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The jurisprudence of elimination: starvation and force-feeding of Palestinians in Israel's highest court

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Abstract

This paper assesses the functioning of law and legal institutions in Palestine/Israel through the lens of settler colonialism by analysing two thematically interconnected decisions issued by the Supreme Court of Israel, the first involving the starvation of besieged Palestinian civilians and the second involving the force-feeding of Palestinian prisoners. Following a discussion regarding the role of law in settler colonialism, it proceeds to argue that the Court enabled, legitimised and legalised state-sanctioned violence that targeted the native Palestinian population by and through a jurisprudence of elimination in order to facilitate the attainment of Israeli settler-colonial objectives. By so doing, the paper provides further evidence in support of the appropriateness of settler colonialism as a theoretical framework for the case of Israel, including in legal matters.

Keywords: international law; settler colonialism; Palestine/Israel; human rights; Supreme Court; indigenous studies

1 Introduction

Since the establishment of the State of Israel in 1948, Palestinians have petitioned the Supreme Court of Israel with the hope of obtaining the Court's protection from state-sanctioned violence. Decade after decade, the Court not only failed to offer such protection, but also 'rationalized virtually all controversial actions of the Israeli authorities, especially those most problematic under principles' of international law (Kretzmer, 2002, p. 8). As a matter of course, Palestinians have been subjected to acts such as extrajudicial killings, illegal deportations, house demolitions, torture and administrative detentions – to name a few – all with the Court's stamp of approval (Sultany, 2007; 2014; Omer-Man, 2017; Ben-Natan, 2019).

Scholars have advanced several explanations for the Court's consistent failure to protect Palestinians from such acts. For example, Yoav Dotan argued that the Court's record might not be as bad as it seems, as the Court may have utilised other methods to 'influence the social environment' in Israel to protect Palestinian rights (1999, pp. 319–320). Similarly, David Kretzmer contended that the Court's ability to pressure state representatives to reach out-of-court settlements, which he referred to as 'the Court's shadow', demonstrated that 'the restraining influence of the Court has been far greater than can be gleaned from its actual decisions' (2002, p. 190). Despite furnishing these supposedly mitigating factors, both Dotan and Kretzmer agree that when it comes to the legal rights of Palestinians, the Court has been far more likely to legitimise their violation than to protect them (Dotan, 1999, p. 357; Kretzmer, 2002, pp. 2–3).

Another way to explain the Court's reluctance to protect Palestinian rights may be derived from the notion that the Court, like other courts around the world, seeks to preserve its own legitimacy in the eyes of the public, particularly by issuing decisions that align with the views of the majority of citizens (Casillas *et al.*, 2011). In the case of Israel, the Jewish majority largely objects to the judiciary's

imposition of limitations on military 'security' measures, which may help to explain why the Court has avoided doing so (Sultany, 2014; 2017; Heller, 2016; Pew Research Center, 2016). The former Chief Justice of the Supreme Court, Aharon Barak, indicated that the Court has sought to align its rulings with Israeli societal norms, stating: 'a judge must give effect to the purpose of the law and ensure that the law in fact bridges the gap between law and society' (2002, p. 35).

An additional explanation for the Court's unwillingness to protect Palestinian rights can be extrapolated from Barak's writings, in which he has asserted that the Court's sole responsibility is 'to protect the constitution and democracy', as he purportedly did during his time on the bench (*ibid.*, p. 55). A fundamental principle that guides the Court as it seeks to protect the Constitution is that 'Israel is the nation-state of the Jewish people' (*Rufeisen v. Minister of Interior*, 1962, pp. 2447–2448; *CEC v. Tibi*, 2003, p. 23; Masri, 2017, p. 388; Basic Law: Israel as the Nation-State of the Jewish People, 2018). This principle, the Court emphasised, represents the very purpose for which Israel was established (*United Mizrahi Bank v. Migdal*, 1995, pp. 277–279, 310–311, 426). Such statements have led scholars who analyse the Court's rulings, including in matters involving Palestinian legal rights, to do so within a nation-state framework of analysis (Smooha, 2002, p. 495; Masri, 2017, p. 389). A key premise of this framework is the recognition that 'exclusive advantages' are offered to the 'ethnic group that the state is associated with' (i.e. Jewish Israelis), while the rest (primarily the Palestinians) do not enjoy the same advantages, including the full protection of the law (*ibid.*, p. 388; Nettelbeck *et al.*, 2016, p. 12). Thus, under this framework, the Court's record vis-à-vis the Palestinians can be attributed to the inherent bias within the Israeli nation state in favour of its Jewish citizens and against Palestinians.

The most recent and explicit attempt to identify and utilise a theoretical framework to assess the Court's rulings in cases involving Palestinian legal rights was undertaken by Mazen Masri. Masri argued that scholars 'need to go beyond the nation-state paradigm' and assess the Court's conduct 'through the lens of settler colonialism', as the latter provides 'relevant insight' into the former (2017, pp. 389, 404). Masri noted that aside from his own paper, which discusses settler colonialism and Israeli constitutional law, only a handful of legal studies 'explore[] the links between settler colonialism and Israeli law' (*ibid.*, pp. 389–390). In that paper, Masri drew primarily on the work of Patrick Wolfe, especially Wolfe's logic of elimination theory.[1]

Indeed, as this paper demonstrates, the theoretical framework of settler colonialism sheds new light on the functioning of Israeli law and legal institutions, and the workings of the Supreme Court specifically, regarding their treatment of the native Palestinian population. The discussion begins with a brief overview of settler colonialism and how law functions in settler-colonial societies. It then assesses the role of the Supreme Court within Israeli settler colonialism by analysing two thematically interconnected cases concerning state-sanctioned violence that targeted Palestinians. In the first, Palestinian elected officials petitioned the Court to demand that the Israeli military refrain from using starvation as a method of warfare against besieged Palestinian civilians who sought refuge in the Church of the Nativity during the Al-Aqsa Intifada in 2002. In the second, several Palestinian and Israeli non-governmental organisations petitioned the Court to challenge the legality of a law that authorises district court judges to issue force-feeding orders against hunger-striking Palestinian prisoners. Through and in the course of that assessment, the paper argues that the Supreme Court of Israel functions as an agency of the settler-colonial state it serves and is guided by a jurisprudence of elimination that allows

[1]Masri also utilised a theoretical framework that was developed by Anthony Anghie in his discussion regarding settler colonialism and the law. Anghie argued that legal doctrines formed in colonial societies were premised on the notion that law ought to facilitate the transformation of uncivilised societies into civilised ones. A prerequisite for such a transformation was the law's identification of native populations as 'other[s]' who cannot enjoy the law's full benefits until their 'transformation' is complete. Although this framework is useful in assessing the functioning of law in colonialism, it is less helpful in the context of settler colonialism. The reason is that while the objective of colonialism (per Anghie's argument) is the incorporation of native populations into European civilisation, once their 'transformation' has been completed, law in settler colonialism seeks the permanent exclusion – indeed, the elimination – of native populations, not their 'redemption' (Anghie, 2004, pp. 3–4, 145–146; 2006, pp. 393–394; Veracini, 2011, p. 1; Masri, 2017, p. 393).

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it to enable, legitimise and legalise Israel's eliminatory state conduct that targets Palestinians. That jurisprudence of elimination, the paper further shows, entails the utilisation of various jurisprudential techniques that allow the Court to sanction Israel's pursuit of its settler-colonial objectives, the most important of which include (1) rendering factual circumstances in a way that minimises their severity; (2) advancing only nominally plausible legal reasoning that relies on a distorted interpretation of international law; and (3) presenting extra-legal justifications in an effort to bolster the dubious bases of its rulings, particularly the contention that Israel is waging a war against lawless terrorists rather than against the indigenous Palestinian population striving to stave off its own elimination. As that characterisation indicates, the jurisprudence of elimination is permeated by denial, the repudiation of facts and the false characterisation of the normative aims of the law, which are constitutive elements of settler colonialism.

2 Settler colonialism, the logic of elimination and the law

Settler colonialism, as defined by Lorenzo Veracini, is a 'distinct form of colonization' that is premised on the 'displacement and domination' of the native population of a given territory by a foreign settler society (2015, pp. 34, 52, 106; 2017). Patrick Wolfe, whose pioneering work serves as the basis for our contemporary theoretical conceptualisation of settler colonialism, identified the key features of this settler-colonial enterprise, describing it as 'an inclusive, land-centered project that coordinates a comprehensive range of agencies … with a view to eliminating indigenous societies' (2006, p. 393). In his seminal studies, Wolfe introduced 'the logic of elimination', which represents the settlers' unwavering commitment – as demonstrated through their actions, policies and discourse – to seize as much land as possible, to purge from it as many of the indigenes as possible and to establish on the purged land their settler colonies (*ibid.*, p. 388; 1999, p. 27).

The logic of elimination, Wolfe clarified, takes a 'variety of forms' and is shaped by the social, political and historical circumstances of each colony (2006, p. 401). These forms represent either the 'positive' or the 'negative' dimension of the logic of elimination. The negative dimension involves the physical elimination of the indigenes and is manifested in the settlers' quest for 'the dissolution of native societies' through crude eliminatory actions like massacres, rapes and expulsions that directly target the indigenes' bodies (*ibid.*, p. 388). These actions usually take place during the initial invasion and conquest stages, when the settlers seek to expand their colony through the conquest of additional indigenous land, or amid the settlers' quelling of rebellions waged by the natives. The negative dimension represents the primary means by which settlers violently dispossess native communities from the bulk of their land and significantly reduce the number of indigenes who live in their newly established states (Johnston and Lawson, 2005, p. 362; Wolfe, 2018, pp. 347–348).

Positively, the logic of elimination manifests itself through an array of tightly connected executive, legislative and judicial measures that supplement, and gradually take primacy over, the extralegal violence upon which settler colonies are established (Wolfe, 2006, p. 388; Veracini, 2010, pp. 75–77). These measures seek to retroactively absolve the settlers' violent dispossession of the natives, complete their usurpation and cement the subjugation of the indigenes who survived the initial onslaught (Zureik, 2016). To this end, policies, legislation and juridical techniques that enable that goal are gradually introduced by the settlers (Veracini, 2010, p. 66; Erakat, 2019). These 'positive' measures are classified within the theoretical framework of settler colonialism as part and parcel of the logic of elimination because they represent how settlers enlarge, consolidate and secure the spoils of their invasion, including by 'shatter[ing] and break[ing] up [the pre-invasion] social existence' of indigenous communities (Moses, 2004; Shaw, 2010, p. 5).

As this stance implies, the theories that underpin settler colonialism and genocide are closely connected, as both acknowledge that the destruction of a social group is often facilitated by means other than direct physical elimination, thus making their classification as eliminatory conceptually coherent (Wolfe, 2006, pp. 402–403; Docker, 2008, pp. 94, 98).[2] Indeed, as A. Dirk Moses noted, Raphael

[2]See Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Art. II.

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Lemkin, the architect of the Genocide Convention, himself implied that 'genocide is intrinsically colonial and that therefore settler colonialism is intrinsically genocidal' (2004, p. 27). Walter Hixson affirmed Moses's finding and explained that 'part of the reason the G-word' is largely absent from the discourse on colonialism is that the 'Eurocentric genocide convention established a framework singling out the Holocaust while obscuring the histories of colonial [and settler-colonial] genocide' (2013, pp. 18–19). Acknowledging their shared characteristics while emphasising the distinctiveness of settler colonialism, Wolfe suggested 'structural genocide' as an articulation that incorporates the manifold manifestations of the logic of elimination – including those unrecognised by the convention – and identifies them as the preeminent elements of settler-colonial societies (2006, p. 403). This articulation embodies the centrepiece of Wolfe's argument: settler colonialism is 'a structure, not an event'; it is a comprehensive, complex and multi-faceted system that methodically 'destroys' native societies in order to 'replace' them (1999, p. 163; 2006, p. 388).

As the foregoing discussion indicates, the positive dimension of the logic of elimination is usually manifested through the conduct of the executive, legislative and/or judicial branches of settler-colonial states. Historically, to use well-known examples, the international law doctrines of *terra nullius* and discovery – which were ultimately recognised as 'legal fictions' in the settlers' own jurisprudence – were introduced in places such as Australia and North America to officially deny the recognition of pre-existing indigenous sovereignties and native property rights (Wolfe, 1999, p. 27; Robertson, 2005, p. 72). These doctrines were premised on the factual 'denial of the very existence of indigenous peoples as [right-bearing] human societies' and on the legal sanctioning of the make-believe 'idea that land invaded and taken over by [settlers may legitimately] be considered' unoccupied and ownerless, and thus ripe for discovery, occupation and the establishment of settler sovereignties (Russell, 2006, pp. 8, 40).

Mirroring settler colonialism elsewhere, shortly after the Zionist conquest of Palestine and the establishment of the settler-colonial state, the Israeli government enacted a 'series of laws chiefly aimed at justifying' and legalising its foundational violent dispossession of the indigenous Palestinian Arab population, and at providing the Israeli government with 'extensive powers to continue expropriating land that still remained in Arab hands' (Jiryis, 1976, pp. 82–87). Principal among these expropriation laws was the Absentees' Property Law of 1950, which had a dual function. First, it retroactively sanctioned the expropriation of land and property belonging to more than 750,000 Palestinians who were ethnically cleansed by the Zionists in 1948 (Lustick, 1980, p. 174; Pappé, 2007). Second, it legalised the expropriation of more than 1,000,000 dunums (one dunum is equal to 0.247 acres) of land owned by Palestinians who survived the ethnic cleansing and remained, for various reasons, within Israel (Kimmerling, 1983, p. 140). The latter was accomplished by the law's authorisation of the state's Custodian of Abandoned Property to expropriate the land of Palestinians who 'vacated [or were vacated by Zionist forces from] their homes during the war, regardless of whether they returned' to their homes, remained in Israeli-controlled territories or became Israeli citizens (Cohen, 2000, p. 62; Forman and Kedar, 2004, p. 815). As a result, the law – which presently serves as the legal basis for the expropriation of Palestinian property in East Jerusalem – created a particular group of internally displaced and dispossessed Palestinians, commonly referred to by the term 'present-absentees' (Robinson, 2013, p. 47; Hasson, 2015). This oxymoron, viewed through the lens of settler colonialism, embodies the same logic upon which the legal fictions of *terra nullius* and discovery were based, namely the denial that a right-bearing native Palestinian population exists on the conquered land, and the legal sanctioning of the apocryphal idea that the expropriated land has been abandoned by its owners and is thus available for expropriation and settlement.

As previously discussed, the positive dimension of the logic of elimination also manifests itself through oppressive, legally backed governmental measures designed to secure settler usurpation. These measures represent 'the site-specific workings of the varied local expressions of the settler drive to eliminate native territoriality' and exhibit the coaction of state organs that are tasked with their implementation (Wolfe, 2016, pp. 269–270; 2018, pp. 347–348). The ubiquity of such 'positive'

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manifestations of the logic of elimination in settler colonialism, and their dominant role in its construction, has resulted in their identification as 'an organizing principal of settler-colonial' societies (Wolfe, 2006, p. 388; Veracini, 2010, p. 10). The settlers' strategic shift from warfare-based to lawfare-based elimination thus transforms settler law and legal institutions as they are increasingly tasked with enabling eliminatory conduct, ensuring the perpetual subjugation of the natives and enshrining settler privilege under the law (Chesterman and Galligan, 1997; Elkins and Pedersen, 2005; Comaroff and Comaroff, 2006). Utilised in such a manner, settler-colonial legal systems begin to 'embrace[] and envelope[]' the indigenes in a 'suffocating hold' as they prescribe and permit the implementation of measures designed to control, weaken, fragment and marginalise indigenous communities (Shihade, 2012; Reynolds, 2017, p. 38). The accumulated effects of the positive dimension of the logic of elimination are therefore 'indelibly linked' to its negative dimension, as both are implicated – directly and indirectly – in the destruction of the pre-invasion social existence of native populations (Moses, 2004; Shaw, 2010; Nielsen and Robyn, 2019, p. 13).

Such measures may include, for example, the creation of a separate native citizenship with diminished legal rights, the disunification of communal indigenous land and its severing into alienable freeholds, and the enactment of despotic labour laws that render self-sustaining indigenes into dependent wage employees (Engle Merry, 2000; Wolfe, 2006). The criminalisation of indigenous resistance, however – particularly that which may countervail the various manifestations of the logic of elimination – best exemplifies the critical role that settler law and legal institutions have in this offensive (Simons and Simons, 1969; Douglas and Finnane, 2012; Madley, 2016). To forestall and repel such opposition, settlers use their legal systems to criminalise and punish native conduct that amounts to *or may facilitate* resistance. While the former targets conduct such as rebellions and strikes, the latter has a far greater aim because it criminalises and punishes conduct associated with the reestablishment of indigenous political organisations and spaces in which native resistance may galvanise.

For instance, indigenous peoples in South Africa withstood the criminalisation of labour unionisation (Seekings and Nattrass, 2005); First Nations in Canada endured the illegalisation of communal fundraising efforts that sought to cover the legal costs of lawsuits that challenged settler dispossession (McHugh and Ford, 2013); and Native Californians bore the prohibition of communal 'religious and cultural gatherings' (Madley, 2016, p. 10). Similarly, the native Palestinian population living under Israeli rule has faced the banning of civil associations, political parties and newspaper publications, as well as travel to neighbouring Arab countries to visit their compatriots, among others (Gordon, 2008). Indeed, as this paper demonstrates, settler-colonial societies are particularly concerned about the appearance of a unified front of native resistance and accordingly continuously work to forestall its emergence through measures that are sanctioned by settler law, even if nominally.

The reliance of settler colonialism on law and legal institutions, especially in its European variant, should therefore be briefly explained. The legal systems of European states, including international law, have for centuries been widely regarded by Europeans as the 'defining feature' of their civilisation (Robin Letwin, 2005; Russell, 2006, p. 31). This belief stemmed from another: that without a legal system that 'define[s] rights and entitlements' and 'ensure[s] compliance' with its rules, civilisation cannot actualise (Collins, 1982, pp. 10–12). This reverence for the law, which is linked to Europe's embrace of Christian divine law, gave rise to prevalent perceptions about the law's virtues, particularly the impression that all laws retain an 'inviolable, built-in principled integrity' deriving from their inherent 'core of good and right' (Tamanaha, 2006, p. 215). Such perceptions were later emboldened by natural law scholarship that 'solidified the identification of law with justice' and ultimately culminated in the ascension of 'the rule of law' as Europe's premier principle of governance (Tamanaha, 2004, pp. 24, 137–141). Consequently, Europe's conflation of law and morality was discursively extended to positive law, greatly contributing to the dissemination of the idea that law is 'good' and therefore that 'it is good to be ruled by law … regardless of its particular content' (Hussain, 2003, p. 68; Marmor, 2010, pp. 666–667).

The supposed inherent benevolence of the law provided European settler-colonial formations with a powerful tool through which the unjust dispossession of native communities and the ceaseless

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violence upon which it depends are simultaneously justified, obscured and disavowed (Johnston and Lawson, 2005; Whitt, 2009). As Robert Williams demonstrated, European law and legal discourse became the 'most vital and effective instrument[s]' in the enablement of settler-colonial 'genocidal conquest[s]' specifically due to their capacity to approbate self-serving 'vision[s] of truth' that vindicated these violent dispossessions (1990, pp. 6, 325–326). Indeed, denial is a fundamental feature of settler colonialism, for it continuously seeks to conceal the 'conditions of its own production' by cloaking them with the 'immaculate garment of justice' that settler law and legal institutions consistently provide (Chanock, 2001, p. 21; Veracini, 2010, p. 14). As the long legal history of European settler colonialism demonstrates, the judiciaries – supreme courts in particular – are at the forefront of settler denialism and represent a key site in which the various manifestations of the logic of elimination are legally sanitised (Bell and Asch, 2002; Russell, 2006; Miller *et al.*, 2010). The following sections illustrate the ways in which this occurs in Palestine/Israel.

3 Zionist settler colonialism, the Supreme Court of Israel and the jurisprudence of elimination

The Zionist conquest of Palestine and the founding of Israel – 'the last European settler colony to be established on earth' (Wolfe, 2018, p. 357) – epitomises settler colonialism, a finding thoroughly proven by pertinent literature (Sayegh, 1965; Abu-Lughod and Abu-Laban, 1974; Kimmerling, 1983; Shafir, 1996; Veracini, 2006; 2013; Jabary Salamanca *et al.*, 2012; Wolfe, 2016; Khalidi, 2020). As the following discussion shows, law and legal institutions, the Supreme Court of Israel in particular, are correspondingly implicated in the ongoing violent dispossession and subjugation of the native Palestinian Arab population.

In Israel, the Supreme Court stands at the top of the judicial hierarchy and is the foremost institution responsible for 'safeguarding the rule of law' (Netanyahu, 1993, p. 2; *Velner v. Chairman of the Israeli Labor Party*, 1995, pp. 758, 808; Barak, 2006, p. 22). As such, it is incumbent upon the Court to apply, interpret and enforce Israeli and international law (Waldron, 2006; Kedar, 2018). However, as Menachem Mautner noted, the Court 'has unquestionably perceived itself, above all, as an organ of the Zionist state' – a perception acutely felt by its indigenous Palestinian Arab population (2011, p. 38). Historically, the Court's support for the various manifestations of the logic of elimination has been represented not only by the one-sidedness of its rulings, but also through its employment of distinct jurisprudential techniques, to which I will refer as the jurisprudence of elimination. These techniques, I argue, include the misrepresentation of pertinent facts, reliance on dubious interpretations of international law, assertions of extralegal justifications in support of its rulings and denials that the Court and other state organs engage in a co-ordinated attack against the indigenous Palestinian population. Hence, the concept of the jurisprudence of elimination represents a positive manifestation of the logic of elimination.

Importantly, the suggested conceptualisation of the jurisprudence of elimination does not exclude previous assessments of the Court's jurisprudence involving Palestinians. Rather, it seeks to contextualise their findings and emphasise their aggregate importance in a manner that can be applied to interpret the Court's rulings through the lens of settler colonialism. For example, Nimer Sultany pointed to six 'legal and rhetorical moves' that the Court used to 'justify and advance' Israeli military rule in the Occupied Palestinian Territories (2014, p. 323). These moves consisted of (1) refusal to recognise international humanitarian law (IHL) as the controlling legal regime; (2) inconsistent employment of its justiciability doctrine; (3) blind acceptance of arguments presented by the state; (4) stalling for time by refusing to issue decisions on pending cases; (5) decontextualisation of the systematic nature of state-sanctioned violence targeting Palestinians; and (6) narration of a language that presents Israel as fighting against 'incomprehensible and irrational [Palestinian] violence' (*ibid.*, pp. 325–326). Similarly, Aeyal Gross demonstrated how the Court utilised international human rights law to 'obscure rather than challenge' the routine violation of Palestinian legal rights (2017, p. 35). Likewise, Baruch Kimmerling showed how the Court formally held that all Israeli citizens – including Palestinians – are equal before the law, only to leave a 'loophole for the court to avoid supporting equal

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rights for Arab citizens if the mere specter of national security is raised' (2002, p. 1121). Furthermore, Ronen Shamir's study of landmark, supposedly precedent-setting, cases in which the Court ruled in favour of Palestinians revealed that they were in fact 'isolated victories' that 'were not followed by similar results in subsequent cases' (1990, p. 797). Critically, Shamir concluded that what these cases were able to accomplish was the 'reinforce[ment of] the court's legitimacy as a solid defender of human rights' (*ibid.*).

Shamir's conclusion was affirmed by Sultany, who contended that the six aforementioned 'moves' helped the Court to maintain its 'discourse of legitimation' (2014, p. 323). This ongoing quest for legitimation by the Court is hardly surprising when assessed through the framework of settler colonialism. As Veracini demonstrated, settler-colonial societies experience 'stubborn and lingering anxieties' about the legitimacy of their projects (2010, p. 77). This persistent sense of illegitimacy, he contended, is tied to the 'original founding violence' through which the state was established and to the protracted violence through which the colonial project progresses (*ibid.*). Therefore, the concept of the jurisprudence of elimination brings together, expands upon and establishes a framework that incorporates the numerous ways in which the Court has been able not only to legalise, but to legitimise the negative and positive manifestations of the logic of elimination.

The consistent failure of the Court to protect the legal rights of Palestinians, while simultaneously striving to present its rulings as legitimate, has resulted in what Kretzmer described as a 'schizophrenic legal system' (2014, p. 52).[3] When applied to Jewish Israelis, the system 'has a fairly liberal character and employs the rhetoric of rule of law, human rights, and democratic values' (*ibid.*). When applied to Palestinians, however, the same system 'has little connection to the rule of law, only minimal connection to human rights, and no connection to democratic values' (*ibid.*). Understanding the fundamental objectives of settler colonialism makes this state of affairs less puzzling, as the legal systems within such societies are subservient to the logic of elimination (Williams, 1990, pp. 7, 327; Engle Merry, 1991, p. 890; Miller *et al.*, 2010, p. 93). To paraphrase P.G. McHugh, the logic of elimination is a vision sealed in blood and set in law (2004, p. 129).

The following discussion illustrates how the jurisprudence of elimination facilitated Israel's eliminatory conduct targeting the native Palestinian population by analysing two thematically interconnected cases adjudicated by the Court. The first involves the Court's sanctioning of a negative manifestation of the logic of elimination entailing the 2002 siege of the Church of the Nativity in Bethlehem, during which the Israeli military starved Palestinians holed up inside in order to compel their surrender.[4] The second involves the Court's sanctioning of a positive manifestation of the logic of elimination entailing the 2015 amendment to the 1971 Prison Ordinance that empowered Israeli district courts to issue force-feeding orders for the suppression of hunger strikes by Palestinian prisoners.[5] As these analyses show, the Court indeed misrepresented pertinent facts, advanced dubious interpretations of international law, relied on extralegal assertions and sought to conceal, deny and vindicate the state's – and the Court's – eliminatory aims. Moreover, the analyses highlight the degree of settlers' apprehension regarding the emergence of a unified front of native resistance and the severity of their response when they encounter it.

4 Starvation of besieged Palestinian civilians

In April 2002, in the midst of the Second Intifada, then Chief Justice Aharon Barak presided over a case that drew substantial international attention (*Almandi v. Minister of Defense*, 2002). Operation Defensive Shield, the brutal Israeli response to the Palestinian uprising, was ongoing and Israel was in the process of re-establishing complete military rule over major Palestinian cities in the West

[3]Kretzmer made this assertion when comparing between the legal system of Israel proper and that of the Occupied Palestinian Territories. The legal rights of Palestinian citizens of Israel have been similarly denied (Sultany, 2017, pp. 228–229; Masri, 2013, pp. 328–329; Pappé, 2011, pp. 43–44).

[4]HCJ 3451/02 *Muhammad Almandi v. Minister of Defense* (2002), IsrSC 56(3): 30.

[5]HCJ 5304/15 *Israel Medical Association v. Knesset* (2016), IsrSC unreported.

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Bank. Israel utilised hundreds of tanks and F-16 fighter jets during the operation, which resulted in the killing of 497 Palestinians and the wounding of 1,447 more (United Nations, 2002). When Israeli forces entered the city of Bethlehem, Palestinians began fleeing. In a desperate attempt to find safe haven, about 200 entered the Church of the Nativity, a holy Christian site believed to be located above the cave in which Jesus was born, locking themselves inside together with forty-eight priests. Most of the Palestinians in the church were unarmed civilians, although a few – most of whom were Palestinian police officers who also sought refuge in the church – were armed (Perry, 2002). At the time, Israel contended that between thirty and forty of those in the church were 'wanted Palestinian terrorists', but did not provide evidence to support its contention (*Almandi v. Minister of Defense*, 2002, p. 32; Anon., 2002). Due to the religious and historical significance of the site, and to the fact that the world was watching, the military chose not to break in. Instead, it laid siege to the church for thirty-nine days, cut off the water and electricity supply, and utilised snipers from afar to kill seven Palestinians and wound forty of them (Hammer, 2002; Perry, 2002; Hass, 2014).

During the course of the siege, the Israeli military allowed the priests to exit and enter the church so that they could eat, but blocked food supplies that had been provided by peace activists from reaching the rest of the Palestinians in the church. That situation prompted the Palestinian governor of the Bethlehem District and two Palestinian Knesset members (Petitioners) to submit a petition to the Court. Therein, the Petitioners argued, inter alia, that the military's refusal to allow food to enter the church was a violation of international law (*Almandi v. Minister of Defense*, 2002, p. 35). The pertinent international law provisions are Article 17 of the Fourth Geneva Convention, which calls for the besieger and besieged to reach an agreement regarding 'the removal [of civilians] from besieged areas'; and Article 54 of Protocol I to the Geneva Conventions (Protocol I), which prohibits the 'starvation of civilians as a method of warfare'.[6] If an agreement regarding the removal of civilians from the besieged area cannot be reached, the besieger 'at minimum' is required to provide them with 'adequate food' in the besieged area (Watts, 2014, p. 16). As former UN Secretary-General Ban Ki-Moon emphasised: 'Let me be clear: the use of starvation as a weapon of war is a war crime' (UN News Centre, 2016; Van Schaack, 2016).

The Court, however, allowed the military to continue to starve the Palestinian civilians by finding the actions of the military to be legal and in compliance with international law, despite the clear evidence to the contrary. Barak, who wrote for the Court, accepted that the Church of the Nativity siege 'is not taking place in a normative void [and] is being carried out according to the rules of international law, which provide principles and rules for combat activity' (*Almandi v. Minister of Defense*, 2002, p. 34). He then emphasised the Court's steadfast commitment to IHL, especially regarding its protection of civilians. Barak asserted:

> 'The saying, "when the cannons roar, the muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality. … Even in a time of combat, the laws of war must be followed. Even in a time of combat, all must be done to protect the civilian population.' (*ibid.*)

By referring to Cicero's aphorism, Barak sought to provide reassurance that the Court would protect the besieged civilians by recognising the legal protections to which they are entitled and by instructing the Israeli military to ensure that its conduct complies with IHL. However, and as I demonstrate below, this commitment was confined to the realm of rhetoric.

As alluded to above, under the particular circumstances of the siege, international law provided the Israeli military with three options regarding its treatment of the Palestinian civilians in the church: (1) reach an agreement with the armed Palestinians that would allow all unarmed civilians to exit the

[6]See ICRC Commentary of 1958, Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 17; ICRC Commentary of 1987, Protocols Additional to the Geneva Convention of 12 August 1949 (Protocol I), 8 June 1977, Art. 54.

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church; (2) provide food to the unarmed civilians in the church; or (3) refrain from blocking the peace activists' food supplies from reaching the unarmed civilians in the church. Despite the fact that the military rejected all three options and continued to starve the civilians inside the church, the Court found that the actions of the military were not illegal or contrary to international law.

As for the first option, which entailed reaching an agreement with the armed Palestinians to remove the unarmed ones from the church, the Court stated that '[the military contends that it is] not preventing Palestinian civilians from exiting the compound, and [is] encouraging them to exit, while promising them that no harm shall befall them' (*ibid.*, p. 35). The Court stated further that it had asked the military whether it would allow the unarmed civilians to exit the church so that they could eat and return to the church afterward if they chose, and that the Court received 'a positive answer' to this question (*ibid.*). Predictably, the Court accepted both contentions as true, despite the fact that the reality in the church, as it was widely reported at the time, was quite different. In fact, the Israeli military made no distinction between armed and unarmed civilians, and used snipers to kill any Palestinian it could spot inside the church. As one Israeli soldier who took part in the siege stated: 'Anyone armed gets shot, anyone crawling around [in the church] gets shot' (Hammer, 2002). This statement not only constitutes an admission of a war crime; it also serves to illustrate the horrific circumstances under which Palestinians had to decide whether to trust the Israeli military when it said that no harm would come to those who chose to exit the church (Protocol I, Arts 48, 51(2), 52(2), 85 (5); Hathaway *et al.*, 2019, pp. 65–66, 90–91).

Furthermore, the Court then stated that the Petitioners had argued before it that even if the military allowed the unarmed civilians to exit the church, the armed Palestinians would prevent them from leaving. Therefore, the willingness of the military to allow the unarmed civilians to exit the church did not free it from its legal obligation to provide the unarmed civilians with food (*Almandi v. Minister of Defense*, 2002, p. 35). If the Court's characterisation of the argument presented by the Petitioners is indeed accurate, it is somewhat peculiar. As the various (cited) news articles that covered the progression of the siege indicate, at no point did the armed Palestinians block the unarmed ones from exiting the church. It seems that the fear of the Israeli military (which had already killed several unarmed civilians) as well as the desire to stay united and not leave their brethren behind were the reasons why the unarmed civilians did not exit the church. Therefore, the wanton assault that the Israeli army mounted against the Palestinians may be attributed in part to the goal of preventing the formation of a unified front of native resistance in the church, as previously discussed. Regardless, whether it was the former, the latter or a combination of both reasons, the Israeli military failed to reach an agreement that resulted in the removal of the unarmed civilians from the church.

This left the Israeli military with the second and third options: either provide food to the civilians in the church or do not prevent food provided by others from reaching them. Yet, the Court failed to oblige the military to take either of those options. Instead, it justified the ongoing starvation of unarmed Palestinian civilians by misconstruing the conditions of the siege, claiming that there was already food inside the church and that the Israeli military was only preventing 'extra' food from entering:

> 'Palestinians who left the compound reported that there are bags of rice and beans inside. It is clear, however, that there is a shortage of food, and the petition here concerns that shortage …. It appears to us that, in view of the reality in the compound, in which there is … food, even if it is only basic, and in view of the willingness of the respondents to provide extra food to the civilians even if they do not leave the compound, the respondents have fulfilled their obligation under international law.' (*ibid.*, pp. 34–35)

Barak's account of the factual circumstances of the case and his determination that the Israeli military had satisfied pertinent legal requirements prescribed by international law are perplexing. First, contrary to the Court's assertion, on 21 April 2002, ten days before the Court issued its decision, the church's warden, Father Ibrahim Faltas, informed the British Broadcasting Corporation that 'food

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has run out in the church' and made no qualifications to his statement (BBC, 2002). The severity of the hunger experienced by the Palestinians in the church was made even clearer when a few of them tried to smuggle food from the adjacent Greek Orthodox convent with the help of one its members, risking their lives in the process. Demonstrating again that no distinction was made between armed and unarmed civilians in the church, when Israeli snipers spotted a twenty-year-old unarmed civilian trying to obtain food from the convent, they shot him too (Hammer, 2002).

Second, even if we do accept the Court's assertion regarding the existence of bags of rice and beans in the church, this would not have absolved the military of its legal responsibility to provide additional food, or to refrain from blocking additional food from reaching the unarmed civilians. As the International Committee of the Red Cross's commentary on Article 54 of Protocol I emphasises, besieged civilians are entitled to 'adequate' food (1987; Watts, 2014, p. 16). Not only are bags of uncooked rice and beans inadequate – especially considering the cutting-off of the water and electricity supply by the military – but it seems that the Court expected the Palestinians inside the church to manage to cook under Israeli sniper fire. It is telling that the Court did not identify either the Palestinians who purportedly reported the presence of rice and beans inside the church or to whom they made this report. It is likewise telling that the Court cited no legal source in support of its reasoning that the mere existence of uncooked rice and beans inside the church satisfied the requirements international law imposes upon a besieger. Nevertheless, it appears that the Court was able to convince at least one scholar of the validity of its reasoning. Daphne Barak-Erez, the former dean of the Faculty of Law of Tel Aviv University who joined the Court as a judge in 2012, stated that

> 'the Court reviewed the behavior of the military in the situation arising from the siege around the Church of Nativity … and held that the army must supply water and basic food to all civilians in the church compound, in pursuance of the rules of international humanitarian law.' (Barak-Erez, 2004, p. 619)

As the above discussion showed, no reading of the Court's decision would support Barak-Erez's assertion.

But the Court did not stop there. To further legitimise its ruling, the Court provided extralegal justifications in support of the ongoing war crime committed by the Israeli military. As Barak stated:

> 'Israel finds itself in the middle of [a] difficult battle against a furious wave of terrorism. … The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law and exploit its violation. The war against terror is also the law's war against those who rise up against it. … [T]he State of Israel is founded on Jewish and democratic values. We established a state that upholds the law – it fulfills its national goals, long the vision of its generations, while upholding human rights and ensuring human dignity. Between these – the vision and the law – there lies only harmony, not conflict.' (*Almandi v. Minister of Defense*, 2002, pp. 34–35)

This was not the first time that Barak used the war against terror as a justification for qualifying the legal protections to which Palestinians are entitled under international law (*PCATI v. Israel*, 1999, p. 836; *PCATI v. Israel*, 2006, p. 545). As Anthony Anghie explained, by invoking the War on Terror, Barak implied that the case at hand involved a 'threatening entity beyond the realm of the law that must be dealt with by extraordinary emergency powers, or even extra-legal methods' (2004, p. 299). Remarkably, however, here Barak did so to justify the starvation of innocent civilians while nonetheless insisting that his ruling comported with international law.

In summation, the jurisprudence of elimination embodied in the Church of the Nativity decision consisted of the Court's rendering of the factual circumstances of the case in a way that diminished their severity, its distortion of international law and its advancement of extralegal justifications of

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the state's actions. By so doing, the Court sought to legalise and legitimise the eliminatory conduct of starvation, to vindicate the state and its army of any wrongdoing, and to conceal and deny the Court's own complicity in this co-ordinated offensive against Palestinians. Therefore, the decision illustrates the interplay between the negative and positive manifestations of the logic of elimination, how the former may be enabled by the latter and the synergy that exists between Israeli state organs as they implement eliminatory measures. As for the besieged Palestinians in the church, Israel reached an agreement with the Palestinian Authority to deport twenty-six of them, half to the Gaza Strip and half to European countries, in exchange for ending the siege (Kraizim, 2013). Although the agreement stipulated a period of exile of two years, Israel has refused to allow them to return to their homes in the West Bank to this day (*ibid.*).

5 Force-feeding of Palestinian prisoners

Force-feeding a prisoner who goes on a hunger strike is an extremely painful, traumatic, degrading and dangerous practice, and is accordingly classified by many legal scholars as a form of torture that is prohibited by international law (Dayal, 2015). During a force-feeding procedure, a prisoner is strapped to a chair, while conscious, as a medical official forcefully inserts a two-foot-long plastic tube through the nose, down the throat and into the stomach (Kim, 2015). Once the tube reaches the stomach, liquid food is delivered through it. Force-feeding has caused the death of prisoners as a result of food being released into the lungs instead of into the stomach, which resulted in 'rapid death from pneumonia' (Miller, 2016, p. 3). The World Medical Association and legal experts from the UN have determined that the force-feeding of prisoners amounts to 'cruel, inhumane and degrading treatment' (OHCHR, 2015; Crosby *et al.*, 2007). Such treatment of prisoners of war is illegal under multiple instruments of international law (UDHR, 1948, Art. 5; ICCPR, 1966, Art. 7; UNCAT, 1984, Art. 16). Moreover, Article 11 of Protocol I to the Geneva Conventions explicitly prohibits subjecting such prisoners to 'any medical procedure … which is not consistent with [the] generally accepted medical standards [that] would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure' (Goodman, 2013; Nocera, 2014). Furthermore, as Summer Dayal argued, force-feeding may amount to a crime against humanity under the Rome Statute of the International Criminal Court (2015, p. 703).

Yet, despite the prohibition against the practice in international law, several countries, Israel among them, continue to subject prisoners to force-feeding.[7] These countries justify this form of torture by arguing that they bear responsibility and are acting out of concern for the well-being of prisoners who endanger themselves by going on a hunger strike. According to that reasoning, the concern for prisoners' lives trumps prisoners' right to autonomy over their bodies, thus making force-feeding permissible (Lempel, 2016).

In protest of their prolonged imprisonment (of months or even years) without trial and of their poor prison conditions, many Palestinian prisoners have gone on hunger strike. These hunger strikes often result in negative publicity for Israel, especially in cases in which a detainee's health deteriorates drastically. In the past, Israel has force-fed hunger-striking prisoners, killing at least five of them while administering the procedure (Bandet and Zalait, 2015). A 2015 case brought Israeli force-feeding back into the headlines when Muhammad Allan, a Palestinian attorney from the West Bank who was imprisoned for months without charge or trial, went on a hunger strike (Rudoren and Hadid, 2015).

After several weeks with no food, Allan's life was in danger and he was transferred to a hospital in the city of Ashkelon. The Israel Security Agency (the ISA, also known as Shin Bet or Shabak, is Israel's internal security service) demanded that Allan be force-fed. However, the physicians who were called in to administer the procedure refused to do so, as the World Medical Association prohibits physicians from force-feeding prisoners who are 'capable of forming an unimpaired and rational judgment' regarding their decision to go on a hunger strike (WMA, 1975, Art. 8; WMA, 1991, Art. 21;

[7]E.g. the US, France, Germany, Austria and Australia force-feed hunger-striking prisoners, while the UK and Canada prohibit it (*IMA v. Knesset*, 2016, pp. 41–42).

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Mishali and Gvur, 2015). Allan's rapidly deteriorating health and the international attention that his case received forced the ISA to admit that it had no evidence that could be used to legally continue his imprisonment and so it eventually permitted his release (Murphy, 2015). Israel, fearing that other Palestinian prisoners would follow suit, then decided to legalise the force-feeding of Palestinian prisoners by enacting a law to that effect (Anon., 2015b; Hadid, 2015).

In July 2015, the Knesset amended the 1971 Prison Ordinance to legally expand and systematise the force-feeding of Palestinian prisoners. Prior to the passage of this amendment, the legal basis for the practice had been the 1996 Patient Rights Law (PRL), which allowed force-feeding only in instances in which a medical ethics committee had approved the measure.[8] The PRL required that the committee ensures the following prior to granting its approval: (1) that the prisoner received the necessary medical information ordinarily provided to patients to meet the general legal requirement of informed consent for medical procedures; (2) that the force-feeding would substantially improve the prisoner's health; and (3) that it was reasonable to assume that the prisoner would retroactively authorise the force-feeding procedure (Art. 15). The PRL's criteria had made it difficult for the Israeli government to obtain permission from the ethics committee to force-feed Palestinian prisoners, as it could not prove that Palestinian prisoners, who had clearly stated their intention to go on hunger strike and their reasons for doing so, would retroactively give their permission to be force-fed. The amendment was accordingly designed to bypass this PRL restriction by creating an alternative legal path for force-feeding Palestinian prisoners. In addition to the ethics committee, the amendment now allowed force-feeding to be approved by a court order issued by chief justices of district courts or by their deputies.

What makes the amendment so significant is the criteria it prescribes for the granting of a force-feeding order. First, the amendment requires that district courts grant the order if

> 'there is an actual possibility that in a short [period of] time the prisoner's life will be in danger or that a serious irreversible disability will occur and that the medical treatment [i.e. force-feeding] is expected to benefit the prisoner.' (Prison Ordinance, 1971, Art. 19–14(1))

Second, the amendment requires that courts take into account 'considerations of risk [posed by the prisoner] to human life or actual risk of serious harm to national security' (Prison Ordinance, 1971, Art. 19–14(5)). While the first requirement reflects the justification for force-feeding espoused in the PRL and by other force-feeding countries, the second requirement, force-feeding in pursuit of national security objectives, is the world's first. No other country has ever justified, let alone legalised, the force-feeding of prisoners on such grounds (*IMA v. Knesset*, 2016, pp. 57–58, 76, 80).

Soon after the enactment of the amendment, several organisations, including the Israel Medical Association, filed a petition with the Supreme Court arguing against the legality of the amendment. In the government's response to the petition, the relationship between a Palestinian prisoner's hunger strike and national security was explained in the following way: a hunger strike is in essence a political tool that engages and influences those who sympathise with the prisoner. In cases in which prisoners die, unrest among other Palestinian prisoners and among Palestinians living in the Occupied Palestinian Territories could ensue (AG Response, 2015, pp. 15, 42).[9] Further, a hunger strike puts pressure on the government to release prisoners despite the danger they may pose to the public and to the state itself (*ibid.*, p. 41). Therefore, the government explicitly admitted that the main purpose of the amendment is to dismantle the unified front of native resistance that emerges when a Palestinian prisoner goes on a hunger strike.

The government went on to state that the goal of the amendment was to allow security interests to serve as a basis for a force-feeding court order precisely because the PRL's ethics committee was not legally allowed to take such interests into account (*ibid.*, p. 14; *IMA v. Knesset*, 2016, pp. 19–24). The

[8]Prior to the PRL, the legal basis for force-feeding was the 1962 Legal Capacity and Guardianship Law.

[9]Attorney General's Response to the Petition and to the Request for Preliminary Injunction by the Petitioners, 9 September 2015, available at www.nevo.co.il (accessed 23 August 2021).

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government's bluntness regarding the motive that stood behind the enactment of the amendment left the Court in an odd position, as it revealed the hollowness of the first stated objective of the amendment of ensuring the well-being of the prisoner. It was then up to the Court to provide a normative framework under which force-feeding for national security interests – and not, as it had been traditionally excused elsewhere in the world, to protect the prisoner's well-being – could be deemed legal and constitutional (Khoury, 2016).

And that it did. In its ruling, the Court began its discussion regarding the compatibility of the amendment with pertinent international norms, not by assessing its legality, but by emphasising that the Israeli government had gone to great lengths to ensure that the amendment complied with international law. As Justice Elyakim Rubinstein, who penned the bulk of the decision, asserted:

> 'Following the mass hunger strike of security and administrative detainees in 2012, … an inter-departmental team was established, headed by the deputy attorney general (criminal division), that included members from the Ministry of Justice, Ministry of Interior, Ministry of Health, Prison Services, and the [ISA], in order to form a proper [legal] framework for handling the phenomenon [of hunger-striking prisoners]. … The team conducted a series of deliberations at the [office of the] deputy attorney general, thoroughly researched international law requirements of the issue and examined the challenges that make hunger-striking in Israeli prisons unique.' (*IMA v. Knesset*, 2016, p. 8)

The above assertion was followed by statements regarding the general legitimacy of force-feeding hunger-striking prisoners from a global perspective. Therein, Rubinstein situated Israel among other Western countries that force-feed hunger-striking prisoners. He noted:

> 'Reviewing relevant legislation and court decisions from outside the borders of Israel shows that countries of the Western world, as well as international tribunals, are divided when it comes to the question of the legitimacy of force-feeding hunger-striking prisoners. Despite the World Medical Association's position on the matter, it seems that a substantial number of Western countries allow the force-feeding of a prisoner in extreme situations when the prisoner's life is in jeopardy.' (*ibid.*, p. 41)

Therefore, the Court sought to provide reassurance, not only that the amendment was drafted in accordance with international law, but also that it did not represent a departure from the way in which force-feeding is justified by other countries. Importantly, up to that point of the decision, the Court had avoided discussing the ultimate purpose of the amendment – the legalisation of force-feeding as a measure through which Israel could prevent Palestinians from using hunger strikes as a means of resistance – a purpose conveniently obscured behind the banner of national security. This came next.

As previously discussed, the international norm regarding the force-feeding of hunger-striking prisoners in states that permit the practice is that it can only be legally justified if its officially stated aim is the protection of the health or life of the prisoner. It is thus worth emphasising the significance of what the Supreme Court sought to accomplish here. The Court attempted to justify the creation of an alternative legal path for the force-feeding of Palestinian prisoners – a measure that was specifically designed to protect the political interests of the state, not the health of the prisoner. Such a justification for the abrogation of the prisoner's autonomy over their life and body, a justification that privileges the good of the state over the good of the individual, represents a significant departure from the way in which force-feeding has been justified elsewhere in the world.

As the following discussion shows, the Court sought to conceal the significance of this departure by contending that it was not a departure, but an appropriate interpretation of the rationale upon which other states justify force-feeding hunger-striking prisoners. By so doing, the Court not only resorted again to denial in its jurisprudence of elimination; it also illustrated what Veracini described as the

'mimetic character' of settler-colonial societies seeking to conceal the implementation of eliminatory practices by describing them as ones already deemed permissible by other states (Veracini, 2010, pp. 14, 76–80, 93–94; Cohen, 2001, pp. 7–9). Thus, the force-feeding case exhibits how two positive manifestations of the logic of elimination – the enactment of the amendment and its sanctioning by the Court – work in tandem in pursuit of the same objective.

The Court began by reiterating that force-feeding hunger-striking prisoners is already permitted in some countries when the life of a prisoner is at risk. This justification, the Court asserted, derives from the principle that life is sacred. Thus, the Court concluded, since all life is sacred and since the amendment was enacted to protect the lives of the Israeli public, a decision to force-feed a prisoner that is based on national security considerations is as justifiable as one based on the well-being of the prisoner. As Rubinstein contended: 'Force-feeding may be justified … [when] the hunger strike poses a risk to the life of others. … The precedence given to the value of life allows certain harm of other values' (*IMA v. Knesset*, 2016, p. 55). In other words, the Court took the justification for force-feeding based on the well-being of the prisoner and equated it with a broader, generalised concern for the well-being of Jewish Israelis, arguing that the protection of the latter, too, justifies force-feeding. Such legal reasoning has virtually no support among legal scholars, thus exemplifying once more the Court's commitment to the enablement of eliminatory practices implemented by the state (Shahshahani and Arvind Patel, 2018; Anon., 2015a).

Similar to the Church of the Nativity case, here, too, the Court sought to bolster the legitimacy of its decision by advancing extralegal justifications for it. As Rubinstein asserted:

> 'The relationship between human rights and the security challenge … is destined to remain for a long period a consideration of Israeli society and the courts in Israel. The peace negotiation is ongoing, but even the most optimistic do not expect that it will [result in making Israel safer]. … Therefore, the tension between [Israel's] security [needs] and [Palestinian human] rights will continue.' (*IMA v. Knesset*, 2016, p. 64)

The reality that Rubinstein portrayed is puzzling. On the one hand, he alluded to an 'ongoing' peace negotiation, even though no such negotiation was taking place at or around the time the Court issued its decision in September 2016. On the other hand, he predicted that the ways in which Israel's 'security challenge[s]' (i.e. the existence of a native Palestinian population in the territories conquered by Israel since 1948) were being resolved – through the systematic violation of Palestinians' human rights – 'will continue' for the foreseeable future. Importantly, in Rubinstein's conception, even the attainment of peace between Israelis and Palestinians will not result in Israel being any safer, which accordingly shows that elimination, rather than security, guides the Court and the state it serves as they implement such measures. Furthermore, the portrayal of the native population as posing a permanent security challenge is a common pretext advanced by settler-colonial states to justify a wide range of eliminatory practices (Veracini, 2015, p. 25; Chanock, 2001, p. 115). As Wolfe emphasised, by merely 'staying at home, the native gets in the way of settler colonization' (Wolfe, 1999, p. 36).

Perhaps the most revealing attempt made by Rubinstein to extra-legally justify the Court's ruling is this:

> 'It is possible that some countries will [force-feed prisoners] for the purpose of suppressing [hunger strikes]. However, I think that it can be assumed that in the Israeli legal system the likelihood [of force-feeding for that purpose] is not high.' (*IMA v. Knesset*, 2016, p. 56)

Thus, despite the state's admission that the amendment was enacted specifically for the purpose of suppressing Palestinian resistance, Rubinstein insisted that it was not (*ibid.*, p. 65). Hence, Rubinstein attempted to deny and obscure the official purpose for which the Prison Ordinance was amended and the fact that Israel already had a proven track record of force-feeding Palestinian

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prisoners extra-legally for the same end. Therefore, Rubinstein illustrated again the omnipresence of denial in the jurisprudence of elimination.

In summation, the above delineation of the Court's jurisprudence of elimination, its rhetorical manoeuvring and the dubious reasoning that it employed to legalise and legitimise the force-feeding of hunger-striking Palestinian prisoners demonstrated the Court's role in advancing eliminatory state conduct. Analysed through this more apposite theoretical framework, the Court's refusal to protect Palestinian legal rights no longer seems 'schizophrenic'; on the contrary, the Court is manifestly fulfilling its purpose within a settler-colonial society (Fitzpatrick, 2001, p. 36; Veracini, 2010, p. 66; Madley, 2016, pp. 146, 172). It is worth mentioning that despite the Court's decision, the Israel Medical Association still prohibits Israeli physicians from administering force-feeding procedures to Palestinian prisoners. To bypass this prohibition, Israel is reportedly seeking to hire foreign physicians (Carlstrom, 2017).

6 Conclusion

This paper has examined the ways in which the Supreme Court of Israel has been able to legalise and legitimise state-sanctioned violence against Palestinians. It did so by analysing the Court's workings through the lens of settler colonialism and highlighting the insight such an analysis provides into the functioning of law and legal institutions in settler-colonial societies. The foregoing discussion showed how the Court employed in its rulings a wide range of techniques designed to enable eliminatory state conduct, including the advancement of unsubstantiated factual assertions, groundless reasoning, extralegal justifications and, perhaps more than anything else, denial. These and similar techniques, the paper has argued, represent a jurisprudence of elimination that serves to facilitate and justify various manifestations, both negative and positive, of the logic of elimination while simultaneously concealing and obscuring their eliminatory aims. Moreover, the paper affirmed that the native population of Palestine – like indigenous peoples living in other settler-colonial states – is indeed facing co-ordinated attacks mounted by organs of the usurping state (Wolfe, 2006, p. 393). Although these attacks may consist of 'different modalities of force', their ultimate aim – the destruction of the pre-invasion social existence of the native population – is identical (Banivanua-Mar, 2007, p. 147; Chesterman and Galligan, 1997, pp. 56–57). The utilisation of settler colonialism as a theoretical framework for the analysis of the functioning of law and legal institutions in Palestine/Israel, as this paper has shown, is not only elucidating – it calls for a complete reassessment of the legal historiography of the Zionist conquest and occupation of the country. This paper takes one additional step towards the accomplishment of such an ambitious goal.

Conflicts of interest. None

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