealth.[86] With local artisans out of work, the resulting deindustrialization of a colonized economy also turned it into a captive market for the European power to sell its goods.[87] An array of disciplinary mechanisms stymied colonized people's resistance to this system, predominantly martial law and "states of emergency" that characterized anticolonial resistance as "terrorism."[88]

Anticolonial lawmaking consequently understood the independence aspect of self-determination as freedom from "colonial control," broadly defined as the "subjection of peoples to alien subjugation, domination and exploitation."[89] This definition can be broken up into three constitutive elements: (1) the "peoples," (2) "alien" rule, and (3) "subjugation, domination and exploitation." First, this right of self-determination attaches to "peoples," which are defined as those populations connected together by "social and political organization" in relation to an area of land.[90] Second, the exertion of sovereignty over the "people" must be "alien" such that colonies are only those territories that are "geographically separate" and "distinct ethnically and/or culturally from the country" exerting control.[91] A common misconception of colonialism requires that the colonizing power be separated from the colony by a sea or ocean, as was typical for European colonization.[92] Under the law created by

85. PATNAIK & PATNAIK, *supra* note 78, at 75–79; *see also* Sylla, *supra* note 79 (noting that land is not used for the benefit of majority populations under colonial rule).

86. PATNAIK & PATNAIK, *supra* note 78, at 116–19.

87. *Id.* at 18, 75–79, 116, 226.

88. John Reynolds, *The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law*, 6 COMPAR. RSCH. L. & POL. ECON. 1, 11, 16–17 (2010).

89. G.A. Res. 1514, *supra* note 65, ¶ 1.

90. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶¶ 59, 80–81 (Oct. 16).

91. G.A. Res. 1541 (XV), annex, princs. IV–V (Dec. 15, 1960).

92. *See, e.g.*, Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 186 (2008) (discussing self-determination's "blue water doctrine" and arguing that it denied independence to indigenous peoples located in sovereign states by implying that "the right to sovereign independence vests only in colonized populations separated by water"

anticolonial lawmaking, however, alien rule is actually determined by *uti possidetis*, which geographically distinguishes a colony from the colonizing power based on "colonial administrative borders" rather than a body of water.[93] *Uti possidetis* thus reveals the importance of the element of "alien" rule in defining colonial relations between peoples that are not separated by saltwater, such as Morocco's rule over Western Sahara.[94] While *uti possidetis* has been roundly critiqued for forcing peoples to remain within territorial configurations imposed on them by their colonizers,[95] anticolonial leaders used it to ensure the entire colonized landmass would be freed—meaning colonies' territorial integrity would be fully restored—and to prevent former colonizing powers from retaining colonial control over some part of the territory in the process of decolonization, which would inhibit the restoration of colonies' territorial integrity.[96] Finally, the third element requires

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from the colonizing state); Heinz Klug, *Self-Determination and the Struggle Against Apartheid*, 8 WIS. INT'L L.J. 251, 280 (1990) (rejecting an interpretation of the doctrine of self-determination that requires the "salt-water test").

93. Steven R. Ratner, *Drawing a Better Line:* Uti Possidetis *and the Borders of New States*, 90 AM. J. INT'L L. 590, 590 (1996).

94. *See* discussion *infra* Section II.B.

95. For an example of such a critique, see Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1, 59–66 (2010).

96. In Latin America, newly decolonized states adopted *uti possidetis* to prevent European powers from re-colonizing any "unclaimed" territory. Tomas Bartos, *Uti Possidetis. Quo Vadis?*, 18 AUSTL. Y.B. INT'L L. 37, 40 (1997). Subsequently, amid the decolonization of Africa, the potential utility of *uti possidetis* was made evident through specific European efforts to retain colonial rule. For example, certain maneuvers, such as Belgium's orchestration of Katanga's secession from the Congo, aimed to circumvent decolonization efforts and maintain imperial dominion over these regions, in violation of *uti possidetis*. *See* Georges Nzongola-Ntalaja, *Ethnicity and State Politics in Africa*, 2 AFR. J. INT'L AFFS. 31, 50 (1999) (explaining how European colonial interests made it appear as if a distinct Kantangan people sought to exercise their right of self-determination from the Congo despite the multi-ethnic coalition seeking secession); Josiah Brownell, *Diplomatic Lepers: The Katangan and Rhodesian Foreign Missions in the United States and the Politics of Nonrecognition*, 47 INT'L J. AFR. HIST. STUD. 209, 212–13 (2014) (explaining that the Katangan government and security forces were run by Belgian advisors); Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RSRV. J. INT'L L. 199, 251 n.252 (1992) (noting that "Belgium argued for the right of self-determination of indigenous peoples at least partly in order to enable Katanga to secede from Congo so that Belgium could continue to exploit the copper in Katanga"); *Questions Relating to the Situation in the Republic of the Congo*

(Leopoldville): Political Developments, 1960 U.N.Y.B. 52, 53–54, U.N. Sales No. 61.1.1 (reporting submissions by Congolese leaders "complaining that the arrival of Belgian metropolitan troops in the Congo constituted aggression and that the provincial authorities of Katanga had declared secession as a result of 'colonialist machinations'"); Georges Nzongola-Ntalaja, *Patrice Lumumba: The Most Important Assassination of the 20th Century*, GUARDIAN (Jan. 17, 2011), https://www.theguardian.com/global-development/poverty-matters/2011/jan/17/patrice-lumumba-50th-anniversary-assassination [https://perma.cc/LMK3-EZY7] (noting that western colonial powers moved to eliminate the secessionist regimes in the Congo, including the one in Katanga, after the assassination of Congolese President Patrice Lumumba because "Lumumba's physical elimination had removed what the west saw as the major threat to their interests in the Congo"). Some U.N. Member States expressly noted the attempted Katanga secession during the drafting of paragraph 6 of Resolution 1514, referring to the protection of a people's territorial integrity. *See* James Summers, *Decolonisation Revisited and the Obligation Not to Divide a Non-Self-Governing Territory*, 55 QUESTIONS INT'L L. 147, 163 & n.82 (2018) (citing U.N. GAOR, 15th Sess., 929 plen. mtg., ¶¶ 104, 108, U.N. Doc. A/PV.929 (Nov. 30, 1960)) (noting that some states "highlighted the Congo, at the time fracturing with the Katanga secession, to emphasise the importance of territorial integrity for states"). Similarly, the principle of *uti possidetis* was used to counter Britain's retention of sovereignty over the Chagos Archipelago of Mauritius, such as when the U.N. General Assembly declared that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter . . . ." Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos Advisory Opinion), Advisory Opinion, 2019 I.C.J. Rep. 95, ¶¶ 34–35 (Feb. 25) (quoting G.A. Res. 2232 (XXI) (Dec. 20, 1966)); *see also id.* ¶¶ 153, 168 (discussing other relevant General Assembly resolutions). On the other hand, *uti possidetis* was sometimes used to preserve colonial interests. For example, in Biafra's attempted secession from Nigeria, Nigeria was supported by the British government, which believed that a "One Nigeria" policy would protect their oil interests in the Niger Delta. *See generally* Chibuike Uche, *Oil, British Interests and the Nigerian Civil War*, 49 J. AFR. HIST. 111, 111 (2008) (presenting evidence suggesting that "British oil interests played a much more important role in the determination of the British attitude to the war than is usually conceded"). However, an independent Biafran state would not have addressed the problem discussed here—i.e., the self-determination of peoples—thereby revealing one of the fundamental problems with the concept of "statehood." *See* Nimanthi Perera-Rajasingham, *"Work Is War": The Biafran War and Neoliberalism in Ken Saro-Wiwa's Sozaboy*, 48 RSCH. AFR. LITERATURES 1, 3, 5, 6 (2017) (explaining how "a separate state controlled by the Igbos would not benefit micro-minorities like the Ogoni people"). *Uti possidetis* is also criticized for protecting the interests of the comprador class by creating states that were too small to challenge capitalist imperial interests. *See* Walter Rodney, *Aspects of the International Class Struggle in Africa, the Caribbean and America*, *in* PAN-AFRICANISM: STRUGGLE AGAINST NEO-COLONIALISM AND IMPERIALISM 18, 23 (Horace Campbell ed., Afro-Carib Publications 1975) (arguing that the failure of African petty bourgeoisie to

"subjugation, domination and exploitation," which is understood broadly through "administrative, political, juridical, economic or historical" conditions that place the people of the colonized territory "in a position or status of subordination" to the administering state.[97]

The presence of these three elements triggers certain obligations of the colonizing power if the independence aspect of self-determination is to be fulfilled. First, recognizing how colonialism destroys a people's relationship to the land, colonial powers may not facilitate "the systematic influx of foreign immigrants and the dislocation, deportation and transfer of the indigenous inhabitants."[98] At the same time, colonial powers must restore and protect a people's sovereignty over the natural resources embedded in their lands.[99] Second, the colonial power must "bring a speedy end to colonialism, having due regard to the freely expressed will of *the peoples concerned*" (meaning the colonized people, as opposed to settlers),[100]

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counteract the "deliberate creation of non-viable dependent mini-states by France attests not merely to the strength of the colonizers but also to fear on the part of the presumptive African rulers that larger territorial units might have negated their narrow class welfare").

97. G.A. Res. 1541, *supra* note 91, annex, princs. IV, V.

98. G.A. Res. 2105 (XX), ¶ 5 (Dec. 20, 1965); *see also* G.A. Res. 2621 (XXV), ¶ 4 (Oct. 12, 1970) ("Member States shall consider the adoption of necessary steps . . . [which] should also aim at preventing the systematic influx of foreign immigrants into colonial Territories, which disrupts the integrity and social, political and cultural unity of the peoples under colonial domination."); G.A. Res. 2878 (XXVI), ¶ 6 (Dec. 20, 1971) (condemning the policy adopted by some colonial powers "of imposing non-representative regimes and constitutions, strengthening the position of foreign economic and other interests, misleading world public opinion and encouraging the systematic influx of foreign immigrants while evicting, displacing and transferring the indigenous inhabitants to other areas" in colonially dominated territories); G.A. Res. 2908 (XXVII), ¶ 7 (Nov. 2, 1972) (same). *See also* Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 239 (July 19) ("[B]y virtue of the right to self-determination, a people is protected against acts aimed at dispersing the population and undermining its integrity as a people.").

99. G.A. Res. 1803 (XVII) (Dec. 14, 1962); G.A. Res. 3171 (XXVIII), ¶ 2 (Dec. 17, 1973); G.A. Res. 2158 (XXI) (Nov. 25, 1966). *See also* Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 240 (July 19) ("A[n] element of the right to self-determination is the right to exercise permanent sovereignty over natural resources, which is a principle of customary international law.").

100. G.A. Res. 2625 (XXV) (Oct. 24, 1970) (emphasis added); *see also* G.A. Res. 1514, *supra* note 65, ¶ 5 ("Immediate steps shall be taken . . . to transfer all powers to the peoples of [colonial] territories, without any conditions or

usually through a referendum.[101] The referendum must include an option of independence, and it may also offer the colonized people the choice of (1) "integrating" into the colonizing power, so long as such a choice is determined through "a free and voluntary" "democratic" process in which the people are fully "informed" and integration is conducted "on the basis of *complete* equality" between the formerly colonized people and the citizens of the former colonizing power,[102] or of (2) "free association" with the formerly colonizing power with its own attendant requirements.[103] Finally, the right of self-determination attaches to peoples within the "the *entirety* of" the

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reservations, in accordance with their freely expressed will and desire . . . in order to enable them to enjoy complete independence and freedom."); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 241 (July 19) ("[A] key element of the right to self-determination is the right of a people freely to determine its political status and to pursue its economic, social and cultural development."); David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & C.R.L. REV. 1, 34 (2006) ("[S]ettler populations have been barred from participation in decolonization plebiscites."); *Sahrawi Arab Democratic Republic v. Owner and Charterers of the MV 'NM Cherry Blossom'* 2017 (5) SA 105 (ECP) para. 48 (S. Afr.) (distinguishing the Sahrawi people of Western Sahara from Moroccan settlers when considering the right of self-determination as it relates to sovereignty over resources).

101. *See, e.g.*, N.Y. CITY BAR, COMM. ON THE U.N., THE LEGAL ISSUES INVOLVED IN THE WESTERN SAHARA DISPUTE 68–70 (2012), https://www2.nycbar.org/pdf/report/uploads/20072264-WesternSaharaDispute--SelfDeterminationMoroccosLegalClaims.pdf [https://perma.cc/HUV9-LYGU] (asserting that "there is strong precedent for the holding of referendums or plebiscites on the issue of self-determination" in the colonial context and describing recent examples).

102. G.A. Res. 1541, *supra* note 91, annex, princs. VIII–IX; *see also* Barnard, *supra* note 100, at 34 (noting that the United Nations declared that "the population of a Non-Self-Governing Territory should be free to choose their status in relation to the governing State, through 'informed and democratic processes.'") (quoting G.A. Res. 742 (VIII) (Nov. 27, 1953)).

103. G.A. Res. 1541, *supra* note 91, annex, princ. VII. According to the resolution, "[f]ree association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes." *Id.* The "association" between the former colonizing power and its former colony should also respect the latter's "right to determine its internal constitution without outside interference" and retain the option for the people to become fully independent through democratic processes at a later date. *Id.*

colonized landmass, as defined by *uti possidetis*.[104] This means that in the process of decolonization, the territorial integrity of this landmass may not be disturbed.[105]

The above-described right to self-determination is often thought to apply solely to those colonized peoples recognized by the international community as outside the territorial borders of an existing state as of 1960, when the General Assembly adopted Resolution 1514.[106] This would thus exclude, for example, Native and First Nations peoples in the United States and Canada.[107] This is in part because the right protects territorial integrity (e.g., the granting of full independence to the Navajo people would disturb the territorial integrity of the settler state of the United States),[108] and in part because the general principle of intertemporality under international law requires a legal question to be resolved by the laws in effect at the time of the offense.[109] However, as clarified by the ICJ, the independence aspect of self-determination applies to territories *recognized as* non-self-governing *as of 1919*.[110] There were numerous

104. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos Advisory Opinion), Advisory Opinion, 2019 I.C.J. Rep. 95, ¶ 160 (Feb. 25) (emphasis added).

105. *Id.*; Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 237 (July 19) ("[T]he Court recalls that the right to territorial integrity is recognized under customary international law as 'a corollary of the right to self-determination.'").

106. John Reynolds, *Anti-Colonial Legalities: Paradigms, Tactics & Strategy*, 18 PALESTINE Y.B. INT'L L. 8, 14 (2015) [hereinafter Reynolds, *Anti-Colonial Legalities*].

107. *See id.* (noting that the United Nations expressly drafted General Assembly resolution 1514 to exclude already established settler colonial states to "allay any concerns that states such as Australia or Canada may have had about the prohibition applying to their rule over indigenous peoples within their borders").

108. *Id.*

109. *See generally* Steven Wheatley, *Revisiting the Doctrine of Intertemporal Law*, 41 OXFORD J. LEGAL STUD. 484, 486–89 (2021) (explaining the intertemporal principle in international law).

110. The ICJ first conducted this retroactive application of the right of self-determination in a challenge to apartheid South Africa's efforts to retain colonial rule over Namibia well past 1960. South Africa defended the legality of its efforts on the ground that it gained sovereign control of Namibia as a Class C Mandate under the League of Nations' mandate system, a designation which it asserted was "not far removed from annexation." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia Advisory Opinion), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 45 (June 21). The Court found

territories that were non-self-governing as of 1919 and were still arguably non-self-governing by the time that anticolonial lawmaking's conception of the right of self-determination was established, since the process of decolonizing was still incomplete. For example, in some territories decolonization was incomplete because of flaws in the referendum of the colonized people, such as those in Hawai'i[111] or Puerto Rico,[112] or because the powers that be failed to

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that, regardless of the intentions of the League of Nations' members in designating Class C mandates, the concepts embodied in the Mandate system (such as that of the "sacred trust") "were not static, but were by definition evolutionary." *Id.* ¶ 53. The Court thus concluded that "it must take into consideration the changes which have occurred in the supervening half-century," including the way the right of self-determination was "considerably enriched" by anticolonial lawmaking. *Id.* ¶¶ 52–53. The Court then retroactively applied this "enriched" understanding of Class C Mandates to reject South Africa's legal justification for continuing its rule over Namibia. *Id.* ¶ 54. The ICJ extended this reasoning to those colonies considered by Western European powers to be within their sovereign territory in its advisory opinion addressing the question of Western Sahara. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶ 54 (Oct. 16). Even following the adoption of Resolution 1514, Spain considered Western Sahara to be a province of Spain and therefore not subject to this newly elaborated right of self-determination. Thomas M. Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694, 701 (1976). Even so, the Court held that the right of self-determination applied to the people of Western Sahara. Western Sahara, Advisory Opinion, 1975 I.C.J. ¶ 162. In a separate opinion, Judge De Castro reasoned that a proper interpretation of the principle of intertemporal law required application of the right of self-determination. Klug, *supra* note 92, at 277–78. Unfortunately, though indigenous peoples in the settler states in the Americas and Oceania are subjected to colonization by the same Western European powers, they remain excluded from the independence aspect of self-determination because the guarantees protecting territorial integrity determined by *uti possidetis* protected their settler states' geographic borders well established prior to 1919. Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 186 (2008); *see also* Iorns, *supra* note 96, at 201–03 (noting that indigenous peoples' claims to self-determination have been repeatedly rejected and arguing that this is primarily because of modern conceptions of state sovereignty); Duane Champagne, *UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights*, 28 WÍČAZO ŠA REV. 9, 17–18 (2013) (noting that the U.N. Declaration on the Rights of Indigenous Peoples recast the issue of self-determination of indigenous peoples as a "bundle of rights" and thus "capture[d] issues of self-government and self-determination within the legal frameworks of nation-states").

111. Barnard, *supra* note 100, at 34 (explaining that the referendum did not include the option of independence and how settlers were permitted to vote in the referendum).

112. *See Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1616, 1657–64 (2017) [hereinafter *The U.S. Territories*] (explaining the United

hold a referendum at all, such as in West Papua,[113] Kashmir,[114] or Palestine.[115] In some cases, colonizing powers failed to respect the choice made by the people, even via flawed processes for determining their will, such as the United States' continued colonial control of Puerto Rico[116] or India's de facto, and ultimately de jure, unilateral annexation of Kashmir.[117] In other territories, the colonial powers

States' and Puerto Rico's divergent views on the extent of self-government provided via Public Law 600 and suggesting that Puerto Ricans were not fully informed when they voted in the referendum approving the law); Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 80–81 (2013) (arguing that the process through which the United States was able to convince a majority in the U.N. General Assembly that it had ended its colonial rule over Puerto Rico "can at best be described as a marriage of convenience—and, at worst, a monumental hoax").

113. *See, e.g.*, Emma Kluge, *How the World Failed West Papua in Its Campaign for Independence*, CONVERSATION (Jan. 23, 2020), https://theconversation.com/how-the-world-failed-west-papua-in-its-campaign-for-independence-129623 [https://perma.cc/4KKH-9PFE] (discussing the repeated failure to hold a genuinely democratic referendum in West Papua despite multiple attempts by advocates and activists since at least 1960).

114. *See, e.g.*, Fozia N. Lone, *The Creation Story of Kashmiri People: The Right to Self-Determination*, 21 DENNING L.J. 1, 6–11 (2009) (making the case for the Kashmiri people's right to self-determination and explaining how India evaded the U.N. Security Council's call to determine the accession of Kashmir through a democratic method of a free and impartial plebiscite); S.C. Res. 47, pmbl., ¶¶ 1(b), 7, 12 (Apr. 21, 1948) (establishing that the Kashmiri people should determine "the question of accession" through democratic processes but failing to include an option of independence).

115. NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE 45–46 (Stanford Univ. Press 2019) [hereinafter ERAKAT, JUSTICE FOR SOME] (making the case for the Palestinian people's right of self-determination across Mandate Palestine and describing the United Nations' failure to conduct a referendum of the Palestinian people before deciding its plan for partition through U.N. General Assembly Resolution 181).

116. *See The U.S. Territories*, *supra* note 112, at 1665–72 (explaining how the "free association" status which the United States claims that Puerto Rico obtained via Public Law 600 does not fully comply with the requirements of self-determination).

117. *See Aman, Why Article 35A Matters: Of Demography and the Right of Self-Determination in Indian-Administered Kashmir*, LEAFLET (Aug. 15, 2018), https://theleaflet.in/why-article-35a-matters-of-demography-and-the-right-of-self-determination-in-indian-administered-kashmir/ [https://perma.cc/R8CB-HNHT] (explaining how India is "reneging" of its promise of Kashmir's "free association" status); *From Domicile to Dominion: India's Settler Colonial Agenda in Kashmir*, 134 HARV. L. REV. 2530, 2534–38 (2021) (same); Zainab Ramahi & Azadeh Shahshahani, *Destroying to Replace: Settler Colonialism from Kashmir to Palestine*, VERSO (Aug. 10, 2020), https://www.versobooks.com/blogs/news/4817-destroying-to-replace-settler-colonialism-from-kashmir-to-palestine

disrupted the territorial integrity of the colonized landmass to retain colonial rule, such as the case with the Chagos Islands[118] and Ireland.[119] I therefore argue that these territories should still be acknowledged as colonized and subject to the analysis set forth in this Article.[120]

Anticolonial lawmaking effectively modified the laws governing the use of force (*jus ad bellum*) and the laws governing belligerent occupation (*jus in bello*) to account for the independence aspect of self-determination. Anticolonial lawmaking adopted General Assembly resolutions extending *jus ad bellum*'s prohibition against states using force against each other to prohibit any forcible annexation of land to which a people with a right to self-determination belong, even if their statehood has not yet been recognized by the international community.[121] This lawmaking

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[https://perma.cc/PU6Z-KPK3] (reporting that the Indian government had formally and unilaterally revoked Kashmir's "free association" status).

118. *See* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos Advisory Opinion), Advisory Opinion, 2019 I.C.J. Rep. 95, ¶¶ 170–74 (Feb. 25) (analyzing the United Kingdom's detachment of the Chagos Islands for Mauritius and concluding that "as a result of the Chagos Archipelago's unlawful detachment . . . the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968").

119. *See, e.g.*, Bill Rolston & Robbie McVeigh, *Ireland's Arc of Colonisation*, CELTIC JUNCTION ARTS REV. (2021), https://celticjunction.org/cjac/arts-review/issue-15-beltane-2021/irelands-arc-of-colonisation/ [https://perma.cc/7RUP-DB46] (explaining how "[b]ecause of partition, the Six Counties never experienced the *first stage* of the decolonising process – the formal disengagement of the colonial power"); Francis A. Boyle, *The Decolonization of Northern Ireland*, 4 ASIAN Y.B. INT'L L. 25, 26–28 (1994) (reviewing international law governing territorial integrity and self-determination and concluding that "the continuing partition of Ireland constitutes an illegal partial disruption of the national unity and territorial integrity of the state of Ireland, which violates the terms of the United Nations Charter").

120. *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 222 (Cambridge Univ. Press 1995) [hereinafter CASSESE, SELF-DETERMINATION OF PEOPLES] (explaining how the right of self-determination "could only lapse . . . if it was properly exercised").

121. G.A. Res. 2625, *supra* note 100, annex; *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion), Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 87–88 (July 9) (discussing the contents and implications of Resolution 2625 relating to the use of force and the right of self-determination); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 179 (July 19) (concluding that "to seek to acquire sovereignty over an occupied territory, as shown by the policies and practices adopted by Israel in East Jerusalem and the West Bank, is

further prohibited colonizing powers from using force against colonial subjects who use force to resist the colonizer.[122] In both instances, anticolonial lawmaking made it illegal for third states to provide assistance to the colonizer (or would-be colonizer) in its use of force.[123]

Further, recognizing that unilateral annexation can occur in less conspicuous ways, anticolonial lawmaking extended *jus in bello*'s rules governing belligerent occupation to protect peoples not yet recognized as independent states by adopting Additional Protocol I to the Geneva Conventions.[124] This modification protects peoples in occupied territories not yet recognized as states from the risk of an occupying power becoming a colonizing power. *Jus in bello* mandates that the occupying power manage the occupied territory as a trust (of

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contrary to the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force"); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia Advisory Opinion), Advisory Opinion, 1971 I.C.J. Rep. 16, 67, ¶ 12 (June 21) (separate opinion by Ammoun, J.) (noting that many states and the General Assembly had characterized South Africa's intervention in Namibia as an act of aggression and concluding that the U.N. Security Council had adopted this interpretation by adopting Resolution 276).

122. CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 120, at 196.

123. *See*, *e.g.*, *id*. at 199–200 (noting that while third party states may "provide economic, political and logistical support to liberation movements," they "must refrain from assisting a State that forcibly opposes self-determination" because "[a]ny substantial help to the oppressive State, be it military or economic in nature, is regarded as illegal under international law").

124. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, ¶ 4, *adopted* June 8, 1977, 1125 U.N.T.S. 3, 7 [hereinafter Additional Protocol I] (explicitly providing that the Protocol applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination"); *see also* G.A. Res. 50/6, ¶ 1 (Oct. 25, 1995) (reaffirming "the right of self-determination of . . . peoples under . . . foreign occupation"); Eyal Benvenisti & Guy Keinan, *The Occupation of Iraq: A Reassessment*, 86 INT'L L. STUD. 263, 275–76 (2010) (explaining that the law of occupation "is heavily influenced by the effort not to alienate the indigenous people's right to continue to exercise its right to self-determination.").

which the people under occupation are the beneficiaries[125]) to prevent such occupations becoming "a new form of colonialism."[126]

There are several ways occupying powers are required to uphold this trust agreement. First, as a trustee, the occupier's rule must be "purely administrative," meaning it cannot make decisions that would "detrimentally affect . . . the future exercise by the local population of their internationally recognised right to self-determination."[127] Second, the occupation must be both "temporary" and "based on military necessity."[128] This is because, in an indefinite occupation, the occupier would be required to make decisions to ensure and protect the occupied people's human rights that would make permanent changes, thereby undermining the people's sovereignty over the territory.[129] Finally, *jus in bello* includes the demographic and natural resource protections inherent in the independence aspect of self-determination. The occupying power may not "artificially creat[e] demographic changes" in the occupied territory, for example "by transferring its civilian population into the occupied territory and transferring the local population out of the territory, or forcing them to move within it."[130] The occupying power

125. Ben-Naftali et al., *supra* note 76, at 555; Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 105 (July 19) ("[T]he occupying Power bears a duty to administer the territory for the benefit of the local population.").

126. AEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 50–51 (Cambridge Univ. Press 2017) [hereinafter GROSS, THE WRITING ON THE WALL].

127. VALENTINA AZAROVA, EUR. COUNCIL ON FOREIGN RELS., ISRAEL'S UNLAWFULLY PROLONGED OCCUPATION: CONSEQUENCES UNDER AN INTEGRATED LEGAL FRAMEWORK 3 (2017), https://ecfr.eu/wp-content/uploads/ISRAELS_UNLAWFULLY_PROLONGED_OCCUPATION_ECFR216.pdf [https://perma.cc/A29R-QG34].

128. *Id*.

129. *Id*. For example, the ICJ found that Israel's "assumption of broader regulatory powers by virtue of the prolonged character of the occupation, entrenches its control over the occupied territory." Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 170 (July 19).

130. *Id*. To illustrate, the ICJ concluded that "the transfer by Israel of settlers to the West Bank and East Jerusalem, as well as Israel's maintenance of their presence, is contrary to the sixth paragraph of Article 49 of the Fourth Geneva Convention," Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 119 (July 19), and that "Israel's policies and practices…[that] often leave little choice to members of the Palestinian population

must also "safeguard the natural resources of the occupied territory" and "exploit them only for the benefit of the local population, and exceptionally for the purpose of covering reasonable expenses of its military administration."[131] Violations of these protections can amount to de facto unilateral annexation.[132] A de facto annexation effectively "confer[s] the benefits of annexation to the occupier without requiring it to incorporate the people under occupation to its polity, with its ensuing rights and privileges."[133] In other words, the

living in Area C but to leave their area of residence…[and] are not temporary in character and therefore cannot be considered as permissible evacuations…are contrary to the prohibition of forcible transfer of the protected population under the first paragraph of Article 49 of the Fourth Geneva Convention," *id*. ¶147.

131. *Id*. *See also* Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 124 (July 19) (describing how the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 protect an occupied people's access to their natural resources).

132. *See* Eugenia de Lacalle, De Facto and De Jure Annexation: A Relevant Distinction in International Law? 24 (2019) (Master's thesis, Université Libre de Bruxelles) (arguing that a de facto annexation is distinguishable from a de jure annexation by "the way in which the intent to acquire permanent title over the territory is demonstrated" and arguing that the former might be defined through "different practices, legislation, and policies"); *see also* Yaël Ronen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201, 207, 210 (2008) (arguing that the illegality of prolonged occupation may be understood as stemming from violations of the right to self-determination); Benvenisti & Keinan, *supra* note 124, at 276 (arguing that "authorizing an occupant to derogate from its responsibilities under the law of occupation and thereby limit and shape the political choices of an occupied sovereign people carries the danger of effectively infringing the right to self-determination"). For example, in regards to the Occupied Palestinian Territory, in 2004, the ICJ considered "that [Israel's] construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case . . . it would be tantamount to *de facto* annexation." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion), Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 121 (July 9). Assessing the developments of the subsequent twenty years, in 2024, the ICJ concluded that "Israel's policies and practices . . . entrench Israel's control of the Occupied Palestinian Territory, . . . [and] are designed to remain in place indefinitely and to create irreversible effects on the ground," and therefore "amount to annexation of large parts of the Occupied Palestinian Territory." Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 173 (July 19).

133. Ben-Naftali et al., *supra* note 76, at 586.

occupation takes on the "form of colonial regime" in violation of the independence aspect of self-determination.[134]

B. The Distinction Between the Independence Aspect of Self-Determination Focusing on Decolonization and Self-Determination as a Human Rights Norm

The independence aspect of self-determination is often referred to as "external" self-determination governed by the right as laid out in the preceding Section, while a government's respect of human rights is often referred to as "internal" self-determination.[135] External self-determination permits a subjugated people to choose to become an independent sovereign state.[136] By contrast, internal self-determination functions within the framework of an existing state, enabling the populace to "define the structure of" the state without seeking independence from it.[137] The difference between external and internal self-determination can be seen in three legal frameworks: the law of secessions, *jus ad bellum*, and *jus in bello*. These frameworks offer valuable insights into whether a system of oppression operates like colonialism and violates the independence aspect of self-determination and thus requires unilateral economic sanctions.

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134. *Id.*; Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 257 (July 19) ("The Court is of the view that occupation cannot be used in such a manner as to leave indefinitely the occupied population in a state of suspension and uncertainty, denying them their right to self-determination while integrating parts of their territory into the occupying Power's own territory."). To illustrate: In its *Wall Opinion*, the ICJ concluded that Israel's policy and practices in the West Bank (e.g., facilitating Israeli settlements, depriving Palestinians of access to some of their most fertile lands, contributing to the departure of Palestinians from those areas) not only violated the laws of occupation, but also "severely impede[d] the exercise by the Palestinian people of its right to self-determination." Wall Advisory Opinion, 2004 I.C.J. ¶¶ 120–22, 132–33. A 2016 U.N. Human Rights Council Resolution similarly concluded that, based on these findings, the Israeli settlements restrict the ability of Palestinians "to dispose freely of natural resources . . . required for the meaningful exercise of Palestinian self-determination." Human Rights Council Res. 31/36, U.N. Doc. A/HRC/RES/31/36, at 3 (Apr. 20, 2016); *see also* Human Rights Council Res. 34/31, U.N. Doc. A/HRC/RES/34/31, at 3 (Apr. 3, 2017) (reiterating that Israeli settlements restrict the ability of Palestinians to dispose of natural resources as is required for the exercise of their self-determination).

135. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 126 (Can.).

136. *Id.*

137. Robert E. Gorelick, *Apartheid and Colonialism*, 19 COMPAR. & INT'L L.J.S. AFR. 70, 76 (1986).

To start, secession is distinct from decolonization. The former is a struggle to break away from an existing state while the latter is a struggle for independence from foreign rule.[138] Only decolonization struggles are protected by the right of external self-determination.[139] This distinction is best illustrated by comparing the case of Quebec and Canada (demonstrating the former) with the case of Western Sahara and Morocco (demonstrating the latter). Settlers in Quebec, or Quebecois, sought to secede from Canada, a settler state created by virtue of a colonial inheritance from Britain.[140] The Supreme Court of Canada found that the Quebecois' attempt to secede from Canada was not a valid exercise of *external* self-determination.[141] As non-indigenous people, the Quebecois did not constitute a "people" belonging to that territory, but rather constituted a subset of the Canadian settler population.[142] As such, their secession would violate the territorial integrity of the Canadian state.[143] The court held that the Quebecois could struggle only for *internal* self-determination—that is, improved representation within the Canadian government.[144]

Conversely, in its Advisory Opinion on Morocco's claim to Western Sahara, the ICJ found that the Sahrawi constituted a "people" belonging to the territory of the Western Sahara.[145] It then found that their right of external self-determination had been

138. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 131 (Can.).

139. *Id*. paras. 132, 138.

140. Notably, this secession was opposed by the First Nations Tribes (colonized by the Canadian settler state) in Quebec. Charles Trueheart, *Quebec's Natives Almost Unanimous in Opposition to Secession from Canada*, WASH. POST (Oct. 26, 1995), https://www.washingtonpost.com/archive/politics/1995/10/26/quebecs-natives-almost-unanimous-in-opposition-to-secession-from-canada/175a2f87-a4b1-48ba-9583-19c3c5fb3d62/ (on file with the *Columbia Human Rights Law Review*).

141. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 138 (Can.).

142. The Quebecois settlers did not encompass the First Nations Tribes belonging to that land. *See id.* para. 139 (acknowledging the distinct nature of aboriginal rights and interests in the secession negotiations); *see also* Trueheart, *supra* note 140 (reporting Cree and Inuit opposition to Quebec's secession and territorial claims).

143. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 138 (Can.).

144. *See id*. paras. 138, 126 (holding that "neither the population of the province of Quebec . . . nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law to secede unilaterally from Canada" but leaving untouched the possibility that the Quebecois pursue their "political, economic, social and cultural development within the framework" of the Canadian government).

145. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶¶ 80–81 (Oct. 16).

violated first by Spain, and later by Morocco when it inherited Spain's colonial rule by taking over the territory without the Sahrawi people's consent.[146] The Court dismissed Morocco's claims that Western Sahara formed an integral part of Morocco because of its geographical proximity and shared landmass, and thus that its independence would actually constitute a "secession" in violation of Morocco's territorial integrity.[147] The Court concluded that the territorial integrity of Western Sahara, as determined by *uti possidetis*, could only be respected by determining the sovereign aspirations of the Sahrawi people, which included the option of independence from Moroccan rule.[148]

Like the law of secession, *jus ad bellum* distinguishes between external and internal self-determination by delineating what actions third-party states can take in either circumstance. As a general rule, *jus ad bellum* prohibits the use of force by one state or a coalition of states on another state's territory.[149] Such use of force

146. *See id.* ¶¶ 82, 162 (finding that Western Sahara was not *terra nullius* at the time of Spanish colonization and concluding that there were no ties between the people of Western Sahara and their neighbors that might affect the former's right to self-determination pursuant to G.A. Res. 1514).

147. *Id*. ¶¶ 49, 161; *see also* Erica Vásquez, *The Roots of Conflict: From Settler-Colonialism to Military Occupation in the Western Sahara*, JADALIYYA (Jan. 9, 2015), https://www.jadaliyya.com/Details/31655 [https://perma.cc/N2GB-SALF] (describing Morocco's claim over Western Sahara as grounded in "nationalist belief in the recovery of terra irredenta").

148. Western Sahara, Advisory Opinion, 1975 I.C.J. ¶¶ 55–59; *see also* G.A. Res. 34/37 (Nov. 21, 1979) (affirming the Sahrawi people's right to self-determination and independence and urging Morocco to end its occupation of Western Sahara). Similarly, despite Indonesia's claims that East Timor's independence would constitute a secession in violation of its territorial integrity, because Indonesia inherited its rule over East Timor from Portugal, "the legal basis for East Timor's right of self-determination lay in its relations with Portugal," and the people of East Timor's exercise of self-determination would not threaten the territorial integrity of Indonesia. Catriona Drew, *The East Timor Story: International Law on Trial*, 12 EUR. J. INT'L L. 651, 656–58 (2001) (discussing East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. Rep. 90 (June 30)). Along the same lines, West Papua's integration into Indonesia resulted from a European colonial inheritance without the West Papuan people's genuine consent, and, thus, could also be characterized as the result of a "flawed decolonization process," *id*. at 658 n.34, such that West Papuan independence would not violate Indonesia's territorial integrity.

149. *See, e.g.,* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, ¶ 227 (June 27) (holding that the use of force or threat of force against another state's territorial integrity or political independence is prohibited under customary international law).

constitutes "aggression."[150] One key exception to this prohibition is the use of force in self-defense.[151] Thus, third-party states may assist another state in its use of force if it is using force in self-defense, but not if the state is committing aggression.[152] Anticolonial lawmaking "carefully excluded" armed struggles of peoples fighting colonial rule from the definition of "aggression,"[153] and instead situated such armed struggles as *akin to* a state's right of "self-defense"[154] given their "legitimacy" in realizing the independence aspect of self-determination.[155] Consequently, anticolonial lawmaking also

150. G.A. Res. 3314 (XXIX), annex, art. 1 (Dec. 14, 1974).

151. *See* U.N. Charter art. 51 (preserving the right to self-defense "if an armed attack occurs against a Member of the United Nations"); Nicar. v. U.S., 1986 I.C.J. ¶ 232 (stating that collective self-defense requires an armed attack and an express request by the victim state).

152. *See, e.g.,* Nicar. v. U.S., 1986 I.C.J. ¶ 232 (requiring an armed attack and a request for assistance to justify collective self-defense).

153. G.A. Res. 3314, *supra* note 150, annex, art. 7; John Dugard, *The Role of International Law in the Struggle for Liberation in South Africa*, 18 SOC. JUST. 83, 90 (1991) [hereinafter Dugard, *The Role of International Law*].

154. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia Advisory Opinion), 1971 I.C.J. Rep. 16, 67, ¶ 2 (June 21) (separate opinion by Ammoun, J.) (asserting that armed struggles for self-determination derive from the right of self-defense).

155. G.A. Res. 3070 (XXVIII), art. 2 (Nov. 30, 1973) ("[R]eaffirm[ing] the legitimacy of the peoples' struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggles[.]"); *see also* G.A. Res. 2625, *supra* note 100 (affirming the legitimacy of struggles for self-determination); Christos Theodoropoulos, *The Decolonization Approach to the Eradication of Apartheid*, 18 N.Y.U. J. INT'L L. & POL. 899, 910–12 (1986) (recognizing armed struggles against colonial powers as legitimate exercises of self-determination rather than acts of aggression); Sultany, *supra* note 44, at 18 (quoting Antonio Cassese's observation that gross denials of self-determination by colonial, racist, or occupying regimes justify the use of force by oppressed peoples and allow third-party states to assist such liberation movements) (quoting Antonio Cassese, *Remarks on the Present Legal Regulation of Crimes of States*, *in* THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS OF ANTONIO CASSESE 403, 404–05 (Paola Gaeta & Salvatore Zappalà eds., 2008) [hereinafter Cassese, *Remarks*). While anticolonial lawmaking produced the Lusaka Manifesto of 1970, which has been interpreted to stand against the use of armed struggle to resist colonial domination, such lawmakers "unequivocally declared their backing for the armed struggle" in the subsequent Mogadishu Declaration of 1971. Rodney, *supra* note 96, at 33–34. Indeed, since armed struggle of colonized people was "the primary factor in the formation" of the right to self-determination, the legitimacy of such struggle was recognized by the international community as a whole (including through the Security Council) as a component of the independence aspect of self-determination. Namibia Advisory Opinion, 1971 I.C.J. Rep. ¶¶ 2, 7 (separate opinion Ammoun, J.). This

recognized that a third state's assistance to a people engaged in armed resistance to colonization—an exercise of *external* self-determination—would not violate *jus ad bellum*.[156] Though a third state may not "send troops to fight against the colonial power,"[157] anticolonial lawmaking specifically directed third states to offer all "moral, material and any other assistance to all peoples struggling" against colonization.[158] Such assistance could include arms,[159] which is governed by *jus ad bellum*.[160] For example, anticolonial lawmaking adopted General Assembly resolutions calling on all states to support armed resistance to apartheid South Africa's occupation of Namibia (as it was viewed as a form of colonial rule),[161] and were called to do

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holds true regardless of whether one only takes into account the view of anticolonial resistance movements—which understood that they had a legal *right* to armed struggle—or the more restrained view that even if peoples struggling for self-determination have "no legal right proper" to resort to force under *jus ad bellum*, "resort to force by these movements" in the face of either military force or institutionalized violence by the colonizing power was legitimate and "was not in violation of the general ban on force" under *jus ad bellum*. CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 120, at 181–82, 198.

156. G.A. Res. 2625, *supra* note 100; G.A. Res. 3314, *supra* note 150, annex, art. 7.

157. CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 120, at 198.

158. G.A. Res. 3070, *supra* note 155, ¶ 3. In a series of resolutions, anticolonial lawmaking called for all states to "provide material and moral assistance to the national liberation movements in colonial Territories." G.A. Res. 2105, *supra* note 98, ¶ 10; G.A. Res. 2878, *supra* note 98, ¶¶ 5, 7; G.A. Res. 3103 (XXVIII), ¶ 5 (Dec. 12, 1973).

159. CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 120, at 199–200 (explaining that third states can provide "economic, political and logistical support to liberation movements, as well as sending arms and ammunitions"). As Christoper O. Quaye has put it, "The call on states to assist the strugglers cannot have any practical meaning if it excludes assistance in the form of arms." CHRISTOPHER O. QUAYE, LIBERATION STRUGGLES IN INTERNATIONAL LAW 289 (1991). Even conventional scholars who do not believe this lawmaking has created permission under *jus ad bellum* for states to provide *armed* assistance to anticolonial struggles, have conceded that it allows for states to provide other forms of material assistance, such as in the form of training, to those engaged in anticolonial armed struggle. *See, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 1038–39 (5th ed. 2003) (allowing other forms of material support, like training, for armed anticolonial struggles). These forms of assistance are covered by *jus ad bellum*'s understanding of the use of force. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, ¶ 228 (June 27).

160. Nicar. v. U.S., 1986 I.C.J. ¶ 228 (explaining how arming and training a non-state group can violate *jus ad bellum*'s prohibition of the use of force).

161. G.A. Res. 2678 (XXV), ¶ 10 (Dec. 9, 1970); G.A. Res. 2871 (XXVI), ¶ 9 (Dec. 20, 1971).

the same for colonized peoples' armed resistances to Portuguese colonial rule.[162]

By contrast, third-party states are prohibited from aiding a non-state group in conflict with its own state, even if such support is framed as an endeavor to protect human rights (i.e., an exercise of *internal* self-determination).[163] This distinction between lawful and unlawful support from third-party states is most clearly seen in the ICJ's ruling in *Nicaragua v. United States*.[164] The Court found that the United States' support for *contra* rebels against Nicaragua's Sandinista government was unlawful, and if such support involved armed assistance, it would also infringe *jus ad bellum*, regardless of whether the "cause appeared particularly worthy by reason of the political and moral values with which it was identified."[165] The Court specifically explained that it reached this conclusion because the case did not pertain to decolonization.[166] This distinction also appeared in debates leading to the 1970 *Friendly Relations Declaration*.[167] Certain representatives in those debates emphasized that the colonization of peoples is a matter of "international concern" for which such peoples would be "entitled to assistance from other States,"[168] even as they affirmed that States are prohibited from providing assistance to groups "directed towards the violent overthrow of the regime of

162. G.A. Res. 2795 (XXVI), ¶¶ 8, 13 (Dec. 10, 1971); G.A. Res. 2707 (XXV), ¶¶ 7, 11 (Dec. 14, 1970).

\163. The *Friendly Relations Declaration* cautioned that nothing in the entitlement of peoples struggling for self-determination to assistance by third-party states "shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." G.A. Res. 2625, *supra* note 100, at 124. Similarly, while recognizing the right of colonized peoples "to seek and receive support" from third-party States in their armed struggles, the General Assembly's definition of aggression prohibits the use of force on humanitarian grounds. *See* G.A. Res. 3314, *supra* note 150, annex arts. 5 ¶ 1, 7 (asserting that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression" despite reaffirming that nothing in the adopted definition of the crime of aggression "could in any way prejudice the right to self-determination, freedom, and independence derived from the Charter").

164. Nicar. v. U.S., 1986 I.C.J.

165. *Id.* ¶¶ 206, 237–38.

166. *Id.* ¶ 206.

167. G.A. Res. 2625, *supra* note 100.

168. Report on Friendly Relations Among States, *supra* note 60, ¶ 207.

another State," or otherwise "interfer[ing] in civil strife in another State."[169]

Finally, anticolonial lawmaking amended *jus in bello*'s laws governing armed conflict through the adoption of Additional Protocols I and II to the Geneva Conventions, which by their nature implicitly distinguish between external and internal self-determination.[170] Additional Protocol I grew out of a series of implementing resolutions for Resolution 1514 mandating that anticolonial resistance movements be treated like privileged combatants in international armed conflicts rather than "terrorists."[171] These resolutions also specifically required the application of the Geneva Conventions to the struggles waged by peoples resisting Portuguese colonial rule,[172] Namibians resisting South African occupation,[173] and Palestinians resisting Israeli occupation.[174] Additional Protocol I sought to legitimize these struggles by recognizing peoples "fighting against colonial domination and alien occupation . . . in the exercise of their right of self-determination"[175] as essentially "states in waiting," such that these conflicts would be treated as on par with armed conflicts

169. G.A. Res. 2625, *supra* note 100, at 123; *see also, e.g.*, Nicar. v. U.S., 1986 I.C.J. ¶¶ 241–42 (finding that the United States clearly breached the principle of non-intervention by supporting the military and paramilitary activities of the *contras* in Nicaragua); G.A. Res. 31/91, ¶ 3 (Dec. 14, 1976) (denouncing "any of form of interference" in the sovereign affairs of another state); G.A. Res. 36/103, annex ¶ 1 (Dec. 9, 1981) ("No State or group of States has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States.").

170. Additional Protocol I, *supra* note 124; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

171. *See, e.g.*, G.A. Res. 2621, *supra* note 98, ¶ 3(6)(a) (calling on all states to treat freedom fighters under detention in accordance with the Geneva Convention related to the Treatment of Prisoners of War); G.A. Res. 3103, *supra* note 158, ¶ 3 (declaring that "armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions"); *see also* Whyte, *supra* note 58, at 318 (explaining that under the colonial powers' view, "anticolonial fighters . . . could be treated as mere terrorists").

172. G.A. Res. 2547 (XXIV), ¶ 8 (Dec. 11, 1969); G.A. Res. 2707, *supra* note 161, ¶ 6; G.A. Res. 2795, *supra* note 161, ¶ 7.

173. G.A. Res. 2547, *supra* note 172, ¶ 9; G.A. Res. 2678, *supra* note 161, ¶ 11; G.A. Res. 2871, *supra* note 161, ¶ 8.

174. G.A. Res. 42/209 B, pmbl. (Dec. 11, 1987); G.A. Res. 46/82 A, pmbl. (Dec. 16, 1991).

175. Protocol I art. 1, ¶ 4, *supra* note 124.

between two sovereign states.[176] Separately, Additional Protocol II was formulated to regulate internal (and otherwise non-international) armed conflicts.[177] This Protocol applies to conflicts where a faction of a state's population is fighting the state, which in some instances may include claims of internal self-determination.[178] According to Additional Protocol II, combatants belonging to non-state groups which lack the potential to become independent states, and instead may seek at most improved representation within their current state, do not enjoy the same rights and privileges that anticolonial resistance movements enjoy under Additional Protocol I.[179]

This distinction between external and internal self-determination can be applied to the question of economic sanctions. Are they being used to support a population seeking internal self-determination or a people seeking external self-determination? If the former, then sanctions imposed by former colonizing powers and their settler states against formerly colonized states would violate the non-domination aspect of self-determination.[180] If the latter, as Part III will show, then sanctions would be *required* to avoid international complicity in colonial domination.

C. Freedom from Settler Apartheid as Part of the Independence Aspect of Self-Determination

Understanding settler apartheid requires an understanding of settler colonialism. The processes that lead to settler apartheid and

176. Whyte, *supra* note 58, at 317 (quoting BEST, *supra* note 58, at 227).

177. Protocol II art. 1, ¶ 1, *supra* note 170.

178. *See id.* ("This Protocol . . . shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups . . . ."); Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-77), Vol. VII, at 80–81, CDDH/SR.49 (1978) (recording that India voted against Article 1 of Additional Protocol II during the 49th plenary meeting based on fears that it would erode state sovereignty while simultaneously reiterating its support for Additional Protocol I's legitimation of "wars of national liberation").

179. Darin Johnson, *The Problem of the Terror Non-State: Rescuing International Law from ISIS & Boko Haram*, 84 BROOK. L. REV. 475, 508–09 (2019). The treatment of anticolonial fighters as privileged combatants recognizes that "ensuring that the host state's domestic law continues to apply against [such] non-state actors, as required by a non-international armed conflict framework would be of little import once the host state had ceded power to the liberation movement." *Id.* at 509.

180. This argument is asserted and analyzed in Shah, *supra* note 18.

settler colonialism are similar, up to a point. In settler colonialism, settlers[181] seek access to a land that is devoid of any indigenous *people* belonging to that land to avoid recognizing such people's sovereign relationship to the land.[182] To achieve full sovereignty over the land, settlers must eliminate any other potential sovereign claim to the territory.[183] Successful settler colonialism accordingly requires "the radical reduction of the indigenous population"—through genocidal acts such as killings, forced displacement, and child removals[184]—after which "elements of a settler citizenship can be

181. As used in this Article, the term "settlers" refers to those who migrate to a territory as "founders of new political orders who strive to carry sovereignty with them, as opposed to migrants seeking to join the-already constituted order." Reynolds, *Anti-Colonial Legalities*, *supra* note 106, at 11. As a result of such settler actions, the people who held sovereignty to the land by virtue of being present there and belonging to the land become "indigenous." In this sense, "indigeneity" is used to signify those peoples subjected to persistent colonial and settler colonial structures, rather than serving as a retrieval of the ancient history of a land and migration patterns of human populations. J. Kēhaulani Kauanui, *The Politics of Indigeneity, Anarchist Praxis, and Decolonization*, *in* ANARCHIST DEVELOPMENTS IN CULTURAL STUDIES 9, 14 (2021); J. Kēhaulani Kauanui, *"A Structure, Not an Event": Settler Colonialism and Enduring Indigeneity*, 5 LATERAL (2016), https://csalateral.org/issue/5-1/forum-alt-humanities-settler-colonialism-enduring-indigeneity-kauanui/ [https://perma.cc/GB8K-UUDP]. Thus, under these definitions, the eradication of colonial and settler colonial structures would ultimately render these signifiers obsolete. For instance, under British colonial rule all populations on the Indian subcontinent could be referred to as indigenous vis-à-vis their British colonial rulers. With the end of British rule and the emergence of the sovereign State of India, within the State of India only those peoples in resistance or who are "oppositional" to the "nation-state"—referred to in Sanskrit/Hindi as *adivasi*—would be appropriately described as indigenous. Paulomi Chakraborty, *Framing "Always Indigenize" Beyond the Settler-Colony: "Indigenizing" in India*, 30 ENG. STUD. CAN. 17, 20–22 (2004).

182. Settlers in South Africa, for example, "wanted the land and the labor, but not the people—that is to say, they sought to eliminate stable communities and their cultures of resistance." Robin D.G. Kelley, *The Rest of Us: Rethinking Settler and Native*, 69 AM. Q. 267, 269 (2017).

183. *See* Harald Bauder & Rebecca Mueller, *Westphalian Vs. Indigenous Sovereignty: Challenging Colonial Territorial Governance*, 28 GEOPOLITICS 156, 161 (2023) (asserting that the conventional Westphalian conception of sovereignty is mutually exclusive with the existence of any indigenous sovereignty as "there cannot be two sovereigns sharing the same fixed and bounded territory" and concluding that settlers continue to pursue policies of elimination).

184. *See generally* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006) [hereinafter Wolfe, *Settler Colonialism*] (explaining that settler colonialism relies on "frontier homicide," as well as "child abduction . . . and a whole range of cognate biocultural assimilations").

selectively offered" to any remaining indigenous persons "as a means to eradicate residual sovereign impulses."[185] This process is exemplified in the U.S. and Canadian approaches towards their territories' indigenous populations.[186] Settler apartheid arises when genocidal policies and ethnic cleansing are no longer a viable political option, which became the case after the Holocaust and the adoption of the 1948 Genocide Convention.[187] In the absence of genocide and ethnic cleansing, indigenous people remain in the numerical majority in settler states.[188] To assimilate them into the settler polity would pose a demographic threat to the settler state, so the only option is for the indigenous population to remain both distinct and subjugated from the settler population so that the settler polity can retain power.[189] This is akin to the divide between citizen and colonial subject under a colonial structure, except that here both citizens and subjects reside on the same landmass.[190] This option is made possible through "a *process* of separate development," or *apartheid*.[191] It is thus through apartheid that colonial relations are maintained.

This understanding of settler apartheid is missing from conventional legal analysis, which instead construes struggles against apartheid as a form of internal self-determination through

185. Veracini, *The Other Shift*, *supra* note 76, at 30.

186. *Id*. at 27.

187. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277.

188. *See, e.g.*, Veracini, *The Other Shift*, *supra* note 76, at 29 (asserting that Israel, Rhodesia, and South Africa are examples of settler societies where the "'classic' model of settler colonialism" does not apply because their colonial settlements operate "amid a far larger population" of indigenous peoples).

189. *Id*. at 29–30.

190. *Id*. at 31 ("[T]he enforcement of segregation *everywhere* . . . result[s] in creating a colonized subjectivity mirroring the institution of *colonial*, rather than *settler* colonial, forms."); *see also* Michael Bueckert, Boycotts and Backlash: Canadian Opposition to Boycott, Divestment, and Sanctions (BDS) Movements from South Africa to Israel 26 (2020) (Ph.D. dissertation, Carleton University) (on file with the *Columbia Human Rights Law Review*) (describing the South African Communist Party's characterization of apartheid as a form of colonialism "in which the oppressing White nation occupied the same territory as the oppressed people themselves and lived side by side with them").

191. Bueckert, *supra* note 190, at 29; *see also* Karine Mac Allister, *Applicability of the Crime of Apartheid to Israel*, AL-MAJDAL MAG. 11 (2008), https://badil.org/cached_uploads/view/2021/05/06/al-majdal-38-1620308674.pdf [https://perma.cc/3JND-PWZC] (providing a legal analysis of the Israeli government's practices and policies and arguing that "the policies and practices of the Israeli government amount to apartheid against Palestinian nationals").

the lens of a human rights framework.[192] Yet, as Antonio Cassese observed, the "international sanctions against South Africa [were] urged by the [United Nations] not so much on account of massive violations of human rights, but insofar as apartheid . . . amounts to a grave manifestation of *forcible denial of self-determination*."[193] In other words, as this Section will show, anticolonial lawmaking understood settler apartheid as a form of colonialism and, thus, a structure against which the independence aspect of self-determination may be exercised. The difference between the conventional conception of settler apartheid and anticolonial lawmaking's conception of this structure is critical to understanding why sanctions are required against settler apartheid as a variant of colonialism, whereas they could be prohibited if apartheid were considered a human rights issue that is purely internal to a sovereign state.

This Section begins by showing how the conventional human rights conception of settler apartheid actually supports it preservation. This conception focuses remedial measures on individual atrocities stemming from the apartheid structure while maintaining apartheid's core structure of land dispossession that ensures settler domination. The Section then explains how settler apartheid is a variant of colonialism that functions as a tool to evade decolonization and that continues colonialesque operations through a combination of petty and grand forms of apartheid. It ends by showing how anticolonial lawmaking avoided "presum[ing] the sovereign legitimacy" of a settler apartheid state[194] and thus included freedom from apartheid alongside colonialism as covered by the independence aspect of self-determination.[195] Anticolonial lawmaking accordingly adapted each of the legal frameworks governing secessions and war (*jus ad bellum* and *jus in bello)* explained in the preceding Sections.

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192. For an example of such an analysis, see Gorelick, *supra* note 137, at 76.

193. Cassese, *Remarks on the Present Legal Regulation of Crimes of States*, *supra* note 155, at 404.

194. Theodoropoulos, *supra* note 155, at 906; *see also id*. at 912–15 (summarizing the colonial history of South Africa and concluding that the "conventional view of South African 'decolonization' is highly questionable" because "the colonial status of South Africa's indigenous peoples" had not been affected by the formation of an independent settler state).

195. *See, e.g.*, G.A. Res. 3175 (XXVIII), ¶¶ 1, 4 (Dec. 17, 1973) (affirming the right of peoples under foreign occupation to permanent sovereignty over all their natural resources and declaring that "the above principles apply to all States, territories and peoples under foreign occupation, colonial rule or *apartheid*").

1. Conventional Understandings of Apartheid under International Law

Conventional legal understandings of settler apartheid define it as "institutionalized racial discrimination"[196]—a form of domestic oppression by an otherwise legitimate sovereign for which the subjugated could typically seek relief through internal self-determination only.[197] Definitions of settler apartheid are often derived from treaties that do not outline the structure of apartheid, but rather have a narrower focus: assigning individual criminal responsibility for "inhuman acts" stemming from apartheid.[198] The rationale for utilizing this method instead of scrutinizing settler apartheid through the independence aspect of self-determination is based on the misconception that the latter is a *political* question rather than a *legal* question.[199]

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196. *See, e.g.*, *Draft Code of Crimes Against the Peace and Security of Mankind: Comments and Observations Received from Governments*, [1993] 2 Y.B. Int'l L. Comm'n 59, 68 U.N. Doc. A/CN.4/SER.A/1993/Add.1 (Part 1) (noting Austria's objection to including apartheid under Article 20 of the Draft Code of Crimes Against the Peace and Security of Mankind and proposed instead the "more general formulation" of "[i]nstitutionalized racial discrimination"); *id.* at 87 (noting that the Netherlands construed the offense of apartheid as "generally constitut[ing] a systematic or mass violation of human rights").

197. *See*, *e.g.*, Gorelick, *supra* note 137, at 76 ("Apartheid is thus a question of what might be called internal self-determination, that is, that the people of an existing state must have the right to define the structure of the state.").

198. G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid, annex arts. I–II (Nov. 30, 1973) [hereinafter "Apartheid Convention"]; Rome Statute of the International Criminal Court art. 7 ¶¶ 1(j), 2(h), *adopted* July 17, 1998, 2187 U.N.T.S. 90, 93–94; *see* Carola Lingaas, *Jewish Israeli and Palestinians as Distinct 'Racial Groups' Within the Meaning of the Crime of Apartheid?*, EJIL: TALK! (July 6, 2021), https://www.ejiltalk.org/jewish-israeli-and-palestinians-as-distinct-racial-groups-within-the-meaning-of-the-crime-of-apartheid/ [https://perma.cc/B6L7-5TPT] (explaining that international criminal law "must always be interpreted strictly," so as to respect rights of the accused); Joshua Kern, *Uncomfortable Truths: How HRW Errs in Its Definition of "Israeli Apartheid", What Is Missing, and What Are the Implications?*, EJIL: TALK! (July 7, 2021), https://www.ejiltalk.org/uncomfortable-truths-how-hrw-errs-in-its-definition-of-israeli-apartheid-what-is-missing-and-what-are-the-implications/ [https://perma.cc/8TLZ-6Q5X] (distinguishing between "the crime of apartheid" and "the inter-State prohibition of apartheid").

199. Sultany, *supra* note 44, at 18–19 (quoting Kenneth Roth, *Saving Lives in Time of War*, DAWN (Aug. 5, 2022), https://dawnmena.org/saving-lives-in-time-of-war/ [https://perma.cc/N88D-TS9F]).

The conventional understandings of settler apartheid as comprising policies and practices of an otherwise legitimate sovereign align with the defenses raised by the *settler apartheid states* of southern Africa (South Africa, Rhodesia, Angola, and Mozambique) against anticolonial lawmaking's efforts to dismantle apartheid.[200] Based on the inviolability of a sovereign state's territorial integrity, these states insisted that the independence aspect of self-determination "could not apply in their cases, as the territories they governed were internal to their own political units."[201] Colonizing powers and their settler states agreed.[202] Thus, identifying a correct framing of settler apartheid became critical in the concerted efforts to end it. As Heinz Klug observed in 1990, apartheid South African President F. W. de Klerk framed the struggle against the apartheid South African state in human rights terms, thereby limiting remedial measures to "some of the more extreme violations of human rights which led to apartheid being declared a crime against humanity," while at the same time "attempting to control the transition away from apartheid to ensure that white minority privileges continue[d] to be guaranteed in a 'post-apartheid' South Africa."[203] Even many anti-apartheid scholars contended that if Black South Africans were entitled to "independence" through their exercise of external self-determination, the result would effectively replicate the Bantustan system decried as an instrument of settler apartheid[204]—wherein the indigenous peoples are concentrated in small semi-sovereign enclaves, which would be territorially and politically circumscribed by

200. GETACHEW, WORLDMAKING AFTER EMPIRE, *supra* note 22, at 87; *see also* Dugard, *The Role of International Law*, supra note 153, at 84 (explaining how "South Africa found support from many Western governments for its insistence that its racial policies fell within its exclusive domestic jurisdiction"); J.K. Feimpong & S. Azadon Tiewel, *Can Apartheid Successfully Defy the International Legal System?*, 5 NAT'L BLACK L.J. 287, 297 (1977) (discussing how South Africa defended against international condemnation of the apartheid regime by arguing that the issues were purely internal affairs).

201. GETCHEW, WORLDMAKING AFTER EMPIRE, *supra* note 22, at 87.

202. *See*, *e.g.*, Richardson, *supra* note 66, at 192–93 (discussing pushback on international condemnation of apartheid from South Africa and several European powers and noting that the Benelux countries equated such condemnation with "reverse discrimination").

203. Klug, *supra* note 92, at 251.

204. Gorelick, *supra* note 137, at 71–72, 76; *see also*, *e.g.*, Iorns, *supra* note 96, at 261 n.294 ("[E]ven in the two clear cases of internal racism that were held to violate self-determination, that of Southern Rhodesia and of South Africa, it was never argued that the oppressed people (the majority of the people of the state) had a right to secede from the oppressor state.").

the settler state.[205] Consequently, these scholars posited that the sole viable recourse for Black South Africans was internal self-determination.[206]

Guided by this analysis, conventional legal scholars have long argued that the outcry against settler apartheid in southern Africa was a historical moment in which decolonized states were forced to choose between their desire to protect their newly gained sovereignty from foreign interference—the non-domination aspect of self-determination—and their desire to compel the international community to protect Black Africans from the settler apartheid state's human rights violations.[207] The situation of apartheid South Africa is thus seen as a situation that first tested the "inherent tension" between human rights protections and the non-domination aspect of self-determination.[208] This view holds that it was because "th[e] racial dimension of apartheid . . . reflect[ed] the outmoded colonizer-colonised relationship between blacks and whites in Africa"[209] that the only solution then was to create "a *sui generis* regime, specific to South Africa," to resolve this tension.[210] Under this *sui generis* regime, apartheid South Africa would be considered the unique situation where a problem internal to a sovereign state, normally addressed by internal self-determination, would be subject to the same consequences as purely international situations like colonialism, to be addressed by the independence aspect of (or, external) self-determination.[211] Under this view, General Assembly resolutions referencing apartheid alongside colonialism as structures

205. Leila Farsakh, *Independence, Cantons, or Bantustans: Whither the Palestinian State?*, 59 MIDDLE E.J. 230, 234 (2005).

206. Gorelick, *supra* note 137, at 71–72, 76; *see also*, *e.g.*, Iorns, *supra* note 96, at 261 n.294 ("[I]t was envisaged that the appropriate remedies were internal: that the respective (then minority) governments must be made more representative of the whole people of the state.").

207. R. H. Payne, *Sub-Saharan Africa: The Right of Intervention in the Name of Humanity*, 2 GA. J. INT'L & COMPAR. L. 89, 91–93 (1972).

208. Dugard, *The Role of International Law*, *supra* note 153, at 84.

209. Gorelick, *supra* note 137, at 76.

210. John Dugard & John Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, 24 EUR. J. INT'L L. 867, 883 (2013); *see also* U.N. SCOR, 18th Sess., 1045th mtg. at 19, U.N. Doc. S/PV.1054 (Aug. 6, 1963) (recording the British delegation as stating that "the case of apartheid" should be treated "as *sui generis*").

211. *See* Dugard, *The Role of International Law*, *supra* note 153, at 84 (noting that some states tried to limit their recognition of the precedence of international human rights over a state's domestic jurisdiction to the specific situation of apartheid).

from which a right of external self-determination could be exercised were a "historical anomaly."[212]

2. Settler Apartheid as a Tool to Evade Decolonization and Maintain Colonial Relations

In reality, settler apartheid is not simply institutionalized racial discrimination practiced by a legitimate sovereign. Rather, it is a tool that settlers use to evade decolonization and maintain the colonial structure, rendering the settler state inherently illegitimate under international law. Settler apartheid results from settlers, whose sovereign authority arises from metropole colonizing powers, coming to share the same territorial space as the colonized and thereafter breaking off from the political authority of the metropolitan power.[213] The nationality of the settler need not be limited to that of the metropolitan power; rather the key fact is that the settlers gain sovereign authority by *virtue* of that metropolitan power.[214] What the settler state gains when it refers to its "independence" from the metropole is actually the settler state obtaining a colonial inheritance.[215] Its "independence" is a way to evade the decolonization process the metropolitan power is required to carry out under the independence aspect of self-determination. Then, by instituting a rule of apartheid, the settler state is able to maintain a distinctly colonial structure with its attendant benefits of the colonial drain.

The settler apartheid process of evading decolonization is best illustrated by the colonial histories of the region where the word "apartheid" originates. Settler apartheid in southern Africa resulted from the institutionalized discrimination intrinsic to Britain's colonial relations.[216] For example, Britain colonized present-day Zimbabwe,

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212. Noura Erakat & John Reynolds, *Understanding Apartheid*, JEWISH CURRENTS (Nov. 1, 2022), https://jewishcurrents.org/understanding-apartheid [https://perma.cc/P6KE-WJ22].

213. Reynolds, *Anti-Colonial Legalities*, *supra* note 106, at 10–11.

214. *Id.* at 12 n.11 (describing "many examples in colonial history of where significant settler populations were not nationals of the metropolitan government (the French in Canada, the Boers in South Africa, the Italians in France's north African colonies, and so on)" and concluding that the nationality and racial components of colonialism must therefore be read together).

215. See *id.* at 10–11 (supporting the notion of settler colonialism as an extension of colonial domination that often seeks to use "the mantle of a self-determination struggle" to displace or eradicate indigenous sovereignty).

216. Padraig O'Malley, *Colonial Background - Apartheid*, NELSON MANDELA FOUND.,

known as Rhodesia under British colonial rule, by dispossessing the Ndebele and Shona peoples.[217] This dispossession was "followed by successive waves of expropriation and openly racially discriminatory legislation and administrative practice."[218] It was illegal for indigenous Black peoples to purchase the most fertile lands; they were instead "confined within native reservations that were both very small in comparison to the growing population and of relatively low soil quality."[219] In 1965, the White settler government moved towards independence from Britain, as a way of "comply[ing] with growing international pressure for decolonization" while attempting to maintain settler control.[220] But in order for the settler polity to retain political power in the face of an indigenous majority, the new state of Southern Rhodesia needed to take on a distinctly apartheid structure.[221] The United Nations recognized in real time that the independence of apartheid Southern Rhodesia was a way of evading decolonization.[222] The United Nations, pressured by anticolonial lawmaking, therefore directed Britain "not to transfer under any circumstances to its colony in Southern Rhodesia any powers or attributes of sovereignty," and declared the settler apartheid state illegal.[223] Similarly, Britain had colonized and institutionalized racial discrimination in the lands that eventually became the state of South Africa.[224] When British rule was transferred to the White settlers, they "retained existing colonial legal relationships and laws"[225] and further consolidated colonial relations by denationalizing "Xhosa, Tswana, Venda and potentially all Africans."[226] Thus, in effect, the

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https://omalley.nelsonmandela.org/index.php/site/q/03lv02424/04lv03370/05lv03387.htm [https://perma.cc/KN6F-SCZ5].

217. Ntina Tzouvala, *Invested in Whiteness: Zimbabwe, the von Pezold Arbitration, and the Question of Race in International Law*, 2 J.L. & POL. ECON. 226, 233 (2022) [hereinafter Tzouvala, *Invested in Whiteness*].

218. *Id.*

219. *Id.*

220. Glen Anderson, *Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy?*, 34 ARIZ. J. INT'L & COMPAR. L. 1, 38–39 (2016).

221. *Id.*

222. *Id.*; S.C. Res. 216, ¶¶ 1–2 (Nov. 12, 1965).

223. Anderson, *supra* note 220, at 38; G.A. Res. 2024 (XX), Question of Southern Rhodesia (Nov. 11, 1965); S.C. Res. 216, *supra* note 222, ¶¶ 1–2; S.C. Res. 217 (Nov. 20, 1965); S.C. Res. 277 (Mar. 18, 1970).

224. O'Malley, *supra* note 216.

225. Theodoropoulos, *supra* note 155, at 914.

226. Raymond Suttner, *Has South Africa Been Illegally Excluded from the United Nations General Assembly?*, 17 COMPAR. & INT'L L.J.S. AFR. 279, 297

indigenous Black peoples belonging to these lands experienced the transfer of colonial rule from Britain to a White settler apartheid regime.[227] Indeed, the settler apartheid state itself evoked this transfer of *colonial* power when presenting apartheid legislation,[228] and it defended its Bantustan policy (as explained below) as fulfilling its "trusteeship" (i.e., colonial) obligations over thirteen peoples in South Africa by offering them the prospect of their own independent states.[229] Thus, apartheid South Africa was "an illegitimate state from its inception, a squatter State on the land of its colonial victim."[230]

Evading decolonization allows the settler apartheid state to maintain distinctly "colonial" relations on the territory it governs. While settler apartheid powers would argue this is impossible because there is no "geographic separation" between them and the

(1984); *see also* John Dugard, *South Africa's Independent Homelands: An Exercise in Denationalization*, 10 DENV. J. INT'L L. & POL'Y 11, 16 (1980) [hereinafter Dugard, *South Africa's Independent Homelands*] (discussing the homelands policy of the apartheid government).

227. The ANC described Britain's acts as having "vested national sovereignty in a racially exclusive South African state" as well as having "institutionalised and statutorily defined black South Africans as a subordinate category of persons within their own country . . . a continuation and entrenchment of our status as a colonised people." Press Release, Afr. Nt'l Cong., ANC Statement at the Lisbon Conference 4 (Mar. 1977) [hereinafter ANC Statement at the Lisbon Conference], https://disa.ukzn.ac.za/pre19770300026021000 [https://perma.cc/J65B-R2EQ]; *see also* World Conference for Action Against Apartheid, *The Lagos Declaration for Action Against Apartheid*, ¶¶ 5–6, U.N. Doc. S/12426 (Oct. 26, 1977) [hereinafter Lagos Declaration] (declaring apartheid to be "a flagrant violation of the Charter of the United Nations and the Universal Declaration of Human Rights" because "[i]t rests on the dispossession, plunder, exploitation and social deprivation of the African people since 1652 by colonial settlers and their descendants" and describing South African apartheid as "one of the main opponents of the efforts . . . to promote self-determination and independence in the area"); Klug, *supra* note 92, at 281–82 (describing how "the black peoples of South Africa were treated in a single article of the constitution as the object of foreign rule").

228. Feimpong & Tiewel, *supra* note 200, at 288.

229. Klug, *supra* note 92, at 283.

230. Theodoropoulos, *supra* note 155, at 915; *see also* U.N. Special Committee Against Apartheid, *Report of the Seminar on the Legal Status of the Apartheid Regime in South Africa and Other Legal Aspects of the Struggle Against Apartheid*, U.N. Doc. A/AC.115/L.616 (Aug. 13–16, 1984) [hereinafter *Report of the Seminar on the Legal Status of Apartheid*] ("What happened . . . was not an act of decolonization by Great Britain but a grant of independence to the colonizers, not to the colonized.").

indigenous peoples,[231] such a defense is belied by the actual operation of settler apartheid through the twin processes of petty and grand apartheid, described in more depth below. Moreover, this defense is not unique to settler apartheid powers. Colonial powers often insist that their colonies are an integral part of their political territory.[232]

231. GETACHEW, WORLDMAKING AFTER EMPIRE, *supra* note 22, at 87; *see* Dugard, *The Role of International Law*, *supra* note 153, at 84 (discussing the "inherent tension between the human-rights provisions in the Charter and the recognition of the exclusive domestic jurisdiction of states contained in Article 2(7)" in the context of apartheid states declaring that institutionalized racism was within their exclusive domestic jurisdiction); Feimpong & Tiewel, *supra* note 200, at 296–97 ("[T]he principal defense of *apartheid* advanced by the South African government is one resting on a technical premise. It is no more than that *apartheid* is a matter within South Africa's domestic jurisdiction, so as to bring it within the meaning of Article 2(7) . . . .").

232. European colonial powers did not necessarily consider their colonies to be distinct "political units" from the metropole, as that would have required the European powers to implicitly recognize that the colonized lands had some inchoate sovereign status. Instead, European colonial powers considered their own states and many of their colonies to be a part of a single integral political unit. *See, e.g.*, Bhambra, *supra* note 75, at 312 (explaining how colonizing powers are misunderstood as states "having empires instead of more properly understood as being imperial states"). For example, the 18th century British government "located responsibility for the colonies within the Home Office, that is, under the remit of the domestic and not of foreign affairs," which were the responsibility of the Foreign Office. *Id.* Similarly, France asserted that Algeria existed within its territorial borders, as opposed to being separate and apart from it. *See*, *e.g.*, U.N. GAOR, First Committee, 11th Sess., 840th mtg. at 52, U.N. Doc. A/C.l/PV.840 (Feb. 9, 1957) (noting that "[t]he French delegation has denied that the United Nations was competent to consider the Algerian problem and has said that it was not competent to seek a solution to this problem" because it claimed that it was subject to France's own domestic jurisdiction under Article 2(7) of the Charter). Portugal and Spain made similar assertions. *See* ANC Statement at the Lisbon Conference, *supra* note 227, at 5 ("With respect to Mozambique and Angola . . . the Portuguese colonialists claimed that theirs was not a colonial empire but rather one national state . . . ."); Franck, *supra* note 110, at 701 (noting that Spain's official position during the 1960s "was that its African territories as provinces of metropolitan Spain, were not subject to self-determination"). Colonizing countries worked to inscribe this understanding into international law. The C-class of mandates had been treated under the League of Nations' mandate system as colonies that "could be administered as an integral portion of the administering power's territory." U.O. Umozurike, *International Law and Self-Determination in Namibia*, 8 J. MOD. AFR. STUD. 585, 585 (1970). And later, in the drafting of the U.N. Charter, when the remaining mandate territories were converted into trust territories to be moved "towards self-government or independence," U.N. Charter art. 76(b), "France and the United Kingdom staunchly resisted any attempt to include their colonies in the trusteeship system by invoking the principle of non-interference in states' domestic affairs." NTINA

This construction of the colonial state conveniently prevents the colony from seeking independence because it has no sovereign territorial status that allows its people to agitate for independence.[233] But even if the colony and metropole are one political unit, the colonial power treats citizens and subjects differently based on racial categories that reflect an "uneven distribution of juridical statuses and rights between communities"[234] in order to extract the colonial drain, as discussed in Section II.A. Thus, even within a singular political unit, there remains a clear distinction between the colonizers and the colonized.

Colonialism's process of racialization is in fact rendered most starkly under settler apartheid since "colonisers are threatened with the requirement to share social space with the colonized."[235] Settler

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TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 132 (Cambridge Univ. Press 2020); *see also* Iorns, *supra* note 96, at 247–48 (explaining how Chapter XI, The Declaration Regarding Non-Self-Governing Territories, "was devised as a compromise" and thus that this chapter provided "a much more attenuated form of international accountability" compared to requirements for trust territories) (quoting JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 116 (Oxford Univ. Press 1979)). Such colonial protestations compelled anticolonial lawmaking to emphasize that "territories under colonial domination do not constitute integral parts of the territory of the States exercising colonial rule," and called for a provision reflecting this in the *Friendly Relations Declaration*. Report on Friendly Relations Among States, *supra* note 60, ¶ 215.

233. *See* Whyte, *supra* note 58, at 317–18 (describing how European colonial powers viewed liberation movements as "terrorists" because their agitation for independence would "strike at the root of national sovereignty") (quoting BEST, *supra* note 58, at 172).

234. PATRICK WOLFE, TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE 19 (Verso 2016) [hereinafter WOLFE, TRACES OF HISTORY]. Race is a sociolegal mechanism through which to mark unequal populations. *See* Bhambra, *supra* note 75, at 316–17 (describing the racial stratification underlying the development of the welfare state in Britain and arguing that it helps explain the persistent inequalities between the former metropole and its former colonial territories); *see also* J.-A. Mbembé, *Necropolitics*, 15 PUB. CULTURE 11, 26 (2003) (explaining how colonialism involves "the enactment of differential rights to differing categories of people for different purposes within the same space"). "Race" is not a biological construct, but a sociolegal one "for differentiating between human collectivities." WOLFE, TRACES OF HISTORY, *supra*, at 15. As such, ethnic and religious identities may also be "racialized." *See generally* Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to Latcrit Theory*, 10 LA RAZA L.J. 57, 114–15 (1998) (discussing the racialization of ethnicity in the context of Latin American communities in the United States); Khaled A. Beydoun, *Faith in Whiteness: Free Exercise of Religion as Racial Expression*, 105 IOWA L. REV. 1475, 1504–15 (2020) (discussing the racialization of religious identities).

235. WOLFE, TRACES OF HISTORY, *supra* note 234, at 12. Because close bonds between citizens and subjects might upend the segregation necessary to maintain

apartheid maintains the distinction between citizen and colonial subject in two ways: (1) segregation under "petty apartheid"; and (2) breaking up the territorial integrity of the colonized landmass under "grand apartheid." Petty apartheid's system of racial segregation demarcates hierarchical citizenship[236] through which the colonial drain can be extracted. However, to avoid criticism of the fundamentally anti-democratic nature of petty apartheid, the settler state gradually moves towards "grand apartheid" through the creation of Bantustans, or semi-sovereign structures within the landmass of the colonized territory.[237] By expelling the indigenous peoples to Bantustans, the settler state thereby denationalizes them and can thus deny them equal political power or provisions without running afoul of democratic norms.[238] Since these newly created states cannot exercise the full powers of sovereign statehood and are instead circumscribed by the settler state's authority, Bantustans are best understood as colonies of the settler state.[239] Even though the legal regimes governing indigenous people living under each of these forms of settler apartheid vary,[240] both petty and grand forms of

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the colonial structure, colonial administrators often maintained strict racialized boundaries. Salar Mohandesi, *The Specificity of Imperialism*, VIEWPOINT MAG. (Feb. 1, 2018), https://viewpointmag.com/2018/02/01/the-specificity-of-imperialism [https://perma.cc/7LQ8-6XMS]. Successful settler colonialism, by contrast, seeks to gradually erase racial difference through mechanisms such as "blood quantum" requirements. Wolfe, *Settler Colonialism*, *supra* note 184, at 388; *see also* WOLFE, TRACES OF HISTORY, *supra* note 234, at 38–39 (arguing that settlers often seek to neutralize "the extraneous sovereignties that conquered Natives continue to instantiate" by "physically liquidat[ing]" Native populations).

236. Bueckert, *supra* note 190, at 29.

237. *Id.* at 30–31.

238. *Id.*

239. *See id.* at 32 ("[A]t no point was apartheid a strictly 'internal' phenomenon — not only was this regime extended to Namibia, but South Africa's leadership believed that Blacks were fundamentally foreign to the South African state, and this was the underlying assumption motivating apartheid itself."); Dugard, *South Africa's Independent Homelands*, *supra* note 226, at 16 (describing how the international community refused to recognize the ostensibly independent "homelands" established by the apartheid government in South Africa because it appeared that the ultimate goal of this policy was to create "a South Africa in which there are no black South Africans, but only black 'guest workers' linked through the bond of nationality to a number of black mini-states carved out of the original boundaries of South Africa"); Richardson, *supra* note 66, 212–13 (arguing that the South African government intended to maintain substantial control over the ostensibly independent state of Transkei through a mixture of "intensely coercive strategies" and intricate legal structures).

240. Indeed, it is the law's very fragmentation of the indigenous peoples subject to the power of the settler state that serves as a "core method" through

apartheid should be viewed together as a "comprehensive body of law that define[s] life chances for everyone in the country."[241] In this way, both petty and grand apartheid operate together through a distinctly *colonial* political economy.

i. Petty Apartheid

Under petty apartheid, the settler state grants a subordinate form of citizenship to limited segments of the indigenous population. Though this population lives *alongside* settlers, they are oppressed through a system of racist, unequal laws. This segmented and hierarchical citizenship structure effectively creates a segregated political economy reminiscent of a colonial metropole-colony relationship within the borders of the settler state.

For example, apartheid South Africa offered its Black citizens only a subordinated form of citizenship through a combination of segregated townships, a pass system, and differential legal treatment, particularly in areas of labor and land ownership.[242] The denial of indigenous Black Africans' political rights[243] effectively made them colonial subjects of the South African State.[244] This political denial sustained a "highly segmented" economy, in which "all of the capital [wa]s white-owned and nearly all management [wa]s white."[245] As such, harms like the differential wages along racial lines[246] represented not simply an issue of racism in the labor market, but also a dividing line between who wealth was extracted from

which apartheid is enforced. Econ. & Soc. Comm'n for W. Asia, I*sraeli Practices Towards the Palestinian People and the Question of Apartheid, Palestine and the Israeli Occupation*, at 37, U.N. Doc. E/ESCWA/ECRI/2017/1 (2017) [hereinafter ESCWA Report].

241. *Id.*

242. Mbembé, *supra* note 234, at 26; Bueckert, *supra* note 190, at 29; Kelley, *The Rest of Us*, *supra* note 182, at 270–71.

243. Klug, *supra* note 92, at 295–96.

244. *Id.* at 294.

245. Charles M. Becker, *The Impact of Sanctions on South Africa and Its Periphery*, 31 AFR. STUD. REV. 61, 64 (1988).

246. Bernard Magubane, *The Political Economy of the South African Revolution*, 1 AFR. J. POL. ECON. 1, 12 (1986); Tshidiso Maloka, *"Sanctions Hurt but Apartheid Kills!": The Sanctions Campaign and Black Workers*, *in* HOW SANCTIONS WORK: LESSONS FROM SOUTH AFRICA 178, 180 (Neta C. Crawford & Audie Klotz eds., 1999).

(indigenous Black peoples) and who reaped the benefit (White settler South Africans), much like in colonial relations.[247]

Similarly, even though France and Algeria did not share the same landmass (as was the case with apartheid South Africa), France nonetheless treated Algeria as an integral unit of the sovereign state of France[248] and deployed petty apartheid within Algeria in part through electoral discrimination.[249] This petty apartheid was also achieved via segregation. The settler colonists, the *colons*, "had ensured a monopoly of state investment in their own settlements, the *commune de pleine exercice*, in the form of roads, electrification, water supply, schools, hospitals and other infrastructures" and withheld "modernisation for the native zones, the *commune mixte*, that were left in endemic poverty" in the rural interior.[250] With their impoverishment, the *commune mixte* "offered a reserve of cheap, mobile labour for the *colon* estates, docks, construction sites and industries."[251] The dispossession and segregation of indigenous Algerians and the use of *commune mixte* as reserves of cheap labor allowed wealth to be extracted from indigenous Algerians and transferred to the French settlers.

As a final example, petty apartheid exists within the 1948 borders of Israel.[252] Israel's exercise of sovereignty via statehood over

247. *See* Tzouvala, *Invested in Whiteness*, *supra* note 217, at 245 (explaining that central to the wage suppression of Black workers "was not the phenotype of the workers as such, but rather the embeddedness, at the time, of native workers into non-capitalist forms of production and re-production that allowed for the suppression of their wages below sustenance levels").

248. Christophe Gillissen, *Ireland, France and the Question of Algeria at the United Nations, 1955-62*, 19 IRISH STUD. INT'L AFFS. 151, 151 (2008).

249. *Id.*

250. NEIL MACMASTER, BURNING THE VEIL: THE ALGERIAN WAR AND THE 'EMANCIPATION' OF MUSLIM WOMEN, 1954–62, at 10 (Manchester Univ. Press 2009) (abbreviations omitted).

251. *Id.*

252. The ICJ has "affirmed the existence of the right of the Palestinian people to self-determination." Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 230 (July 19). The Court has not gone so far as to discuss the full implications of these findings across Mandate Palestine (including within the 1948 borders of Israel). Nevertheless, Noura Erakat has observed that if Palestinians are recognized as a "people," it must also be recognized that Palestinians "successfully inscribed their right to self-determination" in the White Paper of 1939, the U.N. Partition Plan, and the U.N. draft Trusteeship Agreement of 1948. ERAKAT, JUSTICE FOR SOME, *supra* note 115, at 80. As a result, Erakat concludes that "when the British Mandate for Palestine expired in May 1948, sovereignty vested in the people of Palestine." *Id.*

part of Mandate Palestine was an inheritance of Britain's colonial rule over Palestine.[253] Following the 1948 war, Israel "declared an eighteen-year national emergency and oversaw a military legal regime that ensured the forced exile of refugees and removed, dispossessed, and contained the Palestinians that remained in situ."[254] Following the lifting of this regime, Israel maintained a segmented structure of citizenship through the Law of Return and the Nationality Law, which together "established a tiered order that distinguishes between Israel's Jewish population who are 'nationals and citizens' from its non-Jewish Palestinian population who are 'citizens only,'"[255] and was consolidated by the more recent Jewish Nation-State Basic Law.[256] This distinction facilitates "the flow of privileges—to residency, citizenship, land ownership, freedom of movement, and the right to leave and return to one's country—exclusively to Jewish nationals . . . ."[257] Non-Jewish Palestinian

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This is because "[a]rguing otherwise would make the territory vulnerable to conquest by whoever could invade it first and thus contradict 'the whole *raison d'etre* of the [League of Nations] mandates system.'" *Id*. at 80–81.

253. ERAKAT, JUSTICE FOR SOME, *supra* note 115, at 44–54; Nahla Abdo, *Racial Capitalism: From British Colonialism to the Settler Colonial Apartheid State*, 23 J. HOLY LAND & PALESTINE STUD. 187, 192–96 (2024); *see also* Reynolds, *Anti-Colonial Legalities*, *supra* note 106, at 12 (quoting John Strawson, *Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination*, 20 PENN. ST. INT'L L. REV. 363, 377 (2002)) (asserting that "Jewish settler sovereignty developed in the protected space of 'the womb of British colonialism'" despite lacking a mother nation-state in Europe).

254. ERAKAT, JUSTICE FOR SOME, *supra* note 115, at 60.

255. Noura Erakat, *Beyond Discrimination: Apartheid is a Colonial Project and Zionism is a Form of Racism*, EJIL: TALK! (July 5, 2021) [hereinafter Erakat, *Beyond Discrimination*], https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism [https://perma.cc/ABX2-V4CC]; *see also* Mac Allister, *supra* note 191, at 18 ("Combined, the Law of Return and the Citizenship Law form the basis of a regime of systematic discrimination; it creates a superior status—Jewish nationals—and an inferior status—'non-Jews' composed mainly of Palestinians.").

256. *See* Press Release, Adalah, Israeli Parliament Votes to Approve Nation-State Law that Enshrines Jewish Supremacy over Palestinian Citizens (July 19, 2018), https://www.adalah.org/en/content/view/9565 [https://perma.cc/EU46-U89B] ("[The Nation-State Law] guarantees the ethnic-religious character of Israel as exclusively Jewish and entrenches the privileges enjoyed by Jewish citizens, while simultaneously anchoring discrimination against Palestinian citizens and legitimizing exclusion, racism, and systemic inequality.").

257. Erakat, *Beyond Discrimination*, *supra* note 255. As Erakat noted in 2021, "Adalah, the Legal Center for Arab Minority Rights in Israel, maintains an ongoing database of laws, currently totaling 65, that discriminate against

citizens of Israel carry "a second-class citizenship status"[258] that they cannot contest.[259] Through this second-class citizenship, a series of laws have worked to concentrate non-Jewish Palestinians into only three percent of the land inside the 1948 borders.[260] Palestinians are separated from one another "in non-contiguous ghettos throughout the State" that are "systematically underfund[ed] . . . relative to their Jewish counterparts."[261] Consequently, non-Jewish Palestinians "have a lower socio-economic status, receive less, or no, benefits from the State, including electricity and water in some cases, and are excluded from gainful employment, housing, and educational opportunities."[262] This hierarchically segmented citizenship structure works to further transfer land from indigenous Palestinians to the settler polity since it ultimately "facilitates a policy of forced population transfer" outside of the 1948 borders.[263] Petty apartheid thus ensures a significant Jewish majority on as much of the land as possible.

ii. Grand Apartheid

Of the two forms of apartheid, grand apartheid's *colonial* operation is more readily apparent. Grand apartheid disrupts the territorial integrity of the landmass on which the settler state sits through the creation of reservations or Bantustans to which the settler state expels the indigenous peoples while retaining most of the

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Palestinians on the basis of national belonging." *Id.*; *see also* Mac Allister, *supra* note 191, at 16 ("Zionist Jewish Israelis, the group that forms and controls the Israeli government, has 'legalized' a system of institutionalized racial discrimination against Palestinian nationals which intends to establish and maintain domination of Zionist Jewish Israelis over Palestinian nationals.").

258. Noura Erakat, *Whiteness as Property in Israel: Revival, Rehabilitation, and Removal*, 31 HARV. J. RACIAL & ETHNIC JUST. 69, 86 (2015).

259. ESCWA Report, *supra* note 240, at 32–33.

260. Rania Muhareb, *Apartheid, the Green Line, and the Need to Overcome Palestinian Fragmentation*, EJIL: TALK! (July 7, 2021), https://www.ejiltalk.org/apartheid-the-green-line-and-the-need-to-overcome-palestinian-fragmentation [https://perma.cc/GLZ9-6DBG].

261. Erakat, *Whiteness as Property in Israel*, *supra* note 258, at 93, 95; *see also* ESCWA Report, *supra* note 240, at 40 ("These [citizenship law] and other laws comprise a regime of systematic racial discrimination that imposes second-class citizenship on Palestinian citizens of Israel."); Mac Allister, *supra* note 191, at 18 (arguing that the Israeli legal regime governing citizenship "discriminates against Palestinians, in particular Palestinian refugees, on grounds of nationality").

262. Erakat, *Whiteness as Property in Israel*, *supra* note 258, at 87.

263. Erakat, *Beyond Discrimination*, *supra* note 255.

landmass for its settlers. The settler state creates these reservations or Bantustans by detaching or dividing some part of the territory it controls and circumscribing the sovereign authority of those territories, effectively creating colonies. The United States' and Canada's "reservations" arguably provide the earliest examples of grand apartheid resulting from the establishment of a settler state where the indigenous peoples could not be completely eliminated. It is at the border of these reservations that the United States' and Canada's settler colonialism functions more like colonial relations, even today.[264] This is most visible in moments when the settler state tries to expropriate land-based resources from reservations to accumulate wealth, such as through mining and pipeline projects, in a way akin to the colonial drain.[265]

Similar to North American reservations, grand apartheid in South Africa took the form of Bantustans for Black South Africans. Upon its establishment as the Union of South Africa in 1910, the government implemented apartheid institutions by "declar[ing] 87 percent of the land for whites and divid[ing] the remaining 13 percent into tribal homelands for the native population."[266] As apartheid South Africa's petty apartheid was increasingly making it a pariah in the international community, it ramped up its Bantustan policy.[267] Ironically, it was the apartheid state's increasing reliance on Bantustans to maintain White settler political power that made the *colonial* operation of apartheid more readily apparent to the international community, given its disruption of the landmass's territorial integrity.[268] As separate and subordinate entities, subject to the sovereign power of—and for most, completely encircled by—the South African state, Bantustans allowed South Africa to effectively create its own colonies.[269] Specifically, "[t]he source of authority and scope of jurisdiction of the Bantustans' parliaments . . . depended on

264. *See* Tuck & Yang, *supra* note 23, at 5 (describing the United States' colonial relationship with indigenous peoples through the examples of "uranium mining on Indigenous land in the US Southwest and oil extraction on Indigenous land in Alaska").

265. *Id.* at 5.

266. Mahmood Mamdani, *Settler Colonialism: Then and Now*, 41 CRITICAL INQUIRY 596, 608 (2015).

267. Bueckert, *supra* note 190, at 30–31. Between 1960 and 1988, the proportion of indigenous South Africans living in Bantustans rose from 37 percent to 53 percent. Becker, *supra* note 245, at 67.

268. See General Assembly resolutions on Bantustans listed *infra* note 304.

269. Dugard, *South Africa's Independent Homelands*, *supra* note 226, at 16.

decrees and acts issued by" the South African government.[270] In addition, "the Bantustans' governments had to coordinate with the apartheid government on security matters and did not have direct independent relations to foreign countries."[271] Further undermining any potential sovereign equality with the South African state, Black South Africans as a "people" were fragmented by the non-contiguous nature of the Bantustans.[272] And since the South African form of settler colonialism sought land and labor from the same peoples,[273] Bantustans were undeveloped and had little potential for economic viability due to the small amounts of land allotted to each Bantustan and its poor agricultural quality,[274] thereby forcing Bantustan citizens to work as exploited migrant labor in South Africa.[275]

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270. Farsakh, *supra* note 205, at 234.

271. *Id.*

272. For example, only Xhosa could become citizens of Ciskei and Transkei, whereas only Zulu could become citizens of KwaZulu. *The Homelands*, S. AFR. HIST. ONLINE [hereinafter *The Homelands*], https://www.sahistory.org.za/article/homelands [https://perma.cc/P8HL-G78S].

273. Kelley, *The Rest of Us*, *supra* note 182, at 271; *see also* SMITH, *supra* note 84, at 104–05 (explaining that "the infamous pass-laws" were "a necessary condition for the[] super-exploitation" of Black workers in South Africa). This stands in contrast to settler states like the United States, which imported enslaved labor rather than relying on the labor of Native persons whose presence would undermine the United States' claim to sovereignty. *See* WOLFE, TRACES OF HISTORY, *supra* note 234, at 3 (noting that the enslaved and Native societies "were of antithetical but complementary value to White Society" in the United States). Settler states cannot survive if they rely on the labor of the indigenous people. Wolfe argues that "it is not good policy to incur reliance on a population that one is simultaneously seeking to eliminate" because it would "promote the survival of the bearers of sovereignties that exceed the settler import." *Id.* at 23. Thus, successful settler colonists have quickly abandoned the practice of coercing indigenous peoples to work for them, and instead "settlers bring their labour with them, usually already coerced, whether as slaves, convicts, indenturees . . . ." *Id.*; *see also* Olivia C. Harrison, *France, a Settler Postcolony?*, MIDDLE E. RSCH. & INFO. PROJECT (Apr. 20, 2022), https://merip.org/2022/04/france-a-settler-postcolony [https://perma.cc/44C6-R5V3] (explaining how "[s]ettler-colonial fantasies of replacing the indigenous populations never materialized in Algeria" because "the native's labor proved too useful for the settler," and thus, the project was ultimately unsuccessful); Hassan Jabareen, *How The Law Of Return Creates One Legal Order In Palestine,* 21 THEORETICAL INQUIRIES L. 459, 480 (2020) ("Due to the closure of the West Bank and Gaza in the mid-1990s, the Israeli labor market needed foreign workers to replace the Palestinians.").

274. *The Homelands*, *supra* note 272.

275. *Id*. In essence, the Bantustans "served as labour reservoirs, housing the unemployed and releasing them when their labour was needed in White South Africa." *Id.*

A contemporary illustration highlighting how grand apartheid underscores the colonial nature of the apartheid structure is evident in Israel's rule over the Occupied Palestinian Territories (OPT).[276] Upon inheriting sovereignty from Britain's colonial rule over Mandate Palestine, Israeli Prime Minister Ariel Sharon identified the Bantustan model as the solution for the challenge that the non-Jewish Palestinian majority posed demographically to the Israeli settler state.[277] This goal has been carried out through a "strategic fragmentation" of the Palestinian people and destruction of the territorial integrity of Mandate Palestine.[278] The establishment of the State of Israel addressed the settler polity's demographic challenge within the internationally-recognized borders of 1948 by blocking the return of Palestinian refugees dispossessed and expelled by the 1948 war. This action effectively divided Palestinians within the 1948 borders from those residing outside them and contributed to the fragmentation of the Palestinian community.[279] The 1967 war brought about demographic changes in the territory under Israeli control, notably in the OPT where, in contrast to 1948, the majority of Palestinians remained *in situ*.[280] To address this demographic threat, Israel enacted a second layer of fragmentation, prohibiting Palestinians from traveling between the West Bank, East Jerusalem, and Gaza.[281] It then added a third layer of fragmentation by

276. For examples of scholarly works concerning the role of racialization in the context of Israel and Palestine, see WOLFE, TRACES OF HISTORY, *supra* note 234, at 259–93; Erakat, *Whiteness as Property in Israel*, *supra* note 258, at 69–103; Mac Allister, *supra* note 191, at 14–16; Lingaas, *supra* note 198.

277. Farsakh, *supra* note 203, at 231.

278. Muhareb, *supra* note 260 (citing ESCWA Report, *supra* note 240, at 37–38).

279. ESCWA Report, *supra* note 240, at 31–32; Muhareb, *supra* note 260; Mac Allister, *supra* note 191, at 17; *see also* Erakat, *Whiteness as Property in Israel*, *supra* note 258, at 88 (explaining that Palestinian citizens of Israel include only those "present in Israel between 1948 and 1952, which effectively excluded all the refugees who were forced out during the 1948 War"); *id.* at 89–90 (describing the ban on family reunification). Notably, when the U.N. General Assembly accepted Israel's membership in the United Nations—inherently a recognition of Israel's statehood—it noted that its prior conditions of membership included the ability of Palestinian refugees to return. G.A. Res. 273 (III) (May 11, 1949) (referring to G.A. Res. 181 (II) (Nov. 29, 1947) and G.A. Res. 194 (III) (Dec. 11, 1948)); *see also* G.A. Res. 194, *supra*, ¶ 11 (resolving that "refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date").

280. Farsakh, *supra* note 205, at 234–35.

281. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion,

constructing a Wall and settlements in the West Bank, with a corresponding dual legal system governing Jewish Israeli settlers and non-Jewish Palestinians and a pass system for the latter to travel between their non-contiguous West Bank territories.[282] Further, Israel's governance of the OPT effectively imposes colonial subjecthood on Palestinians across the territories. In the West Bank and East Jerusalem, Israeli law subordinates the rights of non-Jewish Palestinians.[283] And, despite Israel's 2005 "disengagement"

2024 I.C.J. Rep. 186, ¶ 202 (July 19) (noting that "stringent restrictions have applied to movement between the Gaza Strip [], the West Bank and East Jerusalem"); HUM. SCIS. RSCH. COUNCIL OF S. AFR., OCCUPATION, COLONIALISM, APARTHEID? A RE-ASSESSMENT OF ISRAEL'S PRACTICES IN THE OCCUPIED PALESTINIAN TERRITORIES UNDER INTERNATIONAL LAW 18, 235 (2009) [hereinafter HSRC, OCCUPATION, COLONIALISM, APARTHEID]; *see also* Farsakh, *supra* note 205, at 231 ("Palestinian territories have been transformed into *de facto* population reserves out of which Palestinians cannot exit without the possession of a permit issued by Israeli military authorities.").

282. Farsakh, *supra* note 205, at 231, 235; HSRC, OCCUPATION, COLONIALISM, APARTHEID, *supra* note 281, at 112; Ben-Naftali et al., *supra* note 76, at 584; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion), Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 83–85, 133 (July 9). *See also* Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 227 (July 19) (concluding that "Israel's settlement policy furthers the fragmentation of the West Bank and East Jerusalem, and the encirclement of Palestinian communities into enclaves"); *id*. ¶ 238 (connecting this fragmentation to the violation of territorial integrity).

283. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 228 (July 19) (concluding the existence of apartheid in the West Bank and East Jerusalem in part because "the partial extension of Israeli law to the West Bank and East Jerusalem" subjects "settlers and Palestinians…to distinct legal systems," "[t]o the extent that Israeli law applies to Palestinians, it imposes on them restrictions, such as the requirement for a permit to reside in East Jerusalem, from which settlers are exempt," and "Israel's legislation and measures that have been applicable for decades treat Palestinians differently from settlers in a wide range of fields of individual and social activity in the West Bank and East Jerusalem"); Michael Sfard, *Israel and Annexation by Lawfare*, N.Y. REV. BOOKS (Apr. 10, 2018), https://www.nybooks.com/online/2018/04/10/israel-and-annexation-by-lawfare (on file with the *Columbia Human Rights Law Review*); Michael Lynk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), *Second Report on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶ 53, U.N. Doc. A/72/556 (Oct. 23, 2017); ESCWA Report, *supra* note 240, at 39–47; Azarova, *supra* note 127, at 10; *see also* Veracini, *The Other Shift*, *supra* note 76, at 26–38 (explaining how the viability of Israeli settlements in the West Bank "(like that of colonial rule) depends on its ability to maintain the sharp division between colonizer and

from Gaza and withdrawal of settlements, it retains effective control over Gaza.[284] Israel's refusal to accept that *jus in bello*'s laws of occupation apply to the OPT suspends Palestinians "in limbo as non-citizens of Israel and as non-sovereigns under occupation," or in other

colonized"). Even if the occupying power is making a distinction between its own people and the occupied people on the basis of nationality (which is not only permitted, but also required under the laws of occupation), this regime may also constitute apartheid if it violates Article 49(6) of the Fourth Geneva Convention and is accompanied by racially discriminatory intent. MILES JACKSON, DIAKONIA INT'L HUMANITARIAN L. CTR., EXPERT OPINION ON THE INTERPLAY BETWEEN THE LEGAL REGIME APPLICABLE TO BELLIGERENT OCCUPATION AND THE PROHIBITION OF APARTHEID UNDER INTERNATIONAL LAW ¶¶ 64, 66–67, 69, 72 (2021), https://www.diakonia.se/ihl/news/expert-opinion-occupation-palestine-apartheid [https://perma.cc/FDJ8-3Z4Z]. This form of apartheid may even arise from the occupying power's prior acts of denationalization and exile of a racialized indigenous people, such that the distinction between the occupying power and the occupied people on the basis of nationality is the result of *ex ante* apartheid practices. *See id.* ¶¶ 35, 68–71 (summarizing legal opinions concerning the prohibition of apartheid in occupied territories and concluding that the crime of apartheid might apply to such territories even absent the presence of a distinct racial group subject to preferential treatment).

284. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶¶ 88-94 (July 19) (explaining that Israel retains effective control over Gaza because "Israel remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip, including control of the land, sea and air borders, restrictions on movement of people and goods, collection of import and export taxes, and military control over the buffer zone, despite the withdrawal of its military presence in 2005" and "even more so since 7 October 2023"). *See also* The Off. of the Prosecutor, Int'l Crim. Ct., *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report, Annex A*, ¶ 27, ICC-13-1/13-60AnxA (Nov. 6, 2014) (concluding in 2014 that Israel's "exercise of control over border crossings, the territorial sea adjacent to the Gaza Strip, and the airspace of Gaza; its periodic military incursions within Gaza; its enforcement of no-go areas within Gaza near the border where Israeli settlements used to be; and its regulation of the local monetary market based on the Israeli currency and control of taxes and customs duties…supports the conclusion that the authority retained by Israel amounts to effective control"); Noura Erakat, *It's Not Wrong, It's Illegal: Situating the Gaza Blockade Between International Law and the UN Response*, 11 UCLA J. ISLAMIC & NEAR E.L. 37, 44 (2012) (concluding in 2012 that Israel's effective control over Gaza based on Israel's control over "Gaza's electricity and sewage systems, its population registry, its electromagnetic sphere, its tax revenue distribution, and its telecommunications network," "Gaza's air space and territorial waters as well as a buffer zone along Gaza's land and sea borders," and "the Rafah Crossing, Gaza's only crossing point with Egypt," along with Israel's "military operations in the Strip").

words, colonial subjects.[285] Israel's rule over the OPT has also effectively created a colonial political economy analogous to apartheid South Africa and its Bantustans, primarily in two ways.[286] First, Israel has misused its authority as an occupying power to exploit Palestinian land.[287] Second, these Palestinian reserves have also been

285. ERAKAT, JUSTICE FOR SOME, *supra* note 115, at 63.

286. An UNCTAD study concluded that when "Israel occupied the Gaza Strip and the West Bank, including East Jerusalem, it annexed Palestinian markets in these areas into its own economy, in a selective, unequal and asymmetrical manner." U.N. Conf. on Trade & Dev., The Economic Costs of the Israeli Occupation for the Palestinian People: The Unrealized Oil and Natural Gas Potential, U.N. Doc. UNCTAD/GDS/APP/2019/1, at 6 (2019) [hereinafter UNCTAD Report]. Unlike the primary function of apartheid South Africa's Bantustans, which served as a reserve of cheap labor along with providing access to land, the "reserves" formed from the fragmentation of Palestinians in the OPT primarily grant Israel access to land. Farsakh, *supra* note 205, at 234. In contrast to apartheid South Africa, the Zionist movement "sought to prevent a structural dependence on the Palestinian economy, particularly labor" because of its desire to secure "the land without the people, and [thus] negate the very notion of a native non-Jewish population living in Palestine." *Id.* at 232–33. Efforts towards this goal have not been perfect, however, given that Israeli businesses profit "by using Palestinian labour rendered extremely cheap by the lack of native economic opportunity." Yara Hawari, *Money Can't 'Fix' Palestine's Occupied Economy*, AL JAZEERA (Jan. 27, 2020), https://www.aljazeera.com/opinions/2020/1/27/money-cant-fix-palestines-occupied-economy [https://perma.cc/D5X5-C6SW]; *see also* UNCTAD Report, *supra*, at 7, 9 (explaining that Israel is able to rely on Palestinian labor "at a fraction of the Israeli labour cost" in part due to "the proletarianization of Palestinian farmers"); NUR ARAFEH, SAMIA AL-BOTMEH, & LEILA FARSAKH, AL-SHABAKA, HOW ISRAELI SETTLEMENTS STIFLE PALESTINE'S ECONOMY 5–6 (2015), https://al-shabaka.org/briefs/how-israeli-settlements-stifle-palestines-economy [https://perma.cc/NYR2-NP4E] (explaining how Israel's military occupation and settlements have transformed Palestinians in the OPT into "cheap labor").

287. UNCTAD Report, *supra* note 286, at vi; *see* Lynk, *supra* note 283, ¶ 58 ("Israel, the occupying power, has ruled the Palestinian Territory as an internal colony, deeply committed to exploiting its land and resources for Israel's own benefit, and profoundly indifferent, at very best, to the rights and best interests of the protected people."). Since the occupation began, Palestinians "have progressively lost control over" the OPT's water, agricultural and grazing land, fisheries, and oil and natural gas. UNCTAD Report, *supra* note 286, at 8, 10, 31. Much of the West Bank, including East Jerusalem, is "under the authority of an Israeli State institution that is legally bound to administer that land for the exclusive benefit of the Jewish people." ESCWA Report, *supra* note 240, at 34. The construction of the Wall led to the dispossession of "the West Bank's most fertile agricultural land . . . upon which tens of thousands of Palestinians rely for their survival," and "increasing difficulties" in accessing "primary sources of water," forcing Palestinians to leave those areas. Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People

constructed to be "dependent on the Israeli economy," transforming the OPT into a captive market for Israel.[288] Like in a colonial

and Other Arabs of the Occupied Territories, U.N. Doc. A/58/311, ¶ 26 (Aug. 22, 2003); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion), Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 133 (July 9); *see also* Lynk, *supra* note 283, ¶ 54 (noting that settlers are given disproportionate access to water sources in occupied territories). By controlling the most fertile land in the West Bank, Israeli settlements benefit the Israeli economy. For example, the settlements "yield 40% of date exports from Israel." Arafeh et al., *supra* note 286, at 3. The Israeli judiciary has also facilitated "the exploitation of Palestinian property for the benefit of Israeli settlers," Sfard, *supra* note 283, as well as the Israeli economy, such as when the high court authorized the military's operation of quarries on the OPT, despite it "not serv[ing] the local population and constitut[ing] an appropriation of the occupied territory's natural resources." GROSS, THE WRITING ON THE WALL, *supra* note 126, at 50–51 (discussing the Israeli High Court of Justice's opinion in HCJ 2164/09 *Yesh Din v. Commander of the IDF Forces in the West Bank*). In 2024, the ICJ concluded that "Israel's policy of exploitation of natural resources in the [OPT] is inconsistent with its obligation to respect the Palestinian people's right to permanent sovereignty over natural resources." Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 133 (July 19).

288. Farsakh, *supra* note 205, at 231–32; Erika Solomon, *Palestinians Seek End to Trade Dependence on Israel*, REUTERS (Aug. 3, 2009), https://www.reuters.com/article/world/palestinians-seek-end-to-trade-dependence-on-israel-idUSTRE5722A7 [https://perma.cc/LXJ5-MJ8D]; *see also* Samah Sabawi, *Israel's Gaza Bantustan*, AL JAZEERA (Jan. 5, 2013), https://www.aljazeera.com/opinions/2013/1/5/israels-gaza-bantustan [https://perma.cc/6QPE-V65Y] (exemplifying how Israel uses techniques such as ID requirements and currency standardization to further fragment the Palestinian population and make them dependent on the occupying power). Like South Africa's Bantustans, the triple-layered fragmentation of the OPT has "br[oken] up an already small domestic market into [an] even smaller one[]." UNCTAD Report, *supra* note 286, at 11*; see also* Arafeh et al., *supra* note 286, at 4 ("Furthermore, the absence of contiguity within the West Bank, coupled with other Israeli movement and access restrictions, has fragmented the West Bank economy into smaller disconnected markets."). Further, Israel's settlement activity and creation of "buffer zones" has confiscated significant portions of the OPT's most fertile agricultural land, Hawari, *supra* note 286, and Israel's "military laws and decrees that regulate[] the civilian, economic, and legal affairs" have produced long stretches of closures, Farsakh, *supra* note 205, at 236, 241. Together, this has led to what UNCTAD describes as the "de-agriculturalization and de-industrialization" of a Palestinian economy. UNCTAD Report, *supra* note 286, at 10; *see also* Arafeh et al., *supra* note 286, at 2–6 (linking the seizure of land in OPT to the weakening of the Palestinian economy); Wall Advisory Opinion, 2004 I.C.J. ¶ 133 (noting the lack of free movement in the OPT which in turn limits the Palestinian economy); Int'l Lab. Org. [ILO], *The Situation of Workers of the Occupied Arab Territories*, at v–vi (2005) [hereinafter ILO Report] (concluding that the economy in the OPT cannot develop "[w]ithout free

movement of people within the territories" achieved through the removal of checkpoints and roadblocks along with restoration of "normal trade relations with the outside"). The ICJ found "the fragmentation of the Palestinian territory" has had "a cumulative, multilayered and intergenerational impact on the Palestinian society, economy and environment and ha[s] caused the deterioration of the living conditions of the Palestinians, their forced displacement, 'de-development' of the Occupied Palestinian Territory, entrenchment of the Palestinian economy's asymmetric dependence on Israel, and exacerbation of Palestinian institutional dependence on foreign aid." Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 242 (July 19) (quoting *Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan*, ¶ 130, U.N. Doc. A/78/127-E/2023/95 (June 30, 2023)). This has rendered unemployment "an inherent characteristic of the labour markets" in the OPT, creating a large surplus population. ILO Report, *supra*, at v. All of these conditions are even more stark in Gaza, where, even before October 7, 2023, Israel's complete blockade had "devastated the agriculture and the manufacturing industries and resulted in the unemployment of 50 percent of the population." Hawari, *supra* note 286. This had effectively created "a model 'native reserve.'" HAIDAR EID & ANDY CLARNO, AL-SHABAKA, RETHINKING OUR DEFINITION OF APARTHEID: NOT JUST A POLITICAL REGIME 8 (2017), https://al-shabaka.org/briefs/rethinking-our-definition-of-apartheid-not-just-a-political-regime [https://perma.cc/MR2C-WSFB]. These factors contributing to the creation of a captive market for Israel were consolidated by the 1994 Paris Protocol. Protocol on Economic Relations Between the Government of the State of Israel and the P.L.O, Representing the Palestinian People, Isr.-Palestine, April 29, 1994, 33 I.L.M. 696. As is common practice amongst colonial regimes, *see* Shah, *supra* note 18, at 97–98 (highlighting the strategy of Global North colonial powers to maintain reliance through a one-way market system), the Protocol "imposed an unequal customs union, granting Israeli businesses direct access to the Palestinian market but restricting Palestinian goods' entry into the Israeli one." Hawari, *supra* note 286. This had the effect of "eradicat[ing] any comparative advantage that Palestinians could have with Israel or with neighbouring Arab markets." UNCTAD Report, *supra* note 286, at 7. And combined with the restrictions Israel placed as the occupying Power on the OPT's "ability to trade with the rest of the world," this arrangement has forced Palestinians in the OPT "to consume products mainly produced by the occupying Power" using remittances and aid money. *Id.* at 8. Additionally, like British taxation of its colonies, the Protocol also "gave the Israeli state control over tax collection." Hawari, *supra* note 286. Palestinians transfer their wealth to Israel through "customs duties and other taxes on products imported via Israel from third countries," as well as "income tax and social security contributions paid by Palestinians working in Israel" which has not resulted in an equal amount of service and infrastructure investment for Palestinians. UNCTAD Report, *supra* note 286, at 10. Israel has at times withheld tax revenue owed to the Palestinian Authority. Shatha Hammad, *A Palestinian Pound? 'Impossible' Without Full Independence, Say Economists*, MIDDLE E. EYE (July 8, 2019), https://www.middleeasteye.net/news/palestinian-

relationship, "many Palestinians find themselves in the unenviable position of being forced to buy goods produced by their occupier on land stolen from them with money earned in labour for occupying businesses and in currency imposed on them again by the same occupying forces."[289]

3. Anticolonial Lawmaking's Struggle Against Apartheid as Form of Anticolonial Struggle

Debates among anticolonial resistance movements reveal their understanding of settler apartheid as an evasion of decolonization that results in a continuing colonial relation. Therefore, in the context of anticolonial lawmaking, both settler apartheid and indigenous resistance to it was articulated through the independence aspect of self-determination: the right of peoples to be free from alien domination, through the restoration of the territorial integrity of the land to which they belong. This Section traces how anticolonial movements conceptualized settler apartheid and how their understanding of their own struggles for independence from apartheid became a part of international law.

From the late 1950s onwards, anti-apartheid movements and their allies articulated their struggles against settler apartheid through the language of decolonization. They saw the similarities between how colonial regimes and settler apartheid regimes subjugated peoples and territories, and, as such, began calling for an end to *all* forms of colonialism. The African National Congress (ANC) viewed its struggle against apartheid South Africa as "an anti-

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pound-impossible-without-full-independence-say-economists [https://perma.cc/RW2J-5Y9K]. And finally, like British imposition of its currency on colonial economies, the Protocol "entrenched the use of the [Israeli] shekel in the occupied Palestinian territories, leaving the newly formed Palestinian Authority with no means to impose fiscal control or adopt macroeconomic policies," Hawari, *supra* note 286, and providing Israel with seigniorage revenue "because its currency has been made legal tender" in the OPT, UNCTAD Report, *supra* note 286, at 10. Israel has used these benefits conferred by the Paris Protocol "to strangle the Palestinian economy." Hammad, *supra*; *see also* Ahmad Melhem, *Can Palestinians Free Themselves of the Shekel*, AL-MONITOR (April 25, 2019), https://www.al-monitor.com/originals/2019/04/palestinian-government-israel-currency-shekel.html [https://perma.cc/F9U6-DCCS] (examining the possibility of dispensing with the shekel but noting the difficulty due to the entrenchment of the currency in the Palestinian economy).

289. Hawari, *supra* note 286. This overall colonial structure has been further entrenched by the "legal, territorial, and economic developments launched by Oslo." Farsakh, *supra* note 205, at 245.

colonialist national liberation struggle" seeking "the abolition of the colonial white state and the creation in its stead of a democratic state based on the principle of majority rule."[290] A key component of this struggle demanded "the return of land" to dispossessed Black South Africans, as seen in more traditional anticolonial struggles.[291] At the first All-African Peoples' Conference, Pan-African delegates identified two types of "colonial" situations that emerged on the continent: (1) "[t]hose territories where indigenous Africans are dominated by foreigners who have their seats of authority in foreign lands," and (2) "[t]hose where indigenous Africans are dominated and oppressed by foreigners who have settled permanently in Africa."[292] The Non Aligned Movement (NAM) characterized apartheid in South Africa as "not just a system of racial discrimination" but "above all a form of colonialism based on fascist oppression of the people by a minority of alien settlers who exploit the people . . . ."[293] Beyond the African

290. ANC Statement at the Lisbon Conference, *supra* note 227, at 6–7.

291. Robin D.G. Kelley, *Our South African Freedom Dreams*, 38 UFAHAMU: J. AFR. STUD. 239, 240 (2014).

292. All-African Peoples' Conference, *Resolution on Imperialism and Colonialism*, ¶ (2) (Dec. 5–13, 1958) [hereinafter AAPC Accra Res.]; *see also* GEORGE M. HOUSER, A REPORT ON THE ALL AFRICAN PEOPLE'S CONFERENCE HELD IN ACCRA, GHANA, DECEMBER 8 - 13, at 1–2 (n.d.) (describing resistance leaders from South Africa as among "nationalist leaders" of "non-self-governing territories"); Second All-African Peoples' Conference, *General Resolution* (Jan. 30, 1960) [hereinafter AAPC Tunis Res.] (describing apartheid in southern Africa as carried out by "colonialists" and demanding "the immediate and unconditional accession to independence of all the African peoples"). The latter group encompassed not only South Africa, but also Algeria, Kenya, Angola, Mozambique, and Rhodesia. AAPC Accra Res., *supra*; AAPC Tunis Res., *supra*.

293. 4th Summit Conference of Heads of State or Government of the Non-Aligned Movement, *Final Document*, at 27 (Sept. 5–9, 1973) [hereinafter NAM 4th Summit]. The NAM extended this analysis to Zimbabwe, Namibia, and the countries under Portuguese domination, as well. *Id.* Similarly, the Conference of East and Central African States coined the acronym NIBMAR ("No Independence Before Majority Rule") and condemned both "any solution" that would contradict it and "all forms of colonialism, neo-colonialism and imperialism," emphasizing not only purely colonial situations but also apartheid South Africa. Org. of African Unity [OAU], *Mogadishu Declaration*, Seventh Summit Conference of East and Central African States, AHG/Res.64 (VII), ¶¶ 10, 14 (Oct. 18–20, 1971). Consequently, these anticolonial resistance movements included among the purposes of the then-newly established Organization of African Unity (OAU) the need "[t]o eradicate all forms of colonialism from the continent of Africa." Org. of Afr. Unity [OAU] Charter art. I, ¶ 1(d). The resolutions implementing this objective "committed African states to supporting and financing fighters to carry on a full-scale war of liberation against the minority regimes of Southern Africa." Klug, *supra* note 92, at 266 (quoting Organization of African Unity, Declaration of

continent, the NAM characterized "zionist settler colonialism" in Palestine as "exactly the same as the situation in Southern Africa, where racist segregationist minorities use the same method of colonial domination and exploitation pursuant to the requirements of a single imperialist strategy."[294] The NAM, in "declar[ing] their full support to the Arab people of Palestine in their struggle for liberation from colonialism and racism," consequently "endorse[d] the full *restoration* of all rights of the Arab people of Palestine to their homeland . . . ."[295] In so doing, the NAM emphasized that "[t]he struggle of the Palestinian people to *recover* their usurped homeland is an integral part of the struggle of all peoples against colonialism and racial discrimination and for self-determination."[296]

Dar es Salaam on Southern Africa, Extraordinary 9th Session, Council of Ministers (Apr. 7–10, 1975), *reprinted in* THE INTERNATIONAL LAW OF HUMAN RIGHTS IN AFRICA: BASIC DOCUMENTS, AND ANNOTATED BIBLIOGRAPHY 15 (M. Hamalengwa, C. Fiintesman & E.V.D. Dankwa eds. 1988)). This understanding of apartheid as a form of colonialism did not translate into the OAU's lawmaking, which treated apartheid as distinct from colonialism. Gorelick, *supra* note 137, at 82–83. However, it is likely that the reluctance to treat apartheid as a form of colonialism in these spaces reflected strategy, not analysis. While the OAU decided to recognize apartheid South Africa as an independent state (thereby reducing condemnation of South Africa to "disapproval of its domestic policy of apartheid"), this decision was based on a strategy of encouraging a detente or cooperation with apartheid South Africa—as opposed to military confrontation—in order to topple weaker colonial and colonial apartheid regimes in the region. N.M. Shamuyarira, *The Lusaka Manifesto Strategy of OAU States and Its Consequences for the Freedom Struggle in Southern Africa*, UTAFITI 247, 249, 260–61 (1977). In contrast to OAU lawmakers drawn from the ranks of the "ruling petit bourgeoisie in the independent black African states," radical southern African liberation movements, composed of the proletarian struggle across the region, denounced this strategy. *Id.* at 249, 251, 256, 259. And, regardless, the OAU was clear that "apartheid, like colonialism, gives rise to a right of self-determination." Gorelick, *supra* note 137, at 81. Similarly, the 1984 *International Seminar on the Legal Status of the Apartheid Regime in South Africa* asserted "the colonial nature of the South African regime." Theodoropoulos, *supra* note 155, at 900 (quoting *Report of the Seminar on the Legal Status of the Apartheid*, *supra* note 230, at 14). That same year, the Conference of Arab Solidarity with the Struggle of Liberation in Southern Africa also "emphasized the need to 'study the phenomenon of settler colonialism'" in apartheid South Africa. *Id.* at 899–900 (citing *Report of the Conference of Arab Solidarity with the Struggle of Liberation in Southern Africa*, ¶ 14, U.N. Doc. A/AC.115/L.615 (Dec. 12, 1984)).

294. NAM 4th Summit, *supra* note 293, at 27.

295. 2nd Summit Conference of Heads of State or Government of the Non-Aligned Movement, *Final Document*, at 10 (Sep. 10, 1964) [hereinafter NAM 2nd Summit].

296. NAM 4th Summit, *supra* note 293, at 11.

Informed by these movements, anticolonial lawmaking viewed settler apartheid as "directly and inevitably bound up with colonialism"[297] and inscribed protections against settler apartheid in three respects related to decolonization: (1) condemning the attempt of European powers to decolonize by transferring sovereign authority to a settler apartheid regime; (2) condemning the breaking up of the territory under settler apartheid rule; and (3) preventing settler apartheid rule by protecting indigenous peoples' relationship to land.

First, this lawmaking expressly condemned European decolonization efforts that resulted in settler apartheid. For example, it attributed the settler apartheid state of Southern Rhodesia to Britain's failure to properly decolonize.[298] Specifically, it condemned Britain's failure to "transfer power, based on free elections by universal adult suffrage and on majority rule, to the people of

297. Héctor Gros Espiell (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *The Right to Self-determination: Implementation of United Nations Resolutions*, ¶ 181, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980). In calling for "an end . . . to colonialism and all practices of segregation and discrimination associated therewith," Resolution 1514 expressly requires that colonizers "transfer all powers to the peoples of those territories . . . in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom." G.A. Res. 1514 (XV), pmbl., ¶ 5 (Dec. 14, 1960). In implementing Resolution 1514, anticolonial lawmaking consistently referred to settler apartheid as a form or continuation of colonialism. Klug, *supra* note 92, at 262, 280; *see also*, *e.g.*, G.A. Res. 33/44, ¶ 2 (Dec. 13, 1978) (declaring that "the continuation of colonialism in all its forms and manifestations, including . . . apartheid" violates the U.N. Charter, the Universal Declaration of Human Rights, and international law, and pose a threat to international peace and security); G.A. Res. 35/118, ¶ 2 (Dec. 11, 1980) (same); G.A. Res. 45/33, ¶ 2 (Nov. 20, 1990) (same); G.A. Res. 2878, *supra* note 98, ¶ 4 (same). The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid framed apartheid "as a phenomenon closely connected to colonialism." Erakat & Reynolds, *supra* note 212; *see* Apartheid Convention, *supra* note 198, pmbl. para. 3 (linking apartheid to colonialism and segregation, emphasizing the need to end both in the interests of human dignity, progress, and justice). In the debates leading to the *Friendly Relations Declaration*, representatives referred to apartheid rule across southern Africa as a "legacy" and "corollary" of colonialism. Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, ¶ 495, U.N. Doc. A/6230 (June 27, 1966) [hereinafter 1966 Report on Friendly Relations Among States]; Report on Friendly Relations Among States, *supra* note 60, ¶ 200. Notably, however, the United Nations' decolonization committee never included apartheid South Africa on its list. Theodoropoulos, *supra* note 155, at 910.

298. *See* G.A. Res. 2383 (XXIII) (Nov. 7, 1968) (condemning Britain's failure to end the apartheid regime in Southern Rhodesia).

Zimbabwe" and expressed that "any independence without majority rule in Southern Rhodesia is contrary to the provisions of General Assembly resolution 1514."[299]

Second, and relatedly, anticolonial lawmaking recognized that settler apartheid threatened decolonization's process of restoring territorial integrity to a people. The most obvious manifestation of this is the bantustanization of a territory.[300] Like the protection of a people's territorial integrity from traditional colonialism, the prohibition of settler apartheid seeks to prevent the ongoing "fragmentation of a self-determination unit."[301] Restoring the territorial integrity of a self-determination unit from settler apartheid rule joins the territory together, allowing indigenous peoples to become the demographic majority. In other words, the right of self-determination confers upon peoples subject to settler apartheid, like those subject to more traditional colonial rule, the right to "recover" their territorial integrity.[302] For example, the bantustanization of South Africa was considered "inconsistent with genuine independence."[303] Anticolonial lawmaking thus condemned South Africa's Bantustans as "designed to . . . dispossess the African people of South Africa of their inalienable rights in their country" and

299. *Id.*

300. *See, e.g.*, G.A. Res. 2775 (XXVI) E, ¶ 1 (Nov. 29, 1971) (condemning apartheid South Africa's creation of Bantustans as violating the territorial integrity component of self-determination).

301. Dugard, *supra* note 153, at 91; *see* G.A. Res. 2625, *supra* note 100, at 124 (requiring that decolonization results in states "possessed of a government representing the *whole* people *belonging to the territory*") (emphasis added).

302. NAM 4th Summit, *supra* note 293, at 11.

303. U.N. Comm'n on Hum. Rts. Res. 1982/16, The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation, ¶ 5, U.N. Doc. E/CN.4/RES/1982/16 (Feb. 25, 1982). As such, though the international community did not require non-recognition of apartheid South Africa as a state as they did of Southern Rhodesia, the General Assembly did take the unusual step of excluding representatives of the apartheid state to participate in the Assembly's work on the ground that they failed to represent a sovereign state. Klug, *supra* note 92, at 294–96; Espiell, *supra* note 297, at 52. As Raymond Suttner has explained, while such exclusions would "not [be] appropriate . . . in every case of an unpopular regime, even a regime with a ruthless human rights record," the General Assembly was "legally correct to do so in the case of South Africa, where the majority of the population of the country, because of its colonial structure, [we]re not represented by the government." Raymond Suttner, *Has South Africa Been Illegally Excluded from the United Nations General Assembly?*, 17 COMPAR. & INT'L L.J. S. AFRICA 279, 289 (1984).

"to destroy the territorial integrity of the country."[304] This culminated in a Security Council resolution which called for the end of settler apartheid "as the necessary step towards the full exercise of the right of self-determination in an *unfragmented* South Africa," specifically calling on the "dismantling" of Bantustans, "the cessation of uprooting, relocation, and denationalization of the indigenous African people," and "[t]he unimpeded return of all the exiles."[305]

Finally, anticolonial lawmaking understood how, like traditional colonialism, settler apartheid's appropriation of land operates through the forced or coerced separation of a people's relationship to the land to which they belong. Accordingly, anticolonial lawmaking sought to prevent settler apartheid in ways similar to how they sought to prevent traditional colonialism. The prohibition of apartheid seeks to protect the relationship between a people and a land in two ways: (1) protecting against forcible demographic changes to erase a people's relationship to the land, and (2) protecting a people's sovereignty over the natural resources embedded in their lands. First, anticolonial lawmaking recognized that settler apartheid required the "uprooting" and "forcible removal" of peoples from their homes in order to "consolidate and perpetuate" the mutually reinforcing processes of domination and dispossession.[306] To prevent these forced demographic changes, it identified as "crimes" of apartheid "forcible transfer," "creation of separate reserves and ghettos," and denial of the "the right to leave and to return to their country, [and] the right to a nationality."[307] Second, anticolonial lawmaking recognized that settler apartheid deprived indigenous peoples of their right to participate in "freely disposing their natural resources" and accessing "a just share of the wealth of the country."[308] Thus, the law renders the "expropriation of

304. G.A. Res. 3411 (XXX) D, ¶ 1–2 (Nov. 28, 1975); G.A. Res. 2775, *supra* note 300, ¶ 1; Richardson, *supra* note 66, at 195–97 (collecting General Assembly resolutions); *c.f.* G.A. Res. 2678, *supra* note 161, ¶ 4 (condemning the bantustanization of Namibia).

305. S.C. Res. 556, ¶ 6 (Oct. 23, 1984).

306. G.A. Res. 2775, *supra* note 300, pmbl.

307. HUM. RTS. WATCH, A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PERSECUTION 6 (2021); Erakat & Reynolds, *supra* note 212.

308. Lagos Declaration, *supra* note 227, ¶¶ 13, 16; *see also* Third Conference of Heads of State or Government of Non-Aligned Countries, *Declaration on Non-Alignment and Economic Progress*, at 82, U.N. Doc. NAC/CONF.3/RES.14 (Sept. 10, 1970) (recognizing that occupation by minority governments deprives indigenous peoples of natural resources and hinders development).

landed property" a crime of apartheid,[309] and requires that peoples subject to apartheid be able to "regain effective control over their natural resources."[310]

Relatedly, as in struggles against traditional colonial relations, anticolonial lawmaking consistently identified struggles against settler apartheid as a form of external self-determination in other foundational legal frameworks, including the legal frameworks governing secession, *jus ad bellum*, and *jus in bello*. First, liberation movements against settler apartheid, like those against traditional colonialism, are seeking to restore, rather than destroy, the integrity of a territory marked by *uti possidetis*, and thus constitute decolonization rather than secession. In finding that the Quebecois did not have a right to secede from Canada, the Supreme Court distinguished the Quebecois claim of a right of *internal* self-determination from situations "where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development"—i.e. apartheid—and thus would have a right to *external* self-determination to restore the territorial integrity of the people.[311] This is most clearly evident when comparing the struggle of the Quebecois to Black South Africans denationalized by apartheid South Africa's Bantustans and formally endowed with a second-class citizenship within petty apartheid.[312] Second, the development of *jus ad bellum*'s understanding of anticolonial armed struggle and third-party states' assistance to such struggles encompassed armed struggles against settler apartheid.[313]

309. HUM. RTS. WATCH, *supra* note 307, at 6; Erakat & Reynolds, *supra* note 212.

310. G.A. Res. 3171, *supra* note 99, ¶ 2; G.A. Res. 3175, *supra* note 195, ¶ 4; *see also* G.A. Res. 3201 (S-VI), ¶¶ 4(f), 4(h) (May 1, 1974) (affirming the right to restitution for resource exploitation under apartheid and the right to regain control over natural resources).

311. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 131–38 (Can.).

312. *See* Klug, *supra* note 92, at 274 (contrasting the anti-apartheid struggle with the internal struggle against Chile's Pinochet regime).

313. For examples of anticolonial lawmaking applying the framework for anticolonial armed struggle to the context of apartheid, see U.N. Comm'n on Hum. Rts. Res. 1982/16, *supra* note 303, ¶ 3; G.A. Res. 2396 (XXIII), ¶¶ 6–7 (Dec. 2, 1968); G.A. Res. 35/206A, ¶¶ 8–9 (Dec. 16, 1980); G.A. Res. 38/39A, ¶¶ 4, 8 (Dec. 5, 1983); G.A. Res. 39/72A, ¶¶ 20–24 (Dec. 13, 1984); *see also* Dugard, *supra* note 153, at 90 & n.7 (citing General Assembly resolutions that recognized the legitimacy of armed struggle against apartheid and called on states to provide material and moral support to South African liberation movements). While "never expressly authoriz[ing] states . . . to use force against South Africa," the Security

Where decolonization fails to lead to a state without apartheid, the *Friendly Relations Declaration* requires third-party states to lend support to peoples subjugated by such rule (including through support of armed struggle) as it does with more traditional anticolonial struggles.[314] For example, in the case of Southern Rhodesia, anticolonial lawmaking called upon the UK "to take effective measures, including *the use of force*, to put an immediate end to the illegal racist minority regime"[315] and called on all States "to extend all moral and *material* assistance to the national liberation movements of Zimbabwe,"[316] while condemning apartheid South Africa's armed intervention in support of Southern Rhodesia.[317] Third, under *jus in bello*'s laws of armed conflict, anticolonial lawmaking treated armed struggles against settler apartheid like anticolonial struggles—i.e., as international, rather than internal (or non-international), armed conflicts. This distinction drew from NAM's recognition of the importance of armed struggle in ending "colonial and racial domination."[318] It was translated into U.N. General Assembly Resolution 3103, which declared that "[t]he struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate" and "regarded as international armed conflicts in the sense of the 1949 Geneva Conventions."[319]

Council implicitly "condoned their support to the ANC and PAC, in the form of permission to establish military bases in their territories and to transit their territories." *Id.* at 90.

314. G.A. Res. 2625, *supra* note 100, at 124 ("In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."); *see also* Theodoropoulos, *supra* note 155, at 911–12 (noting third-party states may assist armed decolonization struggles and deny recognition to colonial acts); Dugard, *supra* note 153, at 90 (highlighting U.N. support for armed struggles against apartheid through resolutions and Protocol I).

315. G.A. Res. 2508 (XXIV), ¶ 7 (Nov. 21, 1969); G.A. Res. 2547, *supra* note 173, ¶ 6.

316 G.A. Res. 2383, *supra* note 298, ¶ 14; G.A. Res. 2508, ¶ 10; G.A. Res. 2652 (XXV), ¶ 10 (Dec. 3, 1970); G.A. Res. 2796 (XXVI), ¶ 9 (Dec. 10, 1971).

317. G.A. Res. 2508, *supra* note 315, ¶ 4; G.A. Res. 2652, *supra* note 316, ¶ 5 (Dec. 3, 1970); G.A. Res. 2796, *supra* note 316, ¶ 3.

318. NAM 4th Summit, *supra* note 293, at 13.

319. G.A. Res. 3103, *supra* note 158, ¶¶ 1, 3; *see also* Iorns, *supra* note 96, at 259, 279–80 (describing the first and third principles of G.A. Resolution 3103 (XXXVIII), which legitimize the use of force to achieve self-determination for people subject to colonial or alien domination and the connection between apartheid and traditional colonial domination).

Anticolonial lawmaking thus included struggles against settler apartheid regimes in Additional Protocol I,[320] as opposed to Additional Protocol II,[321] and directed the application of the Geneva Conventions to specific anti-settler apartheid struggles.[322]

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Settler apartheid is often not thought of as a form of colonialism because the method of decolonizing a settler apartheid state is different from popular understandings of "decolonization." Whereas decolonization of traditional colonial relations "seeks to remove the colonizer," the decolonization of a settler apartheid state allows "the colonizer [to] remain[ ] physically" but requires that settlers "dispens[e] with a 'desire to rule.'"[323] Indeed, in the case of South Africa, Pan-African anticolonial resistance leaders did not view Black South African liberation as necessarily requiring White settlers to leave.[324] Nevertheless, in terms of the political economy, the dismantling of settler apartheid shares the same outcome as the dismantling of colonial relations: creating a single *integrated* political economy on the entirety of the once colonized landmass on the basis of full equality. This full equality between the once-settlers and

320. Protocol I art. 1, ¶ 4, *supra* note 124; *see also* Klug, *supra* note 92, at 272 (describing how "[p]rovision was [ ] made for liberation movements to sign the Final Act of" Additional Protocol I, and notably that "[t]hese developments allowed the African National Congress of South Africa to sign and become a party to the Geneva Convention").

321. INT'L COMM. OF THE RED CROSS, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 15 (2024); ADVISORY SERV. ON INT'L HUMANITARIAN L., INT'L COMM. OF THE RED CROSS, ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949, at 3 (2021).

322. G.A. Res. 2383, *supra* note 298, ¶ 13; G.A. Res. 2396, *supra* note 313, ¶ 8(c); G.A. Res. 2508, *supra* note 315, ¶ 11; G.A. Res. 2652, *supra* note 316, ¶ 11 (Dec. 3, 1970); G.A. Res. 2796, *supra* note 316, ¶ 10; G.A. Res. 36/172A, ¶ 14 (Dec. 17, 1981); G.A. Res. 38/39A, *supra* note 313, ¶ 9; G.A. Res. 39/72A, *supra* note 313, ¶ 21; G.A. Res. 41/35A, ¶ 8 (Nov. 10, 1986); G.A. Res. 2547, *supra* note 172, ¶ 7.

323. Erakat, *Whiteness as Property in Israel*, *supra* note 258, at 99 (quoting Jared Sexton, *The Veil of Slavery: Tracking the Figure of the Unsovereign*, 42 CRITICAL SOCIO. 583, 586 (2014)).

324. Gorelick, *supra* note 137, at 81; Houser, *supra* note 292, at paras. 8, 10 (explaining how European powers were told to "scram from Africa," while settlers "could be a part of the Africa of the future so long as the basic principle of democracy (One man one vote) is accepted") (internal quotations omitted). Legal scholars have incorrectly relied on this distinction as evidence that even anticolonial movements did not see apartheid South Africa as a "colonial" situation. *See* Klug, *supra* note 92, at 293–94 (arguing that legal scholars have failed to consider the South African government's own recognition of its colonial structure).

indigenous peoples requires, as the above lawmaking shows, (1) the restoration of the territorial integrity of the entire colonized landmass; (2) the renationalization of any portions of the indigenous people denationalized by the apartheid state; and (3) the restoration of lands expropriated from indigenous peoples.

III. SANCTIONS REQUIRED BY THE ANTICOLONIAL DUTY OF NON-RECOGNITION OF COLONIAL STRUCTURES, INCLUDING SETTLER APARTHEID

Anticolonial resistance movements and their lawmaking acknowledged the role of international recognition and economic relations in consolidating colonial and settler apartheid structures. To safeguard the independence aspect of the right to self-determination, they inscribed a corresponding duty into international law of non-recognition of colonial and settler apartheid states. This anticolonial duty of non-recognition entails not only refusing to acknowledge the legitimacy of colonial and settler apartheid situations, but also imposing a form of unilateral economic sanctions targeted at a colonial or settler apartheid power's control over the subjugated people's territory. It specifically seeks to make the *colonial relations* inherent in colonial and settler apartheid structures economically unviable by prohibiting those economic relations that would allow the colonizing power to benefit from the colonial drain. This requirement of sanctions seeks to prevent international complicity in colonial or settler apartheid powers' profiting from the appropriated land and/or subjugated people through trade, public or private investment, or economic assistance. Since the settler apartheid state is entirely dependent on its colonial relation with the subjugated people through the combination of petty and grand apartheid, avoiding international complicity in its colonial drain necessarily requires targeting the entirety of the settler apartheid state's economy.

To bring a speedy end to colonial relationships, anticolonial resistance movements called upon the international community to not recognize a colonizing power's authority over a colonized people and their territory, and to sever all relations with the colonizing power—diplomatic, military, and *economic*—in that regard.[325] For instance, in

325. *See*, *e.g.*, NAM 4th Summit, *supra* note 293, at 30–31 (calling on the non-aligned countries to sever or suspend all relations with colonizing powers; denounce these regimes in all international political, economic, cultural, and social forums; denounce other governments that support these regimes; and implement economic and trade measures against these regimes); NAM 2nd

1973, the NAM condemned "the foreign financial interests which operate in the countries under Portuguese colonial domination and exploit the human and material resources of these countries" and pledged "to take political, diplomatic, economic and trade measures against those Western countries and Japan which continue to give their political, military and economic support to the fascist colonial regime of Portugal."[326] In the same vein, to fulfill the Palestinian people's right to self-determination, the NAM called upon "all States . . . to abstain from providing Israel with arms, or any political, economic or financial support which may enable it to continue its aggressive and expansionist policy"[327] and considered all dealings involving Israel's exploitation of the natural resources of the OPT illegal on the grounds that such activity "enables Israel to continue . . . to consolidate its occupation" of Palestine.[328]

Similar calls were made at the regional level by Pan-African and Arab anticolonial resistance movements. For instance, in 1960, the Second All-African Peoples' Conference adopted a resolution urging that the United States "withdraw[ ] . . . economic and military aid to France on the ground that such assistance was being used to prolong the Algerian War."[329] In 1971, the Conference of East and Central African States denounced the Portuguese construction of a dam in Mozambique, finding its "objective [was] eventually to make it possible to settle one million White emigrants from Europe," and commended "the withdrawal from participation in the financing and construction of the dam by several European firms and banks or the

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Summit, *supra* note 295, at 31 (affirming that apartheid "should be eliminated by every possible means including economic sanctions").

326. NAM 4th Summit, *supra* note 293, at 37.

327. *Id.* at 11.

328. *Id.* at 34–35. Israel's violation of the self-determination of Palestinian people in the OPT could be viewed as colonialism via de facto annexation under the laws of occupation, as explained in Section II.A, *supra*, or via settler apartheid, as explained in Section II.C.2, *supra*. *See* Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶¶ 173, 229, and 243 (July 19) (concluding that Israel's policies and practices "amount to annexation of large parts of the Occupied Palestinian Territory," constitute apartheid, and violate the right of the Palestinian people to self-determination, all on the basis of the same facts); *see also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶¶ 129–30 (June 21) (holding that apartheid can violate the self-determination of a people outside of the apartheid state's recognized borders).

329. *All-African People's Conferences*, *supra* note 60, at 429–34.

refusal by their governments to guarantee their investments" in the dam project.[330] The 1973 OPEC Oil Embargo, supported by the Organization of African Unity (OAU, later renamed the African Union), was undertaken with "the direct goal" of "the recovery of the legitimate rights of the Palestinian people in accordance with the United Nations resolutions."[331] Immediately following the OPEC Oil Embargo, the Arab Summit Conference decided to extend the embargo to target colonial structures in Africa.[332]

Anticolonial lawmaking, through the U.N. General Assembly, incorporated these demands of non-recognition into international law. Those who contributed to this lawmaking noted that colonial powers' treaties with third states that involved the extraction of wealth and natural resources of colonized territories were invalid.[333] They thus prompted the General Assembly to adopt resolutions recognizing how the realization of the right to self-determination was impeded by "activities of . . . foreign economic, financial and other interests [that] continue[d] to exploit the natural and human resources of the colonial Territories and to accumulate and repatriate huge profits to the detriment of the interests of the inhabitants."[334] Third-party states were required to "discontinue" and "refrain from entering into" all "economic, financial or trade relations" with the colonizing powers "acting, on behalf of or concerning" their relationship with their colonized territory.[335] States were also required to end enterprises in colonized territories that were operated by corporations under their jurisdiction and prevent new such investments.[336]

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330. *Mogadishu Declaration*, *supra* note 293, ¶ 8.

331. Ibrahim F.I. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L L. 591, 593 (1974).

332. *Id.* at 596.

333. 1966 Report on Friendly Relations Among States, *supra* note 297, ¶ 379.

334. G.A. Res. 3398 (XXX), ¶¶ 5, 7 (Nov. 21, 1975).

335. *Id.* ¶ 7; *see also* G.A. Res. 2621, *supra* note 98, ¶ 4 ("Member States shall wage a vigorous and sustained campaign against activities and practices of foreign economic, financial and other interests operating in colonial Territories for the benefit and on behalf of colonial Powers and their allies . . . ."); G.A. Res. 3281 (XXIX), art. 16 (Dec. 12, 1974) (declaring that "[i]t is the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development" and reaffirming that "[n]o State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force").

336. G.A. Res. 3398, *supra* note 334, ¶¶ 5, 7; G.A. Res. 2621, *supra* note 98, ¶ 4.

Anticolonial sanctions are distinct from the broader duty of non-recognition imposed by the rules of state responsibility under conventional international legal analysis. The conventional duty of non-recognition requires unilateral economic sanctions in response to any and all peremptory norms of international law.[337] Such norms extend beyond just violations of the independence aspect of self-determination, and include violations of norms prohibiting genocide, slavery, racial discrimination, crimes against humanity, and torture.[338] Expanding a duty to impose sanctions to address *all* peremptory norms facilitates the deployment of unilateral economic sanctions as a tool of neoimperialism, as utilized by former colonizing powers and their settler states against formerly colonized states.[339] This would violate the non-domination aspect of self-determination. By contrast, the duty of non-recognition elaborated by anticolonial lawmaking to enforce the independence aspect of self-determination prevents the consolidation of a distinctly *colonial relation* with a land and its people. For example, in support of those subjugated by Portuguese colonial rule in the 1960s, anticolonial lawmaking required states to: end all forms of aid to Portugal that "*enable*[*d* it] to persist in . . . colonial domination";[340] "wage a vigorous and sustained campaign against activities and practices of foreign economic, financial and other interests *operating in colonial Territories for the benefit* and on behalf of" Portugal;[341] and take steps to "prevent[] the systematic influx of foreign immigrants *into colonial Territories*, which disrupts the integrity and social, political and cultural unity of the peoples under colonial domination."[342] Similarly, in the context of

337. *See, e.g.*, G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, annex arts. 40–41, U.N. Doc. A/RES.56/83 (January 28, 2022), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, 29, U.N. Doc. A/56/10 (2001) (explaining that states may not "render aid or assistance in maintaining [a] situation" created by the violation of a peremptory norm).

338. *See* Int'l L. Comm'n, Report on the Work of its Seventy-First Session, U.N. Doc. A/74/10, at 146–47 (2019) (providing a non-exhaustive list of preemptory norms including the right to self-determination and the prohibition against genocide, slavery, torture, and other serious criminal acts).

339. *See* Shah, *supra* note 18, at 139–40 (explaining how U.S./E.U. sanctions against the formerly colonized world are themselves a violation of the peremptory norm of self-determination and thus are not permissible to stop human rights abuses).

340. G.A. Res. 2621, *supra* note 98, ¶ 3(3)(c) (emphasis added).

341. *Id.* ¶ 3(4) (emphasis added).

342. *Id.* (emphasis added); *see also* G.A. Res. 2795, *supra* note 162, ¶ 10 ("*Calls upon* all States to take immediate measures to put an end to all activities

South Africa's occupation of Namibia, anticolonial lawmaking condemned assistance given to South Africa "*in the pursuit of* its repressive policies in Namibia . . . in particular, by its major trading partners and financial, economic and other interests *operating in*" Namibia.[343] Under this obligation, states were required to refrain from "entering into economic and other forms of relationship or dealings with South Africa *on behalf of or concerning* Namibia which may entrench its authority over the Territory."[344] In the case of Morocco's occupation of Western Sahara, several international organizations and judicial bodies have applied anticolonial lawmaking to find that any third-party state's dealings with Morocco that specifically involve the "exploitation of" of Western Sahara's natural resources "without consultations with [the Sahrawi people's] legitimate representatives" would serve to "help[] in the perpetuation or legitimization of the colonial situation in Western Sahara."[345]

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that help to exploit the Territories under Portuguese domination and the peoples therein . . . .").

343. G.A. Res. 2678, *supra* note 161, ¶¶ 5–6 (emphases added); *see also, e.g.*, G.A. Res. 2871, *supra* note 161, ¶¶ 5–6 (deploring support given to South Africa enabling repressive policies in Namibia and calling on states "[t]o take effective economic and other measures designed to ensure the immediate withdrawal of the South African administration from Namibia"); G.A. Res. 42/14 A, ¶¶ 69–75 (Nov. 6, 1987) (declaring that "all activities of foreign economic interests in Namibia are illegal under international law and that all the foreign economic interests operating in Namibia are liable to pay damages to the future legitimate Government of an independent Namibia" and reiterating that states should takes steps to prevent domestic corporations from exploiting or facilitating the exploitation of Namibian resources).

344. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia Advisory Opinion), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 124 (June 21) (emphasis added); *see also* S.C. Res. 283, ¶¶ 1, 4–5 (July 29, 1970) (directing all states to *inter alia* "refrain from any relations—diplomatic, consular or otherwise—with South Africa implying recognition of the authority of the Government of South Africa over the Territory of Namibia"; "ensure that companies and other commercial and industrial enterprises owned by, or under direct control of, the State cease all dealings with respect to commercial or industrial enterprises or concessions in Namibia"; and "withhold from their nationals or companies of their nationality not under direct governmental control, government loans, credit guarantees and other forms of financial support that would be used to facilitate trade or commerce with Namibia").

345. Afr. Union Comm'n, Legal Opinion on the Legality in the Context of International Law, Including the Relevant United Nations Resolutions and OAU/AU Decisions, of Actions Allegedly Taken by the Moroccan Authorities or Any Other State, Group of States, Foreign Companies or Any Other Entity in the Exploration and/or Exploitation of Renewable and Non-Renewable Natural

Similarly, in condemning Bantustans for operating as traditional colonial relations, anticolonial lawmaking required third-party states to unilaterally deny "any form of recognition" of or dealings with apartheid South Africa's Bantustans and to institute "effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings" with them.[346] As a final example, anticolonial lawmaking condemned Israel's colonizing actions in the OPT, directing all states "not to recognize or cooperate with, or assist in any manner in, any measures undertaken by [Israel] to exploit the resources of the occupied

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Resources or Any Other Economic Activity in Western Sahara, ¶¶ 70, 72 (2015). A South African court similarly held that because Western Sahara is "still subject to colonial rule," Resolution 1514 and the *Permanent Sovereignty Declaration* render illegal trade with Morocco involving resources from Western Sahara without the consent of Saharawi people and for their benefit. *Sahrawi Arab Democratic Republic v. Owner and Charterers of the MV 'NM Cherry Blossom'* 2017 (5) SA 105 (ECP) paras. 1, 38, 44–48 (S. Afr.). Specifically, the court considered the Sahrawi people's claim to a cargo of phosphate mined from Western Sahara and exported to South Africa by a Moroccan-State owned company. *Id.* para. 1. The court concluded that the Moroccan company could not claim to have "mine[d] phosphate for the benefit of the people" since "most of the Sahrawi people live to the east of the berm or in refugee camps in Algeria," such that "those who may benefit from the mining of phosphate are not the 'people of the territory' but, more likely, Moroccan settlers." *Id.* para. 48. In the same vein, the European Court of Justice ruled that trade agreements between the European Union and Morocco could not include resources extracted from Western Sahara without the consent of the people of Western Sahara. Case C-104/16, Council of the Eur. Union v. Front Polisario, ECLI:EU:C:2016:677, ¶¶ 92, 106–14 (Sept. 13, 2016). The court reasoned that "[i]n view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, in relation to that of any State, including the Kingdom of Morocco, the words 'territory of the Kingdom of Morocco' set out in [the EU's trade agreement with Morocco] cannot . . . be interpreted in such a way that Western Sahara is included within the territorial scope of that agreement." *Id.* ¶ 92.

346. G.A. Res. 31/6, ¶¶ 3–4 (Oct. 26, 1976); *see also* Anderson, *supra* note 220, at 45–46 (discussing the significance of G.A. Res. 31/6 in anticolonial lawmaking's efforts to denounce South Africa's establishment of Bantustans); S.C. Res. 402, ¶ 1 (Dec. 22, 1976) (endorsing G.A. Res. 31/6 A and emphasizing that states should "deny any form of recognition to" and refrain from dealings with Bantustans); S.C. Res. 407, pmbl. (May 25, 1977) (reaffirming the Security Council's endorsement of G.A. Res. 31/6). Like many of the examples discussed above, anticolonial lawmaking repeated these assertions in subsequent resolutions. *See, e.g.*, G.A. Res. 3411 D, *supra* note 304, ¶ 3 ("*Calls upon* all Governments and organizations not to deal with any institutions or authorities of the bantustans or to accord any form of recognition to them."); G.A. Res. 35/206 A, *supra* note 313, ¶ 10 (denouncing the establishment of Bantustans and reiterating its calls for states to deny recognition of Bantustans or engage in dealings with prohibited entities).

territories or to effect any changes in the demographic composition or geographic character or institutional structure of those territories."[347]

347. G.A. Res. 3005 (XXVII), ¶ 5 (Dec. 13, 1972); *see also* G.A. Res. 32/161, ¶¶ 4, 7 (Dec. 19, 1977) (reaffirming the illegality of Israel's exploitation of resources in the occupied territories and calling on states and other entities "not to recognize, or co-operate with or assist in any manner in, any measures undertaken by Israel to exploit the resources of the occupied territories"). They also declared "all measures taken by Israel to change the physical character, demographic composition, institutional structure or the status of the occupied territories, or any part thereof, [to be] null and void," and consequently directed all states "to refrain from any action which Israel will exploit in carrying out its policy of colonizing the occupied territories" and "avoid actions, including actions in the field of aid, which might be used by Israel in its pursuit of [such] policies and practices." G.A. Res. 3092 (XXVIII) B, ¶¶ 7–8 (Dec. 7, 1973); *see also* G.A. Res. 42/209 B, *supra* note 174, ¶¶ 10–11 (concluding that aid from the United States had "encouraged Israel to pursue its aggressive and expansionist policies" and calling on states to put an end to "any military, economic, financial, and technological aid" aimed at encouraging Israel's aggressive policies against the Palestinian people and Arab countries); G.A. Res. 77/187, ¶ 10 (Dec. 22, 2022) (calling on states to "pursue policies to ensure respect for their obligations under international law" in their relations with Israel); G.A. Res. 77/126, ¶ 13 (Dec. 12, 2022) (same); G.A. Res. 72/86, ¶ 12 (Dec. 7, 2017) (same); G.A. Res. 46/82 A, *supra* note 174, ¶ 10 ("*Calls upon* all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories[.]"). The U.N. Human Rights Council has echoed calls for states to "pursue policies that ensure respect of their obligations under law with regard to all illegal Israeli practices and measures in the Occupied Palestinian Territory." Human Rights Council Res. 31/36, *supra* note 134, ¶ 10. Similarly, in finding that Israel's "construction of the wall and its associated régime" in the West Bank "would be tantamount to de facto annexation," the ICJ concluded that all states had an "obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion), Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 121, 163 (July 9). And more recently, in 2024, the ICJ held that all states held an "obligation to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory; to abstain from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory; . . . and to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory." Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 186, ¶ 278 (July 19). The Security Council has joined in this assessment and affirmed the duty of non-recognition with respect to Israeli settlements in the OPT. S.C. Res. 2334, pmbl., ¶¶ 3, 5 (Dec. 23, 2016); S.C. Res. 465, ¶ 7 (Mar. 1, 1980); *see also* S.C. Res. 446, ¶¶ 4–5 (Mar. 22, 1979)

The preceding examples show how sanctions aimed at ending traditional forms of colonialism are targeted at the colonial relationship and not necessarily more broadly against the colonial power itself. By contrast, undermining a settler apartheid structure requires sanctions targeting the settler apartheid power itself because the colonial relation is inherent in the power's very existence, which is based on the combination of its petty and grand apartheid structures. In 1964, the second NAM conference called for "all States to boycott all South African goods and to refrain from exporting goods, especially arms, ammunition, oil and minerals to South Africa."[348] The NAM further issued a resolution condemning "the continued economic, financial and military assistance given to South Africa by certain NATO powers . . . thereby enabling the Government in Pretoria to maintain and reinforce its policy of repression and apartheid."[349] It invited all States "to suspend all scientific collaboration with South Africa," and called on "all non-aligned countries to take all steps, including diplomatic and, where possible, economic steps, both through the United Nations and unilaterally, to bring countries which encourage investments in South Africa to withdraw their investments."[350] In 1963, the OAU similarly called for the imposition of a "total economic boycott" against South Africa.[351] Accordingly, anticolonial lawmaking ordered states to impose

(establishing the Security Council Commission and tasking it with writing a report concerning Israeli settlements in occupied territories); S.C. Res. 452, pmbl., ¶ 2 (July 20, 1979) (emphasizing "the need for confronting the issue of the existing settlements " and accepting the Security Council Commission's report pursuant to S.C. Res. 446); AZAROVA, *supra* note 127, at 2 (explaining how these resolutions require states to "exclude settlement-based entities and activities from their dealings with Israel"). Likewise, several institutions of the European Union have affirmed that E.U. Member States have the duty to refrain from recognizing Israeli settlements. Press Release, Council of the Eur. Union, Council Conclusions on the Middle East Peace Process ¶ 6 (July 20, 2015); Guidelines on the Eligibility of Israeli Entities and Their Activities in the Territories Occupied by Israel Since June 1967 for Grants, Prizes and Financial Instruments Funded by the E.U. from 2014 Onwards, 2013 O.J. (C 205), 9, 10; *see also* C-386/08, Brita GmbH v. Hauptzollamt Hamburg-Hafen, ECLI:EU:C:2014:994, ¶¶ 55–58 (Feb. 25, 2010) (holding that European customs agencies may refuse to grant preferential treatment to Israeli goods manufactured in the West Bank despite the free trade agreement between Israel and the European Union).

348. NAM 2nd Summit, *supra* note 295, at 12.

349. NAM 4th Summit, *supra* note 293, at 33.

350. *Id.*

351. Dugard, *supra* note 153, at 87.

comprehensive sanctions against the settler apartheid state.[352] This lawmaking characterized "any collaboration" with the apartheid state to be "a hostile act against the oppressed people of South Africa."[353] The General Assembly specifically directed states to end "economic collaboration and trade with" South Africa and to "take effective action to prohibit all loans to or investments in South Africa by banks and corporations within their national jurisdiction."[354] This lawmaking also condemned the "activities of transnational corporations, which continue to exploit the racially oppressed people of South Africa and plunder its natural resources."[355] Similarly, in condemning the White settlers' creation of a settler apartheid state of Southern Rhodesia, anticolonial lawmaking understood that the continuing "political, economic, financial and other relations" that South Africa and Portugal maintained with Southern Rhodesia "enabl[ed]" the apartheid state "to sustain itself."[356] It thus instructed all states to "sever immediately all economic and other relations" with the "illegal racist minority régime" and "take all the necessary measures" to bring to an end all financial and other activities "which,

352. *See*, *e.g.*, G.A. Res. 31/6 H, ¶ 1 (Nov. 9, 1976) ("*Proclaims* that any collaboration with the racist regime of South Africa constitutes a hostile act against the oppressed people of South Africa and a contemptuous defiance of the United Nations and the international community[.]"); *see also* Barber, *supra* note 11, at 355–56 & n.62 (noting that the General Assembly called on states to impose comprehensive mandatory sanctions to ensure the total isolation of South Africa) (citing G.A. Res. 1761 (XVII) (Nov. 6, 1962); G.A. Res. ES-8/2 (Sept. 14, 1981); and G.A. Res. 41/35 A-B (Nov. 10, 1986)); Dugard, *supra* note 153, at 87 (describing "the wide support for coercive measures in the General Assembly," which did not receive Security Council support because of vetoes by the United States and the United Kingdom). The General Assembly repeatedly condemned the actions of states, corporations, and other entities which had the effect of encouraging or otherwise enabling the South African government to maintain its racial policies. G.A. Res. 2396, *supra* note 313, ¶ 5; G.A. Res. 35/206 A, *supra* note 313, ¶ 7; G.A. Res. 36/172 A, *supra* note 322, ¶¶ 3–5, 11; G.A. Res. 38/39 A, *supra* note 313, ¶ 12; G.A. Res. 39/72 A, *supra* note 313, ¶¶ 13–14, 17; G.A. Res. 36/172 D, *supra* note 322, ¶ 7; G.A. Res. 41/35 A, *supra* note 322, ¶ 11.

353. G.A. Res. 31/6 H, *supra* note 352, ¶ 1.

354. *Id.* ¶¶ 3–4; *see also*, *e.g.*, Espiell, *supra* note 297, at 52–54 (summarizing numerous General Assembly and Security Council resolutions demanding states cease support and collaboration of trade with South Africa); Lagos Declaration, *supra* note 227, ¶¶ 17(e), 27 (calling on governments and organizations to "intensify the campaign for the further isolation of the apartheid régime" by ensuring the free and equal exercise of the right to self-determination by the people of South Africa and recognizing "the urgent need for economic, and other measures, universally applied, to secure the elimination of apartheid").

355. G.A. Res. 31/6 H, *supra* note 352, ¶ 5.

356. G.A. Res. 2383, *supra* note 298, ¶ 7.

by supporting and assisting the illegal racist minority régime in Southern Rhodesia, and by their exploitation of the human and material resources of the Territory, . . . [we]re impeding the African people of Zimbabwe from attaining freedom and independence . . . ."[357]

The anticolonial duty of non-recognition's requirement that unilateral economic sanctions strictly target only colonial relations (including settler apartheid) is further evidenced by the practice of anticolonial resistance movements. Such movements simultaneously demanded such sanctions while condemning other forms of unilateral economic sanctions, namely those imposed by former colonizing powers and their settler states against formerly colonized states.[358] For example, for the NAM, the call for sanctions against colonizing

357. G.A. Res. 2262 (XXII), ¶¶ 9–10 (Nov. 3, 1967); *see also* G.A. Res. 2383, *supra* note 298, ¶¶ 7–8 (condemning the policies of South Africa, Portugal, and other governments "which render direct or indirect economic, military and other assistance to the illegal racist minority régime" in Southern Rhodesia and calling upon all states "to bring to an end the activities of financial, economic and other interests operated by their nationals in Southern Rhodesia"); G.A. Res. 2508, *supra* note 315, ¶ 9 ("*Calls upon* all States which continue to maintain political, economic, military and other relations with the illegal racist minority régime in Southern Rhodesia to bring them to an immediate end[.]"); G.A. Res. 2765 (XXVI), ¶ 4 (Nov. 16, 1971) (reminding states of their duty to comply with sanctions imposed on the regime in Southern Rhodesia); G.A. Res. 2796, *supra* note 316, ¶¶ 4–6 (affirming prior condemnations of collaborators, reaffirming the need for sanctions to be "comprehensive, mandatory, effectively supervised, enforced and complied with by all States," and urging all states to impose "more stringent measures" to prevent anyone from circumventing those sanctions). Anticolonial lawmaking specifically condemned the United States for importing chrome and nickel from Southern Rhodesia. G.A. Res. 3298 (XXIX), ¶ 4 (Dec. 13,1974); G.A. Res. 3397 (XXX), ¶ 3 (Nov. 21, 1975); G.A. Res. 31/154 B, ¶ 3 (Dec. 20, 1976). It also required that states forbid their nationals from furthering settler apartheid by emigrating there. G.A. Res. 2508, *supra* note 315, ¶ 6; G.A. Res. 3397, *supra*, ¶ 4(b); G.A. Res. 31/154 B, *supra*, ¶ 4(b). The Security Council supported these efforts and called on all states "not to recognize this illegal racist minority regime. S.C. Res. 216, *supra* note 222, ¶¶ 1–2. It subsequently directed states to refrain from importing into their territories any products originating in or exported from Southern Rhodesia, to prevent any dealings by their nationals in such products, and to prohibit the sale of any products by their nationals or from their territories to Southern Rhodesia as well as the shipping of any products from or to Southern Rhodesia. S.C. Res. 253, ¶ 3 (May 29, 1968). It likewise called on states to refrain from making investments in Southern Rhodesia and prevent their nationals from making such investments. *Id.* ¶ 4. At the same time, it called on states to prohibit the admission of persons traveling on a passport issued by Southern Rhodesia and activities by their nationals "encouraging emigration to Southern Rhodesia." *Id.* ¶ 5.

358. Shah, *supra* note 18, at 128–29 & n.262–67.

and settler apartheid powers was in no way in tension with the prohibition of sanctions against formerly colonized states. At its second summit in Cairo in 1964, the NAM called both for the sanctions against Portuguese colonial rule[359] and for the United States to lift its economic blockade against Cuba on the ground that "foreign pressure and intervention to impose changes in the political, economic, and social system chosen by a country are contrary to the principles of international law . . . ."[360] At its fourth conference, which adopted resolutions calling for unilateral economic sanctions against the colonial situations discussed above,[361] the NAM also concluded that imposing such sanctions against formerly colonized states where no colonial or settler apartheid relations are present can impede self-determination.[362] The All-African Peoples' Conferences similarly found no tension between the call for anticolonial sanctions and the condemnation of unilateral economic sanctions against formerly colonized states.[363] Accordingly, anticolonial lawmaking routinely adopted resolutions calling for unilateral economic sanctions pursuant to the anticolonial duty of non-recognition of colonial and settler apartheid structures while simultaneously condemning unilateral economic sanctions imposed by formerly colonizing powers and their settler states against formerly colonized states.[364]

CONCLUSION

Anticolonial lawmaking is often overlooked as a source for identifying and understanding norms of customary international law. But when this lawmaking is taken into account, questions that seem confounding or intractable, like the contradictory role of unilateral economic sanctions in furthering and dismantling imperialism, can become clear. Anticolonial lawmaking shows us how to assess economic sanctions by considering the distinct political economic structures against which they are imposed. Viewing sanctions

359. NAM 2nd Summit, *supra* note 295, at 8.

360. *Id.* at 18.

361. *See* discussion accompanying *supra* notes 293–296, 302, 318, 325–328, 349–350.

362. NAM 4th Summit, *supra* note 293, at 78.

363. AAPC Accra Res., *supra* note 292 (calling for divestment and sanctions against apartheid South Africa and French colonial Algeria, while also denouncing the "indirect and subtle form of domination by political, economic, social, military or technical" means as "the greatest threat to African Countries that have newly won their independence or those approaching this status").

364. Barber, *supra* note 11, at 358–59.

through anticolonial lawmaking's independence aspect of self-determination shows how sanctions are necessary to prevent international complicity in colonial structures, including indefinite occupation and settler apartheid. Colonial structures seek to extract wealth—be it in the form of land and/or labor—by dispossessing a people of the land to which they belong. International trade and investment play a significant role in facilitating that extraction of wealth. Thus, in order to avoid being complicit in such relations, third-party states must refrain from engaging in trade and investment specific to those colonial relations. In this way, anticolonial lawmaking's elaboration of the independence aspect of self-determination entails a specific anticolonial duty of non-recognition of colonial relations. It is this duty of non-recognition, which mandates sanctions, that forms the legal basis of BDS campaigns.

As critical as they were to dismantling colonial relations in Africa in the era of decolonization, BDS can only go so far in the work of decolonization. Given that international law was used for centuries to manage imperialism,[365] like all remedies for imperialism under international law, BDS is "a tactic, not an end."[366] Ultimately, in an international legal order structured on statehood, true decolonization is unavailable.[367] Since statehood is premised on conceptions of relationships to land informed by "property"—with land belonging to certain populations to the exclusion of others—rather than informed by an understanding that peoples belong to a land, colonial and settler apartheid relations cannot be fully dismantled under existing legal frameworks.[368] This is most clearly evident in the continued colonization of indigenous peoples in the Americas and Oceania and bordering regimes that selectively and violently exclude migrant populations around the world, maintaining a form of "global apartheid."[369] Indeed, many today continue to question even whether

365. Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 742–46 (2006).

366. Reynolds, *supra* note 106, at 50.

367. Hiroshi Fukurai, *Original Nation Approaches to "International" Law (ONAIL)*, 26 IND. J. GLOBAL LEGAL STUD. 199, 207–09, 212–13 (2019).

368. *Id.*; Bauder & Mueller, *supra* note 183, at 161; Tshepo Madlingozi, *LANDBACK in South Africa: When, How, and For Whom?*, FUNAMBULIST (Feb. 14, 2022), https://thefunambulist.net/magazine/the-land/landback-in-south-africa-when-how-and-for-whom [https://perma.cc/PT9C-LPG4].

369. Harsha Walia, *There Is No "Migrant Crisis"*, BOSTON REV. (Nov. 16, 2022), https://www.bostonreview.net/articles/there-is-no-migrant-crisis [https://perma.cc/6AJA-BRUP].

apartheid was truly ended in southern Africa, in particular due to the failure to fully realize the independence aspect of self-determination from settler apartheid by ensuring the restoration of lands expropriated from indigenous Black peoples.[370] Instead, southern African political economies remain structured on that expropriation.[371]

Thus, as Noura Erakat has observed:

> In the middle of the last century, Frantz Fanon entreated his fellow subjugated peoples to imagine a better horizon for humanity than Europe was offering in the form of nation-states. . . . This path is not well-paved; in fact, it does not even exist. Embarking upon it is a commitment to build new possibilities for decolonization and freedom more generally.[372]

Today's BDS campaigns can serve as a powerful tool in paving this path. By using all the tools at their disposal in working towards decolonization, transnational solidarity movements can build these new possibilities for freedom.

370. Madlingozi, *supra* note 368.
371. Erakat & Reynolds, *supra* note 212.
372. ERAKAT, JUSTICE FOR SOME, *supra* note 115, at 239–40.