

STANFORD JOURNAL  
OF  
INTERNATIONAL LAW



VOLUME 57, NUMBER 1

WINTER 2021

# STANFORD JOURNAL OF INTERNATIONAL LAW

Winter 2021

## CONTENTS

### ARTICLES

THE UNITED NATIONS PLAN OF PARTITION FOR PALESTINE REVISITED: ON THE ORIGINS OF PALESTINE'S INTERNATIONAL LEGAL SUBALTERNITY	<i>Ardi Imseis</i>	1
MIXED STAKES CONFLICTS IN INTERNATIONAL AND CONSTITUTIONAL LAW	<i>Jide Nzelibe</i>	55
ARCTIC INDIGENOUS COMMUNITIES AND ANTARCTIC ICEBERGS AS SUBJECTS OF INTER-LEGALITY	<i>Nedim Hovic &amp; Imad Antoine Ibrahim</i>	105

# THE UNITED NATIONS PLAN OF PARTITION FOR PALESTINE REVISITED: ON THE ORIGINS OF PALESTINE’S INTERNATIONAL LEGAL SUBALTERNITY

ARDI IMSEIS\*

*This Article critically examines the United Nations (U.N.) commitment to international law by revisiting General Assembly Resolution 181(II) of 29 November 1947 recommending the partition of Mandate Palestine into a Jewish State and an Arab State. The main claim advanced is that Resolution 181(II) was an expression of an international rule by law, rather than an international rule of law, through which law was used, abused or selectively applied with grossly iniquitous results. To this end, it undertakes a critical international legal analysis of Resolution 181(II) with specific reference to the verbatim and summary records of the United Nations Special Committee on Palestine whose report of September 1947 formed the basis of both the Resolution’s text and its underlying rationale. Rather than being governed by the objective application of international law, the Resolution was driven by distinctly European political goals, which privileged support for the European Zionist program in Palestine. The result was to legislate into U.N. law the two-state framework as the legal cornerstone of the Organization’s position on Palestine against the wishes of the country’s indigenous Arab majority. In this sense, Resolution 181(II) can be understood as the opening act of Palestine’s disenfranchisement and contingency in the U.N., a subaltern position which continues to this very day.*

I. INTRODUCTION .....2  
 II. THE UNITED NATIONS AS THE STANDARD-BEARER OF THE INTERNATIONAL  
 RULE OF LAW .....6

---

\* Assistant Professor, Faculty of Law, Queen’s University. I am indebted to Reem Bahdi, John Dugard, Richard Falk, Michael Lynk and Alice Panepinto for comments received on earlier drafts of this article. All errors are mine.

III. RESOLUTION 181(II) AND THE UNITED NATIONS AS A SITE OF THE INTERNATIONAL RULE BY LAW.....8

A. Requirements of the International Rule of Law: The U.N. Charter, Self-Determination and the Role of the U.N. in the Mandate for Palestine .....8

B. Resolution 181(II): Its Terms..... 13

C. Resolution 181(II): Assessment Under International Law ..... 15

D. Resolution 181(II) as an Embodiment of the International Rule by Law.....20

IV. WHAT PRODUCED THE RULE BY LAW IN RESOLUTION 181(II)? THE UNITED NATIONS SPECIAL COMMITTEE ON PALESTINE AND SUBSEQUENT GENERAL ASSEMBLY DEBATES .....23

A. Bias in UNSCOP’s Composition and Terms of Reference .....24

B. UNSCOP’s Unwillingness to Sufficiently Engage Palestinian Arab Opinion .....30

C. UNSCOP’s Contempt for Democratic Government and the Empirical Reality of the Indigenous Arab Population.....35

V. THE PRACTICAL CONSEQUENCES OF THE RULE BY LAW: UNSCOP’S COGNITIVE DISSONANCE REGARDING THE INEVITABILITY OF VIOLENCE BEFALLING PALESTINE FOLLOWING PARTITION .....44

VI. CONCLUSION .....50

I. INTRODUCTION

On 28 January 2020, the Trump Administration launched its long-awaited “Deal of the Century” for Middle East peace.<sup>1</sup> It was preceded by a number of internationally unlawful decisions by Washington recognizing Israeli sovereignty in occupied East Jerusalem and the legality of Israeli settlements in the occupied Palestinian territory (OPT).<sup>2</sup> Its terms openly endorsed, *inter alia*, Israeli annexation of up to 30 per cent of the OPT, including all Israeli settlements and the Jordan Valley, and the establishment of a Palestinian “state” on the remaining territorially discontinuous fragments. The envisioned Palestinian “state” would not possess any control over its territorial and maritime borders, sea space, air space, and electromagnetic sphere. It would be completely demilitarized and connected only through a series of bridges, roads and tunnels all subject to Israeli control. A symbolic Palestinian capital city of “al-Quds” would be established, but only outside of the actual city of Jerusalem, and no Palestine refugee would be allowed to return to their lands inside Israel, with return limited to the new Palestinian “state” subject to an Israeli veto.<sup>3</sup>

<sup>1</sup> White House, *Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People* \*2020), <https://www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf> [<https://perma.cc/K6JD-ZAQJ>] [hereinafter Trump Plan].

<sup>2</sup> Kali Robinson, *What is U.S. Foreign Policy on the Israeli-Palestinian Conflict?*, COUNCIL ON FOREIGN RELATIONS: BACKGROUNDERS, <https://www.cfr.org/backgrounder/what-us-policy-israeli-palestinian-conflict> [<https://perma.cc/9MLQ-TBGK>] (last updated Dec. 15, 2020). As the belligerent occupant in the occupied Palestinian territory, Israel cannot legally be sovereign in the territory. Likewise, it may not transfer any of its civilian nationals into the territory it occupies. See S. Michael Lynk (Special Rapporteur), *Second Rep. on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, U.N. Doc. A/72/43106 (Oct. 23, 2017) [hereinafter Lynk Report].

<sup>3</sup> Trump Plan, *supra* note 1.

Reactions to the Trump Plan were swift. Israel, who bilaterally negotiated it with Washington, warmly welcomed it and announced that it would formally annex those portions of the OPT allocated to it by the plan at a time of its choosing after 1 July 2020.<sup>4</sup> For its part, the Palestine Liberation Organization (PLO) rejected the plan because it would result in a “Swiss cheese” state, legitimize the illegality of Israel’s territorial conquest of the OPT, permanently frustrate Palestinian self-determination, and “flagrantly violate” international law as “represented by hundreds of United Nations resolutions and dozens of Security Council resolutions.”<sup>5</sup> As if to rub salt into the wound, Jared Kushner, Trump’s son-in-law and chief Middle East peace negotiator (as well as leader of a foundation financing Israeli settlements),<sup>6</sup> publicly urged the Palestinians to seize this “big opportunity,” goading them on their “perfect track record of blowing every opportunity they’ve had in their past.”<sup>7</sup> So brazen was the Trump Plan, that even individuals traditionally close to Israel chided it. Thus David Makovsky, a fellow at the Washington Institute for Near East Policy, derided it for being “more an annexation plan than a peace plan,”<sup>8</sup> while Daniel Levy, an Israeli former peace negotiator, called it “an act of aggression dripping with the coarse syntax of racism. A hate plan, not a peace plan.”<sup>9</sup> Among the international community, States roundly rejected the plan,<sup>10</sup> and 47 independent United Nations (U.N.) Special Procedures mandate-holders indicated that the plan must be “meaningfully opposed” as a “vision of a 21<sup>st</sup> century apartheid.”<sup>11</sup>

In view of the above, it was disconcerting to find that the Trump Plan was met with a relatively muted response by U.N. Secretary-General, António Guterres. Before the Security Council, he dryly affirmed “the commitment of the United Nations to supporting the parties in their efforts to achieve a two-State solution,” noting that “the position of the United Nations in this regard has been defined throughout the years by resolutions of the Security Council and the General Assembly, by which the Secretariat is bound.”<sup>12</sup> When pressed by journalists, he repeated these talking

---

<sup>4</sup> Tovah Lazarof, *Annexation as Early as July 1 under Netanyahu-Gantz Deal*, JERUSALEM POST (May 9, 2020), <https://www.jpost.com/arab-israeli-conflict/annexation-as-early-as-july-1-under-netanyahu-gantz-deal-625304>.

<sup>5</sup> Statement by H.E. President Mahmoud Abbas (Palestine), Situation in the Middle East, Including the Palestine Question, U.N. SCOR, 8717th mtg. at 4, U.N. Doc. S/PV.8717 (Feb. 11, 2020).

<sup>6</sup> Chris Riotta, *Jared Kushner Failed to Disclose He Led a Foundation Funding Illegal Israeli Settlements Before U.N. Vote*, NEWSWEEK (Dec. 3, 2017, 6:00 AM), <https://www.newsweek.com/jared-kushner-disclosure-form-west-bank-settlements-israel-white-house-729290> [<https://perma.cc/QU2D-87FG>].

<sup>7</sup> Michael Crowley & David M. Halbfinger, *Trump Releases Mideast Peace Plan that Strongly Favors Israel*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/01/28/world/middleeast/peace-plan.html> [<https://perma.cc/59VL-9XZ8>].

<sup>8</sup> *Id.*

<sup>9</sup> Daniel Levy, *Don’t Call it a Peace Plan: Ten Ways Trump Has Launched a Relentless Assault on the Very Idea of Israeli-Palestinian Peace*, THE AMERICAN PROSPECT (Jan. 30, 2020), <https://prospect.org/world/dont-call-it-a-peace-plan-israel-palestine-trump/> [<https://perma.cc/74ZY-STL2>].

<sup>10</sup> See, e.g., The Situation in the Middle East, Including the Palestinian Question, U.N. SCOR, 8717th mtg. at 4, U.N. Doc. S/PV.8717 (Feb. 11, 2020) (listing entities, such as The League of Arab States and the European Union High Representative, that rejected the proposal).

<sup>11</sup> U.N. Human Rights Council, Special Procedures, Israeli Annexation of Parts of the Palestinian West Bank Would Break International Law – UN Experts Call on the International Community to Ensure Accountability (June 16, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25960> [<https://perma.cc/SAJ9-A3F3>].

<sup>12</sup> The Situation in the Middle East, Including the Palestinian Question, U.N. SCOR, 8717 mtg. at 2, U.N. Doc. S/PV.8717 (Feb. 11, 2020).

points, only adding that “we are the guardians of the U.N. resolutions and of international law in relation to the Palestinian question.”<sup>13</sup> Of course, the Secretary-General’s position was carefully designed to avoid confrontation with Washington.<sup>14</sup> At the same time, however, it is unclear whether his reference to the U.N. as the guardian of international law and resolutions was enough to assuage concerns with his equivocation. To this day, the conventional wisdom holds that the U.N.’s position on the question of Palestine is the only normative framework based on the international rule of law upon which a legitimate peace may one day be established. This article critically interrogates this proposition and argues that at key moments, there has been a gulf between the requirements of international law and the position of the U.N. on the question of Palestine which has inevitably helped frustrate, rather than facilitate, the search for a just and lasting peace. At the heart of this cleavage, is a condition I have elsewhere called international legal subalternity (ILS), the defining feature of which is that the promise of justice through international law is repeatedly proffered to a global subaltern class<sup>15</sup>—here represented by the Palestinian people—under a cloak of political legitimacy furnished by the international community through the U.N., but its realization interminably withheld. This withholding is performed through the application of what might be called an international rule *by* law—as distinct from the rule of law—characterized by the cynical use, abuse, or selective application of international legal norms under a claim of democratic rights-based liberalism, but with the effect of perpetuating inequity between hegemonic and subaltern actors on the system. As will be demonstrated, the international rule by law is the result of both deliberate and consequential action by hegemonic actors which manifests in structural inequality on the international legal plane for subaltern ones. By critically interrogating the claims of fidelity to the international rule of law of hegemonic actors—in this case at and by the U.N.—one is better able to understand the contours of the international rule by law and how it operates to maintain and

---

<sup>13</sup> U.N. Secretary-General, Press Conference by Secretary-General António Guterres at United Nations Headquarters, U.N. Doc. SG/SM/19958 (Feb. 4, 2020).

<sup>14</sup> The Trump administration was particularly disdainful of the multilateral order and its institutions, including the U.N. This led it to undertake unprecedented action, from withdrawal of funding or membership from a host of subsidiary U.N. organs and international treaty regimes to threatening legal and financial sanctions against international civil servants employed by multilateral organizations. See, e.g., Maya Finoh, *Five Ways the Trump Administration has Attacked the U.N. and International Human Rights Bodies*, AMERICAN CIVIL LIBERTIES UNION (Sept. 24, 2018, 12:00 PM), <https://www.aclu.org/blog/human-rights/five-ways-trump-administration-has-attacked-un-and-international-human-rights> [<https://perma.cc/BG5E-ARY4>]; Sarah Nakasone & Kori Schake, *What the U.N. Is Good For . . . or Could Be*, FOREIGN POLICY (Sept. 21, 2020, 4:59 PM), <https://foreignpolicy.com/2020/09/21/what-the-u-n-is-good-for-or-could-be/> [<https://perma.cc/YZQ8-WP7V>]. Because of Washington’s continued and outsized influence on these organizations, this has given rise to great concern at the U.N.

<sup>15</sup> The origins of the term “subalternity” 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. See Edward W. Said, *Foreword* to SELECTED SUBALTERN STUDIES, at v–vi (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988). 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. See *id.* 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.

perpetuate the contingency and subordination of weaker actors on the system despite claims to the contrary.<sup>16</sup>

To explore these ideas, this article revisits perhaps the most important U.N. resolution ever passed by the Organization on the question of Palestine, namely U.N. General Assembly Resolution 181(II) of 29 November 1947. Resolution 181(II) recommended the partition of Mandate Palestine into a Jewish State and an Arab State and was therefore a watershed for introducing within the U.N. the very idea of a two-state framework as the principle means of resolving the Israel/Palestine conflict. The resolution was rejected by the PLO for decades until its “historic compromise” in 1988, when it recognized Israel and the two-state framework on the basis of the creation of a sovereign, independent, and contiguous Palestinian state in the OPT, despite being less than half the territory allocated the Arab State under the resolution.<sup>17</sup> The depth of this historic compromise is something not usually appreciated by policymakers today, but over seventy years later, the terms of the Trump Plan ask for a critical reappraisal of Resolution 181(II), and the U.N.’s unique role in fashioning it, so as to better appreciate the issues presently at stake.

The main claim advanced in this article is that Resolution 181(II) was more an expression of a continued international rule by law, than an espousal of the Charter-mandated international rule of law, and as such, helped crystalize Palestine’s ILS in the newly-formed U.N. 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 article 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 Europe’s “Jewish question” through support for the European Zionist Jewish settlement of Palestine,<sup>18</sup> over the normative requirements of international law as applied to the country and its indigenous Arab population. The result was to legislate into U.N. 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. For the Palestinian people,

---

<sup>16</sup> For further exposition of the international rule by law and the condition of international legal subalternity it has spawned, see ARDI IMSEIS, *THE UNITED NATIONS AND THE QUESTION OF PALESTINE: RULE BY LAW AND THE STRUCTURE OF INTERNATIONAL LEGAL SUBALTERNITY* (forthcoming).

<sup>17</sup> JOHN QUIGLEY, *THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE* 212–13 (2d ed. 2005).

<sup>18</sup> Zionism is a political movement that originated in late 19<sup>th</sup> century Europe. Its 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 prototypical Other in Western culture,” anti-Semitism was “the archetypal Western prejudice.” See BENJAMIN BEIT-HALLAHMI, *ORIGINAL SINS: REFLECTIONS ON THE HISTORY OF ZIONISM AND ISRAEL* 9 (1993). European anti-Semitism was therefore the driving force behind the so-called “Jewish question,” according to which the place of the Jew in 19<sup>th</sup> century Europe was openly impugned in the public sphere. See THEODOR HERZL, *THE JEWISH STATE* 85–97 (Jacob M. Alkow ed., Scopus Publ’g Co. trans., Dover Publications, Inc. 1998) (1896); see also VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891–1949*, at 9–10 (2009).

this ultimately produced Resolution 181(II) as the opening act of disenfranchisement and contingency in the U.N. that would continue for years to come.

The remainder of this article is divided into four parts. Part Two briefly sets out the role of the U.N. as the ostensible standard-bearer of the international rule of law in the post-World War II period. Part Three juxtaposes this role against the U.N. as a site of the international rule by law, demonstrated through an international legal examination of Resolution 181(II). Part Four 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 Five then discusses the practical consequences of the resolution through a critical subaltern lens.

## II. THE UNITED NATIONS AS THE STANDARD-BEARER OF THE INTERNATIONAL RULE OF LAW

In the aftermath of World War II, the framers of the U.N. 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 U.N. 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 U.N. *membership*. Both the League and the U.N. were founded by victorious imperial powers following a world war. Both thereby excluded from original membership a majority of the colonized world and the defeated powers. Yet the U.N.'s conditions for acquired membership were made 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.<sup>19</sup> With the exception of a handful of cases, this more liberal approach to joining the U.N. 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 U.N.'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 would be achieved, its drafters buried this lofty aspiration in its preamble.<sup>20</sup> In contrast, the maintenance of international peace and security "in conformity with principles of justice and international law" was codified as an explicit purpose of the U.N. under its Charter.<sup>21</sup> Accordingly, the U.N.'s commitment to international law and its progressive development was, on its face, far more robust, clear, and sustained. This

---

<sup>19</sup> Konrad Ginther, *Membership: Article 4 in I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 177, 180 (Bruno Simma ed., 2d ed. 2002).

<sup>20</sup> See League of Nations Covenant pmbl.

<sup>21</sup> See U.N. 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. See Rüdiger Wolfrum, *Purposes and Principles in I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 19, at 52–53.

is demonstrated by various other operative provisions of the U.N. Charter and related practice.

For example, the regime governing the use of force is far more restrictive under the U.N. Charter than it was under the League of Nations Covenant. The Charter imposed 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> Finally, the role of the U.N. in the affirmation and development of customary international law through its principal organs is unprecedented. For instance, the resolutions of the now 193-member strong General Assembly can offer unique evidence of a widespread practice accompanied by sufficient *opinio juris*.<sup>25</sup> Likewise, through the International Law Commission, the Assembly has encouraged “the progressive development of international law and its codification.”<sup>26</sup> This, of course, is in addition to the Security Council’s authority to issue legally binding decisions on Members in accordance with the Charter,<sup>27</sup> and the mandate of the International Court of Justice (ICJ) to exercise compulsory and advisory jurisdiction on legal questions brought before it.<sup>28</sup>

In a very real and substantial sense, therefore, the U.N. can lay rightful claim to being the guardian of the primacy of the international rule of law in the post-World War II order in ways that contrast significantly with the League’s role in perpetuating inequity as between the late-colonies and the rest of the world during its heyday. 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 a late-imperial international rule by law as an organizing principle from the interwar through the post-war years, now manifest in the work of the U.N.? To the extent that

<sup>22</sup> U.N. Charter art. 2, ¶ 4, art. 39–51; League of Nations Covenant art. 10–16.

<sup>23</sup> U.N. Charter art. 2, ¶ 1 (“The Organization is based on . . . sovereign equality of all its Members.”); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, U.N. Doc. A/RES/2625(XXV), (Oct. 24, 1970) (“All states enjoy sovereign equality”); League of Nations Covenant art. 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).

<sup>24</sup> 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.” U.N. 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 Leiß, J.R. & Adreas Paulus, “Miscellaneous Provisions: Article 103” in II THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 19, at 2110–13.

<sup>25</sup> ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 1–10 (1963).

<sup>26</sup> U.N. Charter art. 13, ¶ 1.

<sup>27</sup> *Id.* art. 25.

<sup>28</sup> Statute of the International Court of Justice art. 36, art. 38, ¶ 1, June 26, 1945, 33 U.N.T.S. 933 [hereinafter I.C.J. Statute].

the U.N. Charter codified inequitable distributions of power as between the permanent five and the rest of the membership, for example, there is little question that an element of international rule by law indeed survived. But has the U.N. 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 affirmation of Palestine's ILS, help create a better understanding of this?

### III. RESOLUTION 181(II) AND THE UNITED NATIONS AS A SITE OF THE INTERNATIONAL RULE BY LAW

To assess the questions above, this section undertakes four tasks. First, it assesses what prevailing international law required of the U.N. when the question of Palestine was put before it in 1947. Second, it examines the terms of Resolution 181(II). Third, it analyzes Resolution 181(II) under that international law. Fourth, it discusses whether Resolution 181(II) can be best understood as embodying an international rule by law, ultimately crystalizing Palestine's ILS condition in the U.N.

#### *A. Requirements of the International Rule of Law: The U.N. Charter, Self-Determination and the Role of the U.N. in the Mandate for Palestine*

Legal texts reflect the values of the time in which they are produced.<sup>29</sup> The U.N. Charter is no different. In line with the Organization's ostensible commitment to the 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.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> By 1945, self-determination of peoples had

---

<sup>29</sup> JOHN STRAWSON, PARTITIONING PALESTINE: LEGAL FUNDAMENTALISM IN THE PALESTINIAN-ISRAELI CONFLICT 5 (2010).

<sup>30</sup> U.N. Charter art. 1, ¶ 2.

<sup>31</sup> Indeed, one of the four ends for which Wilson asserted the Allies fought World War I—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. Report to the General Assembly, UNSCOP 2d Sess., Supp. 11 at 24, U.N. Doc. A/364, (Sept. 9, 1947) [hereinafter UNSCOP Report, Vol. II].

<sup>32</sup> See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 43 (1995). 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* following World War I. Consistent with the Eurocentric nature of the international order then prevailing, the main determinant for membership in the system required evidence of “civilization” as measured by the European powers. See QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 24–25, 32 (1968). 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

developed sufficiently to be expressly included in the U.N. Charter as both a purpose of the Organization and a principle that would guide its action.<sup>33</sup> 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 was not 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.<sup>34</sup> 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 U.N. Charter was drafted.”<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

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 the partition of Palestine—the general contours of self-determination of peoples were sufficiently established under international law *as regards class A mandated territories*, of which Palestine was one. 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

---

conditions of the modern world”, formed “a sacred trust of civilization.” League of Nations Covenant art. 22. To that end, “the tutelage of such peoples should be entrusted to advanced nations,” namely the victorious imperial powers. *Id.* 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.” *Id.* It accordingly affirmed that “[t]he wishes of these communities must be a principal consideration in the selection of the Mandatory.” *Id.*

<sup>33</sup> U.N. Charter art. 1, ¶ 2, art. 55.

<sup>34</sup> International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (providing that “[a]ll peoples have the right of self-determination”, by virtue of which “they freely determine their political status,” “freely pursue their economic, social and cultural development,” and “for their own ends, freely dispose of their natural wealth and resources”). *Accord* International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>35</sup> HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 33 (1990).

<sup>36</sup> Marc Weller, *Why the Legal Rules on Self-Determination Do Not Resolve Self-Determination Disputes*, in *SETTLING SELF-DETERMINATION DISPUTES: COMPLEX POWER-SHARING IN THEORY AND PRACTICE* 17, 44 (Marc Weller & Barbara Metzger eds., Martinus Nijhoff, 2008).

<sup>37</sup> Karl Doehring, *Self-Determination*, in *THE CHARTER OF THE UNITED NATIONS*, *supra* note 19, at 49.

<sup>38</sup> CASSESE, *supra* note 32, at 43.

assistance by the Mandatory under a “sacred trust” until such time as these nations were “able to stand alone”.<sup>39</sup> According to the ICJ, the ultimate objective of this sacred trust was the self-determination and independence of the peoples concerned.<sup>40</sup> 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.”<sup>41</sup> 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 U.N. 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 an expression of the international rule by law. In short, a review of the text of both the League of Nations Covenant and the U.N. Charter, as well as relevant state practice, suggests that prevailing international law admitted of only two possibilities for Palestine in 1947: immediate independence in accordance with the freely expressed wishes of Palestine’s inhabitants, whatever its eventual constitutional structure, or temporary delay of independence through conversion into a U.N. trusteeship under the Charter.<sup>42</sup>

As to the first possibility—immediate independence—it must be recalled that the terms of the Mandate for Palestine only required the establishment in Palestine of a Jewish national home, *not* a Jewish state.<sup>43</sup> According to a 1939 White Paper,

---

<sup>39</sup> League of Nations Covenant art. 22; *see also* CASSESE, *supra* text accompanying note 32.

<sup>40</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 53 (June 21) [hereinafter *Namibia*].

<sup>41</sup> Report to the General Assembly, UNSCOP, 2d Sess., Supp. No. 11 at 43, U.N. Doc. A/364/1963 (Vol. I), at 43 (Sept. 3, 1947) [hereinafter UNSCOP Report, Vol. I]. 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 to be granted independence in separate states, it mustn’t 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 infra* text accompanying notes 189–92.

<sup>42</sup> JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* 88 (2010).

<sup>43</sup> British Mandate for Palestine, League of Nations, Jul. 24, 1922, L.O.N. O. J. No. 3, 1007 (1922). The British Mandate for Palestine was negotiated between the Zionist Organization (a body dedicated to the colonization of Palestine by European Jews) and the British Government in 1920 without the participation of the Palestinian Arabs who then numbered over 90 percent of the population of the country. Its terms were openly committed to the Zionist program at the expense of the indigenous Palestinian Arabs. For example, its preamble indicated 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.” To this end, the Mandatory was to be furnished with “full powers of legislation and of administration” (art. 1) 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. *See* French Mandate for Syria and The Lebanon, League of Nations, Jul. 24, 1922, L.O.N. O. J. No. 3, 1013, art. 1 (1922)). Instead, the Palestine Mandate provided that the “Mandatory shall be responsible for placing the country under such political, administrative and economic conditions

the U.K. itself acknowledged that the Jewish national home had been established in Palestine by that time.<sup>44</sup> This would suggest that it had discharged its obligation under the terms of the Mandate vis-à-vis the Zionists and could proceed with granting the country full independence in accord with Article 22 of the League of Nations Covenant. As will be demonstrated, the problem was that the minority Zionists insisted on transforming all of Palestine into a Jewish 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 led the British to conclude that the mandate was unworkable and should be handed over to the U.N. In a very practical sense, the issue before the U.N. was how to deal with the impediment that Palestinian demography—the sheer presence of the Palestinian indigenous population—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 U.N. 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.<sup>45</sup> 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.*”<sup>46</sup> 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.<sup>47</sup> 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.”<sup>48</sup> 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.”<sup>49</sup>

---

as will secure the establishment of the Jewish *national home.*” (art. 2) (emphasis added). No mention of Jewish “state” was made in the instrument.

<sup>44</sup> Palestine, Statement of Policy, Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty, May 1939, *available at* [http://avalon.law.yale.edu/20th\\_century/brwh1939.asp](http://avalon.law.yale.edu/20th_century/brwh1939.asp) [<https://perma.cc/HG35-NK8K>].

<sup>45</sup> U.N. Charter art. 77, ¶ (1).

<sup>46</sup> *Id.* art. 76(b) (emphasis added).

<sup>47</sup> Dietrich Rauschnig, *International Trusteeship System*, in THE CHARTER OF THE UNITED NATIONS, *supra* note 19, at 1104–05.

<sup>48</sup> *Resolutions Adopted on the Reports of the First Committee*, Mandates, League of Nations, Apr. 18 1946, L.O.N. O. J. Spec. Supp. 194, 278 (1946).

<sup>49</sup> *Id.* at 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 U.N. Charter.<sup>50</sup> 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.”<sup>51</sup> As a matter of positive U.N. law, this was ensured by the safeguarding clause in Article 80 of the Charter. It 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.”<sup>52</sup> 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*.”<sup>53</sup> 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 U.N. 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 Arab population was both in the majority and adamantly against partition, political independence invariably meant the establishment of the country as a 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, U.N. 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. This

---

<sup>50</sup> 3 HERSCH LAUTERPACHT, INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 509 (Elihu Lauterpacht ed., Cambridge, 1977).

<sup>51</sup> *Namibia*, *supra* note 40, ¶ 55.

<sup>52</sup> U.N. Charter art. 80(1).

<sup>53</sup> *Namibia*, *supra* note 40, ¶ 59 (emphasis added).

rupture cemented Palestine's ILS condition in the U.N. 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. This has ultimately marked the question of Palestine under international law to this very day.

### B. 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.<sup>54</sup> 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.<sup>55</sup>

The terms of Resolution 181(II) provided for the partition of Palestine into an Arab State and a Jewish State in economic union,<sup>56</sup> with the city of Jerusalem and its environs constituted as a *corpus separatum* under the administering authority of the U.N. Trusteeship Council (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.<sup>57</sup> Aside from the act of partition itself, the extent to which the resolution established Palestinian ILS in the U.N. system is best illustrated in the specific details of the plan as regards the related 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<sup>58</sup> even though the Jewish population comprised only 33 percent of the country (see Maps I & II).<sup>59</sup> 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,<sup>60</sup> and was

---

<sup>54</sup> The following seven states comprised the majority: Canada, Czechoslovakia, Guatemala, the Netherlands, Peru, Sweden, and Uruguay. The following three members comprised the minority: India, Iran, and Yugoslavia. UNSCOP Report, Vol. I, *supra* note 41, at 47–64. Australia abstained from voting on the respective plans. See UNSCOP Report, Vol. II, *supra* note 31, at 23.

<sup>55</sup> G.A. Res. 181 (II) (Nov. 29, 1947).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> KATTAN, *supra* note 18, at 152.

<sup>59</sup> 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. See UNSCOP Report, *supra* note 41, at 11.

<sup>60</sup> As of 1945, of the 26,323,023 million *dunam* landmass of Palestine, the Jewish community owned only 1,491,699 million *dunams* to the Arab community's 12,574,774 *dunams* (48 percent), the remainder being publicly owned land. Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2dSess., Annex 25, Report of Sub-Committee 2, A/AC.14/32 and Add.1 at 292-293 & Appendix VI ["U.N. Ad Hoc Committee, Report of Sub-Committee 2"].

eclipsed by the Arabs in land ownership in every one of Palestine's 16 sub-districts (see Map III).<sup>61</sup> 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"<sup>62</sup>—Palestine's staple export crop—even though approximately half of the citrus-bearing land was owned by the Arabs.<sup>63</sup> 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".<sup>64</sup>

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.<sup>65</sup> 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 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.*"<sup>66</sup>

Although the Zionists had coveted the whole of Palestine, the Jewish Agency leadership pragmatically, if grudgingly, accepted Resolution 181(II).<sup>67</sup> 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, U.N. recognition of the Jewish state in Resolution 181(II) represented a fundamental shifting of the goal-posts. Based on its own terms, it is impossible to escape the conclusion that the partition plan privileged European 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.<sup>68</sup>

---

<sup>61</sup> In eight of Palestine's sixteen sub-districts, Jewish land ownership did not exceed 5 percent and in no case did it exceed 39 percent. *Id.* at 574.

<sup>62</sup> Citrus was the principal export of Palestine at the time. See UNSCOP Report, *supra* note 41, at 48.

<sup>63</sup> U.N. Ad Hoc Committee, Report of Sub-Committee 2, *supra* note 60, at 293, Appendix VI.

<sup>64</sup> Statement of Sir Mohammed Zafrullah Khan (Pakistan), U.N. GAOR, 2d Sess., 126th plen. mtg. at 1374, U.N. Doc. A/PV.126, (Nov. 28, 1947).

<sup>65</sup> UNSCOP Report, *supra* note 41, at 54.

<sup>66</sup> U.N. Ad Hoc Committee, Report of Sub-Committee 2, *supra* note 60, at 291 (emphasis added).

<sup>67</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 4th mtg. at 16–17 (Oct. 2, 1947). The Jewish Agency was the body empowered under the British Mandate for Palestine, *supra* note 43, art. 6, to develop the Jewish National Home in Palestine.

<sup>68</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 3d mtg. at 11 (Sept. 29, 1947).

This rejection has disingenuously been presented in some of the literature as indicative of political intransigence,<sup>69</sup> and even hostility towards the Jews as Jews.<sup>70</sup> 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 U.N. 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 U.N. legal authority to undermine indigenous rights in Palestine in favour of European interest, and was therefore an embodiment of the international rule by law.

### C. Resolution 181(II): Assessment Under International Law

The international legality of Resolution 181(II) has long been a matter of some debate with continued relevance to this day. 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 that the state was established “on the strength” of this resolution.<sup>71</sup> For its part, and as noted above, the 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.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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<sup>75</sup> or in violation of the U.N. Charter and self-determination of peoples.<sup>76</sup> 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.<sup>77</sup>

Despite the difference of opinion that exists regarding the international legality of Resolution 181(II), one common thread is the tendency to collapse the

---

<sup>69</sup> See, e.g., Strawson, *supra* note 29 at 101–02.

<sup>70</sup> HOWARD GRIEF, *THE LEGAL FOUNDATION AND BORDERS OF ISRAEL UNDER INTERNATIONAL LAW* 166–67 (2010).

<sup>71</sup> PROVISIONAL GOVERNMENT OF ISRAEL, *THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL*, May 14, 1948, available at [https://www.knesset.gov.il/docs/eng/megilat\\_eng.htm](https://www.knesset.gov.il/docs/eng/megilat_eng.htm) [<https://perma.cc/92UT-KYVZ>].

<sup>72</sup> See *infra* text accompanying note 108.

<sup>73</sup> GRIEF, *supra* note 70, at 156–57.

<sup>74</sup> JULIUS STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* 62 (1981).

<sup>75</sup> HENRY CATTAN, *THE PALESTINE QUESTION* 38 (Saqi, 2000).

<sup>76</sup> *Id.* at 39. See also JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 246 (Oxford, 8th ed. 2012).

<sup>77</sup> W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 171–73 (1986).

General Assembly's distinct procedural powers and substantive powers. The diplomatic record reveals that this was an issue for some delegations in the debate over the terms of the resolution.<sup>78</sup> 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 1947, approving a partition plan for Palestine, was if not *ultra vires* at any rate not binding on member states.<sup>79</sup>

It is apparent that the General Assembly's legal capacity to convey title is a matter of substantive power, while its legal capacity to make recommendations to member states is one of procedural power. Questioning the Assembly's authority 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 more effective approach to assessing 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: One, does the Assembly have the procedural power to issue recommendations under the Charter? Two, 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 . . ."<sup>80</sup> Based on the ordinary meaning of these terms, the Assembly is thus vested with the procedural competence to issue recommendations to members of the U.N. and/or to the Security Council under the Charter. The second prong then asks whether there are any substantive limits on the Assembly in exercising this procedural authority. The answer is yes. Article 10 provides, in relevant parts, that the Assembly may make recommendations but only on "any questions or any matters within the scope of the present

---

<sup>78</sup> See Statement of Semen K. Tsarapkin (USSR), Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 30th mtg. at 184 (Nov. 24 1947) ("Such doubts [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* Statement of Sir Zafrullah Khan (Pakistan), Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 30th mtg. at 184 (Nov. 24 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.").

<sup>79</sup> CRAWFORD, *supra* note 76, at 246.

<sup>80</sup> U.N. Charter art. 10.

Charter or relating to the powers and functions of any organs provided for in the present Charter . . . .<sup>81</sup>

One can therefore argue 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.<sup>82</sup> 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 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.<sup>83</sup> At the time it was issued, therefore, the resolution constituted nothing more than a recommendation that the Assembly properly issued as a matter of procedure, and one which would not normally be binding under international law.<sup>84</sup>

At the same time, however, in exercising its procedural power to make a recommendation on the future government of Palestine, the Assembly was substantively bound by the scope of the Charter, including its provisions relating to the powers and functions of any organs. 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.<sup>85</sup> 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 country’s population was against partition, 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 U.N. 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 Hersch 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

---

<sup>81</sup> *Id.* art. 10 (noting the exception of those powers under Article 12 of the Charter, which concerns the preservation of the primary competence of the Security Council over questions relating to the maintenance of international peace and security).

<sup>82</sup> 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 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 G.A. Res. 181 (II), *supra* note 55; and Part IV.A of this Article.

<sup>83</sup> G.A. Res. 181 (II), *supra* note 55.

<sup>84</sup> KATTAN, *supra* note 18 at 155. See also PHILLIP JESSUP, THE BIRTH OF NATIONS 264 (1974) (“I do not believe that the most ardent advocates of the binding legal effect of such resolutions as Resolution 181(II) would attribute legislative force to the partition resolution. Like most General Assembly resolutions, it was merely a recommendation”). But see *supra* text accompanying note 25, and *infra* text accompanying notes 100–105.

<sup>85</sup> See Part III.A of this Article.

Palestine.”<sup>86</sup> He opined that because Great Britain exercised effective “sovereignty over Palestine” and it had requested the U.N. “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.<sup>87</sup> Likewise, he affirmed that the General Assembly possessed “unrestricted powers . . . to recommend the solution of the problem of Palestine.”<sup>88</sup> These views suffer from a number of defects. First, the British request of the U.N. was not directed toward the broad end of “the question of Palestine and its political future in all its aspects” but rather only toward the much more limited end of “the future government of Palestine.”<sup>89</sup> As discussed below, this implies that the territorial unity of the country would remain intact, 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 U.N. and/or the Security Council is not unrestricted. To the contrary, this power is expressly limited by the scope of the Charter, which includes the sacred trust principles and the continuing mandates regime.<sup>90</sup> 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. After all, partition had been consistently rejected by the great majority of the people of Palestine.<sup>91</sup>

Another, more recent differing view is captured in a detailed opinion advanced by Victor Kattan, who rightly points out that Resolution 181(II) was merely a recommendation.<sup>92</sup> But in assessing the resolution’s legality, Kattan seems to have maintained the general tendency to collapse the procedural and substantive powers of the General Assembly, as noted above. He states that there is “no basis in the U.N. 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.”<sup>93</sup> 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.”<sup>94</sup> On this basis, he concludes that “the U.N. 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.”<sup>95</sup>

---

<sup>86</sup> LAUTERPACHT, *supra* note 50, at 508.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> G.A. Res. 181 (II), *supra* note 55, preamble. *See also* UNSCOP Report, Vol. II, *supra* note 31, at 1.

<sup>90</sup> *See* Part III.A of this Article.

<sup>91</sup> *See supra* text accompanying note 68.

<sup>92</sup> KATTAN, *supra* note 18, at 155.

<sup>93</sup> *Id.* at 154.

<sup>94</sup> International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128, 143 (July 11) [hereinafter *South-West Africa*].

<sup>95</sup> KATTAN, *supra* note 18, at 154.

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 U.N. to modify the status of a mandated territory with the consent of the mandatory power was *substantively unlimited*. Indeed, the Court made clear that South-Africa remained the mandatory power in South-West Africa,<sup>96</sup> that it was bound by the terms of Article 22 of the League of Nations Covenant,<sup>97</sup> that the General Assembly was “legally qualified to exercise the functions previously exercised by the League of Nations,”<sup>98</sup> 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.”<sup>99</sup> 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 indigenous majority 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—one month prior to its eventual adoption—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.<sup>100</sup> This effort was narrowly defeated in the ad hoc committee of the General Assembly,<sup>101</sup> giving rise to concern among some that the international rule of law was being sacrificed for other ends.<sup>102</sup>

---

<sup>96</sup> *South-West Africa*, *supra* note 94, at 143.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 137.

<sup>99</sup> *Id.* at 144.

<sup>100</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., U.N. Doc. A/516, Annex 15 (Iraq), 16 (Egypt), and 17 (Syria) (Nov. 25, 1947).

<sup>101</sup> As Iraq, Egypt and Syria put more than one question forward, these were amalgamated in a combined 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, U.N. GAOR, 2d Sess., 32d mtg. at 203, U.N. Doc. A/AC.14/SR.32 (Nov. 24, 1947).

<sup>102</sup> *See, e.g.,* Pittman B. Potter, *The Palestine Problem Before the United Nations*, 42 AM. J. INT’L L. 858, 860 (1948) (stating contemporaneously 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

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 “the consent of the inhabitants of Palestine” has “not been established to our satisfaction.”<sup>103</sup> 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.”<sup>104</sup> 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.”<sup>105</sup>

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 viewed its goal of establishing a Jewish state in Palestine 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 rights of the indigenous people of Palestine thereunder. How could partition be legal if the only possibility envisioned under the U.N. 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 U.N. 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 provide a better understanding the rule by law essence of Resolution 181(II) and why it solidified Palestine’s ILS condition in the UN.

#### *D. 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 it be understood 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

---

dealing with international problems manifested only too often in the history of Great Power behavior in the United Nations”).

<sup>103</sup> Statement of Alfonso Lopez (Colombia), U.N. GAOR, 2d Sess., 127th plen. mtg. at 1398, A/PV.127 (Nov. 28, 1947).

<sup>104</sup> Statement of Mohamed Fadhil Jamali (Iraq), U.N. GAOR 2d Sess., 126th plen. mtg. at 1390, A/PV.126 (Nov. 28, 1947)

<sup>105</sup> *Id.* at 1384 (Statement of Ernesto Dihigo (Cuba)).

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—the resolution 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*.<sup>106</sup> On the international plane, the formation of customary international law is understood as requiring “evidence of a general practice accepted as law”.<sup>107</sup> This practice may be global or regional/local in nature.<sup>108</sup> 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.<sup>109</sup> Here, the universality of the U.N. is of direct relevance. As noted by Rosalyn Higgins, the practice of the UN’s political organs—General Assembly resolutions 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.”<sup>110</sup> 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 “provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”<sup>111</sup>

It is admittedly difficult to argue that the terms of Resolution 181(II) would *in toto* qualify as customary international law on these bases. Key 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 overtaken by events of the 1948 war and were never implemented or followed by the concerned states. Thus, as noted by Crawford: “Both the Security Council and the United Kingdom refused to enforce the partition plan,” and the functions of the U.N. 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.<sup>112</sup>

Nevertheless, in the intervening seventy-three years since the passage of Resolution 181(II), the practice of Israel, the PLO, as well as the UN, suggest the legally binding character of the resolution’s fundamental object and purpose: namely,

<sup>106</sup> Yuval Shany, *Legal Entitlements, Changing Circumstances and Intertemporality: A Comment on the Creation of Israel and the Status of Palestine*, 49 *ISR. L. REV.* 391, 392 (2016).

<sup>107</sup> I.C.J. Statute, *supra* note 28, art. 38(1)(b).

<sup>108</sup> CRAWFORD, *supra* note 76, at 29.

<sup>109</sup> *Military and Paramilitary Atrocities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 207 (June 27). [hereinafter *Nicaragua*].

<sup>110</sup> HIGGINS, *supra* note 25, at 2, 5.

<sup>111</sup> *Id.* See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8).

<sup>112</sup> JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 431–32 (Oxford 2d ed. 2006).

the peaceful resolution of the dispute over mandate Palestine *through its territorial division into two states*. 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.<sup>113</sup> Likewise, since 1988, the PLO has recognized Resolution 181(II) as one of the bases upon which the State of Palestine was established, albeit within the smaller territorial confines of the OPT.<sup>114</sup> As for the rest of the international community, the best evidence that a custom exists comes from numerous General Assembly resolutions over the years, usually adopted by a large or overwhelming majority, in which Resolution 181(II) is recalled or affirmed.<sup>115</sup> For example, resolution 48/158D of 20 December 1993 was adopted following the commencement of the Oslo process by a vote of 92 to 5 with 51 abstentions, and 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.”<sup>116</sup> Likewise, in relation to the Madrid Peace Conference, the same principle was affirmed by the Assembly in its Resolution 44/42 of 6 December 1989 (151 to 3, with 1 abstention), Resolution 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).<sup>117</sup> In line with these resolutions, widespread state practice as reflected in bilateral and multilateral treaties, and 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. Thus, it is possible to argue that beyond its specific terms and mechanics rendered moot by the 1948 war and subsequent events, the legal effect of Resolution 181(II)’s two-state principle has arguably taken on a binding character through its treatment by states within the U.N. system. This has given the resolution its rule by law quality, which has, in turn, cemented Palestine’s ILS condition within the UN.

Even if the two-state paradigm underpinning Resolution 181(II) is not regarded as binding international law doctrinally, might it still possess a discursive or normative force that informs its rule by law character? In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ noted that “General Assembly resolutions, even if they are not binding, may sometimes have normative value.”<sup>118</sup> Based on the historical record subsequent to the passage of Resolution

<sup>113</sup> THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, *supra* note 71, ¶¶ 9, 11.

<sup>114</sup> Deputy Permanent Observer of the Palestine Liberation Organization to the U.N., Letter dated Nov. 16, 1988 from the Deputy Permanent Observer of the Palestine Liberation Organization to the United Nations addressed to the Secretary-General, as appended to Letter dated Nov. 18, 1988 from the Permanent Rep. of Jordan to the United Nations addressed to the Secretary-General, U.N. Doc. A/43/827 (Nov. 18, 1988); *see also* Palestine Liberation Organization, Enhancement of Palestine’s Status at the UN, Position Paper (Nov. 26, 2012), <https://unispal.un.org/unispal.nsf/47d4e277b48d9d3685256ddc00612265/f675a6b229b0571d85257ac200630364> [https://perma.cc/J7MC-SMZB].

<sup>115</sup> *See, e.g.*, G.A. Res. 71/25 (Nov. 30, 2016); G.A. Res. 71/23 (Nov. 30, 2016); G.A. Res. 71/20 (Dec. 14, 2016); G.A. Res. 70/12 (Nov. 24, 2015); G.A. Res. 70/15 (Nov. 24, 2015); G.A. Res. 66/18 (Jan. 26, 2012); G.A. Res. 52/250 (July 13, 1998); G.A. Res. 43/177 (Dec. 15, 1988).

<sup>116</sup> G.A. Res. 48/158 (Dec. 20, 1993).

<sup>117</sup> G.A. Res. 44/42 (Dec. 6, 1989); G.A. Res. 45/68 (Dec. 6, 1990); G.A. Res. 46/75 (Dec. 11, 1991).

<sup>118</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 111, ¶ 70.

181(II), there is little question that the resolution structured the way the U.N. has come to understand the conflict over Palestine and how it should be resolved in accordance with other relevant bodies of international law. 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 crystallized in the post-decolonization era.<sup>119</sup> Insofar as these bodies of law have been applied within and by the U.N. 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). Thus, from a discursive or normative standpoint, Resolution 181(II) provided what has become the fundamental architecture of the U.N.’s seventy-three-year engagement with the question of Palestine: the two-state framework.<sup>120</sup> This has also bolstered the resolution’s rule by law quality, affirming Palestine’s ILS condition 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 U.N.’s work on the question of Palestine. The PLO was compelled to accept the legitimacy of the resolution in its “historical compromise” of 1988 in return for a modicum of Palestine’s international legal rights being recognized and hopefully realized. 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, the resolution represented the clash between the hegemonic and European-dominated General Assembly’s interest 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 indigenous Muslim and Christian Arab population who persistently objected to it. This ultimately informed the resolution’s rule by law character and the subsequent solidification of Palestine’s ILS status 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.

#### IV. 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.<sup>121</sup> 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.<sup>122</sup> In

---

<sup>119</sup> See, e.g., Lynk Report, *supra* note 2 (restating the UN’s position on the prohibition of the acquisition of territory through use of force, the law on self-determination of peoples, and the law governing belligerent occupation as applicable to the OPT)

<sup>120</sup> RICHARD FALK, PALESTINE’S HORIZON: TOWARD A JUST PEACE 4 (2017).

<sup>121</sup> UNSCOP Report, Vol. I, *supra* note 41, at 3.

<sup>122</sup> *Id.*

addition, it visited Jewish displaced persons camps in Germany and Austria.<sup>123</sup> 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.<sup>124</sup> The committee 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.”<sup>125</sup>

An examination of UNSCOP records reveals at least three factors that establish the existence of the international rule by law 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: One, 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 under international law; two, an unwillingness to sufficiently engage Palestinian Arab opinion in its deliberations; and three, 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.

#### A. *Bias in UNSCOP’s Composition and Terms of Reference*

In 1947, the General Assembly was composed of only fifty-seven member states, forty-one of whom were either European or settler-colonial offshoots of Europe.<sup>126</sup> The other sixteen were newly independent Asian, African and Middle Eastern states, the majority of those regions remaining under some form of European imperial control at the time.<sup>127</sup> Notwithstanding this five-to-two 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 non-European.<sup>128</sup> 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 reflected a continuation of the 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

---

<sup>123</sup> *Id.* at 8.

<sup>124</sup> *Id.* at 47, 59.

<sup>125</sup> *Id.* at 42–46.

<sup>126</sup> See *Growth in United Nations Membership, 1945-present*, UNITED NATIONS, <https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> [https://perma.cc/BMG5-B77X] (last visited Feb. 11, 2021).

<sup>127</sup> *Id.*

<sup>128</sup> G.A. Res. 106 (S-1) (May 15, 1947). See also JOHN QUIGLEY, *THE INTERNATIONAL DIPLOMACY OF ISRAEL’S FOUNDERS: DECEPTION AT THE UNITED NATIONS IN THE QUEST FOR PALESTINE* 51 (2016).

standpoint.”<sup>129</sup> Set against the calamitous backdrop of World War II, further evidence suggests this bias was also political, as some UNSCOP members (and other states in the Assembly) sought 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. Despite one writer having rejected this claim as mere “myth,”<sup>130</sup> 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 U.N. on 2 April 1947, it asked the General Assembly “to make recommendations, under Article 10 of the Charter, concerning the future government of Palestine.”<sup>131</sup> The United Kingdom requested the Assembly to constitute and instruct a special committee to help it consider this question.<sup>132</sup> 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 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 U.N. trust territory until independence was recognized in accordance with the freely expressed wishes of its inhabitants.<sup>133</sup>

The First Committee of the General Assembly was tasked with composing UNSCOP’s terms of reference.<sup>134</sup> During deliberations, the scope of the terms originally referred by the United Kingdom were considerably broadened, directing 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

<sup>129</sup> QUIGLEY, *supra* note 128, at 51.

<sup>130</sup> See STRAWSON, *supra* note 29, at 5 (“[S]ome myths that have achieved the status of facts can be disposed of. The partition resolution [i.e. Resolution 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 U.N. 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.”)

<sup>131</sup> Permanent Rep. of the United Kingdom to the U.N., Letter dated Apr. 2, 1947 from the Permanent Rep. of the United Kingdom to the United Nations addressed to the Acting Secretary-General. U.N. Doc. A/286 (Apr. 3, 1947).

<sup>132</sup> *Id.*

<sup>133</sup> See *infra* Part III.A of this Article.

<sup>134</sup> UNSCOP Report, Vol. I, *supra* note 41, at 2.

Palestine” to the more opaque “question of Palestine.”<sup>135</sup> 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.<sup>136</sup> The British representative realized that this skewed his government’s original intention in referring the matter to the General Assembly and accordingly requested the removal of any reference to “the request of the Government of the United Kingdom” in the terms of reference.<sup>137</sup> 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.”<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup> In the end, UNSCOP’s final terms of reference were set out in General Assembly resolution 106 (S-1) of 15 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.”<sup>141</sup> To that end, UNSCOP was empowered to “conduct investigations in Palestine and wherever it may deem useful,” and to “receive and examine written or oral testimony” from “the mandatory Power, from representatives of the population of Palestine, from Governments and from such organizations and individuals as it may deem necessary.”<sup>142</sup> No reference was made to Palestine’s independence, the U.N. 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 were not 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 would not necessarily exclude independence from being considered.<sup>143</sup> These efforts were in vain. As pointed out by the Lebanese

---

<sup>135</sup> U.N. GAOR, 1st Spec. Sess., 55th mtg. at 276–78, U.N. Doc. A/C.1/136 (May 12, 1947).

<sup>136</sup> *Id.* at 278.

<sup>137</sup> *Id.* at 278–79. Notwithstanding the preamble of Resolution 181(II), which 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,” G.A. Res. 181 (II), *supra* note 55.

<sup>138</sup> U.N. GAOR, 1st Spec. Sess., 55th mtg. at 283–87, U.N. Doc. A/C.1/136 (May 12, 1947) (emphasis added).

<sup>139</sup> *Id.* at 283.

<sup>140</sup> *See, e.g.*, U.N. GAOR, 1st Spec. Sess., 56th mtg. at 310–13, U.N. Doc. A/C.1/136 (May 13, 1947).

<sup>141</sup> G.A. Res. 106 (S-1) (May 15, 1947).

<sup>142</sup> *Id.*

<sup>143</sup> U.N. GAOR, 1st Spec. Sess., 79th plen. mtg. at 168, 180, U.N. Doc. A/PV.79 (May 15, 1947).

delegate—and as Jewish Agency Chairman, David Ben Gurion, would later testify to UNSCOP<sup>144</sup>—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 prejudices the issue, but precisely the act of omitting to use a term which was already in use thirty years ago.<sup>145</sup>

Similar concerns were repeatedly expressed by the Egyptian,<sup>146</sup> Iraqi,<sup>147</sup> and Syrian<sup>148</sup> delegations 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

---

<sup>144</sup> United Nations Special Committee on Palestine, Rep. to the General Assembly, Oral Evidence Presented at Public Meetings at 48, U.N. Doc. A/364/ADD.2 (Vol. III), annex A (Sept.9, 1947) [herein after UNSCOP Report, Vol. III].

<sup>145</sup> U.N. GAOR, 1st Spec. Sess., 55th mtg. at 288–89, U.N. Doc. A/C.1/136 (May 12, 1947).

<sup>145</sup> *Id.*

<sup>146</sup> *See, e.g.*, U.N. GAOR, 1st Spec. Sess., 78th plen. mtg. at 145, U.N. Doc. A/C.1/136 (May 14, 1947) (“Whereas by the stroke of a pen the reference to the independence of Palestine has been in effect removed, the Committee failing even to conform to 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 its 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’ . . .”).

<sup>147</sup> U.N. GAOR, 1st Spec. Sess., 77th plen. mtg. at 125–26, U.N. Doc. A/C.1/136 (May 14, 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 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!”).

<sup>148</sup> U.N. GAOR, 1st Spec. Sess., 78th plen. mtg. at 142, U.N. Doc. A/C.1/136 (May 14, 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 prejudice the action of the special committee. We said that it would not prejudice 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.”).

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 really unacceptable.<sup>149</sup>

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 [Jewish] refugees and displaced persons [of World War II] 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.<sup>150</sup>

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. The reasonableness of this concern at the time 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.”<sup>151</sup> 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 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

---

<sup>149</sup> U.N. GAOR, 1st Spec. Sess., 57th mtg. at 359, U.N. Doc. A/C.1/136 (May 13, 1947).

<sup>150</sup> U.N. GAOR, 1st Spec. Sess., 78th plen. mtg. at 155–56, U.N. Doc. A/C.1/136 (May 14, 1947).

<sup>151</sup> U.N. GAOR, 1st Spec. Sess., 77th plen. mtg. at 125, U.N. Doc. A/C.1/136, (May 14, 1947).

problem and the preparation of relevant proposals must constitute an important task of the special committee.<sup>152</sup>

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,”<sup>153</sup> this did not mean that Palestine was not 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,<sup>154</sup> Norway,<sup>155</sup> and Poland.<sup>156</sup> 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.”<sup>157</sup>

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 in UNSCOP’s composition and terms of reference are certainly vindicated by the record. To be sure, a number of the Asian and Middle Eastern States shared concerns for the Jewish refugees and the historic injustice faced by European Jewry.<sup>158</sup> Indeed, as a matter 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,<sup>159</sup> while many Western states refused to open

<sup>152</sup> *Id.* at 131–32.

<sup>153</sup> UNSCOP Report, Vol. I, *supra* note 41, at 89.

<sup>154</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 19th mtg. at 129 (Oct. 21, 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 . . .”).

<sup>155</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 16th mtg. at 107–08 (Oct. 16, 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.”).

<sup>156</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 8th mtg. at 42 (Oct. 8, 1947) (“[T]he 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.”).

<sup>157</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 6th mtg. at 31 (Oct. 6, 1947).

<sup>158</sup> *See, e.g.*, Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 7th mtg. at 36–37 (Oct. 7, 1947). The Pakistani representative stated:

The 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 and 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. *Id.*

<sup>159</sup> *Id.* *See also* U.N. GAOR, 2d Sess., 126th plen. mtg. at 1368, U.N. Doc. A/PV.126 (Nov. 28, 1947). 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

their doors in any remotely comparable way.<sup>160</sup> But because these non-European states had nothing to do with the persecution of European Jews, any talk of using the U.N. 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 submitted to the General Assembly: "If Jews were persecuted in Europe what have the people of Palestine to do with that?"<sup>161</sup>

*B. 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 role of the British and the League of Nations 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:

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

---

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. *Id.*

<sup>160</sup> See, for example, Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 15th mtg. at 94 (Oct. 16, 1947). The Saudi representative stated:

The 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. . . . [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. *Id.*

<sup>161</sup> Statement of H.R.H. Prince Seif El Islam Abdullah (Yemen), U.N. GAOR, 2d Sess., 124th plen. mtg. at 1316, U.N. Doc. A/PV.124 (Nov. 26, 1947). See also Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 18th mtg. at 120 (Oct. 18, 1947) (statement by a representative of the Arab Higher Committee) ("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."). See also U.N. GAOR, 2d Sess., 126th plen. mtg. at 1385, U.N. Doc. A/PV.126 (Nov. 28, 1947).

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. *Id.*

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.<sup>162</sup>

Be that as it may, the literature tends to treat the boycott and its negative consequences as an instance of “exceedingly inept diplomacy”<sup>163</sup> on the part of the Palestinian Arabs. This victim-blaming approach imputes any negative consequences wholly, if impliedly, to the subaltern class.<sup>164</sup> This approach likely explains the little attention that 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 through the operation of the standard of civilization in the classical era of the discipline.<sup>165</sup>

It is axiomatic that the work of high-stakes U.N. 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 U.N. which, in the words of Trygve Lie, the 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.”<sup>166</sup> It is therefore surprising to find 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.<sup>167</sup>

---

<sup>162</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 3d mtg. at 6 (Sept. 29, 1947).

<sup>163</sup> See, CHARLES D. SMITH, *PALESTINE AND THE ARAB-ISRAELI CONFLICT* 135 (St. Marten’s, 2d ed. 2006).

<sup>164</sup> See, e.g., STRAWSON, *supra* note 29, at 114; see KATTAN, *supra* note 18, at 147, 159.

<sup>165</sup> HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 17 (Little, Brown & Co., 8th ed. 1866) (“The 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.”).

<sup>166</sup> TRYGVE LIE, *IN THE CAUSE OF PEACE: SEVEN YEARS WITH THE UNITED NATIONS* 422 (1954).

<sup>167</sup> 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 Record of the Second Meeting (Private), A/AC.13/PV.2 (June 2, 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.”

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, which indicated that if the Arab States were afforded the right to address the Assembly it should be able to as well.<sup>168</sup> In response, the Syrian representative indicated that the Palestinian Arabs were represented by the AHC and not by any Arab state.<sup>169</sup> 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 non-governmental organizations who wished to be heard.<sup>170</sup> 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.<sup>171</sup> 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,<sup>172</sup> as well as providing it with all UNSCOP documentation not classified as secret.<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup> 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 full co-operation in its task from all elements in the population."<sup>176</sup> The following day, at UNSCOP's seventh meeting, Jose Brilej, the Yugoslav representative, made an impassioned appeal that UNSCOP address the AHC directly. Yet, the committee not only voted it

---

<sup>168</sup> Letter dated 22 April 1947 from the Jewish Agency for Palestine, U.N. GAOR, 1st Spec. Sess., Vol. III, Annex 2, at 363–64, U.N. Doc. A/C.1/139 (Apr. 22, 1947).

<sup>169</sup> U.N. GAOR, 1st Spec. Sess., Vol. I, 75th plen. mtg. at 104 (May 5, 1947).

<sup>170</sup> *Id.*

<sup>171</sup> U.N. GAOR, 1st Spec. Sess., Vol. III, 47th mtg. at 77–78, Annex 6 at 367, U.N. Doc. A/C.1/151 (May 7, 1947).

<sup>172</sup> See generally UNSCOP, Summary Record of the Fourth Meeting (Private), U.N. Doc. A/AC.13/SR.4 (June 6, 1947) (demonstrating UNSCOP received, prior to requesting it, information from the Jewish Agency on the question of Palestine, in addition to tens of thousands of written communications from Zionist groups and individuals, solicited and unsolicited).

<sup>173</sup> UNSCOP, Summary Record of the Seventh Meeting (Private) at 11, U.N. Doc. A/AC.13/SR.7 (June 17, 1947).

<sup>174</sup> UNSCOP, Summary Record of the Fifth Meeting (Private) at 1, U.N. Doc. A/AC.13/SR.5 (June 16, 1947).

<sup>175</sup> *Id.* at 2.

<sup>176</sup> UNSCOP Report, Vol. II, *supra* note 31, at 5.

down but also approvingly voted “to defer further action for the time being” on the point.<sup>177</sup>

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.<sup>178</sup> It was not 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 decided to pen a letter to the AHC in an attempt to convince it to reverse its position on the boycott.<sup>179</sup> But the summary and verbatim records of UNSCOP’s private meetings leading up to that point indicate that even that decision had not come as self-evident. In its eleventh meeting on 22 June 1947, after the committee extensively discussed 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 had not even reached out to the AHC on the principal issues it was sent to Palestine to investigate.<sup>180</sup> Likewise, at UNSCOP’s eighteenth meeting on 6 July 1947, an attempt by the Yugoslav representative to get the committee to reopen the question of AHC engagement that he raised at the seventh meeting was simply ignored.<sup>181</sup> Finally, at the twentieth meeting on 7 July 1947, although the Uruguayan representative, Enrique Rodriguez Fabregat, 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.<sup>182</sup>

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 subsequently revealed. 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.<sup>183</sup> 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

---

<sup>177</sup> UNSCOP, Summary Record of the Seventh Meeting (Private) at 8, U.N. Doc. A/AC.13/SR.7 (June 17, 1947).

<sup>178</sup> See UNSCOP, Summary Record of the Fifth Meeting (Private), U.N. Doc. A/AC.13/SR.5 (June 16, 1947); see also UNSCOP Report, Vol. II, *supra* note 31, at 4–5 (articulating the itinerary itself).

<sup>179</sup> UNSCOP Report, Vol. II, *supra* note 31, at 6.

<sup>180</sup> UNSCOP, Summary Record of the Eleventh Meeting (Private) at 3, U.N. Doc. A/AC.13/SR.11 (June 22, 1947).

<sup>181</sup> UNSCOP, Summary Record of the Eighteenth Meeting (Private) at 1, U.N. Doc. A/AC.13/SR.18 (July 6, 1947).

<sup>182</sup> UNSCOP, Summary Record of the Twentieth Meeting (Private) at 3, U.N. Doc. A/AC.13/SR.20, (July 7, 1947).

<sup>183</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 5th mtg. at 19 (Oct. 3, 1947).

AHC's "attitude and to induce local Arab representatives to enter into political discussion of the Arab case."<sup>184</sup> 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."<sup>185</sup>

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 U.N. diplomacy and investigation. Although some Arab states eventually provided testimony to UNSCOP toward the end of the mission,<sup>186</sup> the committee 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."<sup>187</sup> But to blame the Palestinian Arab leadership alone for this result, as some UNSCOP members subsequently did—and with no small measure of racism, to boot—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

---

<sup>184</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, U.N. GAOR, 2d Sess., 15th mtg. at 105–06, 16 October 1947.

<sup>185</sup> Statement of Jorge Garcia Granados (Guatemala), U.N. GAOR, 2d Sess., 126th plen. mtg. at 1380–81, U.N. Doc. A/PV.126 (Nov. 28, 1947) (emphasis added).

<sup>186</sup> At its 23<sup>rd</sup> 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), U.N. Doc. A/AC.13/SR.23 (July 8, 1947).

<sup>187</sup> QUIGLEY, INTERNATIONAL DIPLOMACY, *supra* note 128, at 67.

UNSCOP's plan of partition, which in turn contributed to the rule by law character of Resolution 181(II).

*C. UNSCOP's Contempt for Democratic Government and the Empirical Reality of the Indigenous Arab Population*

A third and perhaps the most important 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 cemented, 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 19<sup>th</sup> century and the extent to which similar values continued to prevail in the U.N. system. An examination of UNSCOP's verbatim and summary records demonstrates that it claimed 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 U.N. 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, representing an outgrowth of the continued imperial Eurocentricity of the international order at the UN.

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.<sup>188</sup> 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

---

<sup>188</sup> UNSCOP Report, Vol. III, *supra* note 144, at 49–50 & 93.

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.<sup>189</sup>

In its report to the General Assembly, UNSCOP clearly recognized this purported conundrum presented by Palestinian demography, but left it surprisingly unquestioned. 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.<sup>190</sup>

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:

“[I]f 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.”<sup>191</sup>

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 the Palestinian 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. One would have expected this to give UNSCOP, an organ of the U.N. tasked with safeguarding the international rule of law, some pause. Instead, UNSCOP effectively adopted a

---

<sup>189</sup> *Id.* at 93.

<sup>190</sup> UNSCOP Report, Vol. I, *supra* note 41, at 35.

<sup>191</sup> *Id.* at 31.

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<sup>192</sup>—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.<sup>193</sup> 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 Arab demography was to advocate for a delay of the application of the principle of self-determination until they surpassed the indigenous population's number, UNSCOP's method was to advocate for its immediate application but only through the creation of two racially gerrymandered states. 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<sup>194</sup>—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.<sup>195</sup> 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 given their much higher birth rate. Jews therefore required immigration to offset this problem or would otherwise have to 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.<sup>196</sup>

---

<sup>192</sup> See, e.g., Statement of Camille Chamoun (Lebanon), UNSCOP, Report to the General Assembly, 2d Sess., Vol. IV, Annex B, Oral Evidence Presented at Private Meetings, at 43, U.N. Doc. A/364 Add. 3 (1947). [hereinafter *UNSCOP Report, Vol. IV*].

<sup>193</sup> UNSCOP Report, Vol. I, *supra* note 41, at 42.

<sup>194</sup> *Id.* at 24.

<sup>195</sup> *Id.* at 31–32.

<sup>196</sup> *Id.* at 30.

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,<sup>197</sup> thereby violating the Charter and disenfranchising the indigenous population.

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. 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.”<sup>198</sup> 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 U.N. 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.<sup>199</sup>

In light of this recommendation, it is reasonable to conclude that UNSCOP’s majority accepted 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, thus violating 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-committee two of the ad hoc committee, which determined that the Jews would, in fact, be in a minority in the Jewish State.<sup>200</sup> 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.<sup>201</sup> 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

---

<sup>197</sup> *Id.* at 47.

<sup>198</sup> *Id.* at 52.

<sup>199</sup> *Id.* at 45.

<sup>200</sup> See *supra* text accompanying notes 59.

<sup>201</sup> UNSCOP Report, Vol. I, *supra* note 41 at 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.”)

“in the way of loans for expansion of education, public health and other vital social services of a non-self-supporting nature.”<sup>202</sup> Because no such appeal was deemed 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 UNSCOP itself 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 a Jewish state, and would be 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 be constitutionally earmarked for members of both communities, with powers of local self-government in the hands of each state (for example, education, health, local taxation, administration of justice, and settlement). Arabic and Hebrew would be the official languages of the country at both federal and state level, and minority rights would be constitutionally protected.<sup>203</sup> 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.<sup>204</sup> Doubtless because 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.<sup>205</sup> 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

---

<sup>202</sup> *Id.* at 48.

<sup>203</sup> *Id.* at 59–64.

<sup>204</sup> See Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 29th mtg. at 178 (Nov. 22, 1947). The Yugoslav representative 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”). *Id.*

<sup>205</sup> UNSCOP Report, Vol. II, *supra* note 31, at 62.

would be highly undesirable—nay, almost impossible—to overlook important minorities, such as Jews in Palestine happen to be at present.<sup>206</sup>

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 pretensions to the contrary. The most eye-opening justification offered in support of partition came from none other than the Guatemalan representative to UNSCOP, Mr. Garcia Granados. 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 U.N. 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 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.<sup>207</sup>

---

<sup>206</sup> *Id.* at 42 (emphasis added).

<sup>207</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 10th mtg. at 56-58 ( Oct. 10, 1947) (emphasis added).

While Garcia Granados seems to have parroted some of what the Jewish Agency had argued before the Assembly,<sup>208</sup> 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 Eurocentric 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 binational 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.”<sup>209</sup> 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.”<sup>210</sup> Echoing earlier exhortations of other delegates,<sup>211</sup> 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 . . . 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.”<sup>212</sup> 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 the equality of peoples and the right of self-determination,” unlike the unitary state framework which allegedly “paid no regard to democratic principles.”<sup>213</sup> Likewise,

---

<sup>208</sup> See, e.g., Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 17th mtg. at 114 (Oct. 17, 1947). 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.” *Id.* See also Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 18th mtg. at 124 & 126 (Oct. 18, 1947). Former Jewish Agency Chair Chaim Weizmann opined 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.” *Id.*

<sup>209</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 8th mtg. at 43 (Oct. 8, 1947).

<sup>210</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 29th mtg. at 175 (Nov. 22, 1947).

<sup>211</sup> See *supra* text accompanying note 137.

<sup>212</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 29th mtg. at 180 (Nov. 22, 1947).

<sup>213</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 30th mtg. at 184 (Nov. 24, 1947).

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.<sup>214</sup>

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 opposition from the Asian and Middle Eastern group was to question the logic of partition as an application of the self-determination principle. As the representative of Yemen noted:

Since 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.<sup>215</sup>

This view was shared by the representative of Lebanon,<sup>216</sup> who 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.”<sup>217</sup> 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.”<sup>218</sup> 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

---

<sup>214</sup> U.N. GAOR, 2d Sess., 124th plen. mtg. at 1318, U.N. Doc. A/PV.124 (Nov. 26, 1947).

<sup>215</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 14th mtg. at 92 (Oct. 15, 1947).

<sup>216</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 14th mtg. at 90 (Oct. 15, 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.”).

<sup>217</sup> *Id.* at 88.

<sup>218</sup> U.N. GAOR, 2d Sess., 126th plen. mtg. at 1385, U.N. Doc. A/PV.126 (Nov. 28, 1947).

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.”<sup>219</sup>

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 apply 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 Lebanon,<sup>220</sup> Pakistan,<sup>221</sup> and Yemen.<sup>222</sup> 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 in an Arab State, it was equally unjust to place 400,000 Arabs in the Jewish State set up by partition.”<sup>223</sup> 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.”<sup>224</sup> 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.”<sup>225</sup> 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.”<sup>226</sup> 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:

---

<sup>219</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 18th mtg. at 122 (Oct. 28, 1947).

<sup>220</sup> U.N. GAOR, 2d Sess., 125th plen. mtg. at 1342, U.N. Doc. A/PV.125 (Nov. 16 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?”).

<sup>221</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 31st mtg. at 192, U.N. Doc. [A/AC.14/SR.31](#) (Nov. 24, 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.”).

<sup>222</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 28th Mtg. at 171–72 (Nov. 22, 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.”).

<sup>223</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 30th mtg. at 188 (Nov. 24, 1947).

<sup>224</sup> U.N. GAOR, 2d Sess., 126th plen. mtg. at 1374, U.N. Doc. A/PV.126 (Nov. 28, 1947).

<sup>225</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 28th mtg. at 172 (Nov. 22, 1947).

<sup>226</sup> U.N. GAOR, 2d Sess., 126th plen. mtg. at 1370, 1382, U.N. Doc. A/PV.126 (Nov. 28, 1947).

[The U.N. has] 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?<sup>227</sup>

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 inequity 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 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 U.N. system.

#### V. THE PRACTICAL CONSEQUENCES OF THE 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 late-imperial interwar rule by law ethic inherited by the UN. But beyond its doctrinal, normative and 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

---

<sup>227</sup> *Id.* at 1383.

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.<sup>228</sup> 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, made Palestinian Arab resolve inevitable. 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.<sup>229</sup>

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 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.<sup>230</sup> 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.<sup>231</sup> 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.<sup>232</sup> Approximately 400,000–450,000 more Palestinian Arabs fled or were expelled during this phase.<sup>233</sup> 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.”<sup>234</sup> 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.<sup>235</sup> 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

<sup>228</sup> KATTAN, *supra* note 18 at 160.

<sup>229</sup> BENNY MORRIS, 1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR 76–77 (2008). 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 indicates that it was not clear whether these were related to the passage of the resolution as such; *see also* RASHID KHALIDI, THE IRON CAGE: THE STORY OF THE PALESTINIAN STRUGGLE FOR STATEHOOD 130–31 (2007).

<sup>230</sup> KHALIDI, *id.* at 131.

<sup>231</sup> SMITH, *supra* note 163, at 143.

<sup>232</sup> SAMI HADAWI, PALESTINIAN RIGHTS & LOSSES IN 1948: A COMPREHENSIVE STUDY 81 (Saqi, 1988).

<sup>233</sup> SMITH, *supra* note 163, at 146.

<sup>234</sup> G.A. Res. 94 (III), at 24 (Dec. 11, 1948).

<sup>235</sup> The figure of 392 is given in BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED xvi–xxii (2004). The figure of 418 is offered in WALID KHALIDI, ALL THAT REMAINS: THE PALESTINIAN VILLAGES OCCUPIED AND DEPOPULATED BY ISRAEL IN 1948 (1992) at 585.

1948<sup>236</sup>—the Palestine refugees, including their descendants, number approximately 5.3 million persons and continue to remain in forced exile.<sup>237</sup>

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, 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 World War II, and Whitehall's concern about these operations developing into a full-scale clash.<sup>238</sup>

The record therefore 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 Pappé has called the ethnic cleansing of Palestine,<sup>239</sup> 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 one-to-one 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 U.N. 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

---

<sup>236</sup> G.A. Res. 302 (IV), at 23–24 (Dec. 8, 1949).

<sup>237</sup> COMMUNICATIONS DIVISION, UNRWA in figures, UNRWA (Jan. 2017), [https://www.unrwa.org/sites/default/files/content/resources/unrwa\\_in\\_figures\\_2016.pdf](https://www.unrwa.org/sites/default/files/content/resources/unrwa_in_figures_2016.pdf) [<https://perma.cc/K8PJ-LGLV>]. 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 LEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* 18–19 (1998).

<sup>238</sup> MORRIS, *supra* note 231, at 38.

<sup>239</sup> See generally ILAN PAPPE, *THE ETHNIC CLEANSING OF PALESTINE* (2006) (referencing international law and popular usage to explain why the term 'ethnic cleansing' is appropriate to describe the systematic expulsion of the indigenous Palestinian Arab population from Palestine during the 1948 war).

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*.”<sup>240</sup> Despite concerted Zionist settlement during the mandate period, by 1947 the Palestinian Arabs were still very much the 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*.”<sup>241</sup>

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 U.N. 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*.”<sup>242</sup> 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.<sup>243</sup> 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.”<sup>244</sup> Most vitally, Sandstrom was convinced that if the U.N. voted for partition, the Jews could be relied upon to implement and impose it on the Arabs in the Jewish State.<sup>245</sup> In an indication of the Eurocentric orientation of UNSCOP’s majority, it would appear that far from assessing the threat posed by the

<sup>240</sup> UNSCOP Report, Vol. I, *supra* note 41, at 32 (emphasis added).

<sup>241</sup> *Id* (emphasis added). 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 U.N. difficult to implement. *See id.* at 46.

<sup>242</sup> UNSCOP Report, Vol. III, *supra* note 144, at 56 (emphasis added). See also UNSCOP Report, Vol. IV, *supra* note 192, at 37, where Judge Sandstrom stated to the Lebanese delegate who was testifying before UNSCOP on 23 July 1947, “[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?”

<sup>243</sup> UNSCOP Report, Vol. III, *supra* note 144, at 68.

<sup>244</sup> Elad Ben-Dror, *The United Nations Plan to Establish an Armed Jewish Force to Implement the Partition Plan (United Nations Resolution 181)*, 24 *DIPLOMACY & STATECRAFT* 559, 562 (2013).

<sup>245</sup> *Id.*

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.<sup>246</sup> 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.<sup>247</sup>

The most crucial development in the record appears to have been the United Kingdom’s decision that it would refuse to enforce any U.N. 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.<sup>248</sup> 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 Czechoslovak 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.<sup>249</sup> 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 responsibility.”<sup>250</sup> This was echoed by the Soviet representative, who accused the British of “burying” the Assembly’s recommendation before even taking it.<sup>251</sup> Similar rebukes were issued by the Canadian,<sup>252</sup> New Zealand,<sup>253</sup> 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.”<sup>254</sup> Despite this apparent concern, however, in the end each of these states

---

<sup>246</sup> See, e.g., Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 15th mtg. at 102 (Oct. 16, 1947), in which the Iraqi delegate Fadhil Jamali 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.”

<sup>247</sup> UNSCOP Report, Vol. IV, *supra* note 192, at 27.

<sup>248</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 2d Mtg. at 3–4, 26 September 1947, and 25th Mtg. at 153 (Nov. 20, 1947). See also U.N. GAOR 2d Sess., 124th plen. mtg. at 1323–24, A/PV.124 (Nov. 26, 1947).

<sup>249</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 8th mtg. at 45 (Oct. 8, 1947).

<sup>250</sup> U.N. GAOR 2d Sess., 124th plen. mtg. at 1327, A/PV.124 (Nov. 26, 1947).

<sup>251</sup> U.N. GAOR 2d Sess., 125th plen. mtg. at 1362–63, A/PV.125 (Nov. 26, 1947).

<sup>252</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 29th mtg. at 176 (Nov. 22, 1947).

<sup>253</sup> U.N. GAOR 2d Sess., 125th plen. mtg. at 1357, A/PV.125 (Nov. 26, 1947).

<sup>254</sup> Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September–25 November 1947, U.N. GAOR, 2d Sess., 9th Mtg. at 49 (Oct. 9, 1947).

curiously voted *in favour* of partition rather than to abstain on 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.”<sup>255</sup>

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 UNPC 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.<sup>256</sup> 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.

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 1950s and 1960s,<sup>257</sup> subsequently and largely corroborated by Israel’s ‘new historians’ in the 1980’s.<sup>258</sup> 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 settler minority. It was well understood by the U.N. 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 U.N. 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.

---

<sup>255</sup> U.N. GAOR 2d Sess., 124th plen. mtg. at 1312–13, U.N. Doc. A/PV.124 (Nov. 26, 1947).

<sup>256</sup> GRIEF, *supra* note 70, at 154; QUIGLEY, *INTERNATIONAL DIPLOMACY*, *supra* note 128, at 79.

<sup>257</sup> See CONSTANTIN ZURAYK, *THE MEANING OF THE DISASTER* (R. Bayley Winder trans., 1956); WALID KHALIDI, *FROM HAVEN TO CONQUEST: READINGS IN ZIONISM AND THE PALESTINE PROBLEM UNTIL 1948* (1971). For later work by Walid Khalidi, see *ALL THAT REMAINS*, *supra* note 231, and *Plan Dalet: Master Plan for the Conquest of Palestine*, 18 *J. PALESTINE STUD.* 4 (1988/89).

<sup>258</sup> See PAPPE, *supra* note 241; NUR MASALHA, *EXPULSION OF THE PALESTINIANS: THE CONCEPT OF “TRANSFER” IN ZIONIST POLITICAL THOUGHT, 1882–1948* (1992); NUR MASALHA, *A LAND WITHOUT A PEOPLE: ISRAEL, TRANSFER AND THE PALESTINIANS 1949–96* (1997); MORRIS, *supra* note 231.

## VI. CONCLUSION

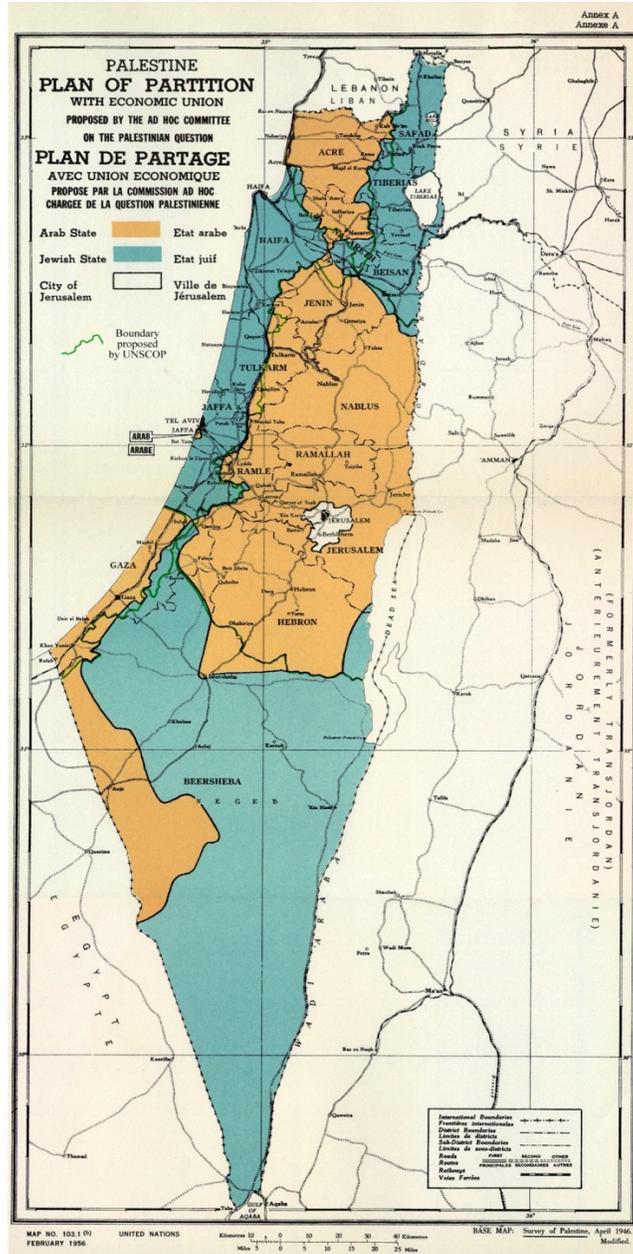
Contrary to the conventional that wisdom posits the U.N. as the guardian of the international rule of law on the question of Palestine, this article has argued that it is possible to see a gulf between the Organization's actions and the requirements of international law that help us better explain the depth of injustice experienced by Palestinians to this day. Instead of a commitment to the international rule of law, the U.N. has at times adopted an approach shaped by an international rule by law framework, characterized by the cynical use, abuse or selective application of international legal norms under a claim of democratic rights-based liberalism, but with the effect of perpetuating inequity between hegemonic and subaltern actors on the system. The resulting ILS that this has produced has been a marked feature of the Palestinian experience in the international legal order.

To demonstrate this, this article undertook a critical international legal analysis of the U.N. plan of partition of November 1947, and examined the effective *travaux préparatoires* 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 U.N. 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 U.N. demonstrated that the old international rule by law order lingered on 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 U.N 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 U.N. in Palestine in 1947: immediate independence, or conversion of the country into a U.N. 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. 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 the expense of Palestine's Arabs. A close examination of the UNSCOP records reveals at least three factors that demonstrate a 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 its 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.

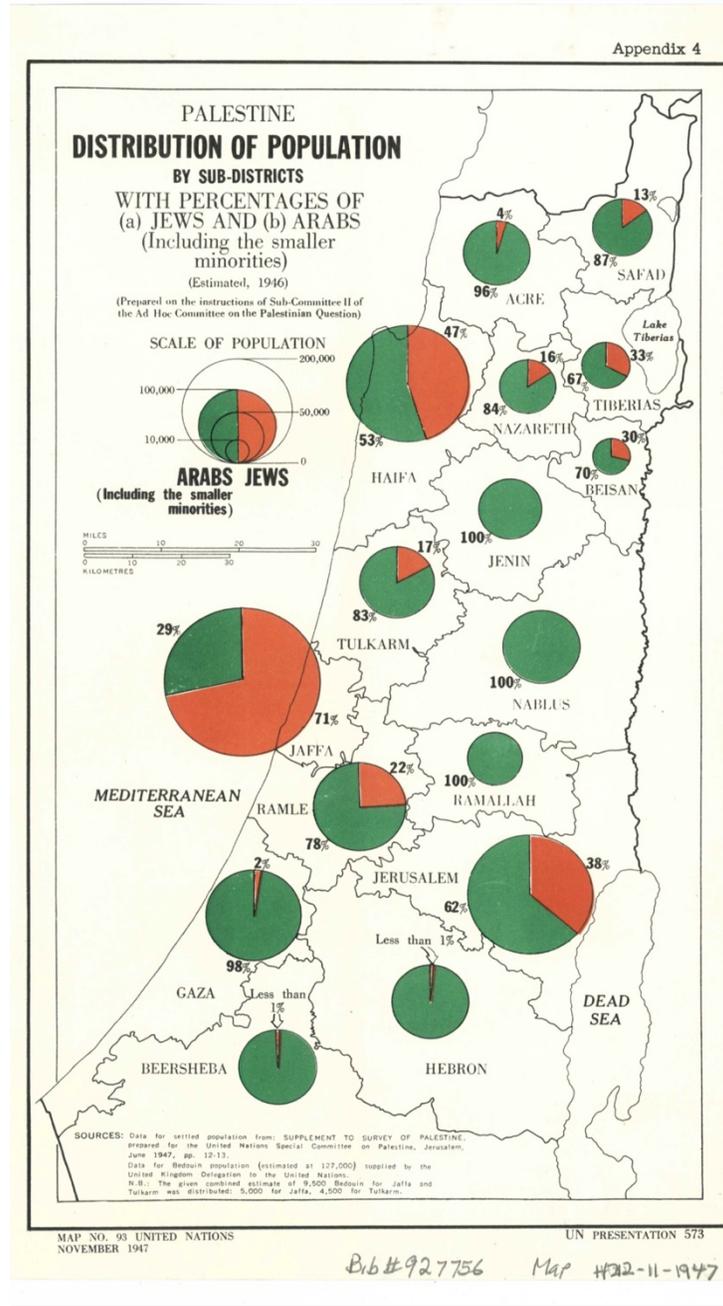
Resolution 181(II) effectively legislated into U.N. law the contingency and disenfranchisement of the Palestinian Arabs, thereby confirming Palestine's ILS condition in the ostensibly new international legal order. But there was a deeper twist. With partition, the international legal goalposts had now 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 U.N. system, if at all, would be confined to the truncated remnants of that patrimony. Such is the depth of the injustice inherent in the PLO's 1988 historical compromise. In today's context, where the Palestinian people continue to struggle for universal recognition of their sovereign right to self-determination in the OPT, threatened as it is by the terms of the Trump Plan, the two-state paradigm that Resolution 181(II) set on course within the U.N. 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 U.N. 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.

MAP I



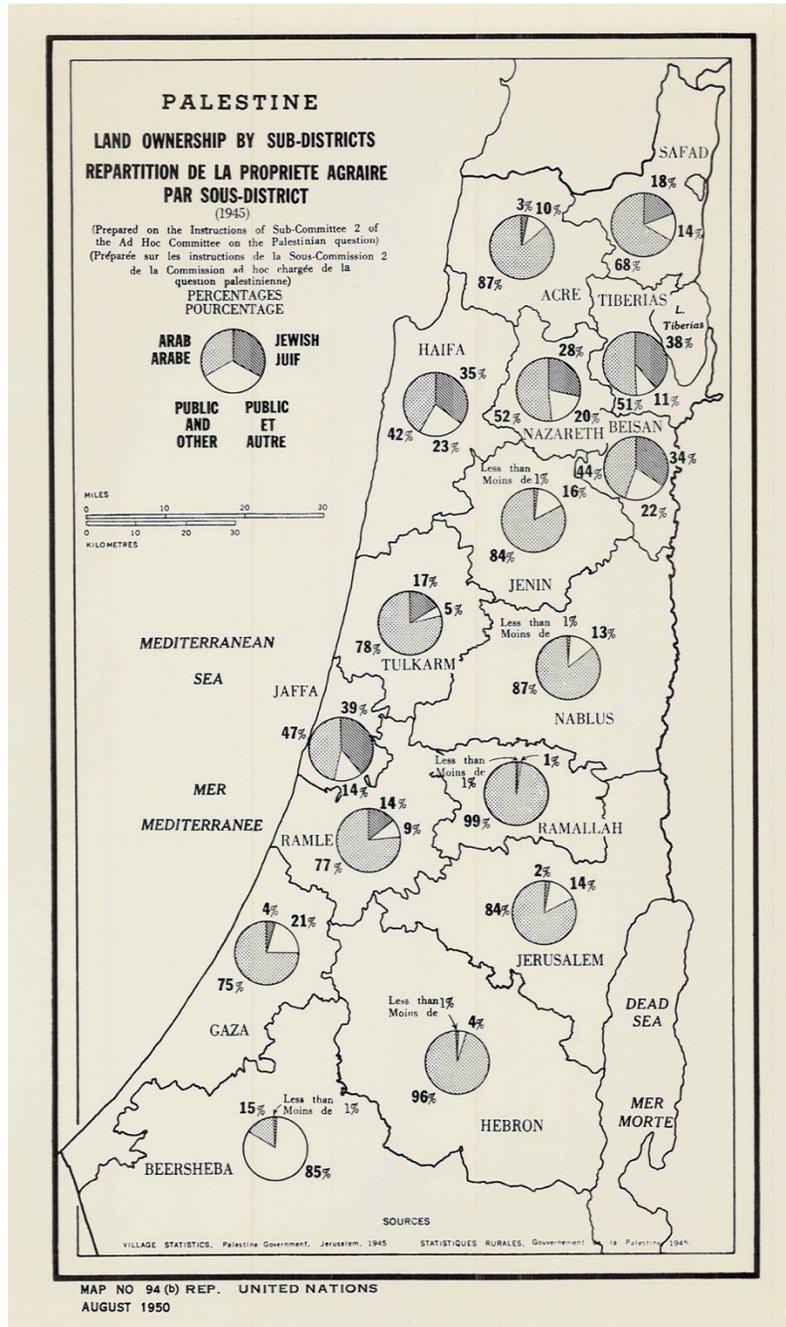
Palestine, Plan of Partition with Economic Union Proposed by the Ad Hoc Committee on the Palestinian Question, Map No. 103.1(b), United Nations, February 1956. Reproduced with permission of the United Nations.

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.