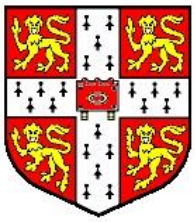

THE UNITED NATIONS AND THE QUESTION OF PALESTINE: A STUDY IN INTERNATIONAL LEGAL SUBALTERNITY

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This dissertation is submitted for the degree of Doctor of Philosophy

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Abstract

The United Nations and the Question of Palestine: A Study in International Legal Subalternity

Ardi Imseis

As one of the longest running disputes on the United Nations agenda, the conventional wisdom holds that the UN's position offers the only normative basis of a just and lasting peace between Israelis and Palestinians grounded in international law. Contrary to this position, this dissertation argues that there has been a continuing though vacillating gulf between the requirements of international law and the position of the UN, which has inevitably frustrated rather than facilitated the search for a just and lasting peace. To this end, the research examines a number of areas in which the UN has assumed a leading role in the question of Palestine since 1947. It critically explores the tensions that exist between the positions adopted by the Organization on the one hand, and various requirements of prevailing international law on the other. If the UN has failed to respect the normative framework of international law in its management of the question of Palestine, what forms has this taken? How long has it persisted? What are the implications, not only on the Palestinian people – whose contemporary leadership has long had faith in the UN as the forum within which their international legal entitlements must be pressed – but also on the Organization itself? By addressing these questions, the research critically interrogates the received wisdom regarding the UN's fealty to the international rule of law, in favour of what more accurately might be described as an international rule by law. It demonstrates that through the actions of the Organization, Palestine and its people have been committed to a state of what the author calls International Legal Subalternity, according to which the promise of justice through international law has been repeatedly proffered under a cloak of political legitimacy furnished by the international community, but its realization interminably withheld.

Acknowledgments

This project finds its origins in questions encountered long-before the decision to pursue them academically was taken. Early intellectual influences that triggered my ongoing interest and commitment to contemporary Palestine studies include the pivotal works of Ibrahim Abu Lughod, Sami Hadawi, Walid Khalidi, Rashid Khalidi, Nur Masalha, Ilan Pappe and Edward Said. International law influences include the seminal writings of Michael Akehurst, Ian Brownlie, Antonio Cassese, James Crawford, John Dugard, Richard Falk, Anis Kassim, Thomas and Sally V. Mallison and John Quigley. Between 2002-2014, I served in various capacities with the United Nations Relief and Works Agency for Palestine Refugees in the Near East, first in Gaza City and then in East Jerusalem, with occasional duty taking me to Jordan, Lebanon and Syria. Among other things, it was in service of the Palestine refugees that my appreciation for both the limits and possibilities of international law took shape; a sensibility developed during this time thorough exposure to the works of various critical international legal scholars, including Martti Koskenniemi and Antony Anghie, along with the rest of the Third World Approaches to International Law network of scholars.

At Cambridge, gratitude is owed to my supervisor at the Lauterpacht Centre for International Law, Marc Weller, who provided just the right measure of guidance, critique and encouragement to help bring the project to fruition, as well as to Glen Rangwala, in the Department of Politics and International Studies and Nicky Padfield, Master, Fitzwilliam College. Thanks are also due to the staff at the Squire Law Library who warmly hosted me, in particular Leslie Dingle, Kay Naylor, and David Wills, and the UN Library at the Palais des Nations, Geneva, in particular Adriano Gonçalves and Amanda Howland. Special thanks are owed to various individuals who read portions of the dissertation as it evolved, especially Michael Lynk, Alice Panepinto and Reem Bahdi. Gratitude must be extended as well to the countless individuals who provided valuable feedback on elements of it in talks, workshops and conferences at Cambridge and beyond, including the American University in Cairo, the American University of Paris, the Australian National University, Birzeit University, and the University of Cork. I am particularly indebted to Professors Dugard and Falk, who were my examiners on the viva. Beyond the conferral of the doctorate itself, knowing that the project met the exacting standards of those two towering figures was achievement enough. Last, but not least, my largest debt of gratitude is owed to my family, in particular my Father, Michel, my partner, Rema, and our children, Kinan, Yasmin, and Laila. But for their collective patience and support, none of this would have been possible. It is to my children that this work is dedicated.

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1

Introduction

1. The Research Question

Owing to its unprecedented representative scope, what the United Nations (UN) says and does globally is widely perceived to be accompanied by an unparalleled moral and political legitimacy directly linked to its status as the principal guardian of the international legal order. But what happens when the acts or omissions of the UN do not accord with international law, but are rather the result of political expediency, great power politics or bureaucratic inertia? In such circumstances, what is to be made of the UN's solemn *Charter* obligation to maintain international peace and security "in conformity with the principles of justice and international law"?[1] What impact does this have on the UN's legitimacy, particularly from the standpoint of the global south, where most UN operations and the majority of the world's population are located? As part of the growing critique of the UN, there is a general consensus that its value in the 21st century will increasingly rest upon its ability to respect and ensure respect for international law in the discharge of its functions, and thereby enhance the legitimacy of its actions.[2] While the UN has successfully done this in a variety of spheres, doubt remains as to whether its handling of the question of Palestine has been one of them.

Since its founding in 1945, no other geopolitical conflict has occupied as much time within the UN system as the question of Palestine.[3] As one of the longest-running disputes on the UN's agenda, now in its eighth decade, the conventional wisdom holds that the UN's position on the question of Palestine offers the only normative basis of a just and lasting peace between Israelis and Palestinians grounded in international law. Contrary to this position, this dissertation argues that there has been a continuing though vacillating gulf between the requirements of international law and the position of the UN on the question of Palestine, which has inevitably helped to frustrate rather than facilitate the search for a just and lasting peace. To this end, the research will examine a number of areas in which the UN has assumed a leading role in the question of Palestine since 1947. It will critically explore the tensions that exist between the positions adopted by the Organization on the one hand, and various requirements of prevailing international law on the other. If the UN has failed to respect the normative

[1] *UN Charter*, art. 1(1).
[2] Thakur (2010), 4.
[3] *E.g.*, the work of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, especially the Division for Palestinian Rights.

framework of international law in its management of the question of Palestine, what forms has this failure taken? How long has it persisted? What are the implications, not only for the Palestinian people – whose contemporary leadership has long had faith in the UN as *the* forum within which their international legal entitlements must be pressed – but also for the Organization itself? By addressing these questions, the research will critically interrogate the received wisdom regarding the UN's fealty to the international rule of law in its work. It will demonstrate that through the actions of the Organization, Palestine and its people have been committed to a state of what I shall call international legal subalternity (ILS), according to which the promise of justice through international law has been repeatedly proffered under a cloak of political legitimacy furnished by the international community, but its realization interminably withheld.

The choice of Palestine as a case study is valuable for at least two reasons. First, owing to its prolonged and festering nature, the question of Palestine offers a window into the role of international law in UN action over virtually the entirety of the Organization's existence. Temporally, this window is broad enough to cover the major paradigmatic shifts and political divides in the international system that have marked the UN's evolution from its very origins; *i.e.* late-empire/colonies, East/West, North/South. Second, it is striking that despite the copious international legal literature that exists on the Palestine problem on the one hand, and the very rich experience of the UN in dealing with its many aspects on the other, there has yet to be written an independent and critical scholarly study that attempts to bring these two strands together in any meaningful way. To be sure, no critical scholarly volume on the UN and the question of Palestine exists, as such. The closest one comes to any publicly available general treatment of the UN and the question of Palestine is found in a series of public information pamphlets produced by the UN and the Arab League, a few monographs that fleetingly cover aspects of the Palestine problem within the UN (mostly dated from the 1970s and 80s), and a number of edited volumes that offer histories of the UN's coverage of the question of Palestine through the narrow prism of partially reproduced UN documents.[4]

While this dissertation cannot reasonably cover every aspect of the UN's handling of the question of Palestine, by critically examining key moments of the Organization's engagement

[4] *The Question of Palestine and the United Nations* (UN, 2008); *The United Nations and the Palestine Question* (Arab League); Nuseibeh (1981); Tomeh, *The Palestine Case*; Forsythe (1972); Hawley (1975); Hadawi, *The Palestine Problem* (1966); Hadawi, *United Nations* (1966); Quigley (2016); *The United Nations and the Question of Palestine* (Wolf, 2009). The Nuseibeh monograph is particularly conspicuous in that, despite its title, it offers very little by way of examination of the UN's position on the question of Palestine.

with it over an extended period of time through the prism of international law, an attempt will be made to provide a picture that has yet to be offered. While previous legal analyses of some of these moments have been undertaken extensively, and others have not, they have not collectively been interpreted with reference to the subaltern theoretical approach adopted here, which draws and builds upon on the critical international legal theory associated with the Third World Approaches to International Law (TWAIL) school of thought.

2. Theoretical Framework & Literature Review

2.1 Epistemological Foundations: Subalternity in the International System

A useful point of departure is to make two separate but related observations about the epistemological framework of this study, each of which is rooted in a subaltern perspective of the nature of the international system. Before setting them out, however, we must first ask who or what is the "subaltern"? The origins of the term can be traced to Antonio Gramsci, who understood it to mean that which is in a positional opposite to a "dominant", "elite" or hegemonic position of power.[5] To Gramsci, it was the interaction between dominant and subaltern communities that formed the essence of human history.[6] Today, subaltern studies scholars use the term broadly, to connote all those subordinated in global society, whether according to traditional categories such as race, class, gender and religion, or more recently acknowledged categories such as age, sexual orientation, physical ability, etc.[7] Viewed in the positivist context of modern international law and institutions, where the state is the principal actor on the system, individuals, non-self-governing peoples, and, in many respects, developing states, are among those that constitute the subaltern. This includes Palestine and the Palestinian people.

The first observation concerns a point that may seem self-evident, given the subject matter of this study, but one that cannot be taken for granted owing to prevailing skewed and at times anti-Palestinian sentiment in some mainstream circles, particularly in the West:[8] any study devoted to examining Palestine, including before the UN, requires us to take the place and its people *seriously*. One might balk at this proposition, given the inordinate amount of time and energy the UN has devoted to the question of Palestine over the past seven decades. It may also

[5] Said, E.W. "Foreword" *in* Guha & Spivak (1988), v-vi.
[6] Hoare & Smith (1996), 52-55. *See also id*., vi.
[7] Guha & Spivak (1988).
[8] Of note was Edward Said's lamentation of the fact that one staple of the "common discourse of enlightened American liberal democracy" was what he identified as "the complete hegemonic coalescence between the liberal Western view of things and the Zionist-Israeli view" when it came to Palestine and the Palestinians; Said (1980) at 37. *See generally*, Chomsky, *Fateful Triangle* (1999); Said & Hitchens (2001); Philo & Berry (2004).

seem inconsistent with the oft-recited mantra (regularly, though not exclusively, expressed within UN circles) that good faith engagement requires 'balance' and 'neutrality' between competing claims in Palestine.[9] But that would miss the point. By taking Palestine seriously, I refer to the imperative that the lived reality of the Palestinian people over the course of its modern history from the late-nineteenth century onward – colonized, dispossessed, forcibly exiled, occupied, discriminated against – must remain at the forefront of any study of it; not as an object to be ignored, casually dismissed, or represented for, but as a subject with a sustained history, presence, and agency of its own. This was well demonstrated by Edward Said, who urged us to view the matter of Palestinian subalternity as an "issue involving representation", in order to counter the "blocking operation by which the Palestinian cannot be heard from (or represent himself) directly on the world stage".[10] The result has been to misrepresent or efface (figuratively and literally) the lived reality of Palestine and its people in order for power to justify its engagement with Palestine, whether for geo-strategic purposes (as in the case of Great Britain and the United States (US)) or in order to transform it into a settler-colonial state (as in the case of political Zionism and, eventually, Israel).[11] By taking Palestine seriously, it is therefore vital to adopt an approach that critically interrogates how and at what points in Palestine's modern history its position in the international system was superseded and compromised in *legal* terms. This will allow for a better understanding of the UN's engagement with it beyond the realm of the political, humanitarian and developmental spheres. The character of contemporary Palestine as a place of unfulfilled promise whose people continue to be denied their internationally sanctioned legal rights, and stubbornly refuse to submit themselves to such fate, is a useful window through which ILS can be explained and understood. Therefore, while this study will necessarily take account of competing hegemonic claims and interests in Palestine, it will take a decidedly subaltern view of things, rejecting the all too common tendency of power to disregard the lived reality of the indigenous people of that land.

The second observation concerns the nature of international law, not only as a series of rules upon which the international state system is based in the classical positivist sense, but also as a legal narrative organically connected to the European imperial setting in which it was constituted and then replicated, to varying degrees, in the international institutions created in

[9] Simona Sharoni has decried this as the "trap of false-symmetry", which requires the scholar to submit herself to the Pavlovian condition of affirming a purported moral, legal, and political equivalence between hegemonic Israel and its western sponsors and the infinitesimally weaker Palestinians, in order to be received as intellectually worthy, honest or fair. Sharoni (1995), 5.
[10] Said (1980), 39.
[11] Herzl (1896).

the first half of the twentieth century.[12] Critically understanding this pedigree and evolution of modern international law will allow us to shed light on the role of international law in the actions of the UN in Palestine, most particularly in the defining period immediately following World War II (WWII). Central to the argument is the work of the TWAIL network of scholars.[13] In particular, Antony Anghie has focused on the imperial and colonial origins of international law "to show how these origins create a set of structures that continually repeat themselves at various stages in the history of international law."[14] According to him, "colonialism was central to the constitution of international law" in that many of its "basic doctrines" going back to the sixteenth century "were forged out of" Europe's "attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation."[15] The "essential point", according to Anghie, is that international law "did not precede and thereby effortlessly resolve" European/non-European relations; rather, international law was created by imperial Europe in its encounter with its colonial Other.[16] Examples of this hegemonic/subaltern binary, and the process by which the former *reconceptualized* and/or *created* new law to regulate the latter, abound in the annals of public international law and institutions.[17] One of the goals of this dissertation is to demonstrate how this process – what I shall call rule *by* law – has played itself out at key stages of the UN's engagement with the question of Palestine. What makes this rule by law process intriguing, is that it has unfolded at a time when the organizing principle of the post-WWII international community has ostensibly been based upon an international rule *of* law framework, the defining feature of which has been the universal application of international law without regard to the power or station of the subjects in question.

Structurally, there appears to be three crosscutting themes that animate subalternity in the international system and, by extension, the ILS condition. To the extent that these themes are related and overlap with one another, they will inform the episodes examined by this research. First, is the theme of the Eurocentricity of the modern international legal order as rooted in

[12] Imseis (2009), 1.
[13] *See* Anghie (2005); Anghie (2002); Anghie (1999); Anghie (1996) at 322; Anghie, et al. (2003); Chimni (2007); Fakhri (2008); Gathii, "Alternative" (2000); Gathii, "Neoliberalism" (2000); Mutua (2000); Okafor (2010); Rajagopal (2000).
[14] Anghie (2005), 3.
[15] *Id*.
[16] Anghie (1996), 322.
[17] For instance, in the 17th-19th centuries European colonial powers commonly granted forms of quasi-sovereign authority over non-European peoples to private European entities in order to better serve their imperial interests abroad; Anghie (2005), 68-69. Likewise, the dissociation of Latin America from Europe expressed in the 1823 Monroe Doctrine, unilaterally proclaimed by the United States (US) against European intervention in the Western hemisphere, served as the legal basis for numerous military interventions by the US in Latin America; Moore (2013); Chomsky, *Year 501* (1999), 157-158.

Europe's imperial and colonial past. In this respect, an important problematic for TWAIL theorists is the notion of *la mission civilisatrice*; the idea that "justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, underdeveloped people of the non-European world by incorporating them into the universal civilization of Europe".[18] In juridical terms, this manifested itself in the social-Darwinistic standard of "civilization", the prime legal determinant for membership and standing in the international system in the imperial age.[19] Although reaching its zenith in the second half of the nineteenth century, use of this standard persisted through the turn of the twentieth century, featuring prominently in the League of Nations mandate system. Second, is the theme of the circumscribed nature of Third World sovereignty and international legal personality in the post-decolonization era UN. The end of WWII ushered in a new world order in which classic forms of European empire ostensibly gave way to more liberal principles set out in the *UN Charter*. This included the principles of sovereign equality of states, suppression of acts of aggression, equal rights and self-determination of peoples.[20] Yet for all the promise of the UN, particularly following decolonization, a continued tension between the old imperial rule by law structure and these new liberal rule of law ideals remained.[21] Third, is the theme of neo-imperial power and the role it has played in perpetuating the contingency and marginalization of the global subaltern. In the post-WWII era, the victorious allied powers have sometimes used international law to further their own national interests at the expense of the international rule of law. In this respect, and particularly since the end of the Cold War, the US has played the most significant role under cover of a purported commitment to a progressive, democratic and rights-based international order.

Notably, the above crosscutting themes span the history of modern international law and institutions, including as embodied in the UN from 1945 to the present. Here, Anghie's analysis of a basic paradox in the evolution of international law and institutions is instructive in helping us understand the hegemonic/subaltern binary in the system itself. A critical reading of the history of international law and institutions reveals that the mechanisms, doctrines and technologies created as a means of achieving a liberal rights based global order have at times shown themselves to be the very tools through which that order has been frustrated or undermined to the detriment of subaltern classes. This is "inherently problematic", Anghie

[18] Anghie (2005), 3.
[19] Wheaton (1866), 17-18; Oppenheim (1928), 36-37; *and* Koskenniemi (2008), 127.
[20] *UN Charter*, art. 1.
[21] The composition and procedural rules of the Security Council and the codification of "general principles of law recognized by civilized nations" as a source of international law in the *ICJ Statute* are two examples; *UN Charter*, ch. V; *ICJ Statute*, art. 38(1).

argues, "because it is sometimes precisely the international system and institutions that exacerbate, if not create, the problem they ostensibly seek to resolve."[22]

This dissertation will attempt to show that, perhaps more than any single case study, the UN's engagement with the question of Palestine stands out as an obvious example of the phenomenon described above. Through the acts of some of its principal and subsidiary organs, the UN has presided over both the unmaking of Palestine (*i.e.* its attempted partition, military conquest, depopulation and political effacement between 1947 and 1967) and its qualified reemergence, at least in truncated, fragmented and subjugated form (*i.e.* in the occupied Palestinian territory (OPT) post-1967) over time. Throughout this prolonged episode, the failure of the UN to abide by the full range of prevailing international legal norms in its management of the question of Palestine has been demonstrative of a larger failure by the Organization to take Palestine and its people seriously. This has ultimately resulted in the Organization perpetually conceiving of them and their putative membership in the system as subordinate and contingent, thereby reifying, maintaining and perpetuating their condition of ILS over time.

2.2 The Great Paradox: TWAIL and the Counter-Hegemonic Potential of International Law and Institutions

TWAIL scholarship has become an important part of the critical discourse on modern international law and institutions in recent decades. Nevertheless, its proponents have for the most part resisted succumbing to a nihilistic view of the discipline. Foremost among them, Balakrishnan Rajagopal has argued that there remains a counter-hegemonic potential that the Third World can bring through its use of international law and institutions.[23] Thus, while the state-centric nature of international law is what reinforces the hegemonic/subaltern binary inherent in its evolution, lending international law a quality of being nothing more than "a mask for power relationships" and a tool for the maintenance of the established international order,[24] leading TWAIL theorists have taken a more accommodating view. Many recognize that in the interdependent *UN Charter* era, where a multiplicity of actors increasingly engage with one another in infinite ways, international law has come to represent something potentially more than a politics of domination by other means. For subaltern groups, negotiating the state-centric international order has sometimes entailed using the very legal principles that underpin it to challenge that order on its own terms. The great paradox, therefore, is that beyond its role in

[22] Anghie (2005), 192.
[23] Rajagopal (1998), 3.
[24] Brunnée & Toope (2010), 3.

the evolution and maintenance of a hegemonic international order, in so far as international law now claims and has the potential to serve as an authentically universal standard for all peoples, it contains what Dianne Otto calls the "seeds of resistance" for those that remain unable to fully benefit from its promise.[25] Put another way, despite its inequitable origins, elements of which clearly linger on in the contemporary period, international law remains the only means by which to measure, in legal terms, the acts of subjects of the international system.

This critical duality of international law is a proposition that runs throughout this dissertation. Indeed, all law inherently possesses a duality of this sort. On the one hand, law is the product of the exercise of political power by subjects who wish to impose on society some form of normative order consistent with their interests and *weltanschauung*. On the other hand, once created, law acts as the embodiment of such normative order under a claim that it stands apart from the very political power and interests of the subjects that created it and whom it now binds. Throughout this process, law operates as both an expression of the values and interests of political authority, and as a check and balance on that very same authority. In the context of international law, Martti Koskenniemi identified this tension as giving rise to law as both an apology for power and a harbinger of a utopia.[26] Always in discord with one another, never definitively cancelling each other out, the law as apology/utopia dialectic has become a fixed feature of the international system. This is particularly so when viewed from the vantage point of weaker nations and peoples.

Instances of this tension appear everywhere in international law and inform the hegemonic/subaltern binary identified above. For example, from ancient times slavery was considered a natural element of the Roman *jus gentium*. It was the very legality of the holding of property in other human beings that allowed the trans-Atlantic trade in Africans to flourish as the economic backbone of the settler-colonies of the so-called New World. As Great Britain's engagement with the slave-trade became unprofitable and post-Enlightenment philanthropic and populist sentiment eschewed the practice as uncivilized, there emerged sufficient moral resolve to bring it to an end through gradual changes in the law based on both naturalist and positivist schools of legal thought. This was embodied in British abolitionist positions at the Congress of Vienna in 1815, American abolitionism following the American Civil War in 1865, and the eventual universal proscription of slavery in a series of international instruments concluded in the late nineteenth and early twentieth centuries, culminating in the *Slavery*

[25] Otto (1996), 343.
[26] Koskenniemi (2005).

Convention of 1926.[27] A more contemporary example concerns the status of indigenous peoples in international law. While decolonization in the 1960's "promoted the emancipation of colonial territories" modeled along a distinctly Westphalian standard according to which independence was granted the new territorial states under the principle of *uti possidetis*, it "simultaneously promoted the assimilation of members of culturally distinctive indigenous groups into the dominant political and social orders that engulfed them." [28] In response, a rights-based international movement emerged in the 1970's arguing for the increased recognition of the human and people's rights of indigenous groups. Led by a host of non-governmental indigenous people's organizations and independent experts, and facilitated by the UN, this effort has made some incremental gains in the realm of *lex ferenda*. Thus, the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms that indigenous peoples "are equal to all other peoples" and therefore enjoy the right to "self-determination", a recognition that has allowed for the expansion of self-government in a number of states.[29] This evolution in the rights of indigenous peoples would not have been possible but for the active reliance on evolving concepts of prevailing human rights law by indigenous rights activists themselves. These two examples demonstrate international law's duality as both a force for the maintenance of a hegemonic order and one in which those subaltern classes who are overlooked or ill-served by such order may challenge it on its own terms. In both, criticism of prevailing law by and for subaltern groups was rooted in a critical application of that law against evolving social mores and sensibilities. This in turn produced fresh claims of fairness, ultimately resulting in some form of progressive development of the law.

2.3 TWAIL's Blind Spot: International Legal Subalternity as both a Category and a Perpetual Condition

Does the counter-hegemonic potential of international law and institutions mean that the hegemonic/subaltern binary at their root can be eliminated? Despite its decentralized, heterogeneous and polycentric nature,[30] TWAIL literature broadly seems to suggest so. According to Anghie and Bupinder Chimni, Third World jurists of the decolonization period to whom the TWAIL moniker has been affixed *post hoc* (TWAIL I) – *e.g.* Georges Abi-Saab, Francisco Garcia-Amador, R.P. Anand, Mohammed Bedjaoui, and Taslim Elias – tempered their critique of classical European international law and institutions by adopting a "non-

[27] *Slavery Convention*. Allain (2013), 59-60, 64ff; Drescher, "From Consensus to Consensus" *in* Allain (2012), 316-355.
[28] Anaya (2004), 55. *Also* Hohmann & Weller (2018).
[29] *UNDRIP*, preamble, arts. 2, 3.
[30] Gathii (2011), 34.

rejectionist stance".[31] According to this position, "the contents of international law could be transformed to take into account the needs and aspirations" of the colonized and newly independent Third World states.[32] This transformation was to be achieved primarily through the UN, and key doctrines of modern international law were to be employed in leveling the playing field between Europe and its former colonies. Foremost of these were the principles of sovereign equality of states and non-intervention.[33]

From the mid-1990s, contemporary TWAIL theorists (TWAIL II) – *e.g.* James Gathii, Obiora Okafor, Makau wa Matua, Rajagopal, Otto, Anghie, Chimni, etc. – have critiqued this view. At issue has been TWAIL I's apparent deference to the Third World post-colonial state as a site in which modern international law and institutions have been employed not to emancipate Third World peoples from the yolk of European colonialism, but to entrench authoritarian and corrupt native elite rule over them. TWAIL II writers have taken issue with their predecessors' failure to see beyond the sovereignty of the Third World state as an emancipatory end in itself, rather than regard it as a tool through which Third World citizens would realize true freedom and equality *vis á vis* their former European masters. TWAIL II writers have accordingly offered deeper theoretical critiques of international law and institutions, focusing on their colonial and imperial origins, to demonstrate a continuing structural bias in the international legal system far more difficult to dislodge than was previously understood.[34]

Yet, despite their more critical approach, TWAIL II scholars appear to take the view that the prospect of dislodging international law's structural bias – its hegemonic/subaltern binary – remains possible. Thus, to the views of Otto and Rajagopal regarding the counter-hegemonic potential of international law and institutions, Matua has added that TWAIL "present[s] an alternative normative legal edifice for international governance" distinct from the contemporary international legal system.[35] Likewise, through its "empowering radical epistemology that liberates international law" from its "colonial and elitist shackles", Richard Falk argues that TWAIL "validates the transformative and liberationist potential of international law".[36] Adopting a Marxist approach, Chimni argues that despite international law's "imperialist" pedigree, "the idea of international rule of law continues to make sense" for what he calls the

[31] Anghie & Chimni (2003), 81.
[32] *Id.*
[33] *Id.*
[34] *Id.*, 82-86; Imseis (2009), 2-3.
[35] Mutua (2000).
[36] Falk (2016), 1944.

Transnational Oppressed Class, which must rely on various "foundational principles of international law (e.g. the principle of non-use of force)" to overcome its subaltern status.[37] For him, "the challenge is to use CIL [contemporary international law] and institutions to the advantage of the subaltern classes… [L]egal nihilism is not the appropriate counter. What is called for is a creative and imaginative use of existing international laws and institutions to further the interests of the 'wretched of the earth'."[38] Finally, David Fidler argues that along with its critique of "the use of international law for creating and perpetuating Western hegemony", TWAIL's *raison d'etre* is necessarily to "construct the bases for a post-hegemonic global order."[39]

It is unclear whether this optimistic, liberationist view of international law and institutions is fully warranted, leading to the possibility that TWAIL literature may suffer from a blind spot of sorts. This arises through what appears to be a failure to account for international law and institutions as social phenomena, which by their nature are in *constant flux* and *evolution*. Because international law, institutions and society are ever changing, it follows that the law-making/challenging process described above can theoretically never end so long as humanity continues to exist and organize itself internationally with reference to any form of rule of law: *ibi societas ibi jus*. That is to say, there is no legal threshold beyond which all subaltern groups will achieve the full range of international legal personality and rights, thereby putting an end to the hegemonic/subaltern binary once and for all. As law is challenged by the subaltern, and changes are thereby introduced to law over time, the interests served by that law produce either partially assuaged or wholly new subaltern classes who in turn challenge prevailing law. In many ways, therefore, the hegemonic/subaltern rule by law binary operates within a cycle that, it would appear, cannot be broken.

An implied acknowledgement of this is found in Gathii's observation that "a central component of TWAIL is to challenge the hegemony of the dominant narratives of international law…by teasing out encounters of difference along many axes – race, class, gender, sex, ethnicity, economics, trade etc".[40] For him, this teasing "create[s] fruitful tensions or new conceptual spaces for richer, subtler and more nuanced renditions of international law."[41] Far from vitiating these axes of human interaction, critical examination of international law and

[37] Chimni (2010), 75-76.
[38] Chimni, "An Outline" *in* Marks (2008), 90-91.
[39] Fidler (2003), 31.
[40] Gathii (2011), 37.
[41] *Id*., 40.

institutions reveals how such axes are reaffirmed, restructured, or regenerated in similar or new forms. This ultimately allows for fresh intellectual terrain to open up for a more fulsome understanding of the hegemonic/subaltern binary inherent in the discipline. In this sense, ILS emerges as a distinct category within the international legal and institutional framework, and one that, subject to the maintenance of an international society based upon some form of legal order, must exist in perpetuity.

Two points should be made at this stage. First, it is of note that TWAIL scholarship has yet to clearly identify such a distinct category for the subaltern half of what I have called the hegemonic/subaltern binary. To be sure, the notion of hegemony in international law and organization has been well traversed in both mainstream and critical international legal literature, obviating the need to do so here.[42] Yet, only a small minority of TWAIL scholars have used the term "subaltern" in relation to the various classes of groups they have found subjected to the hegemonic effect of the international legal and institutional order.[43] Even then, these authors have curiously failed to find the predicament and features shared by those classes pronounced enough to warrant an acknowledgement that they have given rise to a common condition that must be appropriately named and identified.[44] The closest one comes to what this research identifies as ILS is found in the sociological writings of Boaventura de Sousa Santos and César Rodríguez-Garavito. [45] They posit a sociolegal idea they term "subaltern cosmopolitan legality". The aim of this idea is to "challenge our sociological and legal imagination and belie the fatalistic ideology that 'there is no alternative' to neoliberal institutions."[46] The authors make clear that their notion is not descriptive (*i.e.* of a class or group sharing a common condition), but rather prescriptive (*i.e.* of an idea and approach to be employed metaphysically). In addition, they affirm that it is not focused on the international legal and institutional order as much as it is on law in the transnational and domestic perspective *vis á vis* the forces of "hegemonic, neoliberal globalization". It therefore seems clear that subaltern cosmopolitan legality is not synonymous with what I have called ILS.[47]

Second, the permanency of ILS as a condition should not be taken to suggest that it is immutable and fixed on one or more specific groups. The permanency of ILS as a condition

[42] *E.g.*, Vagts (2001); Alvarez (2003); Gathii (1998).
[43] *E.g.*, Otto (1996); Rajagopal (2000); Chimni (2010).
[44] In discussing international law's "Others", Marks (2008), 16, indicates that scholars use a number of terms including "subaltern classes", "subordinate groups" and "oppressed classes", or otherwise imply the existence of such groups, in reference to "those seeking emancipatory change".
[45] De Sousa Santos & Rodríguez-Garavito (2005).
[46] *Id.*, 1.
[47] *Id.*, 11.

rests not in the fact that given subaltern groups cannot utilize the counter-hegemonic potential of international law and institutions to challenge and, at some point, break free from their inequitable circumstances. Rather, it is to suggest that even as such groups register successes in pushing back from time to time, the overall condition of ILS as a structural component of the international system cannot fundamentally be eradicated. Organically, as international law and organizations are challenged and new law is made within and by that structure, the condition of ILS may morph in respect of one or more subaltern group, or otherwise shift from one or more of them to other, likely new, subaltern groups as part of the law-making/challenging cycle.

Returning to our earlier examples, it is of note that despite the abolition of slavery in international law in the late nineteenth and early twentieth centuries, the racism embedded within the domestic legal structures of former slave-holding states (the paragon being the US) that enabled and sustained slavery in the first place was morphed but not eradicated. For formerly enslaved persons, this structural racism remained basically untouched from an international legal standpoint, given the collective operation of doctrines of non-intervention, the standard of civilization and state-centrism that placed them beyond international legal scrutiny.[48] Likewise, although indigenous peoples are said to enjoy a right of self-determination under the 2007 UNDRIP, this purported right remains limited for two reasons. First, it is limited through an express provision of UNDRIP that constricts the exercise of that self-determination to the realm of internal or local affairs within the territorial sphere of existing sovereign and independent states.[49] Second, it is limited by the doctrinal prescription that deprives declarations like UNDRIP of any binding legal force as a matter of positive international law.

The above are examples where the subalternity of the underclass has essentially remained in place under international law, despite some measure of change introduced within that law. Examples where wholly new categories of subaltern classes have been created through changes in international law include the emergence of internally displaced persons (IDPs) and economic migrants, both of which evolved as recognized groups in need of protection *only after* international law had recognized refugees as a distinct subject of persons with legally binding rights in relation to states.[50] In a sense, the crystallization of refugee rights under international

[48] Alexander (2010).
[49] *UNDRIP*, preamble, arts. 3, 4, 46.
[50] Contrast the *Refugee Convention*, a treaty codifying customary legal obligations on states, with the 1998 *Deng Principles* and the *New York Declaration*, both of which represent non-binding soft law in so far as they deal with IDPs and migrants, respectively.

law opened up space for the emergence, in legal terms, of IDPs and migrants, to whom a greater measure of the burden of subalternity has shifted.

What each of these examples illustrate is that whatever value exists in the counter-hegemonic use of international law and institutions, the limits of that value are to be found in the unbroken cycle of the hegemonic/subaltern binary at the root of the international legal order, a key manifestation of which is ILS. The research will show that the UN's management of the question of Palestine is a good example of this cycle and the ILS condition. Over time, the international law and order created or affirmed by the UN on the question of Palestine has compelled the Palestinian leadership to adjust its position in order to assert the rights of its people, often times in a curtailed measure. This has only resulted in the Organization shifting the legal goalposts in a manner that has frustrated those purported rights in some fashion or another while simultaneously holding itself out as the guarantor of those very rights.

2.4 TWAIL and the Question of Palestine

Given the raft of potential issues at play, it is surprising that TWAIL literature on the question of Palestine has only appeared over the past decade or so. While this literature has broken important ground, at least three shortcomings stand out.

First, to the extent it focuses its critique on the field of international law, as such, as being complicit in the unmaking of Palestine, the literature misses the mark by neglecting to account for the catalytic role of hegemonic actors in the equation. As a metaphysical phenomenon, international law is not self-executing. That function is left to the states that create it, almost always in concert with one another. In the context of the question of Palestine, the key international legal institutional protagonists have been the League of Nations and the United Nations, the latter to a much greater extent than the former. It is therefore striking to find that the current TWAIL literature on Palestine tends to highlight the complicity of international law almost as an actor *suo motu*, over the actions and omissions of those actually responsible for creating and giving it effect. Thus, in her otherwise insightful analysis of Palestinian "quasi-sovereignty", Laura Ribeiro repeatedly indicts "international law", as such, for simultaneously having "colonized" and "liberated" in Palestine while paying insufficient attention to the acts and omissions of the international institutional actors that made it so.[51] Likewise, in her examination of humanitarianism and Palestine, Michele Burgess laments the "role of international law in the subjugation of the European World", although giving slightly more

[51] Ribeiro (2009), 87.

attention to how that law was "used as a tool" in the effort, implying that some form of hegemonic agency was pivotal in the endeavor. Notably, Burgess confines her examination of the role of the UN in this to merely one paragraph.[52]

Second, the literature has largely tended to focus its sights on only two areas of analysis – namely, criticism of international law as manifested through the League of Nations Mandate for Palestine and the subsequent application and operation of international humanitarian and criminal law in the OPT.[53] This work has been vital in helping us critically understand how international law has been used in these moments to push the Palestinian people as a subaltern class to the edges of the international system. Yet one result of its relatively narrow focus has been to neglect the important role of the UN as not merely a forum within which much of this has taken place, but also as an actor responsible for this outcome in a variety of other areas from 1947 to the present.[54]

Third, an increasing volume of TWAIL literature on Palestine has engaged in important, though arguably esoteric, sociolegal analyses of how international law is articulated by its protagonists in "narratives" and "discursive techniques", rather than how it is created and employed by international institutions for unjust ends. Burgess has been the most prominent voice in this respect and her ethnographic work on the narratives of statehood as employed by Palestinian legal practitioners in the field, although novel, is a good example of this.[55]

By utilizing a TWAIL sensibility and theoretical approach to assessing how the UN has managed the question of Palestine over key periods of its engagement with the issue, this dissertation hopes to both build upon and add to the body of scholarship currently evolving in this area.

2.5 A Word on the Nature of the UN: Independent, Sum of its Parts or Both?

The UN is today "the only truly global institution of a general purpose which approximates universality".[56] From an original membership of 51 states in 1945, the body

[52] Burgess (2009), 49, 53.
[53] Ribeiro (2009); Burgess, *id*.; Burgis, "Discourses of Division" (2008); Sayed (2014); Reynolds & Xavier (2016).
[54] Although Strawson (2004-05) and Kattan (2009) have examined some of these moments, they have not identified themselves as TWAIL scholars nor utilized critical methods typically associated with TWAIL scholarship, instead favouring strictly positivist doctrinal methodologies.
[55] Burgis-Kasthala (2014). *See also*, Burgis, "Discourses of Division" (2008); *and* Burgis "The Promise of Solid Ground" (2008).
[56] Thakur (2010), 4.

currently boasts 193 Member States, with two non-Member Observer States, one of which is the State of Palestine.[57] The organization is comprised of six principal organs, each with its own powers and mandate: the General Assembly, Security Council, International Court of Justice, Economic and Social Council, Trusteeship Council and Secretariat. In addition, there are a host of other bodies subsidiary to one or another of the principal organs, each mandated to perform specific functions on behalf of the Organization.

Because the constituent members of each of the principal organs and the subsidiary bodies are either made up of representatives of Member States, UN personnel or a combination of both, and because each of these organs or bodies are empowered to perform widely divergent functions, the nature and extent to which they operate independently of state interest and power differs. This gives rise to questions as to whether the UN can be spoken of in homogenous terms, or if it is more appropriate to address it in heterogeneous ones. Put in another way, is the UN independent or merely the sum of its parts? And how does that help us understand hegemonic/subaltern binary inherent in the work of the Organization?

Simon Chesterman has noted that there are "divergent views as to whether the UN should be a forum for intergovernmental cooperation or an independent actor that can lead on issues of global import".[58] Within both international law and international relations literature these views find expression in the theoretical debate between what Veijo Heiskanen identifies as the realist (or reductionist) and idealist (or institutionalist) schools of thought.[59]

For realists, "international organizations have no independent role or function in international affairs, but are simply extensions of instruments of state power".[60] As such, international organizations are merely the handmaidens of the states that create and use them to do in concert that which would be more difficult to do unilaterally. Within this statist framework, the only political will of consequence is that which resides within and among states, with international organizations merely serving as *fora* where international laws are collectively dictated in the Gramscian sense, not independently created.[61] "Consequently, in the realists' view, an excessive focus on formal international organizations and their internal structure is

[57] The other is the Holy See.
[58] Chesterman (2006), 61.
[59] Coicaud & Heiskanen (2001), 5.
[60] *Id.*
[61] "[L]egality is determined by the interests of the class which holds power in any society"; Gramsci (1994), 230.

mistaken, as it diverts attention from the real subject matter of international relations: the relationships among states and governments".[62]

For idealists, the situation is radically different. Although they acknowledge the role of states in their creation, they hold that "international organizations play a role in international affairs that is somewhat independent of states and governments".[63] They point to various technical legal and political functions exercised by international organizations – such as the capacity to sue and be sued, or the political independence of officials of the organizations in exercising their functions – as evidence of the fact that these organizations possess an autonomy that separates them from the states responsible for their creation and financial upkeep. As a result, idealists are of the view that "international organizations have to be understood as players that not only have to be taken into account, but also have to be made accountable".[64]

Despite the juxtaposition of these two schools of thought, however, what the literature does not appear to contemplate is that the UN actually embodies a mix of *both*. An implicit explanation of this is offered by Jan Klabbers who, in discussing the relationship between international organizations and their members, emphasizes that it is more than merely symbiotic in so far as the two "tend, eventually, to fade into each other so as to become indistinguishable."[65] This derives from the fact that "[w]hatever volonté distincte international organizations may possess, it derives, eventually, from a volonté not their own; and however much states may wish to control organizations, their very creation involves a loss of control."[66]

Support for this double-sided predisposition of the UN system is found in the highly varied memberships, powers and functions of the UN's principal organs, the terms of which are set out in the *Charter* itself and therefore legislated within the corpus of international law. For example, the General Assembly and Security Council embody, to varying degrees, intergovernmental cooperation under chapters IV and V of the *Charter*. Likewise, the Secretariat, and by extension the Secretary-General and the staff, are bound to exercise their functions in an independent manner under article 100. However, even the most cursory examination of UN practice reveals the hegemonic/subaltern binary as a common thread that winds its way throughout the Organization in these respects. Thus, as the plenary of all 193

[62] Coicaud & Heiskanen (2001), 5.
[63] *Id*.
[64] Klabbers, *in* Coicaud & Heiskanen (2001), 225.
[65] *Id*., 227.
[66] *Id*.

Member States, the intergovernmental representativeness of the General Assembly lends it a political legitimacy that no other organ enjoys, but owing to the generally non-binding character of its resolutions relegates it to a subaltern status *vis á vis* the Security Council. Likewise, the 15-member Security Council is solely empowered to render decisions that legally bind all other Member States in relation to threats to international peace and security, despite the lack of political legitimacy such decisions can sometimes be perceived as having owing to the Council's limited membership and its dominance by the five hegemonic permanent veto-wielding powers. Finally, although the Secretary-General and the staff must not seek or receive instructions from any governments, and Member States undertake not to influence them in the discharge of their functions, the long-standing practice of allocating senior UN posts to various of the hegemonic global powers calls these legal requirements into question.

The hegemonic/subaltern binary is therefore manifest in much of the work of the UN. In deference to this, the thesis will take account of the nuanced and multifaceted nature of the organization and the varying roles, functions, and powers of its constituent parts. At the same time, it will assess the UN against the single standard of international law whereby it is, at once, neither the "captive of its own interests" as an independent actor and "more than the sum of its parts" as an intergovernmental forum.[67] By thematically juxtaposing certain rule by law practices and features of the UN against its ostensible rule of law organizing principle, it is hoped that new critical understandings of how the Organization has managed long-term conflict in line with international law and justice can be developed.

3. Overview and Sources

Organized along an international rule of law/rule by law thematic axis, this dissertation argues that the gulf between international law and UN action in its management of key moments of the question of Palestine forms part of an arc of history that runs, to varying degrees, from 1947 to the present. Examined through a subaltern theoretical lens, this arc of history demonstrates that far from being a consistent standard-bearer of international law when it comes to the question of Palestine, the UN has demonstrated a less than principled approach to the matter. At times the UN has adopted positions that overtly run contrary to prevailing international law, at others it has sidestepped the full range of international law's stipulations for what appear to be reasons of political expediency. Despite claims to the contrary, the result has been to commit Palestine and its people to a seemingly perpetual state of legal subordination in the international system, where the promise of justice and international law is repeatedly

[67] Charlesworth & Coicaud (2010), 80.

proffered under a cloak of political legitimacy furnished by the international community, but its realization interminably withheld. This has fostered a condition of ILS, which has served to both underscore and illustrate the international rule by law that lays at the heart of much of the work of the UN and the paradoxical nature of the Organization as the occasional author of the global problems it is mandated to resolve in accordance with – not in spite of – principles of justice and international law.

Building on the theoretical foundation presented in this introduction, chapter 2 begins the study by offering a short historical survey of the origins of Palestine's ILS condition. Rather than within the UN system itself, these origins are to be found in British secret treaty-making and diplomacy between 1915 and 1947, particularly as institutionalized within the League of Nations system. While the literature on the history of Palestine in this period tends to focus on political, cultural and socio-economic themes that emerge through British action at this time, this chapter examines this period through the lens of international law's then prevailing rule by law ethic and the cross-cutting theme of the Eurocentricity of international law and organization. It is set against the backdrop of the global paradigm shift then occurring in the international system, from one based on the norms and values of the late-imperial age through an international rule by law, to one based on those of an emerging liberal western rights-based discourse ostensibly based on an international rule of law. The main thematic issue that emerges at this time for Palestine from an international law perspective is its contingent and subaltern legal status in the modern international legal order, a status that was eventually placed before the UN in 1947.

Chapter 3 discusses how the UN managed this inheritance through an examination of UN General Assembly resolution 181(II) of 29 November 1947 recommending the partition of Palestine. In particular, it undertakes an international legal analysis of resolution 181(II) with specific reference to the work of the United Nations Special Committee on Palestine (UNSCOP) whose report to the General Assembly in September 1947 formed the basis of the resolution. Contrary to the traditional international legal historiography, this chapter posits that the resolution was neither procedurally *ultra vires* the General Assembly, as argued by some pro-Palestinian legal scholars, nor was it substantively consistent in its terms with prevailing international law as regards self-determination of peoples, as argued by some pro-Israeli legal scholars. Set against the larger context of the international legal status of Palestine from WWI to the end of the British Mandate, this chapter argues that resolution 181(II) was, in a sense, the opening act in the reification of Palestine's ILS within the newly minted UN system. In this

regard, the chapter offers a "reinterpretation of an already interpreted domain."[68] It does this by demonstrating that the resolution was not only an embodiment, in legal terms, of the lingering tension between the rule by law diktats of late-European empire (derived as they were from the continuing Eurocentricity of the system) and post-WWII rights-based rule of law liberalism that marked the founding of the UN, but that it also set the stage for a series of other questionable and hitherto sparsely investigated legal moments in the UN's subsequent dealings with the question of Palestine.

Chapter 4 turns to 1967 for one such moment, examining the issue of the UN's position on the legal status of Israel's prolonged occupation of the OPT. International law posits that occupation of enemy territory is meant to be temporary and that the occupying power may not, by virtue of its occupation, rightfully claim sovereignty over such territory. Despite this, since 1967 Israel has systematically altered the status of the OPT with the aim of annexing, *de jure* or *de facto*, most or all of that territory to itself. During this time, while the UN has focused on documenting the legality of a range of individual violations of international law by the occupying power, scant attention has been paid by the Organization to the legality of the occupation regime as a whole. Emphasis has instead been placed on encouraging the parties to bring the occupation to an end through continued, though widely discredited, bilateral negotiations. This chapter asks by what rationale can it be said that Israel's prolonged occupation of the OPT remains either legal or legitimate in the absence of good faith on its part in negotiating the occupation's end? What accounts for the UN's failure to definitively identify the occupation as illegal as such in line with its rule of law organizing principle, and how can its end reasonably be made contingent on negotiations between occupier and occupied? This chapter is set against the reemergence and relative gains made by the Palestinian people within the UN during the decolonization period resulting, *inter alia*, in the UN's acknowledgement of its "permanent responsibility" for the question of Palestine until it "is resolved in all its aspects in accordance with international law",[69] including an express recognition of the right *erga omnes* of the Palestinian people to self-determination in the OPT. The conventional wisdom presents this shift as emblematic of the UN's commitment to upholding the international rule of law in Palestine following the ostensible empowerment of the Third World through decolonization. In contrast, this chapter argues that the UN's failure to take a more principled position on the very legality of Israel's half-century 'temporary' occupation of the self-determination unit of the Palestinian people is demonstrative of the maintenance of Palestine's

[68] Rangwala (2002).
[69] A/RES/70/15, 24 November 2015.

ILS in the UN system, an expression of the structural limitations of Third World quasi-sovereignty, and the continuation of the international rule by law, under a different guise.

Moving to the present day, chapter 5 examines the issue of Palestine's admission to the UN as a Member State. Following the Palestine Liberation Organization's (PLO) historic acceptance of resolution 181(II) in 1988, and the commencement of over two decades of state-building undertaken as a consequence of the Madrid and Oslo peace processes, Palestine made considerable legal advances on the road to being universally recognized as a state, the *sine qua non* for UN membership. By 2011, this included Palestine's recognition by over 130 other states, membership in a number of international intergovernmental entities, among them the UN Educational Scientific and Cultural Organization (UNESCO), and endorsements of statehood by the World Bank, the International Monetary Fund (IMF), and the Ad Hoc Liaison Committee for the Coordination of International Assistance to the Palestinians (AHLC). Set against this backdrop, this chapter critically examines Palestine's unsuccessful bid for membership in the UN of September-November 2011. In particular, it undertakes an international law assessment of the report of the UN Committee on the Admission of New Members, which concluded under the certainty of a US veto that it could not unanimously recommend Palestine's membership in the UN to the Security Council after having examined whether Palestine satisfied the criteria for membership as set out in article 4(1) of the *UN Charter*. Propelled by this unsuccessful bid, Palestine turned to the General Assembly which upgraded its observer status (initially achieved by the PLO in 1974) to that of a non-Member Observer State on 29 November 2012. While the legal consequences of this upgrade have been considerable, including allowing the State of Palestine to accede to a host of international treaties and multilateral organizations, its juxtaposition against the refusal of the Committee on the Admission of New Members to recommend membership to the Security Council in accordance with the international rule of law is demonstrative, yet again, of the international rule by law principle at work. Owing to the position of the US government, this episode highlights the third cross-cutting theme informing the ILS condition, namely its dependence on the exercise of neo-imperial power masked as liberal, democratic and rights-based. Almost 70 years after the UN's initial foray into the question of Palestine, this chapter will demonstrate that while the Organization has allowed for a gradual and qualified recognition of some Palestinian legal subjectivity and rights, under the influence of the neo-imperial power of one of the permanent members of the Security Council it continues to fail to provide the full range of legal and political foundations upon which those rights may actually be realized, thereby continuing to disenfranchise Palestine and perpetuate its ILS in the system.

Chapter 6 concludes this dissertation by summarizing the findings set out in the preceding chapters and situating them in in the larger context of the research question. It will show that, rather than the international rule of law ordering principle, it is the international rule by law principle that finds express and sustained illustration in the UN's management of the question of Palestine. This phenomenon is rooted in the clash between hegemonic and subaltern interests that produce and reproduce situations in which the promise of international law is repeatedly presented as the basis of international legitimacy and peaceful coexistence among a citizenry of formally equal nation-states, but which relegates non-self-governing peoples and other subaltern societies to partial and qualified access in the system.[70] The result is the presence of ILS as a long-range condition, a fixed feature of the international order.

Before proceeding further, a brief word regarding sources is in order. This is a joint international law/international relations study, employing a qualitative methodological approach with almost exclusive emphasis on analysis of international legal text as a means of assessing the legal position of the UN in relation to the single case study of the question of Palestine. As such, primary source material upon which this dissertation relies consists of resolutions, judicial opinions, reports, declarations and statements of the UN and its principal and subsidiary organs. These include resolutions of the Security Council, General Assembly and various subsidiary organs, judicial opinions of the International Court of Justice, and reports, statements and other public records of the Secretariat and the Secretary-General. In addition, primary source materials of other relevant international organizations will be relied on to the extent they shed light on the UN's legal position on the question of Palestine (*e.g.* League of Nations, Permanent Court of International Justice, International Criminal Court, etc.). Furthermore, the regular array of sources of international law will be relied upon, as conventionally understood, including: international treaties, international custom, general principles of law, judicial decisions and the writings of highly qualified publicists of international law.[71] All primary UN documentation utilized is available in the English language through the Cambridge University Library, which is a United Nations Depository Library, the UN Library at Geneva, and the UN Information System on the Question of Palestine, administered by the UN Division for Palestinian Rights.[72] In addition, a supplementary source of information has been culled through the personal interview of 31 officials of the UN, and the

[70] Otto (1996), 337-338, 351.
[71] *ICJ Statute*, art. 38(1).
[72] UN Information System on the Question of Palestine, http://unispal.un.org/unispal.nsf/home.htm.

States of Palestine, Israel, Jordan, Egypt, Lebanon, and Senegal, the latter in the interviewee's capacity as present Chair of the UN Committee on the Exercise of the Inalienable Rights of the Palestinian People (UNCEIRPP). Lastly, as with all legal scholarship, facts examined will be gathered from contemporary and historical documents, including those available in the UN and other pertinent publicly available records. However, because this dissertation is not a history as such, reliance on secondary historical source material, as opposed to primary archival historical sources, will be resorted to as a general rule.

2

Historical Context: International Law in the Interwar Period and the Origins of Palestine's International Legal Subalternity

1. Introduction

This dissertation argues that the United Nations (UN) treatment of Palestine demonstrates a gap between its conduct and the requirements of the international rule of law, and is therefore in some measure responsible for the maintenance of Palestine's international legal subalternity (ILS). It does not claim, however, that this ILS condition originated with the UN itself. No phenomenon arises in a vacuum. This chapter offers a short historical survey of the origins of Palestine's ILS, setting the stage for the issues explored in subsequent chapters. It does this through a subaltern reading of the nature of international law and organization during the interwar period with specific reference to Palestine's treatment thereunder. It argues that despite important political shifts in the international order at this time, epitomized by the formation of the League of Nations and the Wilsonian anti-imperial ideals that ostensibly fueled it, the ordering legal principle of the international community remained thematically rooted in the Eurocentricity of international law and organization through which imperial Europe continued to produce and rely upon law to rule over its subjects. It was through the operation of the rule by law principle that Palestine and its people were wholly disenfranchised under the international legal order then prevailing, with effects that have lasted to the present day.

2. The Interwar Years and the Institutionalization of the International Rule by Law

The time between 1914 and 1945 was an era in which considerable developments in the international legal order took place. These changes were marked by a tension resulting from the global paradigmatic shift from the age of late-empire to the post-World War II (WWII) ascendancy of enlightened liberal values. The classical imperial age of the 16th-19th centuries was one in which international law had been utilized as a tool by European imperial powers to manage their bilateral relations with the non-Europeans whose lands and resources they coveted. But international law in the late-imperial age of the early 20th century took a slightly different form. This difference lay in the *institutionalization* of the international legal order through the creation of the League of Nations.

Set against the devastation of World War I (WWI), the League was formed at the behest of US President Woodrow Wilson under an effective plea for the introduction of a modicum of

international rule of law. In his Fourteen Points of January 1918, he declared "the day of conquest and aggrandizement" of the imperial powers over, denounced the practice of secret treaties and diplomacy as a principal cause of the war, and called for the establishment of a "general association of nations" in order to establish "guarantees of political independence and territorial integrity to great and small states alike".[1] Accordingly, the Covenant of the League imposed hitherto unrecognized limits on the use of force (while not outlawing it altogether). It also required all international treaties concluded by its Members to be registered and published.[2]

With the creation of the League, for the first time in modern history a measure of institutional multilateralism challenged European great power rivalry as the organizing framework of the international community. This was in measure only, because key international powers remained outside the League for much or all of its 26-year existence, with Germany only admitted in 1926 (dropping out in 1933), Turkey in 1932, the Soviet Union in 1934 (expelled in 1939), and the United States never joining despite Wilson's pivotal role. Needless to say, none of the millions of colonial subjects of Europe were members of the League. This meant that the League remained a college of allied imperial Europe to a very large extent and was therefore predisposed to a continuation of imperial rule by law.

Mainstream literature on the history of the League has typically overlooked what the implications of this shortcoming were for subaltern classes of the day. Instead, the focus has largely been centered around Europe's great power rivalry and critiques of the League for its institutionalization of the Carthaginian peace concluded at Versailles in 1919, widely interpreted as having hastened the Organization's demise.[3] Recent literature has highlighted the view from below, as it were, including from the TWAIL and other critical perspectives.[4] Not surprisingly, the focus of these analyses has been the Mandate system.

The Mandate system was a means adopted by the victorious allied powers to divide and administer the former colonial possessions of Germany and the Ottoman Empire *post-bellum*. Although this system was influenced by Wilson's principles of non-annexation and self-determination,[5] its architect, South African statesman and racial segregation advocate, Jan

[1] Woodrow Wilson's Fourteen Points, 8 January 1918, http://avalon.law.yale.edu/20th_century/wilson14.asp.
[2] *League of Nations Covenant*, arts. 10-13, 18.
[3] Crawford (2012), 13.
[4] Anghie (2005); Pedersen (2015).
[5] Wright (1968), 24-25.

Christiaan Smuts,[6] incorporated the imperial standard of civilization into it.[7] Thus Article 22 of the *League of Nations Covenant* resolved that "the well-being and development" of the former possessions of the Central Powers, "which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world", formed "a sacred trust of civilization". To that end, "the tutelage of such peoples should be entrusted to advanced nations", namely the victorious imperial powers. Article 22 further resolved that the communities formerly belonging to the Ottoman Empire (designated "class A" mandates), including Palestine, had "reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone." It accordingly affirmed that "[t]he wishes of these communities must be a principal consideration in the selection of the Mandatory."[8]

For TWAIL writers, the Mandate system was an embodiment of Europe's unwillingness to cede its imperial interests in any fundamental way, high-sounding Wilsonian rhetoric notwithstanding.[9] In the most recent history of the Mandate system, Susan Pedersen tends to adopt this view, but nevertheless argues that the Mandate system had a redeeming feature. To her, while "League oversight could not force the mandatory powers to govern mandated territories differently" than their more conventional colonies, "it obliged them to *say* they were governing them differently."[10] Obligatory reporting to the Permanent Mandates Commission (PMC) in Geneva introduced a "level of international diplomacy, publicity, and 'talk' that" had the unintended consequence of checking imperial power, at least at the discursive level. The mandates system was therefore a vehicle for what Pedersen calls "internationalization", *i.e.* "the process by which certain political issues and functions are displaced from the national or imperial, and into the international, realm."[11]

The occurrence of internationalization through the League is hard to dispute. But I believe Pedersen overstates its overall impact in helping to bring about a global order based upon universal application of the international rule of law. Despite the League's ostensibly revolutionary principles aimed at non-annexation and self-determination of colonial territories, a critical subaltern reading suggests something equally if not more plausible. Namely, that

[6] Mandela (2002), xviii; Wilson & Thompson (1978), 340-343; Meredith (1988), 3-9.
[7] Wright (1968), 32; Anghie (2005), 119.
[8] *League of Nations Covenant*, art. 22.
[9] Anghie (2005), 115-195.
[10] Pedersen (2015), 4.
[11] *Id*., 4-5.

League machinery institutionalized an international rule by law, through which imperial rule over the globe was to be facilitated under an internationalist cloak.

From a subaltern perspective, this is evident in the actual terms of the *League of Nations Covenant*, cited above, based as they are on the imperial standard of civilization. Moreover, it is evident in the manner in which the sacred trust of civilization *was actually discharged* under the League's supervision by so-called "advanced" mandatory powers. Far from facilitating independence of former colonies of the Central powers, the legal framework introduced by the League codified the hegemonic/subaltern binary in international law. Mandatory powers were enabled to comfortably administer their sacred trust in line with their own hegemonic interests, while mandatory subjects struggled to break free, not only in material terms but also in normative ones. This accentuated the legal subalternity that colonized peoples the world over had been relegated to in bilateral engagement with individual imperial powers in the preceding three hundred years. In addition, for the first time in modern history this ultimately allowed for the internationalization of the legal subalternity of the colonies, whose disenfranchised and contingent legal status was formalized at the global level through the conventional international legal framework underpinning the League. The emergence of an international rule by law during the interwar years, with its consequent production of ILS, was the novel and inevitable result. The impact of this is readily apparent when examining the status of Palestine at this time.

3. Palestine and the International Rule by Law in the Interwar Years

In locating the origins of Palestine's ILS in the interwar years, of particular import is the role of British imperial secret treaty-making and diplomacy at the time and the international legal codification of its patronage of European Jewish nationalism in the form of the Zionist movement. In broad terms, the relevant moments are five-fold: (1) the 1915-1916 Hussein-McMahon correspondence; (2) the 1916 Sykes-Picot Agreement; (3) the 1917 Balfour Declaration; (4) the 1920 Covenant of the League of Nations; and (5) the 1922-47 Mandate for Palestine.

Historians of the modern Middle East will readily identify these moments for the pivotal impact they had on the geopolitical evolution of the region in the contemporary period. Yet, for the most part, the literature tends to examine them more from political and socio-economic perspectives than from the standpoint of international law. Although few in number, those studies that have addressed these phenomena through the lens of international law tend to do so from a strictly positivist standpoint, merely highlighting rights and wrongs as measured

against prevailing legal norms.[12] As a result, historiographically this segment of the literature on Palestine largely fails to identify relevant *thematic* issues that emerge through these events from an international law perspective. Foremost of these is the evolution of Palestine's ILS condition as a product of the Eurocentricity of the international legal order of the day.

3.1 Zionism, Colonialism and the Civilizing Mission as a Legal Technology in Palestine

Because of the increasing desire of non-self-governing peoples to assume an equal place within the international order in the late 19th and early 20th centuries, the legal standard of civilization required that European modes of public administration and political organization be emulated by them. This resulted in the spread/adoption of European forms of nationalism and the nation-state. In respect of Palestine, two distinct nationalisms arose at roughly the same time in this period, one indigenous the other European. With respect to the former, it was among the educated urban classes that Arab nationalism first emerged among Palestinians in the last quarter of the nineteenth century. Spurred on by a growing independent Arabic language press, increased exposure to European intellectual and political thought, and a palpable decline in *Pax Ottomana*, increasing calls for pan-Arab independence from what came to be regarded as foreign and imperial rule from Istanbul gained currency.[13] These calls soon gave way to the development of a distinctly Palestinian national identity in the years just prior to the outbreak of WWI.[14] In so far as indigenous Palestinian Arab nationalism developed within an Ottoman and Islamic context, it was not the product of the social-Darwinism then prevalent in European legal and political thought. In contrast, the Zionist movement was a direct result of a politics of those racialized social hierarchies and their projection globally through European empire and legal discourse.[15]

Zionism's adherents argued that the enduring attempts of European Jews to coexist and assimilate with their Gentile counterparts had proved futile and required urgent redress. As the Jew was the European continent's perennial subaltern underclass, anti-Semitism was "the archetypal Western prejudice"[16] and was therefore the driving force behind the so-called 'Jewish question', according to which the place of the Jew in 19th century Europe was openly impugned in the public sphere.[17] In answer to this question, Theodor Herzl posited the

[12] *See e.g.*, Grief (2010); Kattan (2009); Mazzawi (1997); *and* Stone (1981).
[13] Khalidi (1997), 64-65. *But see* Pappe, *A History* (2006), 46-47, who argues that although Arab nationalism emerged as early as 1875 in Greater Syria and Egypt, it remained "on the margins" in Palestine until 1908.
[14] Khalidi, *id*., 149-151.
[15] Taylor, "Vision and Intent" *in* Abu-Lughod (1987), 14 ff.
[16] Beit-Hallahmi (1993), 9.
[17] Herzl (1896), 85-97. Kattan (2009), 9-10.

establishment of an independent Jewish national existence outside of Europe. Although a similar call had been made by Leo Pinsker in 1882,[18] Herzl's 1896 monograph, *Der Judenstaat*, galvanized the movement.[19]

In so far as it fashioned itself in accordance with then prevailing European notions of ethnic or tribal nationalism[20] and successfully aligned itself with European colonial and imperial ideals, methods and power, the Zionist movement situated itself within the paradigm of late-European empire then colliding with emerging liberal rights-based values. Because the political *zeitgeist* of imperial Europe exalted colonialism, and because the Zionists lacked any territorial base in which to give effect to their program in Europe, the colonial nature of Zionism and its role in *la mission civilisatrice* was openly propagated by its leaders. Thus Pinsker wrote that "the auto-emancipation of the Jewish people as a nation" would be realized through "the foundation of a colonial community belonging to the Jews, which is some day to become our inalienable home, our fatherland."[21] Likewise, Herzl spoke of Zionism as a "colonial idea",[22] and presented Zionist settlement of Palestine as "form[ing] a portion of the rampart of Europe against Asia, an outpost of civilization against barbarism."[23] In addressing the fourth Zionist Congress in 1900, Herzl said it was in "the interest of the civilized nations and of civilization in general that a cultural station be established on the shortest road to Asia. Palestine is this station and we Jews are the bearers of culture who are ready to give our property and our lives to bring about its creation."[24] Between the establishment of the first Zionist colony in 1882 and 1914, the Jewish population in Palestine is estimated to have accounted for approximately 60,000, or 7.6 percent of the total population, of whom two thirds were European settlers.[25] Altogether, they owned no more than 2 percent of the land.[26]

Zionism's structural reliance on European colonialism and imperialism is of particular relevance to understanding the evolution of Palestine's ILS in this period. It would be incorrect to understand the movement's asseverations to colonialism and European civilization in strictly

[18] Pinsker (1975), 74.
[19] Herzl (1896).
[20] According to Hannah Arendt (1966), 227, "tribal nationalism [was] the driving force behind continental imperialism" of the period, resulting in the pan-Slavic and pan-Germanic nationalisms that would morph into totalitarian regimes in the 20th century. Importantly, Arendt (2007), 382, observed that "Herzl thought in terms of nationalism from German sources".
[21] Pinsker (1975), 104.
[22] Schliefer (1972), 23.
[23] Herzl (1896), 96.
[24] *The Congress Addresses* (1917), 24.
[25] Strawson (2010), 26-27.
[26] *Id.*, 27.

political and socio-cultural terms, as most of the literature on this period tends to do. As noted in chapter 1, at the time these ideas were articulated they were also key components of the content and structure of public international law, as it was then composed. The expansion of European empire, undertaken as of right by colonial and self-styled 'civilized' powers, was not only legal at the time, but its legality was a derivative of the very colonial and civilizational attributes of the European imperialists themselves. Thus, according to his 1866 treatise, American jurist Henry Wheaton opined that "[t]he public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin."[27] Likewise, in 1894 John Westlake, Whewell chair in international law at Cambridge, explained that "[i]nternational law has to treat natives as uncivilized. It regulates, for the mutual benefit of the civilized states, the claims which they make to sovereignty over the region and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded."[28] To pursue and present its goals in those terms was therefore a conscious and strategic choice by Zionism's founders to furnish their movement with a measure of *legal* legitimacy among its European adherents and benefactors beyond any historical, cultural or political imperative.

It was in this context that the first Zionist Congress in 1897 affirmed that "[t]he aim of Zionism is to create for the Jewish people a home in Palestine *secured by public law*" [emphasis added].[29] In the interwar period this strategy would be directed at obtaining international legal recognition of the Jewish people as a nation, establishing a legal nexus between that people and Palestine, and obtaining international legal recognition for the Zionist Organization (founded at the 1897 Congress) as the official representative of the Jewish people.[30] Would that it were simply a matter of exclusive concern for the legal rights of the Jewish people alone, the question of Palestine would never have arisen. The point is, that while Zionism rightly presented itself to its hopeful recruits as an emancipatory movement *vis-à-vis* European anti-Semitism, in so far as it sought to give effect to that emancipation by adopting and utilizing, *inter alia*, late-19th century legal technologies and discourses of civilizing and colonizing an already inhabited non-European land through the patronage of a European imperial power, it helped set the cornerstone for Palestine's long-term ILS condition. Key to the endeavor was the use to which that imperial power, Great Britain, made of secret treaties in laying the foundation of the international rule by law in Palestine.

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[27] Wheaton (1866), 17-18. *See also* Walker (1899), 138, 331; Oppenheim (1928), 36-37.
[28] Westlake (1894), 143, *as quoted in* Koskenniemi (2008), 127.
[29] Kattan (2009), 21.
[30] Strawson (2010), 15-16.

3.2 1915-16 Hussein-McMahon Correspondence

The first historical moment relevant to the evolution of Palestine's ILS is the Hussein-McMahon correspondence. In seeking to consolidate its position against the Central Powers during WWI, Britain enlisted Arab support against the Ottoman Empire. This came in the form of an exchange of letters between Hussein ibn Ali, the Hashemite Sherif of Mecca and a leader of the Arab nationalist movement, and Sir Henry McMahon, the British High Commissioner in Cairo.[31] In exchange for Arab military support against the Ottomans, Hussein demanded that the British recognize post-war Arab independence in the Middle East, comprised of the whole of the Arabian peninsula (with the exception of Aden), Syria and what would later become Lebanon, Palestine, Iraq and Transjordan. Following a number of detailed exchanges, McMahon indicated Britain was prepared to recognize and support Arab independence in the region with some slight exceptions, including those "portions of Syria laying to the west of the districts of Damascus, Homs, Hama and Aleppo."[32]

Acting in reliance upon this assurance, the Arabs were successful in assisting the Allies in ousting the Ottomans from their lands. At the end of the war, however, a dispute arose about whether Palestine had actually been excluded from the region within which the British had agreed to recognize and support Arab independence. Despite lying clearly to the *south*-west of the districts of Damascus, Homs, Hama and Aleppo, the British now took the public position that Palestine fell within the area excluded under the correspondence. While much of the literature has generally treated this as a disagreement of equal merit, the available evidence suggests that the Arabs were correct in their understanding that post-war Arab independence included Palestine, a conclusion that British archival materials now show the United Kingdom agreed with in private.[33] Nevertheless, controversy arose as the British had been engaging in double-dealing on Palestine with third parties, the full details of which were deliberately kept from the Arabs in an early British affirmation of their subalternity.

3.3 1916 Sykes-Picot Agreement

On 16 May 1916, seven months after the conclusion of the Hussein-McMahon correspondence, Britain entered into a secret treaty with France (with the assent of Tsarist Russia) that contradicted the terms of the correspondence.[34] Under the Sykes-Picot agreement,

[31] Pappe, *A History* (2006), 64-65; Kattan (2009), 39-40, 98-107.
[32] Hussein-McMahon Correspondence, *as quoted in* Ingrams (John Murray), 2.
[33] Kattan (2009), 98; *See also* Smith (1992), 42-47; Pappe, *The Making* (2006), 5.
[34] Cocks (1918), 43-48.

so named after its principal negotiators,[35] the Anglo-French Entente agreed, *inter alia*, that upon the fall of the Ottoman Empire in WWI they would be "prepared to recognize and protect an independent Arab State or a Confederation of Arab States…under the suzerainty of an Arab chief" in areas now comprising large portions of Jordan, Lebanon, Iraq and Syria. Yet they also agreed to allow themselves the right "to establish such direct or indirect administration or control as they desire and as they may think fit to arrange with the Arab State or confederation of Arab States." As for Palestine, the Entente agreed that "there shall be established an international administration, the form of which is to be decided upon after consultation with Russia, and subsequently in consultation with the other Allies, and the representatives of the Shereef of Mecca".[36]

It would appear, therefore, that the pledge made by the British in the Hussein-McMahon correspondence as to post-war Arab independence in the Middle East, most especially in Palestine, had been violated. Nowhere in the correspondence was any reference made to a qualified independence under an arrangement in the nature of a suzerainty, as provided for in the Sykes-Picot agreement. Nor was it suggested that Palestine would be denied Arab independence in favour of being handed over to some form of international administration. In short, this was a classic case of late-European imperial power dictating terms, and in a manner that had international legal effect without the input or knowledge of the non-European population primarily affected. As one of the many secret treaties between the great powers, the Sykes-Picot agreement carried weight under prevailing international law.[37] Although some authors have argued that the Hussein-McMahon correspondence was also a form of secret treaty, questions remain on this point.[38] What is clear, however, is that Sykes-Picot was a manifestation of a rule by law dynamic that undermined the international legal position of the indigenous people of Palestine, as elsewhere in the non-European world. It was not until the Bolsheviks disclosed the existence of the secret treaties on 23 November 1917 as evidence of the "world wide plans of annexation" of the imperial powers that the Palestinian Arab leadership became aware of the Sykes-Picot agreement.[39] Unbeknownst to them matters would only get worse, as in that same month the British made yet another secret undertaking regarding Palestine, this time to the Zionists.

[35] Sir Mark Sykes (1879-1919) and Francois Georges-Picot (1870-1951).
[36] Kattan (2009), 40-41.
[37] Cocks (1918), 43-48.
[38] Kattan (2009), 98; Grosek (2007), 269. Even if the Hussein-McMahon Correspondence was a secret treaty, it is unclear whether it would have taken legal precedence over Sykes-Picot, the latter being a treaty later in time and between two imperial and 'civilized' states, the former involving a non-self-governing non-European people.
[39] Cocks (1918), 11.

3.4 1917 Balfour Declaration

On 2 November 1917, the British Cabinet issued a public declaration in the form of a letter from British Foreign Secretary Arthur Balfour to Lord Lionel Walter Rothschild, a prominent Zionist, indicating, in relevant part, that:

> "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country."[40]

The Balfour Declaration was the result of lengthy negotiations between the British government and members of the Zionist Organization led by Chaim Weizmann and Nahum Sokolow.[41] For the Zionists, securing support from the British was both natural and vital; natural, because of the imperial and colonial legal technologies they adopted to further the movement, vital because the British were poised to take control of Palestine following WWI.[42] For the British, offering support to the Zionists represented an attempt to shore up pressing geostrategic interests, primarily ensuring greater levels of Russian and American support in the waning war effort. Encouraged by Weizmann and others, the British believed that support for Zionism would garner the purported influence of Russian and American Jewry to pressure Petrograd and Washington to further commit to the war.[43] In addition, the Declaration was motivated by Britain's goal of resolving Europe's vexing Jewish question, as well as by the Christian Zionist fervor of some members within the British government, including then Prime Minister David Lloyd George, Mark Sykes, and Balfour himself.[44]

From a subaltern perspective, the Balfour Declaration stands out for three reasons. First, harkening back to Said's critique of hegemonic representations of the Palestinian covered in chapter 1, although the Declaration concerned the political and legal future of Palestine, its drafters failed to refer to the indigenous Palestinian Arab population by name, choosing instead to designate them dismissively as the "existing non-Jewish communities". By adopting this frame of reference in relation to a place whose population was then 92 percent Palestinian Arab, the Declaration effectively erased Palestinian Arab existence from the record.[45] Second,

[40] The Balfour Declaration, *as quoted in* Smith (1992), 54.
[41] Mallison (1986), 24.
[42] Kattan (2009), 26.
[43] Pappe, *A History* (2006), 67-68. This has led some to suggest that British support for Zionism was tainted with anti-Semitism, including the mythical "clandestine power" of the Jews. Segev (2000), 5; Stein, *The Balfour Declaration* (1961), 163-164, *as quoted in* Mallison (1986), 26.
[44] Smith (1992), 55.
[45] One is reminded of Said's observation that language is "a highly organized and encoded system which employs many devices" to express "not 'truth' but representations," ultimately informed by the "culture, institutions, and

although the Declaration contained an important safeguard "that nothing shall be done which may prejudice the civil and religious rights" of the Palestinian majority, its failure to safeguard their *political* rights underscored British intent to prioritize those of the Jewish people in Palestine, despite earlier British pledges of support for Arab independence. Third, at the time the Declaration was issued, neither the British nor the Zionists actually had physical possession or legal title to Palestine. Yet, in promising Palestine to the Zionists without so much as consulting the Palestinian population, British decision-making seems to have been informed primarily by European imperial fiat, with its negative assumptions regarding the contingency of non-European legal rights. Although prevailing international law included a general principle that one could not give what one did not possess (*nemo dat quod non habet*), it is doubtful that this principle applied to the property of colonial peoples at the time.[46] Perhaps one mitigating factor was that in supporting the Jewish national home project in Palestine the British were running up against the then emerging right of self-determination according to which the legitimacy of post-war rule was understood as deriving from the consent of the governed. The extent to which London was contemptuous of this emerging norm was made clear, however, when they formally incorporated the Balfour Declaration into the terms of the League of Nations Mandate for Palestine. Being a treaty of binding force for members of the international community represented at the League and deriving its authority from the Covenant, it constituted the most vital element of the rule by law paradigm then shaping Palestine's ILS condition in the interwar period.

3.5 1920 Covenant of the League of Nations

The sacred trust of civilization codified in Article 22 of the *League of Nations Covenant* was premised on the idea that colonial peoples in class A mandates enjoyed a recognized legal right to political independence based on the principle of the consent of the governed and majority rule. Subject to the discharge by a Mandatory power of this sacred trust, such mandated territories were to eventually enjoy full self-determination. To be sure, self-determination was as yet not a part of the corpus of positive international law. That development would have to await the promulgation of the *UN Charter* in 1945 and subsequent practice.[47] Nevertheless, as noted by the International Court of Justice (ICJ) in its 1971 *Namibia* advisory opinion, there is

political ambience of the representer;" Said (1979), 21, 272.

[46] Deriving from Roman law and established in English law since at least the sixteenth century (*Capel's Case* (1581), Jenk. Cent. 250), the *nemo dat* principle was recognized under international law as applying to states at the time the Balfour Declaration was issued. *See Island of Palmas*, 842.

[47] Cassese (1995), 27, 43.

"little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned".[48]

As it happens, the people concerned in Palestine – namely its overwhelming indigenous majority – made it clear that they preferred the United States to be selected as the Mandatory power in line with Article 22 of the Covenant. This followed the findings of the King-Crane Commission, an American committee created at President Wilson's request to assess the post-war wishes of the inhabitants of Syria, including Palestine. In August 1919, the Commission – which admitted that it began its "study of Zionism with minds predisposed in its favour" – recommended, *inter alia*, the "serious modification of the extreme Zionist program for Palestine of unlimited immigration of Jews, looking finally to making Palestine distinctly a Jewish State".[49] It noted the that "'a national home for the Jewish people' is not equivalent to making Palestine into a Jewish State; nor can the erection of such a Jewish State be accomplished without the gravest trespass upon the 'civil and religious rights of existing non-Jewish communities in Palestine.'"[50] In light of the Wilsonian principle that post-WWI territorial settlements needed to be based upon the "free acceptance of that settlement by the people immediately concerned and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery", the Commission observed that the wishes of Palestine's population, 90 percent of whom were against the Zionist program, had to prevail.[51]

This conclusion of the King-Crane Commission was particularly important for its exaltation of the principle of democratic and majoritarian rule at a time when the hegemonic prerogatives of late-European empire, though on the wane, were still prevalent and given force in international legal instruments. Because of the US commitment to these principles, and the sheer fact of an approximately 90 percent majority Arab population, the Zionists were adamantly against the US from becoming the Mandatory and in favour of the British doing so. In the event, despite the sober findings of the King-Crane Commission, the British were named as Mandatory against the express wishes of the indigenous population paving the way for the crystallization of Palestine's ILS condition into prevailing international law.[52]

[48] *Namibia*, para. 53.
[49] *King-Crane Commission Report*.
[50] *Id.*
[51] *Id.*
[52] Quigley (2016), 24-25.

3.6 1922-1947 Mandate for Palestine

Despite the use of the standard of civilization to codify the contingency of subaltern communities in the *League of Nations Covenant*, the mandate system did eventually facilitate the emergence of a number of sovereign independent states based on majoritarian rule and the consent of the governed (*i.e.* Lebanon, Nauru, Iraq, Jordan, Syria, etc.).[53] In Palestine, however, the mandate system singularly had the result of undermining – in legal terms – indigenous independence and majority rule, ostensibly the very object and purpose of the system itself. In this respect, the Palestine mandate was a *sui generis* arrangement whose rule by law character was more complete and barefaced than in other mandates.

More than anything, this was evident in the text of the Mandate for Palestine, which was negotiated between the Zionist Organization and the British in 1920 without the participation of the Palestinian Arabs. Unsurprisingly, its terms were openly committed to the Zionist program at the expense of the indigenous population. Following its adoption by the Supreme Council of the Principal Allied Powers at San Remo on 24 April 1920,[54] the Balfour Declaration was expressly incorporated into the preamble of the Mandate for Palestine indicating that "recognition has thereby been given to the historical connection to the Jewish people with Palestine and to the grounds for reconstituting their national home in that country."[55] To this end, the Mandatory was to be furnished with "full powers of legislation and of administration",[56] without needing to come to agreement with the indigenous authorities or take into account their rights, interests and wishes as was provided for in other mandates, for instance the French Mandate for Syria and Lebanon.[57] Instead, the Palestine Mandate provided that the "Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home."[58] To this end, it indicated that "an appropriate Jewish Agency shall be recognized as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home," and named the Zionist Organization as that body.[59] Finally, the Mandate provided that

[53] Anghie (2005), 190-191.
[54] Grief (2010), 18.
[55] *British Mandate for Palestine*, preamble.
[56] *Id.*, art. 1.
[57] *French Mandate for Syria and Lebanon*, art. 1.
[58] *British Mandate for Palestine*, art. 2.
[59] *Id.*, art. 4. On the colonizing role of the Jewish Agency, *see* UNSCOP, Report to the General Assembly, 2nd Sess, Vol. III, Annex A, Oral Evidence Presented at Public Meetings, A/364 Add. 2, at 75-76, 9 September 1947, where Chaim Weizmann, on behalf of the Jewish Agency, stated before UNSCOP on 8 July 1947 that: "Other peoples have colonized great countries, rich countries. They found when they entered there backward populations… In olden times, such backward countries were built up by charter companies. All of you will

the Administration of Palestine "shall facilitate Jewish immigration" and "shall encourage, in co-operation with the Jewish Agency...close settlement by Jews on the land."[60]

In contrast, nowhere in all of its 2,757 words does the term "Arab" appear, preferring instead the jaundiced "existing non-Jewish communities" (one reference) or "other sections of the population" (one reference).[61] Likewise, the word "Palestinian" appears only once, though in relation to the Mandatory's obligation to "facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine".[62] Being an international treaty, signed, registered and published under the auspices of the League of Nations, the rights, duties and obligations enshrined within the Mandate were of a qualitatively different international legal character than those previously agreed or represented in the bilateral and secret treaties described above. While authors have debated the international legal character of those arrangements extensively,[63] there is little question that with one stroke of the pen the Mandate for Palestine provided the Zionists with something that had hitherto eluded them. This was nothing other than the international legal recognition of: (1) the Jewish people; (2) its historical connection with the land of Palestine; (3) its political representative in the form of the Zionist Organization; and (4) its right to a "national home" in Palestine. In this way, the Mandate not only fulfilled the key strategic goal of the first Zionist Congress of 1897, namely "to create for the Jewish people a home in Palestine secured by public law",[64] but it also helped mitigate the subalternity of European Jewry *vis á vis* their imperial benefactors.

All of this was done when the approximately 90 percent Palestinian Arab majority population made no secret of its opposition to foreign control of their country, including through Zionist colonization, and their expectation that Arab independence would be realized as per British wartime pledges and Article 22 of the *League of Nations Covenant*.[65] Notwithstanding the clear contradiction between these pledges, the terms of Article 22 and the terms of the

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remember the East Indian Charter Company. But charter companies were hard to fashion in 1918, the first quarter of the twentieth century. The Wilsonian conception of the world certainly would not have allowed a charter company. Therefore, we had to create a substitute. This substitute was the Jewish Agency which had the function of a charter company, which had the function of a body which would conduct the colonization, immigration, improvement of the land, and do all the work which a government usually does, without really being a government. We had all the difficulties of a government and none of its advantages. The Jewish Agency was given a special position in the Mandate. It was not much of a privilege; it was a great burden."

[60] *British Mandate for Palestine*, art. 6.

[61] *Id.*, preamble, art. 6.

[62] *Id.*, art. 7.

[63] *E.g.*, Mallison (1986), 18-78; Cattan (2000), 10-16; Kattan (2009), 58-59, 98-116; Strawson (2010), 36-37; Quigley (2016), 10-15.

[64] Kattan (2009), 21.

[65] *Id.*, 43-44.

Mandate for Palestine, the latter was made to prevail through sheer force of British arms and the suppression of indigenous forms of political representation and governance. As noted by Rashid Khalidi, "[i]t could not have been otherwise, since no indigenous majority would have voluntarily ceded its country to a settler minority."[66] In this light, the Mandate for Palestine stands out as yet another example of the misrepresentation and effacement of the lived reality of Palestine and its people, this time embedded in an international legal instrument that openly violated the principles of self-determination, rule by consent, and the democratic idea of majoritarian rule. It was for these reasons that the British House of Lords symbolically voted to reject the terms of the Mandate for Palestine on 21 June 1922 in a non-binding motion.[67] Tellingly, it was also something not lost on those responsible for imposing this international rule by law on Palestine. In a memorandum written to Prime Minister Lloyd George on 19 February 1919, Balfour himself admitted that:

> "[t]he weak point in our position, of course, is that in the case of Palestine we deliberately and rightly decline to accept the principle of self-determination. If the present inhabitants were consulted they would unquestionably give an anti-Jewish verdict. Our justification for our policy is that we regard Palestine as being absolutely exceptional."[68]

In a subsequent memorandum to Lord Curzon dated 11 August 1919, Balfour noted that:

> "[t]he contradiction between the letter of the Covenant and the policy of the Allies is even more flagrant in the case of the 'independent nation' of Palestine than in the 'independent nation' of Syria. For in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country… The four great powers are committed to Zionism and Zionism, be it right or wrong, good or bad, is rooted in age-long tradition, in present needs, in future hopes, of far profounder import than the desire and prejudices of the 700,000 Arabs who now inhabit that ancient land".[69]

It is precisely this disregard and contempt for Palestine's indigenous people that enabled Britain to legislate Palestine's ILS into international law through the Mandate. Positivist international legal historiography of Israel/Palestine uncritically employs this moment as its starting point, unwitting testament to the hegemonic use of international law in suppressing the presence, history and agency of Palestine's indigenous population. By virtue of the Mandate, Palestinians are said to have possessed no more than a right to be a "protected minority" with "only civil and religious rights" within a Jewish state.[70] Some even argue that it was the Jewish people that was designated the ultimate "national beneficiary" of the sacred trust of Article 22

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[66] Khalidi (2007), 40.
[67] *Id*., 75. *See also* Cattan (2000), 16.
[68] Kattan (2009), 121.
[69] *Id*., 123.
[70] Dinstein, "The International Legal Dimensions" *in* Kellermann (1998), 140; Grief (2010), 18-44; Strawson (2010), 2.

despite comprising only approximately 10 percent of the population.[71] In this regard, the Mandate privileged, in legal terms, the political rights of a people the vast majority of whom had never set foot in the country, over that of the country's indigenous inhabitants. The effect was "that an almost indeterminate number of dispersed people had a legal presence in Mandate Palestine before they had a physical one."[72] At the same time, the indigenous population of the country had, at best, a rarified legal presence as an unrecognized group with no national or political rights whatsoever. As noted in 1925 by Leopoldo Palacios, the Spanish member of the PMC, with the passage of the Mandate "Zionism had the law entirely in its favour."[73] Viewed through a subaltern lens, this was the epitome of international rule by law as the ILS condition was effectively shifted from one previously disenfranchised group (European Jews) to a newly disenfranchised group (the Palestinian people).

Over the course of the Mandate's twenty-five-year duration, the British would carry out the task of facilitating the establishment of the Jewish national home in Palestine in furtherance of the international rule by law inherent its provisions. All the while, the indigenous Palestinians refused to recognize the Mandate's legitimacy, arguing in front of both the Council of the League and the PMC that it violated the terms of Britain's war-time pledges and its sacred trust under Article 22 of the *League of Nations Covenant*.[74] The new international law introduced through the Mandate could not be legitimate, they said, as it did not emerge from the will of the people. If self-determination in Palestine was envisioned in Wilson's new post-imperial order, that right must surely have resided with the indigenous majority. These arguments ultimately proved to be in vain as late-European empire would prevail over Wilsonian principles.

During this time, a Jewish *imperium in imperio* was formed under the tutelage of Britain. As noted by Tom Segev, between 1922 and 1948, the British facilitated the growth of the Jewish population of Palestine more than tenfold, and promoted independent Zionist land purchase, agricultural development and the establishment of industries and banks. Hundreds of new colonial settlements were established, including a number of towns. An independent Jewish labour organization, school system and military was developed. This was in addition to the development of in-country Zionist political leadership and elected institutions, all of which were actively invited to coordinate and work within the British Administration to further

[71] Grief (2010), 35, argues that "[t]he dual or joint application of the Balfour Declaration with Article 22 conclusively meant that Palestine was reserved for the Jewish People as a whole, not merely for the approximate 60,000 Jews living in Palestine at the end of the Great War".
[72] Wheatley (2015), 215.
[73] *Id.*, 216.
[74] *Id.*, 216-217, 220-225.

develop the Jewish national home.[75] Indeed, Zionists held the highest posts in the Administration, beginning with Herbert Samuel, the first High Commissioner.[76] None of this could have happened without the operation of the international rule by law codified in the *British Mandate for Palestine*.

Given the variables at play, tumult was inevitable. Arab-Jewish riots rooted in Palestinian Arab frustration with ongoing Zionist colonization in 1920, '21, '29 and '36 erupted. This was followed by the Great Arab Revolt of 1936-1939, violently suppressed by the British resulting in the killing, wounding, imprisonment or exile of over 10 percent of the Palestinian Arab male population and the decimation of the Palestinian political elite heading into WWII. By the end of the war, as news emerged of the horrors of the Holocaust in Europe, tensions between British and armed reactionary Zionists who demanded an immediate end to the Mandate and unrestricted Jewish immigration emerged. To this was added increased acts of inter-communal violence that compounded the situation. Against the exhaustion of the war, and the quickening retreat of the Empire globally, Britain chose to quit the mandate and hand the matter over to the newly formed UN.[77]

4. Conclusion

From the above, it is possible to locate the origins of Palestine's ILS in British secret treaty-making and diplomacy between 1915 and 1947, with particular emphasis on the Mandate period. This condition was a product of a rule by law which not only remained the ordering principle of the world at a time when European imperial powers were ostensibly on the decline, but was actually institutionalized and internationalized in the conventional law of the League of Nations by those selfsame powers. By legally privileging the Zionist movement's Jewish national home project over the previously assured political rights of the majority Arab population, Palestine's ILS became embedded in the interwar international legal order through the terms of the *British Mandate for Palestine*. The result was that Palestine's indigenous Arab population had become disenfranchised through the operation of prevailing Eurocentric international law as the ILS condition shifted from European Jewry to them. Indeed, this was a double-disenfranchisement of sorts, in the sense that the mandate codified the existence of Palestine as a territorial unit in the effective nature of a colony, while at the same time denying

[75] Segev (2000), 5.
[76] Smith (1992), 71. *See also* evidence given on 16 June 1947 to UNSCOP by Sir Henry Gurney, Chief Secretary of the Palestine Government, UNSCOP, Verbatim Record of the Sixth Meeting, A/AC.13/SR.6/Rev.1, 23 June 1947.
[77] UNSCOP, Report to the General Assembly, 2nd Sess, Vol. II, Annex I, A/364 Add. 1, supplement 11, at 1, 9 September 1947.

its indigenous people the principal benefit of the political rights and status that would normally attach to being a colonial people as such (*i.e.* eventual self-determination).

As this dissertation epistemologically proceeds from a subaltern view of international law and order rooted in imperial Europe's employment of international law to regulate its encounter with the colonial world, one is able to better understand the international rule by law nature that characterized Palestine's ordeal in interwar period. Indeed, the international rule by law was both a description of what was happening to the Palestinian people at the time, but also a prognostication of what was to come. Although the 1945 establishment of the UN has been represented in much of the literature as a break from the European imperial past through the emergence of true universal international rule of law, its management of the question of Palestine as inherited from the British demonstrates that it was heavily influenced by the old order from the start. As will be seen, this manifested itself through the reification of Palestine's ILS within the UN, beginning with General Assembly resolution 181(II).

3

1947: The United Nations Plan of Partition for Palestine and the Reification of Palestine's International Legal Subalternity

1. Introduction

This Chapter focuses on United Nations (UN) General Assembly resolution 181(II) of 29 November 1947, through which the UN recommended the partition of Mandate Palestine into a Jewish State and an Arab State. The main claim, broadly made, is that the resolution was more an expression of a continued international rule by law inherited from the interwar period, than an espousal of the *Charter* mandated international rule of law, and as such helped reify Palestine's international legal subalternity (ILS) in the newly formed UN system. To this end, it undertakes an international legal analysis of resolution 181(II) with specific reference to the verbatim and summary records of the United Nations Special Committee on Palestine (UNSCOP) whose report to the General Assembly in September 1947 formed the basis of both the resolution's text and its underlying rationale. Contrary to the traditional international legal historiography, this chapter posits that the resolution was neither procedurally *ultra vires* the General Assembly, nor was it substantively consistent in its terms with prevailing international law as regards self-determination of peoples. Rather than being governed by the objective application of substantive international law, the resolution was driven by distinctly European political goals and condescending attitudes that privileged European interests, including the desire to resolve the Jewish question, over the normative requirements of international law as they then applied to Palestine. The result was to legislate into UN law the two-state framework as the legal cornerstone of the Organization's position on Palestine against the wishes of the country's indigenous majority. Through this episode, the structural reliance and content of the ILS condition on the Eurocentricity of international law and institutions is exposed. For Palestine, this ultimately produced resolution 181(II) as the opening act of disenfranchisement and contingency in the UN that would continue for years to come.

In order to explore this, the remainder of this chapter is divided into three parts. Part 2 briefly sets out the role of the UN as the ostensible standard-bearer of the international rule of law in the post-World War II (WWII) period. Part 3 juxtaposes this against the UN as a site of the continued international rule by law, demonstrated through an international legal examination of resolution 181(II). Part 4 delves into the UNSCOP records and report to uncover the factors that went into the production of the rule by law legislated in resolution 181(II). Part

5 then discusses the practical consequences of the resolution through a subaltern Palestinian lens.

2. The United Nations as the Standard-Bearer of the International Rule of Law

In the aftermath of WWII, the framers of the UN drew many lessons from the failures of the League of Nations. Among the most important was the need to ensure the *universality* of the new organization. This manifested itself in two significant and related ways, both ultimately facilitating the emergence of the UN as the apparent standard-bearer of the international rule of law in the contemporary period.

First, was the introduction of the principle of universality in the UN's *membership*. Both the League and the UN were founded by victorious great/imperial powers following a world war. Both thereby excluded from original membership a majority of the colonized world and the defeated powers. Yet the UN's conditions for acquired membership were made to be far less stringent than the League's. Indeed, with the exception of the period between 1946 and 1955, these conditions have largely been a procedural formality as a matter of practice.[1] With the exception of a handful of cases, including the membership of Palestine (see chapter 5), this more liberal approach to joining the UN has resulted in the emergence of the Organization as the most globalized intergovernmental and multilateral institution, without parallel in human history.

Second, building on the universality of its membership, the UN's commitment to develop and adhere to *international law* assumed a more global level of importance than ever existed within the framework of the League. While the *League of Nations Covenant* indicated that "the firm establishment of the understandings of international law" was to be a means through which international peace and security was to be achieved, its drafters buried this lofty aspiration in its preamble.[2] In contrast, the maintenance of international peace and security "in conformity" with international law was codified as an explicit purpose of the UN under its *Charter*.[3] Accordingly, the commitment of the UN to international law and its progressive development was, on its face, made to be far more robust, clear and sustained. This is demonstrated by various other operative provisions of the *UN Charter* and related practice.

[1] Ginther, "Membership: Article 4" *in* Simma (2002), 180.
[2] *League of Nations Covenant*, preamble.
[3] *UN Charter*, art. 1(1). Despite the different degrees to which delegates at the San Francisco Conference felt "international law" needed to shape the purposes of the Organization, reference to "principles of justice and international law" was inserted all the same. Simma (2002), 113-114.

For example, the regime governing the use of force is far more restrictive under the *UN Charter* than it was under the *League of Nations Covenant*, with the *Charter* imposing a general prohibition on its "threat or use" with two relatively specific exceptions, while the Covenant imposed unclear general limits on war without any comparable proscription of it.[4] Likewise, the principle of the sovereign equality of states finds express recognition in both the *Charter* and relevant binding resolutions of its political organs, while the Covenant was wholly silent on the issue.[5] Moreover, the regime governing conflicts of law is far more restrictive under the *Charter* than it was under the Covenant, with the *Charter* assuming quasi-constitutional status in the international sphere.[6] Finally, the role of the UN in the affirmation and development of customary international law through its principal organs is unprecedented. For instance, the resolutions of the 193-member strong General Assembly can offer unique evidence of a widespread practice accompanied by sufficient *opinio juris*.[7] Likewise, through the International Law Commission, the Assembly has encouraged "the progressive development of international law and its codification".[8] This, of course, is in addition to the authority of the Security Council to issue legally binding decisions on Members in accordance with the *Charter*,[9] and the mandate of the International Court of Justice (ICJ) to exercise compulsory and advisory jurisdiction on legal questions brought before it.[10]

In a very real and substantial manner, therefore, the UN can lay rightful claim to being the guardian of the primacy of the international rule of law in the post-WWII order in ways that contrast significantly with the League's role in perpetuating an international rule by law in the interwar period. Yet when one examines this proposition from a subaltern perspective, is it possible to arrive at a different conclusion? Might there be a continuity in the maintenance of the international rule by law as an organizing principle from the interwar through the post-war

[4] *UN Charter*, arts. 2(4), 39-51; *League of Nations Covenant*, arts. 10-16.
[5] *UN Charter*, art. 2(1) ("sovereign equality of all of its Members"); *Friendly Relations Declaration* ("All states enjoy sovereign equality"); *League of Nations Covenant*, arts. 3, 4 (providing that Members shall have one vote each in proceedings of the relevant bodies of which they are Members, but remaining silent on sovereign equality).
[6] Whereas the *Charter* simply provides that it "shall prevail" in the event of a conflict between it and the obligations of Members under any other international agreement and, arguably, other sources of international law, the Covenant only provided that: (1) its conclusion automatically annulled any "obligations or understandings" *between members of the League* that conflicted with its terms; and (2) called upon members to release themselves from any other prior obligation in conflict with the Covenant. In any event, these provisions would not affect what the Covenant nebulously termed "international engagements" designed "to secure the maintenance of peace." *UN Charter*, art. 103; *League of Nations Covenant*, art. 20. On the prevailing view interpreting article 103 of the *UN Charter* as including sources of international law other than treaties, *see* Leiæ & Paulus, "Miscellaneous Provisions: Article 103" *in* Simma (2002), 2110-2113.
[7] Higgins (1963), 1-10.
[8] *UN Charter*, art. 13(1)(a).
[9] *Id*., art. 25.
[10] *ICJ Statute*, art. 38(1).

years, now manifest in the work of the UN? To the extent that the *UN Charter* codified inequitable distributions of power as between the permanent five and the rest of the membership of the Organization, for example, there is little question that an element of international rule by law had survived. But has the UN been complicit in the maintenance of the international rule by law in even greater measure than that? And if so, how might its proposed partition of Palestine in 1947, with its resultant reification of Palestine's ILS, help us increase our understanding of this?

3. Resolution 181(II) and the United Nations as a Site for the Continuation of the International Rule by Law

In order to assess the questions above, this section will undertake four tasks. First, it will assess what prevailing international law required of the UN when the question of Palestine was put before it in 1947. Second, it will examine the terms of resolution 181(II). Third, it will assess resolution 181(II) under that international law. Fourth, it will discuss whether resolution 181(II) can be best understood as embodying a continuation of an international rule by law, ultimately reifying Palestine's ILS condition in the UN.

3.1 Requirements of the International Rule of Law: The UN Charter, Self-Determination and the Role of the UN in the Mandate for Palestine

Legal texts reflect the values of the time in which they are produced.[11] The *UN Charter* is no different. In line with the Organization's ostensible commitment to international rule of law, this included a commitment to develop friendly relations among nations based on respect for the principle of self-determination of peoples.[12]

During the inter-war period, self-determination was not a part of the corpus of positive international law, but was rather a political principle rooted in Wilsonian precepts for an anti-imperial new world order.[13] Though not expressly referred to in the *League of Nations Covenant*, it would be a strain to suggest that Wilsonian conceptions of self-determination did not inform the sacred trust of civilization that underpinned the Mandate system, despite its Eurocentric and rule by law nature.[14] By 1945, self-determination of peoples had developed

[11] Strawson (2010), 5.
[12] *UN Charter*, art. 1(2).
[13] Indeed, one of the four ends for which Wilson asserted the Allies fought World War I (WWI) – namely, that "[t]he settlement of every question, whether of territory, of sovereignty, of economic arrangement or of political relations" should be built "upon the basis of the free acceptance of that settlement by the people immediately concerned, and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery" – offered a prescient articulation of the self-determination principle in embryonic form at the time; *UNSCOP Report, Vol. II*, at 24.
[14] Cassese (1995), 43.

sufficiently to be expressly included in the *UN Charter* as both a purpose of the Organization and a principle that would guide its action.[15] Nevertheless, owing to the continued influence of the European imperial powers in the system, self-determination remained undefined in the text of the *Charter*. It wasn't until decolonization in the 1960s that Member States were able to arrive at a commonly agreed definition of the right, codified in common article 1 of the 1966 international human rights covenants.[16] Because of the lack of a clear definition of the content and meaning of self-determination in 1945, a debate exists as to whether a *de jure* right to self-determination of peoples had emerged by that time. Thus, Hurst Hannum argues that "whatever its political significance, the principle of self-determination did not rise to the level of a rule of international law at the time the UN Charter was drafted".[17] More substantively, Marc Weller adds that it was only through state practice during the decolonization era in the late 1950s and 1960s that the right was established, as such.[18] On the other hand, Karl Doehring asserts that "the legally binding nature" of self-determination of peoples "is undoubtedly clear", since it is a purpose of the Organization whose legal protection is expressly provided for in article 2(4) of the *Charter*.[19] Likewise, Antonio Cassese opines that the inclusion of self-determination of peoples in *the* constitutive international legal instrument in the post-WWII era "marks an important turning point," in so far as it signaled "the maturing of the political postulate of self-determination into a legal standard of behavior" in 1945.[20]

Irrespective of where one stands in the debate on whether self-determination of peoples, *per se*, was crystalized under positive international law in 1945, by 1947 – the year the General Assembly recommended partition of Palestine – the general contours of self-determination of peoples were sufficiently established under international law *as regards class A mandated territories*. On this basis, the principle required the immediate, or at the very least, promptly realized, political independence of such territories based on the precepts of consent of the governed and majority rule. This follows from the fact that the political independence of class A mandates was provisionally recognized as far back as 1920 by the League of Nations, subject only to the rendering of administrative advice and assistance by the Mandatory under a "sacred trust" until such time as these nations were "able to stand alone". According to the ICJ, the ultimate objective of this sacred trust was the self-determination and independence of the

[15] *UN Charter*, arts. 1(2), 55.
[16] *ICCPR*, art. 1; *ICESCR*, art. 1.
[17] Hannum (1990), 33.
[18] Weller & Metzger (2008), 44.
[19] Doehring, K. "Self-Determination" *in* Simma (2002), 49.
[20] Cassese (1995), 43.

peoples concerned.[21] As a matter of state practice, by 1947 all class A mandates, except Palestine, had achieved full independence (Iraq, 1932; Lebanon, 1943; Syria, 1945; Transjordan, 1946). Finally, and as will be explored further below, in 1947 UNSCOP itself determined that because "the peoples of Palestine are sufficiently advanced to govern themselves independently," political "independence shall be granted in Palestine at the earliest practicable date."[22] Of note, this recommendation was unanimous among UNSCOP's membership, including both the majority who recommended partition and the minority who preferred a unitary federal state.

If self-determination of peoples required the political independence of Palestine as a class A mandate based on the principles of consent of the governed and majority rule, the question arises, what actions were required of the UN in respect of this independence under prevailing international law in 1947? Answering this is important, as it sets the parameters of what the international rule of law prescribed at the time allowing us to test whether the terms of resolution 181(II) were consistent with it and, if not, why that resolution amounted to a continuation of the international rule by law. In short, a review of the text of both the *League of Nations Covenant* and the *UN Charter*, as well as relevant state practice, suggests that prevailing international law admitted of only two possibilities for Palestine in 1947: (1) immediate independence in accordance with the freely expressed wishes of Palestine's inhabitants, whatever its eventual constitutional structure; or (2) temporary delay of independence through conversion into a UN trusteeship under the *Charter*.[23]

As to the first possibility – immediate independence – it will be recalled that, dismissive of Palestinian Arab rights though it may have been, the terms of the Mandate for Palestine only required the establishment in Palestine of a Jewish national home, *not* a Jewish state. According to a 1939 White Paper, the UK itself acknowledged that the Jewish national home had been established in Palestine by that time. This would suggest that it had discharged its obligation under the terms of the Mandate *vis-á-vis* the Zionists and could proceed with granting the country full independence in accord with Article 22 of the *League of Nations Covenant*. The problem was that the minority Zionists insisted on transforming all of Palestine into a Jewish

[21] *Namibia*, para. 53.
[22] *UNSCOP Report, Vol. I*, 43. While UNSCOP's use of the plural (i.e. "peoples") may be read as suggesting that both the Jewish people and the Arab people of Palestine possessed the legal right be granted independence in separate states, it must not be forgotten that a minority of UNSCOP members also recommended the establishment of a unitary federal state as a means through which Palestine's "peoples" could exercise self-determination. *See* text accompanying *infra* notes 167-170.
[23] Quigley (2010), 88.

state against the wishes of the indigenous Palestinian majority who had long argued for a unitary, democratic and non-denominational state. This is, in part, what lead the British to conclude that the mandate was unworkable and should be handed over to the UN. In a very practical sense, the issue before the UN was how to deal with the impediment that Palestinian demography placed in the way of the establishment of what the Zionists intended to be a Jewish state.

Short of immediate independence in a unitary democratic State in accord with the wishes of Palestine's inhabitants the only other option was the second possibility: conversion of Palestine into a UN trusteeship. Under Chapter XII of the *Charter*, the International Trusteeship System was established for the administration and supervision, *inter alia*, of mandated territories that had yet to achieve independence.[24] Under Article 76, one of the basic objectives of the trusteeship system was "to promote" the "progressive development toward self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples *and the freely expressed wishes of the peoples concerned*" [emphasis added].[25] As between self-government and independence, Palestine's status as a class A mandate rendered the former nugatory and latter obligatory. Indeed, as a matter of state practice, it was only class B and C mandates – neither of which enjoyed a provisionally recognized right of independence under the *League of Nations Covenant* – that were transformed into trust territories under the *Charter*.[26] Neither was the fact that the League of Nations was now defunct a bar to the requirement and inevitability of independence. On the contrary, the final resolution of the League of Nations of 18 April 1946 recognized "that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League."[27] It further noted "the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers."[28]

[24] *UN Charter*, art. 77(1)(a).
[25] *Id.*, art. 76(b).
[26] Rauschning, "International Trusteeship" *in* Simma (2002), 1104-1105.
[27] *1946 Mandates Resolutions*, 278.
[28] *Id.*, 279.

According to Hersch Lauterpacht, this was understood as having the effect of maintaining "the general principles and the regime of the Mandatory system", pending conclusion of new arrangements under the *UN Charter*.[29] As subsequently affirmed by the ICJ in *Namibia*, "[t]o the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfillment of a sacred trust cannot be presumed to lapse before the achievement of its purpose."[30] As a matter of positive UN law, this was ensured by the safeguarding clause in article 80 of the *Charter*. That provided, in relevant part, that "nothing shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."[31] This meant that Article 22 of the *League of Nations Covenant* along with the terms of the Mandate remained in effect. As noted by the ICJ in *Namibia*, a "striking feature" of article 80 of the *Charter* was "the stipulation in favour of the preservation of the rights of 'any peoples', thus clearly including the inhabitants of the mandated territories *and, in particular, their indigenous populations*" [emphasis added].[32] Thus, with the Jewish national home having been established in 1939, the only international legal obligation that remained unfulfilled was the realization of the political independence of the territory of Palestine in accordance with the wishes of its majority indigenous population.

In sum, the *Charter* regime included a commitment to the principle of 'consent of the governed' that underpinned Wilson's world-vision. On the one hand, if self-determination of peoples was sufficiently established in 1947 to justify application to the Palestinian people, the country would have to follow the other class A mandates by having its independence recognized and being admitted to membership in the UN if it so wished. On the other hand, if self-determination of peoples lacked sufficient legal force under the *Charter* to give immediate effect to Palestinian independence, that problem was alleviated by the fact that eventual realization of independence was already established under a sacred trust that survived the League through the trusteeship system. In either case, as a matter of prevailing international rule of law the freely expressed wishes of the peoples concerned were to be determinative.

Given that Palestine's indigenous population was both in the majority and adamantly against partition, political independence invariably meant the establishment of the country as a

[29] Lauterpacht (1977), 509.
[30] *Namibia*, para. 55.
[31] *UN Charter*, art. 80(1).
[32] *Namibia*, para. 59.

unitary democratic state, the Jewish national home having already been established within it. As will be demonstrated, all of this ran up against prevailing European political winds. This included the imperative presented by a predominately western and European bloc of states for the need to find a durable solution to Europe's vexing Jewish question, epitomized at the time by the plight of Jewish displaced persons in post-war Europe and revelations of the horrors of the Holocaust. By recommending partition, UN General Assembly resolution 181(II) introduced a rupture in the purportedly new international legal order and challenged the primacy of the international rule of law as affirmed in its own *Charter*. As will be demonstrated, this rupture reified Palestine's ILS condition in the UN system. By going beyond the terms of what prevailing international law required by recommending the establishment of a Jewish state through partition of the country, the international legal and political goalposts would be fundamentally shifted for the indigenous subaltern majority, ultimately marking the question of Palestine under international law to this very day.

3.2 Resolution 181(II): Its Terms

On 3 September 1947, UNSCOP submitted its report to the General Assembly, in which the majority of the special committee voted in favour of a plan of partition with economic union, while a minority voted in favour of a plan for a unitary federal state.[33] The UNSCOP report was debated in the Assembly between 25 September and 29 November 1947, first by an ad hoc committee of all members of the Assembly ("ad hoc committee") which set up two sub-committees to study a slightly adjusted majority plan and a unitary state plan respectively, and then in full plenary session. This resulted in the passage by the Assembly of resolution 181(II) on 29 November 1947, by a vote of 33 to 13, with 10 abstentions.[34]

The terms of Resolution 181(II) provided for the partition of Palestine into an Arab State and a Jewish State in economic union, with the city of Jerusalem and its environs constituted as a *corpus separatum* under the administering authority of the UN Trusteeship Council (see Map I). Under the plan, both states were required to adopt democratic constitutions, establish government on the basis of universal suffrage and guarantee to all persons equality before the law. Aside from the act of partition itself, the extent to which the resolution reified Palestinian ILS in the UN system is best illustrated in the specific details of the plan as regards the related

[33] The majority comprised: Canada, Czechoslovakia, Guatemala, the Netherlands, Peru, Sweden and Uruguay. The minority comprised: India, Iran and Yugoslavia; *UNSCOP Report, Vol. I*, 47-64. Australia abstained from voting on the respective plans; *UNSCOP Report, Vol. II*, 23.
[34] A/RES/181(II), 29 November 1947.

issues of both the territorial boundaries and the demographic composition of each of the proposed states.

As to territorial boundaries, under the plan the Jewish State was allotted approximately 57 percent of the total area of Palestine[35] even though the Jewish population comprised only 33 percent of the country (see Maps I & II).[36] In addition, according to British records relied upon by the ad hoc committee, the Jewish population possessed registered ownership of only 5.6 percent of Palestine,[37] and was eclipsed by the Arabs in land-ownership in every one of Palestine's 16 sub-districts (see Map III).[38] Moreover, the quality of the land granted to the proposed Jewish state was highly skewed in its favour. UNSCOP reported that under its majority plan "[t]he Jews will have the more economically developed part of the country embracing practically the whole of the citrus-producing area",[39] – Palestine's staple export crop – even though approximately half of the citrus-bearing land was owned by the Arabs.[40] In addition, according to updated British records submitted to the ad hoc committee's two sub-committees, "of the irrigated, cultivable areas" of the country, "84 per cent would be in the Jewish State and 16 per cent would be in the Arab State".[41]

As to demographic composition, the UNSCOP report indicated that while the proposed Arab State would include a clear majority of approximately 725,000 Arabs to 10,000 Jews, the proposed Jewish State would include approximately 498,000 Jews to 407,000 Arabs. Curiously, UNSCOP acknowledged that "[i]n addition, there will be in the Jewish State about 90,000 Bedouins", providing virtual parity in the ethnic composition of the proposed Jewish State, with 498,000 Jews to 497,000 Arabs.[42] This was further compounded by the findings of sub-committee 2 of the ad hoc committee, which reported to the General Assembly that UNSCOP's estimated figures had to be corrected in light of the updated information furnished to it by the British. That information indicated that there would be 105,000 Bedouin in the Jewish State, not 90,000. As noted by the sub-committee, this meant that "the proposed Jewish State will

[35] Kattan (2009), 152.
[36] According to UNSCOP, the total "settled population" of Palestine was 1,846,000 of which 1,203,000 were Arabs and 608,000 were Jews; *UNSCOP Report, Vol. I*, 11.
[37] In 1945, of the 26,323,023 million dunam land-mass of Palestine, the Jews owned only 1,491,699 million dunams to the Arab's 12,574,774 dunams (48 percent), the remainder being publicly owned. *UN Ad Hoc Committee, Report of Sub-Committee 2*, 292-293, Appendix VI.
[38] In eight of Palestine's 16 sub-districts, Jewish land ownership did not exceed 5 percent and in no case did it exceed 39 percent. *Id*.
[39] Citrus was the principal export of Palestine at the time; *UNSCOP Report, Vol. I*, 48.
[40] *UN Ad Hoc Committee, Report of Sub-Committee 2*, 293, Appendix VI.
[41] Statement of Sir Mohammed Zafrullah Khan (Pakistan), UN GAOR, 2nd Sess., 126th Plen. Mtg. at 1374, A/PV.126, 28 November 1947.
[42] *UNSCOP report, Vol. I*, 54.

contain a total population of 1,080,800, consisting of 509,780 Arabs and 499,020 Jews. *In other words, at the outset, the Arabs will have a majority in the proposed Jewish State*" [emphasis added].[43]

Although the Zionists had coveted the whole of Palestine, the Jewish Agency leadership pragmatically, if grudgingly, accepted Resolution 181(II).[44] Although they were of the view that the Jewish national home promised in the Mandate was equivalent to a Jewish state, they well understood that such a claim could not be maintained under prevailing international law. In this way, UN recognition of the Jewish state in resolution 181(II) represented a fundamental shifting of the international legal goalposts. Based on its own terms, it is impossible to escape the conclusion that the partition plan privileged European colonial interests over those of Palestine's indigenous people and, as such, was an embodiment of the Eurocentricity of the international system that was allegedly a thing of the past. For this reason, the Arabs took a more principled position in line with prevailing international law, rejecting partition outright.[45] This rejection has disingenuously been presented in some of the literature as indicative of political intransigence,[46] and even hostility towards the Jews as Jews.[47] Yet an examination of the terms of the resolution as above offers an explanation rooted in what is appropriately characterized as a rejection of the hegemonic dictates imposed on the subaltern people of Palestine by the General Assembly and the ILS condition it wrought for them within the UN system. Far from an opportunity to establish their right to political independence and self-determination in their homeland in line with the international rule of law, resolution 181(II) represented an abuse of UN legal authority to undermine indigenous rights in Palestine in favour of European interest, and was therefore an embodiment of the international rule by law.

3.3 Resolution 181(II): Assessment Under International Law

The international legality of resolution 181(II) has long been a matter of some debate. Among the key protagonists, Israel has historically relied on the resolution as one of the legal bases of its juridical right to exist. The Declaration of the Establishment of the State of Israel of 14 May 1948 expressly provides that the "recognition by the United Nations of the right of the Jewish people to establish their state" contained in resolution 181(II) "is irrevocable", and

[43] *UN Ad Hoc Committee, Report of Sub-Committee 2*, 291.
[44] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 4th Mtg. at 16-17, 2 October 1947.
[45] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 3rd Mtg. at 11, 29 September 1947.
[46] *E.g.*, Strawson (2010), 101-102.
[47] Grief (2010), 166-167.

that the state was established "on the strength" of this resolution.[48] For its part, the Palestine Liberation Organization (PLO) regarded resolution 181(II) as illegal until it accepted it in 1988 as the basis of entering into diplomatic talks in accordance with a two-state settlement.[49] The international legality of resolution 181(II) has also been well traversed in the literature. Positions adopted by pro-Israel legal scholars have treated the resolution as illegal for violating a purported right of the Zionists to the whole of Palestine.[50] Others have considered it 'conditionally legal' on the basis that it would have bound both Israel and the Arab States if the latter had accepted it.[51] Not surprisingly, a similar variance can be seen among positions adopted by pro-Palestinian legal scholars. Some have treated the resolution as illegal for being wholly *ultra vires* the General Assembly[52] or in violation of the *UN Charter* and self-determination of peoples.[53] Still others have regarded it as legal based on acceptance of it by an overwhelming majority of states within the General Assembly, both at the time of its passage and subsequently through sponsorship of the two-state framework.[54]

Despite the difference of opinion that exists on the international legality of resolution 181(II), one common thread that runs throughout much of it is the tendency to collapse the separate issues of the General Assembly's procedural powers with its substantive powers, thus giving rise to some confusion. The diplomatic record reveals that this was an issue for some delegations in the debate over the terms of the resolution.[55] One example drawn from the secondary literature is found in the following view of James Crawford:

> "It is doubtful if the UN has a capacity to convey title, in part because it cannot assume the role of territorial sovereign: in spite of the principle of implied powers, the UN is not a state and the General Assembly only has a power of recommendation. On this basis it can be argued that GA Resolution 181(II) of 29 November

[48] *Declaration of Establishment of Israel* (1948).
[49] *See infra* text accompanying note 88 and Chapter 4.
[50] Grief (2010), 156-157.
[51] Stone (1981), 62.
[52] Cattan (2000), 38.
[53] *Id*., 39; Crawford (2012), 246.
[54] Mallison (1986), 171-173.
[55] *See* Statement of Semen K. Tsarapkin (USSR), Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 30th Mtg. at 184, 24 November 1947 ("Such doubts [i.e. about the legal competence of the GA to deal with the Palestinian problem] as were being expressed in the Ad Hoc Committee were completely unjustified, because Article 10 of the Charter gave the General Assembly the right and the duty to discuss the Palestinian question. It was in complete accordance with the provisions of Article 10 that the special session had been called, the Special Committee established and the Palestinian question considered by the General Assembly. *Any* recommendations which the Assembly made would have sound juridical foundations" [emphasis added]). *But see*, in response, statement of Sir Zafrullah Khan (Pakistan), Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 30th Mtg. at 189, 24 November 1947 ("Article 10 of the Charter certainly authorized the General Assembly to consider the question of Palestine and to make recommendations, but the solution which the General Assembly proposed must be within the scope of the Charter").

> 1947, approving a partition plan for Palestine, was if not *ultra vires* at any rate not binding on Member States."[56]

It is apparent that the legal capacity of the General Assembly to convey title is a matter of substantive power, while its legal capacity to make recommendations to Member States is a matter of procedural power. Questioning the authority of the Assembly to impose a territorial partition in Palestine, however accurate, cannot be fully justified by referencing the limits of its power to bind Member States procedurally. The better approach to assess the overall legality of resolution 181(II) would seem to call for a two-pronged test that severs the procedural and substantive authority of the General Assembly, as follows: (1) does the Assembly have the procedural power to issue recommendations under the *Charter*? (2) If so, what are the substantive limitations on the Assembly in the exercise of that power, if any?

As to the first prong, there is little question that the General Assembly possesses the procedural authority to issue recommendations under the *Charter*. Under article 10 of the *Charter*, the Assembly "may make recommendations to the Members of the United Nations or to the Security Council or to both…".[57] Based on the ordinary meaning of these terms, the Assembly is thus vested with the procedural competence to issue recommendations to members of the UN and/or to the Security Council under the *Charter*. But that takes us to the second prong, namely whether there are substantive limits on the Assembly in exercising this procedural authority. The answer is yes. Article 10 provides, in relevant part, that the Assembly may make recommendations, as above, but only on "any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter…".[58]

An argument can therefore be advanced that it is incorrect to assert that resolution 181(II) was *ultra vires* the General Assembly insofar as the resolution is understood to have *imposed* a political solution for "the future government of Palestine" on the people of Palestine.[59] Nothing in the text of the resolution suggests that the Assembly went beyond its limited powers of making a recommendation. To be sure, the resolution's terms expressly provide that the Assembly "*[r]ecommends* to the United Kingdom, as the mandatory Power for Palestine, and

[56] Crawford (2012), 246.
[57] *UN Charter*, art. 10.
[58] *Id.*, art. 10. This is with the exception of those powers under article 12 of the *Charter*, concerning the Security Council's primary competence over the maintenance of international peace and security.
[59] Although resolution 181(II) is entitled "Future government of Palestine", and the partition plan was presented as a recommendation in respect of same, the terms of reference of UNSCOP's majority report which served as the basis of the partition plan were not as narrow, but examined "all questions and issues relevant to the problem of Palestine." *See* GA Res. 181(II) and section 4.1 of this chapter.

to all other Members of the United Nations the adoption and implementation" of a certain course of action relevant to the future government of Palestine. At the time it was issued, therefore, the resolution constituted nothing more than a recommendation that was, as a matter of procedure, properly made by the Assembly and which, as a rule, would not normally be binding under international law.[60]

At the same time, however, in exercising its procedural power to make a recommendation on the future government of Palestine, the Assembly was bound, in substantive terms, by the scope of the *Charter*, including its provisions relating to the powers and functions of any organs provided for in it. By definition, this must have been delimited by what we might call for our purposes "the sacred trust principles" deriving from the continuation of the mandate regime following the demise of the League of Nations – *viz*. self-determination of peoples in the context of class A mandates, article 22 of the *League of Nations Covenant*, the Mandate for Palestine, and Chapter XII of the *Charter* concerning the International Trusteeship System. As noted above, given the satisfaction of the establishment of the Jewish national home under the terms of the Mandate, and the fact that the indigenous majority of the population of the country was against partition, this meant that the substantive scope of the General Assembly's power to make any recommendation on Palestine must have been limited to either one of two results: immediate independence of the country or delayed independence through transformation of the country into a UN trusteeship. In either case, partition would not be legal without the freely expressed consent of the governed.

Various arguments have been proffered over the years that differ with this conclusion. One of the earliest was advanced by Lauterpacht who, in October 1947, was asked by the Jewish Agency to advise "on the best legal grounds for refuting the suggestion that the General Assembly has no legal competence to partition Palestine."[61] He opined that because Great Britain exercised effective "sovereignty over Palestine" and it had requested the UN "to pronounce a finding upon the question of Palestine and its political future in all its aspects", the Assembly was within its power to recommend partition.[62] Likewise, he affirmed that the General Assembly possessed "unrestricted powers…to recommend the solution of the problem of Palestine."[63] These views suffer from a number of defects. First, the British request of the UN was not directed toward the broad end of "the question of Palestine and its political future

[60] Kattan (2009), 155; Jessup (1974), 264. *But see* text accompanying *supra* note 7 and *infra* notes 79-84.
[61] Lauterpacht (1977), 508.
[62] *Id*.
[63] *Id*.

in all its aspects" but rather only toward the much more limited end of "the future government of Palestine".[64] As discussed below, this implies that the territorial unity of the country would remain in-tact, save where the freely expressed wishes of the population determined otherwise. Second, it is clear from the terms of article 10 of the *Charter* – which Lauterpacht curiously failed to cite in his advice – that the procedural power of the Assembly to make recommendations to members of the UN and/or the Security Council is not unrestricted. To the contrary, it is expressly limited by the scope of the *Charter*, which includes the sacred trust principles and the continuing mandates regime. In view of the object and purpose of these principles and regime, the heart of which was the need to make inquiry of and respect the freely expressed wishes of the inhabitants of mandated territories, there would not seem to be any substantive scope for the General Assembly to suggest partition in exercising its procedural power of recommendation under article 10 of the *Charter*. After all, partition had been consistently rejected by the great majority of the people of Palestine.

Another, more recent example of a differing view is a detailed opinion advanced by Victor Kattan, who rightly points out that resolution 181(II) was merely a recommendation.[65] But in assessing the resolution's legality he seems to have maintained the general tendency to collapse the procedural and substantive powers of the General Assembly, noted above. He states that there is "no basis in the UN Charter or in international law to argue that the General Assembly does not have the power to recommend to states that they adopt a plan partitioning a particular territory over which it has a special responsibility."[66] For support, he relies on the 1950 advisory opinion of the ICJ in *South-West Africa*, where the Court unanimously concluded that "competence to determine and modify the international status of [the mandated territory of] South-West Africa rests with the Union of South Africa [as mandatory power] acting with the consent of the United Nations."[67] On this basis, he concludes that "the UN General Assembly, acting with the consent of the mandatory, can modify the status of a mandated territory and that, in so doing, it is competent to decide on claims of self-determination put forward by communities living in the territory."[68] Similar to problems encountered with Lauterpacht, this seems questionable for one key reason. Nowhere in *South-West Africa* did the ICJ indicate that the authority of the UN to modify the status of a mandated territory with the consent of the mandatory power was *substantively unlimited*. Indeed, the Court made it clear

[64] GA Res. 181(II), preamble. *See also UNSCOP Report, Vol. II*, 1.
[65] Kattan (2009), 155.
[66] *Id.*, 154.
[67] *South-West Africa*, 143.
[68] Kattan (2009), 154.

that South-Africa remained the mandatory power in South-West Africa,[69] that it was bound by the terms of article 22 of the *League of Nations Covenant*,[70] that the General Assembly was "legally qualified to exercise the functions previously exercised by the League of Nations",[71] and that the provisions of Chapter XII of the *Charter* applied to the territory of South-West Africa "in a sense that they provide a means by which the territory may be brought under the trusteeship system."[72] Thus, as previously noted, the scope of the General Assembly's authority to make recommendations under article 10 in respect of mandated territories must necessarily have been circumscribed by the sacred trust principles. These, in turn, were rooted in the principle of the consent of the governed.

In both of the abovementioned opinions, what is missing is the fundamental importance of assessing the legality of resolution 181(II) through the prism of the primacy of the consent of the governed, a crucial frame of reference if subaltern interests are to be given their due. This primacy arises from the substantive limits on the exercise of the procedural right of the General Assembly to make recommendations under article 10 of the *Charter*. By the very terms of that article, these limits are in turn defined by the scope of the *Charter*, which, because of the continuation of the principles and regime of the mandate system, necessarily includes the sacred trust principles embodied in article 22 of the *League of Nations Covenant* and self-determination of peoples living within class A mandated territories. In the end, therefore, resolution 181(II) was illegal under international law, not because it purported to impose a decision that went beyond its powers of recommendation, but because its substantive content – namely, partition against the will of the subaltern people of Palestine – was *ipso facto* in violation of the *Charter* and the international rule of law.

Admittedly, the legality of resolution 181(II) is a complex issue. It was doubtless for that reason that in October 1947 Egypt, Iraq and Syria proposed that an advisory opinion be sought from the ICJ on, *inter alia*, the competence of the General Assembly to recommend the partition of Palestine without the consent of its people.[73] This effort was narrowly defeated in the ad hoc

[69] *South-West Africa*, 143.
[70] *Id*.
[71] *Id*., 137.
[72] *Id*., 144.
[73] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, Annex 15 (Iraq: draft resolution concerning reference of a legal point to the International Court of Justice; 14 October 1947), 16 (Egypt: draft resolution concerning reference of a legal question to the International Court of Justice; 16 October 1947) and 17 (Syria: draft resolution concerning reference of certain legal questions to the International Court of Justice; 16 October 1947) at 239-241.

committee of the General Assembly,[74] giving rise to concern among some that the international rule of law was being sacrificed for other ends.[75] The Colombian delegate opined that "[t]he legal competence of the General Assembly to set up two independent States in Palestine, without regard to the principle of self-determination" and without "the consent of the inhabitants of Palestine", has "not been established to our satisfaction."[76] The Iraqi delegate stated that "if the General Assembly were to adopt this [partition] plan" without the benefit of first going to the ICJ, "the legality of the matter would still be seriously questioned."[77] Finally, the Cuban delegate noted that refusal to have resort to the ICJ "was a mistake", not least because it "may well give the impression that the Assembly is avoiding solutions which conform to the law".[78]

At its heart then, the key problem with resolution 181(II) was that it recommended a purported solution to the question of Palestine on terms that manifestly ran counter to prevailing international law. If the Assembly's goal of establishing a Jewish state in Palestine was viewed by it as a politically legitimate end, that end was arrived at the expense of the international rule of law as it existed at the time and the purported rights of the indigenous people of Palestine thereunder. How could partition be legal if the only possibility envisioned under the *UN Charter* was independence of the country, either immediately as with other Class A mandates, or at some point in the immediate future following temporary administration as a UN Trusteeship? What of the principle of self-determination of such mandated territories, rooted in the precepts of consent of the governed and majority rule? Even if the Jewish people possessed an internationally recognized right to a Jewish *national home* in Palestine by virtue of the Mandate, how did that legally justify the General Assembly's recommendation to establish a Jewish *state* in Palestine? At any rate, how would the "Jewishness" of that state be secured, if the ratio of Arabs to Jews in it was virtually on par or the Jews were a minority in it from the start, and the plan required it to adopt a democratic constitution guaranteeing universal suffrage and equality before the law? As will be seen, following these lines of inquiry will assist us in better understanding the rule by law essence of resolution 181(II) and why it reified Palestine's ILS condition.

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[74] As Iraq, Egypt and Syria put more than one question forward, these were amalgamated in a proposal that was defeated in two votes, as follows: 25 to 18, with 11 abstentions; 21 to 20, with 13 abstentions. Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 32nd Mtg. at 203, A/AC.14/SR.203, 24 November 1947.

[75] Potter (1948), 860, states that failure to put the question of United Nations jurisdiction over the Palestine question to the ICJ "tends to confirm the avoidance of international law in dealing with international problems manifested only too often in the history of Great Power behavior in the United Nations".

[76] UN GAOR, 2nd Sess., 127th Plen. Mtg. at 1397, A/PV.127, 28 November 1947.

[77] UN GAOR 2nd Sess., 126th Plen. Mtg. at 1390, A/PV.126, 28 November 1947.

[78] UN GAOR, 2nd Sess., 126th Plen. Mtg. at 1384, A/PV.126, 28 November 1947.

3.4 Resolution 181(II) as an Embodiment of the International Rule by Law

If the passage of resolution 181(II) violated the international rule of law, how should we understand it as an embodiment of the international rule by law? The partition plan may very well have amounted to a form of "rule by something", but does this something amount to "law"? There seem to be two ways through which the rule by law nature of resolution 181(II) can be understood. The first is through the lens of positivist international law doctrine or hard law. The second is through the prism of discursive international norms or soft law.

Doctrinally, the assertion that resolution 181(II) was declarative of law and therefore amounted to a form of rule by law may seem surprising. This is because the resolution was merely a recommendation of the General Assembly, and therefore not normally binding under international law. While this may have been true of the resolution when it was passed in 1947, an argument can be made that over time, through its express and implied acceptance by states and other subjects of the international community – most importantly, the Israeli and Palestinian protagonists with whom it is concerned – it has come to have binding legal force if not *in toto*, then in respect of its embodiment of the principle of the territorial division of mandate Palestine.

It is a general principle that law may arise from a long and consistent practice: *ex factis oritur jus*.[79] On the international plane, the formation of customary international law is understood as requiring "evidence of a general practice accepted as law".[80] This practice may be global or regional/local in nature.[81] Accordingly, as noted by the ICJ in *Nicaragua*, settled practice accompanied by *opinio juris sive necessitatis* – the subjective belief that the practice engaged in is required as matter of law – qualifies as binding customary international law.[82] Here, the universality of the UN is of direct relevance. As noted by Rosalyn Higgins, the practice of the UN's political organs – the General Assembly in particular – can provide a "rich source of evidence" of customary international law as the "[c]ollective acts of states, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law."[83] This has been affirmed by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where it opined that General Assembly resolutions "can

[79] Shany (2016), 392.
[80] *ICJ Statute*, art. 38(1)(b).
[81] Crawford (2012), 29.
[82] *Nicaragua*, para. 207.
[83] Higgins (1963), 2, 5.

provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*."[84]

It is admittedly difficult to argue that the terms of resolution 181(II) would *in toto* qualify as customary international law on these bases. Support for this conclusion rests in the fact that key specific terms of the resolution – including the proposed territorial delimitations of the envisioned Jewish and Arab states, the proposed economic union, guarantees intended for the protection of civil and political rights of minorities, and the envisioned means of the resolution's enforcement – were never in fact followed by the concerned states and had been overtaken by events on the ground during the 1948 war. Thus, as noted by Crawford, "both the Security Council and Britain refused to enforce the partition plan," and the functions of the UN Palestine Commission (UNPC) – established in resolution 181(II) to administer the transfer of power from Britain to the two proposed states during a transitional period – were subsequently terminated by the General Assembly in resolution 186(S-2) of 14 May 1948, during the course of the war.[85] Likewise, John Dugard argues that, rather than resolution 181(II), Israel owes its international legal existence to the operation of state secession.[86]

Nevertheless, in the intervening 70 years since the passage of resolution 181(II) a good case can be made that there has emerged enough state practice, including by both the States of Israel and Palestine, but also within the UN system, suggestive of the legally binding character of the resolution's fundamental object and purpose: namely, the principle of a peaceful resolution of the dispute over mandate Palestine *through its territorial division into two states*. As noted, the Declaration of the Establishment of the State of Israel provides that "recognition by the United Nations of the right of the Jewish people to establish their state" contained in resolution 181(II) "is irrevocable", and that the state was established "on the strength" of the resolution.[87] Likewise, since 1988, the PLO has recognized resolution 181(II) as one of the bases upon which the State of Palestine may be established, albeit within the smaller territorial confines of the occupied Palestinian territory (OPT).[88] As for the attitude of the rest of the international community, the best evidence that a custom exists in this regard comes in the form of the numerous resolutions of the General Assembly over the years, usually adopted by a large

[84] *Nuclear Weapons*, para. 70.
[85] Crawford (2006), 432.
[86] Dugard (2013), 182-187.
[87] *Declaration of Establishment of Israel* (1948).
[88] *PLO Letter to the Secretary-General (1988)*. *See also Enhancement of Palestine's Status at the UN*.

or overwhelming majority, in which resolution 181(II) is recalled or affirmed.[89] Thus, for example, resolution 48/158D of 20 December 1993, passed following the commencement of the Oslo peace process and adopted by a vote of 92 to 5, with 51 abstentions, reaffirmed a number of principles "for the achievement of a final settlement and comprehensive peace" including "[g]uaranteeing arrangements for peace and security of all States in the region, including those named in resolution 181(II) of 29 November 1947, within secure and internationally recognized boundaries." [90] Likewise, in relation to the Madrid Peace Conference, the same principle was affirmed by the Assembly in its resolutions 44/42 of 6 December 1989 (151 to 3, with 1 abstention), 45/68 of 6 December 1990 (144 to 2, with 0 abstentions), and resolution 46/75 of 11 December 1991 (104 to 2, with 43 abstentions).[91] In line with these resolutions, widespread state practice as reflected in bilateral and multilateral treaty, diplomatic, economic and political relations affirms that historical Palestine is today legally recognized by the vast majority of the international community as being shared by two distinct self-determination units, Israel and Palestine (*see* chapters 4 & 5). Thus, it is possible to argue that beyond its specific terms and mechanics which were rendered moot by the 1948 war and subsequent events, the legal effect of the two-state principle that underpinned resolution 181 has arguably taken on a binding character through its treatment by states within the UN system. This has given the resolution its rule by law quality, which has, in turn, reified Palestine's ILS condition within the UN.

Even if the two-state paradigm that underpins resolution 181(II) is not regarded as binding international law doctrinally, might it still possess a discursive/normative force that informs its rule by law character? In *Nuclear Weapons*, the ICJ noted that "General Assembly resolutions, even if they are not binding, may sometimes have normative value".[92] Based on the historical record subsequent to the passage of resolution 181(II), there is little question that the resolution produced a discursive/normative imagery that structured the way the UN as an organization has come to understand the conflict over Palestine and how it should be peacefully resolved in accordance with other relevant bodies of international law. As will be fleshed out in chapters 4 and 5, this includes the law concerning acquisition of territory through the threat or use of force, the law of belligerent occupation, and the law on self-determination of peoples as crystalized

[89] *E.g.*, A/RES/71/25, 30 November 2016 (149-7-8); A/RES/71/23, 30 November 2016 (153-7-7); A/RES/71/20, 14 December 2016 (100-9-55); A/RES/70/12, 24 November 2015 (102-8-57); A/RES/70/15, 24 November 2015 (155-7-7); A/RES/66/18, 26 January 2012 (164-7-5); A/RES/52/250, 13 July 1998 (124-4-10); A/RES/43/177, 15 December 1988 (104-2-36).
[90] A/RES/48/158D, 20 December 1993.
[91] A/RES/44/42, 6 December 1989; A/RES/45/68, 6 December 1990; A/RES/46/75, 11 December 1991.
[92] *Nuclear Weapons*, para. 70.

in the post-decolonization era. In so far as these bodies of law have been applied within and by the UN system to affirm the rights and obligations of the protagonists in the question of Palestine, the *only* confines within which they have legitimately been allowed to do so – those of the two-state paradigm – were set forth in principle in resolution 181(II). In addition, one can argue that through its passage of resolution 181(II) the UN effectively imposed a territorial regime for Palestine that was to be treated as an objective legal fact with almost international constitutional effect. In this sense, the General Assembly was the vehicle through which an illegal act would eventually provide a definite legal basis for the territorial transformation of Palestine into two distinct self-determination units. Thus, from a discursive/normative standpoint, resolution 181(II) provided what has become the fundamental architecture of the UN's 70-year engagement with the question of Palestine: the two-state framework.[93] This has also bolstered resolution's rule by law quality, with its resulting reification of Palestine's ILS within the Organization.

In light of the above, when viewed from a subaltern perspective, resolution 181(II) stands out as the first example of the rule by law in operation in the UN's work on the question of Palestine. As noted, the PLO would later be compelled to accept the legitimacy of the resolution as a price to be paid in return for a modicum of Palestine's international legal rights being recognized and hopefully realized (see chapter 4). Yet, from the standpoint of the PLO's constituents, the introduction of the two-state paradigm through resolution 181(II) represented a signal disaster at the time it was passed. At bottom, it was the clash between the interest of the hegemonic and European-dominated General Assembly in the juridical establishment of a Jewish State in Palestine, and the obstacle to doing so in the form of the very presence of a majority Muslim and Christian Arab population who persistently objected to it, that forms the essence of the rule by law character of the resolution and the subsequent reification of Palestine's ILS inherent in its terms. In order to better understand the nature and genus of the ILS condition through this problem, it is useful for us to look deeper into the diplomatic record with a subaltern sensibility. To this end, we must give particular critical focus to the terms of UNSCOP's report, the verbatim and summary records on which it was based, and the debates that subsequently took place in the ad hoc and plenary sessions of the General Assembly between 25 September and 29 November 1947.

[93] Falk (2017), 4.

4. What Produced the Rule by Law in Resolution 181(II)? The United Nations Special Committee on Palestine and Subsequent General Assembly Debates

UNSCOP was created by the General Assembly on 15 May 1947.[94] It held sixteen public and thirty-six private meetings with a variety of stakeholders in Lake Success, Jerusalem, Beirut and Geneva between June and August 1947.[95] In addition, it visited a range of Jewish displaced persons camps in Germany and Austria.[96] As noted, UNSCOP proposed two plans for the future government of Palestine: a majority plan proposing partition with economic union, and a minority plan proposing a unitary federal state. It also unanimously adopted twelve recommendations, including that the Mandate "shall be terminated" and "independence shall be granted in Palestine at the earliest practicable date", and that the new state or states to be formed in Palestine shall be constitutional democracies guaranteeing "full equality of all citizens with regard to political, civil and religious matters".[97]

An examination of UNSCOP records reveals at least three factors that point up a continuation of the international rule by law and the hegemonic/subaltern binary in its work. They were rooted in UNSCOP's disregard for prevailing international law throughout the course of its deliberations, which was carried through to the General Assembly debates following the submission of its report on 3 September 1947, ultimately resulting in the passage of resolution 181(II). These factors were: (1) an apparent bias in UNSCOP's composition and terms of reference directing it away from recommending the immediate independence of Palestine upon the dissolution of the Mandate, as per the normal course for class "A" mandates in under international law; (2) an unwillingness to sufficiently engage Palestinian Arab opinion in its deliberations; and (3) a contempt for democratic governance and the empirical reality of the indigenous Arab population in Palestine as the main problem to be overcome. As each of these are addressed below, the Eurocentricity of international law and institutions as a structural component of ILS will be readily apparent.

4.1 Bias in UNSCOP's Composition and Terms of Reference

In 1947, the General Assembly was composed of only fifty-five Member States, forty of whom were either European or settler-colonial offshoots of Europe. The other sixteen were made up of newly independent Asian, African and Middle Eastern states, the majority of those regions remaining under some form of European imperial control at the time. Notwithstanding

[94] *UNSCOP Report, Vol. I*, 3.
[95] *Id*.
[96] *Id*., 8.
[97] *Id*., 42-43, 45.

this 5:2 ratio, of the eleven members of UNSCOP, nine were drawn from the European and settler-colonial group (Australia, Canada, Czechoslovakia, Guatemala, Netherlands, Peru, Sweden, Uruguay and Yugoslavia), whereas only two (India and Iran) were drawn from the non-European group. No Arab state was named to UNSCOP and only one member (Iran) was drawn from the Middle East. It is apparent, therefore, that UNSCOP's membership empirically reflected a continuation of the "civilized" Eurocentricity of international law and institutions that had hitherto been a marked feature of the international system. As noted by John Quigley, UNSCOP was "friendly territory for the Jewish Agency from the cultural standpoint."[98] Set against the calamitous backdrop of WWII, the evidence further suggests this bias was also political, as a key feature of the work of UNSCOP was the desire of some of its members (and other states in the Assembly) to find a solution to Europe's long-standing Jewish question. This was to be done through the juridical transformation and recognition of the Jewish national home into a Jewish state in Palestine, something that could only happen at the expense of the international rule of law and the rights of the Palestinian Arabs thereunder. Despite one writer having recently rejected this claim as mere "myth",[99] such a position seems warranted on a close reading of the diplomatic record.

The record suggests that these ends were enabled initially through UNSCOP's unduly broad terms of reference. When the United Kingdom referred the matter of Palestine to the UN on 2 April 1947, it asked the General Assembly "to make recommendations under Article 10 of the Charter, concerning the future government of Palestine". To this end, the UK requested the Assembly to constitute and instruct a special committee to help it consider this question.[100] Thus the envisioned special committee was asked to work within the relatively narrow confines of advising on Palestine's *future government* within the scope of the *Charter*. It was not asked to entertain territorial dismemberment of the territory in favour of a European settler minority colonizing it against the will of the indigenous non-European majority. This was consistent

[98] Quigley (2016), 51.

[99] *See* Strawson (2010), 5, where he writes: "…some myths that have achieved the status of facts can be disposed of. The partition resolution [i.e. GA Res. 181(II)] is a case in point. The creation of Jewish state in 1948 is now commonly regarded as a form of international compensation to the Jews for the Holocaust. It is regularly claimed that guilt, in particular 'western guilt,' led the international community to foist the Jews onto the innocent Palestinians, thus provoking the conflict. However, through a systematic reading of contemporary UN debates and the partition proposal contained in the report of the United Nations Special Committee on Palestine (UNSCOP) no such intention can be found. The Holocaust is rarely mentioned. There are certainly no expressions of guilt. Indeed the UNSCOP report in a sideways reference to the Holocaust explicitly says that its recommendations for partition are not intended as a solution to the 'Jewish problem'. In reading the debates in particular I was struck by the callous manner in which the Holocaust was either ignored or sometimes referred to… It is thus a myth that the source of the problem was a legal decision to hand over part of Palestine to the Jews at the expense of the Palestinians."

[100] *UNSCOP Report, Vol. II*, 1.

with Palestine's status as a single administrative unit under international law whose independence had been provisionally recognized in 1920 and whose legal fate under the *Charter* was either to have its independence immediately recognized or be converted into a UN trust territory until such time as independence was recognized in accordance with the freely expressed wishes of its inhabitants.

The First Committee of the General Assembly was tasked with composing UNSCOP's terms of reference. During its deliberations, the scope of the terms originally referred by Britain were considerably broadened in a manner that directed the matter away from Palestine's independence. This allowed for consideration of a number of factors more amenable to Zionist and associated post-war European goals of establishing a Jewish state. To begin with, Chile, Guatemala, and Uruguay succeeded in gaining approval for expanding the political scope of UNSCOP's investigation by replacing reference to it having to report on "the future government of Palestine" to the more opaque "question of Palestine".[101] This was justified by the Guatemalan and Uruguayan representatives – both of whom were members of UNSCOP – ostensibly as a measure to ensure against "directing", "limiting" and "restricting" the committee's task.[102] The British representative realized that this skewed his government's original intention in referring the matter to the General Assembly. He accordingly requested the removal of any reference to "the request of the Government of the United Kingdom" in the terms of reference.[103] Furthermore, despite objections from Lebanon and Syria, the Guatemalan representative succeeded with assistance from Australia and South Africa to gain support for an expansion of the geographical scope of UNSCOP's investigation. This scope was enlarged from merely "Palestine" to "Palestine *and wherever it may deem useful*" [emphasis added].[104] As stated by the Guatemalan representative, this was done with the specific purpose of empowering the committee to "obtain official knowledge of the wishes of the Jews in the European camps" regarding their possible future settlement in Palestine.[105] Finally, various attempts to ensure UNSCOP's terms of reference included "a proposal on the question of establishing without delay the independent democratic State of Palestine" were repeatedly defeated by the western European and settler-colonial bloc of states.[106] In the end, UNSCOP's final terms of reference were set out in General Assembly resolution 106 (S-1) of 15 May 1947,

[101] UN GAOR, 1st Spec. Sess., Vol. III, 55th Mtg. at 276-278, A/C.1/136, 12 May 1947.
[102] *Id.*, 278.
[103] *Id.*, 278-279. Notwithstanding, the preamble of GA Res. 181(II) references "the request of the mandatory Power to constitute and instruct a special committee to prepare for the consideration of the question of the future government of Palestine."
[104] *Id.*, 283-287.
[105] *Id.*, 283.
[106] *See* UN GAOR, 1st Spec. Sess., Vol. III, 56th Mtg. at 308-310, A/C.1/136, 13 May 1947.

mandating it to prepare "a report on the question of Palestine" and granting it "the widest powers to ascertain and record facts, and to investigate all questions and issues relevant to the problem of Palestine." To that end, UNSCOP was empowered to "conduct investigations in Palestine and wherever it may deem useful," and to "receive and examine evidence" from "the mandatory Power, from representatives of the population of Palestine, from Governments and from such organizations and individuals as it may deem necessary".[107] No reference was made to Palestine's independence, the *UN Charter*, or the *League of Nations Covenant*.

Given UNSCOP's wide mandate, Arab fears that Palestinian independence in line with the freely expressed wishes of its inhabitants, immediate or delayed, was being sacrificed for the broader political goals of partitioning the country do not seem to have been taken seriously by the Assembly. Indeed, the Dominican and Brazilian representatives each attempted to allay such concerns by suggesting that failure to mention independence in the terms of reference, for instance, would not necessarily exclude independence from being considered.[108] These efforts were in vain. As pointed out by the Lebanese delegate – and as would later be testified to UNSCOP by Jewish Agency Chairman, David Ben Gurion[109] – the Zionists had been open in their opposition "to the independence of Palestine until the Jews form a majority there. […] Consequently, this apparent shyness of the term 'independence for Palestine' on the part of many, when considered in conjunction with the declared and avowed intentions of the Jewish Agency, is exceedingly disquieting. […] The word 'independence' already exists in the Covenant of the League of Nations, on which the mandate was based, and therefore, obviously, it is not the act of using an already used term which prejudges the issue, but precisely the act of omitting to use a term which was already in use thirty years ago" which does.[110] Similar concerns were repeatedly and expressly articulated by each of the Egyptian,[111] Iraqi[112] and

[107] A/RES/106 (S-1), 15 May 1947.
[108] UN GAOR, 1st Spec. Sess, Vol. I, 79th Plen. Mtg. at 168, 180, A/C.1/136, 15 May 1947.
[109] *UNSCOP Report, Vol. III*, 49-50.
[110] UN GAOR, 1st Spec. Sess., Vol. III, 55th Mtg. at 288-289, A/C.1/136, 12 May 1947.
[110] *Id*., 288-289.
[111] UN GAOR, 1st Spec. Sess, Vol. I, 78th Plen. Mtg. at 145, A/C.1/136, 14 May 1947 ("Whereas by stroke of a pen the reference to independence of Palestine has been in effect removed by the committee failing to confirm the spirit of the request of the of the British government as embodied in its letter of appeal to the United Nations for a settlement of this problem"; "the First Committee has exceeded its powers and was not within it rights when it decided to delete the sentence referring to 'the future government of Palestine' and replaced it by a vague and broad reference to 'the question of Palestine'.").
[112] UN GAOR, 1st Spec. Sess, Vol. I, 77th Plen. Mtg. at 125-126, A/C.1/136, 14 May 1947 ("The First Committee, however, after three days of discussion and after drafting six alternative texts containing the term 'independence', has, by a magic move, deleted the word 'independence' from the terms of reference. […] The terms of reference have actually avoided ideas and concepts like freedom, independence, self-determination, democracy, the Charter, unity, harmony, peace and justice. The situation is strange not because these words are not included – and they are conspicuous by their absence – but because of the firmness of the opposition from certain quarters to the inclusion

Syrian[113] delegations, again to no avail. The Lebanese delegate summed it up succinctly before the General Assembly on 13 May 1947:

> The ground of this concern is the fact that not only has any mention of independence for Palestine been severely suppressed from the terms of reference, but also, the basis on which this extraordinary session of the General Assembly was convened in the first place has finally shifted, in the course of the last two weeks from preparing to advise the United Kingdom Government on the future government of Palestine to preparing for the consideration of the so-called problem of Palestine in general, a phrase which by its very generality may mean anything and which is therefore unacceptable."[114]

And then again on 14 May 1947:

> "The phrase 'future government of Palestine' has now completely vanished. In its place we have the phrase 'the problem or question of Palestine'. This replacement has taken place without any previous adequate discussion of this problem, without even any proper indication as to what it really is. […] For instance, it has been taken for granted by many quarters that the problem of the [Jewish] refugees and displaced persons [of WWII] is somehow related to the problem of Palestine. The Jewish Agency affirmed that the two problems were one and the same, and the introduction of the phrase, 'and wherever it may deem useful [in the terms of reference] was expressly intended by those who introduced and supported it to enable the committee to visit displaced persons' camps and thus bring about a connexion, however strained and artificial, between these two problems."[115]

The chief concern of the Arab states, therefore, was that the General Assembly was furnishing UNSCOP with terms of reference that were biased in favour of what its majority European and settler-colonial bloc wished to impose on the natives of Palestine; namely the establishment of a Jewish state in their country and at their expense, in contravention of what prevailing international law required. This seems to have been a reasonable concern to have had at the time. This was demonstrated by the fact that the Danish delegate, in his capacity as Rapporteur of the First Committee, urged members of the committee to consider the "problem of Palestine" as "not a purely legal problem".[116] More to the point, after extensively recounting the devastation of the Holocaust on the Jews of Europe, the Soviet delegate stated:

> "As we know, the aspirations of a considerable part of the Jewish people are linked with the problem of Palestine and of its future administration. […] The time has come to help these people, not by word, but by deeds. It is essential to show concern for the urgent needs of a people which has undergone such great

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of such words for fear of prejudicing the issue. As if the demand to investigate any people's right to freedom and independence were an indication of partiality!").

[113] UN GAOR, 1st Spec. Sess, Vol. I, 78th Plen. Mtg. at 142, A/C.1/136, 14 May 1947 ("We have voted against the terms of reference of the special committee because no mention was made in the terms of reference to the word 'independence'. I am sorry some of the speakers in the [First] Committee avoided the word 'independence' as if it were something injurious or as if it were out of order, claiming that it would prejudge the action of the special committee. We said that it would not prejudge action. This is the essential and sole object of the mandate, that it be ended by independence, and by the termination of an unworkable mandate. It is the general principle of all mandates and trusteeships, that the end in view be independence. It is in the Charter and the Covenant of the League of Nations. Should we not then instruct the special committee to direct its studies toward realizing this end, which is the essential end? Would that be prejudging? I cannot see any way in which that would be prejudging. We ask that the provisions of the Covenant of the League of Nations and the provisions of the Charter of the United Nations be the basis for any solution to be found for Palestine, and nothing else").

[114] UN GAOR, 1st Spec. Sess., Vol. III, 57th Mtg. at 359, A/C.1/136, 13 May 1947.

[115] UN GAOR, 1st Spec. Sess, Vol. I, 78th Plen. Mtg. at 155-156, A/C.1/136, 14 May 1947.

[116] UN GAOR, 1st Spec. Sess, Vol. I, 77th Plen. Mtg. at 125, A/C.1/136, 14 May 1947.

> suffering as a result of the war brought about by hitlerite Germany. This is a duty of the United Nations. […] The fact that no western European State has been able to ensure the defence of the elementary rights of the Jewish people, and to safeguard it against the violence of the fascist executioners, explains the aspirations of the Jews to establish their own State. It would be unjust not to take this into consideration and to deny the right of the Jewish people, to realize this aspiration. It would be unjustifiable to deny this right to the Jewish people, particularly in view of all it has undergone during the Second World War. Consequently, the study of this aspect of the problem and the preparation of relevant proposals must constitute an important task of the special committee."[117]

When UNSCOP issued its report, although it noted that "any solution for Palestine cannot be considered as a solution of the Jewish problem in general,"[118] this didn't mean that Palestine wasn't to feature as a *prominent part* of a solution for the Jewish problem. Thus, when UNSCOP's report was put before the ad hoc committee of the General Assembly just before the adoption of resolution 181(II), similar views as those expressed by the Soviet delegate above were expressed by the Netherlands,[119] Norway,[120] and Poland.[121] The Uruguayan delegate summed things up by stating that the establishment of a Jewish state in Palestine would represent "a complete plan for a territorial solution of the Jewish problem."[122]

Thus, the desire to resolve Europe's Jewish question took precedence in the minds of key members of the hegemonic European and settler-colonial bloc of states over the requirements of international law and the rights of the subaltern Palestinian Arabs thereunder. The concerns of bias of UNSCOP's composition and terms of reference are certainly vindicated by the record. To be sure, concern for the Jewish refugees and of the historic injustice faced by European Jewry was shared by a number of the Asian and Middle Eastern States.[123] Indeed, as a matter

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[117] *Id*., 131-132.
[118] *UNSCOP Report, Vol. I*, 89.
[119] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 19th Mtg. at 129, 21 October 1947 ("It was abundantly clear that there was a very close link between the solution of the Palestine problem and of the Jewish refugee problem").
[120] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 16th Mtg. at 108, 16 October 1947 ("The delegation of Norway in a spirit of complete impartiality and of equal amity for the two peoples, had finally decided to vote for the majority plan [i.e. to partition Palestine into an Arab State and a Jewish State]…because of the wrongs which the Jews had suffered at the hands of mankind.").
[121] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 8th Mtg. at 42, 8 October 1947 ("…the problem of the distressed European Jews [needs to] be dealt with as a matter of extreme urgency. The Polish delegation considered, however, that the problem could and ought to be solved primarily by Jewish immigration into Palestine").
[122] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 6th Mtg. at 31, 6 October 1947.
[123] *See* Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 7th Mtg. at 36-37, 7 October 1947, where the Pakistani representative stated that "[t]he outbreak of anti-Semitism in Europe had introduced complications into the Palestinian question. The Pakistan delegation had every sympathy with those sufferings, but considered that the problem was one of humanitarian concern which should not affect the rights of the peoples of Palestine wand which should be dealt with as an international problem. With regard to the relief for the persecuted Jews, Palestine had done more than its share in settling more than 500,000 Jews in that country. […] [The Pakistani delegate] acknowledged the urgency of the matter, but considered that those displaced persons should be absorbed in other States where there was already a prosperous and appreciable Jewish population rather than wait for admission to Palestine."

of empirical fact Palestine itself had done more than its fair share in serving as a refuge for hundreds of thousands of Jewish refugees from Europe,[124] while many western states refused to open their doors in any remotely comparable way.[125] But because these non-European states had nothing to do with the persecution of European Jews, any talk of using the UN to partition Palestine in order to resolve Europe's Jewish question contrary to prevailing international law – a result enabled by the bias inherent in UNSCOP's composition and terms of reference – was proof of a lingering imperialism in the new world order and, alas, the international rule by law written into resolution 181(II) and the ILS it affirmed for the Arabs of Palestine. As the representative of Yemen succinctly submitted to the General Assembly: "If Jews were persecuted in Europe what have the people of Palestine to do with that?"[126]

4.2 UNSCOP's Unwillingness to Sufficiently Engage Palestinian Arab Opinion

A second factor that informed the rule by law character of resolution 181(II) was UNSCOP's unwillingness to sufficiently engage the opinion of the Palestinian Arab leadership during its deliberations. At first glance, this may appear to be a contentious claim given that the Arab Higher Committee for Palestine (AHC) took a specific decision to boycott UNSCOP. That decision, however, was motivated by an understandable and widely known frustration with the British and League of Nations role in constructing Palestine's ILS in the interwar period, although not articulated in those terms. As the AHC representative to the ad hoc committee explained:

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[124] *Id*. *See also* UN GAOR, 2nd Sess., 126th Plen. Mtg. at 1368, A/PV.126, 28 November 1947, where Sir Zafrullah Khan (Pakistan) stated: "What has Palestine done? What is its contribution toward the solution of the humanitarian question as it affects Jewish refugees and displaced persons? Since the end of the First World War, Palestine has taken over four hundred thousand Jewish immigrants. Since the start of the Jewish persecution in Nazi Germany, Palestine has taken almost three hundred thousand Jewish refugees. This does not include illegal immigrants who could not be counted. One has observed that those who talk of humanitarian principles, and can afford to do most, have done the least at their own expense to alleviate this problem. But they are ready – indeed, they are anxious – to be most generous at the expense of the Arab."

[125] *See* Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 15th Mtg. at 94, 16 October 1947, where the Saudi representative stated that "[t]he intervention of the United States and its support of the Zionists was incomprehensible, especially since it would not open its own doors to the destitute refugees", and Jewish "suffering should not be used as a weapon for encroaching on the rights of others. If the gates of the world had not been closed to the Jews, they would have been able to find shelter away from Europe."

[126] UN GAOR, 2nd Sess., 124th Plen. Mtg. at 1316, A/PV.124, 26 November 1947. *See also*, Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 18th Mtg. at 120, 18 October 1947, where a representative of the Arab Higher Committee stated: "Nations which had initiated or permitted anti-Semitism had no right to ask tiny Arab Palestine to pay by the loss of its rights for the mistakes of others;" *and* UN GAOR, 2nd Sess., 126th Plen. Mtg. at 1385, A/PV.126, 28 November 1947, where Ernesto Dihigo (Cuba) stated: "With regard to the Jewish or non-Jewish refugees now in camps for displaced persons, a problem on which so much emphasis has been laid by those in favour of partition…it should be solved by good will on the part of all United Nations, each of which should receive a proportion of refugees in accordance with its ability to do so and in the particular conditions in each country. But we do not see why Palestine should be expected to solve the whole problem alone, especially as that country had no hand in determining the circumstances which originally caused the displacement of all these persons."

> "The Arabs of Palestine could not understand why their right to live in freedom and peace, and to develop their country in accordance with their traditions, should be questioned and constantly submitted to investigation. […] The rights and patrimony of the Arabs in Palestine had been the subject of no less than eighteen investigations within twenty-five years, and all to no purpose. Such commissions of inquiry had made recommendations that had either reduced the national and legal rights of the Palestine Arabs or glossed over them. The few recommendations favourable to the Arabs had been ignored by the Mandatory Power. It was hardly strange, therefore, that they should have been unwilling to take part in a nineteenth investigation."[127]

Be that as it may, the literature tends to treat the boycott and its negative consequences as an instance of "exceedingly inept diplomacy"[128] on the part of the Palestinian Arabs. This blaming-the-victim approach apportions any negative consequences wholly, if impliedly, on the subaltern class.[129] It is likely because of this that little attention has been paid to the role UNSCOP may have had in neglecting to engage the understandably skeptical Arab leadership of Palestine. In a Wheatonian sense, UNSCOP's attitude towards engaging the Palestinian leadership in this episode is reminiscent of the denial of international legal standing afforded the non-European thorough the operation of the standard of civilization in the classical era of the discipline.

It is axiomatic that the work of high-stakes UN diplomacy requires a great deal of flexibility, creativity, tenacity and patience, all underscored with a belief in the universal vocation of the mandate of the Organization. These traits are the lifeblood of the UN which, in the words of Trygve Lie, first Secretary-General (1946-1952), "is dedicated to encouraging and facilitating effective cooperation in matters of mutual interest and to the peaceful adjustment of international differences".[130] It is surprising to find, therefore, that the record reveals a relative indifference, even nonchalance, of UNSCOP toward the boycott of the AHC. UNSCOP cannot reasonably be blamed for the AHC's initial boycott decision. But questions arise in respect of its conspicuous unwillingness, in response, to sufficiently encourage or facilitate the AHC's engagement in what appears to have been an abandonment of the usual tools of diplomacy. This is particularly so, given that at least five members of UNSCOP were leading judges or lawyers in their countries. They would therefore have been well versed in the need to ensure objectivity and fairness in their fact-finding mission, both in real terms and as a matter of public perception.[131]

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[127] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 3rd Mtg. at 6, 29 September 1947.
[128] *E.g.*, Smith (1992), 135.
[129] *E.g.*, Strawson (2010), 114; Kattan (2009), 147, 159.
[130] Lie (1954), 422.
[131] Emil Sandstrom, Chair (Sweden) was Chief Justice of Sweden, Ivan Rand (Canada) was a sitting justice of the Supreme Court of Canada, Sir Abdur Rahman (India) was a judge in India, Nasrollah Entezam (Iran) was trained in law at the Sorbonne, and Jose Brilej (Yugoslavia) was a judge in Yugoslavia. *See also* UNSCOP, Summary

The neglect of the AHC in this respect actually began on 5 May 1947, when a plenary session of the General Assembly discussed the question of who its First Committee should hear from when considering UNSCOP's composition and terms of reference. The Assembly had received requests to be heard from a number of Zionist non-governmental organizations, foremost of which was the Jewish Agency who indicted that if the Arab States were afforded the right to address the Assembly it should be able to as well.[132] In response, the Syrian representative indicated that the Palestinian Arabs were represented by the AHC and not by any Arab state.[133] Notwithstanding, the Assembly passed a resolution resolving that the First Committee shall hear *only* from the Jewish Agency, in addition to passing on to the First Committee, for its own decision, communications the Assembly had received from other NGOs who wished to be heard.[134] It was only after several delegations pointed out that the AHC was not explicitly mentioned in the above noted resolution of the Assembly, that the First Committee took a decision the next day to expressly invite the AHC to participate.[135] Thus, while the AHC was invited to be heard by the First Committee, the afterthought-like manner in which it happened – privileging European voices over non-European ones – set the stage for the attitude UNSCOP itself would later adopt.

UNSCOP's mission lasted from 26 May to 31 August 1947, a total of fourteen weeks. Even before committee members arrived in Palestine on 14 June 1947, the committee adopted a practice of receiving information from the Jewish Agency,[136] as well as providing it with all UNSCOP documentation not classified as secret.[137] At UNSCOP's fifth meeting on 16 June, the committee was informed by cablegram from the Secretary-General that the AHC had decided to boycott UNSCOP.[138] The summary record of that meeting indicates that upon receiving this news UNSCOP chairman, Justice Emil Sandstrom of Sweden, confined his response to simply expressing "the hope that contact might be made at a later date with Arab representatives," without stipulating when, how or with whom such contact might be made.[139]

Record of the Second Meeting (Private), A/AC.13/PV.2, 2 June 1947, where Brilej stated that the Committee's choice of a chairman must reflect "the greatest possible measure of impartiality", and Rand stated "I am quite sure that we need as a Chairman someone who has had considerable experience in judicial administration".

[132] UN GAOR, 1st Spec. Sess., Vol. III, Annex 2, at 363, Letter dated 22 April 1947 from the Jewish Agency for Palestine, A/C.1/139.

[133] UN GAOR, 1st Spec. Sess., Vol. I, 75th Plen. Mtg. at 104, 5 May 1947.

[134] UN GAOR, 1st Spec. Sess., Vol. I, 75th Plen. Mtg. at 114-115, 5 May 1947.

[135] UN GAOR, 1st Spec. Sess., Vol. III, 47th Mtg. at 78, Annex 6 at 367 A/C.1/151, 7 May 1947.

[136] UNSCOP, Summary Record of the Fourth Meeting (Private), A/AC.13/SR.4, 6 June 1947.

[137] UNSCOP, Summary Record of the Seventh Meeting (Private), A/AC.13/SR.7, 17 June 1947.

[138] UNSCOP, Summary Record of the Fifth Meeting (Private), A/AC.13/SR.5, 16 June 1947.

[139] *Id.*

In the meantime, Sandstrom satisfied himself by delivering a radio broadcast later that afternoon *in English* ostensibly informing the Palestinian public of UNSCOP's mission, affirming its impartiality, and indicating that it "hopes for the full co-operation in its task from all elements in the population."[140] The following day, at UNSCOP's seventh meeting, an impassioned appeal was made by Jose Brilej, the Yugoslav representative, that UNSCOP address the AHC directly. Yet, the committee not only voted it down but it also approvingly voted "to defer further action for the time being" on the point.[141]

In the meantime, UNSCOP continued its public hearings and investigation. Its itinerary was set on the basis of input invited only from the Jewish Agency and the British mandatory Government of Palestine.[142] It wasn't until UNSCOP's twenty-second and twenty-third meetings on 8 July 1947 – six weeks from the start of its work, three weeks since arriving in Palestine and one and a half weeks before departing Palestine – that UNSCOP took a decision to pen a letter to the AHC in an attempt to convince it to reverse its position on the boycott.[143] But the summary and verbatim records of UNSCOP's private meetings leading up to that point indicate that even that decision hadn't come as self-evident. In its twelfth meeting on 22 June 1947, after extensively discussing a number of communications it received from jailed Jewish underground fighters seeking clemency through UNSCOP's intervention with the Government, the Indian representative, Sir Abdur Rahman, expressed astonishment. He could not understand why the committee was entertaining such tangential requests from the Zionist side when it hadn't even reached out to the AHC on the principal issues it was sent to Palestine to investigate.[144] Likewise, at UNSCOP's eighteenth meeting on 6 July 1947, an attempt by the Yugoslav representative to get the committee to re-open the question of AHC engagement that he raised at the seventh meeting was simply ignored.[145] Finally, at the twentieth meeting on 7 July 1947, although the Uruguayan representative, Enrique Rodriguez Fabrigat, expressed disappointment that "we will not be able to hear any testimony from the Arab side", he failed to take up the Yugoslav representative's repeated initiatives or suggest any other way of constructively dealing with the matter.[146]

[140] *UNSCOP Report, Vol. II*, 5.
[141] UNSCOP, Summary Record of the Seventh Meeting (Private), A/AC.13/SR.7, 17 June 1947.
[142] *UNSCOP Report, Vol. II*, 4-5.
[143] *Id*.
[144] UNSCOP, Summary Record of the Eleventh Meeting (Private), A/AC.13/SR.11, 22 June 1947.
[145] UNSCOP, Summary Record of the Eighteenth Meeting (Private), A/AC.13/SR.18, 6 July 1947.
[146] UNSCOP, Summary Record of the Twentieth Meeting (Private), A/AC.13/SR.20, 7 July 1947.

In the event, the AHC maintained the boycott for the reasons set out above. Notwithstanding UNSCOP's apparent apathy on the boycott, the hegemonic Eurocentric character of its approach was revealed subsequently. This was found in the manner in which the AHC was publicly singled out and lambasted in the debates before the ad hoc committee and plenary sessions of the General Assembly following the issuance of UNSCOP's report. This was done by certain members of UNSCOP who, now sitting before the Assembly as representatives of their individual countries, shed all pretense of impartiality and took positions that clearly contradicted UNSCOP's own documentary record. For instance, the Czech representative, Karel Lisicky, assailed "the uncompromising stand" of the AHC.[147] When UNSCOP was criticized for failing to bring the parties together, Lisicky curiously asserted that UNSCOP "had made every effort, in vain, both to secure a modification" of the AHC's "attitude and to induce local Arab representatives to enter into political discussion of the Arab case."[148] Even more revealing was the intervention of the Guatemalan representative, Jorge Garcia Granados. His statement to the plenary session of the Assembly was as revisionist as it was racist and colonial:

> "Our Chairman and the Committee as a whole sought many times to bring about a settlement between the Arabs and the Jews. Our efforts were frustrated by the intransigent attitude of the Arab Higher Committee, which would not give a hearing even to Judge Sandstrom, and which ordered all its affiliated organizations to refuse to collaborate with the Committee and to threaten and intimidate all Arabs who seemed to favour conciliation. Nothing daunted, UNSCOP made every possible approach to the Arabs, visiting their towns and villages and taking no notice of the hostile reception. Our representatives never failed to hold out the hand of friendship; but in vain, for no Arab would grasp it. […] *Years of propaganda have filled the simple hearts of the Arabs with a rancor which makes all efforts at conciliation and the establishment of friendly relations seem useless today*. […] [T]he creation of a Jewish State is a reparation owed by humanity to an innocent and defenseless people which has suffered humiliation and martyrdom for two thousand years. The Palestine Arabs must know that we who vote in favour of this resolution have no desire to harm their interests, and that *the intransigent attitude of their leaders is the only obstacle* to the attainment of liberty by both peoples and to the forging of ties of brotherhood between them" [emphasis added].[149]

In short, whatever one's views on the rationale and efficacy of the AHC's decision to boycott UNSCOP, there is no escaping the fact that the verbatim and summary records of UNSCOP's deliberations, as well as the subsequent General Assembly debates, reveal a level of apathy and disinterest in securing a reversal of this position surprisingly uncharacteristic of the modus operandi of UN diplomacy and investigation. Although testimony was eventually provided to UNSCOP by some Arab states toward the end of the mission,[150] the committee

[147] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 5th Mtg. at 19, 3 October 1947.
[148] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 15th Mtg. at 105-106, 16 October 1947.
[149] UN GAOR, 2nd Sess., 126th Plen. Mtg. at 1380-1381, A/PV.126, 28 November 1947.
[150] At its 23rd meeting on 8 July 1947, UNSCOP took a decision for the first time to invite representatives of the Arab States to give evidence to it. UNSCOP, Summary Record of the Twenty-Third Meeting (Private), A/AC.13/SR.23, 8 July 1947.

knew that these states did not represent the Palestinian Arab position as such. As noted by Quigley, there is little question that "[t]he scant participation on the Arab side left the Jewish Agency with a great advantage."[151] But to blame the Palestinian Arab leadership alone for this result, as some UNSCOP members subsequently did, is unfair if not disingenuous. On the contrary, UNSCOP's unwillingness to actively ensure what was a central aspect of its mandate – *i.e.* to obtain direct evidence from *both* principal protagonists in Palestine – stands out as a product of the hegemonic and Eurocentric worldview of the majority of its membership. This ultimately enabled the violation of international law embodied in UNSCOP's plan of partition, which in turn contributed to the rule by law character of resolution 181(II).

4.3 UNSCOP's Contempt for Democratic Government and the Empirical Reality of the Indigenous Arab Population

A third factor that ran throughout UNSCOP's work, and which heavily influenced the international rule by law nature of resolution 181(II) and the ILS condition it reified, was the general contempt held by UNSCOP's majority for democratic government as it applied to the non-European population of the country and, concomitantly, the *empirical reality* of the indigenous Palestinian Arab population. This too is reminiscent of a classical Wheatonian disregard for non-European rights and standing in the 19th century and the extent to which similar values continued to prevail in the UN system. An examination of UNSCOP's verbatim and summary records demonstrates that it claimed that its work was directed toward democratic ends through the establishment of two self-determination units in Palestine. Both of these states would be required to commit to democratic principles, including the protection of minorities within their territorial borders. Nevertheless, UNSCOP could only paradoxically arrive at this result by violating the democratic right of the indigenous majority to freely determine the whole of the territory's fate as dictated by prevailing international law on class A mandates. The ostensibly liberal, rights-based order heralded by the UN meant that UNSCOP needed to find a clever way around the Palestinian Arab majority as a condition precedent to partition. A review of the diplomatic record demonstrates that among the arguments used to justify the legitimacy of partition, most were fraught with a curiously strained logic, at times accompanied by openly racist views, regarding the indigenous majority population and its right to self-determination. Upon close examination, what they all shared was a general failure to take the very presence of the native Palestinian Arabs and their international legal rights seriously, an outgrowth of the continued imperial Eurocentricity of the international order at the UN.

[151] Quigley (2016), 67.

On 8 July 1947, the Jewish Agency leadership gave evidence before UNSCOP. It was made apparent that the Zionists regarded the Jewish national home as equivalent to a Jewish state. The Zionists further clarified that such a state, although the right of the Jewish people, could not be established until the Jews were in a demographic majority in Palestine.[152] When pressed on the seeming incongruence of the Zionists' recognition of the principle of self-determination of peoples, and their request that its exercise be delayed in the case of Palestine until such time as the Jews were in the majority, David Ben Gurion (who would become Israel's first Prime Minister) offered the following cyclical reasoning, citing a purported "overriding right" of his constituents:

> "There are certain rights of self-determination, and when I say the right of the Jew to come back to his country [*i.e.* Palestine] and the right of our people to be here as equal partners in the world family, it is an over-riding right which applies to Palestine, and therefore no regime – not only an Arab State, should be created, even no trusteeship, no mandate should be created – which will make that right impossible of realization. This is why we oppose it [*i.e.* immediate application of self-determination in Palestine]… [i]t can be safeguarded only if there is independence and the Jews are in the majority."[153]

In its report to the General Assembly, this purported conundrum presented by Palestinian demography was well recognized, but surprisingly unquestioned, by UNSCOP. For instance, in its consideration of the issue of Palestinian self-determination and independence in a unitary democratic state, UNSCOP stated:

> "With regard to the principle of self-determination, although international recognition was extended to this principle at the end of the First World War and it was adhered to with regard to the other Arab territories, at the time of the creation of the 'A' Mandates, it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the sui generis Mandate for Palestine run counter to that principle."[154]

Instead of taking issue with the *sui generis* nature of the mandate and its presumptive violation of the *Charter* principle of self-determination of peoples, as the liberal rights-based ethos of the day would require, UNSCOP adopted an approach evocative of the erasure of non-European legal subjectivity of the past. Thus, in considering how to reconcile the development of self-governing institutions under the mandate regime with the demands of the Jewish national movement for a state, UNSCOP noted:

> "…if the country were to be placed under such political conditions as would secure the development of self-governing institutions, these same conditions would in fact destroy the Jewish National Home. […] Had self-governing institutions been created, the majority in the country, who never willingly accepted Jewish immigration, would in all probability have made its continuance impossible, causing thereby the negation of the Jewish National Home."[155]

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[152] *UNSCOP Report, Vol. III*, 49-50, 93.
[153] *Id.*, 93.
[154] *UNSCOP Report, Vol. I*, 35.
[155] *Id.*, 31.

This recognition of the inimical nature of the mandate's privileging of the rights of a European settler minority in Palestine over the development of self-governing institutions for the whole of its population in line with the sacred trust owed under the *League of Nations Covenant* and the principle of self-determination of peoples outlined in the *Charter* could not have been clearer. As an organ of the UN, duty bound to uphold the international rule of law, one would have expected this to give UNSCOP some pause. Instead, UNSCOP effectively adopted a position that maintained the international rule by law inherent in the mandate's negation of the rights and presence of the Arab majority and the principle of consent of the governed. For instance, although UNSCOP understood the Arab position to be one of establishing a unitary democratic state based on proportional representation[156] – the gold standard of democracy by any measure at the time – it curiously rejected this position as "extreme" because it would have left the Arabs substantially in control of the country.[157] To be sure, UNSCOP also characterized full Jewish control over Palestine as "extreme", but that would have been reasonable given the Jewish community's status as a settler minority in the country. In drawing this false equivalence between majority indigenous rule and minority European settler rule, UNSCOP was effectively expressing its contempt for democratic government and in a manner consistent with the ostensibly antiquated international legal standard of civilization.

This contempt was maintained in UNSCOP's majority plan of partition. Whereas the Zionists' way around the "problem" of Palestinian demography was to advocate for a delay of the application of the principle of self-determination until they surpassed their number, UNSCOP's method was to advocate for its immediate application, but only through the creation of two racially gerrymandered states via partition. The first step in the process was to provide some legitimacy to the Zionist view that the right to a Jewish national home – which UNSCOP itself noted had already been declared established by the mandatory Power in 1939[158] – was somehow equivalent to a right to a Jewish state. Accordingly, although it acknowledged that the notion of a "national home" had "no known legal connotation" under international law, and that both the Balfour Declaration and the Mandate for Palestine intentionally used "national home" in place of the less restrictive words "commonwealth" or "state", UNSCOP curiously found that none of this "precluded the eventual creation of a Jewish state" in Palestine.[159] The second step was to highlight the impediment posed in the way of the establishment of such a Jewish state by the fact that the Arabs were in a commanding majority of the population, that

[156] *UNSCOP Report, Vol. IV*, 43.
[157] *UNSCOP Report, Vol. I*, 42.
[158] *Id*., 24.
[159] *Id*., 31-32.

they enjoyed a much higher birth rate and that the Jews therefore required immigration to offset this problem or otherwise accept partition to maintain what little majority they could achieve, if at all. UNSCOP wrote:

> "…a Jewish State would have urgent need of Jewish immigrants in order to affect the present great numerical preponderance of Arabs over Jews in Palestine. The Jewish case frankly recognizes the difficulty involved in creating at the present time a Jewish State in all of Palestine in which Jews would, in fact, be only a minority, or in part of Palestine in which, at best, they would immediately have only a slight preponderance."[160]

Thus, stuck between the 'extreme' demands of the Arabs for a unitary democratic state based on proportional representation and recognition of Zionist independence in all of Palestine in which the Jews would be a minority, UNSCOP's majority chose partition thereby violating the *Charter* and disenfranchising the indigenous population.[161]

The reasoning offered in support of this decision highlights UNSCOP's contempt for democratic government if the result of such democracy was to place government in non-European hands. In noting that in the Jewish state envisioned under the majority plan "there will be a considerable minority of Arabs" – something UNSCOP tellingly identified as a "demerit" of the scheme – it reasoned that "such a minority is inevitable in any feasible plan which does not place the whole of Palestine under the present majority of the Arabs."[162] Further, UNSCOP appears to have remained oblivious to the paradox embedded in its unanimously endorsed recommendation VII, under which it affirmed the importance of "democratic principles and protection of minorities" in any plan the UN considered:

> "In view of the fact that independence is to be granted in Palestine on the recommendation and under the auspices of the United Nations, it is a proper and an important concern of the United Nations that the constitution or other fundamental law as well as the political structure of the new State or States shall be basically democratic, i.e., representative, in character, and that this shall be a prior condition to the grant of independence. In this regard, the constitution or other fundamental law of the new State or States shall include specific guarantees respecting…[f]ull protection for the rights and interests of minorities, including…full equality of all citizens with regard to political, civil and religious matters."[163]

In light of this recommendation, it is reasonable to conclude that UNSCOP's majority accepted the fact that the only way it would be able to give effect to the emergence of two democratic states in Palestine was to negate the right of the indigenous majority of the whole of the country to those very same democratic rights *ab initio* and without its consent, in violation of prevailing international law. This says nothing of the fact that the population figures it used for the proposed Jewish state were subsequently determined to be incorrect by the findings of sub-

[160] *Id.*, 30.
[161] *Id.*, 47.
[162] *Id.*, 52.
[163] *Id.*, 45.

committee 2 of the ad hoc committee, which determined that the Jews would, in fact, be in a minority in the Jewish State.[164] Nor does it account for UNSCOP's own admission that partition would not offer any great benefit to the proposed Arab State, the economic viability of which it openly admitted was "in doubt" from the start.[165] Indeed, this viability was so concerning that the authors of the majority plan felt compelled to issue an appeal in the UNSCOP report that "sympathetic consideration should be given" to any claims the Arab state may make to the newly formed Bretton Woods institutions "in the way of loans for expansion of education, public health and other vital social services of a non-self-supporting nature."[166] Because no such appeal was felt required for the envisioned Jewish state, it is hard not to conclude this liberal concern for the economic wellbeing of the putative Arab state was feigned in light of the fact that it was UNSCOP itself who was the author of the plan that would render the Arabs vulnerable in the first place.

Importantly, UNSCOP's minority plan attempted to balance the competing interests more consistently with "democratic principles and protection of minorities" without the heavy hand of Eurocentricity animating it. This was in line with the relevant international law on self-determination of peoples in class A mandates, rooted in the consent of the governed, and the overall international rule of law. It proposed the establishment of an independent unitary federal state of Palestine. This federation would be comprised of an Arab state and Jewish state based on a bicameral parliamentary system, with proportional representation the basis of one chamber and equal representation guaranteed in the other. The constitution of the proposed federal state would provide for a division of powers between the federal and state governments. Key positions in the executive and judicial branches would constitutionally be earmarked for members of both communities, with powers of local self-government in the hands of each state (*e.g.* education, health, local taxation, administration of justice, settlement etc.). Arabic and Hebrew would be the official languages of the country at both federal and state level, and minority rights would be constitutionally protected.[167] In arriving at this plan, UNSCOP's minority essentially deferred to the presence of Palestine's indigenous majority as the controlling factor, but without sacrificing the Jewish national home.[168] Doubtless because

[164] *See* text accompanying *supra* notes 42-43.
[165] *UNSCOP Report, Vol. I*, 55. ("In the case of the plan for the partition of Palestine recommended in this report, as well as in the case of all previous partition plans which have been suggested, it is the viability of the Arab State that is in doubt.")
[166] *Id*., 48.
[167] *Id*., 59-64.
[168] *See* Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 29th Mtg. at 178, 22 November 1947, where the Yugoslav representative

Palestine had nothing to do with Europe's persecution of the Jews, UNSCOP's minority also took a clear stand that separated the Jewish question from finding a resolution to the question of Palestine.[169] In a separate note appended to UNSCOP's report, Sir Abdur Rahman, the Indian representative, explained the approach that animated the minority report. His intervention highlighted the continued tension between the values of late-empire and those of the post-1945 liberal age now before UNSCOP, and the justification of the minority plan in erring toward the latter:

> "According to the well-known international principle of self-determination, which is now universally recognized and forms a keystone of the Charter of the United Nations, the affairs of a country must be conducted in accordance with the wishes of the majority of its inhabitants. *In 1947, it is too late to look at the matter from any other angle.* And thus looked at, the claim put forward by the Arabs is unanswerable and must be conceded, although it would be highly desirable – nay, almost impossible – to overlook important minorities, such as Jews in Palestine happen to be at present."[170] [emphasis added]

With the minority plan having failed to gather enough support within the membership of UNSCOP, the majority plan of partition was the focus of debate in the ad hoc and plenary sessions of the General Assembly between 25 September and 29 November 1947. Unsurprisingly, those debates were also characterized by a strained logic among the largely European and settler-colonial bloc of states that supported partition. This was underscored by their obvious disregard for international law, democratic governance and the indigenous Arab majority, notwithstanding occasional pretentions to the contrary. The most eye-opening justification offered in support of partition came from none other than the Guatemalan representative, Mr. Garcia Granados, who it will be recalled was a member of UNSCOP. In response to the argument that Palestine's Arab majority was entitled to have its freely expressed wishes accounted for, let alone deferred to, in any future government of Palestine in accordance with prevailing international law, Ambassador Garcia Granados demonstrated that the old standard of civilization – animating what he called "a certain order in the world" – continued to hold sway among some in the new UN system:

> "[W]hat characterized a nation was its culture and not the number of inhabitants. In twenty-five years, the Jewish people had left upon Palestine the indelible mark of an outstanding culture, which characterized the country even more than the Arab culture: Palestine was no more Arab than certain Spanish countries of Latin America were Indian. The Jews had come to Palestine on the strength of a promise. They had transformed the deserts, and their model farms compelled admiration not only for their productiveness but also for the democratic character of their social structure. […] [T]he Jews had made a pleasant and healthy country out of a land in which a *sparse and rachitic population had merely vegetated*. It was *incomprehensible that the Arabs should adduce their numerical superiority as an argument* when it was the Jews who had made the increase in the Arab population possible. […] Could anyone think of placing that flourishing community under the domination of another community, even a community of a comparable

stated that "[t]he federal State solution was based on a recognition of the national aspirations of the Arabs as well as of the Jews, but it respected the unity and guaranteed the genuine independence of the Palestinian homeland."

[169] *UNSCOP Report, Vol. II,* 62.

[170] *Id.,* 42.

> standard of development? What would happen if the demands of the Arabs were yielded to and an independent State of Palestine were created? The Arab population with its *simple religiousness and rudimentary political sense* [would harm the Jews]. […] An *ignorant majority* should not be allowed to impose its will. […] There was a *certain order in the world* which helped to maintain the necessary equilibrium. If the United Nations wished to save that order it must consolidate it."[171] [emphasis added]

While Garcia Granados seems to have parroted some of what the Jewish Agency had argued before the Assembly,[172] not all delegations in favour of partition expressed their support for the plan in such openly racist terms. What is clear, however, is that they shared the same underlying assumptions rooted in the continued hegemonic/subaltern nature of the international system. This was expressed in the curious view that if the principle of self-determination was to be applied to Palestine, the exercise of such a right by the indigenous majority population had to impliedly be suppressed if it meant that the minority Jewish settler population would remain a minority. Predictably, the rhetorical moves employed to advance this position included exhortations to opt for (European) justice over law, and to treat the Jewish national home as tantamount to a Jewish state. In the end, however, the effect was to subvert the international rule of law based on the requirement to ensure respect for the consent of the governed in class A mandates and to impose an international rule by law on the non-Europeans of Palestine.

Thus the Polish delegate indicated that while "a single bi-national state" in Palestine was desirable, "such a solution would be neither just nor appropriate" if it meant that the Arabs "would preponderate over a Jewish minority."[173] Likewise, the Chilean delegate noted that although the Arab case "was easily understandable and their argument was supported by unequivocal fact," partition seemed the only way "to safeguard peace and justice" in "the absence of a solution acceptable to both parties."[174] Echoing earlier exhortations of other

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[171] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 10th Mtg. at 56-58, 10 October 1947.

[172] *See* Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 17th Mtg. at 114, 17 October 1947, where Moshe Shertok of the Jewish Agency rejected the proposal of a unitary democratic state because "it would mean that Palestine would be an Arab state with a Jewish minority at the mercy of an Arab majority," and that in such a state "a highly democratic minority would be forced down to the economic and social level of an Arab majority, whereas under partition the Arab minority would benefit from contact with the progressive Jewish majority." *See also* Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 18th Mtg. at 124 & 126, 18 October 1947, where former Jewish Agency Chair Chaim Weizmann stated that "[i]t was not in order to become citizens of an Arab State that the Jews, on the strength of international promises, had made their home in Palestine"; and that the "creation of a Jewish State would be a great event in history and a practical demonstration of liberal and humanitarian thought. A persecuted people would achieve recognition of its national sovereignty, desert soil would be redeemed for cultivation, [and] progressive social ideas would flourish in an area that had fallen behind the modern standards of life."

[173] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 8th Mtg. at 43, 8 October 1947.

[174] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 29thth Mtg. at 175, 22 November 1947.

delegates,[175] the Dominican representative urged that "the Palestine question could not be examined from an exclusively legal standpoint", and that partition "most nearly accorded with justice" as it "left to the Arabs a country of their own, while endorsing the concept of the Jewish National Home by establishing a Jewish State in Palestine."[176] The Soviet delegate argued that partition "gave both the Arab and the Jewish people an opportunity to organize their national life as they desired", because "[i]t was based on the principles of equality of peoples and the right of self-determination", unlike the unitary state framework which allegedly "paid no regard to democratic principles."[177] Likewise, the Canadian delegate noted that the Arab case for a unitary democratic state was "otherwise unanswerable", but for the fact of the Jewish national home policy embedded in the mandate.[178]

Going through these and other similar statements given by the European and settler-colonial bloc of states in the ad hoc and plenary records of the General Assembly, one is constantly confronted by their failure to take international law, democratic government, and the empirical reality of the Palestinian Arab population seriously. Instead, false equivalence abounds. Partition was presented to the Palestinian Arabs as a promising opportunity that was not to be missed. As it happens, other states – largely members of the Asian and Middle Eastern group – refused this approach and took the native population of Palestine seriously. They attempted to counter this Eurocentric international rule by law narrative with one of their own firmly rooted in prevailing international legal norms.

One form of response was to question the logic of partition as an application of the self-determination principle. As noted by the representative of Yemen "[s]ince the population of Palestine was predominately Arab, the only logical and just application of that principle was that Palestine should become an independent Arab State with full protection of the rights of Palestinian Jewish minorities. If it were conceded that the principle of self-determination could justify the grant of discriminatory and preferential privileges to a minority over the will of the majority, or the division of a country against the wishes of the majority, then the world would be overwhelmed with similar problems and chaos would prevail."[179] This view was shared by

[175] *See* text accompanying *supra* note 116.
[176] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 29th Mtg. at 180, 22 November 1947.
[177] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 30th Mtg. at 184, 24 November 1947.
[178] UN GAOR, 2nd Sess., 124th Plen. Mtg. at 1318, A/PV.124, 26 November 1947.
[179] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 14th Mtg. at 92, 15 October 1947.

the representative of Lebanon.[180] He also queried how proponents of partition, who "admitted that the Arabs in Palestine were in a majority," could nevertheless propose "that the Arabs should become a minority and the Jews a majority," and expect that "that would constitute a peaceful solution."[181] The Cuban representative considered partition illegal and "unjust because it involves forcing the will of a minority upon an overwhelming majority, in contravention of one of the cardinal principles of democracy."[182] Unsurprisingly, the most direct of criticisms of the rule by law logic of partition-as-self-determination came from the representative of the AHC, Mr. Husseini, who pointedly noted: "After the Arabs had been deprived of self-determination for a quarter of a century in order that a [European settler] minority might be artificially created" through the British Mandate, "what ground was there for asking that that artificial minority should have the right of self-determination" against the will of the majority of the population? In his view, "[i]f that request were granted, it would be a stain on the Charter."[183]

Another form of response was to question the logic of partition through the lens of double-standards in application of the principle of self-determination. If the European Jewish settler minority possessed a right to self-determination justifying the partition of the country against the will of its majority, would the same principle be applicable to the Palestinian Arabs that would end up in the Jewish state, whether they were almost equal in number or in the majority? This slippery slope argument was expressed by the representatives of each of Lebanon,[184] Pakistan,[185] and Yemen.[186] The issue of moral equivalence and justice was also spoken to. For instance, the Pakistani delegate stated that "[i]f it were considered unjust to place 600,000 Jews

[180] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 14th Mtg. at 90, 15 October 1947 ("If the United Nations should sanction the partition of Palestine and flout all the rules of democracy, it would mean that in future the political independence of nations and their territorial integrity would be dependent on the whim of the minorities living in their midst, and it would be an encouragement to separatist tendencies within the Member States of the United Nations").
[181] *Id*., 88.
[182] UN GAOR, 2nd Sess., 126th Plen. Mtg. at 1385, A/PV.126, 28 November 1947.
[183] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 18th Mtg. at 122, 18 October 1947.
[184] UN GAOR, 2nd Sess., 125th Plen. Mtg. at 1342, A/PV.125, 26 November 1947 (Partition, if "pushed to its logical conclusion, would lead to the following sequence of events: self-determination for the Jewish people, therefore a separate Jewish State. Now there is an Arab minority almost equal to the majority in this separate Jewish State, as you have envisaged it. Will the principle of self-determination…apply to this Arab minority?").
[185] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 31st Mtg. at 192, 24 November 1947 ("If the principle of self-determination were to be applied to the Jews in Palestine, it should be borne in mind that the same principle would be applicable to the 435,000 Arabs who would be in the Jewish State").
[186] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 28th Mtg. at 171, 22 November 1947 ("Moreover a dangerous precedent would be established if a minority were given the right to form a separate State. He asked whether the Arab minority in the Jewish state would be allowed to establish a separate State, and why Palestine could not remain a single State for both Arabs and Jews").

in an Arab State, it was equally unjust to place 400,000 Arabs in the Jewish State set up by partition".[187] Elsewhere he demurred that partition was based on the assumption that "[t]he Jews are not to live as a minority under the Arabs, but the Arabs are to live as a minority under the Jews. If one of these is not fair then neither is the other."[188] The record demonstrates that, for the non-European states, the issue always came back to the preeminence of the principle of consent of the governed, in line with prevailing international law concerning class A mandates. Thus the Syrian representative affirmed "that self-determination could not be achieved in Palestine unless the inhabitants of the country were consulted."[189] The Pakistani delegate stated that "[i]n effect" the partition "proposal before the United Nations General Assembly says that we shall decide – not the people of Palestine, with no provision for self-determination, no provision for the consent of the governed – what type of independence Palestine shall have."[190] Perhaps the Cuban delegate put it best when he stated that "[i]n fact the [partition] plan would mean deciding the fate of a nation without consulting it on the matter." After indicating his view that partition would violate the *Charter*, he continued in a way that underscored the rule by law essence of what was being contemplated by the Assembly:

> "We [*e.g.* the UN] have solemnly proclaimed the principle of the self-determination of peoples, but we note with alarm that, when the moment comes to put it into practice, we forget it. This attitude seems to us highly dangerous. The Cuban delegation is firmly convinced that true peace and the international justice about which the great leaders of the Second World War spoke so often cannot be brought into being by setting forth certain fundamental principles in conventions and treaties, and then leaving them there as a dead letter; on the contrary, these ends can be attained only if all of us, great and small, weak and strong, are prepared to put our principles into practice when the occasion arises. Why was the democratic method of consulting all the people of Palestine not applied in this case? Is it because it was feared that the results of such a procedure would be contrary to what it was intended the outcome should be in any case? And, if that was so, where are the democratic principles which we are continuously invoking?"[191]

In sum, the contempt displayed by UNSCOP's majority report for democratic governance and international law is what led it to adopt a plan of partition for Palestine in furtherance of the rule by law ordering principle. The majority plan fashioned a proposal whose object and purpose was to circumvent the reality of the indigenous Arab population while paradoxically claiming that doing so was in complete conformity with the principle of self-determination as applicable to class A mandates under the *Charter*. The hegemonic/subaltern binary inherent in the work of UNSCOP was thus exposed, underscored by the geographical and philosophical split between its controlling European majority and its largely non-European minority. While

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[187] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 30th Mtg. at 188, 24 November 1947.
[188] UN GAOR, 2nd Sess., 126th Plen. Mtg. at 1374, A/PV.126, 28 November 1947.
[189] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 28th Mtg. at 172, 22 November 1947.
[190] UN GAOR, 2nd Sess., 126th Plen. Mtg. at 1370, A/PV.126, 28 November 1947.
[191] *Id.*, 1383.

the former operated according to the values of the Eurocentric late-imperial global order, which privileged European interests over colonial ones, the latter remained consistent with the universal values of the ostensibly new liberal, rights-based global order. The result was a failure to take the indigenous population's rights under the international rule of law seriously, thereby helping to reify their ILS condition in the new UN system.

5. The Practical Consequences of the International Rule by Law: UNSCOP's Cognitive Dissonance Regarding the Inevitability of Violence Befalling Palestine Following Partition

Informed by the clash between hegemonic European and subaltern non-European worldviews and interests evident in the work of UNSCOP and subsequent General Assembly debates, it is clear how resolution 181(II) emerged as the lingering product of the interwar rule by law ethic inherited by the UN. But beyond its doctrinal and normative/discursive results under international law, did the resolution have any immediate tangible consequences on the subaltern Palestinians? Unfortunately for them, the short answer is yes.

The practical consequences of resolution 181(II) are sometimes overlooked given that it was, in effect, stillborn. But it was precisely because the resolution's terms were so repugnant to the liberal international legal order ostensibly prevailing and, by extension, the rights of Palestine's Arab population, that it gave impetus for them to resist and fight if need be to block it, their general incapacity to do so notwithstanding.[192] Viewed in the context of the preceding thirty years, during which time Palestine's ILS had taken hold through the operation of the League of Nations, such Palestinian resolve was inevitable. The fact that the resolution was passed by a new international organization that, through its *Charter*, held itself out as embodying an end to empire and heralded self-determination of peoples as a new principle upon which friendly relations between sovereign equals was purportedly to be based, only made matters worse. It is no wonder, therefore, that on 1 December 1947, merely two days after the General Assembly's passage of resolution 181(II), that the AHC leadership called a three-day general strike in Palestine. This gave rise to rioting and clashes between Arabs and Jews, ultimately setting off the 1948 war.[193]

The war lasted from December 1947 to July 1949 and was fought in two general phases. The first phase was a non-international armed conflict and lasted for six months. It was waged

[192] Kattan (2009), 160.

[193] Morris (2008), 76-77. While there had been other low-level hostilities prior to the general strike, including on 29 November 1947 – the day of the partition resolution – Morris (2008), at 76, indicates that it was not clear whether these were related to the passage of the resolution as such. *See also* Khalidi (2007), 130-131.

between the European Zionist armed organizations – Haganah, Irgun, and Lehi – and loose bands of Palestinian Arab irregulars, supported by an Arab volunteer force, the so-called Arab Liberation Army. The protagonists were woefully mismatched, with the better-equipped Zionist forces numbering 50,000, mostly under a central command, against the ill-equipped and disunited Arab forces, who numbered less than 10,000.[194] During this phase, approximately 300,000 Palestinian Arabs from within the borders of the proposed Jewish State under the partition plan were forcibly expelled or took flight.[195] The remainder of the war was fought on an inter-state basis following the intervention in Palestine of four Arab states (Egypt, Iraq, Syria and Transjordan) on 15 May 1948, the day Israel proclaimed its statehood upon the departure of the British. During this phase, Israel expanded its territory to control some 78 percent of mandatory Palestine, well beyond the terms of the partition resolution.[196] Approximately 400,000 more Palestinian Arabs fled or were expelled during this phase.[197] In response, the General Assembly passed resolution 194(III) on 11 December 1948, calling on Israel to repatriate the refugees "at the earliest practicable date".[198] Repatriation was barred, however, by a war-time decision of the Israeli cabinet in June 1948, and by the Zionists' deliberate destruction of between 392 and 418 Palestinian villages from whence the majority of refugees hailed.[199] Today, according to the United Nations Relief and Works Agency for Palestine refugees in the Near East (UNRWA) – a subsidiary organ of the General Assembly mandated to provide protection and assistance to those displaced in 1948[200] – the Palestine refugees, including their descendants, number approximately 5.3 million persons and continue to remain in forced exile.[201]

One might ask: what role UNSCOP in all of this? A review of the record indicates that UNSCOP's deliberations were tainted by what can be regarded as a cognitive dissonance as to the inevitability of violence befalling Palestine following partition. To be sure, UNSCOP was aware of the fact that the mandate period was characterized by periodic outbreaks of low to medium-grade violence between all chief protagonists, Jews, Arabs and Britons. Indeed,

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[194] Khalidi, *id.*, 131.
[195] Smith (1992), 143.
[196] Hadawi (1988), 81.
[197] Morris, "Revisiting the Palestinian Exodus of 1948" *in* Rogan & Shlaim (2001), 37.
[198] A/RES/194(III), 11 December 1948.
[199] The figure of 392 is given by Morris (2004), xvi-xxii. The figure of 418 is offered by Khalidi (1992), 585.
[200] A/RES/302(IV), 8 December 1949.
[201] *UNRWA in Figures*: https://www.unrwa.org/sites/default/files/content/resources/unrwa_in_figures_2016.pdf. The actual number of Palestinian refugees from the 1948 war is disputed to this day. Arab officials have traditionally estimated it to be as high as one million, while Israeli officials have usually cited 520,000. In 1949, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) recorded numbers as high as 960,000. *See* Takkenberg (1998), 18-19.

although historians have debated the reasons behind Britain's choice to hand Palestine over to the UN, it is generally accepted that one principal factor to which UNSCOP was very much alive was the armed operations of the Zionist underground militias – Haganah, Irgun Zvai Leumi (Etzel or Irgun) and Lohamei Herut Yisrael (Lehi or "Stern Gang") – directed against the British in the years following WWII, and Whitehall's concern of these operations developing into a full-scale clash.[202]

Thus, the record does not suggest that UNSCOP and the General Assembly were oblivious to the possibility of violence occurring, *per se*. Rather it suggests an unwillingness to account for the possibility that any recommendation of partition would be followed by violence. Worse from the perspective of the subaltern, it suggests an unwillingness to account for the possibility that such violence would, for the most part, be directed against the unprotected Arab civilian population, and in a manner that would fundamentally alter the demographic and political status quo of the country. While there was no way UNSCOP and the General Assembly could have foretold the exact contours and scope of the seismic demographic shift that would mark the Palestinian Nakba of 1948 – what Israeli historian Ilan Pappe has called the ethnic cleansing of Palestine[203] – there were certainly signposts available for it to have appreciated that the ultimate success of the Zionists in establishing a Jewish state in any partitioned area of the country would necessarily depend on that state having an unassailable Jewish majority. Given the almost 1:1 ratio of Jew to Arab in the proposed Jewish state projected by UNSCOP itself, and UNSCOP's specific knowledge that the Zionists were prepared and able to use force to impose it on Palestine's much weaker Arabs in the absence of British protection, it should have been apparent that the forcible removal of substantial portions of the indigenous Arab population would have been a possible result of any UN recommendation to partition the country.

This is something that UNSCOP intimated in its report to the Assembly. In its appraisal of the "Jewish case", UNSCOP recounted that "[w]hen the Mandate was approved, all concerned were aware of the existence of an overwhelming Arab majority in Palestine", and that "the King-Crane report, among others, had warned that the Zionist program could not be carried out *except by force of arms*"[204] [emphasis added]. Despite concerted Zionist settlement during the mandate period, by 1947 the Palestinian Arabs were still very much the

[202] Morris (2008), 38.
[203] Pappe, *Ethnic Cleansing* (2006).
[204] *UNSCOP Report, Vol. I*, 32.

overwhelming majority of the population and still refusing to acquiesce in the partition of their country. As a result, the fundamental calculus on the inevitability of violence being needed to give effect to Zionist aims could not have fundamentally changed. It was for these reasons that UNSCOP unequivocally affirmed that "the history of the last twenty-five years has established the fact that not only the creation of a Jewish State but even the continuation of the building of the Jewish National Home by restricted immigration could be implemented *only by the use of some considerable force*"[205] [emphasis added].

As to the nature of this "considerable force", the record indicates that UNSCOP was well aware of Zionist military capability and willingness to employ it if need be. When asked by UNSCOP on 7 July 1947 as to what the Jewish leadership would do in the event a UN recommendation to establish a Jewish state in Palestine was rejected by the Arabs, Ben Gurion replied in no uncertain terms: "First we will go to them and tell them, here is a decision in our favour. We are right. We want to sit down with you and settle the question amicably. *If your answer is no, then we will use force against you*" [emphasis added].[206] After being questioned by UNSCOP chairman, Justice Sandstrom, as to the relationship between the Jewish Agency and the Haganah, Ben Gurion stated that the Haganah had been an organized underground armed Jewish force in Palestine "for at least the last forty years", that he was formerly a member of it and that it would be happy to appear before UNSCOP, though in private given its status as an illegal organization.[207] Subsequently, on 13 July 1947, Sandstrom and two members of the UNSCOP secretariat met privately with four Haganah leaders, including its chief of staff, Yisrael Galili. At that meeting, the Haganah expressed full confidence in its ability to manage local and international Arab force, including the ability to attack naval bases and airfields of neighbouring Arab states. According to Israeli historian, Elad Ben Dror, this meeting left Sandstrom with the "strong impression" that the Haganah, in addition to Etzel and Lehi, "would defeat the Arabs in the event of hostilities."[208] Most vitally, Sandstrom was convinced that if the UN voted for partition, the Jews could be relied upon to implement and impose it on the

[205] *Id*. Neither was this a one-off acknowledgement, as UNSCOP elsewhere noted the inevitability of force being required to ensure Zionist aims if delayed independence pending the achievement of a Jewish majority was envisioned. It also assailed the "recurrent acts of violence, until very recently confined almost exclusively to underground Jewish organizations," and indicated that such violence would render any decision arrived at by the UN difficult to implement. *See id*., 46.
[206] *UNSCOP Report, Vol. III*, 56. *See also UNSCOP Report, Vol. IV*, 37, where Judge Sandstrom stated to the Lebanese delegate testifying before UNSCOP on 23 July 1947 in Beirut, "[y]ou know as well as we do that certain disorders in Palestine now are caused by Jews and that the Jews have considerable underground forces, such as Haganah, and so on. Do you not think it would be necessary to have a rather strong police force to maintain order in that case?"
[207] *Id*., 68.
[208] Ben Dror (2013), 562.

Arabs in the Jewish State.[209] In an indication of the Eurocentricity of the majority of UNSCOP's orientation, it would appear that far from assessing the threat posed by the Zionist militias to the non-European indigenous population, Sandstrom was more concerned with whether the European settlers could impose themselves militarily.

Of course, the Zionists were not alone in issuing expressions of bellicosity. The verbatim and summary records of the UNSCOP hearings, as well as of the ad hoc and plenary debates of the General Assembly, demonstrate that the Arabs reserved their right to use force to protect against the dismemberment of Palestine.[210] Despite these statements, however, the record suggests that UNSCOP understood that the Arabs were not capable of mounting any effective armed force in this regard and were, in any event, no match for the Zionists who were better armed and organized. This was made amply clear in the testimony given to UNSCOP by Sir Henry Gurney, Chief Secretary of the Palestine Government, on 19 July 1947. According to him, the British were well aware that the Zionists were better armed and organized, they knew that "no Arab armed organization" existed in the country, and they were going out of their way prevent the establishment of such a force.[211]

The most crucial development in the record appears to have been the United Kingdom's decision that it would refuse to enforce any UN recommendation on Palestine not agreed between the Jews and Arabs. Absent such agreement, the British would withdraw their troops and administration by 1 August 1948.[212] In a sign that the values underpinning the liberal rights-based order might prevail in the eleventh hour, this decision drew heavy criticism, including from members of the European and settler-colonial bloc of states. The Czech delegate indicated that this had "radically changed the background of the deliberations," as the General Assembly would now "have to find the means of implementing" any solution it arrived at.[213] The American delegate derided the British for imposing "an impossible condition" of Jewish-Arab agreement, and therefore placing "upon the United Nations a very heavy moral

[209] *Id*.
[210] *See* Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 15th Mtg. at 102, 16 October 1947, where the Iraqi delegate stated "The political consequences of partition would be that the Arabs would never acquiesce, but would fight for their rights even at the risk of civil war."
[211] *UNSCOP Report, Vol. IV*, 27.
[212] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 2nd Mtg. at 3-4, 26 September 1947, and 25th Mtg. at 153, 20 November 1947. *See also* UN GAOR 2nd Sess., 124th Mtg. at 1323-1324, A/PV.124, 26 November 1947.
[213] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 8th Mtg. at 45, 8 October 1947.

responsibility."[214] This was echoed by the Soviet representative, who accused the British of "burying" the Assembly's recommendation before even taking it.[215] Similar rebukes were issued by the Canadian,[216] New Zealand[217] and Swedish delegates, the latter of whom presciently noted that unless "a reasonable and realistic solution could be found" to the power vacuum the British would leave behind, "the possibility that had to be faced was a civil war between the two nascent states in Palestine, a situation which would gravely threaten peace and security in that part of the world."[218] Despite this apparent concern, however, in the end each of these states curiously voted *in favour* of partition rather than abstain or reject it. The cognitive dissonance involved in this respect was, once again, demonstrative of the general disregard for non-Europeans held within an Organization that remained fundamentally Eurocentric in its outlook. This was exhibited, for example by the Swedish delegate who informed the Assembly that although his "Government regrets to note that the method of enforcement" of the partition plan "does not appear to satisfy [the] essential condition" of being "practical" and "efficient", Sweden would vote in favour of resolution 181(II) "since the efforts of the Assembly have not resulted in anything more perfect than the plan of partition."[219]

Resolution 181(II) provided for the establishment of the UNPC which, as noted, was mandated to administer the transfer of power from Britain to the two proposed states during a transitional period to last until 1 October 1948. Under this scheme, the UNPC would, *inter alia*, exercise political and military control over the "armed militia" of each state with a view to maintaining public order. None of these plans came to fruition, however, given the predictable British refusal to allow the UNCP to enter Palestine until May 1948 (merely two weeks before its advanced departure date of 15 May) and, more generally, the Arab rejection of the partition plan – both of which factors were well known to the General Assembly while deliberating partition.[220] Thus, attempts to create some form of UN-mandated force that would fill the vacuum left by the British were stymied from the start. This left a power imbalance in place in the country between the Zionists and the Palestinian Arabs.

[214] UN GAOR 2nd Sess., 124th Plen. Mtg. at 1326-1327, A/PV.124, 26 November 1947.
[215] UN GAOR 2nd Sess., 125th Plen. Mtg. at 1362-1363, A/PV.125, 26 November 1947.
[216] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 29th Mtg. at 176, 22 November 1947.
[217] UN GAOR 2nd Sess., 125th Plen. Mtg. at 1357, A/PV.125, 26 November 1947.
[218] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Sess, 9th Mtg. at 49, 9 October 1947.
[219] UN GAOR 2nd Sess., 124th Plen. Mtg. at 1312, A/PV.124, 26 November 1947.
[220] Grief (2010), 154; Quigley (2016), 79.

Thus, the record does not establish an awareness of UNSCOP or the General Assembly of the specific animus and plans Zionist forces had to expel the Palestinian Arabs from territories they would control in 1948; that would emerge later with the chronicling of the 1948 war by Palestinian historians in the 1950's and 1960's,[221] subsequently and largely corroborated by Israel's 'new historians' in the 1980's.[222] What it does establish, however, is the clear understanding UNSCOP had or ought to have had regarding the relative military capabilities of both sides, and the political imperatives underpinning their respective goals. For the stronger and better organized European Zionists, these goals were animated by a singular 50-year effort to establish a Jewish state in a place in which, by all accounts, they were a decided demographic minority. It was well understood by the UN that for any Jewish state to materialize, the demographic balance had to be altered, including by force, if the opportunity arose. When one considers that the UN knew partition was anathema to the indigenous population, and that enforcement of partition was futile without British cooperation which was not forthcoming, the writing on the wall was clear for all to see. In this way, the illegality and rule by law character inherent in the terms of resolution 181(II) helped further the conditions that, in real terms, led to the consummation of what the Palestinian Arabs had feared most.

5. Conclusion

This chapter has argued that the ILS condition derives its content, in part, from the structural Eurocentricity of international law and organization. To demonstrate this, it undertook a critical international legal analysis of the UN plan of partition of November 1947, and examined the effective *travaux preparatoires* of that plan as found in the UNSCOP records and report and animated in the General Assembly debates that followed. In 1945, the newly formed UN had a unique opportunity to prove its worth as an embodiment of a new liberal rights-based global order centered on the international rule of law following WWII. Instead, through the Assembly's promulgation of resolution 181(II), the UN demonstrated that the old international rule by law order continued in fundamental respects, informed by the structural Eurocentricity of the order it inherited from the League of Nations. Although the passage of the resolution was procedurally valid, its terms were substantively illegal under the *UN Charter* for being in violation of the prevailing law and practice on self-determination of peoples in class A mandated territories. Because that law required the Assembly to defer to the freely expressed wishes of the people concerned, and because the indigenous non-European majority was against partition, there were only two courses of action open to the UN in Palestine in 1947: (1)

[221] Zurayq (1956); Khalidi (1971). For later work, *see* Khalidi (1988) and Khalidi (1992).
[222] Pappe, *Ethnic Cleansing* (2006); Masalha (1992); Masalha (1997); Morris (2004).

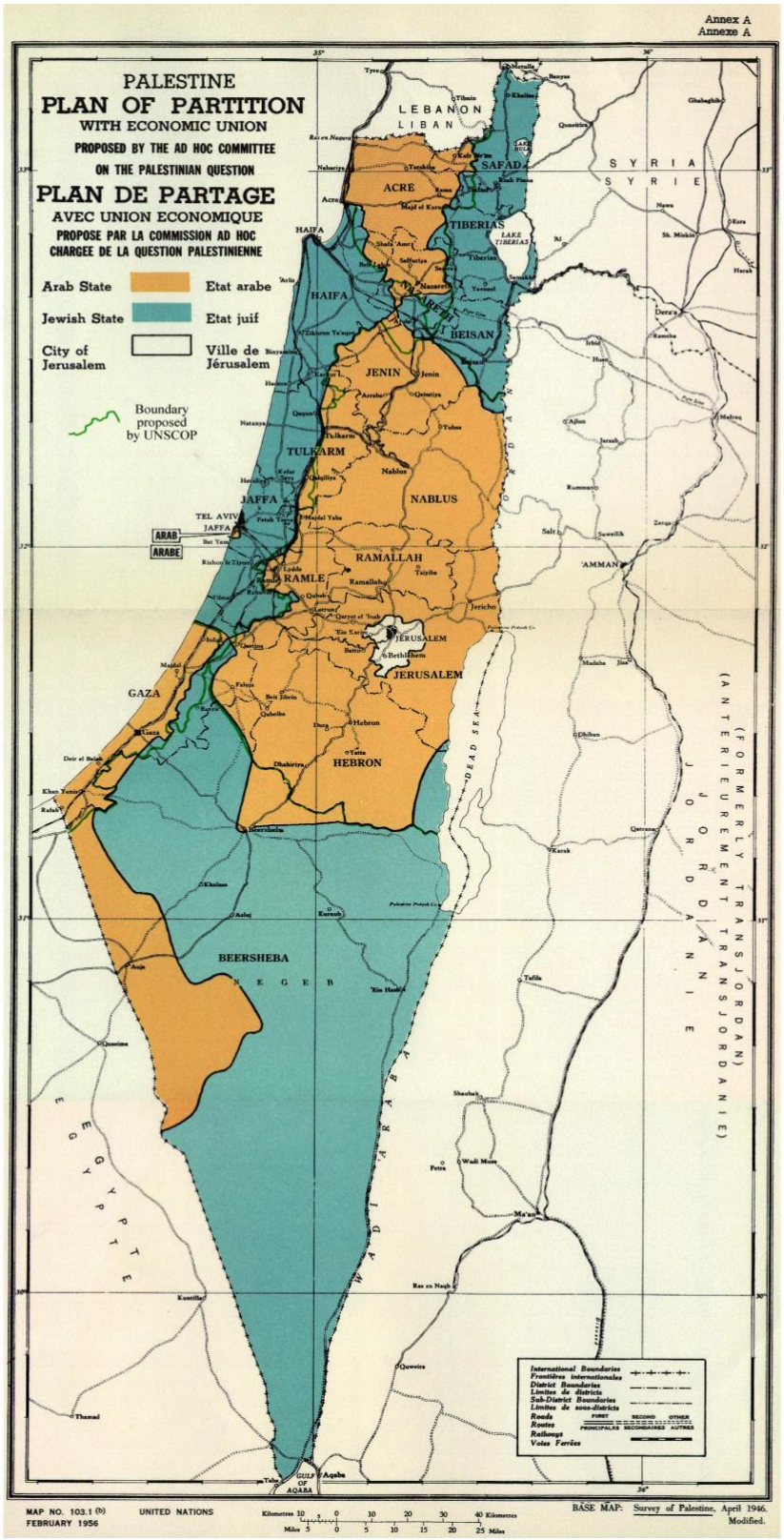
immediate independence in the whole of the country; or (2) conversion of it into a UN trusteeship.

In the event, territorial partition was the option recommended by an Assembly then dominated by hegemonic European states and their settler-colonial offshoots. Many of these states saw in the question of Palestine an opportunity to rectify Europe's age-long Jewish question in the wake of the Holocaust thereby consummating the shift of the ILS condition from one group to another. Accordingly, the majority of UNSCOP and the Assembly chose to treat the acquired international legal rights of the Jewish people to a Jewish national home as equivalent to their right to a Jewish state at Palestine's expense. A close examination of the UNSCOP records reveals at least three factors that undergirded its disregard for international law during the course of its work, and which influenced the General Assembly in attempting to facilitate the creation of this Jewish state through the passage of resolution 181(II). Between a Eurocentric bias in UNSCOP's composition and terms of reference, its unwillingness to sufficiently engage the AHC, and it's evident contempt for the application of democratic governance to the non-European people of Palestine, the institutional roots of the rule by law nature of resolution 181(II) were laid bare. To make matters worse, the record indicates that UNSCOP's deliberations were tainted by what can be regarded as a cognitive dissonance as to the inevitability of violence befalling Palestine's indigenous population following partition.

Resolution 181(II) effectively legislated into UN law the contingency and disenfranchisement of the Palestinian Arabs, thereby reifying Palestine's ILS condition inherited from the interwar period. But there was a deeper twist. With partition, the international legal goalposts had now indelibly shifted. By virtue of events shaped by and within the UN, no longer would the subaltern Palestinians be able to claim sovereignty over the whole of their historical patrimony. From now on, any right to self-determination they would be allowed to legitimately assert within the UN system, if at all, would be confined to the truncated remnants of that patrimony. In today's context, where the Palestinian people continue to struggle for universal recognition of their sovereign right to self-determination in the OPT, the two-state paradigm that resolution 181(II) set on course within the UN system has ironically become very important for the subaltern class, both politically and legally. Viewed in the context of 1947, however, the rule by law character of the partition resolution was something that confirmed Palestine's subaltern status under international law and organization. As a demonstration of the ILS condition, it began a pattern within the UN system in which the promise of international law would be repeatedly proffered to the Palestinian people, but which would, in turn,

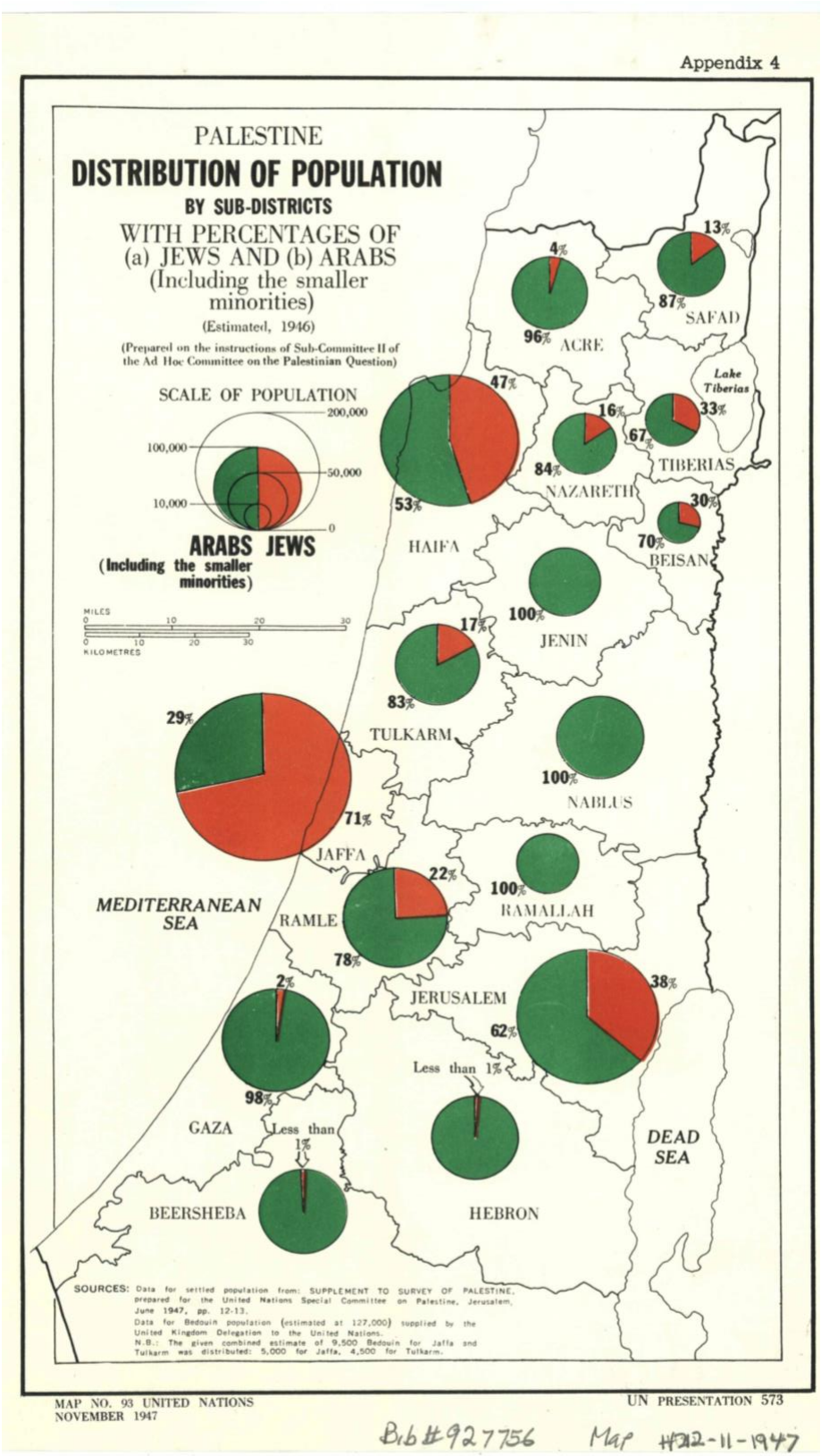
continually be withheld in some fashion or another. As will be demonstrated in the following chapters, overcoming this dilemma has been marked by a cruel paradox for the Palestinian people as an embodiment of the global subaltern; for they have at once had to become inured to the injustice of their contingent and qualified membership in the international legal order in order to find the space within which they may establish full and equal membership in that very same order.

MAP I



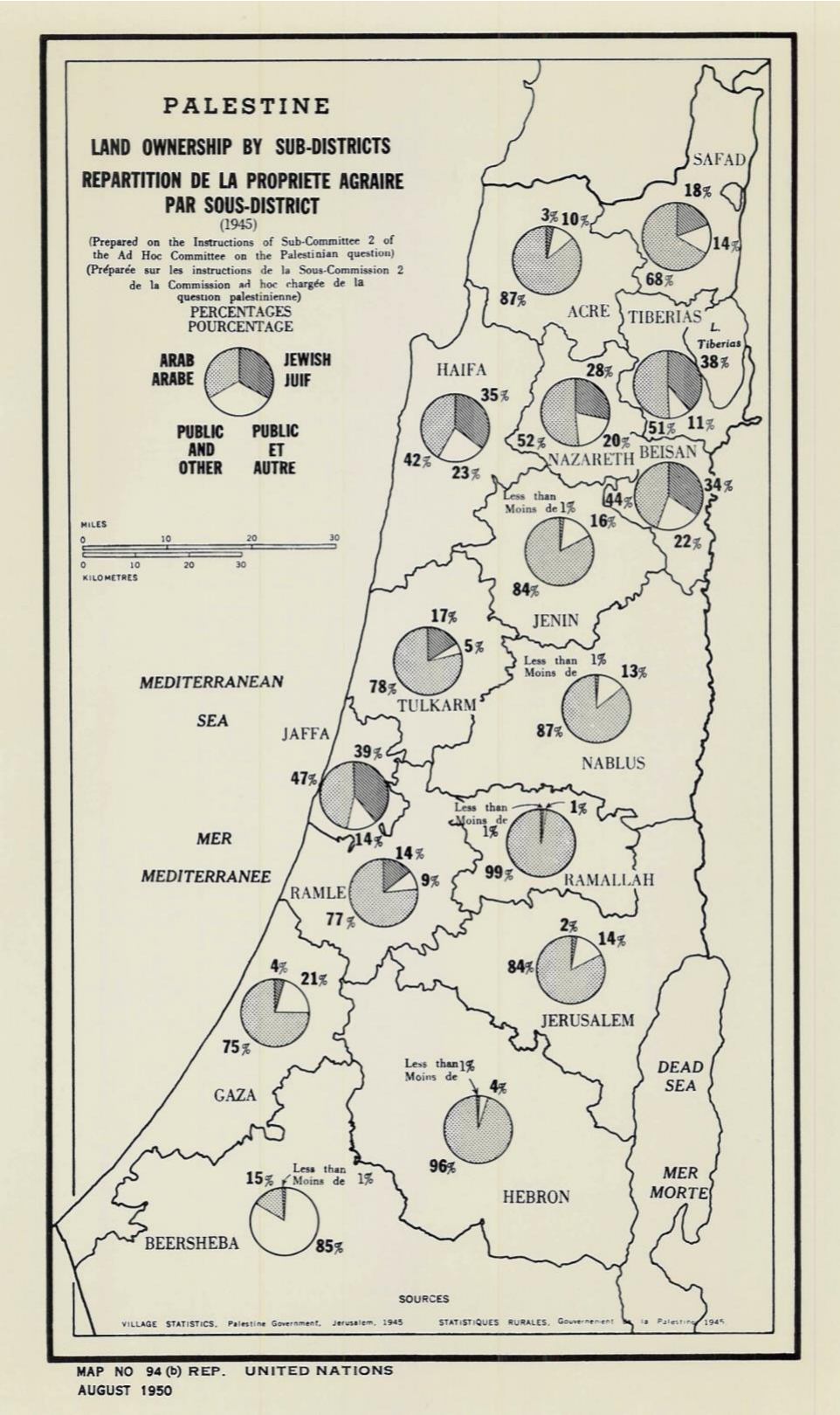
Palestine, Plan of Partition with Economic Union Proposed by the Ad Hoc Committee on the Palestinian Question, Map No. 103.1(b), United Nations, February 1956. Reproduced with permission of the United Nations.

MAP II



Palestine, Distribution of Population by Sub-Districts with Percentages of Jews and Arabs (Estimated at 1946), Map No. 93, United Nations, November 1947. Reproduced with permission of the United Nations.

MAP III



Palestine, Land Ownership by Sub-Districts (1945), Map No. 94(b), United Nations, August 1950. Reproduced with permission of the United Nations.

4

1967 and After: The Occupied Palestinian Territory and the Maintenance of Palestine's International Legal Subalternity at the United Nations

1. Introduction

This chapter addresses Palestine's international legal subalternity (ILS) through the handling by the United Nations (UN) of the legal status of Israel's prolonged military occupation of the occupied Palestinian territory (OPT). The main claim is that the UN's failure to consistently and clearly take a principled position on the very legality of Israel's half-century 'temporary' occupation of the OPT exposes a fundamental chasm in its position on the occupation demonstrative of the continuation of the international rule by law, under a different guise.

Central to this chapter is the cross-cutting theme of the structural limitations of Third World quasi-sovereignty in the post-decolonization era and its impact in the maintenance of the ILS condition in international law and organization. In contrast to the classical law governing conquest of territory during the age of empire, modern international law posits that occupation of enemy territory is meant to be temporary and that occupying powers may not rightfully claim sovereignty over foreign territory they occupy. Despite this, since 1967 Israel has systematically altered the status of the OPT with the aim of annexing, *de jure* or *de facto*, most or all of it to itself. In the intervening 50-year period, the Palestinian people have had their right to self-determination in the OPT recognized within a decolonized UN whose position has been held out to them as forming the only normative basis upon which the realization of this right is to be achieved. As part of this rights-based promise, the UN's position on the OPT has been informed by the considerable documentation of a range of individual violations of international humanitarian law (IHL) and human rights law (IHRL) by the occupying power in furtherance of its purported rule of law ordering framework. Yet the Organization has paid scant attention to the legality of the occupation regime as a whole and the concomitant requirement that it be brought to an end *unconditionally*, in line with UN practice and the law governing state responsibility. Instead, emphasis has been placed on encouraging the parties to end the occupation through continued, though highly unbalanced and widely discredited, bilateral negotiations.

One consequence of this has been for the UN to have provided a measure of legitimacy to Israel's occupation of the OPT at a time when the Third World membership of the Organization has been pivotal in developing a universally binding international legal proscription against all forms of alien domination, subjugation and exploitation, itself one of the bases upon which the right of the Palestinian people to self-determination in the OPT rests. By choosing a humanitarian/managerial approach to assessing the legality of Israeli actions in the OPT, the constitutional propriety of its occupation regime has been taken as a given by the UN and has therefore been regarded intrinsically, if impliedly, to be legal. This chapter argues that through the UN's failure to consistently and clearly identify Israel's prolonged occupation of the OPT as illegal owing to its structural violation of peremptory norms of international law, the UN's position on the OPT runs counter to the conventional wisdom which has presented the re-emergence and relative gains made by the subaltern Palestinian people within the Organization during decolonization and after as emblematic of the UN's commitment to finally uphold the international rule of law in their case. As an embodiment of the quasi-sovereignty of the Third World underpinning the ILS condition, UN recognition of Palestinian rights in this period has thereby remained contingent and nominal in essence.

In order to explore this, the remainder of this chapter is divided into three parts. Part 2 outlines the ostensible universalization of the promise of the post-1945 international liberal legal order within the UN as a result of decolonization, with specific reference to the crosscutting theme of the contingency of Third World sovereignty underpinning the ILS condition. Part 3 examines how the UN's approach to the OPT post-1967 has helped maintain, rather than remedy, Palestine's ILS in the Organization by reducing the question of Palestine almost exclusively to the humanitarian management of the occupation of the OPT through the IHL/IHRL paradigm without definitively addressing the central issue of the occupation's legality. Finally, Part 4 examines why the occupation of the OPT is illegal under prevailing international law as supported by the UN record, including discussion of relevant legal consequences of such a finding. It posits that even though the General Assembly and International Court of Justice (ICJ) should be looked to as potential sites where the illegality of the occupation can be definitively established within the UN in order to mitigate Palestine's ILS condition, such a counter-hegemonic approach would not in and of itself fundamentally disrupt that condition.

2. Realizing the Universal Promise of the International Rule of Law? Decolonization, Third World Sovereignty and the United Nations

When the UN was established in 1945, its membership consisted of 51 states, 40 of which were either European or settler-colonial derivatives of Europe.[1] Although on the decline, European colonialism was still a marked feature of the international system, with approximately one third of the global population – some 750 million people – still subject to some form of alien subjugation, domination and exploitation.[2] Accordingly, in its early years the Organization was shaped by the interests of an international state system still largely Eurocentric in orientation, and deeply influenced by the international legal standard of civilization that underpinned it going back to the nineteenth century. Although international law was beginning to give due regard to the interests of colonized and subject peoples, as evinced by the incorporation into the *UN Charter* of the principles of self-determination and human rights, the UN was still dominated by the old Western imperial powers. The legitimacy of the UN's law-making actions was therefore highly questionable. If the basis of that legitimacy was the international character of the organization and the universality of its *Charter*, then the UN had some ways to go in its early years with so much of the world's population denied a seat at the proverbial law-making table. As demonstrated in previous chapters, it was the global disenfranchisement of the non-European world that helped produce Palestine's ILS in the interwar period, which was, in turn, reified within the UN system through the General Assembly's partition plan of 1947.

It is for these reasons that the process of decolonization represented a watershed in the history of the United Nations. Decolonization opened a path through which it was thought the counter-hegemonic potential of the international rule of law could be realized in service of the global south. If colonial peoples were disenfranchised by virtue of not being regarded as fully sovereign under the very international law which purported to exercise dominion over them, the surest way to remedy the problem would be to put an end to colonialism itself and invite these subaltern peoples into the Organization as full members. UN recognition of Third World sovereignty was therefore the prerequisite for the universalization of the promise of the *UN Charter*, itself built on the principle of sovereign equality of states.[3] From the perspective of

[1] *Basic Facts about the United Nations* (2017), 247-251.
[2] United Nations and Decolonization, http://www.un.org/en/decolonization/history.shtml.
[3] Art. 2(1) of the *Charter* provides that "[t]he Organization is based on the principle of the sovereign equality of all its Members". Despite the limiting reference suggestive that the principle of sovereign equality only attaches to UN Members, the provision's drafting history demonstrates that its framers intended it to apply to all States, in line with then prevailing customary international law. *See* Simma (2002), 77.

colonial peoples, recognition of Third World sovereignty was the entry-point through which their own ILS at the UN had a prospect of finally being remedied.

Of course, sovereignty is a broad concept and encompasses a number of different elements: territorial, political, economic and cultural among them. The first step in the decolonization process was for Third World peoples to assume effective control over their respective land, sea and airspace and obtain recognition of their territorial sovereignty within the UN. Once independence was proclaimed over their territory and membership in the UN was secured, the second step was for the new Third World states to assert their political, economic and cultural sovereignty through the multilateral framework now at their disposal. Because decolonization was a gradual process, in practice these developments unfolded concurrently and in a self-propagating manner, with exponential results as empire receded. The more the territorial sovereignty of Third World states was recognized and reflected through an expanded membership of the UN, the greater leverage the Third World had to collectively assert its political, economic and cultural sovereignty in the work of the Organization. Between 1945 and 1980, UN membership over tripled to 154, the great majority of whom were former colonies from Africa and Asia. The effect of this rapid change was twofold: it shifted the automatic majority in the General Assembly from Europe to the Afro-Asian states, which in turn shifted the agenda of the Organization to issues that were of primary interest to the Third World.[4] What had formerly been regarded as the exclusive concern of the colonized world – decolonization and Third World development – soon became the concern of the UN as a whole.[5] In this sense, the Eurocentricity underpinning the ILS condition in international law and organization seemed to be giving way.

This change in priorities at the UN was reflected in the introduction by Third World states of new organizational machinery aimed at decolonization and development, challenging prevailing hegemonies in the system. This, in turn, enabled the progressive development of a number of areas of international law under the auspices of the UN that would fundamentally alter the course of the discipline. Moving beyond Chapters XI and XII of the *Charter*,[6] Third World states utilized their newfound strength in the General Assembly to form new political blocs, such as the Group of 77 and the Non-Aligned Movement (NAM), which helped promulgate new normative frameworks aimed at bolstering their sovereignty in the system.

[4] Luard (1989), 517-518.
[5] Kay (1967), 808-809.
[6] Concerning non-self-governing territories and the international trusteeship system, respectively.

This included, *inter alia*, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples;[7] the 1961 Special Committee on Decolonization (known as the Committee of 24),[8] the 1962 General Assembly resolution on Permanent Sovereignty over Natural Resources,[9] and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[10] Among other things, these instruments and mechanisms affirmed the need to bring colonialism, in all its forms, to a speedy and unconditional end, that all peoples have the right to self-determination by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development, and that the subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle of self-determination, fundamental human rights and the *UN Charter*.[11] Perhaps more than anything, the evolution of the content of the principle of self-determination and its codification in common article 1 of the 1966 human rights covenants stands out as a particularly important contribution of the Third World during this period. As will be explored below, that principle has achieved the status of *jus cogens*,[12] a development that would not have transpired but for the gradual enfranchisement of the Third World in the General Assembly through decolonization.

Yet, despite these gains, evidence suggests that the rule by law nature of the old international order survived the hey-day of decolonization and has persisted up to the present. For one thing, despite the almost complete eradication of classic forms of colonialism between the 1960's and 1980's, a number of regions continue to be afflicted by what effectively amounts to neo-colonial rule, with 17 non-self-governing territories presently "administered" largely by Western powers and monitored by the UN Committee of 24,[13] and two territories suffering contemporary forms of colonial rule through prolonged occupation in Western Sahara and the OPT. More deeply, even accounting for the territorial sovereignty gained by most of the Third World during the decolonization period, certain structural inequities between the former imperial powers and their relatively newly independent colonies have remained, such that the full realization of Third World political, cultural and economic sovereignty seems to have been

[7] *1960 Declaration on Colonialism*.
[8] A/RES/1654(XVI), 27 November 1961.
[9] A/RES/1803(XVII), 14 December 1962.
[10] *Friendly Relations Declaration*.
[11] *E.g. 1960 Declaration on Colonialism*, preamble, arts. 1, 2; *and* Friendly Relations Declaration, *id*.
[12] Crawford (2005), 188, 246-247.
[13] With the exception of Western Sahara, a former Spanish colony the majority of which has been militarily occupied by Morocco since 1975, the remaining 16 non-self-governing territories have been administered by France, New Zealand, the United Kingdom and the United States.

impaired from the start. The result was the evolution of Third World sovereignty as unequal and fractional relative to that of its Western progenitors, and the political legitimation of this state of affairs within the work of the UN system.[14] Despite the best efforts of the Third World to utilize the counter-hegemonic potential of international law within the UN, their ILS condition has fundamentally remained in place through the contingent quasi-sovereignty of its subaltern members.

Given the highly diverse natures, histories and experiences of the Third World, it is impossible to identify a single way in which this quasi-sovereignty has manifested itself amongst its members. Guarding against reduction, it must be acknowledged that Third World quasi-sovereignty may, in principle, appear across a wide spectrum of areas – territorial, political, cultural, economic – and may vary depending on respective levels of development and independence achieved by the peoples in question. What seems clear, however, is that beyond this wide spectrum of potential fields of manifestation, a unifying theme that binds them together appears to be the unfulfilled promise of international law and institutions upon which they are based and which rests at the heart of the ILS condition itself.

To briefly illustrate, the following example from the field of economic development is useful. Following decolonization, the realization of economic development through the Bretton Woods institutions (BW) was promoted to Third World peoples, who in turn became preoccupied with advancing their interests through the so-called New International Economic Order (NIEO) under the auspices of the Group of 77 at the UN.[15] Nevertheless, various liberal and neo-liberal mechanisms of the BW institutions, replete with legal conditions that privileged market fundamentalism through the Washington Consensus, resulted in considerable loss of Third World control over its economic sphere. These structural inequities transformed the old legal dichotomy between civilized and uncivilized peoples into a new cleavage between "developed" and "undeveloped" states.[16] Substantively, Third World jurists argued that their territorial sovereignty implied an acceptance that sovereignty over their natural resources pre-dated the colonial encounter and could therefore be nationalized post-independence subject only to the provisions of relevant internal law. In response, Western jurists argued that positivist intertemporal considerations made Third World sovereignty incapable of extending to the pre-decolonization period (Third World sovereignty having *originated* with decolonization and UN

[14] *See* Jackson (2011).
[15] Anghie (2005), 204; Otto (1996).
[16] Anghie (2005), 204.

recognition), and that even if post-independence nationalization were possible the relevant controlling law would be international law, not local law. Because the emerging international law of state secession included significant exceptions to the so-called 'clean-slate doctrine' requiring the new Third World states to respect some of the obligations of predecessor colonies, the economic interests of former colonial powers were well served.[17] This was because during colonial times, they provided favourable terms and concessions over colonial resources to European trading companies under cover of an international law that then legalized colonial exploitation.[18] Thus, despite the ostensible independence of the Third World post-decolonization, the former colonial powers ultimately stood to benefit from an international legal system *they* constructed, without the input of the uncivilized-cum-undeveloped world *they* colonized. The NIEO represented an attempt by the Third World to realize the promise of the international rule of law in a manner that took account of and tried to remedy, in economic terms, centuries of European exploitation. While the legal principle of sovereign equality of states underpinning the *UN Charter* system ostensibly allowed for the assumption of Third World international legal personality and membership in the system, that very legal personality relied on a positivist legal fiction of neutrality and objectivity which, by remaining oblivious to the inequity created by the old legal order, operated as a cloak of legitimization of continued European and Western privilege.[19] The effort to realize *actual* equality through the materialization of Third World economic sovereignty has thereby been structurally compromised through the work of the UN in the way of a continued rule by law with the result that its long-term condition of ILS has not been fundamentally altered.

As will be demonstrated below, the impact of the quasi-sovereignty of the Third World on the maintenance of Palestine's ILS in the post-1967 era has manifested itself in a different way than that described above. Nevertheless, it has still been underpinned by the unifying theme of the unfulfilled promise of international law and institutions as promoted by the UN itself.

3. Palestine as an Embodiment of Third World International Legal Subalternity at the United Nations

An examination of the UN's treatment of the question of Palestine during the decolonization period and after brings the themes of the circumscribed nature of Third World sovereignty and the resulting preservation of ILS through the rule by law dynamic into sharp relief. Decolonization enabled a gradual if incomplete recognition and legitimation at the UN

[17] *DASST*, art. 15, paras. 3, 15-16, 19.
[18] *Id*., 212-214.
[19] Otto (1996), 346.

of Palestinian legal personality and rights that in some respects approximated the recognition of Third World territorial sovereignty in this period. At the same time, a close examination of the UN record reveals that the Organization has operationally reduced the question of Palestine to a humanitarian problem, according to which the UN's task has been to largely monitor and report the violation of IHL and IHRL within the OPT without paying sufficient attention to the illegality of the very regime generating this outcome. As a result, UN recognition of Palestinian rights seems to have been only nominal in nature. This is underscored by the fact that a central element of this humanitarian/managerial approach has been the UN's insistence that the end of the occupation of the OPT must be contingent on endlessly futile negotiations with a bad faith and infinitely more powerful occupant, which in effect offers no way for the Palestinians to actualize their putative sovereignty, ostensibly recognized as a legal entitlement within and by the Organization. The result has been to maintain Palestine's ILS in the UN during a period in which the received wisdom posits the Organization as *the* standard-bearer of the international rule of law. These claims are fleshed out in further depth below.

3.1 Bringing the International Rule of Law to Bear in Palestine? Decolonization and the Gradual Recognition of Palestinian Legal Subjectivity at the United Nations

As part of the Third World's attempt to promote decolonization as a means of reshaping the international legal order through the UN, specific effort was made to highlight the plight and international legal rights of the Palestinian people in the work of the new-look General Assembly. The context for this was what can only be described as an institutional erasure of the Palestinian people within the UN following the Organization's attempt at partition, and the resulting dispossession of the Palestinians and collapse of the country in 1948. In the 20 years following the 1948 Nakba, the question of Palestine was treated merely as a 'refugee problem' in the machinery of the UN. This was largely manifested in the work of the two subsidiary organs created to deal with the fallout of the 1948 war, namely the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)[20] and the United Nations Conciliation Commission for Palestine (UNCCP).[21] In the aftermath of the 1967 war, during

[20] A/RES/302(IV), 8 December 1949. UNRWA is mandated to provide protection and assistance to Palestine refugees until they are able to exercise their rights to return and compensation in line with Assembly resolution 194(III) of 11 December 1948.

[21] A/RES/194(III), 11 December 1948. UNCPP was mandated with mediating peace between Israel and the Arab states (Egypt, Jordan, Lebanon and Syria), without the meaningful participation of the Palestinian Arabs whose only acknowledgement by UNCCP was an identification and valuation of "abandoned Arab property in Israel" as a result of the 1948 war. Despite failing to mediate peace in the early 1950's, and completing its task of identification and valuation of Arab refugee property in Israel by 1963, the UNCCP's mandate was never terminated. It continues to report annually to the General Assembly, indicating that it regrets that the terms of resolution 194(II) have yet to be implemented and "that it has nothing new to report". *See Seventy-First Report of the United Nations Conciliation Commission for Palestine*, A/72/332, 15 August 2017.

which Israel captured the OPT (see Map IV), the Security Council passed resolution 242 in which it continued this trend by cryptically calling for "a just settlement of the refugee problem", without reference to Palestine or the Palestinians.[22]

This effective erasure of the Palestinian people at the UN was curious given that Palestine's independence had been provisionally recognized by the League of Nations as far back as 1919. Additionally, the Palestinian Arabs were a political collective known to the UN through the events surrounding partition. It would appear that with the UN's denial of Palestinian independence in a unitary state in 1947, the fate of the Palestinian people became subsumed within the state-centric global order not unlike the indigenous peoples of the New World. This order not only literally engulfed the territorial sphere of their country in the form of the establishment of Israel on roughly 78 per cent of the whole and the resulting occupation of its remainder by Jordan and Egypt, but at the UN it operated to negate their very existence as a people as such and to legitimize that state of affairs within the Organization.

From a subaltern perspective, decolonization brought a needed push by the Third World to re-introduce the Palestinian people, its leadership and certain of its inalienable rights into the UN system. This move reflected an invocation of the counter-hegemonic promise of the international rule of law embedded in the *Charter*-based liberal global order, and an attempt to bring it to bear in the UN's work on Palestine. Much like the Third World's preoccupation with economic development through the promise of the BW institutions, the Palestinian people quickly became preoccupied with gaining recognition of their plight, narrative, and national movement within the UN.

The process was slow and was set against the political backdrop of the emergence of the Palestine Liberation Organization (PLO) in 1964 and Israel's victory in 1967. In 1969, the General Assembly recognized for the first time "that the problem of the Palestine Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights," and accordingly reaffirmed "the inalienable rights of the people of Palestine".[23] In 1970, the Assembly gave content to these inalienable rights when it recognized "that the people of Palestine are entitled to equal rights and self-determination."[24] In 1973, the Assembly condemned "all governments which do not recognize

[22] S/RES/242, 22 November 1967.
[23] A/RES/2535(XXIV)B, 10 December 1969.
[24] A/RES/2672(XXV)C, 8 December 1970.

the right to self-determination and independence of peoples, notably the peoples of Africa still under colonial domination and the Palestinian people."[25] This was followed in 1974, when the Assembly voted to include a separate item entitled the "Question of Palestine" on its agenda for the first time since 1952, with the aim of underscoring UN accountability for its actions in 1947, affirming the denial of Palestinian rights as the main impediment to peace, and laying the groundwork for the representatives of the Palestinian people to be given a platform at the UN to shape their own future.[26] This unfolded in a series of resolutions adopted that year in which the PLO was invited to participate in the deliberations of the Assembly on the question of Palestine in plenary meetings,[27] and granted observer status in the sessions and work of the Assembly, including international conferences convened under its auspices.[28] The high-water mark came with the passage of resolution 3236(XXIX) of 22 November 1974, in which the Assembly reaffirmed the "inalienable rights of the Palestinian people in Palestine, including: (a) the right to self-determination without interference; [and] (b) the right to national independence and sovereignty".[29] In a landmark address before the Assembly, Yasser Arafat, then Chairman of the Executive Committee of the PLO, highlighted that decolonization offered a unique opportunity for the UN to render its work and role more capable of implementing the principles of the *Charter* and human rights universally. In his view, the re-opening of the question of Palestine at the UN represented "a victory for the world Organization as much as a victory for the cause of our people," in that it was part of "a great wave of history bearing peoples forward into a new world that *they have created*." [emphasis added].[30]

In the above actions, one is able to clearly identify the themes of enfranchisement of the global subaltern and the effects such enfranchisement in the deliberative processes of the UN were thought to have had in addressing the ILS condition of historically contingent actors. By appealing to the primacy and universalism of the international rule of law, the UN held itself

[25] A/RES/3070(XXVIII), 30 November 1973.
[26] *See* UN GAOR, 29th Sess., 219th Mtg., item 111, at 11-13, A/BUR/SR.219, 19 September 1974, where, *e.g.*, the Algerian representative stated that "[i]t was at the United Nations that the case of Palestine should be reopened and the matter be treated not as a social problem caused by the Palestinian refugees but as a political problem. The time had come for the United Nations to rectify its mistake and focus its efforts on settling a crisis with which it had been encumbered almost since its creation". Likewise, the Yugoslav representative "deplored the fact that the question of Palestine was regarded as a refuge problem rather than as a problem of the usurpation of a people's right to liberty and independence". Finally, the Soviet representative indicated "that a discussion by the General Assembly of the question of Palestine in all its aspects, with the participation of a representative of the Arab people of Palestine, would further the settlement of that question...".
[27] A/RES/3210(XXIX), 14 October 1974.
[28] A/RES/3237(XXIX), 22 November 1974. This set a precedent for the provision of UN observer status to the South West Africa People's Organization (SWAPO), then struggling for independence of the Namibian people. *See* A/RES/31/152, 20 December 1976.
[29] A/RES/3236(XXIX), 22 November 1974.
[30] UN GAOR, 29th Sess, 2282nd Mtg., item 108, A/PV.2282 and Corr. 1, at 861-862, paras. 7-9, 19, 13 November 1974.

out as the essential platform for the PLO which, together with the rest of the global south, set out to establish a new counter-hegemonic international legal order responsive to its people's needs. Whereas the old European imperial order was thought to be collapsing, a new post-imperial world was actively being forged. The result was an apparent commitment within the UN to reaffirm and realize the promise of international law in its work regarding historically subordinated peoples, including on the question of Palestine. This was borne out in the growing attention afforded the Palestinian people in the UN, a large proportion of which was articulated in international legal terms.

Thus, mirroring the Committee of 24 and other Third World-initiated machinery designed to advance decolonization and development, in 1975 the General Assembly established the Committee on the Exercise of the Inalienable Rights of the Palestinian People (UNCEIRPP). Composed of twenty Member States drawn from the Third World, the UNCEIRPP was, and continues to be, mandated with promoting the realization of the inalienable rights of the Palestinian people, as outlined in Assembly resolution 3236(XXIX) and subsequent resolutions. From that point, the General Assembly increased the number of its resolutions on Palestine, often times in response to developments on the ground, with the result that today there exists a copious body of resolutions demonstrative of widespread state practice and *opinio juris* supportive of Palestinian legal subjectivity and rights. Thus, to the long record of General Assembly resolutions affirming the rights of Palestine refugees under resolution 194(III) of December 1949,[31] has been added resolutions devoted to Palestine refugee property and revenues,[32] the Palestinian people's right to self-determination,[33] the applicability to the OPT of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[34] development assistance,[35] Jerusalem,[36] Israeli settlements in the OPT,[37] the permanent sovereignty of the Palestinian people over its natural resources in the OPT,[38] international protection of the Palestinian people,[39] and the peaceful settlement of the question of Palestine,[40] among scores of others.

[31] *E.g.*, A/RES/70/83, 9 December 2015.
[32] *E.g.*, A/RES/70/86, 9 December 2015.
[33] *E.g.*, A/RES/70/141, 17 December 2015.
[34] *E.g.*, A/RES/70/88, 9 December 2015. *Geneva Convention IV*.
[35] *E.g.*, A/RES/70/108, 10 December 2015.
[36] *E.g.*, A/RES/70/16, 24 November 2015.
[37] *E.g.*, A/RES/70/89, 9 December 2015.
[38] *E.g.*, A/RES/70/225, 22 December 2015.
[39] *E.g.*, A/RES/70/90, 9 December 2015.
[40] *E.g.*, A/RES/70/15, 24 November 2015.

Viewed through the prism of the UN's institutional erasure of the Palestinian people from 1949-1969, the above developments demonstrate the extent to which decolonization was responsible for giving greater substance to the UN's commitment to the universal application of international law in general, including its unique role in bringing it to bear as the normative framework upon which peace in Palestine had to be based. Evidence of the underlying promise to the Palestinian people inherent in this process is found in what the General Assembly has, since 1992, referred to as the UN's "permanent responsibility" over the question of Palestine "until the question is resolved in all its aspects in accordance with international law".[41] The central importance of both international law and the unique role of the UN as guarantor of that law in helping forge a peaceful resolution to the question of Palestine has by now become a common article of faith within the international system, the original sin of partition notwithstanding. Nowhere has this faith been more reverent then among the Palestinian people themselves.[42] Thus, notwithstanding the rule by law character of the UN's management of the question of Palestine between 1947-1969, the conventional view of the UN as guarantor of the universal international rule of law appears to have held, largely due to the promise of justice and peace through its myriad invocations of same. With the apparent mitigation of Palestine's ILS condition thorough the UN's increased recognition of Palestinian legal subjectivity and rights following decolonization, it would appear that the only change in the landscape has been the acquiescence in this view by the political leadership of the Palestinian people. As will be seen, however, a critical examination of the evidence would not seem to justify this position.

3.2 The Maintenance of the International Rule by Law in Palestine: The Reduction of Palestine and the Limits of Palestinian Legal Subjectivity at the United Nations

A closer review of the UN's record in the decolonization period and after reveals that while the rule by law character of the Organization's treatment of Palestine has been partially mitigated through a more genuine application of *Charter*-based international law to the issue, that situation has been substantially maintained, albeit in a different form. Essentially, while the partition resolution of 1947 was tainted with illegality resulting in the reification within the UN of Palestine's ILS, what characterizes the maintenance of this condition in the decolonization period and after has been the UN's unwillingness to bring the full normative regime of international law to bear on its treatment of the OPT in line with the international rule of law. Unlike events in 1947, here the stress is not so much on the illegality of a specific

[41] *E.g.*, A/RES/71/23, 30 November 2016.

[42] This was demonstrated in a 2017 address to the General Assembly of Mahmoud Abbas, current President of the State of Palestine, in which he stated that "[t]he path we have chosen as Palestinians and Arabs, and the path chosen by the world is that of international law." *See Abbas 72nd GA Statement*.

UN action in respect of a disenfranchised group. Rather, the problem is with the failure *by omission* of the UN to apply the full array of relevant international law to that disenfranchised group. This, even as the UN has come to rely upon that group's acquiescence in the legitimacy of prior illegal UN action (*i.e.* partition) as a condition of eventually gaining full membership in the Organization, and while the Organization has held itself out as a protector of Palestinian legal subjectivity and rights. More specifically, the evidence suggests that the problem rests primarily in the UN's failure to clearly and consistently identify Israel's prolonged presence in the OPT as illegal as such, with all of the consequences such illegality entails in international law. Most importantly, this includes the obligation of the UN to require the occupying power to unilaterally bring its illegal presence to an end unconditionally and in good faith, rather than condition such an end upon negotiation. In a sense, the UN's reduction of Palestine to the documentation of Israel's individual violations of IHL and IHRL within the OPT, important though it has been, has had its own dark side. Echoing the frustration of Third World sovereignty by the structural limitations of the BW institutions, UN recognition of Palestinian legal subjectivity, including the right to self-determination in the OPT, has been frustrated by the UN itself through its failure to definitively address the legality of the very regime impeding its actual exercise. Instead, the UN has satisfied itself with affirming and reaffirming selective elements of the relevant international law governing the status of the OPT, thereby frustrating its own ostensible commitment to maintaining international peace and security in accordance with the international rule of law resulting in the maintenance of Palestine's ILS in the system.

To deconstruct this further, it is helpful to examine the following three interrelated aspects of the UN's management of the question of Palestine in the post-1967 era: (1) the increased recognition of Palestinian legal subjectivity within the UN and its restricted territorialisation of Palestinian national claims to the OPT following the PLO's 1988 recognition of the two-state formula embodied in resolution 181(II); (2) the proliferation of UN machinery focused on the humanitarian/managerial documentation of IHL and IHRL violations by the occupying power short of definitively identifying Israel's continued occupation of the OPT as illegal; and (3) the UN's conditioning of the end of Israel's occupation of the OPT on negotiations. Each of these will be taken in turn.

First, the 1988 recognition by the PLO of Israel on the basis of resolution 181(II) signalled the acceptance by the PLO of the political legitimacy of the partition plan. Reminiscent of the Third World's acceptance of the principle of *uti possidetis*, this recognition was notable for the fact that its adherents had no part in fashioning its terms but were compelled to accept them *ex*

post facto as a price to be paid if even a modicum of their national rights were to be achieved. In the form of a *quid pro quo*, this historic compromise resulted in greater levels of recognition of Palestine's international legal personality at the UN, albeit curtailed in line with the two-state formula. Thus, as part of its 1988 acknowledgement of the proclamation of the State of Palestine by the Palestine National Council, the General Assembly decided that the designation "Palestine" be used in the place of the "Palestine Liberation Organization" in the UN system.[43] This was followed in 1998 with the Assembly's conferral of additional privileges on Palestine, including the rights to participate in the general debate and to co-sponsor draft resolutions on Palestinian and Middle East issues.[44] Following Palestine's failed 2011 attempt to seek full membership in the Organization the General Assembly upgraded its status to a non-member observer State in 2012 (see chapter 5).[45] This has allowed the State of Palestine to accede to a host of multilateral treaties, including the main IHL and IHRL treaties and the Rome Statute of the International Criminal Court (ICC),[46] and to gain membership in a number of international organizations. Importantly, although the *quid pro quo* induced recognition of Palestinian legal subjectivity at the UN was accompanied by an affirmation of the right of the Palestinian people to self-determination in a state of their own, it wasn't until 1988 that the exact territorial location of that state was expressly articulated by the UN. The territorialisation of Palestinian national rights within the UN in the post-decolonization era thus began with the PLO's compelled recognition of resolution 181(II). This resulted in an affirmation by the General Assembly in 1988 of "the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967," an area representing approximately half that proposed by the Assembly in 1947.[47] Since then, the OPT has regularly been affirmed, expressly and impliedly, as the territorial sphere within which the Palestinian people are entitled to exercise self-determination by each of the General Assembly,[48] the Security Council,[49] the ICJ,[50] the Economic and Social Council (ECOSOC)[51] and the Secretariat through the Secretary-General.[52] To the extent that the promise of the UN's copious affirmation of Palestinian legal

[43] This change was done without prejudice to the observer status and functions of the PLO within the UN system. A/RES/43/177, 15 December 1988.
[44] A/RES/52/250, 7 July 1998.
[45] A/RES/67/19, 29 November 2012.
[46] *Rome Statute*.
[47] A/RES/43/177, 15 December 1988.
[48] *E.g.*, A/RES/67/19, 29 November 2012.
[49] *See e.g.*, S/RES/2334(2016), 23 December 2016 *and* S/RES/1515(2003), 19 November 2003 where, in so far as the Council endorses a vision where two states, Israel and Palestine, live side by side in peace within secure and recognized borders on the basis of SC Res. 242 (1967), it is implied that the OPT is the self-determination unit of the Palestinian people.
[50] *Wall*, paras. 115, 118, 122.
[51] *E.g.*, E/RES/2017/10, 7 June 2017.
[52] *E.g., Peaceful Settlement of the Question of Palestine*, paras. 23, 40.

subjectivity has yet to materialize, the historical compromise that produced it has arguably assumed the contours of a Faustian bargain of sorts.

Second, since the decolonization era there has emerged a proliferation of UN machinery devoted to a humanitarian/managerial approach through the documentation of IHL and IHRL violations by the occupying power in the OPT. This is in large part the result of the prolonged nature of the conflict and an expression of the above-mentioned permanent responsibility of the UN for its resolution in line with international law. Among the bespoke machinery is the UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories,[53] the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied Since 1967, [54] UNCERIPP and its secretariat in the Division for Palestinian Rights,[55] and the UN Register of Damage Caused by the Construction of the Wall in the OPT (UNROD).[56] More general machinery includes portions of the work of a host of subsidiary organs such as UNRWA,[57] the UN Office of the High Commissioner for Human Rights,[58] the UN Human Rights Council (HRC),[59] the UN Educational Scientific and Cultural Organization (UNESCO),[60] the UN Office for the Coordination of Humanitarian Affairs (OCHA),[61] and the UN Conference on Trade and Development, [62] among others.[63] Important judicial, quasi-judicial and/or investigative interventions have been carried out by the ICJ,[64] HRC mandated commissions of inquiry such as the Goldstone[65] and Davis[66] commissions, and a host of special procedures

[53] The Special Committee was established by the General Assembly in 1968 under the style "Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories". The contemporary name reflects the evolution of Palestinian legal subjectivity within the UN over time. *See* A/RES/2443(XXIII), 19 December 1968.
[54] The mandate of the Special Rapporteur was established by the Commission on Human Rights in resolution E/CN.4/1993/2A, 19 February 1993.
[55] A/RES/71/21, 30 November 2016.
[56] A/RES/ES-10/17, 24 January 2007.
[57] An important element of UNRWA's mandate is the provision of human rights-based protection to Palestine refugees. *See UNRWA Annual Report, 2016*, 31-33.
[58] *E.g., Implementation of Human Rights Council Resolutions S-9/1 and S-12/1, Report of the United Nations High Commissioner for Human Rights*, A/HRC/31/40, 20 January 2016.
[59] *E.g.*, A/HRC/34/28, 11 April 2017.
[60] *E.g., UNESCO Decisions, November 2016*, 32.
[61] *E.g., UN OCHA Report, October 2017.*
[62] *E.g., Economic Costs Report.*
[63] These include the International Labour Organization (ILO), UN Children's Fund (UNICEF), the UN Development Fund for Women (UNIFEM), World Health Organization (WHO), World Food Program (WFP), the UN Human Settlements Program (UNHABITAT), and the UN Population Fund (UNFPA).
[64] *Wall.*
[65] *Report of the UN Fact-Finding Mission on Gaza, September 2009.*
[66] *Report of the Detailed Findings, June 2015.*

mandate holders.[67] Finally, the machinery includes scores of regular reports and resolutions issued by other principal organs of the UN, namely the General Assembly,[68] Security Council,[69] ECOSOC[70] and the Secretariat through the Secretary-General.[71] So prodigious has been the coverage of this UN machinery, that it is impossible to cover it all here. Suffice to say, those areas of IHL and IHRL violations of the occupying power that have been documented and have come to undergird the UN's position on the question of Palestine include: the applicability of *Geneva Convention IV* to the OPT, the illegality and economic impact of Israeli settlement, wilful killing, torture and inhumane treatment, unlawful deportation or transfer, collective punishment, the taking of hostages, extensive destruction and appropriation of property not justified by military necessity, the right to life, liberty and security of the person, equality before the law, protection from arbitrary arrest and detention, due process of law, freedom of expression, freedom of thought, conscience and belief, freedom of association, the right to work, the right to an adequate standard of living, including food and housing, and the right to education. Despite the broad scope of this comprehensive cataloguing of the occupying power's individual violations of relevant IHL and IHRL in the OPT, what makes it notable is its conspicuous failure to definitively address the legality of Israel's very presence in the OPT. Indeed, the hyper-legality of the UN's approach to the OPT through the relatively narrow confines of the IHL/IHRL paradigm has produced an absurd situation. By focusing so much energy on addressing IHL/IHRL violations in the OPT, the UN has unduly raised expectations of what application of that humanitarian normative paradigm can reasonably achieve. This has led to a false hope that adherence to IHL/IHRL norms will eventually deliver the end of the occupation. For the Palestinian people, this false hope has become reflected in the institutionalization of the IHL/IHRL paradigm in the official and civil society sectors of Palestine. This has been exacerbated and reinforced by the rights-based humanitarian approaches driving virtually all non-UN international stakeholders in the OPT to this day,

[67] *See e.g., Report of the Special Rapporteur on Violence Against Women, June 2017*; *Report of the Special Rapporteur on Adequate Housing, December 2012*; *and Report of the Special Rapporteur on Freedom of Opinion and Expression, June 2012*.

[68] The number of GA resolutions are copious. In 2016 alone, the Assembly passed 16 resolutions on Palestine, including: A/RES/71/98, 6 December 2016 (Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem); A/RES/71/97, 6 December 2016 (Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan); A/RES/71/96, 6 December 2016 (Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories); A/RES/71/184, 19 December 2016 (Right of the Palestinian People to Self-determination); *and* A/RES/71/247, 21 December 2016 (Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, and of the Arab Population of the Occupied Syrian Golan Over Their Natural Resources).

[69] *E.g.*, S/RES/605(1987), 22 December 1987; *and* S/RES/904(1994), 18 March 1994.

[70] *E.g., Repercussions of Occupation Report*.

[71] *E.g., Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem: Report of the Secretary-General*, A/HRC/31/44, 20 January 2016.

including third states, the European Union, the League of Arab States, the Organization of Islamic Cooperation, the International Committee of the Red Cross, Amnesty International, Human Rights Watch, etc. Although occupation is meant to end under international law, nothing in the conventional IHL/IHRL paradigm expressly compels this result; rather, adherence to its norms merely operates to enhance the manner in which the occupation is administered pending its eventual end. Thus, by focusing on the IHL/IHRL framework instead of failing to definitively identify Israel's occupation as illegal as such, the UN has privileged a humanitarian/managerial approach to the OPT over a remedial/emancipatory one. This has ultimately lent Israel's presence in the OPT a legitimacy in which its legality has also been implied. The result has been to affirm the theme of Third World quasi-sovereignty underpinning Palestine's ILS condition.

Third, and arguably most important, has been the UN's position that the end of Israel's prolonged occupation of the OPT must be contingent on the conclusion of negotiations between it and the PLO. This is a universally held position among each of the relevant five principal organs, and one that has accordingly been parroted throughout the UN system by subsidiary organs and other bodies. Thus, the Security Council has since 1967 affirmed the need for Israel to withdraw from the OPT as part of a negotiated settlement under the land for peace formula.[72] In 2016, the Council accordingly stressed the need "to create the conditions for successful final status negotiations and for advancing the two-State solution through those negotiations" aimed at achieving "an end to the Israeli occupation that began in 1967."[73] Likewise, the General Assembly has on multiple occasions stressed "the need for a resumption of negotiations based on the long-standing terms of reference" set out in relevant UN resolutions, including "the principle of land for peace," and called upon Israel to refrain from undertaking actions in the OPT, such as settlement building, that are aimed "at prejudging the final outcome of peace negotiations, with a view to achieving without delay an end to the Israeli occupation that began in 1967."[74] For its part, ECOSOC has reiterated "the importance of the revival and accelerated advancement of negotiations…on the basis of relevant United Nations resolutions" and "the principle of land for peace", with the view "to pave the way for the realization of the two-State solution…based on the pre-1967 borders."[75] To this has been added repeated calls by various Secretaries-General for a negotiated resolution of the end of the occupation, coming most

[72] S/RES/242, 22 November 1967, paras. 1, 3.
[73] S/RES/2334, 23 December 2016, preamble, para. 9.
[74] A/RES/71/23, 30 November 2016, paras. 4, 16. *See also* A/RES/67/19, 29 November 2012, paras. 4, 5; *and* A/RES/66/17, 30 November 2011, para. 15.
[75] E/RES/2014/26, 16 July 2014, para. 17. *See also* E/RES/2017/10, 7 June 2017, para. 7.

recently in a June 2017 statement in which Antonio Guterres indicated that "[e]nding the occupation that began in 1967 and achieving a negotiated two-State outcome is the only way to lay the foundations for enduring peace" and "the only way to achieve the inalienable rights of the Palestinian people."[76] Finally, and perhaps most tellingly, the ICJ reiterated this position when it ruled in 2004 that the construction of the wall by Israel in the OPT was contrary to international law. In reaching this conclusion, the Court went out of its way to underscore that the question of Palestine "can be brought to an end only through implementation in good faith of all relevant Security Council resolutions," and continued "efforts to initiate negotiations to this end."[77] It accordingly underscored "the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region."[78] This uniform insistence of negotiations as the only way to end the occupation and realize Palestinian rights is fraught with a telling paradox. Because the OPT has been determined by the UN to be the territorial unit within which the Palestinian people are entitled to exercise their right to self-determination under international law, the result has been for the UN to have frustrated, on its own terms, the very recognition it has bestowed upon the Palestinian people since decolonization. How? If realization of Palestinian self-determination in the OPT is a long-established right in the nature of a peremptory norm of international law derogation from which is not permitted, how can the culmination of this right can be left to negotiation between an infinitely more powerful occupier and a beleaguered and vastly weaker occupied people? This is particularly so, if the occupation itself is or has become illegal through the acts of a bad-faith occupant, as is the case with the OPT.

In so far as the above factors have been the basis of the UN's ostensibly rights-based approach to the question of Palestine through which the subaltern Palestinians have been encouraged to overcome their contingent status, the research suggests that they actually demonstrate the perpetual nature of Palestine's quasi-sovereignty inherent in the present international legal order. Palestinian acquiescence to the partition brought with it UN recognition of Palestinian national rights, if only in the OPT. Nevertheless, actual realization of those rights has been frustrated by the UN itself owing to its failure to definitively characterize Israel's occupation as illegal, as such. Instead, the UN has dogmatically insisted

[76] *UN Press Release SG/SM/18554, 5 June 2017*.
[77] *Wall*, para. 162.
[78] *Id.*

on the chimera of negotiations as the only means through which the occupation's end is to be brought about. Once again, we can see a shifting of the legal goalposts for the subaltern who, having acquiesced to prior illegal acts of the UN cannot be allowed to rely in good faith that the gesture will be met with a commitment by the Organization to bring international law *fully* to bear in their case. In place of a position based upon the fulsome application of the international rule of law, the interests of the subaltern Palestinians are governed according to a rule by law dynamic, where rights are affirmed only to a point (*e.g.* IHL/IHRL), and implementation is left subject to the whims of a purportedly legitimate Israeli hegemon. In a very real sense then, it is possible to see in the UN's position in this period the maintenance of Palestine's ILS.

In the following section, we examine the question of whether Israel's continued occupation of the OPT is illegal, and what the consequences of such a finding would be in law. In addition, we examine how various organs of the UN can be resorted to in order to confirm this finding with a view to mitigating the effects of the rule by law nature of the Organization's handling of the question of Palestine in the post-1967 period.

4. Mitigating Palestine's Continued International Legal Subalternity at the United Nations: The Illegality of Israel's Continued Presence in the OPT and its Legal Consequences

4.1 Why Legality Matters: Negotiating the Illegal in Light of the Law of State Responsibility

Before we delve into why Israel's continued presence in the OPT is illegal, further discussion about why its legality matters is in order. At the heart of the issue is the tension between the UN's position on the OPT with the relevant international law governing state responsibility. On the one hand, is the political consensus that the emergence of an independent Palestinian state in the OPT can only arise through a negotiated withdrawal of the occupying power and the conclusion of peace on the basis of the two-state land for peace formula. This consensus has been codified in a wide array of resolutions by the principal political organs of the UN and affirmed by its principal judicial organ and Secretary-General. On the other hand, is the relevant international law concerning the responsibility of states for internationally wrongful conduct, an elemental foundation of which is the proposition that states may not negotiate the consequences of their actions if those actions are themselves illegal: *ex injuria jus non oritur*.[79] A review of the relatively sparse literature on the illegality of Israel's occupation of the OPT demonstrates a curious neglect of the international legal consequences of same in

[79] *See infra* note 91.

light of the law of state responsibility.[80] Nevertheless, in view of the above, it is submitted that understanding the international law governing state responsibility is a prerequisite to appreciating the continued rule by law character of the UN's handling of the OPT in the post-1967 era, and how its effects might ultimately be mitigated.

The International Law Commission's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (*ASRIWA*) is widely considered to be a codification of customary international law governing state responsibility.[81] Under the *ARSIWA*, an internationally wrongful act of a state occurs when conduct consisting of an action or omission is both attributable to the state under international law and constitutes a breach of an international obligation of that state.[82] A state may breach an international obligation through a composite series of actions or omissions defined in aggregate as wrongful, in which case the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation of the state.[83] The state responsible for an internationally wrongful act is under three general obligations in respect of that act. First, if continuing, it must cease the act forthwith.[84] Second, it must offer appropriate assurances and guarantees of non-repetition if circumstances so dictate.[85] Third, it must make full reparation for the injury caused by the act, including any material or moral damage.[86] Finally, where a state's internationally wrongful conduct entails a serious – meaning gross or systematic – breach of an obligation arising under a peremptory norm of general international law, in addition to the above obligations of the wrongdoing state, all other states are under a twofold obligation to cooperate to bring the serious breach to an end through lawful means, and to refrain from recognizing as lawful the situation created by the serious breach nor render aid or assistance in maintaining that situation.[87]

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[80] *See* Gross (2017); *Lynk Report*; *and* Finkelstein (2018), Appendix, none of which engage with the law on state responsibility. *See also* Ben-Naftali, et al. (2005), 612, where the authors merely restate in their conclusion that a state "whose conduct constitutes an internationally wrongful act having a continuing character is under an obligation to cease that conduct, without prejudice to the responsibility it has already incurred." No other elements of the law of state responsibility are discussed by Ben-Naftali et al., nor is the dilemma raised by the UN's conditioning of the end of the occupation on negotiation examined in this light. In a similar vein, the only article that raises the legal consequences of "illegal occupation", *per se*, at any length confines its discussion of negotiation as a means of ending such an occupation to one line. *See* Ronen (2008), 228. Although Ronen partially examines General Assembly and ICJ pronouncements on the legality of Israel's occupation of the OPT, her analysis does not examine the UN's position that the end of the occupation must be contingent on negotiation.

[81] *ASRIWA*, 26-30. For the customary nature of the *ASRIWA*, *see Genocide Case*, para. 401; Crawford (2013), 43.

[82] *ASRIWA*, *id*., art. 2.

[83] *Id*., art. 15.

[84] *Id*. art. 30(a). Although the text of the article does not reference any time parameters within which cessation must occur, ICJ jurisprudence suggests cessation must occur forthwith. *See Wall*, paras. 151, 163.

[85] *ASRIWA*, *id*., art. 30(b).

[86] *Id*., art. 31.

[87] *Id*., arts. 40, 41; *Wall*, para. 163.

The international law governing state responsibility is rooted in a desire to ensure a global order that is based on the primacy of the international rule of law, in line with the ostensible organizing principle of the UN. In his commentary on the *ASRIWA*, James Crawford indicates that "[t]he responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law."[88] Where a state responsible for an internationally wrongful act refuses to perform its obligations of cessation, non-repetition and reparation, as applicable, an injured state may take appropriate and proportional countermeasures to help induce such performance.[89] Where the obligation breached is owed to a group of states and is established for the protection of a collective interest of that group or is owed to the international community as a whole (*i.e.* obligations *erga omnes*), states other than the injured state are entitled to take lawful measures against the responsible state to ensure its observance.[90]

It therefore follows that where an internationally wrongful act has taken place and/or is continuing, the international rule of law neither mandates nor requires the responsible state to make adherence to its obligations of cessation, non-repetition and reparation conditioned on negotiation.[91] To do so would be to legitimate that which is illegal. Rather, the law requires strict, unconditional and timely performance of those obligations in keeping with its overall object and purpose, namely to ensure the international rule of law. This is particularly so where a state's internationally wrongful conduct entails a serious breach of an obligation arising under a peremptory norm of general international law. In such case, international law neither mandates nor requires third states (collectively or individually) to make adherence to their own

[88] Crawford (2005), 197.
[89] *ASRIWA*, arts. 49-54.
[90] *Id*. arts. 48, 54.
[91] While art. 52(1) of the *ASRIWA* imposes an obligation on an injured state to, *inter alia*, notify the responsible state of any decision to take countermeasures and to offer to negotiate with that State, such recourse to negotiation remains the sole prerogative of the injured state, and only then if it invokes countermeasures. Negotiation cannot be invoked by the responsible or any other state under the *ASRIWA*. In any event, even where invoked by an injured state, it is doubtful whether the *ASRIWA* contemplates recourse to negotiations if doing so would frustrate the overall obligation of the responsible state to abide by the underlying primary rule it has violated. Such an allowance would sabotage the object and purpose of the *ASRIWA* and the international rule of law itself. For a judicial opinion in which these principles are followed, *see Armed Activities*, paras. 261, 345, where, after determining that Uganda was internationally responsible for making reparations to DRC for illegal actions arising on the territory of the DRC, the ICJ deferred to the DRC's wish to resolve the issue by negotiation with Uganda, failing which the matter would be settled by the Court. In so doing, the Court made clear that while "[i]t is not for the Court to determine the final result of these negotiations...the Parties should seek in good faith an agreed solution based on the findings of the present Judgment" (i.e. based on international law).

obligations to bring such breaches to an end, nor to recognize their legality nor render aid or assistance in their maintenance, conditional on negotiation.

It is apparent, therefore, that the question of the legality of Israel's continued presence in the OPT, as such, is important because it animates the continued ILS of Palestine in the UN's position in the post-1967 period. If Israel's occupation is legal, for the Organization to contemplate its end through negotiation would amount to a mere invocation of *Charter* principles regulating the peaceful resolution of disputes. In such case, the legitimacy of the Organization's call for negotiations could not be impugned on the basis that it runs counter to international law, despite any disparity in negotiating power of the parties. If, on the other hand, Israel's presence is or has become illegal, for the Organization to condition its end on negotiation would run counter to the relevant international law governing state responsibility. In such a case, any disparity in negotiating power could be abused by the more powerful party to consolidate its illegal actions under a cloak of legitimacy provided by the UN. This would only operate to marginalize the weaker party, thereby prolonging injustice and conflict indefinitely.

This is why, for instance, the UN has never suggested that the end of Israel's individual violations of IHL or IHRL in the OPT, including settlement and wall construction, be conditioned on negotiation.[92] It is also why the practice of the UN in respect of occupations in other contexts tends to demonstrate that where an occupation has been deemed illegal by the Organization, the end of that illegality has not been made contingent on negotiation, and *vice versa*. Before demonstrating the illegality of Israel's prolonged occupation of the OPT, it is important to briefly review some of this practice as an embodiment of the UN's purported commitment to upholding the international rule of law.

4.2 Relevant United Nations Practice

This section summarizes six cases of alien occupation as handled by the UN, juxtaposing the UN's management of the OPT against them. The first three (Namibia, Afghanistan, Kuwait) concern cases where the UN consistently declared the occupation to be illegal, whereas the second three (Western Sahara, Northern Cyprus, East Timor) concern situations where the UN remains/ed silent on the legality of the occupation. Each of these cases involve/d some violation by the occupying power of the *jus ad bellum*, its corollary prohibiting the acquisition of territory

[92] *See e.g.*, S/RES/2334, 23 December 2016. *See also* Bekker (2005), 560 ("Why should illegalities be subject to negotiations, which according to the ICJ are to proceed 'on the basis of international law'?").

through the threat or use of force, or the right of the occupied population to self-determination. Yet only in the former cases was the end of the occupation understood as an unconditional requirement consistent with the law of state responsibility, whereas in the latter cases the end of occupation was made contingent on negotiation, the occupation not being defined by the UN as an internationally wrongful act in itself.

Namibia. Upon the dissolution of the League of Nations in 1946, South Africa asserted that the mandate it held over Namibia (then South-West Africa) had lapsed and sought UN recognition for its annexation of the country. The General Assembly refused and submitted the matter to the ICJ in 1950, which ruled, *inter alia*, that South Africa continued to be the mandatory power with supervisory functions over the mandate to be exercised by the UN.[93] Following South Africa's refusal to adhere to the ruling, in 1966 the Assembly reaffirmed the right of the people of Namibia to self-determination and terminated the mandate for failure by South Africa to fulfill its obligations as mandatory.[94] Subsequently, both the Assembly and Security Council passed a series of resolutions which, *inter alia*, reaffirmed the right of the people of Namibia to self-determination, denounced South-Africa's "illegal occupation" of Namibia as a violation of the latter's territorial integrity, and/or affirmed the requirement that South Africa withdraw from Namibia "unconditionally and without delay".[95] This was followed by another Advisory Opinion of the ICJ in 1971, which affirmed that South Africa's continued presence in Namibia was illegal and it was under an "obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory".[96] The Court further ruled that UN Member States were under an "obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration".[97] South-African withdrawal eventually occurred in 1988, against the backdrop of the impending fall of its Apartheid regime at home. At no point did the UN suggest that the end of its illegal occupation of Namibia be made subject to negotiation.

[93] *South-West Africa*.
[94] A/RES/2145(XXI), 27 October 1966, paras. 1, 3.
[95] *See* A/RES/2248(S-V), 19 May 1967; A/RES/2325(XXII), 16 December 1967; A/RES/2372(XXII), 12 June 1968; A/RES/2403(XXIII), 16 December 1968; S/RES/246, 14 March 1968; S/RES/264, 20 March 1969; S/RES/276(1970), 30 January 1970.
[96] *Namibia*, para. 133.
[97] *Id*.

Afghanistan. Following a communist *coup d'état* in Kabul on 27 April 1978, Afghanistan became a satellite of the Soviet Union. As internal opposition mounted against the coup the following year, the USSR invaded the country ostensibly upon the invitation of an unelected expatriate Afghan resident in Moscow. With the Soviet intervention, the expatriate was installed as the head of state and the two countries promptly concluded a secret treaty regulating the terms of the USSR's "temporary" presence in Afghanistan.[98] An attempt to condemn the illegality of the Soviet invasion and call for its unconditional withdrawal in a draft resolution of the Security Council was blocked by a Soviet veto.[99] This lack of unanimity of the permanent five resulted in the Council deciding, in a procedural vote, to call an emergency special session of the General Assembly to consider the matter.[100] The Assembly subsequently passed resolution ES-6/2 in which it reaffirmed "that respect for the sovereignty, territorial integrity and political independence of every State is a fundamental principle" of the *UN Charter*, "any violation of which is contrary to its aims and purposes", strongly deplored the Soviet invasion of Afghanistan as being "inconsistent with that principle", and called for "the immediate, unconditional and total withdrawal of foreign troops from Afghanistan in order to enable its people to determine their own form of government and choose their economic, political, and social systems free from outside intervention."[101] Resolution ES-6/2 was affirmed on an annual basis by the Assembly until the USSR withdrew from Afghanistan in 1988 against the backdrop of impending collapse of the Soviet Union. At no point did the UN make withdrawal contingent on negotiation.

Kuwait: On 2 August 1990, Iraq invaded Kuwait, setting off a relatively rapid response by the UN. On the same day, the Security Council condemned the invasion and demanded that Iraq "withdraw immediately and unconditionally" from Kuwait.[102] On 6 August, acting under Chapter VII of the *Charter*, the Council indicated its determination "to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait", imposing mandatory economic sanctions against Iraq.[103] Two days later, an Iraqi declaration of its "comprehensive and eternal merger" with Kuwait was met with a Council decision affirming that the "annexation" of Kuwait "under any form and whatever pretext has no legal validity and is considered null and void."[104] The Council further

[98] Benvenisti (2012), 178.
[99] UN SCOR, 2189th Mtg., Draft Res. S/13729, 7 January 1980, S/13737/Add.1, 16 January 1980.
[100] S/RES/462, 9 January 1980. In procedural votes of the Council, permanent members may not exercise veto power.
[101] GA Res. ES-6/2, A/RES/ES-6/2, 14 January 1980.
[102] S/RES/660, 2 August 1990.
[103] S/RES/661, 6 August 1990.
[104] S/RES/662, 9 August 1990.

"called upon all states, international organizations and specialized agencies not to recognize the annexation and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation."[105] In the face of continued Iraqi non-compliance with its international legal obligations, the Council indicated that if Iraq failed to withdraw its forces from Kuwait by 15 January 1991, Member States were authorized to use "all means necessary" to end the illegal annexation of Kuwait.[106] Thereafter, the General Assembly condemned Iraq for its violation of IHL and IHRL in "occupied Kuwait".[107] Within hours of the passage of the Council-imposed deadline, a United States-led multinational coalition commenced military action to compel Iraqi withdrawal, which was effected on 28 February 1991. At no point did the UN make Iraqi withdrawal subject to negotiation.

Western Sahara. Following a report by the Committee of 24, in 1965 the General Assembly urged Spain, the colonial power in Western Sahara (then Ifni and Spanish Sahara), to take all necessary measures for the "liberation" of the territory and "to enter into negotiations on the problems relating to sovereignty" in relation to it.[108] In addition to the indigenous Sahrawi people, competing claims to sovereignty over the territory were advanced by both neighbouring Morocco and Mauritania. A 1975 Advisory Opinion of the ICJ affirmed the right of the population of Western Sahara to self-determination.[109] By agreement later that year, Spain handed administration over the territory to Morocco and Mauritania, who subsequently partitioned it between themselves. Morocco took control over the whole of it in 1979, when Mauritania withdrew on the strength of a peace agreement with the representatives of the Sahrawi people, the Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (POLISARIO). In line with the ICJ's Advisory Opinion, General Assembly and Security Council resolutions have repeatedly affirmed, both expressly and impliedly, the right of the Sahrawi people to self-determination.[110] The Assembly has also affirmed the fact that Morocco is in "continued occupation" of the territory,[111] and Morocco has illegally settled some 200-300,000 of its civilians in it who now form the majority of the population.[112] Nevertheless, at no point has the UN declared Morocco's occupation of Western Sahara to be illegal,[113] and it

[105] *Id*.
[106] S/RES/678, 29 November 1990.
[107] A/RES/45/170, 18 December 1990.
[108] A/RES/2072(XX), 16 December 1965.
[109] *Western Sahara*, para. 70.
[110] *See* A/RES/33/31A, 13 December 1978; A/RES/34/37, 21 November 1979; A/RES/35/19, 11 November 1980; S/RES/ 377, 22 October 1975; S/RES/380, 6 November 1975.
[111] A/RES/34/37, 21 November 1979.
[112] Mundy (2012).
[113] *But see* Benvenisti (2012), 171, where the author argues that Morocco's occupation of Western Sahara has been recognized as illegal, citing only academic opinion as opposed to official positions of the UN.

has conditioned the realization of the right of the Sahrawi people to self-determination upon negotiations and the holding of a referendum in agreement with both parties.[114] Over forty years on, the referendum has yet to take place, Morocco remains in occupation of Western Sahara and the indigenous people of that territory have yet to attain freedom and independence.

Northern Cyprus. On 20 July 1974, Turkey invaded Cyprus following years of inter-communal strife between the Greek Cypriot majority and the Turkish Cypriot minority, and a coup that brought a pro-Greek unification leadership to power. The tumult of the coup and the invasion that followed threatened to upend the delicate balance upon which the island's independence from British rule in 1960 was forged. With the northern third of the island under effective Turkish military control, and over two-hundred thousand Cypriots internally displaced – Turks taking refuge in the north, Greeks in the south – what pre-invasion communal links that did exist had been indelibly severed. Attempts by the Turkish Cypriots to establish a federal state system between 1975 and 1983 failed, and in November 1983 the community declared the establishment of the Turkish Republic of Northern Cyprus (TRNC). The response at the UN was swift, in so far as both the General Assembly and Security Council called upon all states to respect the sovereignty, independence and territorial integrity of the Republic of Cyprus, deplored the continued occupation of part of its territory by foreign forces, demanded the immediate withdrawal of those forces, and affirmed the inadmissibility of the acquisition of territory by force.[115] The Council was particularly firm in denouncing the establishment of the TRNC as "legally invalid" and called upon all states not to recognize or "in any way assist" it.[116] Notwithstanding these clear positions, at no point has the UN ever declared Turkey's occupation of Northern Cyprus to be illegal, but has instead repeatedly called upon the parties to negotiate its end under UN auspices.[117] Despite the good offices of multiple Secretaries-General, the occupation of Northern Cyprus continues.

East Timor. On 8 December 1975, Portugal vacated East Timor, a non-self-governing territory it had held since the sixteenth century, following a declaration of independence by the Frente Revolutionaria de Timor Leste Independente (FRETILIN). At approximately the same time, Indonesia invaded East Timor in an attempt to supress the emergence of indigenous

[114] *E.g.*, S/RES/1495, 31 July 2003; S/RES/2351, 28 April 2017.
[115] *See* A/RES/3212(XXIX), 1 November 1974; A/RES/3395(XXX), 20 November 1975; A/RES/33/15, 9 November 1978; A/RES/34/30, 20 November 1979; A/RES/37/253, 20 December 1982; S/RES/365, 13 December 1974; *and* S/RES/367, 12 March 1975.
[116] S/RES/541, 18 November 1983; S/RES/550, 11 May 1984.
[117] Each of the resolutions in *supra* note 115 and well as *id*. urge the parties to negotiate under UN auspices. *See also* A/RES/31/12, 12 November 1976 *and* A/RES/32/15, 9 November 1977.

independence under FRETILIN. Having established effective control over the territory, in July 1976 Indonesia declared East Timor to be its twenty-seventh province. Initially, the UN response was principled with the Security Council and the General Assembly deploring the Indonesian invasion, calling upon all states to respect East Timor's territorial integrity and the right of its people to self-determination, rejecting Indonesia's purported annexation and calling for it to withdraw without delay.[118] Notwithstanding these clear positions, neighbouring Australia recognized Indonesia's annexation of East Timor in February 1979. This lead to proceedings brought by Portugal before the ICJ in which the Court affirmed the right *erga omnes* of the people of East Timor to self-determination, though expressly refusing to rule on the legality of Indonesia's presence in the territory.[119] At the same time, UN action in both the Council and the Assembly shifted away from expressly calling for Indonesia's unconditional withdrawal, opting instead for UN mediated talks.[120] After years of violence in which hundreds of thousands of East Timorese lost their lives, Indonesia vacated East Timor in 1999 leading to a UN sponsored referendum that led to independence and full membership of the UN in 2002.[121] At no time throughout its engagement with the question of East Timor did the UN expressly recognize the illegality of Indonesia's presence in the territory.

The six case studies above demonstrate two points of interest relevant to the impact of the UN's fidelity to international law in perpetuating the ILS condition. First, there is a correlation between the UN's determination of the illegality of an occupant's presence in occupied territory and the fact that that presence was eventually brought to an end consistent with the law on state responsibility. To be clear, the emphasis here is not merely on the fact of the occupation having come to an end, as such, but rather that its end was consistent with the relevant international law on state responsibility thereby demonstrating a commitment of the UN to the maintenance of the international rule of law, the ostensible organizing framework of the UN system. In these three cases, tendencies toward consigning the occupied population to contingent ILS status were thereby mitigated. Second, in those cases where the UN has remained silent on the legality of an occupant's presence in occupied territory and made its end subject to negotiation, the possibility of a correlative rule by law character in UN action arises that arguably has made it more difficult to resolve conflict in accordance with international law. In such cases, the more powerful occupant has benefited from a measure of political legitimacy

[118] *See* S/RES/384, 22 December 1975; S/RES/389(1976), 22 April 1976; A/RES/3485(XXX), 12 December 1975; A/RES/31/53, 1 December 1976; A/RES/32/34, 28 November 1977; *and* A/RES/33/39, 13 December 1978.
[119] *East Timor*, paras. 17, 29, 33-35.
[120] *See* A/RES/35/27, 11 November 1980; A/RES/36/50, 24 November 1981; A/RES/37/30, 23 November 1982.
[121] S/RES/1414, 23 May 2002.

bestowed upon its prolonged violation of international legal norms, including those of a peremptory character, thereby affirming the contingent ILS condition of the weaker occupied population, undermining the international rule of law and rendering the prospects for peace in conformity with that law more distant.

The Occupied Palestinian Territory. Based on the record, the UN's handling of Israel's prolonged occupation of the OPT falls into the second batch of cases cited above, in so far as it has failed to *definitively* determine that presence to be illegal on the basis of its own UN record, and has made its end subject to negotiation. The need for definitiveness derives from the fact that the Organization's treatment of the issue has suffered from inconsistency and contradiction. While some UN organs began consideration of the matter with a principled approach, their positions have become diluted or legally confused over time. Still, other organs have remained silent on the matter altogether. The net result has been an undermining of the UN's stated commitment to the maintenance of the international rule of law in its policy positions on the question of Palestine. Concomitantly, Palestine's reliance on the unfulfilled promise of those positions has in turn resulted in the maintenance of its ILS condition.

Thus, in 1975 and 1976 the General Assembly condemned the occupation as a "violation of the Charter of the United Nations",[122] while from 1977 to 1981 it expressly qualified it as "illegal".[123] Between 1981 and 1991 the Assembly dropped this reference and reverted to condemning the occupation as a "violation of the Charter of the United Nations", albeit demanding Israel's "immediate, unconditional and total withdrawal".[124] Taken together, this practice would suggest the Assembly was of the view that at least by the eighth year of the occupation, Israel's presence in the OPT had become illegal for being in violation of the *jus ad bellum* provisions of the *Charter* and, accordingly, could not condition its end on negotiation in line with the law on state responsibility. The problem arises from the fact that from 1992 onward – just after the convening of the Madrid Peace Conference – all such references in Assembly resolutions simply vanish. From that point on, the Assembly has satisfied itself with an annual affirmation that "the occupation itself" constitutes a "grave", "gross" or "primary"

[122] A/RES/3414(XXX), 5 December 1975; A/RES/31/61, 9 December 1976.
[123] *See* A/RES/32/20, 25 November 1977; A/RES/33/29, 7 December 1978; A/RES/34/70, 6 December 1979; A/RES/35/122E, 11 December 1980; A/RES/35/207, 16 December 1980; *and* A/RES/36/147E, 16 December 1981, the latter of which references "illegal Israeli military occupation".
[124] *See* A/RES/36/147E, 16 December 1981; A/RES/36/226A, 17 December 1981; A/RES/37/123F, 20 December 1982; A/RES/38/180D, 19 December 1983; A/RES/39/146A, 14 December 1984; A/RES/40/168A, 16 December 1985; A/RES/41/162A, 4 December 1986; A/RES/42/209B, 11 December 1987; A/RES/43/54A, 6 December 1988; A/RES/44/40A, 4 December 1989; A/RES/45/83A, 13 December 1990; *and* A/RES/46/82A, 16 December 1991.

violation only of "human rights", while expressing the "hope" that the parties are able to bring it to an end through negotiation.[125] The only other organ of the UN that has qualified Israel's occupation as illegal as such has been ECOSOC. This has been done on an annual basis since 2010, while curiously also urging the international community to renew efforts aimed at the conclusion of a negotiated peace leading to the occupation's end, the requirements of the law on state responsibility notwithstanding.[126] For its part, the office of the Secretary-General has taken a more conservative line. When Kofi Annan called upon Israel to "end the illegal occupation" of the OPT in 2002, public criticism resulted in a quick reversal of course with a clarification that his reference to illegality was meant to be understood in relation to the IHL and IHRL violations of the occupying power, not the nature of the occupation as such. Notably, this clarification included an affirmation of the standard UN position on the need for negotiations between the parties based on the land-for-peace formula.[127] In the *Wall* advisory opinion, the ICJ failed to opine on the legality of Israel's presence in the OPT, although in a separate opinion Judge Elaraby affirmed "the illegality of the Israeli occupation regime itself".[128] The silence of the majority opinion on the legality of the occupation was made problematic by the fact of the Court's invocation of the need for negotiations as a means to resolve the conflict, as noted above. In addition, any value placed in Elaraby's illegality finding was undermined by his incorrect statement of law that occupation *per se* is always illegal.[129] The Security Council has never opined on the legality of Israel's presence in the OPT, an omission demonstrative of the lack of unanimity among Member States on the legality of Israel's use of force in 1967. Finally, the current UN Special Rapporteur on Human Rights in the Palestinian Territories Occupied since 1967, Michael Lynk, has very recently issued a report

[125] The reference to the occupation constituting a "grave", "gross" or "primary" violation of human rights dates from 1981. *See* A/RES/36/147C, 16 December 1981; A/RES/37/88C, 10 December 1982; A/RES/38/79, 15 December 1983; A/RES/39/95, 14 December 1984; A/RES/40/161D, 16 December 1985; A/RES/41/63D, 3 December 1986; A/RES/42/160D, 8 December 1987; A/RES/43/58, 6 December 1988; A/RES/44/48, 8 December 1989; A/RES/45/74, 11 December 1990; A/RES/46/47, 9 December 1991; A/RES/47/70A, 14 December 1992; A/RES/49/36, 9 December 1994; A/RES/50/29, 6 December 1995; A/RES/51/131, 13 December 1996; A/RES/52/64, 10 December 1997; A/RES/53/53, 3 December 1998; A/RES/54/76, 6 December 1999; A/RES/55/130, 8 December 2000; A/RES/56/59, 10 December 2001; A/RES/57/124, 11 December 2002; A/RES/58/96, 9 December 2003; A/RES/59/121, 10 December 2004; A/RES/60/104, 8 December 2005; A/RES/61/116, 14 December 2006; A/RES/62/106, 17 December 2007; A/RES/63/95, 5 December 2008; A/RES/64/91, 10 December 2009; A/RES/65/102, 10 December 2010; A/RES/66/76, 9 December 2011; 18 December 2012; A/RES/68/80, 11 December 2013; A/RES/69/90, 5 December 2014; A/RES/70/87, 9 December 2015; *and* A/RES/71/95, 6 December 2016.

[126] *See* E/RES/2010/6, 20 July 2010; E/RES/2011/18, 26 July 2011; E/RES/2012/25, 14 September 2012; E/RES/2013/17, 9 October 2013; E/RES/2014/1, 18 July 2014; E/RES/2015/13, 19 August 2015; E/RES/2016/4, 22 July 2016; *and* E/RES/2017/10, 4 August 2017.

[127] *See* UN GAOR, 57th Sess., 4488th Mtg. at 3, S/PV.4488, 12 March 2002; Fletcher (*New York Times*, 21 March 2002); Eckhard (*New York Times*, 23 March 2002).

[128] *Wall*, Separate Opinion of Judge Elaraby at 124.

[129] *See id*. where Elaraby opined: "Occupation, as an illegal and temporary situation, is at the heart of the whole problem". *See also infra* section 4.3.

identifying Israel as an illegal occupant in the OPT.[130] Nevertheless, given Lynk's status as an independent expert, his views cannot be taken as reflective of the official position of the UN Organization.

Therefore, between the incongruity and, at times, incoherence of the positions articulated by various organs of the UN, it is clear there is a need for the Organization to definitively confirm whether Israel's continued occupation of the OPT is legal. This is perhaps why the scant literature on the legality of Israel's occupation has largely neglected to discuss the above-noted practice of the UN, instead taking it as a given that the international community treats Israel as the lawful occupant of the OPT.[131] By definitively addressing the illegality of Israel's occupation regime, the UN would be able to complete its application of the international rule of law on the question of Palestine, going beyond the usual humanitarian/managerial IHL & IHRL paradigm. This, in turn, would allow the Palestinian people to mitigate the effects of the quasi-sovereign and contingent status upon which their ILS condition in the UN has been maintained in the post-1967 era.

4.3 The Illegality of Israel's Continued Presence in the OPT

Assessing the legality of Israel's prolonged occupation of the OPT requires a detailed consideration of three interconnected branches of international law, including as confirmed within the extensive UN practice on the OPT outlined above. These are the law governing the use of force (*jus ad bellum*), the law governing how force is used in armed conflict (*jus in bello* or IHL), and IHRL, including the law on self-determination of peoples. Because of the OPT's status as an occupied territory, the starting point must be the law of occupation. As will be demonstrated, this *lex specialis* is underpinned by all three of these branches.

As a component of IHL, the law of occupation governs the administration of enemy territory captured as a result of an armed conflict pending the withdrawal of the occupying power and the return of the occupied territory to its people, the lawful sovereign. Although it consists of general rules recognized as customary international law and therefore binding on all states, it is codified to a large extent in the 1949 Geneva Convention Relative to the Protection

[130] *Lynk Report*. At the request of the Special Rapporteur, the author advised him in the preparation of his report while conducting this research.
[131] *Lynk Report*, para. 18. *See also* Benvenisti (2012); Gross (2017); Finkelstein (2018); *and* Ben-Naftali, et al. (2005). The only exception to this is Ronen (2008), 216-221, who surveys the UN's position on the illegality of Israel's occupation based only on a sample of GA and ICJ practice, without going into that of other key organs of the Organization. The result is to give the false impression that the UN's position on the illegality of the occupation is more definitive than it actually is.

of Civilian Persons in Time of War[132] and the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, along with its annexed Regulations,[133] themselves widely regarded as codifications of custom. While Israel has not disputed the applicability of the *1907 Hague Regulations* to the OPT given its acceptance of its customary status, it holds that *Geneva Convention IV*, to which it is signatory without reservation, does not apply to the territory. This position has been rejected by all relevant organs of the UN, including the ICJ.[134]

In essence, the law of occupation delineates how the civilian (or "protected") population is to be treated while an occupying power maintains effective control over an occupied territory. The law also outlines the duties and corresponding rights of the occupying power in respect of its overall obligation to protect the civilian population and maintain public order in the territory. Although the law aims to balance the legitimate military interests of the occupying power with the interests of the civilian population, its overriding imperative is to protect the human and political rights of the latter when confronted with claims of military necessity of the former.[135]

There are two fundamental principles underlying the law of occupation. The first principle is that occupation is a temporary condition during which the occupying power's authority is limited merely to that of the *de facto* administrator of the territory in question. Such authority is to be exercised for the principle benefit of the protected population in the way of a fiduciary duty, although the occupying power is permitted in specific circumstances to take measures to protect its *legitimate* military interests in the occupied territory so long as the advantage gained is proportionate to the harm suffered by the protected population. Accordingly, an occupying power may not use its forces to further an objective unrelated to its military interests in the territory or is itself manifestly illegal in character (*i.e.* population transfer, including civilian settlement). Thus, an important corollary of the temporariness principle, is the proposition that under no circumstances may an occupying power exercise its authority under the law of occupation to further its domestic needs (*e.g.* acquisition of scarce natural resources), national political interests (*e.g.* territorial aggrandizement or the establishment of a puppet regime), or to impose regimes and systems of government on the protected population inimical to humanity as a whole (*e.g.* racial discrimination).[136] Because

[132] *Geneva Convention IV*.
[133] *1907 Hague Regulations*.
[134] *E.g.*, S/RES/2334, 23 December 2016; A/RES/70/88, 9 December 2015; E/RES/2017/10, 4 August 2017; *and Wall*, para. 101. For examination of the Israeli claim, *see* Imseis (2003), 92-100.
[135] Imseis, *id*., 66.
[136] Benvenisti (2012), 349, is of the view that where a "recalcitrant occupant" takes "measures aimed at the occupant's own interests", *viz.* those that go beyond the security of the military in the occupied territory, such interests should be viewed as "illegal and void".

occupation is inherently temporary, the occupying power is prohibited from altering the status of the occupied territory.[137] In addition, it is bound to permit and ensure the functioning of the pre-war administration of the territory, including the obligation to respect the laws in force in the territory, amending them only to the extent required to enable the occupying power to meet its obligations under the law.[138] Despite the temporariness principle, one lacuna in the prevailing law is the lack of a specific provision imposing a time limit on occupation.

The second principle is that under no circumstances does the fact of being in occupation of a territory entitle the occupant to sovereignty over that territory. This non-sovereign principle evolved from the antiquated law and practice governing the right of states to resort to force in their international relations, including as a means of acquiring territory. The right of conquest, as it was understood, has gradually given way to the notion of occupation: the idea that sovereign possession of territory occupied through force, whether defensive or aggressive, can never be definite until the restoration of sovereignty in the people of the territory is achieved through withdrawal of the occupying power. Until such time, occupation of territory thus acquired or maintained can only be regarded as provisional in nature. Contemporary state practice on occupations, exemplified by the American-led occupation of Iraq following the US invasion in 2003, underscores that the modern law of occupation defers to the principle of self-determination of peoples and the complementary idea that sovereignty lies in the people and not in its ousted government. The right of peoples to self-determination has been recognized by the ICJ as a right *erga omnes*.[139] As such, occupying powers are obligated to respect that right and do nothing to permanently frustrate its exercise.[140] In addition, the non-sovereign principle is an embodiment of the prohibition on the acquisition of territory through the threat or use of force, itself a corollary of the general prohibition of the threat or use of force as codified in article 2(4) of the *UN Charter*.[141] The Friendly Relations Declaration, which according to Ian Brownlie is "a useful epitome of the law and a form of state practice",[142] makes clear that "[t]he

[137] Imseis (2003), 91. Although a principle of customary international law, this proposition finds expression in *1977 API*, art. 4, which provides that "[n]either the occupation of a territory nor the application of the Conventions and this Protocol shall effect the legal status of the territory in question".
[138] These general propositions are given expression in a number of treaty provisions codifying both the Hague and Geneva law. Article 43 of the *1907 Hague Regulations*, a first point of reference, provides that the occupant "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Likewise, Article 64 of *Geneva Convention IV* states that "[t]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention".
[139] *East Timor*, para. 29; *Wall*, para. 88; *and Namibia*, para. 12.
[140] Benvenisti (2012), 198.
[141] *Wall*, para. 87; S/RES/242, 22 November 1967.
[142] Brownlie (2003), 705.

territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force" and that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal".[143] This peremptory norm is reflected in a host of other norms under public international law relevant to the situation in the OPT, including in both the law of occupation[144] and international criminal law.[145]

The significance of the abovementioned fundamental principles cannot be overstated. They are rooted in the protection of at least three *jus cogens* norms of international law of *erga omnes* character, derogation from which is not permitted: the prohibition on the acquisition of territory through the threat or use of force, the obligation of states to respect the right of peoples to self-determination, and the obligation of states to refrain from imposing regimes of alien subjugation, domination, and exploitation inimical to humankind, including racial discrimination.[146] As interdependent concepts, they constitute the pith and substance of the modern law of occupation and inform virtually every aspect of that normative regime as exists in both treaty and custom.

Because the humanitarian imperative underpinning IHL contemplates the existence of a legal regime governing military occupation, it necessarily follows that occupation as such does not *ipso facto* represent an illegal state of affairs. That said, the fundamental distinction between the *jus ad bellum* and the *jus in bello* has rendered it generally accepted among scholars that occupations resulting from the impermissible use of force (*i.e.* aggression) are necessarily

[143] *Friendly Relations Declaration*, first principle, para. 10.
[144] *Geneva Convention IV* provides for the continued application of the Convention in situations of purported annexation of occupied territory by an occupant (art. 47), and classifies as a grave breach the extensive appropriation of property not justified by military necessity and carried out unlawfully and wantonly (art. 147).
[145] The *Rome Statute* prohibits the extensive appropriation of property not justified by military necessity and carried out unlawfully and wantonly when committed as part of a plan or policy or as part of a large-scale commission of such crimes (art. 8(2)(a)(iv)).
[146] Crawford (2005), 188, 246-247. Of note, Crawford's commentary on the *ASRIWA* was published in 2002 and does not expressly identify the inadmissibility of the acquisition of territory through the threat or use of force as a *jus cogens*, but rather only its parent principle, the general prohibition on the threat or use of force. Nevertheless, as Orakhelashvili has argued, "once the exercise of sovereign authority entails, or is consequential upon, a breach of a peremptory norm, the acts performed become subject to the overriding effect of *jus cogens*. Not only are they illegal – which would be the case for every wrongful act – but they are also void", resulting in what he calls "a jus cogens nullity". *See* Orakhelashvilli (2006), 216, 218-223. But it is doubtful whether a *jus cogens* nullity should be understood as a separate sub-category of *jus cogens* norms, *per se*. The better view would be that there is little, if any, substantive legal difference or effect between the two, particularly because both are rooted in the identical purpose of safeguarding the most fundamental value of the international state system: respect for the territorial integrity and political independence of states. As a matter of state practice, this is presumably the rationale behind the virtually indistinguishable treatment these two precepts have been afforded on the international plane, particularly in resolutions of the Security Council and the General Assembly, including the *Friendly Relations Declaration*. In its 2004 written statement furnished to the ICJ in the *Wall* advisory opinion, Palestine submitted that the prohibition on the acquisition of territory through force amounted to a *jus cogens* norm. It is of note that Crawford, now a Judge on the ICJ, was then among counsel of record for Palestine. *See Wall, Palestine Written Statement*.

illegal,[147] while occupations resulting from a lawful use of force under the *UN Charter* are legal, *per se*, notwithstanding subsequent transgressions by the occupying power of the *jus in bello* during the occupation.[148] The legality of occupations has therefore traditionally only ever been conceived against these two separate paradigms; the *jus ad bellum* understood as providing the normative framework for assessing the legitimacy of the original act giving rise to the occupation, the *jus in bello* perceived as providing a valuable normative framework within which to measure the behaviour of the occupant during an occupation, but inappropriate for, if incapable of, assessing the legality of the particular regime of occupation itself.[149] This traditional view was affirmed, in part, by Judge Koojimans in *Armed Activities*, where he opined *in obiter dicta* that: "[i]t goes without saying that the outcome of an unlawful act is tainted with illegality. The occupation resulting from an illegal use of force betrays its origin but the rules governing its regime do not characterize the origin of the result as lawful or unlawful".[150]

The problem with this traditional bifurcation is that it fails to consider a third possibility, a failure which is found at the heart of the UN's current position on the question of Palestine and one that continues to inform the Palestine's ILS condition in the system. Namely, where an initially lawful occupant engages in gross or systematic violations of international law involving breaches of obligations of a *jus cogens* and *erga omnes* character, by what rationale can it be said that the regime of force maintaining such situation remains legal and therefore legitimate? Only a few writers have touched upon this question, and the implications of the collapse of the fundamental distinction between *jus ad bellum* and *jus in bello* inherent in it, particularly though not exclusively in situations of prolonged occupation. Benvenisti has argued that "the law of occupation ought not to condone an occupant that holds out in bad faith, using its control of the occupied territory as leverage", as such a situation would be "no different from outright annexation" and "aggression".[151] Ben-Naftali, Gross and Michaeli have proposed to read into the law of occupation the notion of "reasonable time", with the reasonableness of an occupation's duration measured by the "nature, purpose and circumstances" of the actions

[147] Benvenisti (2012), 140. *See also Friendly Relations Declaration*, first principle, para. 10 ("[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter").
[148] *But see* Dinstein (2009), 2, who argues that it is a "myth surrounding the legal regime of belligerent occupation that it is, or becomes in time, inherently illegal under international law".
[149] This is a view shared by Ben-Naftali, et al. (2005), 552, who ascribe the "virtual immunity" enjoyed by Israel from any critical discussion of the legality of its occupation of the Occupied Palestinian Territory (OPT) to "the perception of the occupation as a factual, rather than a normative, phenomenon. Thus posited, the fact of occupation generates normative results – the application of the international laws of occupation – but in itself does not seem to be a part of that, or any other, normative order".
[150] *Armed Activities*, para. 60.
[151] Benvenisti (2012), 349.

undertaken by an occupant to maintain it in place.[152] Ronen posits that the illegality of an occupation is established where a *jus cogens* norm is violated, so long as that norm relates to territorial status.[153] Finkelstein has argued that failure of an occupant to negotiate the end of the occupation in good faith is enough to taint it with illegality.[154] Finally, Lynk has argued that occupants "will cross the red line into illegality if they breach their fundamental obligations as alien rulers", namely respect for the non-annexation of occupied territory, ensuring the temporariness of their presence, and governing the territory in the best interests of the protected population in good faith.[155]

Collectively, these writers draw upon principles/themes of temporariness, trusteeship and good faith, and all deal to varying degrees with the two fundamental principles of occupation law as informed by the content of *most* of the *jus cogens* norms in issue. However, there are at least four gaps in the body of this work. First, of the three legal tests that are proposed, one (Ben-Naftali et al.) is rooted in the realm of *lex ferenda*, focused as it is on rectifying the lacuna in the law as to time limits on occupation by proposing a wholly new legal test as yet unrecognized in international law. Another (Ronen) circumscribes her *jus cogens*-based test to those norms that relate to territorial status. Finally, another (Lynk) unfortunately does not to speak to the very peremptory character of the norms underpinning his otherwise well thought out approach. Second, as noted above, all but one of these authors fail to deal with the important, though confused, UN practice that at least for a time already declared Israel's occupation to be illegal, as such, while the one that does (Ronen) fails to account for UN practice beyond a portion of that of the General Assembly and the ICJ. Third, neither of the latter two contributions (Finkelstein; Lynk) have taken into account the upgraded status of the State of Palestine at the UN, which is curious in light of the elevated consequences that status portends in view of the cardinal principle protecting the territorial integrity of *states* codified in article 2(4) of the *Charter*. Fourth, with the exception of one author, none of this work deals to any great extent with the legal consequences of Israel's illegal occupation under the law of state responsibility; the one that does (Ronen) fails to examine what is perhaps *the* fundamental problem of the UN's practice in this area, namely that the end of Israel's occupation should be contingent on negotiation.

[152] Ben-Naftali, et al. (2005), 599.
[153] Ronen (2008), 201.
[154] Finkelstein (2018), 46.
[155] *Lynk Report*.

In view of the above, and informed by the need to read subaltern interests fully into relevant international law so as to mitigate against the ILS condition, it is submitted that the most plain and efficient test to assess the legality of any occupation not otherwise impugned by an initial violation of the *jus ad bellum* is to focus on whether the occupant in question is systematically violating *any* of the three key *jus cogens* norms underpinning the law of occupation: (i) the prohibition on the acquisition of territory through the threat or use of force; (ii) the obligation to the respect the right of peoples to self-determination; and/or (iii) the obligation to refrain from imposing regimes of alien subjugation, domination, and exploitation inimical to humankind, including racial discrimination. The benefit of using *jus cogens* norms as the standard derives from the fact that these norms reflect prevailing law (*lex lata*) and form part of the constitutional bedrock upon which the post-WWII international order, both legal and political, is based. Where the acts or omissions of the UN run counter to *jus cogens* norms of an *erga omnes* character, the corrosive effect on the international rule of law will be pronounced, with negative implications for both the authority of the Organization and international law as a whole. Indeed, where such a corrosion exists, as is the case with the UN's management of the OPT post-1967, the contingency of subaltern peoples who have been made to rely on the promise of international law and organization can only be mitigated through maintaining respect for these *jus cogens* norms.

The legality of Israel's occupation of the OPT may be impugned on two grounds. The first of these is that it may be regarded as illegal *ab initio*, being the result of the impermissible use of force in 1967. Without wholly discounting its merits, the problem with this argument for the purposes of this research is that the historical record as established in UN practice does not lend itself to a finding that Israel's invocation of force in 1967 was illegal, as such. Between the silence of the Security Council on the issue in 1967, and the subsequent confusion in General Assembly resolutions in the years that followed, it is difficult to point to any UN practice sufficient to ground such a claim in either fact or law.[156] The second ground is that even if the occupation was not illegal *ab initio*, it has been rendered illegal over time for being in violation of the *jus cogens* norms outlined above. This ground is easier to establish on the basis of the UN record, which demonstrates a clear nexus between Israeli contraventions of IHL and IHRL and Israel's systematic violation of the relevant *jus cogens* norms in play over time.

[156] *See* S/RES/242, 22 November 1967. For GA resolutions, *see supra* notes 122-125. Leaving aside the position of the UN, as such, for an argument that Israeli actions were objectively illegal in 1967, *see* Quigley (2013).

In the section below, and relying primarily on the UN record, we briefly assess various Israeli actions in the OPT against each of these norms in turn. As we do, it is important to keep in mind that of all of Israel's relevant actions, the one that almost singularly constitutes the proximate cause of its violations of these norms is its policy of introducing civilian settlers into the OPT in violation of *Geneva Convention IV*,[157] the *Rome Statute*,[158] and customary international law.[159]

Prohibition on the acquisition of territory through the threat or use of force. The question of whether or not occupied territory may be considered "annexed" is a factual one that does not necessarily require formal declarations of annexation to be satisfied under international law.[160] Since 1967, Israel has undertaken actions that have effectively annexed a substantial portion of the OPT through a series of legislative, administrative and other acts in contravention of the peremptory norm prohibiting the acquisition of territory through the threat or use of force.

Following the 1967 war, Israel extended its municipal law and jurisdiction to occupied East Jerusalem, unilaterally expanding the city's 6.5km^2 area to encompass 71km^2 of expropriated Palestinian land in the surrounding areas of the West Bank.[161] In response, the General Assembly declared "all measures taken by Israel to change the status of the city" to be "invalid",[162] while the Security Council determined that "all legislative and administrative actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem, are invalid and cannot change that status."[163] These resolutions both affirmed the inadmissibility of the acquisition of territory by force. After the passage of Israel's 1980 'basic law' declaring Jerusalem to be its "complete and united" capital, the Security Council once again determined that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent 'basic law' on Jerusalem, are null and void and must be rescinded forthwith." It further decided "not to recognize the basic law, and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem," and called upon "all Member States to accept this decision".[164] Despite Israel's agreement in the Oslo accords from initiating "any step that will

[157] *Geneva Convention IV*, art. 49.
[158] *Rome Statute*, art. 8(2)(b)(viii).
[159] Henckaerts & Doswald-Beck (2005), 462.
[160] *See* Brownlie (2003), 140.
[161] Imseis (2000), 1043-1047.
[162] A/RES/2253(ES-V), 4 July 1967.
[163] S/RES/252, 21 May 1968. *See also* S/RES/267, 3 July 1969; S/RES/298, 25 September 1971.
[164] S/RES/478, 20 August 1980. *See also* S/RES/476, 30 June 1980.

change the status of the West Bank and Gaza Strip" during the interim phase of negotiations with the PLO,[165] since 1993 Israeli polices designed to alter the status of Jerusalem have been pursued at a continually aggressive pace, with thousands of Palestinians being evicted from the city while the population of Israeli settlers has grown exponentially. In response, the General Assembly and the Security Council have continued to denounce Israel's purported annexation of East Jerusalem as "illegal", "null and void", and having "no validity whatsoever".[166]

Beyond Jerusalem, Israeli actions in the rest of the OPT have operated to effectuate its annexation in all but name. Key among these has been the unilateral expropriation of large segments of the territory for the establishment of Israeli settlements and related infrastructure (by-pass roads, electrical and sewage grids, tunnels, military checkpoints, etc.), as well the construction of the wall and its associated regime in the West Bank, including East Jerusalem. Far from being a secret, as noted by a 2012 UN Human Rights Council International Fact-Finding Mission on Settlements, each successive Israeli government since 1967 has "openly lead and directly participated in the planning, construction, development, consolidation and/or encouragement of settlements" in the OPT through a variety of political, military and economic means.[167] Whereas between 1967 and 1973, the number of Jewish settlers in the West Bank stood at just over 1,500,[168] by 1987 their number in the whole of the OPT, including East Jerusalem, had grown to 169,000.[169] Since the commencement of the Oslo process in 1993 – with its proviso that nothing be done by either party to prejudge the outcome of negotiations – the settler population has over tripled, with the UN Fact-Finding Mission on Settlements estimating its figure to be 520,000 as at 2012 (200,000 in East Jerusalem, 300,000 in rest of OPT),[170] and the Israeli Prime Minister himself putting the figure at 650,000 in 2011.[171] This means that today between 19 and 23 percent of the population of the West Bank, including East Jerusalem, are settlers.[172] According to the UN Fact-Finding Mission on Settlements, the growth rate of settlers in the OPT between 2002-2012 was almost triple that of the yearly average in Israel.[173] In total, OCHA reports that Israel has allocated over 43% of the West Bank

[165] *Interim Agreement*, art. 31(7).
[166] *E.g.*, S/RES/2334, 23 December 2016; A/RES/71/25, 30 December 2016; A/RES/70/16, 24 November 2015; A/RES/69/24, 25 November 2014; A/RES/68/16, 26 November 2013.
[167] *UN Fact-Finding Mission on Settlements*, paras. 20-24. This report was endorsed by the UN Human Rights Council in A/HRC/RES/22/29, 15 April 2013.
[168] Shehadeh (1997), 3.
[169] *UN OCHA Settlements Report, July 2007*, 20.
[170] *UN Fact-Finding Mission on Settlements*, para 28.
[171] *SG's Settlements Report*, para. 7.
[172] Based on the 520,000 figure, the Secretary-General has reported that "Israeli settlers now represent approximately 19 percent of the overall population of the West Bank." *Id*., para. 12.
[173] The mission cited the Israeli Central Bureau of Statistics for this figure. *See UN Fact-Finding Mission on Settlements*, para. 28.

to local or regional 'settlement councils'.[174] These councils are located predominately within 'Area C' of the territory, which comprises over 60% of the total area of the West Bank and within which Israel exercises exclusive control, including over planning and construction.[175]

In 2004, the ICJ found the wall, along with its associated regime, being constructed by Israel in the OPT to be contrary to international law as it "gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements".[176] The Court also found that the wall and its associated regime give rise to "a risk of further alterations to the demographic composition" of the territory "in as much as it is contributing…to the departure of Palestinian populations from certain areas."[177] It further noted that the wall would incorporate, in the area between it and the 1949 armistice line, "more than 16 per cent of the territory of the West Bank" and "[a]round 80 per cent of the settlers" in the OPT. The Court accordingly considered "that the construction of the wall and its associated regime create a 'fait accompli' on the ground that could well become permanent", in which case "it would be tantamount to *de facto* annexation."[178] Some 14 years since this opinion was issued, Israel has maintained and expanded the wall and its associated regime with its attendant effects of annexation of huge swathes of the OPT, as foretold by the ICJ.

The Right of Peoples to Self-Determination. Israel's violation of the right of the Palestinian people to self-determination in the OPT has equally been driven by its settlement policy. In his commentary on *Geneva Convention IV*, Jean Pictet explains that the prohibition on civilian settlement by an occupying power was intended to prevent the introduction of demographic changes in occupied territory "for political and racial reasons", and to frustrate attempts "to colonize" such territory.[179] Yet, according to the UN record, that is precisely what has transpired in the OPT over the past 50 years. As noted by the UN Fact-Finding Mission on Settlements, Israeli governmental authorities in East Jerusalem have openly pursued a policy of "demographic balance" in the city, most recently incorporated into the "Jerusalem 2000" master-plan expressly envisioning a ratio of Jews to Arabs of no worse than 60/40 in favour of the former.[180] The Fact-Finding Mission has further noted that Israel's settlement of the rest of the OPT has largely followed a series of 'master plans' drawn up by governmental or quasi-

[174] As reported in *id*., para. 37.
[175] *Lynk Report*, para.46.
[176] *Wall*, para. 122.
[177] *Id*.
[178] *Id*., para. 121.
[179] Pictet (1958), 283.
[180] *UN Fact-Finding Mission on Settlements*, para. 25; Imseis (2000), 1054.

governmental bodies, including the Allon Plan (1967), the Drobles Plan (1978), the Sharon Plan (1981) and the Hundred Thousand Plan (1983).[181] The principal aim of these plans has been to use civilian settlement as means to simultaneously colonize the OPT and forestall the emergence of an independent Palestinian state in it. Thus, in the words of the Drobles Plan:

> "The best and most effective way of removing every shadow of doubt about our intention to hold on to Judea and Samaria [*viz*. the OPT] forever is by speeding up the settlement momentum in these territories. The purpose of settling the areas between and around the centers occupied by the minorities [*viz*. the Palestinian majority] is to reduce to the minimum the danger of an additional Arab state being established in these territories. Being cut off by Jewish settlements, the minority population will find it difficult to form a territorial and political continuity."[182]

In 2012, the Secretary-General reported that because self-determination of the Palestinian people requires a territorial state in the OPT, "the current configuration and attribution of control over the land", dominated by Israel and its settlement policy, "severely impedes the possibility of the Palestinian people expressing their right to self-determination." Confirming the success of the strategy outlined by Drobles, the Secretary-General noted that, "because the settlements are scattered across the West Bank, including East Jerusalem, the territory of the Palestinian people is divided into enclaves with little or no territorial contiguity," with a resulting "fragmentation" that "undermines the possibility of the Palestinian people realizing their right to self-determination through the creation of a viable state."[183] He further noted that given the "settlements and the associated restrictions on access of Palestinians to large portions of the West Bank", the Palestinian people are impeded from exercising permanent control over their natural resources. Most vitally, this includes water, "which Palestinians have virtually no control over", and 86% of the Jordan Valley and Dead Sea area, which are "under the *de facto* jurisdiction of the regional councils of the settlements and which prohibit Palestinian use."[184] Similar views were articulated by the UN Fact-Finding Mission on Settlements, which echoed the Secretary-General's concern over the threat the settlements pose to the "demographic and territorial presence of the Palestinian people" in the OPT. It took issue with the fragmentation of the Palestinian territorial sphere, highlighting in particular the bisecting effect on the West Bank of the Ma'ale Adumim settlement, as well as the impediments posed by the settlements as a whole on Palestinian access to and control over their natural resources. It accordingly found

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[181] *UN Fact-Finding Mission on Settlements*, para. 23.
[182] Thus, in the words of the Drobles Plan: "The best and most effective way of removing every shadow of doubt about our intention to hold on to Judea and Samaria [*viz*. the OPT] forever is by speeding up the settlement momentum in these territories. The purpose of settling the areas between and around the centers occupied by the minorities [*viz*. the Palestinian majority] is to reduce to the minimum the danger of an additional Arab state being established in these territories. Being cut off by Jewish settlements, the minority population will find it difficult to form a territorial and political continuity." *See* Drobles, *Master Plan for the Development of Settlement in Judea and Samaria, as quoted in* Matar, "Exploitation of Land and Water Resources", *in* Playfair (1992), 446.
[183] *SG's Settlements Report*, para. 11.
[184] *Id*. paras. 11, 13.

that the right of the Palestinian people to self-determination "is clearly being violated through the existence and ongoing expansion of the settlements."[185]

These observations should be read in the context of the ICJ's 2004 finding that Israel is obligated to respect the right of the Palestinian people to self-determination in the OPT, and that "all states" are independently obligated "to see to that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end."[186] For their part, on the many occasions the General Assembly and the Security Council have affirmed the right of the Palestinian people to self-determination, those resolutions have often been accompanied by statements stressing that the settlements constitute an "obstacle" to the achievement of peace through a two-state solution,[187] thereby implying a nexus between the settlements and a violation of the Palestinian people's self-determination right. At any rate, both the Council and the Assembly have passed resolutions recalling the ICJ's *Wall* advisory opinion, with the Assembly demanding that Israel "comply with its legal obligations" as affirmed by the Court.[188]

Contrary to popular belief, at no point has any Israeli government formally agreed to the establishment of a Palestinian state in the OPT. This assertion has become commonplace, yet in return for the PLO's recognition of the "right of the State of Israel to exist in peace and security", the only recognition made by Israel at Oslo was of "the PLO as the representative of the Palestinian people."[189] While it is true that recognition of the "Palestinian people" perforce implies a right in that people to self-determination, Israel has consistently adopted an emaciated view of the kind of "sovereignty" it would offer the Palestinians, if at all. Thus, it is common to hear that the Palestinian "state" that Israel would accept would be deprived of a military, control over its air space, territorial sea, borders, the Jordan valley, and be territorially non-contiguous – akin, in many respects to the Bantustan model of Apartheid South Africa.[190] Doubtless, this would fall considerably short of the attributes of statehood as universally accepted under international law.[191] In this respect, it is instructive to find that the ruling Likud

[185] *UN Fact-Finding Mission on Settlements*, paras. 33, 34, 36, 38.
[186] *Wall*, paras. 122, 149, 155, 159.
[187] *E.g.*, S/RES/2334, 23 December 2016; A/RES/70/89, 15 December 2015; A/RES/69/92, 5 December 2014; A/RES/68/82, 11 December 2014; *and* A/RES/67/120, 18 December 2012.
[188] *Id.*
[189] Watson (2000), 315-316.
[190] Le More (2008), 170. *See also* Horowitz (*Times of Israel*, 13 July 2014), where Israel's Prime Minister was quoted as saying "I think the Israeli people understand now what I always say: that there cannot be a situation, under any agreement, in which we relinquish security control of the territory west of the River Jordan."
[191] *Montevideo Convention*, art. 1. The UN rejected the Bantustan model of 'statehood' resoundingly. *See* S/RES/402, 22 December 1976 *and* A/RES/31/6A, 26 October 1976.

party in Israel has always officially rejected the establishment of a Palestinian state west of the Jordan river,[192] and that Israel's current Prime Minister, Likud leader Benjamin Netanyahu, was elected in 2009 on a promise that there would be "no Palestinian state" established in the OPT "on my watch".[193] This was most recently reflected in a series of 2017 public statements by Netanyahu that no settlement will be uprooted in the West Bank, that Israel will remain in the territory "forever",[194] and that insofar as the notion of a Palestinian state is concerned, "it's time we reassessed whether the modern model we have of sovereignty, and unfettered sovereignty, is applicable everywhere in the world."[195] Far from being alone, Netanyahu's views are widely shared among the Israeli political and governing elite.[196]

Prohibition on Racial Discrimination. Finally, Israel's settlement enterprise has introduced a system of government in the OPT that, according to the UN record, is systematically engaged in racial discrimination. More than a series of individual acts of racial discrimination, this system has developed into an overall governing regime. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which Israel is signatory without reservation, defines "racial discrimination" as:

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".[197]

Like its position on the non-applicability of *Geneva Convention IV*, Israel's view that international human rights law, including ICERD, does not apply to the OPT has been rejected by the UN, including the ICJ.[198] The racial discrimination embodied in the regime the occupying power has erected through the imposition of exclusively Jewish settlements in the OPT, both in their service and for their expansion, is systematic and widespread.

Among the transgressions of ICERD the settlements have given rise to is the violation of the right to equal treatment before the law.[199] This is the result of Israel's maintenance of separate civilian and military legal systems operating concurrently in the OPT, the applicability

[192] Weiler (*Informed Comment*, 4 August 2014).
[193] "Netanyahu: No Palestinian State on My Watch" (*Times of Israel*, 16 March 2015).
[194] Berger (*Ha'aretz*, 29 August 2017).
[195] Pfeffer (*Ha'aretz*, 3 November 2017).
[196] Foundation for Middle East Peace, "In Their Own Words: Israeli Officials on a Palestinian State", 29 May 2015, http://fmep.org/blog/2015/05/in-their-own-words-israeli-officials-oppose-palestinian-state/.
[197] *ICERD*, art. 1.
[198] *Wall*, para. 114.
[199] *ICERD*, art. 5.

of which is determined solely by the national or ethnic origin of the individual concerned, effectively dividing the population along racial lines. Thus, any person in the OPT who is Jewish, whether a citizen of Israel or not,[200] is governed by Israeli municipal law, extraterritorially applied to them *in personam* and to the occupied lands upon which they illegally reside or travel. On the other hand, Palestinians in the OPT are governed by Israeli military law, which is much more draconian in both scope and effect, covering both civil and criminal matters.[201] Another violation is the right to security of the person and protection by the state against violence or bodily harm, whether inflicted by government or individuals.[202] Since 1967, thousands of Palestinians have been killed or injured by Israeli security forces for protesting the occupation,[203] including through legally sanctioned extrajudicial execution[204] and torture,[205] none of which methods are routinely used against Israeli settlers. In addition, Israeli settlers – who, unlike Palestinians, are permitted to own and bear arms – have regularly committed violence against the person and property of Palestinians with an impunity rooted in what the UN Fact-Finding Mission on Settlements calls "institutionalized discrimination" that is aimed at "forcing Palestinians off their land."[206] Yet another violation concerns the right to universal and equal suffrage.[207] While the extrajudicial application of Israeli municipal law to settlers in the OPT provides for their right to vote, participate in and stand for elections, and to otherwise take part in public affairs and benefit from equal access to public services under the Israeli political system, none of these rights are extended on an equal basis to the Palestinians in the OPT. This abject disenfranchisement stands out owing to the fact that, despite the existence of the Palestinian Authority – a body created through the Oslo process meant to temporarily exercise local and limited 'self-autonomy' in Palestinian enclaves in the OPT pending conclusion of peace – the Israeli government, in effect, exercises exclusive control over the territory in which these two populations reside and within which it remains the occupying power.[208] Another violation is the right to freedom of movement.[209] With Palestinian space having been fragmented into numerous discontiguous enclaves by Israeli settlements, settler-only by-pass roads, hundreds of checkpoints and other similar roadblocks, the wall and

[200] As the self-declared state of the 'Jewish people', Israeli law only recognizes Jewish, as opposed to Israeli, nationality. *See George Rafael Tamarin* v. *State of Israel*, 20 January 1972, *in Decisions of the Supreme Court of Israel* (Supreme Court, 1972) Vol. 25, pt. 1, at 197 (in Hebrew) *as quoted in* Tilley (2012), 119. On the application of Israeli municipal law to Jewish non-citizens of Israel in the OPT, *see* Tilley (2012), 67.
[201] Tilley (2012), 64-77.
[202] *ICERD*, art. 5.
[203] Tilley (2012), 131.
[204] *Id*., 132-133; Gross (2017), 243-244.
[205] Imseis (2001); *B'Tselem Torture Report, May 2007.*
[206] *UN Fact-Finding Mission on Settlements*, paras. 50-57, 107.
[207] *ICERD*, art. 5.
[208] *Wall*, para. 78. S/RES/2334, 23 December 2016.
[209] *ICERD*, art. 5.

other closed military zones, the only way they are able to move into and out of these enclaves, or into and out of occupied East Jerusalem, is with permits issued by the Israeli military. Only a very small minority of Palestinians obtain such permits, which are spatially and temporarily limited and are notoriously difficult and costly to obtain. No such administrative restrictions apply to settlers under the applicable law.[210] Finally, another violation is the right to leave and to return to one's country.[211] Leaving aside the Palestine refugees forcibly exiled as a result of the 1948 war, approximately 300,000 Palestinians either fled or were expelled from the OPT when Israel conquered it in 1967.[212] In addition, approximately 90,000 were abroad during the hostilities and therefore rendered refugees *sur place*.[213] Despite the Security Council having called upon Israel to facilitate the return of these people to the OPT, to this day Israel has refused.[214] In contrast, by operation of Israel's Law of Return (1950), any person who is of Jewish heritage is automatically entitled to immigrate to Israel and take up residence in the OPT, irrespective of where they were born.[215] These are but a representative sample of the systematic violations of the ICERD that arise from the settler colonial regime Israel has imposed on the OPT since 1967.[216]

For these and other related reasons, in its concluding observations on Israel's 2012 periodic review under ICERD, the UN Committee on the Elimination of Racial Discrimination reiterated its view that Israeli settlements in the OPT "are an obstacle to the enjoyment of human rights by the whole population, without distinction as to national or ethnic origin."[217] It expressed its concern with Israel's refusal to apply ICERD in the OPT and the fact that Israeli law does not provide for equality guarantees, including the prohibition on racial discrimination.[218] It continued:

> "The Committee is extremely concerned at the consequences of policies and practices which amount to *de facto* segregation, such as the implementation by the State party in the Occupied Palestinian Territory of two entirely separate legal systems and sets of institutions for Jewish communities grouped in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand. The Committee is particularly appalled at the hermetic character of the separation of two groups, who live on the same territory but do not enjoy either equal use of roads and infrastructure or equal access to basic services and water resources. Such separation is concretized by the implementation of a complex combination of

[210] Tilley (2012), 151-152.
[211] *ICERD*, art. 5.
[212] *UNRWA Annual Report, 1966-67*, 1.
[213] Tilley (2012), 163.
[214] S/RES/237, 14 June 1967.
[215] *Law of Return* (1950).
[216] Other violations of *ICERD* include the rights to: nationality, property, freedom of thought, conscience and religion, peaceful assembly and association, work and the formation of trade unions, housing, public health and education (art. 5). Of particular concern will be the impact of the *Basic Law: Nation-State of the Jewish People*, passed by the Knesset on 19 July 2018.
[217] *ICERD Concluding Observations*, para. 4.
[218] *Id*., para. 13.

> movement restrictions consisting of the Wall, roadblocks, the obligation to use separate roads and a permit regime that only impacts the Palestinian population (art. 3 of the Convention)."[219]

These findings were echoed by the UN Fact-Finding Mission on Settlements, which decried the "[t]he legal regime of segregation" operating in the OPT for having "enabled the establishment and consolidation of the settlements through the creation of a privileged legal space for settlements and settlers." In its view, this has resulted "in daily violations of a multitude of the human rights of the Palestinians" in the OPT, "including, incontrovertibly, violating their rights to non-discrimination, equality before the law and equal protection of the law."[220]

The racial discrimination inherent in Israel's settlement regime in the OPT has given rise to concerns that the occupying power is also engaged in the crime of apartheid, as proscribed in the International Convention on the Suppression and Punishment of the Crime of Apartheid.[221] Although Israel is not a signatory to the *Apartheid Convention*, the convention itself is declarative of customary international law and is therefore binding on all states. The *Apartheid Convention* defines the crime of apartheid as involving any number of "inhumane acts" – including those proscribed by the ICERD above, as well as "measures designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups"[222] – when these acts are "committed for the purpose of establishing and maintaining domination by one racial group of persons over another racial group of persons and systematically oppressing them."[223] It is therefore the element of *mens rea* – in this case demonstrative of an intent to racially dominate and systematically oppress – that renders the crime of Apartheid distinct from the commission of what would otherwise be a series of discreet acts of racial discrimination. For reasons of economy, it is not possible to cover in any sufficient detail the extent to which Israeli actions in the OPT satisfy the constituent elements of the crime of Apartheid in this research. Suffice to say, given the UN record establishes that Israel's prolonged occupation of the OPT is clearly characterized by systematic racial discrimination, an increasing number of opinions and studies have been produced that have made strong cases to this effect.[224] Of course, because none of these opinions and studies

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[219] *Id.*, para. 24.
[220] *UN Fact-Finding Mission on Settlements*, para. 49.
[221] *Apartheid Convention*.
[222] *Id.* art. II(d). *But see ICERD*, art. 5(v) .
[223] *Id.* art. II. *See also, Rome Statute*, art. 7(1)(j), which prohibits the crime of Apartheid as a crime against humanity.
[224] One of the most detailed of these is a 2012 study commissioned by the Human Sciences Research Council of South Africa, that found that Israel has "introduced a system of apartheid in the OPT" demonstrative of a "system of ensuring domination by Jews over Palestinians" in the territory principally through "transferring control over land in the OPT to exclusively Jewish use; forcibly dividing the population of the territory into discrete Jewish and Palestinian enclaves; restricting movement between these zones on discriminatory grounds; and disadvantaging Palestinians in all areas of economic, social and political life." Tilley (2012), 222-223. A 2013

represent the views of the UN, the Organization has yet to make a definitive pronouncement on the matter, despite the urging of at least one previous President of the General Assembly to do so in 2008.[225]

In light of the above, it is apparent that Israel's prolonged occupation of the OPT has become illegal for its systematic violation of at least three *jus cogens* norms. According to the UN record, these are the prohibition on the acquisition of territory by force, the obligation to respect the right of peoples to self-determination, and the obligation to refrain from imposing regimes of alien subjugation, domination, and exploitation inimical to humankind, including racial discrimination. The systematic nature of Israel's violation of these norms is rooted in a series of discrete but interconnected violations of IHL and IHRL over an abnormally prolonged foreign military occupation. In and of themselves these discrete violations constitute internationally wrongful acts attributable to the occupying power. What lends them their true normative bite, particularly when considering the research question, is the fact that, when taken together, they constitute a composite series of actions defined in the aggregate as internationally wrongful. As such, and in accordance with the international rule of law of which they form a part, they give rise to specific international legal consequences for both Israel and third states the substance of which clashes with the UN's long-standing position on the OPT in the post-1967 period. This position, focused as it is on holding out the promise of addressing only a variety of IHL and IHRL violations while at the same time affirming that the end of the occupation giving rise to those violations must be made contingent on negotiation, has in turn been pivotal in the maintenance of Palestine's ILS condition in the UN system. Its incoherence represents an embodiment of the international rule by law – in this case, the limited remit and selective application of IHL and IHRL – and affirms the essentially encumbered character of the international legal subjectivity of Palestine as a Third World quasi-sovereign within the UN. In order to demonstrate this further, it is useful to look more closely at the legal consequences

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study co-authored by John Dugard, a South African former UN Special Rapporteur on Human Rights in the OPT, and John Reynolds, similarly concluded that "[o]n the basis of the systemic and institutionalized nature of the racial domination that exists" in the OPT, there are "strong grounds to conclude that a system of apartheid" has been introduced in that territory by the occupying power." Dugard & Reynolds (2013), 912. This conclusion was concurred in by Richard Falk, Dugard's successor as UN Special Rapporteur, and Virginia Tilley, in a 2017 study commissioned by the UN Economic and Social Commission for Western Asia (ESCWA), a report which the Secretary-General caused to be withdrawn ostensibly for reasons of process rather than substance (his office was not consulted in its preparation). *See UN ESCWA Apartheid Report*; *and* UN Official Resigns Over Israel Apartheid Report, Al-Jazeera, 17 March 2017, http://www.aljazeera.com/news/2017/03/official-resigns-israel-apartheid-report-170317182241142.html.

[225] In his capacity as President of the General Assembly, Father Miguel d'Escoto Brockmann, permanent representative of Nicaragua to the UN, described Israeli policies in the OPT as a form of Apartheid and urged the Assembly to "not be afraid to call something what it is." UN GAOR, 63 Sess., 57th Plen. Mtg. at 2, A/63/PV.57, 24 November 2008.

of Israel's illegal presence in the OPT, highlighting how those consequences are at odds with the negotiations condition at the center of the UN's position on the issue, and whether and to what extent having recourse to them can assist in mitigating Palestine's ILS condition in the Organization.

4.4 Legal Consequences and the Mitigation of Palestine's International Legal Subalternity

Under the international law of state responsibility, the legal consequences of Israel's illegal occupation of the OPT are three-fold. First, it is obligated to end the occupation forthwith and unconditionally. Second, it must offer appropriate guarantees of non-repetition. Third, it must make full reparation for injury caused, including any material and moral damage. Given the occupation involves gross and systematic breaches of *jus cogens* norms, the law of state responsibility imposes additional consequences on third states. These require third states to cooperate to bring to an end, through lawful means, Israel's occupation of the OPT and to refrain from rendering aid or assistance to Israel in maintaining its illegal occupation of the OPT. In light of the general principle of law that states may not do collectively that which they are bound to refrain from doing individually, these third state obligations necessarily set the parameters of what the UN is obligated to do as an international organization.

It is apparent from the above that the UN's conventional approach to ending Israel's illegal occupation of the OPT – based on conditioning such end on negotiation between the parties – is highly problematic from a subaltern standpoint as it underscores the overall contingency of those gripped by the ILS condition. This is for at least three reasons. First, it runs counter to prevailing international law. Just as most municipal legal systems do not countenance a common thief being able to negotiate the terms of the return of stolen property, international law does not contemplate allowing states who are engaged in internationally wrongful conduct to negotiate the terms of how, to what extent, and when that conduct is to be brought to an end. This is particularly so where the internationally wrongful conduct is the result of a composite series of wrongful acts that violate peremptory norms, respect for which is non-derogable for being in the interest of, and owed to, the international community as a whole. In light of the 2012 upgrade in the status of Palestine at the UN to a non-member observer state, the implications of the UN's position on negotiations as a condition of ending the illegal occupation of Palestine are important. For they go beyond the mere rights that accrue to a protected population under IHL and IHRL, and touch upon the rights and duties of all states to refrain from the use of force against the territorial integrity and political independence of any other state, as codified in article 2(4) of the *UN Charter*. It is not for nothing that this principle

has been characterized as the "cornerstone" and the "heart" of the *Charter* system by both the ICJ[226] and publicists alike.[227] Without it, the international system would be vulnerable to a complete collapse under the specter of a return to the age of total war and the legitimation of territorial aggrandizement through conquest. By conditioning the end of Israel's occupation of the OPT on negotiation, the UN is undermining its *raison d'être* as rooted in the international rule of law upon which the promise of the Organization is ostensibly built. In this sense, the upgrade in Palestine's status at the UN has elevated the urgency of the legal issues at play not only for the subaltern Palestinian people, but also for the Organization and its members as a whole. To the extent the UN continues to adopt a position at variance with the international rule of law, the legal rights and subjectivity of the Palestinian people purportedly recognized by it will remain contingent.

Second, the UN's insistence on negotiations as a condition of ending Israel's prolonged occupation of the OPT runs contrary to its own practice on foreign military occupations in other contexts. That practice demonstrates that where an occupation has been determined by the Organization to be illegal, the obligation to bring it to an end has not been conditioned on negotiation, but rather made an unconditional requirement to be speedily fulfilled in line with the law on state responsibility. The fact that the General Assembly and ECOSOC have to varying degrees affirmed the illegality of Israel's occupation of the OPT would suggest that the Organization's 'negotiations condition' is at odds with this practice. Nevertheless, because the UN cannot claim any measure of consistency in characterizing Israel's occupation to be illegal, complications arise. The above assessment of the legality of Israel's prolonged occupation highlights a potential remedy for this in so far as it shows, on the basis of legal positions and determinations already established by the UN itself, that the occupation has indeed become illegal for its violation of a number of *jus cogens* norms of an *erga omnes* character. In this light, it is submitted that the fact that the Organization has failed to adopt a position more in line with the requirements of international law on the issue is demonstrative of the continued rule by law binary inherent in its handling of the question of Palestine in the post-1967 period.

Third, the UN's 'negotiations condition' is problematic because it renders conflict resolution more difficult to achieve by providing a measure of political legitimacy to the claims and positions of Israel *vis á vis* the territory without full regard for its track-record, again as established by the UN itself, of bad faith in adhering to its legal obligations as an occupying

[226] *Armed Activities*, para. 148.
[227] Waldock (1952), 492; Henkin (1971), 544.

power. Given the disparity in negotiating power between hegemonic Israel and the subaltern people subject to its rule in the OPT, it is hard to imagine how a negotiated resolution could be concluded at all, leave aside "in conformity with the principles of justice and international law" as envisioned in the *Charter*, if the full weight of international law is not brought to bear on the situation. For the past 50 years the occupying power has exercised absolute dominion over the OPT and its population to the point where nothing and no one is able to enter, exit or subsist in the territory without doing so under its *de facto* sovereign authority. In the quarter century since negotiations began at Oslo, the occupying power has consolidated its hold on the OPT under a public claim that it will never relinquish it, in complete contravention of the norms underpinning the law of occupation and its treaty obligations to refrain from prejudging the outcome of negotiations themselves. How calling for continued negotiations in such a context can be regarded as an effective way to bring about a peace in conformity with the principles of justice and international law under the *Charter*, instead of an effective endorsement of the internationally wrongful acts of the hegemonic party, is a question no one seems to have seriously asked. It is against this context that the UN's conditioning of the end of the occupation of the OPT on negotiations falls clearly short of the mark and represents a continuation of the rule by law character of the Organization's management of the question of Palestine in the post-1967 period.

In view of the above, the question arises whether the way is open for the UN to correct its position and, if so, whether this would vitiate the quasi-sovereignty at the heart of Palestine's ILS condition? In line with the counter-hegemonic potential of international law set out in the introduction to this research, it is submitted that although important enhancements can be made to the UN's position, such enhancements would only mitigate not vitiate, Palestine's ILS condition. That said, both the General Assembly and the ICJ should be looked to as potential sites where the illegality of the occupation of the OPT can be definitively established, with all of the legal consequences such a finding would entail.

Because the General Assembly remains a venue where the State of Palestine enjoys continued widespread support, it holds an important place as an entry point on the issue. The temporal correlation between the onset of the Oslo process and the cessation of the Assembly's characterization of Israel's occupation of the OPT as "illegal" and/or in "violation of the UN Charter" is something of note. It can be reasonably assumed that this change in Assembly practice was the result of the promise the Oslo process held out of the parties finally realizing a negotiated resolution based on the two-state formula. Nevertheless, following 25 years of

process, there has been little peace to show for it. On the contrary, the UN record demonstrates that Israel has used this time to consolidate its hold over the OPT while gaining increased political legitimacy both regionally and internationally by paying lip service to "peace" at the UN, while pursuing patently illegal objectives in the territory that run counter to the Organization's declared two-state "land for peace" formula. Now that the peace process is all but dead,[228] the Assembly could be engaged in order to revive its previous position on the illegality of the occupation, thereby furnishing the international community with greater leverage to call for the unconditional and immediate end of the occupation in line with the law on state responsibility.

Another possibility that might be considered would be to seek a second advisory opinion of the ICJ. The proposed question could ask the Court for an opinion on "the legal consequences for all states and the United Nations arising from Israel's continued settlement and prolonged occupation of the State of Palestine, in particular when and how that occupation must come to an end, considering the rules and principles of international law, including the UN Charter, the Fourth Geneva Convention of 1949, international human rights law, relevant Security Council and General Assembly resolutions, and this Court's advisory opinion of 9 July 2004?" Such a question would allow arguments to be advanced that go to the illegality of Israel's occupation based on the *jus cogens* norms identified above with a view to terminating it, rather than merely managing it. If, before the matter reaches the Court, previous General Assembly practice referring to the occupation of the OPT as "illegal" and in "violation of the Charter" can be reinvigorated, this will make it easier to advance such arguments before the Court.

In public discussions under UN auspices held in 2015 involving the author and the current Permanent Observer of the State of Palestine to the UN, the latter opined that seeking a second advisory opinion is "not a good idea". Instead, it was suggested that "all the available tools must be revisited," including the 2004 *Wall* advisory opinion.[229] To be sure, aside from the establishment of UNROD, there has been little follow up by the UN on the *Wall* advisory opinion, so the point is well taken. Nevertheless, one of the problems with this view is its mistaken assumption that even robust follow-up on the *Wall* advisory opinion would offer a break from the rule by law inherent in the UN's conventional humanitarian/managerial

[228] The death of the Oslo process has long been the subject of debate and lamentation in the secondary literature. *See* Said (2001). The 6 December 2017 recognition by the United States of Jerusalem as Israel's capital, absent Palestinian-Israeli peace, has been widely regarded as a confirmation of this. *See* Lazaroff & Wilner (*Jerusalem Post*, 6 December 2017).
[229] *See UN Experts Meeting, Brussels 2015*.

approach to the occupation under the IHL/IHRL paradigm. What good would follow-up bring, if the only result would be to enhance the manner in which Israel maintains its over 50-year occupation and colonization of the OPT rather than end it?

It is well to recall that even though the ICJ's 2004 opinion identified various Israeli violations of international law and called upon the occupying power and third states to see to it that those violations were brought to an end, these did not include reference to any obligation of Israel to actually end its continued occupation of the OPT. On the contrary, as noted above, after setting out its findings on the illegality of the wall, the Court went to pains to call for "a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel", thereby upholding the conventional UN position.[230] A second advisory opinion would enable the ICJ to determine that the very presence of Israel in occupied Palestine has become, in and of itself, illegal, and that its end cannot reasonably be pinned to continued, essentially hollow negotiations between what the UN's own record proves has been a bad faith occupant and a besieged and occupied people under duress, but can only be fulfilled through immediate, unconditional and full withdrawal in line with the law on state responsibility.

Of course, under prevailing international law, neither the General Assembly nor the ICJ when exercising its advisory jurisdiction are endowed with authority to legally bind the international community. Therefore, neither a revival of General Assembly practice nor a second advisory opinion of the ICJ would in and of themselves result in an end of the occupation. They would, however, help the Palestinian people build further legal and political momentum in the UN in support of its rights in line with the international rule of law, thereby mitigating the effects of Palestine's ILS condition within the UN. In this regard, the role of third states would be vital given the imbalance of power between the parties and the historical record since Oslo. In addition to requiring Israel to end its occupation forthwith and unconditionally, an ICJ advisory opinion affirming the continued occupation of the State of Palestine as illegal would also enable the Court to require all states to cooperate to bring that occupation to an end, to not recognize it as lawful, nor to render aid or assistance in maintaining it. Questions would arise concerning the scope of what measures third states would be required to take in order to bring Israel's serious breaches of *jus cogens* norms in the OPT to an end. But, as noted by Crawford, although such measures "must be through lawful means, the choice of which [to

[230] *Wall*, para. 162.

pursue] will depend on the circumstances of the given situation".[231] Set within the context of a finding that Israel's very presence in the State of Palestine, as opposed to a narrower set of practices undertaken within it, has become illegal, the way will thus be open to require third States to do much more, individually and collectively, than they have been required to do until now under the conventional UN approach given the higher order norms involved (*i.e.* territorial integrity of *states*). This could include a host of targeted economic, political and cultural measures, taken individually or collectively through the UN, as was done in support of other subaltern groups in other similar contexts.

For an instructive precedent on the benefits such a counter-hegemonic recourse to international law may offer the subaltern, we return to Namibia and the string of cases brought before the ICJ between 1950 and 1971 in respect of its occupation by South Africa.[232] As noted above, it was in the last of these opinions that the ICJ ruled that the continued presence of South Africa in Namibia was illegal, that it was under an obligation to withdraw immediately, and that third states were required to recognize this illegality and to refrain from lending support or assistance to South Africa so long as it remained in Namibia.[233] But for prior political and legal determinations made by various organs of the UN on the question, it is possible the Court may not have arrived at the principled conclusions it did. Key among these was the 1950 ruling by the Court affirming the General Assembly's supervisory role over Namibia, resolutions of the Assembly terminating the mandate for South Africa's failure to abide by its obligations as mandatory, and resolutions of the Security Council affirming the illegality of South Africa's continued presence in Namibia. While it wasn't until 1988 that South Africa ended its illegal occupation of Namibia, there is little doubt that this result was given vital legal momentum by the ICJ's 1971 advisory opinion and the merger of international legality with international legitimacy represented in the Organization's work through it. For the much less powerful subaltern Namibians, having the full force of international law upon which to rely made the legitimacy of their position and that of the UN that much stronger. As noted by Judge Weeramantry in *Nuclear Weapons*:

> "The Court's decision on the illegality of the *apartheid* regime [*i.e.* in Namibia] had little prospect of compliance by the offending Government, but helped to create the climate of opinion which dismantled the structure of *apartheid*. Had the Court thought in terms of the futility of its decree, the end of apartheid may well have been long delayed, if it could have been achieved at all. The clarification of the law is an end in

[231] Crawford (2005), 249.
[232] *See South-West Africa*; *Voting Procedure*; *Admissibility of Hearings*; *and Namibia*. Other authors have invoked the usefulness of the Namibia precedent to the question of Palestine. *See Lynk Report*; Dugard, "A Tale of Two Sacred Trusts" *in* Maluwa (2014); Finkelstein (2018); *and* Koury, "Legal Strategies at the United Nations" *in* Akram, et al. (2011).
[233] *Namibia*, para. 133.

> itself, and not merely a means to an end. When the law is clear there is greater chance of compliance than when it is shrouded in obscurity.[234]

In a similar vein, Richard Falk has noted that the "overall purpose of relying on international legal mechanisms in the absence of prospects for compliance is to alter the political climate in ways that make the realization of Palestinian rights, including the right of self-determination, more probable."[235] It is submitted that a second advisory opinion on the legal consequences of Israel's continued settlement and occupation of the State of Palestine, with a particular focus on when and how that occupation must come to an end, would offer a similar promise of clarity and alteration of the political climate that, while not assuring the end of the occupation itself, would make that result more probable than it is at present.

5. Conclusion

This chapter has examined the UN's handling of the legal status of Israel's 50-year military occupation of the OPT. Its basic claim is that the UN's failure to consistently and clearly take a more principled position on the very legality of Israel's occupation regime exposes a fundamental chasm in its position on the OPT, and is ultimately demonstrative of the continuation of the rule by law in the Organization's handling of the question of Palestine post-1967.

Decolonization brought about a shift in the UN that changed the post-war late-imperial features of the Organization responsible for the 1947 plan of partition and the resulting reification of Palestinian legal subalternity in it. Through the ostensible enfranchisement of the Third World in the UN, this shift promised to help universalize the application of international law and the *UN Charter* in the work the Organization. With most of the former Afro-Asian colonies now members of the system, the legal output of the UN became the product of a more representative community of nations than had hitherto been the case. This empowerment of the Third World gave rise to a gradual recognition by the UN of Palestinian legal subjectivity and rights, including the right to self-determination in the OPT as part of the two-state framework. The conventional wisdom has presented these developments as emblematic of the UN's commitment to finally uphold the international rule of law in its management of the question of Palestine.

[234] *Nuclear Weapons*, p. 550.
[235] Falk (2017), 92.

Yet, despite these important changes, the circumscribed nature of Third World quasi-sovereignty persisted following decolonization. For the Palestinian people, this has manifested itself in the maintenance of Palestine's ILS in the system, as evidenced in the UN's adoption of a humanitarian/managerial approach to the occupation of the OPT. Under this approach, the Organization has satisfied itself merely with addressing a host of individual violations by the occupying power of IHL and IHRL in the OPT without definitively addressing the legality of the very regime giving rise to those violations themselves, all while insisting on negotiations as the only means through which the occupation can be brought to an end. The curiosity of this position is rooted in the fact that there is more than enough in the UN record to demonstrate that Israel's occupation has become illegal over time for being in violation of three *jus cogens* norms of international law, being the prohibition on the acquisition of territory through the threat or use of force, the obligation to the respect the right of peoples to self-determination, and the obligation to refrain from imposing regimes of alien subjugation, domination, and exploitation inimical to humankind, including racial discrimination. As an internationally wrongful act, prevailing international law on state responsibility, including as affirmed by UN practice in other cases of alien occupation, does not allow for negotiation as the means of ending Israel's occupation, but rather requires that it be ended forthwith and unconditionally. What is more, by making the end of the occupation contingent on the chimera of negotiation between what the UN record also demonstrates is a bad faith and immensely more powerful occupant and an enfeebled population held captive by it, the UN has in effect undermined its own position. It has thereby made the realization of Palestinian rights under international law repeatedly affirmed by it impossible to achieve, while facilitating the consolidation of the illegal actions of the occupying power that operate to violate those rights under a cloak of legitimacy provided by the Organization.

Despite the conventional wisdom, it is apparent that the UN's recognition and affirmation of Palestinian legal subjectivity and rights in the OPT post-1967 can only therefore be regarded as nominal in nature, contingent on the exercise of hegemonic forces virtually beyond reach. Once again, the promise of international law – this time in a far more truncated portion of Palestine as even envisioned in the partition plan – is repeatedly proffered by the UN, but ultimately withheld by operation of the Organization's own failure to bring the full application of prevailing international law to bear on the situation.

To be sure, the possibility for incremental positive change exists, in so far as recourse may be had to the General Assembly and ICJ to definitively establish the UN's position on the

illegality of Israel's occupation regime. Although largely ignored in the literature, relevant practice exists in the Assembly going back decades in which Israel's occupation of the OPT has been qualified as illegal, in itself. Were this practice to be revived, including through a judicial affirmation of the ICJ, the research suggests that further strides could be made. Nevertheless, owing to prevailing legal limits on the binding authority of these bodies, having resort to them would only operate to mitigate, not vitiate, the effects of the occupation and, by extension, Palestine's continued ILS in the UN system.

MAP IV

Territories Occupied by Israel Since June 1967, Map No. 3243 Rev.4, United Nations, June 1997. Reproduced with permission of the United Nations. Author's note: only the West Bank and Gaza Strip, including East Jerusalem, constitute the OPT; Israeli occupation of the Egyptian Sinai Peninsula ended in 1982, while its occupation of the Syrian Golan Heights continues.

5

2011: Membership of the United Nations and the Perpetuation of Palestine's International Legal Subalternity

1. Introduction

This chapter addresses Palestine's international legal subalternity (ILS) through the issue of its attempted admission to the United Nations (UN) as a Member State in 2011. The essential claim is that the UN's failure to admit Palestine to full membership under operation of a procedural power of the Security Council to decide who may be recommended for admission is the latest manifestation of how Palestine's ILS has been perpetuated within the UN system. Central to this chapter is the crosscutting theme of the role of neo-imperial power in the maintenance of the ILS condition in international law and organization.

Following the Palestine Liberation Organization's (PLO) acceptance of resolution 181(II) in 1988, and the commencement of over two decades of state-building undertaken in the Occupied Palestinian Territory (OPT) resulting from the Madrid and Oslo peace processes, this truncated version of Palestine made considerable legal advances on the road to being universally recognized as a state, the *sine qua non* for UN membership. By 2011, this included recognition by over two-thirds of the General Assembly, membership in a number of international intergovernmental entities, and endorsements of Palestine's statehood by the Bretton Woods institutions, among other influential actors. Set against this backdrop, this chapter critically examines Palestine's bid for membership of the UN of September-November 2011. In particular, it undertakes an international law assessment of the report of the Security Council's Committee on the Admission of New Members ("Committee on Admission"), which concluded that it could not unanimously recommend Palestine's membership in the UN after having examined whether Palestine satisfied the criteria for membership under Article 4(1) of the *UN Charter*.[1]

When measured against the prevailing international law and practice governing UN membership, the research demonstrates that Palestine's failure to gain admission in 2011 was the result of United States pressure to adopt an unduly narrow and erroneous application of Article 4(1), a provision of the *Charter* that has long been given a liberal, flexible and permissive interpretation by the Organization. Thereafter, Palestine turned to the General

[1] *UN Charter*, art. 4(1).

Assembly, which upgraded its observer status to that of a non-member observer state in 2012. While the legal consequences of this upgrade have been considerable, its juxtaposition against the refusal of the Committee on Admission to recommend membership to the Security Council as a result of the US position is demonstrative, yet again, of the rule by law principle at work. While the UN has allowed for a gradual and qualified recognition of some Palestinian legal subjectivity and rights over time, including through Palestine's upgrade to non-member observer state, its failure to provide it with the legal and political foundation upon which those rights have a greater chance of being realized through full membership in the Organization – the legal conditions of which Palestine objectively fulfills based on UN practice – has ultimately perpetuated Palestine's ILS in the system.

To explore this claim, the remainder of this chapter is divided into three parts along the rule of law/rule by law axis underpinning this research. Part 2 sets out the international rule of law as embodied in the law and practice governing admission to membership of the UN. With few exceptions, this law and practice is marked by a liberal, flexible and permissive interpretation of Article 4(1) of the *Charter*, ostensibly predicated on the principle of the universality of the Organization. Part 3 contrasts this against the international rule by law evidenced in Palestine's failed membership bid in 2011. Owing to the unduly narrow and erroneous interpretation of Article 4(1) taken by some members of the Committee on Admission under US pressure, it shows that Palestine has been unfairly kept from availing itself of the full protection of its rights under international law within the Organization, despite having considerably adjusted its own claims and national development to accommodate the two-state formula imposed upon it through prior UN action. Part 4 then examines the implications of Palestine's turn to the General Assembly and its upgrade to non-member observer state status in 2012. In keeping with the pattern of Palestine's treatment at the UN since the decolonization period, it posits that the move to the Assembly represents a good example of both the promise and the limits of the counter-hegemonic use of international law by subaltern classes.

2. The International Rule of Law as Represented Through the Principle of the Universality of the Membership of the United Nations

2.1 Universality of Membership as the General Principle

In chapter 3, it was noted that the post-World War II (WWII) emergence of the UN as the standard-bearer of the international rule of law was one of the Organization's defining features. A central aspect of this has been the Organization's universality of membership. Given the general purposes of the UN, not least the safeguarding of international peace and security, it is

axiomatic that it remains "an open organization with a universal vocation."[2] The greater the Organization's membership, the greater the global adherence and contribution to the international rule of law ordering principle, represented foremost in the terms of the *Charter*. UN membership brings with it a host of rights and obligations under the *Charter*. This includes automatic voting membership of the General Assembly,[3] periodic membership of the Security Council,[4] Economic and Social Council,[5] and Trusteeship Council,[6] and *ipso facto* accession to the Statute of the International Court of Justice (ICJ).[7] While a handful of states have chosen to remain outside the UN of their own accord (*e.g.* Holy See, Switzerland until 2002), that is a rare exception to the general rule of universal membership. Today, the Organization boasts a membership of 193 states.

Membership of the UN is governed by Chapter II of the *Charter*. Under Article 3, "original" members of the UN were those states that participated in the San Francisco conference, or associated themselves with the allied powers during WWII, and who signed and ratified the *Charter* in June 1945.[8] Under Article 4, acquisition of membership subsequent to the Organization's founding is governed as follows:

> "(1) Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations;
>
> (2) the admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."[9]

Articles 3 and 4 are similar, in so far as they envision that only *states* may be members of the United Nations.[10] They are also different, in so far as the latter imposes substantive and procedural conditions that, with the exception of the condition of statehood, do not exist under the former. Appreciating the interdependence of these conditions – the substantive and

[2] Ginther, "Membership: Article 4" *in* Simma (2002), 178.
[3] *UN Charter*, art. 9(1).
[4] *Id*., art. 23.
[5] *Id*., art. 61.
[6] *Id*., art. 86(1).
[7] *Id*., art. 93(1).
[8] This was with the exception of Poland, who did not sign until October 1945. Fastenrath, U. "Membership: Article 3", *in* Simma (2002), 173-174.
[9] *UN Charter*, arts. 3, 4.
[10] Because of the lack of political independence of some original members (*e.g.* Belorussia, India, Philippines and Ukraine), Higgins, (1963), 15-16, argues that inclusion of these entities in the Organization were *sui generis*. She cites various political reasons for the inclusion of these members. Yet, from an international legal standpoint, this does not square with the ordinary meaning of the term "state" as used in Article 3. This is particularly so because (as Higgins herself notes) the *Charter's* drafters consciously chose to use the term "state" over "nation", when the latter had been proposed by the Philippine delegation.

procedural – is vital for a full appreciation of Article 4 as the legal gateway to membership in the Organization (post-1945) and the maintenance of its universal function.

Substantively, the conditions laid out in Article 4(1) have been determined by the ICJ as subjecting admission to the UN to a five-part test. The applicant must: (1) be a state; (2) be peace-loving; (3) accept the obligations of the *Charter*; (4) be able to carry out those obligations; and (5) be willing to do so.[11] Procedurally, the responsibility of determining whether an applicant meets these five criteria is jointly exercised by the Security Council and the General Assembly under Article 4(2). However, because a decision of the Assembly necessarily requires a recommendation of the Council, admission of new members resides, in the first instance, with the Council whose permanent members may utilize their veto power in making such determinations.[12]

From a subaltern perspective, the practical consequences of this are readily apparent. With the great powers commanding permanent seats on the Security Council, the international law governing admission of new members to the UN is clearly open to the exercise of hegemonic interest, and occasionally abuse. For those applicants who find themselves negatively subjected to the exercise of such interest and abuse, the resulting disenfranchisement owes its existence to the exercise of what amounts to neo-imperial power, the third crosscutting theme underpinning the ILS condition. Because such power is exercised out of pure self-interest and realpolitik, its hallmark, from the vantage point of the subaltern, rests in the potential of its pernicious and arbitrary use.

This was the case during the first decade of the UN's existence, when the Cold War rivalry between the United States and the Soviet Union gave rise to a general deadlock on admission of new states under the guise of narrow, at times overtly political, interpretations of the Article 4(1) criteria.[13] The result was that, during this period, no discernable consensus was reached on the normative legal content of the criteria, thereby leaving the substantive international law on membership in the UN inchoate. Between 1945 and 1955, only nine of 31 applicant states were admitted to membership.[14] It wasn't until the end of the deadlock in 1955, following the so-called package-deal admission of 16 members *en bloc*, that there began to emerge a consensus of practice in any meaningful legal sense. Since then, Article 4(1) has been interpreted within

[11] *Conditions of Admission*, p. 62.
[12] This was affirmed by the ICJ in the *Competence Case*, p. 10.
[13] Ginther, *in* Simma (2002), 179.
[14] *Id*.

the organization in a very liberal, flexible and permissive manner, giving it a normative content wholly consistent with the principle of the universality of the UN's membership.[15] It is the permissiveness of this normative content that underpins the international rule of law governing membership in the UN.

It is noteworthy that even at the height of the Cold War deadlock, the position of the Organization and its members was virtually unanimous on the principle of the universality of membership of the UN and the need that a liberal approach be adopted in favour of an expansive admission of new members. At a meeting of the Security Council in 1946, the Secretary-General noted that the "founding Members of the United Nations and all of the great powers which form part of our Organization have agreed, on numerous occasions, that the United Nations must be as universal as possible. This is one subject where there has never been a serious difference of opinion."[16] At the same meeting, the American representative stated that, despite his government's own "misgivings" about the "complete readiness" of some applicants for membership, "the Organization should move toward universality of membership".[17] He therefore urged the Council to "take broad and far-sighted action to extend the membership of the United Nations now as far as is consistent with the provisions of Article 4 of the Charter."[18] Subsequently, the principle of universal membership was expressly endorsed in resolutions of the General Assembly,[19] and continues to be reflected in the contemporary period through numerous references to it by Member States in the deliberations of both the Assembly and the Security Council.[20]

The Cold War deadlock served a useful and abiding purpose from an international law standpoint. With each of the United States and the Soviet Union agreeing with the principle of universality of membership but nevertheless exercising neo-imperial power to refuse admission to allies of one another without an equivalent *quid pro quo*, in 1948 the General Assembly requested the ICJ for an Advisory Opinion. The Court was asked whether a member of the UN, when called upon to consider an application for admission under Article 4 of the *Charter*, is "juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article".[21] In particular, the Court was asked whether a

[15] Higgins (1963), 14; Crawford (2006), 179, 182; Quigley (2010), 236.
[16] UN SCOR, 1st Yr., 54th Mtg., at 44, S/PV.54, 28 August 1946.
[17] UN SCOR, 1st Yr., 54th Mtg., at 41-42, S/PV.54, 28 August 1946.
[18] *Id*., 42.
[19] *E.g.*, A/RES/197B, 8 December 1948; A/RES/506A(VI), 1 February 1952; *and* A/RES/718(VIII), 23 October 1953.
[20] *Repertory of Practice*.
[21] *Conditions of Admission*, p. 58.

member could "subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations" at the same time.[22] In answering both of these questions negatively, a majority of the Court opined that the "natural meaning" of the text of Article 4(1) makes clear that the five conditions for membership thereunder are "exhaustive", and that the "provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded."[23] The Court accordingly held that "considerations extraneous to the conditions laid down in" Article 4(1) could not be employed to "prevent the admission of a State which complies with them".[24] In the Court's view this includes "new condition[s]…concerning States other than the applicant State."[25] It also includes "political considerations", so long as such considerations cannot reasonably and in good faith be connected with the exhaustive conditions of admission under Article 4.[26] In a separate opinion, Judge Alvarez agreed with the majority and went one step further. Having acknowledged "the purposes of the United Nations Organization and its mission of universality," he took the view that "all States fulfilling the conditions required by Article 4 of the Charter have a *right* to membership in that Organization", and that the "exercise of this right cannot be blocked by the imposition of other conditions not expressly provided for by the Charter", including "grounds of a political nature." In his view, if members of the Security Council or General Assembly were to do otherwise, that would be "an abuse of right which the Court must condemn."[27]

The ICJ's opinion regarding the exhaustive nature of the Article 4(1) criteria remains valid today. Whether Judge Alvarez was correct in his characterization of membership as a positive right where those criteria are met by an applicant is arguable, given the fact that Article 4(1) does not expressly speak of a "right" to membership as such. Nevertheless, Article 4(1) does provide that membership "is open" to applicant states that meet the criteria, which can be read to imply such a right once the threshold has been passed. As such, Alvarez's characterization of membership constituting a right upon fulfillment of the Article 4(1) criteria would seem to logically hold. Indeed, the author of a leading study of Article 4, Thomas Grant,

[22] *Id.*
[23] *Id.*, 62.
[24] *Id.*, 63.
[25] *Id.*, 65.
[26] *Id.*, 62-63. This latter proviso has led Thomas Grant to observe that the majority's opinion was "wide enough that it is to be wondered whether a State, in spite of the court's interpretation, might add an 'extraneous consideration' by folding it into" a determination under the Article 4(1) criteria. Nevertheless, Grant concludes, given "admission procedure in time was treated in most cases as an essentially *pro forma* exercise", such application of additional criteria "would not, in practice, be [a] problem." Grant (2009), 36, 39, 45.
[27] *Conditions of Admission*, p. 67.

has indicated that it is now a "presumption that any State seeking admission will be granted admission."[28]

The *Conditions of Admission* advisory opinion was critical in setting legal limits on the influence of political factors and the imposition of other extraneous conditions on the process for application of new members to the UN that plagued the Organization through the exercise of neo-imperial power during its first decade. Taken together with the unanimously held principle of the universality of membership of the UN, the international legal practice of the Security Council and General Assembly rapidly led to the adoption of a permissive approach to the Article 4(1) criteria, thereby shelving the exercise of that power. This was particularly apparent during the decolonization period and after. Writing in 1963, Rosalyn Higgins noted that UN practice on Article 4(1) had, as early as that time, demonstrated a "flexibility" in approach to the criteria that had become widely evident.[29] Since 1963, of the 87 successful applications for membership in the UN, all but five were approved without any objection.[30] During decolonization, the admission of new states "took place as a rule without even mentioning the [Article 4(1)] criteria."[31] This is not to suggest that all admissions decisions down the years have been uniformly unproblematic or automatic.[32] But it is reasonable to say that the liberal, flexible and permissive interpretation of the Article 4(1) criteria in the vast majority of cases has reduced that provision of the *UN Charter* to what Konrad Ginther has called "a mere procedural formality."[33] Grant concurs, noting that "in time, the substantive criteria for admission came scarcely to be implemented at all."[34] All of this has ultimately led to an "unconditional universality" of membership within the Organization as the defining feature of the international rule of law on UN membership.[35] The following brief survey of state practice on each of the criteria bears this out.

2.2 Relevant United Nations Practice

The first criterion for UN membership is that the entity in question must be a state. International law proffers two theories on the existence of statehood.[36] The constitutive theory

[28] Grant (2009), 244.
[29] Higgins (1963), 14.
[30] Crawford (2006), 180, puts the figure at 85 successful applicants between 1963 and 2005. Since then, Montenegro and South Sudan have been admitted to membership without objection.
[31] Ginther, *in* Simma (2002), 180.
[32] Crawford (2006), 180.
[33] Ginther, *in* Simma (2002), 180. *See generally*, Grant (2009).
[34] Grant (2009), 52.
[35] Ginther, *in* Simma (2002), 180.
[36] Crawford (2006), 19-28.

holds that a state exists only if it is recognized by other states, thus rendering it a product solely of political facts established between sovereigns. In contrast, the declarative theory posits that an entity must possess the following four *de jure* qualifications, codified in the 1933 Montevideo Convention on the Rights and Duties of States: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."[37] Although some authors have suggested additional factors under this theory, such as independence, sovereignty and effectiveness,[38] the four Montevideo requirements have been the standard followed in UN admissions practice. When any additional factors have been taken into account in UN practice, they have only been factored in *as part* of the relevant Montevideo qualifications (normally the second two) and in no manner have been given uniform treatment. In addition, there is a slight hybridity of the two theories in UN practice, in so far as the issue of recognition (upon which the constitutive theory rests) figures prominently in determining the fourth of the Montevideo qualifications (foreign relations capacity). As noted by James Crawford, statehood is therefore a mixed question of law and fact.[39] All of this underscores the liberal, flexible and permissive reading that the four qualifications have been given in UN practice.

Thus, with respect to a permanent population, practice indicates that a state's population need not be homogenous. For example, Indonesia, Nigeria, and Yugoslavia are UN Member States[40] whose populations consist of a multiplicity (in some cases hundreds) of differing ethnic, religious and linguistic groups. Nor does a state's population have to be *in situ* for a prescribed period of time. In this respect, the Member States of Australia, Canada, New Zealand, South Africa and the United States stand out, with their mix of indigenous peoples, and descendants of slaves, indentured servants and European settlers each adding to the general population at varying points in time, along with other newer migrants. Finally, there is no lower or upper limit that a state's population must reach. UN membership includes microstates such as Tuvalu, Nauru, and Palau, whose populations only number in the few thousands.[41] It is clear, therefore, that the population requirement has been applied permissively in UN admissions practice.

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[37] *Montevideo Convention*, art. 1. Although the UN practice has consistently referred to the Montevideo criteria when assessing whether an entity is a state under international law, some scholars have questioned the validity of the criteria themselves. *See e.g.*, Crawford, "Israel (1948-1949) and Palestine (1998-1999)" *in* Goodwin-Gill (2012), 113.
[38] Crawford (2006), 46, 62-89; Higgins (1963), 25.
[39] Crawford, *in* Goodwin-Gill (2012), 95.
[40] A/RES/491(V), 28 September 1950; A/RES/1492(XV), 7 October 1960; Yugoslavia was an original member.
[41] Crawford (2006), 52. *See also* A/RES/55/1, 5 September 2000; A/RES/54/2, 14 September 1999; A/RES/49/63, 15 December 1994.

The requirement of a defined territory has been similarly construed by the UN. Practice indicates that there is no lower limit to the size a territory must be before it can satisfy this branch of the Montevideo test. Diminutiveness does not preclude statehood.[42] Thus, microstates such as Liechtenstein, Monaco, and San Marino did not face objections to their membership on the basis of their relatively negligible areas of 160, 2, and 61 km^2, respectively.[43] Likewise, great allowance has been made for the extent to which a territory must be demarcated by definite borders. As noted by the ICJ in *North Sea Continental Shelf*, "[t]here is…no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not."[44] The most obvious example of this is Israel, which gained UN membership despite not having settled territorial delimitations with any of its neighbours following the first Arab-Israeli war.[45] Similarly, there have been other cases where the qualification of a defined territory has been questioned on the basis of competing territorial claims of other states. Nevertheless, the existence of unsettled Iraqi claims to Kuwait and Moroccan claims to Mauritania did not frustrate the attainment of membership in the UN by each of those two latter states.[46] It is equally clear, therefore, that the defined territory requirement has enjoyed a liberal interpretation by the UN.

In practice, the government requirement has been bound up with notions of independence and effective control over territory and public administration.[47] According to this approach, government cannot logically be said to exist if it is not effective and/or independent. Like the other Montevideo criteria, this requirement has been construed broadly. For example, when the Republic of the Congo's application was approved by the General Assembly on 20 September 1960,[48] the fact that the country was embroiled in a civil war was not regarded as barring the existence of its statehood. Only six days prior, its elected Prime Minister was removed from office in a *coup d'état*, and the central government was consequently divided into two factions, both claiming to be lawfully in control.[49] To complicate matters, despite gaining independence

[42] Grant (2009), 240.
[43] A/RES/45/1, 18 September 1990; A/RES/47/231, 28 May 1993; A/RES/46/231, 2 March 1992. *But see* Grant, *id*., 240-244, who discusses the concern of some Member States in the 1960's and 70's as to the ability of microstates, in general, to assume their obligations as full members.
[44] *North Sea Continental Shelf*, p. 32.
[45] A/RES/273(III), 11 May 1949. Higgins (1963), 17-18. *See also* text accompanying *infra* notes 195-198, 207-210.
[46] *Id.*, 18-19. A/RES/1872(S-IV), 14 May 1963; A/RES/1631(XVI), 27 October 1961.
[47] *Id*., 21.
[48] A/RES/1480(XV), 20 September 1960.
[49] Crawford (2006), 56. Indeed, the continued fighting between these split groups made it impossible for the Assembly to identify which among the warring factions should be allocated a UN delegation chair. *See* UN GAOR, 15th Sess., 864th Plen. Mtg., at 6, A/PV.864 (20 September 1960); Higgins (1963), 21-22.

from Belgium on 30 June 1960, Belgian forces remained in the country, prompting the Security Council to call for their withdrawal and authorize the deployment of UN forces.[50] Another similar case concerns the admission of Rwanda and Burundi. Held as a single Trusteeship under Belgian administration, these entities were declared "independent" on 1 July 1962. Their purported independence was belied by the fact that Belgian forces remained in the territories after 1 July, and a UN commission suggested that neither entity possessed the capacity for effective government at the time.[51] Nevertheless, the General Assembly admitted both to membership.[52] Guinea-Bissau was admitted to UN membership under similar circumstances, in the sense that its colonial power, Portugal, remained in control of the country after "independence" and admission.[53] Other emblematic cases concern original members. Thus neither Belorussia nor Ukraine were independent when the UN was formed, but were rather constituent territories of the Soviet Union, which was clearly another state. As noted by John Quigley, the Soviets enjoyed "broad legislative power" over these states.[54] Likewise, both the Philippines and India were still dependent territories when they helped form the UN in 1945, with the former only gaining its independence from the United States on 4 July 1946, the latter its independence from Great Britain on 15 August 1947.[55] Thus, practice indicates that when considering the requirement of government, the degree and extent to which such government must be independent and effective has been given a very wide and flexible interpretation by the UN.

The requirement of capacity to enter into foreign relations has also been given a flexible and permissive interpretation in UN admissions practice. Staying with Belorussia and Ukraine, the Soviet Union maintained authority in matters concerning foreign trade and external defence, and neither of them were authorized to enter into international treaties on their own initiative, but instead required approval from the Soviet Union.[56] Likewise, Monaco was admitted to membership in the UN in 1993,[57] despite the fact that under a 1918 treaty with France it ceded

[50] S/RES/143(1960), 14 July 1960. *See also*, S/RES/145(1960), 22 July 1960; S/RES/146(1960), 9 August 1960. After admission, the General Assembly added its voice to the call for the withdrawal of Belgian and foreign forces, which continued. *See* A/RES/1599(XV), 15 April 1961.
[51] Higgins (1963), 23.
[52] A/RES/1746(XVI), 27 June 1962; A/RES/1748(XVII), 18 September 1962 *and* A/RES/1749(XVII), 18 September 1962.
[53] A/RES/3205(XXIX), 17 September 1974. Quigley (2010), 239. Other examples include the Federated States of Micronesia and the Republic of the Marshall Islands, who were admitted to UN membership despite having entered into a compact granting the United States extensive authority over their domestic affairs. Palau also has a similar arrangement with the US. *See id*. 240-242. *See also* text accompanying *infra* notes 59-60.
[54] Quigley (2010), 236-237.
[55] *Id*., 239.
[56] *Id*., 236-237.
[57] A/RES/47/231, 28 May 1993.

all authority over its defence to France, agreed to govern itself in "complete conformity with the political, military, naval and economic interests of France", and agreed not to conduct its international relations without prior consultation with France. Notably, it was France, and not Monaco, that registered the 1918 treaty with the UN.[58] Two more examples are the cases of the Federated States of Micronesia and the Republic of the Marshall Islands, which were admitted to membership in the UN in 1991.[59] Similar to the arrangement between Monaco and France, these microstates entered into a tripartite agreement with the United States in 1986 in which they agreed, *inter alia*, to cede "full authority and responsibility for security and defense matters", and to not engage in foreign affairs without prior consultation with the United States.[60] It is apparent from these and other cases[61] that the requirement of possessing the capacity to enter into relations with other states has also been furnished with a very permissive interpretation by the UN.

Leaving the Montevideo requirements for statehood, we now turn to the second criterion for UN membership under Article 4(1) of the *Charter*. The requirement that an applicant state be peace-loving derives from the desire of the framers of the *Charter* to disqualify the Axis powers and their allies from gaining immediate membership in the Organization in the aftermath of WWII.[62] The framers also agreed that an applicant's peace-loving credentials could not properly be judged by reference to its domestic political institutions.[63] Over time, the criterion was relaxed to the point that, during decolonization, when the vast majority of UN Member States were admitted to membership, the requirement of being peace-loving "was of no practical importance at all."[64] On those occasions when the criterion has figured into admission determinations, it has sometimes been assessed through whether the applicant state has shown sufficient respect for principles upon which the *UN Charter* is based, including non-intervention and peaceful resolution of disputes.[65] Even then, there are enough cases to demonstrate that the threshold has remained low. There can be no better evidence of this than the fact that the UN has admitted states to membership despite being in situations of active and/or formal war with their neighbours. Thus, Israel was deemed a peace-loving state when it was admitted in May 1949, despite the fact that it was still formally at war with Egypt, Jordan,

[58] *France-Monaco Treaty*, arts. 1, 2. Quigley (2010), 239-240.
[59] A/RES/46/2, 17 September 1991; A/RES/46/3, 17 September 1991.
[60] *Compact of Free Association*, 1822. Quigley (2010), 240-242.
[61] *See* Grant (2009).
[62] Ginther, *in* Simma (2002), 182.
[63] *Id.*
[64] *Id.*
[65] *Id.*

Lebanon and Syria, having only concluded armistice agreements with the former three.[66] Likewise, as noted above, when the Republic of the Congo was admitted it was involved in an active civil war that required the deployment of UN peacekeepers by the Security Council. Finally, when the Republic of Bosnia and Herzegovina was admitted to membership in 1992,[67] it was in the middle of a multi-party war that would last for three more years. It is evident, therefore, that the criteria of being peace-loving has been interpreted very permissively by the UN in its admissions decisions.

The third criterion under Article 4(1) of the *Charter* is that an applicant must accept the obligations contained in the *Charter*. This is a matter of procedure and has historically been satisfied through the submission of a formal instrument of acceptance affixed to the application for membership in which the applicant solemnly accepts the obligations of the *Charter*, usually "without any reservation".[68] As a *pro forma* act, this requirement has not given rise to any great difficulties in practice.

The fourth and fifth criteria under Article 4(1), namely that the applicant must be both *able* and *willing* to carry out its obligations under the *Charter*, have also been given a broad and liberal application in UN admissions practice. Ability was originally intended to bar from membership those states that lacked sufficient material and human resources to meet their obligations under the *Charter* (*e.g.* troop and financial contributions, etc.). Yet, the admission of states with little to no military or financial capacity over the years (*e.g.* Austria, Japan, the microstates, etc.) has rendered this criterion "practically irrelevant."[69] As to the willingness criterion, in 1952 the General Assembly suggested that it be assessed against such factors as an applicant's maintenance of friendly relations with other states, the fulfillment of its international obligations and its record and disposition to have recourse to pacific means of dispute settlement.[70] Despite this early attempt to provide substance to the criterion capable of objective verification, the Assembly's suggestions were never formally endorsed by Member States.[71] This may be due to the fact that there is a considerable overlap between the willingness and

[66] In the debates on Israel's application for admission in May 1949, these factors did not preclude a finding that Israel was peace-loving for the purposes of Article 4(1). UN GAOR, 3rd Sess., 207th Plen. Mtg., A/PV.207, 11 May 1949, at 306-336. *See also* text accompanying *infra* notes 195-198. *See generally*, *1949 Egypt-Israel Armistice Agreement*; *1949 Lebanon-Israel Armistice Agreement*; *1949 Jordan-Israel Armistice Agreement*; *1949 Israel-Syria Armistice Agreement*.
[67] A/RES/46/237, 22 May 1992.
[68] *SC Provisional Rules of Procedure*, Rule 58; *and GA Rules of Procedure*, Rule 134. *See also Repertory of Practice*.
[69] Ginther, *in* Simma (2002), 183.
[70] A/RES/506A(VI), 1 February 1952.
[71] Grant (2009), 59-60.

peace-loving criteria of Article 4(1).[72] It is noteworthy that according to the *Repertory of Practice of the United Nations Organs* – which as at time of writing is available for the years 1945-2009 – "although there have been statements of position [by Member States] in respect of specific interpretations of" the terms "peace-loving state" and "able and willing" to carry out the obligations of the *Charter*, "there has never been any attempt, in proposals submitted to the Council or the Assembly, to define their meaning in any general sense."[73] No doubt, this too is indicative of a desire of the UN to maintain as open and permissive an application of these criteria as possible.

2.3 General Observations

The current law on admission to membership of the UN is relatively clear. As affirmed by the ICJ in 1948, the criteria laid down in Article 4(1) of the *Charter* are exhaustive. No condition extraneous to them may factor into an assessment of an application for admission. This includes conditions of a political nature, including in relation to other states, so long as such conditions cannot reasonably and in good faith be connected to the criteria themselves. Once those criteria are met, a presumption, and arguably a positive right, exists for an applicant to assume membership in the Organization. With the exception of the first decade of the UN's existence, when the exercise of neo-imperial power by the US and USSR blocked a number of states from gaining membership for political reasons, the Organization's admissions practice has consistently applied the Article 4(1) conditions in a liberal, flexible and permissive manner. In many cases, substantive application of the criteria has been dispensed with altogether. This approach can be attributed to the international vocation of the UN and its overarching interest in the maintenance of the universality of its membership.

From the standpoint of the maintenance and development of the international rule of law, the principle of the universal membership of the UN is vital.[74] While it is true that not all Member States of the UN are endowed with equal resources and material capabilities, in juridical terms they technically enjoy the same standing as one another. Because sovereign equality among Member States remains a pillar of the *Charter*-based international legal order, it is therefore evident that access to that order can for the most part only be fully secured through membership in the UN. Given the Security Council's role as the effective gatekeeper of membership in the Organization, it is not hard to see how and why admission to the UN remains

[72] Ginther, *in* Simma (2002), 184.
[73] *Repertory of Practice*.
[74] Grant (2009), 79.

a site where the hegemonic-subaltern binary can rear its head, giving rise to the substitution of the international rule of law with an international rule by law if so desired by the neo-imperial powers that be.

As cryptically noted by Simon Chesterman, Ian Johnstone and David Malone, cases of admission to the UN "are interesting from a policy point of view because they illustrate how restrictions on participation can be used as a kind of sanction, registering disapproval of a regime or its policies."[75] For those on the receiving end of such sanction or disapproval, it is the contingency of their own international legal status that such decisions affirm that this research is concerned with. In underscoring the ILS condition of the peoples and states left out of the system, the cross-cutting theme of neo-imperial interest reminds us of the power of law as a tool for the suppression of the weak. While substantive parameters have been set by judicial opinion and state practice on the interpretation of the Article 4(1) criteria, the procedural power vested in the UN's two principal political organs to apply those criteria under Article 4(2) in good faith holds within it a most significant and, in the end, controlling authority. This is particularly so, when that power is being wielded and/or heavily influenced by a permanent member of the Security Council for what are, in effect, hegemonic interests. Along with the abiding Eurocentricity of international law and institutions and the quasi-sovereignty of the Third World, it is the pernicious and arbitrary exercise of this neo-imperial authority under the legitimizing cloak of the *UN Charter* that forms the essence of the ILS condition. It is to the application of that authority in the consideration of Palestine's application for membership in the UN, and its consequences in enabling the perpetuation of its ILS condition, that we now turn.

3. Membership of the State of Palestine in the United Nations and the Continued International Rule by Law

Palestine's application for membership of the UN was submitted by President Mahmoud Abbas to the Secretary-General on 23 September 2011.[76] Unsurprisingly, the application was rooted in the prevailing international rule of law, not only as reflected in the long-established UN position on the question of Palestine but also as regards the law relating to membership in the Organization. The application accordingly stated that it was based, *inter alia*, on General Assembly partition resolution 181(II) of 29 November 1947 and the Declaration of Independence of the State of Palestine of 15 November 1988. Particular reference was made to

[75] Chesterman, et al. (2016), 196.
[76] *Application of Palestine for UN Membership*.

"the successful culmination" of Palestine's "State-building program," endorsed by the Quartet of the Middle East Peace Process (UN, US, Russia, European Union), and to the Palestinian people's long-established right to self-determination, as affirmed on countless occasions by the Security Council, General Assembly and ICJ. It recalled that "the vast majority of the international community" has accorded "bilateral recognition to the State of Palestine on the basis of the 4 June 1967 borders, with East Jerusalem as its capital" (*i.e.* highlighting the self-determination unit as the occupied Palestinian territory (OPT)), and further indicated that the application was consistent with the rights of the Palestine refugees under international law. Finally, the application reaffirmed Palestine's commitment to resume negotiations with Israel on all final status issues – Jerusalem, refugees, settlements, borders, security and water – with the goal of the achievement of a just, lasting and comprehensive resolution of the Israeli-Palestinian conflict based on the vision of two states living side by side in peace and security, as endorsed by the Security Council and General Assembly.[77] Notwithstanding the international rule of law basis of Palestine's application, an assessment of how it was legally appraised by the UN reveals why its effective failure can be better understood as a result of the exercise of the international rule by law by operation of neo-imperial power.

Upon receiving Palestine's application for membership from the Secretary-General, the Council referred it to the Committee on Admission.[78] Procedurally, the Committee is required to examine the application and report its conclusions to the Council, including any recommendation for membership.[79] Because each member of the Council is represented on the Committee, in practice there is little substantive difference between it and the Council proper on matters concerning admission.[80] Following its consideration of the application, the Committee issued its report to the Council indicating that it "was unable to make a unanimous recommendation" on Palestine's admission.[81] Since then, no action has been taken in the Council on Palestine's application for membership, further consideration of which effectively remains adjourned *sine die*.[82] In effect, Palestine's application for admission was rejected.

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[77] *Id.*
[78] *SC Provisional Rules of Procedure*, Rule 59.
[79] *Id.*
[80] The original intention of the Committee on Admission was to provide "a sort of Charter due process", allowing Council members to engage in substantive review, with input from applicants, prior to making a recommendation to the General Assembly on admission cases. Although it performed this function in the first few years of the UN's existence, and at least once in the early 1970's, in practice it has fallen into disuse. Admission having become a *pro forma* exercise, as a rule the Committee does not normally engage in any substantive assessment or fact finding when an application is referred to it by the Council. It is, effectively, a dead letter. Grant (2009), 45, 58-62. Ginther, *in* Simma (2002), 184.
[81] *Committee on Admission Report.*
[82] This is result seems to violate Rule 60 of the *SC Provisional Rules of Procedure*, *id*., under which the Council is required to take one of three actions: (1) recommend membership; (2) not recommend membership; or (3)

In assessing the substance of the report of the Committee on Admission under international law, two general and related points should be kept in mind. First, contrary to the liberal, flexible and permissive application of the Article 4(1) criteria that characterizes the overwhelming corpus of UN admissions practice, the report reveals that some members of the Committee preferred an unduly narrow and strict approach. This made the usual method of *pro forma* consensus recommendations to the Council impossible to reach, thereby frustrating Palestine's admission.[83] Second, because the report of the Committee on Admission was anonymous as to the particular views of given Council members, it is difficult to determine with precision from that document alone which positions where taken by which members. For that, we require an examination of other contemporaneous UN records, in particular the verbatim record of the Security Council debate for 24 October 2011. Based on that record, it was the spectre of a certain US veto that made it impossible for Palestine's application to succeed.[84] Those Council members that indicated they might join the US, or were otherwise unclear as to their intentions, were Bosnia and Herzegovina,[85] Colombia,[86] Gabon,[87] Germany,[88] France,[89] Nigeria,[90] Portugal[91] and the United Kingdom.[92] This lack of clarity introduced challenges for the Palestinians, not least because three of these states (Bosnia and Herzegovina, Gabon and Nigeria) already enjoy full diplomatic relations with the State of Palestine but were generally non-committal on the issue of its membership in the UN owing to pressure being brought to bear by the US on them and other members of the Council.[93] However, even if one were to assume positive votes from those three states, when combined

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postpone consideration of the application. In the event of (1), the Council must inform the General Assembly, providing a complete record of its discussion on the matter. In the event of either (2) or (3), the Council must submit a "special report" to the Assembly with a complete record of the discussion. In Palestine's case, despite receiving the report of the Committee on Admission on 11 November 2011, the Council has yet to take any of these actions. This is confirmed by a review of the annual reports of the work of the Security Council, available for the years 2011-2016. *See* Council actions set out in the *Report of the Security Council*, at 206, none of which reference the Council having taken any action following receipt of the Committee on Admission's report as required under Rule 60.

[83] Some authors have suggested that consensus is required, *e.g.*, Moussa (2016), 60. Based on practice, this is questionable. Thus, when the Committee on Admission recommended the Republic of Nauru's admission, China indicated it was unable to associate itself with that recommendation and yet it still went through. *See* Report of the Committee on the Admission of New Members Concerning the Application of the Republic of Nauru for Admission to Membership in the United Nations, S/1999/716, 25 June 1999. Chesterman (2016), 205.

[84] Statement of Ms. Rice (USA), UN SCOR, 66th Sess., 6636th Mtg. at 12, S/PV.6636, 24 October 2011.

[85] UN SCOR, 66th Sess., 6636th Mtg. at 24, S/PV.6636, 24 October 2011.

[86] UN SCOR, 66th Sess., 6636th Mtg. at 28, S/PV.6636, 24 October 2011.

[87] UN SCOR, 66th Sess., 6636th Mtg. at 22, S/PV.6636, 24 October 2011.

[88] UN SCOR, 66th Sess., 6636th Mtg. at 15, S/PV.6636, 24 October 2011.

[89] UN SCOR, 66th Sess., 6636th Mtg. at 20-21, S/PV.6636, 24 October 2011.

[90] UN SCOR, 66th Sess., 6636th Mtg. at 28-29, S/PV.6636, 24 October 2011.

[91] UN SCOR, 66th Sess., 6636th Mtg. at 27, S/PV.6636, 24 October 2011.

[92] UN SCOR, 66th Sess., 6636th Mtg. at 18-20, S/PV.6636, 24 October 2011.

[93] Bosnia and Herzegovina (1992); Gabon (1988); and Nigeria (1988). *See also* correspondence with Deputy Permanent Observer of the State of Palestine, United Nations, New York, 25 May 2018, on file with author.

with those Council members that did indicate they would vote positively – Brazil,[94] China,[95] India,[96] Lebanon,[97] the Russian Federation[98] and South Africa[99] – it was clear that Palestine might achieve a 9 to 15 majority in favour, but would never be able to overcome a US veto.

The pivotal US role in the Council (whether through exercise of political pressure or a threatened veto) highlights the specific hegemonic and neo-imperial power that was brought to bear in the Committee on Admission's consideration of Palestine's application under the Article 4(1) criteria. The exercise of the Council's powers to recommend membership of an applicant state under Article 4(2) is the site where the rule by law was maintained in this case. In the international law assessment of the Committee's report below, special consideration will thus be given not only to comparing the Committee's approach with UN admissions practice in general, but also with the ostensible long-standing support of the US government for the principle of the universality of UN membership,[100] and the manifestations of that support in the admission of one other Member State with a special relevance to the case at hand, namely Israel in 1949.[101] The research shows that the double standard evident in the strict approach to the Article 4(1) criteria taken by the Council on Palestine's application, when compared with the liberal, flexible and permissive approach normally adopted in UN admissions practice, including in respect of Israel, is demonstrative of the pernicious and arbitrary nature of the neo-imperial power that thematically underpins the ILS condition. In this case, it was the US's exercise of that power that proved to be the proximate cause of Palestine's failure to obtain admission to the UN, a result that ultimately embodies the persistence of its ILS condition in the system.

3.1 Conditions Extraneous to Article 4(1) Criteria

It is evident that one or more members of the Committee on Admission sought to impose conditions extraneous to the Article 4(1) criteria in their evaluation of Palestine's application. Unsurprisingly, these were rooted in the UN's long-established position making the end of Israel's occupation of the OPT contingent on negotiation, covered in chapter 4. Thus, in its report a view was twice expressed that the Committee should take the "broader political

[94] UN SCOR, 66th Sess., 6636th Mtg. at 16, S/PV.6636, 24 October 2011.
[95] UN SCOR, 66th Sess., 6636th Mtg. at 16, S/PV.6636, 24 October 2011.
[96] UN SCOR, 66th Sess., 6636th Mtg. at 13, S/PV.6636, 24 October 2011.
[97] UN SCOR, 66th Sess., 6636th Mtg. at 25, S/PV.6636, 24 October 2011.
[98] UN SCOR, 66th Sess., 6636th Mtg. at 18, S/PV.6636, 24 October 2011.
[99] UN SCOR, 66th Sess., 6636th Mtg. at 23, S/PV.6636, 24 October 2011.
[100] *See* text accompanying *supra* notes 17-18.
[101] After a failed December 1948 application, Israel was admitted in May 1949; A/RES/273(III), 11 May 1949.

context" into account in its assessment.[102] Likewise, it was noted that "a two-State solution via a negotiated settlement remained the only option for a long-term sustainable peace and that final status issues had to be resolved through negotiations".[103] In a similar vein, it was stated that "the Committee's work should not harm the prospects of the resumption of peace talks," and "that the Palestinian application would not bring the parities closer to peace."[104] Doubtless, these were the views of the US, whose representative stated in the October 2011 Council debate on the question of Palestine that "we believe that Palestinian efforts to seek Member State status at the United Nations will not advance the peace process, but rather will complicate, delay and perhaps derail prospects for a negotiated settlement. Therefore, we have consistently opposed such unilateral initiatives."[105] Joining the US in that debate, specifically in referencing negotiations as the only means to Palestinian statehood (and, perforce, UN membership), were Colombia,[106] Germany,[107] and Portugal.[108]

It is clear that the notion "broader political context" is so imprecise as to admit of no relevance to the Article 4(1) analysis. Furthermore, no one would argue that a willingness to engage in peaceful resolution of disputes is relevant to an assessment of the Article 4(1) criterion of being a "peace-loving" state (see below). Nevertheless, based on long-standing UN admissions practice there is no requirement that before an applicant state may acquire membership it must have successfully *concluded* a negotiated peace with belligerent or hostile states, as suggested by members of the Committee. Indeed, underscoring the capricious and arbitrary nature of the US position on Palestine's application, Israel itself was admitted to membership in May 1949 with US support, yet had not concluded peace agreements with its neighbours, a fact readily acknowledged by the US at the time.[109] As noted above, the same is true of Bosnia and Herzegovina and the Congo, each of which were embroiled in armed conflict at the time they were admitted to membership.[110] In none of those cases, did the fact of their not having concluded peace negotiations bar admission to the Organization. Moreover, the

[102] *Committee on Admission Report*, paras. 4, 6.
[103] *Id*., para. 6.
[104] *Id*., para. 7.
[105] UN SCOR, 66th Sess., 6636th Mtg. at 12, S/PV.6636, 24 October 2011.
[106] UN SCOR, 66th Sess., 6636th Mtg. at 28, S/PV.6636, 24 October 2011 ("We understand and support the aspiration of the Palestinian people to have a State...", but "negotiation is the only possible and robust path to achieve that objective").
[107] UN SCOR, 66th Sess., 6636th Mtg. at 15, S/PV.6636, 24 October 2011 ("As a matter of course", a Palestinian "State will become a Member of the United Nations. But…[t]here is no viable alternative to the resumption of negotiations. The two-State solution can be achieved only through a peace agreement").
[108] UN SCOR, 66th Sess., 6636th Mtg. at 27, S/PV.6636, 24 October 2011 ("[A]n independent and sovereign [Palestinian] State…can be achieved only with direct and meaningful negotiations with their Israeli neighbours").
[109] UN GAOR, 3rd Sess., 207th Plen. Mtg., 11 May 1949 at 306-336. *See also* text accompanying *infra* notes 195-198.
[110] *See* text accompanying *supra* notes 48-50, 67.

existence of statehood is conditioned upon the fulfillment of the four Montevideo requirements, not the conclusion of peace agreements with belligerent or hostile states, as suggested by Colombia, Germany and Portugal. Based on long-standing practice, it is therefore clear that both the "broader political context" and "successful negotiations" conditions run afoul of the exhaustive character of the Article 4(1) criteria as affirmed by the ICJ.[111] Neither can they be regarded reasonably and in good faith as permissive political considerations of relevance to any of those criteria in light of UN admissions practice.[112] In effect, these requirements constitute, in the words of the ICJ, "new" and "extraneous" conditions, improperly invoked to "prevent the admission of a State" which might otherwise qualify under Article 4(1).[113]

Some members of the Committee on Admission rejected the imposition of the "broader political context" and "successful negotiations" conditions. In this respect, *Conditions of Admission* was cited as affirming the exhaustive character of the Article 4(1) criteria.[114] At any rate, it was stated, "Palestine's application was neither detrimental to the political process nor an alternative to negotiations."[115] Were it otherwise, it was argued, "Palestinian statehood would be made dependent on the approval of Israel, which would grant the occupying Power a right of veto over the right of self-determination of the Palestinian people."[116] Of note, none of the final status issues to be negotiated between Israel and Palestine include the issue of the right of the Palestinian people to an independent state.[117] It was because of this that Palestine informed the Council that it did not see any contradiction between negotiations with Israel over the final status issues and Palestine's application for membership. Rather, the two were "mutually reinforcing."[118]

These principled objections notwithstanding, the imposition of factors extraneous to the Article 4(1) conditions by the US and some others contributed to frustrating the prospect of

[111] *Conditions of Admission*, p. 62.
[112] *Id.*, 62-63.
[113] *Id.*, 63, 65.
[114] *Committee on Admission Report*, para. 5.
[115] *Id.*, para 7.
[116] *Id*. This was the position taken by Lebanon, who's ambassador articulated it in the public Security Council debate in October 2011; UN SCOR, 66th Sess., 6636th Mtg. at 25, S/PV.6636, 24 October 2011.
[117] These are: Jerusalem, refugees, settlements, security and borders. *Declaration of Principles*, Art. V. The issue of water was subsequently added. Statement of Mr. Mansour (Palestine), UN SCOR, 66th Sess., 6636th Mtg. at 8, S/PV.6636, 24 October 2011.
[118] *Id*., 6. The representative of Palestine also stated, *id*., 8, that: "While committed to the peace process, we must reiterate clearly that the right of the Palestinian people to self-determination, freedom and independence is not up for negotiation, nor will it be the product of negotiations. It is an inalienable right and the sole domain of the Palestinian people. It has never been an issue for negotiations with Israel, nor will it ever be. Negotiations on the core issues and the expression of our self-determination should not be confused by Israel, or others, as one and the same, because they are not. Israel as the occupying Power, should not be allowed to continue obstructing and dictating the terms of our exercise of that inalienable right."

Palestine's admission, contrary to the overwhelmingly *pro forma* character of UN admissions practice. Interestingly, in the case of Israel's application for membership, the US also cited extraneous factors. But then they were invoked to argue the case *for* admission, highlighting once again the arbitrary and capricious nature of its position on Palestine's application. Thus, on 2 December 1948, Philip Jessup, then a US Ambassador-at-Large at the UN, informed the Security Council that "something more" than the Article 4(1) criteria was "being dealt with" in Israel's case. In his view, the Council was "dealing here with the desire of a people who laboriously constructed a community, an authority and, finally a Government operating in an independent State, to see the State which they have thus arduously built take its place among the Members of the United Nations."[119] In offering US support for Israel's application, Jessup failed to acknowledge that the community being "laboriously constructed" was, in real time, being forged through the mass expulsion of Palestine's indigenous population and the expansion of the putative new state's borders beyond those delimited by the General Assembly only months earlier.[120] Though striking, this is unsurprising given the US shared the general Western desire to resolve Europe's Jewish question following WWII. More important for our purposes, however, was the favourable outlook of his statement in general terms. For it provides a useful glimpse into the permissive disposition the US took in the assessment of Israel's application on its merits under Article 4(1) in 1948, and the resulting double standard that emerges when compared with its unduly restrictive approach to Palestine's application under the same *Charter* provision in 2011.

3.2 Statehood

It will be recalled that the first of the Article 4(1) conditions is that the applicant be a "state". The flexibility shown in the general application of this criterion in UN practice has been wide. As noted above, the 1945 inclusion of Belorussia, India, the Philippines, and Ukraine as original Member States is testament to this.[121] It is unsurprising, therefore, to find that the US view regarding Israel's application for membership was equally broad. In the December 1948 Council debate on Israel's membership Jessup opined that "the term 'State', as used and applied

[119] UN SCOR, 3rd Yr., 383rd Mtg., 2 December 1948, at 13-14. As one of the US's leading international jurists of his day, Jessup was given wide latitude by the US State Department to frame Washington's arguments on Israel's admission bid. Jessup (1974), 294. Jessup would later become a Judge on the ICJ, 1961-1970.

[120] By that time the majority of the 700-900,000 Palestine refugees were forcibly expelled by Zionist regular and irregular forces. *See generally*, Morris (2004). This was a matter that would have been well known to Jessup, as the issue was actively being discussed in the General Assembly which, only nine days after he delivered his comment before the Security Council on Israel's admission to the UN, would pass its own resolution affirming, *inter alia*, the right of the refugees to return to their homes. *See* A/RES/194(III), 11 December 1948. *See also* the statement of the representative of Syria, *at* UN SCOR, 3rd Yr., 384th Mtg., 15 December 1948, at 25.

[121] *See supra* note 10.

in Article 4 of the Charter of the United Nations, may not be wholly identical with the term 'State' as it is used and defined in classic textbooks of international law."[122] Although in that case the US would nevertheless apply a close approximation of the classic Montevideo definition, its disposition was clearly to do so in a less vigorous and flexible manner than even that would require.[123]

The four qualifications under the Montevideo formula are a permanent population, a defined territory, government and the capacity to enter into relations with other states.[124] In the Committee on Admission's report concerning Palestine's application for membership, its consideration of the requirement of a permanent population was not a matter of disagreement.[125] The OPT has a population of some 4.5 million people,[126] and that is sufficient to satisfy this requirement. As noted, a very wide appreciation has been given in UN admissions practice to the notion of a permanent population, including as to its homogeneity (not required), its longevity of tenure (no minimum), and its number (no minimum).[127] So flexible is the practice, that even where a putative state's population is undergoing violent dislocation or separation of ethnic groups from one another through war, that has still not been enough to cast doubt on the existence of a population permanent enough to satisfy this requirement. The admissions of Bosnia and Herzegovina[128] and Croatia[129] are useful examples of this. In addition, the case of Israel stands out,[130] highlighted by the flexibility shown by the US in arguing for its admission in 1948/49.

At that time, in recounting "the traditional definition of a State in international law" before the Council, Jessup asserted that the existence of "a people", in contrast to "a permanent population," was the relevant qualification.[131] But as an expression of prevailing treaty and customary international law in 1948, Montevideo referred to "a permanent population", not a "people".[132] Given the favourable American disposition towards Israel's admission, this was possibly done because the Jewish Agency's case for the existence of the State of Israel was based, in part, on the fact that it represented itself as the state of the Jewish *people* as a whole,

[122] UN SCOR, 3rd Yr., 383rd Mtg., 2 December 1948, at 10.
[123] Wählisch (2012), 241.
[124] *Montevideo Convention*, art. 1.
[125] *Committee on Admission Report*, para. 10.
[126] *PCBS Report*.
[127] *See* text accompanying *supra* notes 40-41.
[128] A/RES/46/237, 22 May 1992.
[129] A/RES/46/238, 22 May 1992.
[130] *See supra* note 120 along with accompanying text.
[131] UN SCOR, 3rd Yr., 383rd Mtg., 2 December 1948, at 10.
[132] *Montevideo Convention*, art. 1.

rather than of the whole of Palestine's population, whose indigenous majority was Arab. This may explain Jessup's curious assertion – uttered when the expulsion of Arabs of Palestine hit its peak – that "[n]obody questions the fact that the State of Israel has a people. It is an extremely homogenous people, a people full of loyalty and enthusiastic devotion to the State of Israel."[133] It is telling that in his discussion of the requirements of statehood in his own 1949 treatise on international law Jessup himself referred to "a population" rather than a "people", in deference to the Montevideo standard.[134] Be that as it may, these American interventions before the Council helped contribute to a very liberal understanding of this branch of the Montevideo qualifications in favour of Israel, not only highlighting the malleability of the Article 4(1) requirements, but also emphasizing the capriciousness of the American position on Palestine in 2011.

In the consideration of Palestine's application for membership, the Committee on Admission's assessment of the second requirement of a defined territory was a matter of disagreement. Those who were in favour of admission correctly "stressed that the lack of precisely settled borders was not an obstacle to statehood."[135] This had been affirmed by the ICJ in *North Sea Continental Shelf*, and was a long-established feature of the international law governing statehood.[136] Nevertheless, certain members of the Council impugned Palestine's satisfaction of this qualification by questioning its *control* over its territory. In support of this contention, both the *de facto* control of the Gaza Strip by Hamas and the Israeli occupation of the OPT were raised.[137] While these factors might have some connection to the third Montevideo qualification of government (see below), they have no relevance to the ground of a defined territory. To contemplate this line of challenge, is to confuse two branches of the test for statehood.

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[133] UN SCOR, 3rd Yr., 383rd Mtg., 2 December 1948, at 11. Jessup's position did not go unchallenged. In response to the US position that Israel had a permanent population, the Syrian representative pressed him: "[W]here are the people? Half the people of the territory which they [i.e. the Zionists] occupy have been expelled and dispersed throughout the country. They are now homeless, starving and dying. These are the people of the territory which they are occupying…How can he [i.e. Jessup] say that [t]his people [*i.e.* those of Israel] are peace-loving and are complying with the requirements of Article 4 of the Charter?" *See* UN SCOR, 3rd Yr., 383rd Mtg., 2 December 1948, at 19.

[134] Jessup (1949), 46. Jessup asserted that his reference in the Council to "a people" was affirmed by "all the great writers". *See* UN SCOR, 3rd Yr., 383rd Mtg., 2 December 1948, at 10. However, a review of the leading publicists of his day reveals that only one author used the term, qualifying it as "an aggregate of individuals…who live together as a community." *See* Oppenheim (1937), 112. Given the mass expulsion being experienced by the indigenous population of Palestine at the time, it would be hard to suggest that Palestine's "people" were then living "together as a community." For other writers, *see* Westlake (1904), 44, *and* Hall (1924), 17, both of which refer to "a community…permanently established for a political end". Although Lauterpacht edited the 5th through 7th editions of Oppenheim, *id*., his own text referred to "a permanent population". Lauterpacht (1970), 316.

[135] *Committee on Admission Report*, para. 10. *See* text accompanying *supra* notes 44-46.

[136] *North Sea Continental Shelf*, p. 32.

[137] *Committee on Admission Report*, para. 11.

The borders of what is today the OPT were originally set by UN mediated armistice negotiations in 1949[138] and, since the PLO's recognition of Israel in 1988, have been accepted as delimiting the territorial unit within which the Palestinian people are entitled to exercise their right to self-determination.[139] Although these borders still need to be finalized through some form of peace agreement, the fact that they are unsettled does not render them insufficiently clear under the Montevideo test. That there has been a quarrel between Palestine's two main political parties (Fatah and Hamas) that has manifested in a partially separate administration of the Gaza Strip from the West Bank bears no logical impact on the existence of the OPT as a defined territory, as such. Nor does the fact of Israel being in foreign military occupation of the OPT detract from the sufficiently defined nature of Palestine's territorial sphere. While there have been cases where the qualification of a defined territory has been questioned on the basis of competing territorial claims, such claims have not disrupted the historically liberal construction given to this ground in practice, as demonstrated by the admission of Kuwait and Mauritania to membership in the UN.[140] At any rate, there is no other state that currently lays a legitimate claim to the OPT as its sovereign territory.[141] As discussed in chapter 4, Israel is legally debarred from asserting its sovereignty over the OPT in any form given its status as an occupying Power.[142] Likewise, the only other state that has ever laid claim (and only then, to a portion) of the OPT, namely Jordan, has since 1988 relinquished such claim in favour of the Palestinian people.[143] Nor does the fact that the territory of Palestine is physically discontiguous (*i.e.* between the West Bank, including East Jerusalem, and the Gaza Strip) frustrate this branch of the Montevideo test.[144] There are a large number of UN Member States that share that characteristic,[145] most prominent among which is the US. In short, given the permissible construction afforded in practice to the defined territory requirement, the narrow position of some members of the Committee on Admission concerning the status of the OPT in this regard is demonstrative of legal authority under Article 4(2) of the *Charter* being utilized for hegemonic purposes over a subaltern group.

[138] *1949 Egypt-Israel Armistice Agreement*; *1949 Jordan-Israel Armistice Agreement*.
[139] A/RES/43/177, 15 December 1988.
[140] *See* text accompanying *supra* note 46.
[141] Quigley (2010), 210.
[142] This view was also affirmed by some members of the Committee on Admission; *Committee on Admission Report*, para. 11.
[143] *King Hussein Address (1988).*
[144] Quigley (2010), 210.
[145] *E.g.*, Angola, Azerbaijan, Brunei Darusasalam, East Timor, Oman, United Arab Emirates and the US.

This is underscored by examining the double standard applied in the Security Council's treatment of the defined territory criterion in Israel's application for membership, paying particular note of the US position taken at the time. The application was submitted during the course of the 1948 war, during which time the territory originally allotted to the putative Jewish State in General Assembly resolution 181(II) was being considerably expanded through ongoing military and paramilitary operations. As a result, objections were raised by Syria in the Council that the territory of Israel "has no boundaries" and therefore could not satisfy this branch of Montevideo.[146] Speaking on behalf of the US, Jessup reminded the Council that "[o]ne does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers".[147] He further noted that "many States have begun their existence with their frontiers unsettled," and tellingly cited the expansion of the "indeterminate" US frontier into "land [that] had not even been explored."[148] He concluded that "the concept of territory does not necessarily include precise delimitation of the boundaries of that territory."[149] This position influenced other members of the Council,[150] ultimately paving the way for Israel's admission. In her examination of the issue, Higgins opined that "Israel's admission is the best example of the statehood criterion of 'defined territory'" because it reveals that "this criterion has never been interpreted very strictly."[151] In her view, "given its customary liberal interpretation" in UN admissions practice, it was "properly applied" in Israel's case.[152] Considering the permissive state of the law, it is hard to argue that Palestine would not objectively meet the threshold under this branch of the Montevideo test. Yet that was the effect of the position put forward by some members of the Committee on Admission under US pressure.

On the third requirement for statehood under Montevideo, there was also a difference of opinion within the Committee on Admission as to whether Palestine possessed an effective and independent government. Those who argued for admission pointed to reports of the World Bank, the International Monetary Fund and the Ad Hoc Liaison Committee for the Coordination of the International Assistance to Palestinians, all of which "had concluded that Palestine's

[146] UN SCOR, 3rd Yr., 383rd Mtg., 2 December 1948, at 19.
[147] *Id*., 11.
[148] *Id*. Tellingly, of course, because he failed to even consider the claims of Native Americans in his assessment.
[149] *Id*.
[150] For example, even though the Zionists were expanding their control over a greater portion of Palestine than had been allotted the Jewish State under the partition resolution, the Soviet Union took the view that Israel's territory had been sufficiently defined through GA Resolution 181(II). *Id*., 22-23.
[151] Higgins (1963), 20.
[152] *Id*.

governmental functions were now sufficient for the functioning of a State."[153] The Quartet endorsed, largely EU-funded, state-building effort that evolved during the Oslo period built upon governmental institutions and legal structures inherited from the Ottoman, British, and Jordanian periods of control.[154] Despite being under foreign military occupation, Palestine formally boasts a constitutional parliamentary democratic system, with executive, legislative and judicial branches of government.[155] Its ministries serve across areas A and B of the OPT, and cover education, finance, foreign affairs, health, interior, justice, labour, planning, and social affairs, among other portfolios.[156] Its civil service now numbers in the tens of thousands, and includes security and police services.[157]

All of this notwithstanding, some members of the Committee on Admission argued that Palestine failed the effective and independent governmental control test because since the 2007 split between Fatah and Hamas the latter has been "in control of 40 percent of the population of Palestine" (*i.e.* Gaza). As such, it was argued that Palestine "could not be considered to have effective government control over the claimed territory."[158] In addition, it was asserted that the Israeli occupation "was a factor in preventing the Palestinian government from exercising full control over its territory."[159] When measured against the broad and permissive UN admissions practice, these claims are revealed as both unduly narrow and, at times, confused.

To begin with, a split in government does not negate the existence of the effective government criteria under the Montevideo test. As noted above, when the Republic of the Congo was admitted to membership in 1960, the fact that it was embroiled in a civil war causing its central government to be divided between two factions and prompting the deployment by the Security Council of armed forces was not dispositive. Indeed, although this split made it impossible for the Assembly to identify which among the warring factions should be allocated a delegation's seat in the UN, the Organization still approved admission to membership.[160] Palestine's treatment by the Committee on Admission stands in stark contrast to this liberal,

[153] *Committee on Admission Report*, para. 13.
[154] *See* text accompanying *supra* note 76-77. As noted by Quigley (2010), 214, a May 1994 Palestinian decree affirmed "that 'the laws, regulations and orders in force before June 5, 1967 in the West Bank and the Gaza Strip shall remain in force until unified'."
[155] Quigley (2010), 215. Higgins (1963), 21, notes that in early practice some states exhibited a tendency to interpret the government qualification as needing to be *democratic*. Subsequent practice indicates that this threshold has not displaced the lower standard of effectiveness. Grant (2009), 157, observes that democracy's connection, if any, to the criteria for admission under Article 4(1) is "obscure" at best.
[156] *See Government of the State of Palestine*.
[157] Quigley (2010), 214.
[158] *Committee on Admission Report*, para. 12.
[159] *Id.* paras. 11-12.
[160] UN GAOR, 15th Sess., 864th Plen. Mtg., at 6, A/PV.864, 20 September 1960; Higgins (1963), 21-22.

flexible and permissive application of the test. In Palestine's case, with the exception of a five-day period of armed street clashes in Gaza in 2007, the division between Fatah and Hamas has never descended to anything approximating civil war, remaining largely a matter of internal domestic legitimacy and function. As noted by Quigley, "the fact that the administrative authority became split created practical difficulties" in the Gaza Strip, such as payment of civil service salaries, but such difficulties are "not relevant to the governance criterion for statehood."[161] While the split has "raised questions about the legitimacy of the governing institutions under domestic Palestine law", domestic legitimacy of government has no bearing on the existence of statehood.[162] It is to be recalled that, despite these events, the PLO (led by the West Bank-based Fatah party) has continued to represent Palestine internationally, including at the UN, and Hamas has effectively regarded itself as falling under it for that purpose.[163]

The assertion that the split between Fatah and Hamas deprives Palestine of a sufficient level of effective and independent governmental control over the OPT suffers from another defect. It confuses the distinct issues of the recognition of states with recognition of governments under international law.[164] As noted by Jasmine Moussa, "[i]t is not uncommon for a State to lack control over a particular part of its territory. This does not mean that its statehood can be denied" on the basis that the putative governing authorities in that territory are not internationally recognized.[165] This was an issue that arose in the Council debates concerning Israel's admission in 1949. Only in that case, the US made sure the Council did not let the confusion get in the way of admission. At the time, Syria attempted to vitiate US recognition of Israel in May 1948 by arguing that that recognition was limited to Israel's provisional government as a *de facto* authority, rather than Israel as a *de jure* state.[166] In response, Jessup clarified that the Syrian objection suffered from "some confusion…between recognition of the state of Israel and recognition of the provisional government of Israel."[167] The two were distinct. Jessup affirmed that in entertaining Israel's application for membership, it was the former that the Security Council was concerned with, and it was to that end that the US's act of recognition of the State of Israel was to be understood.[168] Once again, the difference in

[161] Quigley (2010), 216.
[162] *Id.*, 217.
[163] *Id.*
[164] Moussa (2016), 58.
[165] *Id.*
[166] UN SCOR, 3rd Yr., 384th Mtg., 15 December 1948, at 25.
[167] UN SCOR, 3rd Yr., 385th Mtg., 17 December 1948, at 12.
[168] *Id.*

treatment between Israel and Palestine is notable for highlighting the pivotal role of neo-imperial power in the maintenance of the ILS condition.

As to the claim that Israel's occupation of the OPT rendered it impossible to conclude that Palestine possessed a level of effective and independent governmental control sufficient under the test, it is well to recall the many cases of states who were admitted to, or formed the original membership of, the UN while lacking independent government.[169] Unlike these cases, however, what renders Palestine's case even more clear-cut is the fact that the impediment to the full exercise of independence is *the result* of an occupation regime that, under international law, cannot override the sovereign right of the people to exercise self-determination in the territory in question. As opposed to temporarily administering the territory in the best interests of this people in accordance with its obligations under international law, the occupying power has systematically sought to permanently frustrate that people's right to self-determination through, *inter alia*, the unlawful *de jure* and *de facto* annexation of the territory and the transfer of its own civilian population into it. Given the liberal and permissive interpretation afforded the Montevideo qualifications in UN admissions practice, it would be unjust to frustrate Palestine's admission by suggesting that it has not attained a sufficient level of independent and effective governmental control over its own territory owing to the bad faith of the occupying power. As pointed out by the Lebanese delegate to the Council, to do so would be to furnish the occupying power with the authority to deny the realization of Palestine statehood *ad infinitum*, including the right of its people to self-determination.[170] In addition, as demonstrated by the contemporary histories of Denmark, France and Kuwait the mere fact of occupation does not negate the existence of the state subject to it. Notably, this was the view taken by the US when it supported occupied Austria's application for membership in 1947, once again highlighting an arbitrary double-standard at work.[171] While Crawford has argued that such cases are distinct from Palestine, because they involve states that "were once incontestably

[169] This includes Belorussia, Burundi, Congo, Guinea-Bissau, India, Philippines, Rwanda and Ukraine. *See* text accompanying *supra* notes 47-55.

[170] *See* text accompanying *supra* note 116. Writing in 1999, prior to the achievements of the Palestinian state-building effort established by 2011, Crawford took the view that Palestine could not be a state owing to Israel's occupation depriving it of independent government. Yet, he qualified this: "[t]here may come a point where international law (like English equity) is justified in regarding as done that which out to have been done, if the reason it has not been done is the serious default of one party, and if the consequence of its not being done is serious prejudice to another, innocent, party. The principle that a state cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications, and circumstances can be imagined where the international community would be entitled to treat a new state as existing on a given territory, notwithstanding the facts." Crawford, *in* Goodwin-Gill (2012), 24.

[171] UN SCOR, 2nd Yr., 119th Mtg., 21 August 1947, at 2128-2129 ("We all know that, in the case of Austria, there is military occupation. But I submit that this does not impair Austria's sovereignty in the field of international relations, which is the important point to consider in deciding whether Austria is eligible to become a Member of the United Nations at this time").

established as such",[172] Quigley rightly points out that because no other state can legitimately lay claim to the OPT "there is no reason in principle why a [Palestine] state cannot be brought into being under such circumstances."[173]

Finally, with respect to the fourth requirement for statehood under the Montevideo formula, the Committee on Admission differed as to whether Palestine possessed the capacity to conduct foreign relations. In particular, questions were raised by some members regarding the capacity of the Palestinian Authority (PA) to engage in relations with other States, "since under the Oslo Accords the Palestinian Authority could not engage in foreign relations."[174] The trouble with this view, however, is that it runs contrary to the liberal, flexible and permissive interpretation given to this branch of the Montevideo test in UN admissions practice, and is only partially accurate on fact. As demonstrated with the cases of Belorussia, Ukraine, Monaco, the Federated States of Micronesia and the Marshall Islands, to name only a few, satisfaction of this criteria has not been compromised even where a state's foreign relations are wholly or partially ceded to another state.[175] Unlike these cases, however, Palestine has never ceded its foreign relations capacity to another state. Rather, that capacity has always been performed by the PLO on behalf of the Palestinian people, as affirmed by decades of UN practice going back to 1974.[176] Indeed, it was the act of the PLO entering into the Oslo accords with Israel *under US auspices* that created the PA in the first place.[177] While it is true that Oslo stated that the PA did not have "powers and responsibilities in the sphere of foreign relations", it also expressly provided that those powers would be conducted by the PLO on the PA's behalf – a fact not mentioned in the Committee on Admission's report.[178] It is to be recalled that since 1988, the designation "Palestine" has been used in place of the PLO at the UN. It is therefore clear that Palestine has demonstrated a capacity to enter into foreign relations through the PLO, which has included a robust diplomatic and treaty practice both at the UN and with the state of Israel itself.

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[172] Crawford, *in* Goodwin-Gill (2012), 115.
[173] Quigley (2010), 221.
[174] *Committee on Admission Report*, para. 14.
[175] *See* text accompanying *supra* notes 56-61.
[176] *See generally*, A/RES/3210I(XXIX), 14 October 1974; A/RES/3237(XXIX), 22 November 1974. As part of its 1988 acknowledgement of the proclamation of the State of Palestine by the Palestine National Council, the General Assembly decided that the designation "Palestine" be used in place of the "Palestine Liberation Organization" in the UN system. This change was done without prejudice to the observer status and functions of the PLO within the UN. *See* A/RES/43/177, 15 December 1988.
[177] *See e.g.*, *Declaration of Principles*.
[178] *Interim Agreement*, Art. IX(5), 561.

The issue of capacity to enter into foreign relations brings us back to the hybridity of the declaratory and constitutive theories of statehood, the lynchpin of which is to be found in the act of recognition. As noted by Higgins, UN practice "undeniably reveals that most Member States have considered the issue of recognition as relevant" in the Montevideo analysis, in so far as "it is evidence of the international status of an applicant" for membership.[179] Thus, those members of the Committee on Admission that favoured Palestine's application pointed to Palestine's membership in the Non-Aligned Movement (NAM), the Organization of Islamic Cooperation (OIC), the Economic and Social Commission for Western Asia (ESCWA), the Group of 77 (G77) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) as evidence of its capacity in this regard. Most significantly, they noted that "over 130 States had recognized Palestine as an independent sovereign State."[180] As noted by Quigley, this level of recognition has given rise to Palestine's very rich treaty and diplomatic/consular relations practice, the latter of which "perform the tasks that are typical of diplomatic missions, maintaining political contact with host states".[181] Based on the wide ambit afforded the foreign relations capacity branch of the Montevideo test in UN admissions practice, it is hard to suggest that Palestine does not meet the required threshold.

The unduly narrow approach adopted by the Committee on Admission in its assessment of this requirement in Palestine's application is once again underscored by the inconsistent position of the US concerning Israel's application in 1948/49. In urging the Council to take a liberal approach then, Jessup noted that "we already have, among the Members of the United Nations, some political entities which do not possess full sovereign freedom to form their own international policy."[182] Even more to the point, he noted "that neither at San Francisco nor subsequently has the United Nations considered that complete freedom to frame and manage one's own foreign policy was an essential requisite of United Nations membership."[183] In view of the US position then, and its subsequent vindication in wider UN practice, the fact that Palestine's case failed to garner the full support of the Committee on Admission on this ground makes little sense. There can be no other way to view it than as an abuse of the Council's power under Article 4(2) of the *Charter* by the US in exercise of its own neo-imperial interest.

[179] Higgins (1963), 42.
[180] *Committee on Admission Report*, para. 14. As at September 2018 this figure has increased to 137 states. *See Diplomatic Relations of Palestine*.
[181] Quigley (2010), 211-213.
[182] UN SCOR, 3rd Yr., 383rd Mtg., 2 December 1948, at 10.
[183] *Id*.

3.3 Peace-Loving

The second of the Article 4(1) criteria is that the applicant be "peace-loving". Some members of the Committee on Admission questioned Palestine's peace-loving character, citing Hamas's refusal "to renounce terrorism and violence" and its alleged "aim of destroying Israel."[184] While it is true that since its founding in 1988 Hamas has engaged in low intensity armed operations in defence of the Palestinian people living under prolonged military occupation, it is also true that the movement has often transgressed the laws of war while doing so in ways typical of the modus operandi of non-state actors engaged in asymmetrical conflict.[185] This has not stopped Israel from negotiating agreements with the movement, including those establishing truces and prisoner exchanges.[186] Based on relevant international law and practice, none of these facts seem to be reason enough to disqualify Palestine's character as a peace-loving state.

As with the statehood criterion, the flexibility shown in the general application of this condition has been very wide in UN admissions practice. Thus, as noted, the fact that Bosnia and Herzegovina, the Congo, and Croatia were actively engaged in high-intensity conventional armed conflict with their neighbours when they applied for membership was not regarded by the UN as enough to disqualify them from being characterized as peace-loving for the purposes of being admitted under Article 4(1) of the *Charter*. At the same time, the internationally recognized representatives of the Palestinian people and the state of Palestine, namely the PLO, have demonstrated both in word and deed, a commitment to resolving Palestine's dispute with Israel through pacific means. Rooted in the PLO's recognition of Israel and the two-state formula in 1988, this commitment is manifest in almost three decades of engagement in negotiations to that end. This position was unequivocally reiterated both in Palestine's application for membership, as well as in the October 2011 Council debate.[187] It was additionally demonstrated through Palestine's extensive resort to multilateralism, including diplomatic and legal mechanisms of dispute resolution at the UN, as evident in its active support and reliance on the ICJ in 2004.[188] Thus, those members of the Committee in favour of Palestine's membership expressed the view that Palestine was peace-loving "in view of its commitment to the achievement of a just, lasting and comprehensive resolution of the Israeli-

[184] *Committee on Admission Report*, para. 16.
[185] *Report of the UN Fact-Finding Mission on Gaza, September 2009.*
[186] At the time of Palestine's application for membership, Israel had just negotiated an exchange of prisoners with Hamas. Statement of Mr. Ahamed (India), UN SCOR, 66th Sess., 6636th Mtg. at 14, S/PV.6636, 24 October 2011.
[187] *Application of Palestine for UN Membership*. Statement of Mr. Mansour (Palestine), UN SCOR, 66th Sess., 6636th Mtg. at 7, S/PV.6636, 24 October 2011.
[188] *Wall.*

Palestinian conflict."[189] For them, "Palestine's fulfillment of this criterion was also evident in its commitment to resuming negotiations on all final status issues on the basis of the internationally endorsed terms of reference, relevant United Nations resolutions, the Madrid principles, the Arab Peace Initiative and the Quartet road map."[190] The representative of Brazil perhaps put it best when she proclaimed during the October 2011 Security Council debate that "[t]he ultimate demonstration that Palestine is a peace-loving State is precisely the decision to turn to international law and to the United Nations to realize its legitimate right to self-determination."[191] In her view, "[i]nternational recognition of the Palestinian State and its admission in the United Nations as a full Member can help reduce the asymmetry that at present characterizes relations between the parties."[192]

It is important to reiterate that UN practice does not require an applicant for admission who may be engaged in negotiations at the time of application to have successfully concluded peace agreements before admission takes place. Being engaged in negotiations has been deemed to be enough to satisfy the peace-loving criterion. Importantly, this has been a position long-held by the US itself. Thus, when Austria was being considered for membership when it was under quadripartite Allied occupation in 1947, the US took the position that the absence of a peace treaty with the occupying powers (owing to what it viewed was Soviet intransigence) did not disqualify it from membership.[193] This led the US to tellingly proclaim that the people of Austria should not be penalized through the denial of UN membership owing to the negotiating position of "one great Power."[194] Furthermore, when Israel's admission was approved in May 1949, the US took the view that the mere promise of peace, as offered by Israel, was enough for it to pass the threshold of being regarded by the Organization as peace-loving. Thus, in arguing that Israeli admission should be approved by the General Assembly, the US representative proclaimed that "[a] solid foundation for peace and stability in Palestine had been laid by the armistice agreements concluded between Israel and *most* of the Arab States [i.e. Egypt, Jordan and Lebanon]", and that an armistice agreement with Syria was "still in the process of negotiation."[195] In his view, it was enough to "hope" that an agreement would be

[189] *Committee on Admission Report*, para. 15.
[190] *Id*.
[191] UN SCOR, 66th Sess., 6636th Mtg. at 17, S/PV.6636, 24 October 2011.
[192] *Id*.
[193] UN SCOR, 2nd Yr., 119th Mtg., 21 August 1947, at 2129 ("…the projected Austrian treaty is not a peace treaty essential to the restoration of good relations between former belligerents. […] …its conclusion is not in any way necessary to the establishment of normal relations between Austria and Members of the United Nations, [n]or…is [it] a prerequisite to the admission of Austria to the United Nations").
[194] *Id*. Austria was eventually admitted to membership in 1955. *See* A/RES/995(X), 14 December 1955.
[195] UN GAOR, 3rd Sess., 207th Plen. Mtg., 11 May 1949, at 313-314.

concluded in the near future, thereby "inaugurating an era of peace and stability."[196] Notably, the requirement of reaching any sort of peace with the Palestinian people was overlooked by the US at the time.[197] In addition, armistice agreements are not peace agreements; it would be decades before Israel would make peace with its Arab neighbours, and only two of them at that.[198] Finally, it bears recalling that at the time Israel's application for admission was being discussed and approved by the UN in 1948/49, Zionist and then Israeli forces were engaged in the systematic expulsion of the indigenous population from the country. As discussed in greater depth below, these were matters that were well understood by Member States at the UN. Nevertheless, none of this was enough to taint Israel's character as a peace-loving state.

Given the pivotal role played by the US in frustrating Palestine's application for membership in 2011, the relevance of the above is not insignificant. The capricious and arbitrary nature of the US position on Palestine's peace-loving character is exposed by the fact that far from being a passive observer of the near 30-year Israeli-Palestinian peace process, the Americans have been the principal sponsor of it in both bilateral, multilateral and proximity formats. The US therefore has intimate first-hand knowledge of Palestine's commitment to pacifically resolve the conflict on the basis of relevant international law as outlined in the relevant UN resolutions and decisions. The fact that a final peace has yet to be concluded on this basis should not, as a matter of law and practice, including as affirmed by US practice itself, detract from a determination that Palestine is sufficiently peace-loving to satisfy this article 4(1) criterion.

Owing to the highly permissive interpretation and application given to the peace-loving criterion in UN admissions practice, it is not surprising that both the Indian and South African representatives to the Council rejected conditioning Palestine's membership in the UN upon the conclusion of a peace agreement with Israel, the former rightly indicating that to do so would be "legally untenable."[199] Nevertheless, because of the unduly narrow position adopted by some members of the Council, including the clearly hypocritical one adopted by the US, Palestine's peace-loving character was sufficiently impugned to block membership.

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[196] *Id.*, 314.
[197] Wählisch (2012), 240-241.
[198] Egypt in 1979; Jordan in 1994. As at the date of submission, Israel formally remains at war with Lebanon and Syria.
[199] Statement of Mr. Ahamed (India), UN SCOR, 66th Sess., 6636th Mtg. at 14, S/PV.6636, 24 October 2011. *See also* Statement of Mr. Gumbi (South Africa), UN SCOR, 66th Sess., 6636th Mtg. at 23, S/PV.6636, 24 October 2011.

3.4 Acceptance, Ability and Willingness to Carry Out Charter Obligations

The third, fourth and fifth criteria for membership in the UN are that the applicant must accept the obligations contained in the *Charter* and be able and willing to carry them out. As noted, acceptance of an applicant's *Charter* obligations is usually performed by a *pro forma* declaration, while ability and willingness criteria have never been defined by the UN in practice. In the absence of any substantive parameters, and motivated by the principle of universality of membership, these criteria have historically been given very broad application in UN admissions practice, if and when they have even been applied.[200]

Notwithstanding this wide latitude, some members of the Committee of Admission took the view that Palestine did not satisfy these conditions. In particular, it was argued that "the Charter required more than a verbal commitment by an applicant to carry out its Charter obligations", and that "an applicant had to show a commitment to the peaceful settlement of disputes and to refrain from the threat or the use of force in the conduct of its international relations."[201] In this respect, "it was stressed that Hamas had not accepted these obligations."[202] In its application for membership, Palestine offered the standard *pro forma* declaration affirming, *inter alia*, that it accepts the obligations contained in the *Charter* and solemnly undertakes to fulfill them.[203] It also affirmed its 30-year commitment to peacefully resolving its dispute with Israel through a negotiated resolution of all final status issues in line with the relevant UN resolutions and international law. That Hamas had engaged in low intensity armed resistance to Israel's occupation of the OPT was not disputed. Yet, by comparison, its low intensity military actions could not approach the armed conflict accompanying the successful applications of other states, including Israel. It was because of these factors that other members of the Committee on Admission were satisfied that Palestine fulfilled these criteria.[204] In this regard, they rightly pointed out that when the UN considered Israel's application in 1948/49 it was "argued that Israel's solemn pledge to carry out its obligations under the Charter was sufficient to meet this criterion."[205]

To appreciate the extent of the double standard applied to Palestine by some members of the Committee on Admission, it is worth recalling the context in which the UN's acceptance of

[200] *See* text accompanying *supra* notes 68-73.
[201] *Committee on Admission Report*, para. 18.
[202] *Id*.
[203] *Application of Palestine for UN Membership*.
[204] *Committee on Admission Report*, para. 17.
[205] *Id*.

Israel's solemn pledge was given and accepted as sufficient by the Organization. Israel's application for membership was submitted in the fall of 1948, after the civil war phase of the conflict and during the first Arab-Israeli war which commenced on 15 May 1948. By the time the application came before the Security Council and General Assembly in December 1948 and May 1949, the vast majority of the roughly 700,000-900,000 Palestinian refugees had been forcibly exiled as a result of the actions of the Haganah and Zionist dissident groups Lehi and Irgun, amounting to roughly 75-90 percent of the Arab inhabitants of the country.[206] Additionally, the head of the UN Conciliation Commission for Palestine (UNCCP), Count Folke Bernadotte, had been assassinated by Lehi. Finally, during the war, Israel expanded its territory to control some 78 percent of mandatory Palestine, well beyond the terms of the partition resolution, including in violation of the *corpus separatum* and the occupation of West Jerusalem (see Map IV).[207] In response, the General Assembly passed resolution 194(III) on 11 December 1948, calling on Israel to repatriate the refugees "at the earliest practicable date" and affirming that Jerusalem "should be placed under effective United Nations control."[208]

As a result of the foregoing, questions were raised during the debates on Israel's admission as to whether it accepted its commitments under the *UN Charter* and was able and willing to abide by them. In a series of meetings of an Ad Hoc Political Committee of the General Assembly from 5-9 May 1949, Aubrey Eban, a representative of Israel, was given ample opportunity to clarify Israel's position on the above, including whether it would abide by the terms of General Assembly resolutions 181(II) respecting partition, and 194(III) respecting the implementation of the right of the Palestine refugees to return and the need to place Jerusalem under UN control.[209] Despite repeated opportunities, the most he was prepared to do was affirm his country's willingness to negotiate. He was clear that at most Israel would be willing to hand over Jerusalem's holy sites to some form of UN oversight with "integration" of the remainder of the city "into the life of the State of Israel."[210] Likewise, the refugee issue could only be resolved in the context of a final peace concluded with each of the Arab states, it being clear that "resettlement in neighbouring areas [*e.g.* outside of Israel] should be considered

[206] *See* Morris (2004) and text of *supra* note 120.
[207] Hadawi (1988), 81.
[208] A/RES/194(III), 11 December 1948.
[209] Ad Hoc Political Committee, UN GAOR, 3rd Sess., 45th Mtg., 5 May 1949; Ad Hoc Political Committee, UN GAOR, 3rd Sess., 46th Mtg., 6 May 1949; Ad Hoc Political Committee, UN GAOR, 3rd Sess., 47th Mtg., 6 May 1949; Ad Hoc Political Committee, UN GAOR, 3rd Sess., 48th Mtg., 7 May 1949; Ad Hoc Political Committee, UN GAOR, 3rd Sess., 49th Mtg., 7 May 1949; Ad Hoc Political Committee, UN GAOR, 3rd Sess., 50th Mtg., 9 May 1949; Ad Hoc Political Committee, UN GAOR, 3rd Sess., 51st Mtg., 9 May 1949.
[210] Ad Hoc Political Committee, UN GAOR, 3rd Sess., 45th Mtg., 5 May 1949, at 236.

as the main principle of solution."[211] Despite the fact that almost half of the refugees had been expelled prior to the intervention of any Arab army in Palestine, Eban relayed Israel's view that the refugee problem was "a direct consequence of the war launched by the Arab States."[212] As to the Bernadotte assassination, Eban indicated that efforts to apprehend the suspects were unsuccessful owing to the fact that at the time of the assassination (September 1948) "the organization of the internal security in the State of Israel had been still in its initial stages" and the "police force had not yet achieved the necessary degree of internal stability and efficiency which would have enabled it to cope swiftly and effectively with that revolting crime."[213] Oddly, this admission failed to give rise to questions of not only whether Israel was able to abide by its obligations under the *Charter*, but also whether it actually exercised effective governmental control over its claimed territory.

Despite the objections of the Arab states, the Israeli position found support among its Western allies, led by the US. Thus, in the December 1948 Council debate, Jessup recalled that "in the terms of its application for membership" Israel had "indicated its acceptance" of the obligations contained in the *Charter*.[214] He stated that there was "no reason" to "question the solemn assurance of Israel", as per standard practice.[215] Likewise, he asserted that the "willingness of Israel to carry out these obligations is made clear in its letter of application for membership," and that the US government was "satisfied with the ability of the State of Israel" to do so.[216] Following Eban's May 1949 testimony to the General Assembly regarding Israel's acceptance of Assembly resolutions 181(II) and 194(III) on the issues of borders, Palestine refugee repatriation and Jerusalem, the US maintained this position, asserting that those issues could not properly factor into assessing Israel's application under Article 4(1). According to the US representative, Warren Austin, the Assembly could not be understood as being "directly concerned with [the] definitive settlement of the questions of Jerusalem or of the Arab refugees," despite the fact that these issues flowed directly from its own resolutions.[217] Rather, those issues were a matter for the UNCCP to manage as part of the negotiations effort. "The point at issue," according to him, was simply "whether the State of Israel was eligible for membership under Article 4 of the Charter."[218] On the basis of Israeli promises to engage in

[211] *Id*., 239-240.
[212] *Id*., 239.
[213] *Id*., 243. The head of the Lehi group, Yitzhak Yezernitzsky (a.k.a. Shamir) was never brought to justice for the Bernadotte assassination. He would eventually become Israel's seventh Prime Minister (1983-84; 1986-1992).
[214] UN SCOR, 3rd Yr., 383rd Mtg., 2 December 1948, at 12.
[215] *Id*.
[216] *Id*.
[217] UN GAOR, 3rd Sess., 207th Plen. Mtg., at 313, 11 May 1949.
[218] *Id*.

peace negotiations, following the conclusion of three armistice agreements, he concluded Israel fully met the criteria.[219] This very permissive position was adopted by a number of states from the western and European settler colonial block in the Assembly debate.[220]

None of this is to suggest that Israel's application received special treatment on the acceptance, ability and willingness criteria in 1948/49. On the contrary, its treatment was in line with the liberal, flexible and permissive approach that would come to characterize UN admission practice in this area after 1955. Nevertheless, that Israel would have been deemed to have satisfied these criteria in the context of a civil and international armed conflict in which the indigenous population of Palestine had largely been expelled and the contours of its putative state considerably expanded to undefined frontiers, all while being saddled by the high profile political violence of its own dissident groups, renders it as good a case as any to demonstrate the level of permissiveness these criteria have been given in practice.[221] For Palestine, the lesson in this has been all too familiar. Although the UN record shows that its leadership has been committed to a peaceful resolution of its dispute with Israel under US auspices for the past 30 years, and certain dissident elements in Hamas have not committed anywhere near the transgressions against peace as Israel and its dissident groups had when it was admitted to membership, this was not enough to pass the threshold.

3.5 General Observations

On its face, membership in the UN is not absolute. Were it so, the *Charter's* framers would not have set out the five conditions for membership codified in Article 4(1). Nevertheless, propelled by a desire to ensure the universality of the Organization, UN

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[219] *Id.*

[220] *See e.g.*, statements of: Canada, *id*., 317 (Canada "based its position in respect of the admission of Israel on Article 4 of the Charter… It trusted that Israel would recognize the responsibilities and obligations of Member States under the Charter to live in peace with other nations and settle disputes by pacific means."); Guatemala, *id*., 320 (Jerusalem, Arab refugees, accountability for the Bernadotte assassination, and delimitation of final borders "were not directly relevant to the decision on the admission of Israel."); New Zealand, *id*., 322 (New Zealand would "expect from the Government of Israel the same respect for the decisions of the Organization as that which devolved upon all Member States."); Uruguay, *id*., 324-325 ("the requirements for the admission of the State of Israel to the United Nations had been completely satisfied"; General Assembly resolutions 181(II) and 194(III) were the province of the UNCCP and "beyond the scope of Article 4 of the Charter."); Cuba, *id*., 327-328 ("The question of the admission of Israel to membership was completely divorced from other resolutions referring to such matters as the internationalization of Jerusalem and the surrounding areas, the problem of Arab refugees and the problem of boundaries, for the settlement of which a Conciliation Commission had been established by General Assembly resolution 194(II) of 11 December 1948… The sole question on the agenda was the application of Israel for membership. It was therefore inappropriate to consider other aspects of the problem.").

[221] It is not insignificant that in June 1948, one month after Israel's UN admission, repatriation of the Palestine refugees was barred by a decision of the Israeli cabinet. This was compounded by the Zionists' deliberate destruction of between 392 and 418 Palestinian villages from whence the majority of refugees hailed. The figure of 392 is given in Morris (2004), xvi-xxii, while 418 is offered in Khalidi (1992), 585.

admissions practice has historically adopted a liberal, flexible and permissive interpretation of these conditions. This practice has been so liberal, that in many cases the Organization has not bothered to apply the conditions at all. This suggests that we now live in period where the unconditional universality of membership in the UN ostensibly prevails as a feature of the international rule of law.

An assessment of Palestine's failed 2011 application for membership of the UN reveals a double standard in the application of the principle of the universality of membership and, by extension, the international rule of law. This double standard highlights how international law can be used to entrench and propagate the hegemonic-subaltern binary within it, this time thorough the exercise of the neo-imperial power of the US, resulting in the perpetuation of Palestine's ILS condition. Based on the liberal, flexible and permissive interpretation of the Article 4(1) criteria in UN practice, Palestine should have had no trouble qualifying for membership. It possesses the requisite elements for statehood under Montevideo and it can demonstrate that it is peace-loving and accepting of its obligations under the *Charter*, and is both able and willing to abide by them. Although its candidacy for membership may not have been perfect, based on the standards set by UN admissions practice, Palestine met all of these criteria to a qualitatively equal or greater degree than was the case on the admission of many other states members of the Organization, including Israel.

The research demonstrates that Palestine's path to membership was frustrated by the imposition of conditions extraneous to the Article 4(1) criteria, along with the unduly narrow application of those criteria by certain members of the Committee on Admission. In particular, the role of the US as a permanent member of the Security Council proved to be pivotal. Because the Council is vested with the authority to recommend new members under Article 4(2) of the *Charter*, and because the US made it clear from the beginning that it would utilize its veto power to block Palestinian membership, the fate of the effort was doomed from the start. Some writers have suggested that Palestine's case was therefore wholly political and did not turn on whether the Article 4(1) criteria were actually met.[222] But this view is belied by the fact that the Article 4(1) criteria, or some semblance thereof, were not only brought to bear in the Committee on Admission's consideration of Palestine's application, but formed the very basis of it.

[222] Chesterman (2016), 195.

The implications of this are clear. International law was utilized by the Council, under the weight of its preeminent hegemonic member, to impose a result in line with that member's own interests. Palestine's application was not assessed in accordance with the universal legal standard governing UN membership under the international rule of law. Rather its application for membership was denied through the capricious and arbitrary application of the relevant legal criteria, thereby allowing it to ironically take place behind a veil of legitimacy furnished by the terms of the *Charter* itself. Through a comparison of the liberal, flexible and permissive approach to UN admissions with the narrow, strict and at times confused approach adopted in Palestine's case, this veil was effectively pierced. The consequence has been to uphold the international rule by law that Palestine has long been subjected to, and the perpetuation of its ILS condition in the UN system.

Viewed in historical context, Palestine's 2011 application for UN membership can be understood as one of its more recent attempts to break free of the assigned and contingent disposition that underpins its overall ILS condition. Following decades of state-building, itself constructed upon the PLO's acceptance of the inequities of prior UN action, one would have hoped that Palestine would be deemed to have satisfied enough of the requirements under international law as affirmed by the Organization to have finally been released from the cruel ordeal of its subaltern legal position in the system. Yet, just as those prior inequities were the product of a systematic failure to take the Palestinian people and their rights seriously, so too has been the inequity of its failed attempt to gain membership in the UN. This is nowhere more evident than in the stark comparison of the treatment of its application with that of Israel's over six decades before it. In particular, the wholly inconsistent views taken by the US in respect of those two organically related cases underscores the cross-cutting theme of the neo-imperial power at the root of the ILS condition in the contemporary period, to say nothing of the systematic and structural hurdles Palestine will somehow have to surmount if liberation and freedom are to finally be realized. It is to the attempt to circumvent the inequities prevailing in the Security Council that we now turn, as represented in the upgrade of Palestine to non-member observer state status by the General Assembly in 2012.

4. Non-Member Observer State Status for Palestine

Having had its application for membership in the UN effectively blocked at the Security Council, Palestine remained undeterred in its quest to marshal the potential of international law and institutions in its favour. This came by way of its upgrade to non-member observer state

status through the passage of General Assembly resolution 67/19 of 29 November 2012.[223] Although this status would not offer the same access and standing appertaining to full membership, it was viewed by the Palestinian leadership as the best option available given the diametrically opposed dynamics of a Council held hostage by the US on the one hand, and a Third World dominated Assembly on the other. Of note, the Assembly made a point of reaffirming the principle of universality of membership of the UN in resolution 67/19.[224]

Based on the UN record, the non-member observer state option seems to have been pushed by certain members of the Security Council, albeit rooted in realpolitik. In particular, France, which remained silent on the Article 4(1) criteria, noted that full membership "cannot be attained at once" owing to "the lack of trust between the main parties" and the surety of a US veto.[225] It therefore suggested the "intermediate stage" of non-member observer state status building on prior gains of the PLO in the Organization.[226] It will be recalled from chapter 4 that between the mid-1970's and late 1990's the Assembly facilitated the gradual provision to the PLO of a series of privileges, allowing it qualified access to the UN. This included the granting of observer status in the sessions and work of the Assembly in 1974, [227] the use of the designation "Palestine" following the state's declaration of independence in 1988,[228] and the right to participate in the general debate and to co-sponsor draft resolutions on Palestinian and Middle East issues in 1998.[229] Palestine had thus become a prominent part of the development of observer status in the practice of the Secretary-General and the Assembly, and in this way helped advance the principle of universality within the Organization both for itself and as a pioneer for other subaltern groups.[230] In the French view, non-member observer state status "would be an important step forward", in that "[a]fter 60 years of immobility…we would be giving hope to the Palestinians by making progress towards final status."[231]

Far from only maintaining "hope", however, the Palestinian choice to seek non-member observer state status had an even more tangible purpose. It was an attempt to realize concrete benefits that attach to quasi-membership of the UN and, in this way, demonstrate the utility of

[223] A/RES/67/19, 29 November 2012.
[224] *Id*.
[225] UN GAOR, 66th Sess., 11th Plen. Mtg. at 23, A/66/PV.11, 21 September 2011.
[226] *Id*.
[227] A/RES/3237(XXIX), 22 November 1974.
[228] This change was done without prejudice to the observer status and functions of the PLO within the UN system. A/RES/43/177, 15 December 1988.
[229] A/RES/52/250, 13 July 1998.
[230] Ginther, *in* Simma (2002), 187. Following the precedent set by the PLO, the South West Africa People's Organization was granted observer status in 1976. *See* A/RES/31/152, 20 December 1976.
[231] UN GAOR, 66th Sess., 11th Plen. Mtg. at 23, A/66/PV.11, 21 September 2011.

the counter-hegemonic use of international law aimed at mitigating Palestine's ongoing ILS condition. To see this, it is useful to return to the doctrinal theory concerning statehood – the essential prerequisite of UN membership – and to Crawford's observation that its existence is a mixed question of law and fact.

The upgrade in Palestine's status to non-member observer *state* had the effect of tilting the scales in this mixed question in favour of fact. Whereas the question as to whether Palestine constituted a state under the Montevideo test was widely debated prior to the upgrade,[232] following the upgrade much of that debate has been rendered moot. This is because the upgrade enabled Palestine to engage in activity reserved only for states within international law and organization. Thus, following the upgrade the Secretary-General confirmed that Palestine "may participate fully and on an equal basis with other States in conferences that are open to members of specialized agencies or that are open to all states."[233] In accordance with the Secretary-General's practice as depositary of multilateral treaties, this right includes the ability to enter into multilateral treaties open only to states and members of specialized agencies.[234] In point of fact, since 29 November 2012 Palestine has acceded to over 40 multilateral treaties, including the major international human rights,[235] humanitarian law,[236] and criminal law conventions,[237] as well as treaties of more general purpose.[238] Likewise, Palestine has become a member of a number of international organizations, including INTERPOL and the International Criminal Court.[239] Accordingly, as a result of the upgrade there is little doubt that the *de jure* state of Palestine exists, and that among the many benefits it enjoys is the ability to make claims under and contribute to the progressive development of international law.[240] That Palestine is currently under occupation, and subject to a regime of alien subjugation, domination, and

[232] Quigley (2010); Crawford, *in* Goodwin-Gill (2012).
[233] *Status of Palestine in UN*, 3.
[234] This includes treaties operating according to both the "Vienna" and "all states" formulas. *See Summary of Practice*, para. 79.
[235] *E.g.*, *ICCPR*; *ICESCR*; *CAT*; *CEDAW*; *CRC*; *ICERD*.
[236] *E.g.*, *Geneva Convention I-IV*.
[237] *E.g.*, *Genocide Convention*; *Apartheid Convention*; *Rome Statute*.
[238] *E.g.*, *VCLT*.
[239] Palestine's accession to the Rome Statue is a good example of the catalytic role played by GA Res. 67/19. On 22 January 2009, Palestine sought to confer jurisdiction on the ICC by lodging an article 12(3) declaration with the Registrar of the Court. In determining whether the preconditions to the exercise of jurisdiction under article 12 were met, the then Prosecutor, Luis Moreno Ocampo, affirmed that only states can confer such jurisdiction and, in his view, it was then unclear as to whether Palestine was a state for those purposes. Nevertheless, Ocampo noted that because states parties to the *Rome Statute* would have to deposit an instrument of accession with the Secretary-General, the latter's role was vital. Where an applicant's statehood is unclear, Ocampo noted that it is the practice of the Secretary-General to follow or seek the GA's directives on the matter. Accordingly, following the passage of GA Res. 67/19 in November 2012, the State of Palestine acceded to the *Rome Statute* on 2 January 2015, and the Secretary-General accepted its instrument of accession on 6 January 2015.
[240] Moussa (2016), 95.

exploitation inimical to humankind including systematic racial discrimination, does not vitiate this legal reality. Nor does the fact that some states have yet to recognize Palestine, given that universal recognition has never been a condition precedent for the legal existence of a state, as evinced by the case of Israel.[241]

At the same time, symptomatic of the contingency of its Third World quasi-sovereignty, it obviously cannot be said that Palestine's non-member observer state status provides it with the full range of rights and duties that appertain to membership in the UN. Palestine's ability to engage in the Organization is still largely substantively and procedurally limited to matters relating to "Palestinian and Middle East issues".[242] Most importantly, as noted by the Secretary-General, with one minor exception Palestine "does not enjoy the right to vote" within the UN, including in elections."[243] Nor may it "submit its own candidacy for any election or appointment or submit the names of candidates for any election or appointment."[244] It is this sweeping disenfranchisement that underscores Palestine's persisting ILS condition within the UN. Despite the gradual provision to Palestine of a series of privileges within the Organization culminating in its current non-member observer state status, the fact that it remains unable to exercise the franchise as a Member State owing to the exercise of neo-imperial power demonstrates the central importance of that power in the maintenance of ILS in the system. As such, the upgrade thus illustrates both the promise and the limits of international law for subaltern peoples. For while the existence of the *de jure* State of Palestine gives rise to a presumption that it satisfies the statehood criterion of the Article 4(1) criteria, getting over the Security Council's current narrow and strict construction of the test for membership in the Organization cannot be assured given the hegemonic position of the US. This is despite Grant's view that prevailing law and practice has created a presumption of admission to the UN if requested by a state.[245] Palestine therefore remains caught in a seemingly permanent condition of contingency. No matter the gains made through its stubborn belief in international law and the world's preeminent international institution, the operation of that very law and institution may potentially be utilized by neo-imperial power to perpetually keep it out.

[241] *Id.*, 59.
[242] A/RES/52/250, 7 July 1998.
[243] The exception relates to the International Residual Mechanism for Criminal Tribunals, the Statute of which provides that non-Member States maintaining permanent observer missions at UN headquarters have the right to submit nominations for and to vote in the elections for the permanent and *ad litem* judges of the Mechanism. *Status of Palestine in UN*, 2.
[244] *Id*.
[245] Grant (2009), 244.

5. Conclusion

The international vocation of the UN and its unique role as the guardian of international peace and security in the post-WWII era rests upon the principle of the universality of membership of the Organization. By definition, the purposes and principles of the UN cannot be fulfilled without as broad a membership as possible. With the exception of its first decade, UN admissions practice has accordingly been marked by a liberal, flexible and permissive interpretation of the admission criteria enumerated in Article 4(1) of the *Charter*. So open has the practice been, that the Article 4(1) criteria have been reduced to a mere procedural formality, leading to an unconditional universality of membership within the Organization as the defining feature of the international rule of law on UN membership.[246]

In contrast to this, a legal assessment of the Committee on Admission's consideration of Palestine's 2011 application for membership in the UN reveals that it was subjected to an unduly narrow, strict and erroneous application of the Article 4(1) criteria at odds with UN admissions practice. The fact that the Committee was able to undertake this substantively anomalous position under cover of a procedural authority expressly granted it by Article 4(2) lends the result of its deliberation problematic from a subaltern standpoint. Far from an example of the objective application of the international rule of law governing UN membership, the Committee's refusal to recommend Palestine's application can better be understood as an instance of the continued international rule by law. This, in turn, has led to the perpetuation of Palestine's ILS condition in the system.

Based on the UN record, the role of the US as a hegemonic power on the Council was vital in this regard and is a good demonstration of the third theme informing the ILS condition, namely its dependence in the contemporary period on the exercise of neo-imperial power. This is demonstrated through a comparison of the inconsistent American approach concerning Israel's admission with that concerning Palestine's. It is the juxtaposition of a broad and forgiving interpretation of the Article 4(1) criteria in Israel's case, with a strict, narrow and erroneous application of same in Palestine's, that highlights how contemporary neo-imperial power uses law in capricious and arbitrary ways to perpetuate the ILS condition. In this case, but for the abuse – to quote Judge Alvarez – of the Council's legal authority under Article 4(2) of the *Charter* under US pressure, Palestine may have been able to gain some ground in breaking free of its assigned and continuing subaltern position.

[246] Ginther, *in* Simma (2002), 180.

Aside from the immediate goal of UN membership, it is possible to more broadly understand the rationale behind Palestine's application for admission and, upon failing that, for non-member observer state status, as being rooted in the counter-hegemonic potential of international law and institutions. This effort represents the culmination of a prolonged struggle, dating from the decolonization era, to rely on these phenomena to realize Palestinian rights and territorial sovereignty. This struggle is itself founded upon a poignant acceptance of past inequities wrought through international law and institutions (*e.g.* League of Nations mandate; UN partition; UN managerial approach to the OPT), while accompanied by an evidently indelible belief in the centrality of those very laws and institutions in bringing overdue, if partial, relief. Common sense would dictate that the fact that Palestine's international legal standing has suffered at the hands of the UN would render it the last place its people would turn for deliverance. Yet, that is precisely what has transpired. There is nothing in the Palestinian position, as articulated both in its application for membership and non-member observer state status, that is inconsistent with prevailing international law as affirmed by the UN. This counter-intuitive reliance on international law and institutions by the subaltern class has been pivotal in assisting that class in resisting its disenfranchisement and ultimately cultivating a greater measure of international legal personality of its own. In this way, it has given rise to an additional, but related, paradox. Rather than regarding international law and institutions as forms of restraint on state sovereignty, Palestine has used these phenomena as the primary means through which such sovereignty may be asserted and attained.[247] In this way, Palestine's navigation of its ILS condition serves as a useful model for subaltern groups everywhere.

Along with the emancipatory goals of this course of action by the weak, there is a certain magnanimity too, which is of no small consequence for the UN and the international community at large. In chapter 4, we discussed the extent to which the occupying power's actions in the OPT since the onset of the Oslo process have operated to consolidate, not relinquish, its control over the territory. Despite the UN record amply demonstrating this reality, the Organization and its members have uniformly continued to pay only lip service to the need for a two-state solution to the question of Palestine. Yet, as between the two parties, the hegemonic occupying power persists in a course of conduct objectively intended to frustrate this result, while the subaltern people subject to its control resist through recourse to international law and institutions. In this sense, Palestine's application for admission to membership in the UN

[247] Moussa (2016), 43; Yoffie (2011), 501.

represents an attempt – perhaps the last available – to preserve the two-state formula for peace, the ostensible policy goal of the international community as represented by the UN since 1947.

6

Conclusion: Palestine's International Legal Subalternity as a Long-Range Condition

In *The Politics of History* Howard Zinn poignantly observed that "[w]hat one sees in the present may be attributable to a passing phenomenon"; but "if the same situation appears at various points in history, it becomes not a transitory event, but a long-range condition, not an aberration, but a structural deformity requiring serious attention."[1] From an examination of key legal texts and moments in the historical record, this research has attempted to demonstrate that Palestine and its people have suffered the effects of such a long-range condition and structural deformity through the management of their lingering question at the United Nations (UN). I have identified this condition as international legal subalternity (ILS).

The principal attribute of the ILS condition is that those disenfranchised by it are continually presented with the promise of a more just and equitable future though the application of international law, bolstered by the unrivaled political legitimacy of the purveyor of that promise, the organized international community of states as represented at and by the UN. Yet despite the lengths to which such groups go in reliance on this promise, its realization is perpetually kept out of reach in one form or another through the actions of the very same international community of states which all too often either do not pay sufficient heed to the full array of international law's precepts, abuse them or completely overlook them in practice.

Building on the work of the TWAIL network of scholars, I have argued that the ILS condition is the result of a hegemonic/subaltern binary that characterizes the very nature of the international legal order. According to this epistemic, international law is at once the creation and tool of hegemonic power, the manifestation of which invariably produces and reproduces subaltern underclasses who have little or no say in the substantive formation or application of the law that purports to govern them. While the hegemonic side of the equation originally took a distinctly European imperial form between the seventeenth and early-twentieth centuries, since the end of World War II (WWII) it has taken on a multilateral guise in the form of the UN under the all-important influence of a handful of neo-imperial states, foremost the United States (US). At the same time, the subaltern underclasses have been drawn almost exclusively from among the non-European world, initially in the form of colonized, non-self-governing peoples, then shifting to the quasi-independent 'post-colonial' Third World, and lingering on

[1] Zinn (1970), 44.

among a variety of other non-state actors who remain on the margins in the international system (*e.g.* UN trusteeships, indigenous peoples, refugees, etc.). It is the contingent and abridged nature of the rights and membership of subaltern classes in the international legal order that defines the ILS condition. Despite claims regarding the purported universality of modern international law and institutions and the access to justice they are meant to provide, those that suffer from the condition do not enjoy full and equal legal standing and membership in the system.

What brings the ILS condition (and, by extension, the hegemonic/subaltern binary at its root) into sharp relief is the evident clash one is able to trace over time between the international rule *of* law with what I have called the international rule *by* law. At bottom, this is a clash between two ordering principles of international relations in the post-WWII era. On the one hand, the international rule of law is ostensibly based on the universal application of international law without regard to the power or station of those subject to it; received wisdom holds it out as the governing legal principle regulating international affairs. On the other hand, the international rule by law is rooted in a cynical use, abuse or selective application of international legal norms by hegemonic actors under a claim of democratic rights-based liberalism, but with the effect of perpetuating inequity between them and their subaltern opposites. By juxtaposing the international rule of law against the international rule by law, one is able to better understand the nature of the ILS condition as a fixed feature of today's international legal order, despite the varied configurations it may assume.

Tracing these configurations across time reveals at least three related and overlapping themes that cut across the ILS condition, touched upon above, giving it its essential content. First, ILS has its origins in the European imperial encounter with the non-European world during the age of empire and the resultant structural Eurocentricity of the modern international legal order. Marked by the so-called standard of civilization, international law in this period was understood by post-Westphalian states and jurists to be the sole preserve of its European and/or Christian participants with non-European Others relegated to law's passive objects, giving international law its early rule by law character. Second, ILS has continued despite the ostensible creation of a liberal rights-based order in the post-WWII era founded upon the international rule of law as embodied in the UN and its *Charter*. Notwithstanding gains registered through the purported universalism of this new order, embodied primarily through the realization of Third World independence and membership in the UN, elements of the old rule by law order remained as evidenced in the qualitatively inferior legal rights and standing

these Third World/underdeveloped quasi-sovereigns actually came to possess relative to their European/developed world counterparts. Third, ILS has been allowed to persist in the post-decolonization and Cold War eras through the diktat of neo-imperial power masked as democratic and rights-based liberalism. Notwithstanding the ostensible end to classic forms of European empire with the founding and growth of the UN, hegemonic states have served as the primary executors of ILS in their self-appointed roles as guardians of the purportedly liberal international legal order. While the permanent five members of the UN Security Council have been key among such actors, the unparalleled leader among them remains the US.

To complicate matters, the hegemonic/subaltern binary in the international legal order is not a one-way, linear relationship. On the contrary, its great paradox rests in the fact that there remains what TWAIL theorists have identified as a counter-hegemonic potential in modern international law and institutions, thorough which subaltern actors can challenge those very structures on their own terms. This typically involves subaltern criticism of prevailing law based upon a critical application of that law against evolving social mores and sensibilities, which in turn produce fresh claims of fairness and result in some form of progressive development of the law. Yet, despite the possibility of subaltern pushback, TWAIL theory appears to suffer from a blind spot in so far as it suggests that this countermove can be utilized to irrevocably dislodge the hegemonic/subaltern binary *per se*. Through the case of Palestine, this research has demonstrated that the binary is a structural component of the international legal order, and that the ILS condition it produces cannot be eradicated as such, but rather only mitigated. As international law and institutions are challenged by subaltern groups and new law is made, the interests served by that law produce either partially assuaged or wholly new subaltern classes who are eventually compelled to continue the cycle. As a result, the ILS condition may morph in respect of one or more subaltern group, or otherwise shift from one group to another, but it does not lend itself to being overcome once and for all.

Returning to our case study, the ILS condition finds sustained expression in the UN's prolonged management of the question of Palestine. Contrary to the conventional wisdom that presents the UN as offering the only normative basis of a just and lasting peace in Palestine/Israel, there has been a continuing though vacillating gulf between the requirements of international law and UN action that has helped frustrate, rather than facilitate, that lofty end. Given that one of the core purposes of the UN is to maintain international peace and security in

conformity with the principles of justice and international law,[2] understanding why and how the UN has maintained Palestine's ILS condition is important because it provides insight not only into why the conventional view is mistaken, but also how the UN might better perform its functions in line with its *Charter*.

As set out in chapter 2, the origins of Palestine's ILS condition are not to be found within the UN itself, but are rather located in the interwar period and the institutionalization of the international rule by law through the League of Nations. More specifically, Palestine's ILS condition is rooted in British imperial secret treaty-making and diplomacy between 1915 and 1947, which legally privileged the Zionist movement's Jewish national home project over the previously assured political rights of the Palestinian Arab majority. As demonstrated through a brief survey of relevant documents culminating in the Mandate for Palestine, this resulted in the international legal disenfranchisement of the indigenous Palestinians in favour of a self-declared European colonial settler movement. Unsurprisingly, the cross-cutting theme of the international legal order's structural Eurocentricity was most pronounced during this period. Without it, the ILS condition would not have been so successfully codified into the prevailing international legal order through the mandate system. In a real sense, therefore, the international rule by law of this period was both a description of what was happening to the subaltern Palestinian people as well as a prognostication of what was to come.

This was demonstrated in chapter 3, which established that despite the promise of a new liberal rights-based global order based on the international rule of law, the UN remained true to the international rule by law ordering framework it had inherited. This was established through a legal analysis of the General Assembly's plan of partition for Palestine of November 1947, and the resulting reification of Palestine's ILS condition in the UN system. Although the Assembly possessed the procedural power under international law to issue the resolution, it lacked the substantive power to recommend partition in violation of the prevailing law and practice on self-determination of peoples in class A mandated territories. The sacred trust principles folded into the *UN Charter* via the *League of Nations Covenant*, coupled with the British satisfaction of its obligations *vis á vis* the Jewish national home, meant that only two courses of action were legally open to the Assembly at the time: immediate independence of the whole of Palestine in line with the wishes of its inhabitants or UN trusteeship. An examination of the UN record, in the form of the UN Special Committee on Palestine

[2] *UN Charter*, art. 1(1).

(UNSCOP) public and private meetings and report as well as the Assembly debates that followed, demonstrates that partition was not based on these international legal considerations but was rather driven by hegemonic European states and their settler-colonial affiliates. Their goal was to rectify Europe's centuries-old Jewish question in the wake of the Holocaust. The failure to take seriously the rights and interests of Palestine's indigenous population was palpable, as the cross-cutting theme of the structural Eurocentricity of international law and institutions once again reared its head. A close reading of the UNSCOP records underscores this, as they reveal at least three factors that led the Assembly to disregard the liberal international legal order then said to govern in favour of overriding European interests: a bias in UNSCOP's terms of reference, its failure to sufficiently engage the Arab Higher Committee and its contempt for principles of democratic governance. The cognitive dissonance displayed by UNSCOP as to the inevitability of violence befalling Palestine's indigenous people following partition only exacerbated the practical consequences of these fateful actions. In reifying Palestine's ILS condition in the UN system, the UN plan of partition imposed, in both normative and discursive legal terms, the two-state paradigm that would thereafter underpin the Organization's position on the question of Palestine; a position that remains in place to this very day. In so doing, it permanently circumscribed the territorial extent to which the Palestinian people could thereafter legitimately claim any sovereign rights in their own land, having had most of it wrested from them by a European settler colonial movement with the imprimatur of the UN. Once again, but for the structural Eurocentricity of the international legal and institutional order inherited by the UN, it is questionable as to whether any of this would have unfolded the way it did.

With the decolonization era, there was hope that the Eurocentricity of the UN would be vitiated by the rise of the Third World in the Organization, and in a manner that would mitigate the conditions that allowed for the reification of Palestine's ILS in 1947. To this end, chapter 4 demonstrated that the forces of global decolonization gave rise to a partial recognition of Palestinian legal subjectivity and rights in the UN, most importantly the right to self-determination in the occupied Palestinian territory (OPT) as part of the two-state paradigm. This bolstered the conventional wisdom regarding the UN as the standard-bearer of the international rule of law. Yet a closer look at the humanitarian/managerial approach of the UN's position on the OPT in the post-1967 era reveals how the second of the cross-cutting themes underpinning the ILS condition, *viz*. the structural limitations of Third World quasi-sovereignty, has ultimately allowed for the maintenance of Palestine's ILS condition in the so-called post-colonial era. Under this approach, the new-look UN has satisfied itself merely with addressing

a variety of discrete violations by Israel, the occupying power, of international humanitarian and human rights law in the OPT without definitively addressing the legality of the very regime giving rise to those violations themselves. Instead, the UN has insisted on negotiations as the only means through which the occupation can be brought to an end, despite the plethora of evidence in its own record to demonstrate that prevailing international law requires a far more robust and simpler response. Based on the UN record, Israel's occupation has become illegal over time for its violation of a number of *jus cogens* norms, derogation from which is not permitted in international law. These are the inadmissibility of territorial conquest, respect for self-determination of peoples, and the prohibition against regimes of alien subjugation, domination and exploitation, including racial discrimination. As such, Israel's occupation of the OPT has in itself become an internationally wrongful act which, according to the law on state responsibility, cannot be terminated except through unilateral and forthwith withdrawal by the occupying power. By making withdrawal contingent on negotiation between an occupying power that the UN record itself demonstrates has been manifestly acting in bad faith for over fifty-years and an occupied population held captive by it, the Organization is not only violating prevailing international law on state responsibility, but it is also undermining its own stated goal of establishing peace between two sovereign states in the former mandate of Palestine. It has thereby made the realization of Palestinian rights repeatedly reaffirmed by it impossible to achieve. While it is possible for Palestine to have further recourse to the ICJ for an advisory opinion on the illegality of Israel's continued presence in the OPT, the research suggests that such a move would at most only help mitigate its ILS condition, not fundamentally cure it. This has ultimately given the lie to the UN's recognition and affirmation of Palestinian legal subjectivity and rights in the OPT post-1967 which, like the overall contingency of the Third World's quasi-sovereignty, can only be regarded as nominal in nature and dependent on the exercise of hegemonic forces beyond Palestine's control.

The issue of the extent to which post-Cold War hegemonic forces continue to shape Palestine's ILS condition figured prominently in Chapter 5, which examined the State of Palestine's 2011 application for membership in the UN. As the guardian of international peace and security in the contemporary era, the principle of the universality of membership of the Organization is the foundation upon which the UN's success logically rests. For this reason, the international rule of law governing UN admission has long been marked by a liberal, flexible and permissive interpretation of the test for membership contained in Article 4(1) of the *UN Charter*. In contrast to this, a legal assessment of the UN Committee on Admission's consideration of Palestine's application for membership demonstrates that it was subjected to

an unduly narrow, strict and resultantly flawed application of the Article 4(1) criteria. An examination of the contemporaneous debates of the Council demonstrates that the main driver of this approach was the US, which used the legal authority vested in it as a permanent member of the Council to block membership for political reasons thinly veiled as sound legal ones. With no small measure of irony, this was highlighted through the juxtaposition of the broad and forgiving interpretation of the Article 4(1) criteria adopted by the US in respect of Israel's admission in 1949 – itself a reflection of the approach that would eventually become the international standard – with its unduly strict and narrow application of the criteria in Palestine's case in 2011. The resulting frustration of Palestine's bid for membership offers a good demonstration of the third cross-cutting theme informing the ILS condition, namely its dependence in the contemporary period on the exercise of neo-imperial power masked as liberal, democratic and rights-based. In this case, any pretention that Palestine's lack of success was based on an objective application of the international rule of law governing UN membership by the Council is undermined on two fronts. First, by the fact that it was patently contrary to the prevailing law and practice on UN admissions. Second, that despite this anomaly it was done under cover of a procedural authority expressly granted the Council under Article 4(2) of the *Charter*. The result is to reveal this episode as yet another example of the international rule by law at work. While resort to the General Assembly in 2012 offered a counter-hegemonic course to Palestine that produced a variety of gains in the way of affirming its status as a state under international law, the fact that full membership in the preeminent international organization of states remains elusive reveals the limitations inherent in such an approach. To put it simply, despite some limited gains, Palestine's ILS condition remains fundamentally in-tact through its continued disenfranchisement in the UN system.

It is therefore evident that at the heart of the UN's failure to help bring about a peaceful resolution of the question of Palestine in line with the international rule of law is its complicity in the reification, maintenance and perpetuation of Palestine's ILS condition over time through the international rule by law. It is a common refrain of policymakers, pundits and academics alike to bemoan the seemingly endless cycle of violence and failed diplomatic initiatives that have characterized the UN's prolonged management of the problem as resulting from a simple lack of political will or a crisis of impunity.[3] To be sure, there is no doubt that these and other problems exist. Nevertheless, on their own they do not provide sufficient explanation for the situation as it continues to fester at the UN, now for the better part of a century. For that, this

[3] *See e.g.*, Statement of Mr. Bamya (Palestine), UN SCOR, 73rd Sess., 8262nd Mtg. at 95-96, S/PV.8262, 17 May 2018.

research has argued that the UN's failure to resolve the question of Palestine is principally a product of the long-range structural ILS condition that inheres in the international legal and institutional order itself. The operation of this order pits hegemonic and counter-hegemonic uses of law against one another, with the ILS condition manifesting itself in various guises, always with the same disenfranchising result for those who suffer under it.

For Palestine, this has meant having to run an endless gauntlet of shifting goalposts from one legal moment to the next in order to merely maintain the most basic claims of its people under international law. Between the League of Nations mandate system and UN partition, international law and institutions were initially utilized to undermine and reify their international legal standing and position. Despite accepting the inequitable result of these fateful events, subsequent attempts to rely on international law and organization to mitigate their impact have yet to fundamentally produce the promise of justice and equality they portend. And yet the counter-hegemonic struggle continues in line with the subaltern belief in the liberal rights-based global order. In a 17 May 2018 statement to an open meeting of the Security Council on the subject of "Upholding International Law within the Context of the Maintenance of International Peace and Security", the State of Palestine affirmed that "[d]espite being the victims of double standards" at the UN "the Palestinian people have continued to place their faith in international law and have reaffirmed time and again their commitment to international law and to peaceful, legal and diplomatic means for achieving their inalienable rights."[4]

It is unclear as to whether Palestine's counter-hegemonic resort to international law through the UN will enable it to break free from its long-range ILS condition once and for all. To be sure, the number of areas in which that condition has manifested itself in the work of the UN are not limited to those covered by this research which, for reasons of economy, could not be treated here.[5] With the very limited material resources available to Palestine to address its existential situation, it is likely that its leadership will continue to resort to the counter-hegemonic use of international law and institutions as a tactical means to resist. Suffice to say, that as an archetypal embodiment of the ILS condition, it is clear that Palestine's case is one with wider relevance both for other subaltern groups and for the UN as a whole. For the former, examining how Palestine has negotiated the hegemonic forces pitted against it across a variety

[4] *Id*., 95.

[5] The complex issue of Palestine refugees is one such area. This includes protection gaps that arise under international law stemming from legalized double-standards and gender discrimination in refugee status determination under relevant international refugee law as administered by the UN Relief and Works Agency and the UN High Commissioner for Refugees. *See generally* Takkenberg (1998). I shall cover this in a future monograph emanating from this research.

of paradigmatic shifts in the global order offers a useful model to better understand, at a macro level, the politics, scope and limits of contemporary international law and organization. For the latter, appreciating the extent to which the UN Organization itself continues to be implicated in a paradoxical role of serving as venue, facilitator and/or progenitor of the ILS condition is vital. Given the inordinately long duration of the question of Palestine at the UN – a question about which the Organization holds itself out as possessing a permanent responsibility for until it is resolved in all of its aspects in accordance with international law – it is difficult to deny that its festering case remains a litmus test for the credibility of international law and the international system as a whole.[6]

[6] Statement of Mr. Bamya (Palestine), UN SCOR, 73rd Sess., 8262nd Mtg. at 95-96, S/PV.8262, 17 May 2018 at 96.

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	Individual	Affiliation	Date of Interview & Location
1.	C. C.	Head Advocacy and Communications Unit, UN OCHA	Jerusalem, 23 Nov. 2015
2.	Y. L.	Head Analysis, Communications and Protection Unit, UN OCHA	Jerusalem, 23 Nov. 2015
3.	Gen. D. G.	Head of Mission and Chief of Staff, UNTSO	Jerusalem, 24 Nov. 2015
4.	G. R.	Regional Affairs Officer, Regional Desk, UNSCO	Jerusalem, 24 Nov. 2015
5.	R. D.	Barrier Monitor, UN OCHA	Jerusalem, 25 Nov. 2015
6.	S. M.	Chief of Communications & Arabic Spokesperson, UNRWA	Jerusalem, 25 Nov. 2015
7.	M. J.	Deputy Head of Office, UN OCHA	Jerusalem, 26 Nov. & 3 Dec. 2015
8.	P. S.	Chief of Staff, UNSCO	Jerusalem, 26 Nov. 2015
9.	R. G.	Director, UN Political Affairs Department, Ministry of Foreign Affairs, State of Israel	Jerusalem, 26 Nov. 2015
10.	I. N.	Advisor, UN Political Affairs Department, Ministry of Foreign Affairs, State of Israel	Jerusalem, 26 Nov. 2015
11.	Y. E.	Political Affairs Officer, Israel Desk, UNSCO	Jerusalem, 26 Nov. 2015
12.	S. L.	Deputy Chief of Staff, UNRWA	Jerusalem, 27 Nov. 2015
13.	A. P.	Director Microfinance Program, UNRWA	Jerusalem, 27 Nov. 2015
14.	O. A.	Director, UN and Specialized Agencies Department, Multilateral Affairs, Ministry of Foreign Affairs, State of Palestine	Ramallah, 29 Nov. 2015
15.	M. B.	Director, International Treaties Department, Multilateral Affairs, Ministry of Foreign Affairs, State of Palestine	Ramallah, 29 Nov. 2015
16.	A. H.	Deputy Assistant Minister, Multilateral Affairs, Ministry of Foreign Affairs, State of Palestine	Ramallah, 30 Nov. 2015
17.	N. A-K.	Foreign Minister (2005-2006), Permanent Observer of the State of Palestine to the UN (1991-2005), State of Palestine	Ramallah, 30 Nov. 2015
18.	A. A.	Protection Mainstreaming Officer, UNRWA	Jerusalem, 1 Dec. 2015

19.	F. S.	Director of UNRWA Operations, West Bank, UNRWA	Jerusalem, 1 Dec. 2015
20.	K. A.K.	Senior Advisor for Political and Local Affairs, West Bank, UNRWA	Jerusalem, 1 Dec. 2015
21.	M. R.	Coordinator, West Bank, UN OCHA	Jerusalem, 3 Dec. 2015
22.	O. A.E.H.	Analyst, Advocacy and Communications Unit, UN OCHA	Jerusalem, 3 Dec. 2015
23.	F. A.	Field Protection Coordinator, West Bank, UNRWA	Jerusalem, 4 Dec. 2015
24.	R. V.	Special Representative of the Administrator, oPt, UNDP	Jerusalem, 4 Dec. 2015
25.	F. A.H	Deputy Permanent Observer of the State of Palestine to the UN	New York, 10 May 2015
26.	R. M.	Permanent Observer of the State of Palestine to the UN	New York, 10 May 2015
27.	A. K.	Political Coordinator, Permanent Mission of Hashemite Kingdom of Jordan to the UN	New York, 11 May 2015
28.	T. T.	Counselor, Permanent Mission of the Arab Republic of Egypt to the UN	New York, 11 May 2015
29.	E. T.	Director, Division of Palestinian Rights, Department of Political Affairs, UN	New York, 12 May 2015
30.	F. S.	Permanent Representative of Senegal to the UN; Chair, UN Committee on the Exercise of the Inalienable Rights of the Palestinian People	New York, 13 May 2015
31.	N. S.	Permanent Representative of Lebanon to the UN	New York, 13 May 2015

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