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States of Failure?

Ungovernance and the Project of State-building in Palestine under the Oslo Regime

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How can we understand the relationship between Palestinians and Israelis in the wake of the Oslo regime and to what extent has it facilitated the realisation of Palestinian statehood? Rather than read the Oslo regime as a prelude towards peace and resolution, instead, it has been productive of failure. In understanding how this came to pass and how this state of failure persists, the article argues that ungovernance is an instructive approach, which highlights how Israeli control is achieved through a series of disruptions: severing people from the land, severing rule from responsibility and severing statehood from self-government. After discussing the shape of the Oslo regime, this article explores how ungovernance is practiced across the Palestinian territories through the misgovernance micro practices that produce a population in disorientation and despair.

Keywords: Palestine, Oslo regime, Ungovernance, Statebuilding, Failure

1. Introduction

On 13 September 1993, ‘one of the most memorable symbolic acts of the twentieth century’¹ played out on the White House lawn in Washington when at the coaxing of President Clinton, Israeli Prime Minister Yitzhak Rabin ‘reluctantly’² shook the hand of Yassir Arafat, the leader of the Palestinian Liberation Organisation (PLO). Such a gesture was largely read at the time by Western commentators as a breakthrough for peace that would entail a new approach to solving one of the most intractable and prolonged conflicts of the postcolonial era.³ Israel could claim to be an exemplary state, while the

* Many thanks to the feedback of the reviewer and the editors of this special issue as well as conference participants and Sarath Burgis-Kasthala. Mariana Matias provided wonderful research assistance.

¹ Martin Carcasson, ‘Unveiling the Oslo Narrative: The Rhetorical Transformation of Israeli-Palestinian Diplomacy’ (2000) 3(2) *Rhetoric and Public Affairs* 211-245, 211.

² Harvey Sicherman, ‘Yitzhak Rabin: An Appreciation’ (2011) 55(3) *Orbis* 451-457, 455.

³ As discussed by Zinaida Miller, ‘Perils of Parity: Palestine’s Permanent Transition’ (2014) 47 *Cornell International Law Journal* 331-415, 332. Cf especially see Joseph Massad, ‘Return or Permanent Exile? Palestinian refugees and the ends of Oslo’ (1999) 8(14) *Critique: Journal for Critical Studies of the Middle East* 5-23; and Edward Said, *The End of the Peace Process; Oslo and After* (Vintage, 2001).

Palestinians were reassured of the possibility of realising their own exemplary state at the end of the ‘interim’ Oslo regime. The handshake sealed a series of secret negotiations known as the Oslo talks,⁴ which would produce a number of agreements between Israel and the PLO called the Oslo Accords.⁵ The regime emerging from these agreements persists into the present and thus serves as a legal and political framework for understanding Palestinian non-statehood ever since.⁶ While Palestine has gained the diplomatic recognition of the majority of the world’s states and is now a member of the United Nations Economic and Social Council (UNESCO) in 2011,⁷ the International Criminal Court (ICC) in 2015 and as a non-member observer state of the United Nations (UN) since 2012,⁸ none of this negates the reality of Israel’s continuing control and Palestinian incapacity for self-rule.

⁴ For an overview, see Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford University Press, 2019), 144-160.

⁵ *Declaration of Principles on Interim Self-Government Agreements*, Israel–Palestine Liberation Organization, 13 September 1993, 32 ILM (1993) 1525 (Oslo I); *Agreement on the Gaza Strip and Jericho Area*, Israel–Palestine Liberation Organization, 4 May 1994, 33 ILM (1994) 622; *Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip*, Israel–Palestine Liberation Organization, 28 September 1995, 36 ILM (1997) 551 (Oslo II).

⁶ According to Sayed, ‘although conceived as interim, [the Oslo regime] became the stable background condition for all subsequent developments and redeployments’. Hani Sayed, ‘The fictions of the illegal occupation in the West Bank and Gaza’, (2014) 16(1) *Oregon Review of International Law* 79, 104.

⁷ Irina Bokova, ‘Plenary session of the 36th session of the General Conference of UNESCO on the occasion of the agenda item concerning the admission of Palestine as UNESCO State Member’ (Paris, 31 October 2011), online: <https://unesdoc.unesco.org/ark:/48223/pf0000213660>.

⁸ ‘Status of Palestine in the United Nations’, UN GA Res. 67/19 (26 November 2012), UN Doc. A/Res/67/19, online at: <http://unispal.un.org/unispal.nsf/0080ef30efce525585256c38006eacae/181c72112f4d0e0685257ac500515c6c?OpenDocument>. As I discuss in ‘Over-stating Palestine’s UN Membership Bid? An Ethnographic Study on the Narratives of Statehood’, (2014) 25(3) *European Journal of International Law* 677-701.



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Perhaps we have now come to the point of perfection of Palestinian non-statehood in 2020 with the launch of President Trump's 'deal of the century' for Middle East Peace.¹⁰ In 1993, even if begrudgingly, at least both Palestinian and Israeli leaders were present at the White House and shook hands in a semblance of parity. By 2020, and also at the White House, Palestine's leader was absent, and the handshake was only between Israel's leader, Netanyahu and US President Trump. In the wake of Trump's presumptive peace for an emaciated 'Palestine', its President, Mahmoud Abbas has categorically rejected any communication with Trump and has cancelled all security arrangements with Israel. Why bother sealing the deal for Palestinian statehood with the presence of their president when Israeli unilateralism is so much more decisive? While this article does not seek to consider the 'deal of the century', it takes note of this moment as a milestone of both failure and success for Palestinian statehood where the territorial entity's lack of viability is assured. Israel can declare an end to any

⁹ President Bill Clinton gestured as Israeli Prime Minister Yitzhak Rabin and PLO Chairman Yasser Arafat shook hands at the White House on Sept. 13, 1993. ASSOCIATED PRESS. Online at: <https://www.bostonglobe.com/opinion/2018/09/04/the-oslo-handshake-years/jPV391Qd0u9T32V3SS407H/story.html>.

¹⁰ The Peace to Prosperity Plan can be accessed here: <https://www.whitehouse.gov/peacetoprospersity/>. For some background, see Ian Black, 'This deal of the century for the Middle East will be just another bleak milestone' (2020) The Guardian, online at: <https://www.theguardian.com/commentisfree/2020/jan/30/donald-trump-israel-palestinians-middle-east>.

formal regime of occupation entailing responsibility for the welfare of the population, while ensuring that Palestinians remain less than independent in a radically truncated homeland. Israeli irresponsibility since the Oslo handshake has facilitated this path towards (non)statehood and is a useful lens through which to consider the Palestine case.



US President Trump and Israeli Prime Minister Netanyahu shake hands on 28 January 2020 at the White House in support of the latest US-sponsored ‘peace’ initiative.

For photo: This is from <https://www.flickr.com/photos/whitehouse/49456368773/>

Before considering the legal, political and economic effects of the Oslo regime as exemplary of ungovernance, I first want to interrogate the meaning of the ‘Oslo handshake’. While it is typical to read the handshake and its context through the idiom of peace and conflict, development or global governance, a better approach highlights how the case of Oslo and its aftermath is an early and ongoing instance of ungovernance. Following on from the introduction to this special issue, we will see how the Oslo accords taking place as they do in the 1990s, based on transnational institution building that has failed and continues to fail, is a particularly pronounced example of the impossibility of closure.¹¹ While the premise behind the Oslo regime was to achieve closure – Israeli security and Palestinian statehood, at least the latter seems to have become more elusive than ever even with countless (hollow) pledges made in the pursuit of peace for both sides. What Oslo ushered in was a new relationship between Israelis and Palestinians that I argue is best understood not as occupation or governance, but as ungovernance. Further, I illustrate how this general relationship of ungovernance rests on a series of

¹¹ See the Introduction to this special issue.

micro practices of misgovernance, which are the result of intended Israeli incompetence to rule and a belief in failure. Here, ungovernance entails living a life punctuated by a series of Israeli missteps that profoundly disorients the Palestinian populace, promised a future through Oslo, but one that seems ever more tantalising. Approaching the Oslo regime as ungovernance is a valuable exercise in understanding not only the case itself, but regional dynamics of (neo)colonialism¹² as well as a number of global trends in the (un)governance of the Global South. Exploring Palestine under the Oslo regime serves as a laboratory¹³ for understanding the emergence of a range of ungovernance practices.

2. From Governance to Ungovernance? Contextualising the ‘Oslo Handshake’

It was no coincidence that the ‘Oslo handshake’ was coaxed out of Arafat and Rabin by US President Bill Clinton. The US had consistently been the preeminent power throughout the Israeli-Palestinian conflict, but its role took on even greater significance in the context not only of the Cold War’s end, but two key, related events: the 1990-1991 Iraq War and the 1991 Madrid Conference. The absence of Soviet opposition meant that a US-led military force could act legitimately under the auspices of the United Nations Security Council (UNSC) in ending Iraq’s occupation of Kuwait. Although the US had rejected Saddam Hussein’s attempts to link Iraq’s occupation of Kuwait with that of Israel’s in Palestine, the US recognised that the new regional order resulting from its military force also required a correspondingly prominent peace conference to tackle the region’s most vexed problem—the Arab-Israeli conflict.¹⁴ In the words of Shlaim, the “‘mother of all battles’” threatened by the Iraqi tyrant in the Gulf was followed by the “‘mother of all peace conferences’” at Madrid in late 1991.¹⁵

This was the last international conference (as co-convened by Gorbachev) attended by the Soviet Union before its demise, further underscoring the ascendancy of US military and diplomatic power that would dominate the region in the following two decades. It was at Madrid where a Palestinian delegation¹⁶ could participate with regional counterparts not only from the Arab world (Lebanon, Syria and Jordan), but also, Israel itself. Dealing with ‘the enemy’ on such terms would have been unthinkable only a decade earlier. Yet, the first intifada (as discussed below) and particularly the

¹² On the nature of the Middle East’s particular ‘ungovernability’, see Fouad Gehad Marei et al, ‘Interventions on the politics of governing the “ungovernable”’ (2018) 67 *Political Geography* 176-186.

¹³ On the notion of Palestine as a ‘laboratory’, see John Collins, *Global Palestine* (Hurst, 2011).

¹⁴ As important for the US was Syria’s participation in the coalition in exchange for US trilateral talks to address Israel’s occupation of the Golan Heights that began with the Madrid Conference and persisted fruitlessly until Assad senior’s death in 2000.

¹⁵ Avi Shlaim, *Israel and Palestine* (Verso, 2009), 155-156.

¹⁶ Formally, the Palestinian delegation was part of the Jordanian delegation. It included Haidar Abdel Shafi from Gaza and Faisal Hussein and Hanan Ashrawi from the West Bank. While the Palestine Liberation Organisation (PLO) was not granted any formal status due to Israeli demands, some PLO advisors played important roles behind the scenes.

PLO's 1988 declaration of independence¹⁷ facilitated a shift in elite Palestinian mind-sets from violent resistance against Israeli rule to diplomacy and accommodation. According to Khalidi, it was first during Black September in 1970-1971, which saw the defeat of the PLO and its expulsion from Jordan, that armed struggle as the solution to the Palestinian struggle was seriously questioned.¹⁸ Thus, by the time the Palestinian National Congress at Algiers was convened in 1988, it was no surprise that the PLO could countenance the 'two-state solution' as embodied in UNSC resolution 242.¹⁹ Yet in taking such a rhetorical step in exile far from Palestine,²⁰ any realisation of independence would require significant changes in how governance over Palestine and Palestinians was conceived. A change in Israeli leadership from Likud to Labour in 1992 further facilitated the possibility of dialogue where none had existed before. Crossing the Rubicon of mutual recognition²¹ for both Israelis and Palestinians was thus possible by 1993 and indeed, essential for any handshake or serious effort at 'peace'.

Domestically, it was widespread frustration for ordinary Palestinians living under twenty years of Israeli control without an effective leadership that provided the impetus for mass protests and civil disobedience during the first Palestinian Intifada (1987-1993) across the West Bank and Gaza Strip.²² Israel came under pressure to account for alleged human rights abuses perpetrated in its attempt to quell the uprising. Thus, legal idioms of human rights increasingly came to inform both domestic and international narratives about the occupation.²³ Forms of liberal reciprocity and respect however, failed to inform the Oslo texts themselves,²⁴ where human rights concerns are almost wholly absent in a context where Palestinian lawyers were marginalised²⁵ by mindsets that favoured flexible, 'diplomatic' solutions, that nevertheless created far-reaching, legalised effects entrenching rather than constraining a status quo titled in Israel's favour.²⁶ This rejection of the liberal subject would not be towards a

¹⁷Abdullah Salah, 'Letter dated 18 November 1988 from the Permanent Representation of Jordan to the United Nations addressed to the Secretary-General', UN Security Council, online at: <https://unispal.un.org/UNISPAL.NSF/0/6EB54A389E2DA6C6852560DE0070E392>

¹⁸ Yezid Sayigh, *Armed Struggle and the Search for State: The Palestinian National Movement, 1949-1993* (Oxford University Press, 1997), 683.

¹⁹ UN SC Res. 242 (22 November 1967), UN Doc. S/Res/242, online at: <https://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>.

²⁰ The PLO was founded in 1964 by the Arab League and was declared as the sole representative of the Palestinian people a decade later. While it had coordinated resistance operations especially from neighbouring states during this period, (particularly from Jordan during 'Black September in 1970 and then southern Lebanon during its civil war), it was forced to abandon its base in Lebanon in 1982 for exile in Tunis. Being so far from Palestine partly explains the Organisation's willingness to countenance accommodation with Israel: Massad (n 3), 6.

²¹ See Shlaim (n 14), ch 15.

²² See Sayigh (n 17), ch 25.

²³ Lori Allen, 'Martyr bodies in the media: Human rights, aesthetics, and the politics of immediation in the Palestinian intifada' (2009) 36(1) *American Ethnologist* 161-180.

²⁴ Especially see Raja Shihadeh, 'Can the Declaration of Principles Bring About a 'Just and Lasting Peace'?' (1993) 4 *European Journal of International Law* 553-563.

²⁵ M Burgis-Kasthala, '(In)dependent lives? International lawyers and the politics of state-building in the Palestinian advocacy field' (2016) 4 *London Review of International Law* 393, 406.

²⁶ Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (Brill, 1997).

standard settler colonial relationship,²⁷ however, but to one of radical irresponsibility that we can understand as ungovernance.

The evident frustration of a neglected Palestinian population whose uprising required largescale Israeli resources pointed towards the need for a new policy attentive both to (Palestinian) development and (Israeli) security. The ideal Israeli response would also be leaner, cheaper and no longer directly responsible even while legally remaining the belligerent occupier of the territory. A crucial aspect of the debate about economic development assistance was how to understand the social and political drivers of poverty so that increasingly aid, global security and various forms of interventions could work together. It was understood that the Oslo regime could only succeed with the largesse of foreign aid as channelled through a globalised architecture of governance to the increasingly fragmented occupied territories.²⁸ While 'Israel's sovereignty is given; Palestinian sovereignty must be earned.'²⁹ Thus, perhaps ironically, independence would follow in the wake of *more* rather than *less* global institutional oversight and assistance.

3. Understanding Oslo as occupation and as governance: a scholarly sketch

The struggle over historic Palestine is one of the most studied 'conflicts' in contemporary academia, engaging scholars in a number of disciplines who produce thousands of pages on the subject each year. Legal scholars almost invariably approach the case through the lens provided by the law of occupation. In the midst of a plethora of Israeli laws and judgments, international declarations and opinions as well as the relentless advocacy efforts of hundreds of civil society groups working against 'the occupation', it is very hard to adopt an alternative framework. Excellent scholarship has been produced in the genre of occupation and should not be dismissed.³⁰ Such works provide meticulous accounts of Israeli *ius in bello* violations that sometimes even go so far as to question the legality of its occupation per se.³¹ Yet, the results of working within the law of occupation framework, according to Sayed, are not politically neutral as it proscribes a particular (truncated) possible future for Palestinians.³² The law of occupation

²⁷ Over the last decade or so, a rich vein of scholarship utilising the 'settler colonial' framework has been applied to Palestine. For example, see Lorenzo Veracini, 'Israel-Palestine through a settler-colonial studies lens' (2019) 21 (4) *Interventions* 568-581; and Patrick Wolf, 'Settler colonialism and the elimination of the native' (2006) 8 (4) *Journal of Genocide Research* 387-409.

²⁸ Miller (n 3), 333.

²⁹ *Ibid*, 387.

³⁰ For example, Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press, 1993); Ardi Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territory' (2003) 44(1) *Harvard International Law Journal* 65-138; and David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002).

³¹ Especially see Orna Ben-Naftali et al, 'Illegal Occupation: The Framing of the Occupied Palestinian Territory' (2005) 23 *Berkley International Law Journal* 551; and Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press, 2017).

³² See Sayed (n 6), 83. This extends to the territorial focus of inquiry as most scholars focus only on the occupied territories and thus exclude Israel proper. Sayed calls on us to consider the entire territory from the Mediterranean to the Jordan River as one governance regime.

is also ideological as it endows the occupier with an array of prerogative powers over a given population.³³ While the Hague Regulations along with the Geneva Conventions stipulate a range of protections over the population, much of the time these can be (re)read through the imperatives of ‘military necessity’ for the occupier.³⁴ Thus, the law of occupation flows from an initial violent seizure of territory and sanctions ongoing subjugation.

While it might be politically salient to invoke the notion of occupation as a way to reject any de jure Israeli claim to title over Palestinian lands, this does not mean that we should be intellectually beholden to this as a starting point for inquiry. Recent scholarship by critical legal scholars instead suggests that the Oslo regime forces us to abandon such legal categorisations. Instead, most simply, Sayed calls on us to ask how Palestinians under Israeli rule are *actually* governed. His findings, along with those of Miller, suggests that a far more complex regime than that of occupation is at play. I note two points from their provocative work here. First, under the law of occupation, the territory and its population fall under the protection of the belligerent occupier with a number of provisions ensuring that the status quo is preserved as much as possible. Oslo ruptured this framework by allowing Israel to maintain its control over the territory along with the Israeli settler population and its security personnel, while abdicating all welfare oversight of the Palestinian population.³⁵ Second, and to fill this gap, Oslo ipso facto, required massive international assistance on the part of donor aid and international civil society service provision. Both developments then heralded the breakdown of more traditional (liberal) understandings of rule by a government over a people. Instead, such a regime lends itself to a global governance reading. Here, in the following section then, I seek to build on these insights of Miller and Sayed by testing the extent to which contributions from the global governance literature offer useful conceptual tools in understanding the Oslo regime.

³³ Sayed (n 6), 86. Also see Michelle Burgis, ‘A Discourse of Distinction? Palestinians, International Law, and the Promise of Humanitarianism’ (2009) 15 *Palestine Yearbook of International Law* 41-68.

³⁴ For example, according to 23(g) of the Hague Regulations, property can only be seized or destroyed by the occupying power where the ‘necessities of war’ are applicable. Since 1967, Israel has seized and destroyed thousands of houses, sometimes facilitating the construction of settlements.

³⁵ Miller (n 3), 340; Sayed (n 6), 119.

First, we need to settle on a basic definition of ‘global governance’.³⁶ Some writers argue that there is no settled definition of global governance available and in particular,³⁷ they point to the ways in which the term is deployed in an array of discourses for seemingly disparate ends. While we need to recognise variegated governance practices on a global scale,³⁸ we can still do this with some degree of precision so that we are able to interrogate their political implications as rationalities of rule. Furthermore, if we only conceive of governance in its functional characteristic of ‘effectiveness’ then questions about constituencies and legitimacy can be overlooked. Therefore, we need to see the purported change resulting from global governance as epistemic change. For Adler and Bernstein, this entails asking ‘what makes people classify their reality the way they do, and how is this related to global governance?’³⁹ How do certain classifications become a given? In answering this question, they argue that ‘the decoupling of coercive force and legitimate rule is the most striking feature of contemporary global governance’.⁴⁰ Global governance then presents a challenge to the way we think about force and rule within, across and between states whether by governmental or non-governmental actors, especially through the practice of institution building.⁴¹

Any specific analysis about global governance has to begin at the level of meaning, where we explore how specific understandings about the world enable and constrain the approaches to practical problems, such as ‘development’, ‘atrocities’ and institutional ‘failure’. Such an approach also entails grounding knowledge in specific contexts to explore ‘the diverse ways in which situated agents are changing the boundaries of state and civil society by constantly remaking practices as their beliefs change in response to dilemmas. It reveals the contingency and contestability of narratives. It highlights a more diverse view of state authority and its exercise.’⁴² For both Bevir and for Rhodes, this is

³⁶ Although ‘interpretive governance’ is an important strand within the literature, dominant global governance approaches tend to focus more on developing functional and empirical accounts about institutions and actors in a context of globalisation. James Rosenau was the first scholar to coin the term ‘global governance’ in the late 1980s in his pioneering work on regimes. Later in a 1992 article by Rosenau and Czempiel, one of their central concerns was to explore governing without government; and this dichotomy then between government and governance or governing persists in the literature. Although ‘global governance’ was not a widely used term until the mid-late 1990s, Barnett and Duvall argued in 2005 that it had ‘attained near-celebrity status’ as ‘one of the central orienting themes in the practice and study of international affairs of the post-Cold War period.’ Michael Barnett and Raymond Duvall, ‘Power in Global Governance’, in Michael Barnett & Raymond Duvall (eds), *Power in Global Governance* (CUP, 2004), 1-32, 1.

³⁷ Francis Fukuyama, ‘Governance: What Do We Know, and How Do We Know It?’ (2015) 19 *Annual Review of Political Science* 89-105, 90.

³⁸ Amitav Acharya, ‘The Future of Global Governance: Fragmentation May be Inevitable and Creative’ (2016) 22(4) *Global Governance* 453-60.

³⁹ Emanuel Adler and Steven Bernstein, ‘Knowledge in power: the epistemic construction of global governance’, Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (CUP, 2004), 294-318, 295.

⁴⁰ *Ibid*, 302.

⁴¹ Especially this special issue’s Introduction on institution building and ungovernance.

⁴² RAW Rhodes, ‘Waves of Governance’, David Levi-Faur (ed), (2012) *The Oxford Handbook of Governance* 39.

‘interpretive governance’, which constitutes ‘a complex and continuous process of interpretation, conflict, and activity that produces ever-changing patterns of rule.’⁴³

Typically, in invoking the word ‘governance’, Zumbansen points out that it is used in counterpoint to ‘government’.⁴⁴ Yet according to Sending and Neumann, as most global governance studies fixate on questions of authority, they inadvertently end up reinforcing state-centric models.⁴⁵ For example, Börzel and Risse point out that in exploring the role of non-state actors, this will often entail a strong state looming in the background, acting as a ‘shadow of hierarchy’.⁴⁶ Risse also critiques global governance discourse’s reliance on an ideal type of [European] modern statehood, which is rarely represented on the ground, especially in the Global South. Yet, rather than relying on normative categories of ‘failed’ statehood, he prefers studying ‘limited statehood’ as global governance to capture the difficulties faced in much of the world to make, implement and enforce decisions collectively. He points out that often ‘it remains unclear who are the addressees of governance, who is entitled to which governance services, and who actually receives them in practice.’⁴⁷

Thus, particularly for peoples in the Global South, it is perhaps best to speak of ‘fractured sovereignty’⁴⁸ within ‘governance states’⁴⁹ which are the product of sustained and ongoing forms of intervention by a range of state and non-state actors. We can see Palestine as an archetypal ‘(un)governance state’, where daily encounters with governance provided by a range of state and non-state actors are radically removed from the political imperatives of legitimate and representative rule. Crucially, it was the ‘Oslo handshake’ that sealed this trajectory for the Palestinian people as the framework laid out still structures daily life across the West Bank. While it is possible to read the regime ushered in through the lens of the governance literatures as noted above, they can only go so far in accounting for the paradoxical situation that ensued under Oslo: a highly regulated series of blueprints to achieve statehood, which were financed by a range of international actors, juxtaposed with the steady

⁴³ Rhodes (2012), 40. Also see Mark Bevir, ‘Interpretive Theory’, Mark Bevir (ed), (2011) *The SAGE Handbook of Governance* 51-64.

⁴⁴ Peer Zumbansen, ‘Governance: An Interdisciplinary Perspective’, David Levi-Faur (ed), (2012) *The Oxford Handbook of Governance*, 83.

⁴⁵ Ole Jacob Sending and Iver B Neumann, ‘Governance to Governmentality: Analysing NGOs, States and Power’ (2006) 50(3) *International Studies Quarterly* 651, 655.

⁴⁶ Tanja A Börzel and Thomas Risse, ‘Governance without a state: Can it work?’ (2010) 4(2) *Regulation & Governance* 113, 113-114.

⁴⁷ Thomas Risse, ‘Governance in Areas of Limited Statehood’, David Levi-Faur (ed), (2012) *The Oxford Handbook of Governance*, 708.

⁴⁸ Andrew Brandel and Shalini Randeria, ‘Anthropological Perspectives on the Limits of the State’, in A Draude et al. (eds), (2018) *Oxford Handbook of Governance and Limited Statehood*, 74.

⁴⁹ B Bliesmemann de Guevara, ‘Introduction: The Limits of Statebuilding and the Analysis of State-Formation’ (2010) 4 *Journal of Intervention and Statebuilding* 111, 121.

truncation of Palestinian lands and institutional capacity that was the result of slow as well as fast and unpredictable Israeli violence.⁵⁰ Thus, for Persson,

[t]he paradoxical reality... was that the Palestinians seemed to progress towards statehood at the same time as the occupation entrenched itself **even** more...[deeply], in particular through the continued building of Israeli settlements. It was somewhere here that the state-building approach collided with the hard political realities on the ground in the conflict.⁵¹

It is my suggestion here that many earlier critiques of Oslo as studied through the lens of the law of the occupation or as governance effects fail to capture just how significant this change was not only for Palestinians in their interminable quest for liberation, but as an early instance of ungovernance. Before considering ungovernance in Palestine in the final section, first I briefly outline the key parameters of the Oslo regime that have persisted into the present.

4. Key results of the Oslo regime: jurisdiction and governance fractured

To understand how Oslo marked such a significant shift from what preceded it, first I offer a brief sketch of the key developments that have shaped the territory between the Mediterranean Sea and the Jordan River in the twentieth century. Until World War One Palestine was an integral part of the Ottoman Empire. It was during the war, however, that European powers first countenanced its separate status through a series of secret talks.⁵² These came to inform a variety of post-war treaties and more significantly, the creation of the League of Nations Mandate system. Under this scheme, ‘peoples [of West Asia] not yet able to stand by themselves under the strenuous conditions of the modern world’ would be governed by either France (in Syria and Lebanon) or Britain (in Palestine (including Transjordan) and Iraq) as a ‘sacred trust’.⁵³ While Britain acknowledged the interests of the local majority Arab population of Mandate Palestine under its rule, its commitment to establishing a Jewish home in the territory for both resident Jews as well as migrants fleeing Europe,⁵⁴ saw increasing tensions between the two populations. As tensions between the two communities became more pronounced during the late 1920s and 1930s, Britain increasingly came to favour some sort of territorial partition as

⁵⁰ On this paradox, see Anders Persson, ‘Palestine at the end of the state-building process: Technical achievements, political failures’ (2018) 23 *Mediterranean Politics* 433.

⁵¹ *Ibid*, 434.

⁵² Most (in)famously, the Sykes-Picot agreement: Exchange of Letters between France and Great Britain respecting the Recognition and Protection of an Arab State in Syria, 9/6 May 1916, 221 CTS 323.

⁵³ Article 22, *Covenant of the League of Nations*, 8 June 1919, 225 CTS 188.

⁵⁴ This was first expressed in the Balfour Declaration and then incorporated into the Preamble of 1922 Mandate text: ‘Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country’, online at: https://avalon.law.yale.edu/20th_century/palmanda.asp. I explore the Mandate text in detail in Michelle Burgis, ‘Transforming (Private) Rights through (Public) International Law: Readings on a ‘Strange and Painful Odyssey’ in the PCIJ *Mavrommatis* Case’ (2011) 24 *Leiden Journal of International Law* 873-897.

the most favourable 'solution'. Thus, at the Second World War's end in a climate increasingly intolerant of colonialism, it made sense for Britain to withdraw from the territory and allow the newly created United Nations to take over. Although the UN formulated a partition plan that was highly advantageous to the Jewish minority,⁵⁵ it was never implemented as events on the ground soon took over. Once British troops withdrew in late 1947, a domestic conflict between Palestinian Arab and Jewish fighters soon transformed into a regional war. The result was Israel's declaration of independence in 1948 along with significant territorial gains it made during the hostilities. Armistice agreements in 1949 with neighbouring states produced an uneasy status quo that rested on a newly created Israel, Jordanian occupation over the West Bank (including East Jerusalem which included the most significant holy sites for the three monotheistic faiths), along with Egyptian occupation of the Gaza Strip. Palestinians now found themselves in a radically altered world: a large number had been forced to flee during and after the fighting – the Nakba (or, the catastrophe). To this day, these refugees have been denied the right to return to their homes and they now amount to around 7 million Palestinians. Those who remained in their homes under Israeli control would become (second class) Israeli citizens.

It was again through the eruption of hostilities in 1967 between Israel and its Arab neighbours that a radical reconfiguration of territorial control resulted in Israel's favour. Over the course of six days, it managed to take control of Egypt's Sinai Peninsula, Syria's Golan Heights as well as the West Bank and the Gaza Strip. It set about applying a series of legal and administrative measures across the latter two territories almost straight away with particular attention given to the prize of East Jerusalem as a way of 'unifying' the city. This entailed the governance of the Palestinian people who had been ruled by Egypt and Jordan respectively.⁵⁶ While debate has ensued ever since about the specific dimensions of Israel's control, most commentators have been in agreement that its presence across the remaining Palestinian territories satisfied – and satisfies – the law of belligerent occupation. Israel itself largely operated under this assumption through its application of military orders as issued by the military commander. This elaborate system of rule has resulted in a dense network of laws, court decisions and policies, many of which are in contravention to the spirit of the law of occupation as they have radically reshaped the political, economic and social character of the territories. The active support of settlement construction that actually increased after Oslo,⁵⁷ is only example, which attests to the way in which a

⁵⁵ UN GA Resolution 181 (II) (29 November 1947), UN Doc. A/RES/67/19, online at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>

⁵⁶ For Gordon, 'Colonial powers do not conquer for the sake of imposing administrative rule on the indigenous population, but they end up managing the conquered inhabitants in order to facilitate the extraction of resources. After the 1967 war Israel assumed responsibility for the occupied residents, undertaking the administration of the major civil institutions through which modern societies are managed: education, health-care, welfare and the financial and legal systems. Simultaneously it began expropriating Palestinian land and water, the most important natural resources in the region. Neve Gordon, 'From Colonization to Separation: exploring the structure of Israel's occupation' (2008) 29(1) *Third World Quarterly* 25-44, 28.

⁵⁷ The settler population across the West Bank (including East Jerusalem) now exceeds 620 000 Israelis. See the Israeli Information Center for Human Rights in the Occupied Territories, online at

de jure prohibition against Israeli conquest, has failed to prevent its annexation – de jure or de facto⁵⁸ - of much of the territory. Thus, since 1967 and continuing since Oslo, Palestinians and Israelis have lived together in a fundamentally unequal relationship of domination and resistance.

Given the depth of animosity that resulted from these events, it was not surprising that numerous difficulties lay ahead in agreeing on details of the Oslo regime as it emerged in 1995. Until this time, international consensus on complete Israeli withdrawal from the West Bank (including East Jerusalem) and the Gaza Strip⁵⁹ clashed with Israel's policy of de facto colonisation.⁶⁰ Most states had relied on UNSC Article 242 as the basis of a future settlement⁶¹ that would ensure Palestinian sovereignty over 22 percent of historic Palestine (including any settlements located therein) with (East) Jerusalem as its capital as well as some sort of solution to the Palestinian refugee problem. These dimensions were 'non-negotiable'⁶² before 1993. Oslo changed all of this, however, transforming bright lines into blurry points of contention that were up for debate,⁶³ thus amounting to what Edward Said denotes as a 'Palestinian Versailles'.⁶⁴ The thinking that informed such an approach of diplomacy trumping international legal guarantees⁶⁵ suggested that this was the best way to realise short *and* long-term peace. Rather than 'frontload' such negotiations with the most divisive issues, instead, the Oslo regime 'backloaded' most of the key (political) concerns centred on the status of Jerusalem, borders and refugees.⁶⁶ This would ensure some sort of agreement where perhaps none would have resulted in

<https://www.btselem.org/topic/settlements>. This constitutes between 19% and 23% of the West Bank's population: Imseis (n 29), at 21.

⁵⁸ Ardi Imseis, 'Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967-2020' (2020) *European Journal of International Law*.

⁵⁹ As per 1(i) of Resolution 242: 'Withdrawal of Israeli armed forces from territories occupied in the recent conflict'. UNSC Resolution 242/1967 (n 18).

⁶⁰ Such policies were formulated almost immediately after Israel gained control of the West Bank and Gaza Strip (as well as the Golan Heights and the Sinai Peninsula) in 1967. For example, the Allon Plan of 1967 envisaged extensive Israeli settlements and strategic control across the West Bank. Many later plans and policies have built on this initial blueprint. Elihsa Efrat, *The West Bank and Gaza Strip: A Geography of Occupation and Disengagement* (Routledge, 2006), 25-29.

⁶¹ Rashid Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (Oneworld, 2006), 193.

⁶² See Mandy Turner, 'Completing the Circle: Peacebuilding as Colonial Practice in the Occupied Palestinian Territory' (2012) 19 *International Peacekeeping* 492, 495.

⁶³ This metaphor is also employed more generally in relation to the role of the law of occupation in Palestine in Marty Koskenniemi, 'Occupied Zone – "a Zone of Reasonableness"?' (2008) 13 *Israel Law Review* 41. Also see Alice M Panepinto, 'Jurisdiction as Sovereignty Over Occupied Palestine: The Case of Khan-al-Ahmar' (2017) 26 *Social & Legal Studies* 31; and Kerry Rittich, 'Occupied Iraq: Imperial Convergences?' (2018) 31 *Leiden Journal of International Law* 479.

⁶⁴ Edward Said, 'The Morning After' (1993) 15(20) *London Review of Books*, online at: <https://www.lrb.co.uk/the-paper/v15/n20/edward-said/the-morning-after>

⁶⁵ Thus, according to Bell, the 'move within the Oslo peace process to an emphasis on negotiations and complex autonomy arrangements...as an interim solution can be viewed as a mechanism for inching the parties towards agreement on the right of external self-determination as traditionally conceived. However, it can also be argued that the Oslo peacemaking process as it has developed has begun to reshape understandings of whether a stand-alone right of Palestinians to external self-determination remains.' Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press, 2008), 229.

⁶⁶ Baruch Kimmerling and JS. Migdal, *The Palestinian People: A History* (Harvar University Press, 2003), 356–361.

the face of such deep divisions.⁶⁷ Thus for Miller, '[n]egotiations sometimes appear[ed] to be an end in themselves rather than a road towards resolution.'⁶⁸ While politics seemed to elicit mistrust, salvation could instead result from technical governance reforms underpinned by foreign state and multilateral donors. The relationship between lofty ideals of self-determination and statehood and mundane realities of ever more truncated self-rule remained unexplained. In fact, the Oslo regime could only persist if this tension remained radically underexplored and denied.⁶⁹

The concomitant financial, institutional and security sector assistance provided to the newly created Palestinian Authority (PA) was presented as a transitional mechanism straddling former direct Israeli military rule and future Palestinian sovereign rule. Yet while Oslo permitted Israeli abdication of responsibility regarding welfare provision for those Palestinians in the West Bank and Gaza Strip,⁷⁰ this did not mean an end to its presumptive military and financial control over all aspects of their lives either directly through ongoing forms of control or more insidiously through the PA and its donors pursuing security sector reform. Much of this (collaborative) work is dedicated to quelling political unrest in occupied Palestine to ensure Israeli security,⁷¹ especially for those Israeli settlers living only a stone's throw from their non-citizen counterparts. Aside from military preponderance which facilitated Israel's widespread control and use of lethal force during the second intifada (2000-2007), Israel has also maintained economic predominance as a result of the 1994 Paris Protocol, which enshrined the new Israeli shekel as the only legal tender in the Palestinian territories and guaranteed Israeli control over all import tax revenues entering Palestine. Israel uses this prerogative periodically

⁶⁷ Bell and Pospisil's notion of 'political settlement' is useful here, which stresses that rather than strive for consensus, parties instead agree to disagree. This ensures, however, that fundamental points of contention (such as Jerusalem's status or the rights of refugees) persist, requiring a managerial regime of containment so that such insecurity does not threaten the settlement itself as well as spill over and heighten regional and even global instability. Christine Bell and Jan Pospisil, 'Navigating Inclusion in Transitions from Conflict: The Formalised Political Unsettling' (2017) 29 *Journal of International Development* 576.

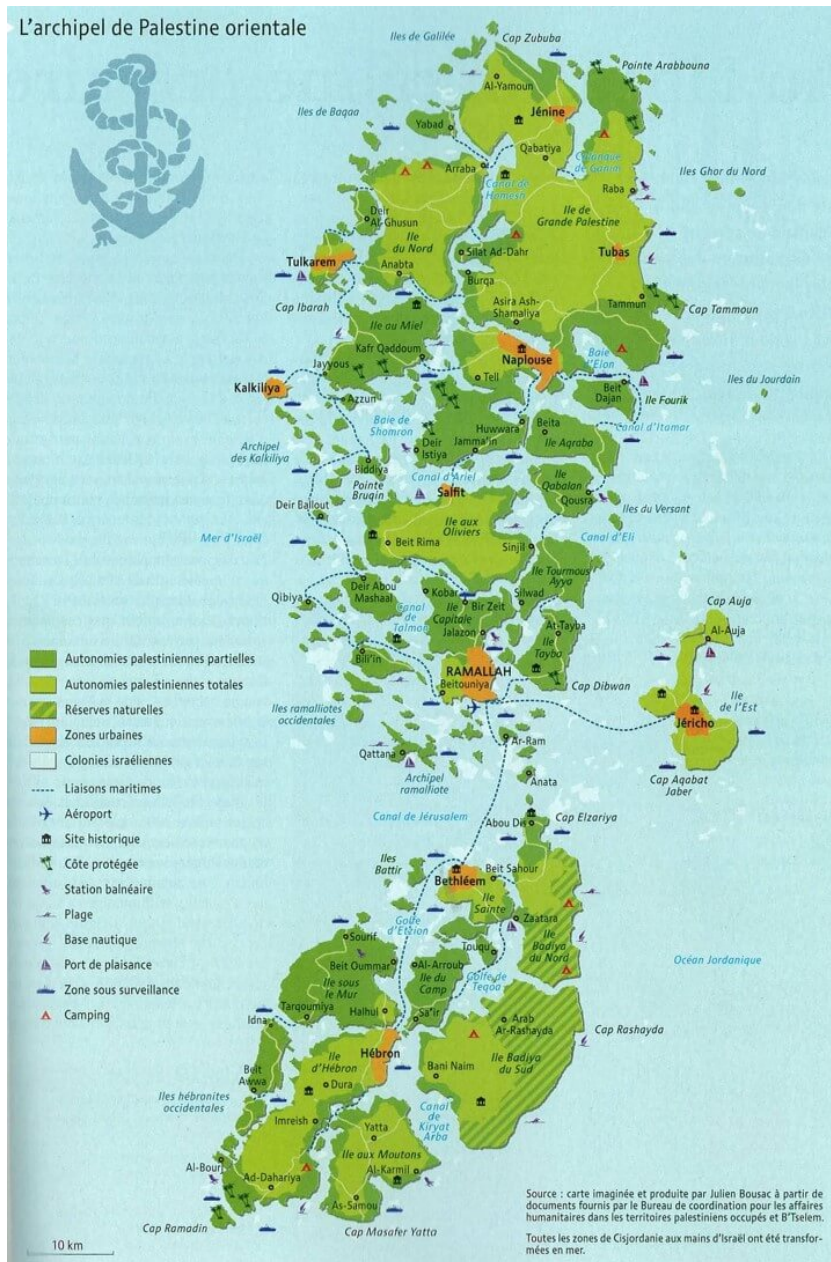
⁶⁸ Miller (n 3), 383.

⁶⁹ Omar M Dajani, 'Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks' (2007) 32 *Yale Journal of International Law* 61-1045, 84-88.

⁷⁰ According to Gordon, 'the general mood in the Occupied Territories during the first decades [after 1967] was very different from that today. For several years the Israeli military government published annual reports entitled 'Accountability', suggesting that Israel felt a need to provide an account of the social and economic developments taking place in the regions that it had captured. In these reports the civilising mission of the colonial principle is omnipresent. Israel portrayed itself as bringing progress to the Palestinians. The thrust of the claims made in the reports can be summed up as follows: thanks to our interventions, the Palestinian economy, industry, education, health-care and civilian infrastructure have significantly developed...[...]Many of the military reports also underscore Israel's ongoing efforts to normalise the occupation... The ultimate aim of the military government... was to render the occupation invisible. Gordon (n 55), 31-32.

⁷¹ For example, Mustafa notes how Lieutenant-General Dayton characterised the success of the policy when no violent backlash resulted in the wake of Israel's deadly assault on Gaza 2008-2009. Tahani Mustafa, 'Damming the Palestinian Spring: Security Sector Reform and Entrenched Repression' (2015) 9 *Journal of Intervention and Statebuilding* 212, 224.

to freeze payments when political tensions escalate and unilaterally to extract large deductions of these funds before passing them on to the PA.⁷²



Another key aspect brought in under Oslo was a far more formalised system of fragmented Palestinian governance across the West Bank, East Jerusalem and the Gaza Strip, which has strangled

⁷² More recently, this has played out in relation to Israel's policy of deducting funds from the taxation revenues that it sees as commensurate with PA payments made to Palestinians imprisoned inside Israel. See Noa Landau and Jack Khoury, 'Palestinian Authority Returns Slashed Tax Revenues to Israel' (2019) *Haaretz*, online at: <https://www.haaretz.com/middle-east-news/palestinians/.premium-palestinian-authority-returns-slashed-tax-revenues-to-israel-1.7194183>.

any possibility of a viable territorial entity capable of self-rule. It is worth quoting Naftali at length on this very point:

The Oslo process has not been about Israel's withdrawal from the West Bank, much less about the dismantlement of settlements; it has been about the fragmentation of the OPT [occupied Palestinian territories] and the reorganization of Israeli power: henceforth, Palestinians would cease to be of interest to Israel, other than for the purpose of their exclusion.

The separation thus affected, is not about separating the state of Israel from a nascent Palestinian state. It is about separating Palestinians from their land, from other Palestinians and from Israelis. It is not about borders between states; it is about bordering the Palestinians in order to realize Israel's sovereignty throughout much of their land.⁷³

Living in a fragmented non-state is visually captured by Bousac in his 'archipelago of Eastern Palestine' map extracted here.⁷⁴ Fragmentation occurred across all of the three areas of (extant) Palestine, namely, Gaza, East Jerusalem and the West Bank.

First, throughout the 1990s, the Gaza Strip in particular fell under increasingly onerous closures,⁷⁵ cutting off its population from accessing the remaining territories as well as Israel itself.⁷⁶ Such closure is now permanent and results from the paradoxical conflation of Israel's 'disengagement' from Gaza in 2005, bolstered by its total control over the movement of people, electricity, water and goods there.⁷⁷ Thus, while Israel continues to hold the ultimate control over life and death in Gaza as per classic disciplinary registers of power, it balances this with a minimal biopolitical oversight, producing a population that is 'perpetually debilitated, and yet alive'⁷⁸. Israel's responsibility at this

⁷³ Orna Ben-Naftali, 'Zone', Ben-Naftali et al., *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press, 2019) 516-547, 520-521.

⁷⁴ See 'Palestine's West Bank Archipelago' (2017) *Brilliant Maps*, online at <https://brilliantmaps.com/palestine-archipelago/>. Please note that this map does not include the Gaza Strip or East Jerusalem as parts of the occupied Palestinian territories. Weizman, an architect by training, also notes how the Wall produces 'barrier archipelagos'. Eyal Weizman, *Hollow Land: Israel's Architecture of Occupation* (London, Verso, 2007), ch 6.

⁷⁵ According to Berda, closure was first used as a consistent policy 'in Gaza in the wake of the First Intifada and during the outbreak of the First Gulf War.' Yael Berda, *Living Emergency: Israel's Permit Regime in the Occupied West Bank* (Stanford University Press, 2018), 37.

⁷⁶ Especially see Sara Roy, 'De-Development Revisited: Palestinian Economy and Society Since Oslo' (1999) 28(3) *Journal of Palestine Studies* 64-82; and Orna Ben-Naftali, 'Violence', Ben-Naftali et al., *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press, 2019), 431-447, 441-444.

⁷⁷ For example, see 'Gaza blockade: restrictions eased but most people still locked in' (2020) UN Office for the Coordination of Humanitarian Affairs, online at: <https://www.ochaopt.org/content/gaza-blockade-restrictions-eased-most-people-still-locked>

⁷⁸ Jasbir K. Puar, *The Right to Maim: Debility, Capacity, Disability* (Duke University Press, 2017). Of course, given that Gaza is one of the most densely populated spaces on earth with an extremely fragile health infrastructure, Covid-19 presents a particularly challenging threat to the population. Especially see Bram Wispelwey and Amaya Al-Orzza, 'Underlying Conditions', (2020) *London Review of Books Blog*, online at: <https://www.lrb.co.uk/blog/2020/april/underlying-conditions>.

point is not to the Gazans as constituents or even as precarious lives under its control;⁷⁹ it rests solely on the need to maintain an element of international legitimacy. Life in Gaza then eludes the hope of statehood or any kind of knowable future. Instead, resilience at its most extreme must be the only antidote to this form of Israeli rule as ungovernance.⁸⁰

Part of the reason that such a situation of ‘abandonment’ can persist is through Israel’s successful characterisation of Gaza as ‘ungovernable’,⁸¹ not as a result of earlier Israeli settler colonialism between 1967-2005, but due to seemingly inherent⁸² and problematic qualities of Gazans themselves.⁸³ Ironically, such ‘ungovernability’ seems to require reformulations of governance,⁸⁴ even when everyone knows they will fail. For Israel, this means an abdication of governance as responsibility, coupled with an impressive array of tools to control life and death across the Strip. In his study of Iraq, Dewachi notes how ‘populations and territories are increasingly governed through ungovernance.’⁸⁵ This combines often extreme capabilities of intervention and control untethered from any sense of responsibility to the target population through a series of policy moves intended to build institutions that nevertheless fail time and time again. Not only Iraq and Gaza, but also Libya, Syria and Lebanon are examples from a region beset by these practices of ungovernance.

Second, although Palestinians maintain claims to East Jerusalem as their future capital,⁸⁶ its designation under Oslo as a ‘permanent status’⁸⁷ issue has served to leave unchallenged the status quo of Israel’s annexation of the city in 1980.⁸⁸ Starting in the 1990s with ever more onerous closure policies,⁸⁹ building restrictions and rezoning, settlement and bypass road construction, along with the

⁷⁹ ‘Israel has no interest in the Palestinians as its own subjects and has therefore withdrawn all disciplinary and biopolitical arrays that were deployed in the first years of the occupation’. Hagar Kotef and Merav Amir, ‘Between Imaginary Lines: Violence and its Justification at the Military Checkpoints in Occupied Palestine’ (2011) 28 *Theory, Culture & Society* 55, 60.

⁸⁰ Gordon captures this sense of living after biopower, when he argues that it ‘is not only that the Palestinian body is no longer considered to be an important object of management and that Israel has abandoned its objective of constituting the occupied inhabitant as an economically efficient subject, it has also adopted a series of policies which in effect weaken and destroy the Palestinian body.’ Gordon (n 55), 41.

Indeed, under the separation principle the Palestinian body is no longer conceived to be an object that needs to be meddled with and shaped.

⁸¹ Omar Dewachi, *Ungovernable Life: Mandatory Medicine and Statecraft in Iraq* (Stanford University Press, 2017), 7.

⁸² *Ibid.*, 9.

⁸³ Marei et al (n 11), 1.

⁸⁴ Ben-Naftali (n 30), 523-4.

⁸⁵ Dewachi (n 80), 7.

⁸⁶ Notably as stated in the political communique to the 1988 declaration of independence, Abdullah (n 16).

⁸⁷ As per Article 5 Oslo I (n 5).

⁸⁸ As per the Basic Law: Jerusalem, Capital of Israel: https://www.knesset.gov.il/laws/special/eng/basic10_eng.htm. This only formalised Israel’s *de facto* annexation of Jerusalem and 28 neighbouring villages through its application of law there two weeks after the end of the June War in 1967. See Ben-Naftali (n 30), 529-530. The municipal area of the city gained through expropriation of Palestinian lands expanded from 6.5 km² to 71 km²: Imseis (n 57), 19.

⁸⁹ For example, according to Gordon, in ‘1994 the Occupied Territories were under closure for 43 days, in 1996 the territories were closed-off for 104 days, and in 1997 for 87 days.’ Gordon (n 55), 39.

erection of the wall in 2003, the overwhelming majority of Palestinians have been denied access to their capital.⁹⁰ According to Khalidi, the

new regime of control Israel gradually put in place over a decade and a half, by 2006 the 3.6 million Palestinians of the occupied territories, who formally could move relatively freely to Israel, to Jerusalem, and between the West Bank and Gaza Strip, were in a fundamentally different situation. Those in the West Bank had been confined to a patchwork of isolated cantons in the 17 percent of its territory administered by the PA set up under provisions of the Oslo and subsequent “self-government” arrangements.⁹¹

Thus, it was Oslo’s promise of eventual resolution of the status of Jerusalem that has allowed an indefinite status quo of Israeli domination to foreclose Palestinian statehood centred on Jerusalem as the capital.

Third, the most complex jurisdictional regime to result from Oslo was the division of the remainder of the West Bank into a series of isolated bantustans situated near settlements and their related infrastructure. The PA would take ‘full’ responsibility for 26 percent of the Palestinian population in Area A, which accounts for 18 percent of the land mass. Any expansion beyond these ‘borders’ is very challenging within the web of the Kafkaesque Israeli permit regime.⁹² The remaining areas were divided into Area B (under ‘joint’ Israeli and Palestinian control) which comprises 70 percent of the population and accounts for 22 percent of the territory and the remainder in Area C, which contains four percent of the population and is under full Israeli control.⁹³ Al-Khalil/Hebron as the site of the first settlement activity, came under its own particular regime with the city divided into two zones that provide privileged access to the city’s small settler population in the heart of the old town.⁹⁴ Settlers residing in the West Bank come under direct Israeli civilian control and enjoy the benefits of high quality infrastructure, security and easy access to Israel proper through a series of bypass roads and tunnels. The result of this apartheid arrangement⁹⁵, has been the selective separation of Israel from the West Bank (excluding East Jerusalem) and the Gaza Strip.⁹⁶ It has also resulted in fragmentation of

⁹⁰ Andy Clarno, ‘A Tale of Two Walled Cities: Neo-Liberalization and Enclosure in Johannesburg and Jerusalem’ (2008) 19 *Political Power and Social Theory* 159-205.

⁹¹ Khalidi (n 61), 201-202.

⁹² Ben-Naftali (n 30) 541-542.

⁹³ *Ibid*, 525.

⁹⁴ *Ibid*, 526-528.

⁹⁵ Especially see John Dugard and John Reynolds, ‘Apartheid, International Law and the Occupied Palestinian Territory’ (2013) 24 (3) *European Journal of International Law* 867-913, who compare the situation in Palestine to that of South Africa; and Sayed, who argues that the ethnic distinction (between Jews and Arabs) has served as the underlying framework for governing the entire territorial space of Mandate Palestine since 1967. Sayed (n 6), 88.

⁹⁶ Most notable was the significant change that occurred in the labour market. After Israel’s occupation began in 1967, there was a steady rise in the integration of Palestinian workers in the Israeli labour market, which accounted for a large portion of household income. For example, by 1977, ‘almost one-third of workers from the West Bank

Palestinian lands, prey to continual threat by the extraction of natural resources,⁹⁷ a significant rise in settlement numbers along with the widespread practice of constraining and/or demolishing Palestinian rural and urban development and extensive restrictions on movement.⁹⁸ Thus, ‘one could conclude that the Oslo Accords presided not over a peace process but over an acquisition process.’⁹⁹ More broadly, Oslo’s lofty rhetoric of statebuilding and development ushered in daily practices to the very contrary. The Oslo regime thus constitutes an elaborate form of de-developing the territory.¹⁰⁰

5. How do we read the Oslo Regime? As governance, as misgovernance, as ungovernance?

Given the variegated jurisdictional regime at play across Palestine as well as the number and diversity of governance actors, it is impossible to note any consistent practice of ungovernance. Politically too, it is important that in acknowledging such variation, we do not lose sight of the often-unliveable conditions of life under Israeli rule by abstracting or normalising its (ir)rationalities. Yet while noting such caveats, this article seeks to advance a preliminary understanding of ungovernance by linking those literatures considered above with a range of recent contributions from geography and anthropology which explore a variety of quotidian realities of Palestinian life as possible examples of the mundane practices of misgovernance that collectively contribute to ungovernance.¹⁰¹ Although many of these studies examine micro practices of Israeli (mis)rule, most of them share two remarkable similarities. First, the key theorist relied on in many of these accounts is Foucault, both to characterise Israeli ‘spectacular’ violence as a form of disciplinary power that often sits alongside biopolitical accounts about Palestinian fragility.¹⁰² Yet given the impetus behind biopower as being to ensure the productivity of populations,¹⁰³ we need to supplement the optics of disciplinary and biopolitical power with what I suggest here as ungovernance, or the radical embrace of irresponsibility and failure.

Second, while for many scholars, it is a political obligation to take note of spectacular, fast episodes of Israeli settler colonial violence, they then move on to explore the rationale behind and

were employed in low-skill construction and agricultural jobs in Israel.’ Berda (n 74), 81. From the 1990s, such participation plummeted as did the Palestinian economy as a result. Particularly see Roy (1999).

⁹⁷ Particularly see Mark Zeitoun, *Power and Water in the Middle East: The Hidden Politics of the Palestinian-Israeli Water Conflict* (I. B. Tauris, 2008).

⁹⁸ See Ben-Naftali (n 30), 543-546.

⁹⁹ Turner (n 61), 495.

¹⁰⁰ Toufic Haddad, *Palestine Ltd.: Neoliberalism and Nationalism in the Occupied Territory* (I. B. Tauris, 2016).

¹⁰¹ Particularly see Berda, Calis, Dewachi, Hammami, Handel, Joronen and Griffiths, Kotef and Amir, Rose, Stamatapoulou-Robbins as discussed throughout.

¹⁰² For example, see Ariel Handel, ‘Exclusionary surveillance and spatial uncertainty in the occupied Palestinian territories’, Elia Zureik et al (eds), *Surveillance and Control in Israel/Palestine: Population, Territory and Power* (Routledge, 2010), 259-275.

¹⁰³ Michel Foucault, *The History of Sexuality: An Introduction, volume I* (Penguin, 1978), Part Five.

effects resulting from violence that is variously termed as slow, ‘procedural’¹⁰⁴ or ‘invisible’.¹⁰⁵ While not negating the pain and suffering caused by the violence of torture or of extermination, both of which are commonly used by Israel, it is the insidious effects of slow violence that can kill not only a (national) body, but its very soul. Berda for instance talks of ‘despair’.¹⁰⁶ For me, it was bearing witness to the annihilation of dignity that I found most troubling during my time in Palestine. This latter type of violence can either arise from Israeli control that often manifests as misgovernance (such as the lack of house permits granted or lack of access to water) or Israeli ungovernance more generally as a tool of disruption and disorientation. Thus, Palestinian life is punctuated by a rhythm of misgovernance and ungovernance as well as by fast and slow violence.

What many authors stress is how such violence is never predictable or knowable. For example, Kotef and Amir note how liberal subjects can identify, decipher and rationally act before a knowable law. This is not the case for Palestinians, for whom the ‘law is always-already uninterpretable.’¹⁰⁷ This may arise from a range of misgovernance practices such as laws that are untranslated, inaccessible or contradictory. Most simply, we can construe misgovernance as ‘bad governance’, which strays from the liberal ideal of transparent and accountable government. The term appears regularly in economics and international studies literatures which point to ‘a breakdown and decay in oversights [sic.] functions of the government, a weak power-participation interface, lack of institutional capacity, corruption and lack of transparency within government institutions.’¹⁰⁸ Misgovernance is often linked with ideas of state corruption and incapacity, ideas which typically are not associated with Israel, which prides itself on being the ‘only democracy in the Middle East’. Here in this section, I map the misgovernance practices of military non-mapping, the use of the ‘imaginary line’ at checkpoints along with (forever pending) house demolitions to demonstrate how their resulting ‘effective inefficiency’¹⁰⁹ is productive of ungovernance.

While Oslo has enabled Israel to scale back on much of the mundanity of everyday governance by contracting out these responsibilities to the PA and foreign donors,¹¹⁰ this has not meant a wholesale rejection of control in its various registers. Most starkly and as mentioned above, Israel has regularly resorted to the use of force, such as its full ‘re’occupation of the West Bank during the second Intifada along with its regular assaults on Gaza, all of which are framed as restoring the status quo of Israeli security through Palestinian insecurity. It is important to note the correlation

¹⁰⁴ Berda (n 74), 128.

¹⁰⁵ Orna Ben-Naftali, ‘Violence’, Ben-Naftali et al., *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press, 2019), 431-447.

¹⁰⁶ Berda (n 74), 109.

¹⁰⁷ Kotef and Amir (n 78), 66.

¹⁰⁸ Monika Barthwal-Datta, ‘Securitising Threats without the State: A Case Study of Misgovernance as a Security Threat in Bangladesh’ (2009) 25 (2) *Review of International Studies* 277-300, 285.

¹⁰⁹ Berda (n 74), ch 4.

¹¹⁰ Miller (n 3), 377; and Weizman (n 73), 157.

between the radical scaling back of Israeli everyday governance juxtaposed with far higher rates of killing. For example, ‘since the eruption of the second intifada Israelis have killed almost twice as many Palestinians as they killed in the preceding 34 years’.¹¹¹ We can follow this trend more recently as well through the way in which assaults on Gaza in particular seem to become more and more unrestrained with no regard for distinctions between civilian and combatant, adult or child, combatant facility or hospital.¹¹² Slow and less spectacular forms of violence continue too in practices such as house demolitions, settlement construction, road blocks and checkpoints.

Yet in addition to these forms of recognisable (mis)rule, I want to note here a range of misgovernance practices aimed at deliberately disorienting a population from its ruler in a gesture of ungovernance. Berda’s study of the permit system, for example, provides a wonderfully rich account of misgovernance or ‘efficient inefficiency’ that is facilitated by a vast bureaucratic network of emergency regulations and discretion. She argues that the

greater the inefficiency in the bureaucratic system, the overlapping authorities, conflicting decisions, forgeries, and secret pathways across the separation wall, the more effective it became in creating uncertainty for Palestinians and instability for Israelis in the permit regime. Effective inefficiency generated a permanent crisis that made those whose expertise was in combatting the security threat – clerks, military commanders, Shin Bet captains, security corporations, and academics – more powerful with the ability to wield more discretion.¹¹³

When we first encounter these misgovernance practices, their irrationality jars with what we expect from a capable, well-resourced governing power such as Israel. Yet when we bring them together through the lens of ungovernance, their meaning becomes clearer as a set of policies ushering in the failure not only of Palestinian statehood, but more acutely, of Palestinian society itself. Thus, while the rhetoric of statehood and a range of policies to facilitate it have blossomed under Oslo, its actual realisation remains more elusive than ever. By 2013, even former Palestinian Prime Minister and self-professed architect of Palestinian recognition, Salam Fayyad declared that statebuilding was ‘a success that failed: It led nowhere’.¹¹⁴ Why then do Palestinians and Israelis keep talking about peace processes and statehood? Although it is beyond the scope of my discussion to address these broader political issues, here I suggest that ungovernance under Oslo helps us to understand this reflex.

First, let us begin by thinking about checkpoints. Typically, Handel suggests that we can understand checkpoints either as a form of colonial surveillance or as an inclusive, biopolitical tool.¹¹⁵

¹¹¹ Gordon (n 55), 27.

¹¹² For example, see fatality statistics documented by Btselem: <https://www.btselem.org/statistics>.

¹¹³ Berda (n 74), 124.

¹¹⁴ Persson (n 49), 446.

¹¹⁵ Handel (n 101) at 261-264.

The former approach aims to control and limit as per classic disciplinary registers, whereas the latter sees the (liberal) state seeking to study populations to enhance their productivity:

the state needs the subjects to pass through as many inspection points as possible... The state requires friction points with the population in order to study, follow, and embrace. The rationale is one of free movement—but one that needs coordination and cooperation with the authorities.¹¹⁶

Handel suggests that neither logic is the dominant approach across the West Bank. Instead, he argues that the third type of surveillance—exclusion *per se*—underpins a relationship of abandonment and neglect.¹¹⁷ This is illustrated through the fact that most roadblocks are not well maintained. Their location and timing often seem completely arbitrary to Palestinians so that it is better to regard them as ‘pieces of theatre’¹¹⁸ which choke Palestinian movement and social interaction. Although such a (mis)governance practice might seem incompetent and inefficient, Handel counters that such a technique is very efficient in producing the main purpose behind the checkpoint—uncertainty.¹¹⁹ Checkpoints then are best seen not as a standard and efficient regulatory tool, but as a sophisticated practice not only to limit movement,¹²⁰ but more importantly, as spaces of ‘unpredictability and petty cruelties’; they engender ‘a constant state of ambiguity and thus a population in a perpetual state of anxious anticipation.’¹²¹

Even when Palestinians are ‘checked’ at ‘check’points, this can entail absurd encounters between the occupier and subject population, as exemplified through the practice of the ‘imaginary line’. In their study, Kotef and Amir consider how even in the face of technological sophistication, Israeli soldiers have continued at random times and locations to resort to the ‘imaginary line’ for controlling individuals seeking to pass through.¹²² This is a practice which requires Palestinians to line up behind a line they cannot see. As the line is invisible, it is impossible for Palestinians to comply with its dictates; failure is inevitable. What is the purpose then of using the line within a system of checkpoints whose purpose is rarely to ‘check’ individuals in the interests of security? According to Kotef and Amir,

¹¹⁶ Emphasis in original, *Ibid*, 264.

¹¹⁷ *Ibid*, 264-266.

¹¹⁸ *Ibid*, 268.

¹¹⁹ *Ibid*, 269. This is also pointed out by Rema Hammami, ‘On (not) suffering at the Checkpoint: Palestinian Narrative Strategies of Surviving Israel’s Carceral Geography’ (2015) 14 *borderlands* 1, at 4. For a study of the uncertainty arising from Palestinian identity documents, see Tobias Kelly, ‘Documented lives: fear and the uncertainties of law during the second Palestinian *intifada*’ (2006) *Journal of the Royal Anthropological Institute* 12(1) 89-107.

¹²⁰ Handel (n 101), 269.

¹²¹ Julie Peteet, *Space and Mobility in Palestine* (Indiana University Press, 2017), 119.

¹²² *Ibid*, 61.

Israel has a real interest in a specific subject position, to which the failure of the disciplinary process is crucial. This failure enables the construction of the persons having to go through the checkpoints as subjected to a foreign power, a foreign omnipotent sovereign, to which they can never have access and, potentially speaking, for whom they are the enemy. In other words: it produces them as occupied subjects, namely, subjects who are never included within the power to which they are subjected (as opposed to the citizen), not completely expelled from it (as opposed to the foreigner, or even more so, the enemy). The occupied subject is, thus, in an ever-lingering state of potentiality...¹²³

Palestinians encounter Israeli checkpoints in two contradictory registers. On the one hand, in ignorance, through the regular resort to the use of Hebrew language signs or a lack of clear instructions, such as an invisible line.¹²⁴ Here, uncertainty is productive of failure. On the other hand, individuals appear at checkpoints with an abundance of knowledge assumed so that it is not even necessary to demarcate lines on the ground; each member of the Palestinian population present at the checkpoint already embodies and performs deferential respect for the soldiers and their hidden or non-existent lines.¹²⁵

Another seemingly pointless form of governance by Israel is the practice of mapping the intricate spaces of Palestinian homes carried by out Israeli soldiers with no warning at any time of the day or night. While such procedures could be expected to provide important intelligence, much of the time such maps remain unused. They are often not archived and are not passed on to army intelligence.¹²⁶ According to one former Israeli soldier, the ‘mappings were designed to make the Palestinians feel that we were there all the time...I had the pictures [I had taken] for around a month...[N]o commander asked about them, no intelligence officer took them...At one point I deleted the pictures, I realized it was all a joke.’¹²⁷ What is the point then of such operations? As in the case of the imaginary line, they are a way of disciplining Israeli recruits into the role of rulers, but also of instilling a sense of ever-possible violation on the part of Palestinians as subjects.¹²⁸ Again, the failure to store these maps and use them wisely might appear to be shortsighted or a form of ineptitude or misgovernance. It is quite the opposite though. This example of misgovernance forges divisions

¹²³ *Ibid*, 64. Also see Kivalnd’s wonderful consideration of Haiti under occupation as a form of statelessness, where occupation not only entails foreign domination, but also a sense of being too busy – too occupied – as a result of an excess of diverse governance actors and policies. Chelsey L Kivland, ‘Unmaking the State in “Occupied” Haiti’ (2012) 35 *PoLAR: Political and Legal Anthropology Review* 248, 252.

¹²⁴ Kotef and Amir (n 78), 66-67.

¹²⁵ *Ibid*.

¹²⁶ M Huss, ‘Mapping the Occupation: Performativity and the Precarious Israeli Identity’ (2019) 24 *Geopolitics* 756, at 757.

¹²⁷ Breaking the Silence, ‘Pictures at 3AM’, quoted in H Viterbo, ‘Future-Oriented Measures’, Ben-Naftali et al, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press, 2019), 118-140, 136.

¹²⁸ *Ibid*, 761.

between occupier and occupied in the most intimate spaces without any rational regulatory effect. Instead, confusion, fear and seeming failure here are productive of ungovernance.

Alongside an unrelenting sense of confusion generated by these and other practices, many scholars also stress the powerful effect of a sense of perpetual precariousness that informs Israeli rule. Rather than be a simple form of deprivation, however, such as knowing that food or shelter is always scarce, precariousness arises from a sense that nothing in the relationship between Palestinians and Israelis is solid or knowable. Like the imaginary line, the rules in some sense are beside the point. The driver instead is to live in a state of perpetual uncertainty - or transition - where governance morphs into ungovernance.

This is best illustrated through the Israeli practice of pending house demolitions across the West Bank (including East Jerusalem).¹²⁹ As many Palestinians living in Areas B, C, Hebron, the seam zone of the Wall and especially East Jerusalem find themselves under Israeli jurisdiction in relation to matters of housing, they are required to possess a valid permit before carrying out any house renovations or construction.¹³⁰ This is essential for a growing population increasingly squeezed on all sides by settlements, the wall and army land requisitions. As it is notoriously difficult to acquire such permits, many Palestinians resort to 'illegal' construction with the significant chance that this will result in an order to demolish the structure. Certain 'unrecognised' villages and buildings have suffered this fate dozens of times and serve as striking examples of what the Israeli state is capable of.¹³¹ Yet, as in the case of house maps misplaced, oftentimes those being served a demolition order might suffer lengthy periods of waiting or never see the order fulfilled. Those in possession of such orders live with the 'simultaneous certainty that something will happen alongside an uncertainty of when.'¹³² This is not due to Israeli incapacity, but again can be seen as a form of misgovernance in an attitude of ungovernance. Receiving an order elicits what Shalhoub-Kevorkian calls 'demolition before the demolition',¹³³ turning homes into houses. This first 'affectual' demolition is in many ways far more powerful than its later embodiment as it creates a population prey to anxiety and fear even in the absence of any manifestation of overt, physical violence.¹³⁴

¹²⁹ For an overview, peruse the website of the Israeli Committee Against House Demolitions: <https://icahd.org/>.

¹³⁰ This is also the case for certain 'unrecognised' villages within Israel, such as al-Araqeeb in the Naqab/Negev in southern Israel, which has been demolished several times.

¹³¹ Some of these places are iconic and have become sites of regular political tourism. I myself took my students to the Bedouin villages of Susia (in the Hebron Hills, Area C of the West Bank) with the assistance of local civil society groups. For some background on house demolitions, particularly see the work of the Israeli Committee Against House Demolitions, *Breaking the Silence* and *Al-Haq*.

¹³² Mikko Joronen and Mark Griffiths, 'The affective politics of precarity: Home demolitions in occupied Palestine' (2019) 37 *EPD: Society and Space* 561, 564.

¹³³ Quoted in *Ibid*, 565.

¹³⁴ *Ibid*, 566.

Collectively, all of these practices sketched above produce conditions contrary to social flourishing, which we tend to understand as a key aim of good governance. For Ben-Naftali, it ‘is socially distorted because it prevents Palestinians from engaging in routine socioeconomic, personal, and political activities that comprise life. It is mentally distorted because of the sense of disorientation, displacement, anxiety, and uncertainty experienced by the Palestinians caught in its violent orbit.’¹³⁵ As it is impossible to live with any sense of certainty, this too is a form of violence, where waiting itself becomes a technique of (un)governance.¹³⁶ For Calis, this is ‘sociocide’—a form of disengaged rule that breaks down the most vital fibres of a community.¹³⁷ She notes how ‘such techniques are applied to an entire population through erratic military policies that disrupt systems of social reproduction and that work to break down frames of self and social reference.’¹³⁸ Joronen echoes her analysis by arguing that

These spaces of suspension operate as sites of administrative and juridico-political performances, which govern by stalling the implementation of Palestinian rights, so creating spaces that theatrically keep the state apparatuses operative in a manner seemingly peculiar to liberal states.¹³⁹

Thus, while Israel is capable of acting as an exemplary (liberal) governor of the territory and its people, its various gestures of misgovernance are the result of radical, illiberal disengagement with its Palestinian subjects that we can understand as ungovernance.

6. Conclusion

While the case of Palestine and its failed statehood inevitably possesses unique qualities, many of the patterns of domination and abnegation highlighted here are common across the region and beyond. Prey to profound neglect as well as penetration, the Middle East is a region seemingly incapable of governing itself.¹⁴⁰ It is a place where subject populations are forever in need of guidance and constraint. Here we have seen how the irony of Palestinian self-rule under the Oslo regime not only radically fragmented governance over the territory, but that it has facilitated a mode of Israeli rule we can understand as ungovernance, where both Israeli and Palestinian failure are markers of success. While I have not

¹³⁵ Ben-Naftali (n 30), 546.

¹³⁶ Mandy Joronen, ‘Spaces of waiting: Politics of precarious recognition in the occupied West Bank’ (2017) 35 *Environment and Planning D: Society and Space* 994. Also see Peteet (n 120), ch 4.

¹³⁷ Irene Calis, ‘Routine and rupture: The everyday workings of abyssal (dis)order in the Palestinian food basket’ (2017) 44 *American Ethnologist* 65, 74.

¹³⁸ *Ibid.*

¹³⁹ Joronen (n 135), 995.

¹⁴⁰ For Marei et al (n 11), ‘The politics of governing the “ungovernable” de-centers the state, and requires it to morph into multiple guises and integrate into increasingly elaborate global networks. This reconfiguration produces new spaces of encounter and arenas of contestation...’ at 3.

offered a definition of ungovernance per se, I have suggested that the various micro practices of misgovernance explored here are illustrative of Israel's 'effectively inefficient' rule over Palestine since the Oslo regime. Collectively these speak to a form of rule – ungovernance - that enables the unravelling of responsibility along an endless path that moves further and further away from closure, whether understood as 'peace', as Palestinian self-determination, or most crazily of all, as one state for all of its people flourishing between the Mediterranean and the Jordan.