

How to Rescue Civil Discourse on Israel

Dan Diker and Alan Baker

ABSTRACT

Critics claim that their condemnation of Israel's policies are legitimate, not anti-Semitic, nor discriminatory. They have asserted that scholars of anti-Semitism and supporters of Israel "weaponize" charges of anti-Semitism to deter criticism.

Yet much of what is termed "criticism" falls under the widely-accepted International Holocaust Remembrance Alliance Working Definition of Anti-Semitism, which adopted standards against the defamation of the Jewish State that mimic classic anti-Semitic patterns.

*As opposed to the anti-Israel slander that has become **de rigeur** in the public discourse, legitimate political critique would include the presentation of facts, stripped of political hyperbole, and framed in principles of evenhanded assessment and well-reasoned legal, historical, security, and diplomatic context, resulting in a far more productive Western dialogue.*

Israel should be judged by the same principles and standards as other nations, to avoid the prevalent tendency to defame, delegitimize, dehumanize, demonize, and deny its existence and its citizens' collective rights. Respectful civil discourse on Israel should be embraced as a moral standard and the international diplomatic, media, and public dialogue.



Most of the articles in this volume have defined and explored *Israelophobia* as a phenomenon that is shaped by, converges with, and generates anti-Semitism and anti-Zionism. As Professor Alan Dershowitz has noted, “The current debate... centers around the demonization of Israel not because of what it does, but because of what it *is*, and that is, a sovereign state of the Jews.”



Prime Minister Benjamin Netanyahu addresses the United Nations General Assembly in New York City in 2011.

Avi Ohayon/IGPO

There are, however, other prominent voices in this debate over Israel. They claim that criticism of Israel and condemnation of its policies do not necessarily constitute anti-Semitism, discrimination, or hate speech, but rather represent legitimate political critique. These Western critics have also asserted that some scholars of anti-Semitism, and supporters of Israel “weaponize” charges of anti-Semitism to deter legitimate criticism of Israel’s policies, particularly regarding the Palestinian-Israeli conflict.¹

Ironically, some of the most outspoken adversaries of Israeli policy, including Professors Norman Finkelstein, Noam Chomsky, Marc Lamont Hill, Noura Erekat, and Saree Makdisi,² regularly level criticism against Israel that falls without doubt under the widely-accepted International Holocaust Remembrance Alliance (IHRA) Working Definition of Anti-Semitism,³ the 2010 State Department⁴ working definition, and the “3D” Test of anti-Semitism against individual Jews and the Jewish State as detailed by Natan Sharansky in this compendium.

Where critics of Israeli policy have fallen short is in their failure to provide a set of substantive principles defining the character of what they insist is “legitimate criticism” and not Israelophobia or anti-Semitism. This challenge appears fairly straightforward to well-intentioned critics with intellectual integrity. Legitimate political critique would likely include the presentation of raw facts, stripped of political hyperbole, and couched in principles of evenhanded assessment and well-reasoned legal, historical, security, and diplomatic context.⁵ These qualifiers would more equitably ground civil discourse and legitimate, important policy criticism of any nation-state, Israel among them.

That is what this article sets out to do. This brief does not seek to engage in polemics arguing for “this” or “that” policy. Rather it proposes a set of underlying principles that can guide deliberation and frame criticism of policy in general. These guidelines include depoliticized factual analysis, context, and acknowledgment of Israel’s legal, historical, security, and diplomatic claims that anchor political discourse and critique, on four sensitive topics; settlements, occupation, the West Bank security barrier, and borders. These topics have been among the most politicized, distorted, and mischaracterized in the decades-long history of the Palestinian-Israeli conflict.

THE DISCOURSE ON SETTLEMENTS

The issue of Israeli “settlements” has been discussed and debated without context and acknowledgment or appreciation of Israel’s rights and claims. Indeed, it is significant and even reasonable to acknowledge that Israel has historic, security, and legal claims regarding the land in Judea and Samaria that serve as the basis for its rights to establish Jewish settlements.⁶ Israel’s historical and modern legal claims deserve to be equitably considered and not rejected out of hand simply because the word “settlements” has been subjected to a mistaken and misguided connotation as “illegal” or devoid of legitimacy.

Critics may not agree with Israel’s substantive claims, and they are entitled and encouraged to argue against them. In the case of settlements, however, critics and supporters need to understand the legal arguments against settlements, as they appear in a memorandum prepared by former U.S. State Department legal advisor Herbert Hansell of the Carter Administration.⁷

At the same time, both critics and supporters of Israel’s legal claims to establishing Jewish communities must familiarize themselves with Israel’s legal refutation of the Hansell memo.⁸ Moreover, in 2020, the United States concurred with Israel’s legal reasoning and principled position on the legality of Jewish settlements. U.S. Secretary of State Mike Pompeo’s counter-claim and legal refutation of the Hansell opinion of 1978 must also be equitably and objectively considered as part of civil discourse on the settlement issue.

Context and comparisons to other settlements in other disputed areas must also be considered. The Turks have established settlements in occupied Northern Cyprus, the Moroccans in occupied Western Sahara, and the Russians in occupied Crimea.

Neither governments, international media, nor international human rights organizations have referred to those situations of settlement by branding Turkey, Morocco, or Russia as apartheid states, war criminals, or genocidal countries. Their rights, and the question of whether such settlement activity is justified if ever referred to, have not been rejected out of hand.

In short, fair assessment requires one to avoid rejecting *a-priori* Israel's legal, security, and historic claims to settlements merely because of the negative international connotation applied to the word "settlement." The issue must be considered substantively and objectively as meriting criticism or not, or as acceptable or not.

One may legitimately agree with the 1978 Hansell interpretation that settlement building contravenes the requirements of the 1949 Fourth Geneva Convention and that it does not answer the humanitarian criteria set out by international humanitarian law. However, any such viewpoint would need to note that Israel and the State Department legal advisors in the Trump Administration argue that the Hansell opinion is mistaken and that it wrongly interprets the Fourth Geneva Convention, which was aimed at preventing the Nazi regime's mass expulsions and forced transfer of populations into occupied territories under their control, as occurred in occupied Europe. This is not what Israel is doing. Therefore, that legal criticism is irrelevant if it is based on the misapplication of the Fourth Geneva Convention of 1949.

THE DISCOURSE ON OCCUPATION

This issue continues to suffer from the most politicized and distorted mischaracterization of the Palestinian-Israeli conflict's core disputes. The original text of the 1964 Palestinian Liberation



Prime Minister Benjamin Netanyahu speaks at the 70th UN General Assembly in New York in 2015.

Photo: IGPO

Organization (PLO) Charter denotes Israel's existence within the 1949 armistice lines as "illegal."⁹ This was a full three years before Israel was forced to enter the West Bank to defend its citizens from Jordan's artillery and sniper attacks against Jewish neighborhoods in Jerusalem.

Since then, Palestinian leader Yasser Arafat and his successor Mahmoud Abbas have weaponized the term "occupation." They have also transformed it into a non-existent legal concept of "*illegal occupation*," which some governments, international organizations, diplomats, media, and human rights activists have blindly adopted, thereby recasting Israel as an illegal, apartheid entity, and war criminal.¹⁰



The security fence separating the Arab village of Abu Dis from Jerusalem.

Photo: Moshe Milner

This distortion has even evolved into the term “*occupied Palestinian territory*” (“OPT”) despite the fact no sovereign Palestinian entity has ever existed. Apart from numerous politically-generated and non-binding UN resolutions, there has never been a binding legal international instrument that determines that the territories are Palestinian. But “OPT” has nevertheless become *lingua franca* within the international community.

Understanding the term “occupation” requires a depoliticized understanding of facts and their international legal context. International law considers occupation to be a legal situation falling under the international laws of armed conflict. It is a legal term of art. It refers to a provisional situation of belligerency in which one sovereign power occupies during an armed conflict, the territory of another sovereign power, pending an

agreed resolution between the parties in conflict. Occupying powers have both obligations and privileges under international humanitarian law.¹¹

“Occupation” was never the case with respect to Israel. Critics cannot ignore Israel’s oft-repeated claim that its status in the West Bank areas of Judea and Samaria is unique (*sui generis*) inasmuch as these areas were never considered to be sovereign Jordanian territory.

The Hashemite Kingdom of Jordan’s annexation of the West Bank in 1950 was never internationally recognized. Critics accusing Israel of being an “illegal occupier” have ignored the fact that Israel legitimately took control over non-sovereign territories during the 1967 war. As such, it has been Israel’s consistent position that the Fourth Geneva Convention’s reference to “belligerent occupation” cannot be applicable to Israel’s unique status. The correct denomination of the status of the territory should, therefore, be termed “disputed” and not “occupied.”

One may indeed criticize an occupying power’s behavior in the light of norms of humanitarian law. But occupation, in and of itself, is not an illegal situation. It must be considered objectively, without the negative, political connotation that it has cynically been given by opponents and critics within the international community, as a means to defame, condemn, and delegitimize Israel’s legal, historic, and security claims that serve as the basis for its presence in the territories east of the 1949 Armistice Lines.

Critics with intellectual and moral integrity would be advised to research any situation of occupation with objectivity, on its merits. Serious, fair-minded discourse must deal with occupation substantively, devoid of any politicized context.



Construction of the security fence near the Megido Junction in northern Israel.

Photo: Amos Ben Gershon/IGPO

DISCOURSE ON THE WEST BANK SECURITY BARRIER

Civil discourse and fair consideration of the West Bank security barrier must take into account the extensive deception campaign that has mislead and mischaracterized the undertaking of this defensive anti-terror measure.

The security barrier was established in 2003 following a tidal wave of infiltrations by Palestinian terrorists and suicide bombings in Israeli towns and villages, which had claimed hundreds of Israeli lives from 2000 to 2003.¹² From the start, the barrier was intended to be an interim security measure, not a political border. That is why it was erected virtually on the indefensible 1949 Armistice Line. Its construction was accompanied by constant legal supervision by Israel's Supreme Court to ensure that the security requirement did not prejudice the basic humanitarian

rights of the Palestinian landowners and residents on the eastern (Palestinian) side of the barrier. To the contrary, the land used was temporarily placed under Israel's security jurisdiction, and market rates of compensation and rent were offered to the owners of private land used.

This anti-bombing barrier reduced incidents of Palestinian suicide bombings by more than 90 percent.

However, the Palestinian Authority, PLO-affiliated NGOs in Ramallah, as well as the global BDS campaign rebranded Israel's West Bank security barrier as "the Apartheid Wall."¹³ The life-saving success of the security barrier has not prevented the international usage of the phrase "Apartheid Wall," advancing the false claim that the security barrier is nothing more than a land grab aimed at racial segregation, ethnic cleansing, and apartheid, as the global BDS campaign has charged.

Clearly, and despite the political distortion and false propaganda regarding the barrier, an objective overview of the historic and security context is critically important in understanding Israel's decision to erect the barrier - to block infiltration into Israel's cities and towns by suicide bombers and to guard against Palestinian sniper fire on some of Israel's main highways. In 2019 alone, the Israel Security Agency thwarted 560 significant terrorist attacks, including more than 300 shootings.¹⁴

It is no less important to note that the nomenclature "wall" is factually incorrect in that approximately 90 percent of the barrier is a fence, and some 10 percent a concrete wall in proximity to Israel's central north-south highway and residential areas.

The rational discourse on the security barrier should take into consideration the genuine and substantive reasons for its

existence, as well as Israel's Supreme Court's requirement that it remain a temporary measure as long as the terror threat continues, after which the barrier has to be removed. The court permitted the fence as a defensive, life-saving measure to block terrorist infiltration, yet, ordered it rerouted following petitions of some Palestinian landowners in the West Bank.

It is worth noting that that the construction of the fence was opposed by many Israelis, among them Israeli Arabs who had regularly shopped and dined in Bethlehem and other Palestinian-controlled cities in the West Bank, until Palestinian terror became too deadly to countenance.

In contrast to Israel's Supreme Court's substantive factual and legal determinations regarding the necessity for the erection of the barrier, the UN General Assembly's knee-jerk condemnation of the security barrier as a *violation of international law* was rubber-stamped in a 2004 advisory opinion by the UN's International Court of Justice that categorically disregarded the life-saving purpose of the barrier and relied only on submissions by the Palestinians and Arab states.¹⁵

THE DISCOURSE ON BORDERS

A well-reasoned civil discourse on the topic of Israel's borders must take into account historical facts and contextual legal components regarding Israel's international legal rights in the area. Many observers and critics alike neglect or ignore these historical and legal rights that were recognized in 1917 in the Balfour Declaration's promise of a national home for the Jews in Palestine that was subsequently affirmed by the League of Nations, the legal predecessor to the United Nations. Israel's legal



An aerial shot of the
Jordan Valley
Photo: IGPO



Aerial view of the Jewish town of Efrat in the Gush Etzion bloc near Jerusalem.

Photo: Yaacov Saar/IGPO

rights have been incorporated into international law through a series of legal instruments and resolutions, such as the 1920 San Remo Declaration and the 1922 League of Nations Mandate Instrument for Palestine. These resolutions have been carried forward and protected by Article 80 of the UN Charter.

Thus, the false and simplistic Palestinian call to return to “1967 borders” is incompatible with the historic and legal background. However, the widely accepted yet legally flawed and false term “1967 borders” has nevertheless become a staple component of the Palestinian narrative despite the fact that no such borders have ever existed. The lines from which Israeli forces entered the West Bank and Gaza Strip in 1967 were nothing more than temporary 1949 Armistice Demarcation lines that the Arab parties to the agreements demanded remain temporary lines and not final political borders.

This fact and all rudimentary historic context have been missing in international discourse and deliberation on the issue of borders. Instead they have been replaced by highly politicized assertions that favor the Palestinians' misleading and viral narrative that established factually and legally false political terminology.

Author Alan Baker, former Legal Advisor to Israel's Foreign Ministry, referenced these broadly accepted buzzwords in his earlier essay in this volume. Such buzzwords prevent truth-based, depoliticized civil discourse on the Israeli-Palestinian conflict.

Facts and historical context on the core issue of borders are critical. UN Security Council Resolution 242 (1967) called for negotiation on "secure and recognized boundaries," thereby indicating formally that the 1949 armistice demarcation lines were never secure and recognized boundaries. Any serious and well-reasoned deliberation over Israel's borders must take into account UNSC Res 242, which the British and American drafters and diplomats at the time stated clearly would not mean a return to the indefensible and unrecognized 1949 armistice lines.¹⁶

The international community, in buying into the blatant lie generated by the Palestinian leadership calling for Israeli withdrawal to the non-existent "1967 borders," has turned this into a form of "lawfare." Critics and neutral observers alike would be advised to seek a fact-based discourse on the issue of borders, taking into consideration the genuine and substantive security, historical, demographic, and religious factors necessary to determine any freely negotiated bilateral border, as directed by the Oslo accords, and more recently the U.S. peace plan. It takes two parties to determine a border which cannot be imposed by false and misleading clichés.

CONCLUSION

Since the establishment of modern nation-states with the Treaty of Westphalia in 1648, Israel has been the only democratic nation-state whose existence has been constantly and consistently rejected and attacked since the day of its establishment in 1948, 36 months following the revelation of the Nazi regime's mass murder of European Jewry. It would appear reasonable that any well-reasoned civil discourse on Israel would include an appreciation of its security concerns, historical and legal rights, and its diplomatic claims.

The principles of fact and context-based discussion on Israel would result in far more productive international dialogue than the current one.

Finally, Israel should be judged by the same values as other nation states, values that overcome the current tendency to defamation, delegitimization, dehumanization, demonization, and denial of equal treatment under the law.¹⁷

Instead, respectful and well-reasoned principles outlined here underlie respectful civil discourse that should be embraced as a moral standard in the international diplomatic, media, and public dialogue on Israel.

Endnotes

- 1 <https://www.amazon.com/Beyond-Chutzpah-Misuse-Anti-Semitism-History/dp/0520249895>
- 2 <http://www.bu.edu/articles/2010/noam-chomsky-rails-against-israel-again/>
https://web.archive.org/web/20141202160042/http://www.todayszaman.com/interviews_norman-finkelstein-israel-is-committing-a-holocaust-in-gaza_164483.html,
<https://www.algemeiner.com/2018/12/17/after-cnn-firing-marc-lamont-hill-blames-israel-for-police-killings-of-black-people-opposes-renouncing-farrakhan/>,
<https://www.aljazeera.com/indepth/opinion/2013/10/structural-roots-israeli-apartheid-20131028101932219688.html>, https://canarymission.org/professor/Saree_Makdisi
- 3 The IHRA Working Definition of Anti-Semitism, adopted in 2016, states: “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.” <https://www.holocaustremembrance.com/working-definition-antisemitism>
- 4 <https://www.state.gov/defining-anti-semitism/>
- 5 Professor Irwin Cotler, former Canadian Minister of Justice, has said that criticism with integrity would be characterized by avoiding the “5D’s” in the application of political criticism: demonization, denial of equality under the law, deligitimization, defamation, and dehumanization. In a discussion with the author, Jerusalem Center for Public Affairs, February 9th 2020,
- 6 <https://jcpa.org/article/israels-rights-territories-settlements/> See also <https://jcpa.org/article/the-legality-of-israels-settlements/>
- 7 See Hansell letter from 1978: https://www.hlrn.org/img/documents/USSDLegalAdvisorHansell_ltr.pdf
- 8 <https://jcpa.org/article/the-legality-of-israels-settlements/>
- 9 <https://palwatch.org/page1/>

- 10 <https://www.journals.uchicago.edu/doi/abs?10.1086/695377/mobileUi0=&journalCode=ci>,
<https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>,
<https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>,
<https://www.youtube.com/watch?v=BvzSv28z97o&t=9s>
- 11 https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ohchr_syria_-_belligerent_occupation_-_legal_note_en.pdf

See also, Alan Baker <https://jcpa.org/israels-rights-territories-international-law/> and <https://www.tabletmag.com/jewish-news-and-politics/294359/israels-rights-in-the-west-bank-under-international-law>

Israel bases its right to use territories under its legal occupation based on the 1907 Hague Convention concept of “usufructuary”, see <https://ihl-databases.icrc.org/ihl/WebART/195-200065>
- 12 Hundreds of Israeli civilians were killed in terror attacks between 2000 and 2003 and 213 victims in 2003 alone. <https://mfa.gov.il/MFA/MFA-Archive/2004/Pages/2003%20Terrorism%20Review.aspx>
- 13 <https://bdsmovement.net/files/apartheid-wall-mural-bethlehem-westbankjpg-0>,
<https://bdsmovement.net/bnc>,
http://english.wafa.ps/page.aspx?id=CUT0tha21688547364aCUT0th&__cf_chl_jschl_tk__=ef9d27fe308b58afe666f00c80715870cf1712ce-1581511825-0-AcE3MzzZlrBQulzCRazhSsKui1Bg6OnSnnrsDNY22shIoj sVf6OdXjO_mu02ZMXa93bjMF0Fv1zk8lKYjfNbUNbLFNVHwBymStc7nSC5ibbXlIrisjAv2mV-AVsLUBmd8GfWUigVf2-XAUQgrG18fz4Hb8Zv yN5azVQoEo6icIngCZRaxUNtUSNsQNyp-NL1Qp8ZxFdsXyEwHnUc_DnNGcyyqv2BAZZ2i0w-HRfMxUuSTwZAAKVBSp7VmQqjq6qlw07A_5tN_6us9p4t6XVZab57CxgzntmuT2chTthkLlf9tzUR0FGP2CCdq3MB18j O8uqxVi5q4x3kex4YUnOibXA
- 14 <https://www.jpost.com/Israel-News/Shin-Bet-chief-Argaman-We-thwarted-560-terror-attacks-this-year614723->
- 15 <https://www.icc-cpi.int/Pages/item.aspx?name=20191220=otp-statement-palestine>
- 16 https://jcpa.org/requirements-for-defensible-borders/security_council_resolution_242/
- 17 Cotler, February 10th 2020