ONLINE

Law Breaking, Law Making, and International Law: Palestine, Israel, and the Foundations of International Law

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This Essay argues that the Israel-Palestine conflict's prominent place in global consciousness reflects deep disagreement on the nature of post-World War II international law and the relationship between power, sovereignty, and legitimacy in that order. It argues that the Zionist movement and then the State of Israel, by creating facts on the ground and enlisting the ex post recognition of its actions by global powers, have consistently sought to make international law by breaking it, in reliance on the principle of effectiveness and assertions of natural right. This strategy has created a paradox between an effective, but law-breaking state, Israel, and a normative, but ineffective state, Palestine, which raises important theoretical questions about the nature of international law. The Essay explores this theoretical paradox through the lens of legal debates dating back to the interwar period in Weimar Germany. It then maps those interwar debates onto the positions of a group of international lawyers' arguments with respect to Palestine. This Essay argues that the institutional structure of post-World War II international law—including the United Nations (UN), the incorporation of international law into the domestic law of member states of the UN, and the spread of non-governmental organizations dedicated to defending international law—has enabled Palestine, despite its inability to satisfy the empirical prerequisites of statehood, to marshal an increasingly effective coalition of actors united in supporting its de jure right to independence. The continued salience of Palestine, therefore, exemplifies Herman Heller's political understanding of law as an "intersubjective, normative binding of wills" that is required, at a minimum "to prevent law making by law breaking."

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I. INTRODUCTION

Palestine has haunted international law since the end of World War I. Viewed as a site of conflicting national aspirations, the conflict in Palestine between Jewish nationalists (Zionists) and Palestine's Arab population left its mark on the foundational documents of the League of Nations[1] and has consumed the United Nations (UN) until the present.[2] Over time, that conflict has also expanded into a global conflict. In the post-colonial era, it is a sharp identity marker, dividing the former imperialist powers of the global north and the formerly colonized world of the global south. This sharp division in the global community was exposed by radically different reactions to Hamas's October 7th attack on Israel, Israel's subsequent

1. League of Nations Covenant; *The Palestine Mandate*, League of Nations Doc. C.529.M.314.1922. VI (1922).

2. ARDI IMSEIS, THE UNITED NATIONS AND THE QUESTION OF PALESTINE: RULE BY LAW AND THE STRUCTURE OF INTERNATIONAL LEGAL SUBALTERNITY 2 (2023).

assault on the Gaza Strip,[3] and South Africa's suit against Israel before the International Court of Justice (ICJ)[4] for alleged violations of the Genocide Convention.[5] The Israel-Palestine conflict has also spawned third-order conflicts within the publics of the global north over their respective governments' stances and actions taken in response.[6]

The conflict in civil society is perhaps most acute in U.S. universities, where increasingly diverse student bodies have faced entrenched support for Israel among political and cultural elites[7] who have historically viewed the Israel-Palestine conflict through the lens of a "special relationship" between the United States and Israel.[8] In the best of circumstances, these elites have viewed sympathy for Palestinians suspiciously, and in the worst, as prima facie evidence of terrorism or other criminality.[9] Controversy over Palestine-related campus protests at Columbia University has resulted in the first mass arrests of students there since 1968.[10] The urgency of the conflict is everywhere apparent in public culture, as shown by prominent *New York*

3. Jorge Heine, *International Reaction to Gaza Siege Has Exposed the Growing Rift between the West and the Global South*, THE CONVERSATION (Nov. 8, 2023, 11:19 AM), http://theconversation.com/international-reaction-to-gaza-siege-has-exposed-the-growing-rift-between-the-west-and-the-global-south-216938.

4. S. Afr. v. Isr., Application Instituting Proceedings, (Dec. 28, 2023), https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf.

5. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948; Nosmot Gbadamosi, *Why the Global South Supports Pretoria's ICJ Genocide Case*, FOREIGN POL'Y MAG. (Jan. 17, 2024, 6:37 AM), https://foreignpolicy.com/2024/01/17/israel-gaza-icj-genocide-south-africa-namibia-bangladesh-global-south/.

6. Rahul Mukherjee & Gordon Shoshana, *Pro-Palestinian Protests on the Rise Across the U.S.*, AXIOS (Dec. 9, 2023), https://www.axios.com/2023/12/09/palestinian-protests-us-israel-gaza-war; Sammy Gecsoyler, *Tens of Thousands of Pro-Palestine Protesters March through London*, GUARDIAN (Mar. 9, 2024), https://www.theguardian.com/uk-news/2024/mar/09/tens-of-thousands-of-pro-palestine-protesters-march-through-london; Ben Cohen & Joshua Chong, *'Steeped in Frustration': Pro-Palestinian Protests Enter Eighth Week as Fighting Resumes*, TORONTO STAR (Dec. 2, 2023), https://www.thestar.com/news/gta/steeped-in-frustration-pro-palestinian-protests-enter-eighth-week-as-fighting-resumes/article_36e8975b-4e2e-5ed2-8f5a-9685c812e255.html; Erika Solomon, *Germany's Stifling of Pro-Palestinian Voices Pits Historical Guilt Against Free Speech*, N.Y. TIMES, Nov. 10, 2023, https://www.nytimes.com/2023/11/10/world/europe/germany-pro-palestinian-protests.html.

7. *See generally* Darryl Li, *The Rise and Fall of Baby Boomer Zionism*, HAMMER & HOPE, https://hammerandhope.org/article/boomer-zionism (last visited Mar. 21, 2024).

8. JEREMY M. SHARP, CONG. RSCH. SERV., RL 33222, U.S. FOREIGN AID TO ISRAEL 5 n.33 (2023).

9. *See* CTR. FOR CONST. RTS. & PALESTINE LEGAL, ANTI-PALESTINIAN AT THE CORE: THE ORIGINS AND GROWING DANGERS OF U.S. ANTITERRORISM LAW (2024) (describing how federal antiterrorism statutes, namely 18 U.S.C. § 2339B criminalizing material support for terrorist organizations, have been used to stifle support for Palestine.

10. Maya Stahl, Sarah Huddleston & Shea Vance, *Shafik Authorizes NYPD to Sweep 'Gaza Solidarity Encampment,' Officers in Riot Gear Arrest over 100*, COLUM. DAILY SPECTATOR, Apr. 18, 2024, https://www.columbiaspectator.com/news/2024/04/18/shafik-authorizes-nypd-to-sweep-gaza-solidarity-encampment-officers-in-riot-gear-arrest-over-100/.

Times podcaster Ezra Klein's devotion of considerable space in his podcast to the Israel-Palestine conflict.[11]

The Israel-Palestine conflict regularly arouses feelings of political paralysis based on an assumption of the radical and irreconcilable claims of the Jewish and Palestinian peoples to statehood in Palestine. The aura of political despair that hangs over the conflict perhaps also explains why many legal scholars choose to avoid the conflict entirely. However, the space for silence is narrowing, as the ICJ has granted provisional measures in South Africa's case against Israel, including an order predicated on the conclusion that Palestinians in Gaza were plausibly at risk of an imminent genocide.[12] The same court may also rule, possibly as soon as this summer, that Israel's occupation of the West Bank and Gaza Strip is per se illegal.[13]

This Essay asks whether it is possible to learn anything about the nature of international law from a careful study of the Israel-Palestine conflict, beyond simply marshaling arguments for one side or the other. I argue in this Essay that the Israel-Palestine conflict illuminates some of the most important questions jurists ask when debating the foundations of international law and how post-World War II international law provides important resources to resist the tendency of powerful actors to use law breaking as a strategy of international law making. It is no accident that the political conflict over Palestine has become global: the issues it raises go to the heart of the question of whether law making by law breaking will be tolerated.

This Essay will proceed as follows. Part II explores the status of Palestine in public international law in the interwar period up to the admission of Israel to the UN in 1949. Part III provides an overview of the crucial events surrounding the end of the Palestine Mandate, the formation of the State of Israel, and the (near) destruction of Palestine. Part IV centers the doctrine of effectiveness in the context of the larger theoretical discussion about the normative status of the "exception" in law—i.e., the relationship of law to sovereignty and politics. It focuses on the contrasting role that the doctrine of effectiveness (and particularly the so-called

11. The Ezra Klein Show, N.Y. TIMES (2023), https://podcasts.apple.com/us/podcast/the-ezra-klein-show/id1548604447. To the best of the author's knowledge, the first time Klein hosted an episode on his podcast on the Israel-Palestine conflict was in the wake of October 7. Between October 18 and December 19, Klein hosted eleven episodes on the conflict.

12. Press Release, ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.): The Court Indicates Provisional Measures, No. 2024/6 (Jan. 26, 2024). A U.S. federal district court judge agreed with the reasoning of the ICJ. Def. for Child. Int'l v. Biden, No. 23-cv-05829-JSW, 2024 WL 390061, at *1, *5 (N.D. Cal. Jan. 31, 2024) ("Yet, as the ICJ has found, it is plausible that Israel's conduct amounts to genocide.").

13. Press Release, ICJ, Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Request for Advisory Opinion) Conclusion of the Public Hearings Held from 19 to 26 February 2024, No. 2024/17 (Feb. 26, 2024).

Montevideo factors) plays in the claims of each side to statehood.[14] The Essay argues that Israel's reliance on the doctrine of effectiveness to allow what would otherwise be unlawful conduct confirms what Ardi Imseis has called an international law regime of "rule by law" with respect to Palestine that is inconsistent with the ideal of "rule of law" that the new post-World War II order, as set out in the UN Charter,[15] seems to promise.[16]

Part V unpacks the different roles that effectiveness plays in Israel and Palestine's legal claims to illustrate different theoretical conceptions of sovereignty and its relationship to law in light of Weimar-era debates between and among several prominent German legal theorists. Carl Schmitt, the arch-conservative, ardently defended the absolute character of sovereign power.[17] The liberal Hans Kelsen advanced what he called "the pure theory of law,"[18] a depoliticized, legal conception of sovereignty that rejected the connection between power and sovereignty and posited a radical separation between law and morality. The social democrat, Herman Heller, proposed a political conception of sovereignty, but unlike Schmitt, did so on the basis of democratic political morality instead of the arbitrary will of a sovereign dictator.[19] Part V further argues that these three approaches to law and sovereignty are replicated in the arguments advanced by advocates for Israel, such as Julius Stone,[20] advocates for a politically neutral system of positive international law, such as the renowned scholar of international law and former ICJ judge James Crawford,[21] and advocates for an independent Palestine, such as American law professor John Quigley.[22] These deep theoretical disagreements on the relationship of sovereignty to law cast light

14. JAMES CRAWFORD, STATE ¶¶ 13-14 (2011) [hereinafter CRAWFORD, STATE]. The four Montevideo factors supporting statehood are: (a) a permanent population; (b) a defined territory; (c) self-government; and (d) capacity to enter into foreign relations with other states.

15. U.N. Charter.

16. IMSEIS, *supra* note 2, at 6. *Cf.* MARK MAZOWER, NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS (2009) (arguing that the UN, in its origin, was intended to serve the interests of empire).

17. Tracy B. Strong, *Foreword* to CARL SCHMITT, THE CONCEPT OF THE POLITICAL xx (Expanded ed. 2007) ("[Schmitt] did not conceive sovereignty as something each individual might have but rather as the exercise of power of the state.").

18. *See generally* Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44 (1941).

19. For an overview of these jurisprudential debates on the relationship of law to power and sovereignty, see generally DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN, AND HERMANN HELLER IN WEIMAR (1999).

20. *See generally* JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS (1981).

21. *See generally* James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT'L L. 307 (1990) [hereinafter Crawford, *Creation of Palestine*].

22. JOHN QUIGLEY, THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT (1st ed. 2010).

on why Palestine remains a, if not the, central problem facing the post-World War II legal order.[23]

II. PALESTINE IN PUBLIC INTERNATIONAL LAW IN THE INTERWAR PERIOD

Many popular accounts of the Israel-Palestine conflict begin with the events surrounding the establishment of Israel and the failure to establish a Palestinian state.[24] However, such accounts often omit two important aspects of the story.

The first omission comprises Palestine's pre-1948 history, allowing the conflict to be described as taking place, essentially, in a *terra nullius*. But Palestine was not *terra nullius*.[25] The post-World War I settlement created an internationally recognized legal person known as the State of Palestine that enjoyed all aspects of legal personhood under international law except independence.[26] A distinct Palestinian nationality existed in public international law separate from any other nationality.[27] The second omission is the *sui generis* genealogy of the State of Israel, which not only created a Jewish state, but destroyed (or attempted to destroy) the legal state of Palestine.[28] Part II of this Essay deals with the first of these two omissions. Part III addresses the second.

A. International Law, the State of Palestine, and "the Sacred Trust of Civilization"

The two most important treaties regulating the status of Palestine and its people in the immediate aftermath of World War I were the 1919 Covenant of the League of Nations[29] and the 1923 Treaty of Lausanne.[30] Article 22 of the former declared that those territories "formerly belonging to the Turkish Empire," due to their relatively advanced development, had reached a stage "where their existence as independent nations can be

23. IMSEIS, *supra* note 2, at xv.

24. *See, e.g.*, Noah Feldman, *The New Antisemitism*, TIME (Feb. 27, 2024, 8:00 am), https://time.com/6763293/antisemitism/ (stating that Israel came into existence by virtue of a UN resolution in 1947 without discussion of its status in the wake of World War I).

25. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 432 (2nd ed. 2007) [hereinafter CRAWFORD, CREATION OF STATES].

26. QUIGLEY, *supra* note 22, at 77 (quoting Crawford for the proposition that while the territories subject to Class A mandates were not "independent," they were nevertheless "states"); *See also infra* p. 10 and notes 61-64.

27. *See infra* pp. 9-10 and notes 51-60.

28. QUIGLEY, *supra* note 22, at 427 (suggesting "Palestine in 1948 remained a single undivided self-determination unit" in international law).

29. League of Nations Covenant.

30. Treaty of Peace (Treaty of Lausanne), July 24, 1923.

provisionally recognized."[31] While Palestine was placed under the supervision of Mandatory Power Great Britain, pursuant to the terms of the Palestine Mandate,[32] the relationship between the Mandatory Power and the people of Palestine was one of trust for the "well-being and development of such peoples."[33]

The Covenant's recognition of the right of the peoples of the former Ottoman Empire to self-government was no accident.[34] It reflected U.S. President Woodrow Wilson's Fourteen Points, which expressly recognized the right of the non-Turkish nationalities of the Ottoman Empire to "an undoubted security of life and an absolutely unmolested opportunity of autonomous development."[35] Although Britain and France, acting pursuant to the secret Sykes-Picot Agreement of 1916, did not fully honor Wilson's promise of "absolutely unmolested opportunity of autonomous development" for the Arabs of the Ottoman Empire,[36] Article 22 placed them in a privileged position relative to other territories then under European rule.[37] Unlike other colonial territories, the independence of the Arab provinces of the Ottoman Empire was provisionally recognized, subject only to "administrative advice and assistance by a Mandatory until such time as they are able to stand alone."[38] At a time when the right to self-determination was not yet universally recognized under customary international law, the Arabs of the Ottoman Empire had received recognition of their entitlement to that right under positive international law.[39]

Unlike the other former Ottoman territories, however, Palestine had not by 1947 achieved the independence it was promised.[40] Before considering

31. League of Nations Covenant art. 22.

32. *The Palestine Mandate*, League of Nations Doc. C.529.M.314.1922. VI (1922).

33. League of Nations Covenant art. 22.

34. *Id.* ("The wishes of these communities must be a principal consideration in the selection of the Mandatory.").

35. Woodrow Wilson, Fourteen Points, *in* 45 The Papers of Woodrow Wilson 536, art. XII (Arthur S. Link et al., eds. 1984).

36. The Sykes-Picot Agreement, Fr.-Gr. Brit., 1916 (partitioning control over newly independent Arab nations between the two countries).

37. Other territories belonging to the defeated Central Powers were subjected to mandates *without* provisional recognition of their independence, a distinction reflected in the scholarly designation of these other territories as Class B or Class C Mandates compared to the designation of the former territories of the Ottoman Empire as Class A Mandates. *See* League of Nations Covenant art. 22; RUTH GORDON, MANDATES ¶¶ 6-9 (2013).

38. League of Nations Covenant art. 22.

39. IMSEIS, *supra* note 2, at 56.

40. Iraq achieved independence in 1932, followed by Lebanon in 1942, Syria in 1945, and Transjordan in 1946. The former territories of the Ottoman Empire were known in the colonial parlance of international law at the time as "Class A" mandates to distinguish them from other territories that had not reached a stage of development that entitled them to provisional recognition of their independence. QUIGLEY, *supra* note 22, at 83.

why Palestine did not attain independence as contemplated by Article 22, it is important to consider the Treaty of Lausanne—the second foundational treaty in the interwar period relevant to understanding Palestine's status in international law. Article 30 of that treaty expressly established, as a matter of public international law, that those persons who had formerly been subjects of the Ottoman Empire would *ipso facto* become nationals of any successor state that formed in the territory in which they habitually resided.[41] In doing so, the Treaty of Lausanne simply gave effect to what was already the prevailing customary rule of international law.[42]

Article 30 therefore established two fundamental rules with respect to the nationality of former Ottoman subjects from the perspective of international law: first, former Ottoman nationals would become nationals of the state in which they had habitually resided prior to the dissolution of the Ottoman Empire; and second, they would not be nationals of any other successor state to the Ottoman Empire.[43]

B. The Terms of the Palestine Mandate

Palestine's failure to attain independence was not due to a lack of capacity or other internal impediment relative to its Arab neighbors. Rather, its independence was deferred because of the idiosyncratic terms of the Palestine Mandate, which committed Great Britain in its capacity as Mandatory to facilitate "the establishment *in* Palestine of a national home for the Jewish people."[44] The very same language requiring the Mandatory to assist in the establishment of a "Jewish national home" also made clear, however, that "nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities *in* Palestine."[45] That the Jewish national home had to be consistent with rights of non-Jews was an obvious aspect of the duties Article 22 imposed on the Mandatory to exercise their powers as a "sacred trust of civilisation" for the benefit of

41. Treaty of Peace (Treaty of Lausanne) art. 30, July 24, 1923 ("Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by the local law, nationals of the State to which such territory is transferred.").

42. For an overview of the general principles of international law governing nationality in the context of state succession, see JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 433-37 (8th ed. 2012).

43. Mutaz Qafisheh, *Genesis of Citizenship in Palestine and Israel. Palestinian Nationality during the Period 1917-1925*, 11 J. HIST. INT'L L. 1, 3, 7 (2009).

44. *The Palestine Mandate*, League of Nations Doc. C.529.M.314.1922. VI (1922). The Palestine Mandate only became legally effective as of September 29, 1923. Qafisheh, *supra* note 43, at 16.

45. *The Palestine Mandate*, League of Nations Doc. C.529.M.314.1922. VI (1922).

Palestine's inhabitants.[46] Were it read otherwise, the Palestine Mandate would arguably have been *ultra vires* the League of Nations Covenant itself.[47]

Certain provisions of the Mandate clearly anticipated the presence and legal rights of non-Jews in Palestine. For example, Article 2 required Great Britain to establish institutions of self-government and "safeguard[] the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."[48] Article 5 established the legal unity of the territory of Palestine and forbade the Mandatory from ceding any part of its territory to a foreign government.[49] Article 6, while requiring Great Britain to facilitate Jewish immigration to Palestine, also required Great Britain to "ensure[] that the rights and position of other sections of the population are not prejudiced" as a result of such immigration.[50]

Article 7 of the Mandate required Great Britain to promulgate a nationality law for Palestine to facilitate Jewish immigration to Palestine by offering immigrating Jews a means to acquire Palestinian nationality.[51] The nationality law that Great Britain enacted recognized as Palestinian anyone who had previously been an Ottoman subject, regardless of their religious identity,[52] both by virtue of generally applicable principles of international law[53] and as required by Article 30 of the Treaty of Lausanne.[54] When the Palestine Citizenship Order went into effect in 1925, slightly more than ninety-nine percent of those who automatically received Palestinian nationality were Arabs—largely Muslims and Christians with small numbers of other religions (Bahais, Druze, and Samaries); less than one percent were Jews.[55] Further, the number of foreign Jews in Palestine in 1925 dwarfed the number of Jews who had been Ottoman subjects. Of the almost 122,000 Jews in Palestine at the time, 115,000 were foreigners, 38,000 of whom had acquired provisional Palestinian nationality in 1922 and 77,000 of whom were registered Jewish immigrants who arrived in Palestine between 1920 and 1925.[56]

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46. League of Nations Covenant art. 22 ("[T]he well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant").

47. *See, e.g.*, Ralph Wilde, *Tears of the Olive Trees: Mandatory Palestine, the UK, and Reparations for Colonialism in International Law*, 25 J. HIST. INT'L L. 387, 418 (2022).

48. *The Palestine Mandate*, art. 2, League of Nations Doc. C.529.M.314.1922. VI, (1922).

49. *Id.* Art. 5.

50. *Id.* Art. 6.

51. *Id.* Art. 7.

52. For the details of the Palestine citizenship law during the Palestine Mandate, see *Palestine Citizenship Order*, OFF. GAZETTE, Sept. 16, 1925, at 460.

53. Qafisheh, *supra* note 43, at 31-32; *see generally* OLIVER DÖRR, NATIONALITY (2019).

54. Treaty of Peace (Treaty of Lausanne), July 24, 1923.

55. Qafisheh, *supra* note 43, at 32-33 (concluding based on the 1925 British census that Palestine had 722,730 Arab native citizens and 7,143 Jewish citizens).

56. *Id.* at 33.

Persons who became naturalized citizens of Palestine—almost all of whom were Jewish immigrants—swore an oath of loyalty to "the Government of Palestine," not to the Jewish Agency.[57] Courts and other legal institutions during the interwar period acknowledged the existence of a distinct Palestinian nationality in recognition of the existence of Palestine as a state.[58] Court decisions during the Mandate held that Palestinians were legally foreigners with respect to the other successor states to the Ottoman Empire, such as Transjordan.[59] Throughout the Mandate, despite substantial Jewish immigration, the vast majority of Palestine's nationals were and remained Arab. Indeed, out of Palestine's population of almost 2,000,000 in 1947, Jews were a little more than 600,000, only one-third of whom had acquired Palestinian nationality.[60]

Palestine's existence as a recognized international legal person was undisputed in the interwar period: although Great Britain exercised sovereignty, it was on *behalf* of Palestine in accordance with Article 12 of the Mandate.[61] On that basis, Palestine entered numerous multilateral and bilateral international treaties.[62] Great Britain also appeared on behalf of the government of Palestine in 1924 to defend a suit brought by Greece in the ICJ.[63] Further, Palestine was recognized as a "foreign state" in an international trade dispute that arose with respect to preferential tariff rates that Great Britain considered giving Palestine.[64] At the cusp of World War II, Palestine had been recognized as a distinct state in international law, albeit one awaiting recognition of its independence.

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57. QUIGLEY, *supra* note 22, at 56. The Jewish Agency had been designated by the Mandatory, pursuant to Article 4 of the Palestine Mandate, as a "public body" assisting the Mandatory in developing the Jewish National Home. *The Palestine Mandate*, League of Nations Doc. C.529.M.314.1922. VI (1922).

58. QUIGLEY, *supra* note 22, at 56-58.

59. Qafisheh, *supra* note 43, at 5-6 (Supreme Court of Palestine, in 1945 *Jawdat Badawi Sha'ban* case, held that nationals of Palestine and nationals of Transjordan were foreigners to one another).

60. VICTOR KATTAN, FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949 141 (2009); Qafisheh, *supra* note 43, at 35-36 (concluding that 132,616 persons became naturalized Palestinian citizens during the Mandate period, 99% of whom were Jewish). To obtain Palestinian nationality, a person had to live in Palestine with the intention of residing there permanently for a period of two out of the three years prior to naturalization and speak either Hebrew or Arabic. *Palestine Citizenship Order*, *supra* note 52, at 462.

61. *The Palestine Mandate*, art. 12, League of Nations Doc. C.529.M.314.1922. VI (1922).

62. QUIGLEY, *supra* note 22, at 53-54.

63. Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), Judgment, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30).

64. QUIGLEY, *supra* note 22, at 61-64 (Other powers, such as the United States, deemed Palestine to be a state for purposes of applying Great Britain's most-favored-nation treaty obligations toward other states in contrast to Great Britain's colonial possessions, such as India).

III. PUBLIC INTERNATIONAL LAW, THE BIRTH OF ISRAEL, AND THE FATE OF PALESTINE

With the end of World War II, the League of Nations was officially dissolved in April 1946[65] and the UN took its place.[66] Part III of this Essay begins with the status of Palestine under the new international legal order of the UN Charter. It then discusses Zionism's historical relationship with international law as necessary background to understanding General Assembly Resolution 181—the ill-fated plan for the partition of Palestine—from the perspective of the UN Charter.[67] The section concludes with a discussion of the legal basis for the State of Israel and Palestine—and the relations of Israel to its neighbors in the wake of the violence that engulfed Palestine in the 1947-49 period—in view of Resolution 181.

A. Palestine and the Charter of the United Nations

The legal framework that Article 22 and the Palestine Mandate provided for Palestine did not disappear with the dissolution of the League of Nations. The UN Charter incorporated the terms of existing mandates and, if anything, strengthened the standing of peoples under mandates and colonial rule.[68] Article 73 of the UN Charter affirmed the principle that, in cases where states were administering territories that had not attained self-government, "the interests of the *inhabitants* of these territories are paramount, and [that such states] accept as a sacred trust the obligation to promote to the utmost . . . the well-being of the *inhabitants* of these territories."[69] Subparagraph b of Article 73 specifically singled out the duty of the state administering such territories to take the aspirations of the people subject to foreign rule into account, imposing duties "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions[.]"[70]

The UN Charter contemplated replacing existing mandates with UN trusteeships, but provided that such a trusteeship could not alter any of the existing rights of the peoples concerned prior to concluding an agreement modifying the terms of the arrangement.[71] Under the plain terms of the UN

65. *Predecessor: The League of Nations*, UNITED NATIONS, https://www.un.org/en/about-us/history-of-the-un/predecessor (last visited Mar. 17, 2024).

66. U.N. Charter. art. 110.

67. G.A. Res. 181 (II), (Nov. 29, 1947).

68. U.N. Charter.

69. *Id.* Art. 73 (emphasis added).

70. *Id.* Art. 73(b).

71. *Id.* Art. 77.

Charter, Palestine was either to obtain independence as a unitary state composed of both Arabs and Jews who, from the perspective of international law, would be non-racialized "Palestinians," *or*, if the Mandate was concluded before Palestine became independent, to have its affairs transferred to a trusteeship under Chapter XII of the charter. If Palestine's independence had to be deferred, any successor trusteeship would have had to make paramount the well-being of Palestinians, defined as those who were the "*inhabitants* of these territories."[72] This promise of independence was declared a "sacred trust of civilization" in the Covenant of the League of Nations, and the UN Charter reiterated that promise.[73]

Public international law required Great Britain to prepare Palestine for independence as a unitary state. As the Mandatory, Great Britain was obliged to protect the interests of all Palestinians, regardless of their race or religion, and promote institutions of self-government that would protect those interests.[74] The UN Charter reaffirmed those duties. Both Great Britain and the UN failed in that task in the face of a political movement—Zionism—that refused to accept as legitimate the constraints international law placed on its ambitions, even as Zionists demanded that international law grant legitimacy to their aspirations for a Jewish state. The next section of this Essay explores how the Zionists were able to frustrate the ends of the "sacred trust of civilization" that had promised independence to Palestine, ironically through the very institutions of public international law that were formally required to protect the independence of Palestine. It is from this perspective that Resolution 181 is best understood: as a legal trapdoor through which the larger edifice of legality governing Palestine was torn down.

B. International Law and Zionism: Resolution 181 and the Charter of the United Nations

Zionism, from the days of Theodor Herzl, pined for international recognition.[75] Indeed, so fundamental was international recognition in Herzl's mind for the success of the Zionist project that he opposed the

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72. *Id.* Art. 73.

73. The ICJ reaffirmed that independence was the intended object of the "sacred trust of civilization" in its 1971 decision regarding the legal status of South Africa's continued presence in Namibia. 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).

74. *See, e.g.*, *The Palestine Mandate*, arts. 2, 5, 6 League of Nations Doc. C.529.M.314.1922. VI (1922).

75. MICHAEL STANISLAWSKI, ZIONISM: A VERY SHORT INTRODUCTION 27 (2016), https://academic.oup.com/book/628 (last visited Jan. 15, 2024) (stating that Herzl's most important political goal toward the end of his life was to obtain a "'charter'—a diplomatic instrument granting the Jews the right to a homeland in Palestine").

establishment of the Jewish National Fund until such time as the Zionists could obtain international recognition of their plans to settle Palestine.[76] While Herzl failed in obtaining such recognition in his lifetime, Zionists succeeded in enlisting Great Britain to their cause in 1917 when the country's government adopted the Balfour Declaration promising to assist the Zionists in their aim to establish a Jewish national home in Palestine.[77] Although the Balfour Declaration lacked any normative status in international law and failed to endorse explicitly a "Jewish state," Zionists took it as granting them what they had long sought: international, or at least great power, support for the establishment of a Jewish state in Palestine.[78]

However, once Zionist leader Chaim Weizmann arrived in Palestine in March 1918, only a few months after Palestine came under the military occupation of Great Britain, the Zionists had little patience for observing the restraints of international law. Palestine, from the perspective of public international law, had remained part of the sovereign territory of the Ottoman Empire, or its successor state, the Republic of Turkey,[79] until the effective date of the Palestine Mandate: September 29, 1923.[80] Accordingly, for the six years between 1917 and 1923, Great Britain only had the authority of an occupant over Palestine, not of a sovereign. Pursuant to Article 43 of the Hague Conventions of 1899,[81] which both the Ottoman Empire and Great Britain had ratified prior to World War I,[82] Great Britain could only exercise its power to the extent necessary "for . . . the maintenance of order and safety, and the proper administration of the country,"[83] a duty that the British military in Palestine duly understood and recognized as binding.[84]

Weizmann, however, believing that the Balfour Declaration had placed Palestine under the control of the Zionists,[85] chafed at these restrictions and lobbied the British to ignore them and immediately change local laws to

76. Walter Lehn, *The Jewish National Fund*, 3 J. PALESTINE STUDS. 74, 76, 79 (1974).

77. Letter from Arthur James Balfour to Lord Rothschild (Nov. 2, 1917).

78. JOHN B. QUIGLEY, THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE 10 (2nd ed. 2005).

79. KATTAN, *supra* note 60, at 81-82.

80. *See* Qafisheh, *supra* note 43, at 16.

81. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. Art. 43, The Hague, 29 July 1899, https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899 (last visited Mar 17, 2024).

82. KATTAN, *supra* note 60, at 81.

83. *Id.* at 82 (quoting Professor Lassa Oppenheim, a German professor of international law and one of the authors of Great Britain's MANUAL OF MILITARY LAW 288 (1914)).

84. *Id.* at 82 (quoting message of General Edmund Allenby, commander of British military forces in Palestine, October 23, 1918, to the War Office).

85. D. K. Fieldhouse, *Palestine: The British Mandate, 1918–1948*, *in* WESTERN IMPERIALISM IN THE MIDDLE EAST 1914-1958 151, 153 (D. K. Fieldhouse ed., 2008).

facilitate the Zionist project.[86] A British court of inquiry, in the wake of what was an unprecedented Arab-Jewish communal riot in 1920, laid blame for the violence squarely on the Zionists for, among other things, their "indiscretion and aggression" and "attempts to coerce the military administration in Palestine to bend the rules of international humanitarian law, in particular the principle enshrined in Article 43 of the 1899 Hague Regulations" that required the occupying power to respect the status quo.[87] But as would occur with increasing frequency in the Zionist-Palestinian conflict, Zionist lobbying succeeded in persuading Great Britain to ignore the limitations of Article 43.[88]

Zionist attitudes toward partition generally, and Resolution 181 in particular, were no different than their attitudes toward the terms of the Palestine Mandate: accept whatever advantages it granted the Zionist movement, but reject any limitations imposed, create "facts on the ground," and compel the international community to acquiesce to those facts. When the Peel Commission, established by Great Britain to investigate the causes of a 1936 Palestinian Arab rebellion,[89] cautiously proposed partition in 1937, Israel's founding father and first prime minister David Ben Gurion saw it is a first step toward the "conquest" of Palestine in its entirety.[90] He also seized on the Peel Commission's cautious suggestion of a *consensual* population transfer as a last resort, transforming it into a policy of expulsion of non-Jews.[91] Despite the doubt surrounding the bindingness of Resolution 181 under international law,[92] Ben Gurion made it plain to the UN Special Committee on Palestine (UNSCOP) that he would view a UN-endorsed partition of Palestine to be a "decision" which, if rejected by the Arabs,

86. 3 CHAIM WEIZMANN, THE LETTERS AND PAPERS OF CHAIM WEIZMANN 200, 203-05 (Meyer W. Weisgal ed. 1968) (describing his frustration with the military administration's commitment to upholding the status quo in Palestine in a letter to Lord Balfour in which he urges Lord Balfour to take affirmative steps immediately to assist in the implementation of the Zionist project); KATTAN, *supra* note 60, at 84.

87. KATTAN, *supra* note 60, at 84.

88. *Id.* at 83.

89. Laila Parsons, *The Peel Commission, 1936-1937: Sowing the Seeds of the Partition*, INTERACTIVE ENCYC. PALESTINE QUESTION, https://www.palquest.org/en/highlight/16013/peel-commission-1936%E2%80%931937 (last visited June 10, 2024).

90. TOM SEGEV, A STATE AT ANY COST: THE LIFE OF DAVID BEN-GURION 264 (Haim Watzman trans. 2019).

91. After reading the Peel Commission report, Ben Gurion wrote in his diary, "'compulsory transfer,' underlining the words in his diary." *Id.* at 264-65.

92. For objections to the legality of Resolution 181, see generally Ardi Imseis, *The United Nations Plan of Partition for Palestine Revisited: On the Origins of Palestine's International Legal Subalternity*, 57 STAN. J. INT'L L. 1 (2021); KATTAN, *supra* note 60, at 155 (quoting the noted American scholar of international law and ICJ judge, Phillip Jessup, as describing Resolution 181 as merely a "recommendation"); CRAWFORD, CREATION OF STATES, *supra* note 25, at 431 (concluding Resolution 181 was only a "recommendation").

would authorize the Yishuv to use military force against them.[93] Arab political leaders had proposed, instead of partition, a unitary democratic state with a written constitution that would have granted the Jewish community in Palestine constitutionally entrenched minority rights.[94]

When the Arabs rejected the proposed partition, in no small part because of its grossly inequitable and possibly unlawful terms,[95] rather than using Resolution 181 as a basis for negotiations, the Yishuv launched a war of conquest, just as Ben Gurion had told the UNSCOP it would.[96] Ben Gurion implemented his policy of "compulsory transfer" of Arabs from the territory that the Yishuv's military conquered.[97] When the United States came to see that partition was impracticable, it moved to adopt a trusteeship for Palestine that would have preserved Palestine as a unitary state with a liberal constitution and guarantee of minority rights,[98] a proposal that mirrored Arab proposals for Palestine.[99] By that time, however, the Yishuv was well on its way to conquering most of Palestine and ignored U.S. calls for a trusteeship, having established a de facto partition by force of arms.[100]

C. Conclusion

Israel would later claim that Resolution 181 was binding,[101] but neither the Yishuv nor Israel after its independence respected either the proposed territorial limits of the Partition Plan or its substantive requirements, including, for example, that the Jewish state adopt a written constitution that

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93. IMSEIS, *supra* note 2, at 104.

94. Albert Hourani, *The Case against a Jewish State in Palestine: Albert Hourani's Statement to the Anglo-American Committee of Enquiry of 1946*, 35 J. PALESTINE STUDS. 80-81, 87 (2005); GEORGE ANTONIUS, THE ARAB AWAKENING: THE STORY OF THE ARAB NATIONAL MOVEMENT 410-11 (2010); KATTAN, *supra* note 60, at 149 ("Egypt, Iraq, Lebanon, Saudi Arabia, Syria and the Yemen declared themselves in favour of an independent unitary state embracing all of Palestine, in which the rights of the minority would be scrupulously safeguarded.").

95. KATTAN, *supra* note 60, at 151-52 (the plan proposed to give almost sixty percent of Palestine, consisting of its most desirable and productive lands, to the Jewish minority at a time the Jewish population of Palestine was only one third of the population and owned barely ten percent of the land*)*; *Id.* at 156-66 (noting that the plan violated the principles of majority rule, did not respect the distribution of the Arab and Jewish populations in Palestine, and did not propose to obtain the consent of the people of Palestine); QUIGLEY, *supra* note 22, at 91 (quoting the then British foreign secretary as saying the partition plan was so manifestly unjust toward Palestine's Arabs that his government could not reconcile it with 'conscience.').

96. *See generally* KATTAN, *supra* note 60, Chapter 7.

97. *Id.* at 190-91 (Ben Gurion complained in a December 1947 speech that Resolution 181 left too many non-Jews in the territory of the Jewish state, which needed to have a population of at least eighty percent Jews for it to be stable and predicting in another speech in April 1948, just as the Yishuv's offensive was beginning, that great demographic changes were to take place in Palestine.).

98. *Id.* at 166-68.

99. *Id.* at 149.

100. *Id.* at 168.

101. *Id.* at 155.

fully protected minority rights.[102] Its indifference to minority rights was most clearly evidenced in its expulsion of Arabs from territories that fell under its control,[103] whether or not Resolution 181 had allocated that territory to the Jewish state or the proposed Arab state,[104] including territories that it conquered in the weeks *prior* to the declaration of Israeli statehood and the intervention of military forces from neighboring Arab states.[105]

For the Zionists, international law was useful insofar as it recognized the legitimacy of their claims, but it was not the source of their claims, nor did it limit them. Rather, their substantive claims derived from an asserted natural right of the Jewish people to dominion in historic Palestine, Eretz Israel.[106] Accordingly, whenever they had the effective power to ignore international law, they did. By expelling most of Palestine's Arabs from the territories that it conquered and confining them to just twenty-two percent of historical Palestine in the disconnected territories of the Gaza Strip and the West Bank, the Zionists, through military force, attempted to destroy the international legal personhood of Palestine and were the proximate cause for the failure of Palestine to become an independent state in accordance with the international community's promise as set out in the League of Nations Covenant and UN Charter.

IV. THE LEGAL BASIS OF ISRAELI STATEHOOD

Israel's Declaration of Independence appealed to the Balfour Declaration, the Palestine Mandate, Resolution 181, *and* the "natural right" of the Jewish people to Palestine to justify the action taken on May 14, 1948.[107] In the Zionists' recitation of these facts, however, these documents were taken as *recognition* of a preexisting right that the Jewish people have to Palestine, independent of these instruments. These instruments, from the

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102. *See* G.A. Res. 181 (II), at I.B. (Nov. 29, 1947).

103. *See id.* at I.C., Chapter 2.

104. KATTAN, *supra* note 60, at 191-202 (describing military tactics used by the Yishuv's militias and later Israel to expel Palestine's Arabs from their cities, towns, and villages, both before and after the intervention of the Arab states in May 1948).

105. Although Syria and Lebanon formally declared war against Israel, no Lebanese military units ever crossed the international frontier between Lebanon and Mandatory Palestine, and while Syria sent two battalions into Palestine, they retreated to Syria five days after entering Palestine. Units of the Iraqi military fought under the command of the Transjordanian forces. As a practical matter, therefore, only Egyptian and Transjordanian forces took part in fighting with Israel. *Id.* at 179.

106. *Declaration of Israel's Independence, 1948*, PBS, https://www.pbs.org/wgbh/americanexperience/features/truman-israel/ (last visited Jan. 3, 2024) (Jewish National Council asserting its authority to act based on both the UN's implicit recognition of the Jewish State by virtue of the Partition Plan *and* "by virtue of the natural and historic right of the Jewish [people]").

107. *Id.*

Zionist perspective, are not constitutive of Israel's legitimacy. They merely confirm it.

The legal immateriality of the substantive terms of these instruments from the Zionist's perspective is further evidenced by their omissions from the Israeli Declaration of Independence. Unlike the United States' Declaration of Independence, which set out in detail the reasons for which the Americans wished to separate from Great Britain,[108] the Zionists provided no reasons for separating from the government of Palestine. Rather, they simply did not recognize Palestine's existence, now or then, as a legal person. Instead, they read Resolution 181 as recognizing their unalienable right to a Jewish nation state in Palestine—understood as an ungoverned geographic space, not as the internationally recognized legal person it was—and chillingly directing them "to take such steps as may be necessary on their part to put the plan into effect."[109]

It is commonly assumed that Israel's legitimacy is based on Resolution 181 and that, but for the Arabs' rejection of that resolution, peace would have been obtained in Palestine.[110] When it is pointed out that Israel did not confine itself to the territorial limits of Resolution 181, some of Israel's defenders invented the dubious legal category of "defensive conquest" to justify the Yishuv's (and later Israel's) incursions into, and annexation of, territory allocated to the Arab state under Resolution 181.[111] But as Professor Victor Kattan puts it, Israel's "actions speak louder than [its] words" with respect to determining the (non)authoritativeness of Resolution 181 for Israel's existence as a state.[112] Indeed, other lawyers openly sympathetic to Israel, such as Julius Stone, have jettisoned entirely reliance on Resolution 181 as a basis for Israel's statehood and instead point to its success on the battlefield as the basis for its statehood, claiming tendentiously that "most other states in the world" have similar roots for their sovereignty.[113]

While Stone's statement has the virtue of greater honesty with respect to the events of 1947-49 and Resolution 181's lack of normative force from the Israeli perspective, it is patently untrue that most states owe their existence to military success, unless the only real "states" are the imperial powers of the global north. Most post-colonial states, including the post-

108. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

109. *Declaration of Israel's Independence, 1948*, *supra* note 106.

110. Feldman, *supra* note 24 ("It was brought into existence by a 1947 United Nations Resolution that would have created two states side by side, one Jewish and one Palestinian.").

111. KATTAN, *supra* note 60, at 174-75. Whether the Yishuv or Israel was acting in self-defense, as that term is understood in international law, is highly dubious, but space constraints do not allow a full discussion of the problematic nature of Israel's claim of self-defense in 1948.

112. *Id.* at 180.

113. STONE, *supra* note 20, at 61.

Ottoman states, came into existence by virtue of the designs of imperial powers, who often established their basic institutions and, crucially, drew their often-arbitrary territorial boundaries.[114] Nevertheless, the post-colonial states, in reliance on the *uti possidetis* doctrine,[115] and to vindicate the Article 2 principles of the UN Charter,[116] accepted those boundaries as legitimate *unless* the state parties freely consented to change them.[117]

Since even ardent Zionists like Stone have rejected Resolution 181 as plausible grounds for Israel's statehood,[118] we must turn to other possible sources. When Stone asserts that it was Israel's military success that grounds Israeli statehood, he could be asserting two different claims. The first is that Israel came into existence by virtue of its successful *conquest* of territory. The second is that Israel came into existence by virtue of a successful *secession* from Palestine. In both cases, the subsequent recognition of Israel's military success, whether characterized as conquest or secession—first by individual states in the world community, and then by Israel's admission into the UN in 1949—gave Israel de jure recognition as a state.

Each theory has grave problems. There is evidence that Zionists believed that they obtained sovereign rights by virtue of conquest. Ben Gurion explicitly used the term "conquest" in describing Zionist ambitions to take control of Palestine in the name of the Jewish people,[119] and compared himself to the biblical figure of Joshua and his conquest of Canaan.[120] Likewise, the Jewish National Fund expressly used the term "legal conquest" to describe the basis for Israel's claim to sovereign right over the territory it controlled.[121] The demographic composition of the Yishuv lends further support to the theory of conquest: of the approximately 600,000 Jews in Palestine in 1947, only a third were Palestinian nationals. The other two-thirds were therefore legally foreigners—i.e., nationals of states other than Palestine or stateless

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114. *See, e.g.*, Giuseppe Nesi, *Uti Possidetis Doctrine* ¶¶ 3-4 (2018) (The practice of accepting colonial borders as determining territorial settlements of post-colonial states originated in the newly independent states of Latin America in the 19th century and was later adopted by post-colonial African states in the 20th century).

115. *Uti possidetis* doctrine originated in Roman law and functioned to prohibit third parties from interfering in the possessory rights of the possessor of immovable property until such time as a court could conclusively adjudicate rights to the property. It subsequently evolved into a doctrine of international law whereby boundary settlements were deemed dispositive unless both parties agreed to change them. *Id.* at ¶¶ 1-2.

116. U.N. Charter., art. 2.

117. Nesi, *supra* note 114, at ¶ 7.

118. STONE, *supra* note 20, at 61.

119. SEGEV, *supra* note 90, at 264.

120. Raef Zreik, *Zionism and Political Theology*, 24 POL. THEOLOGY 687, 697 (2023).

121. Comm. on the Exercise of the Inalienable Rts. of the Palestinian People, Preliminary Note on the Right of Return of the Palestinian People, at § 6, U.N. Doc. ST/SG/SER.F/2 ("Legal conquest of territory is a powerful factor in determining the frontiers and the sovereignty of a state.").

refugees—and therefore could not plausibly claim to be asserting any right of self-determination against the government of Palestine.[122] If the Yishuv, and later Israel, rested its claim to sovereignty based on the success of its arms, its fighting units were composed largely of persons who were legally foreigners, a fact which greatly strengthens the conclusion that Israel owes its existence to conquest.

However, international law had already by 1947 rejected the notion of "legal conquest," first with the Kellogg-Briand Pact of 1928[123] and then with the UN Charter's rejection of the use of force to settle international disputes.[124] Even if one were to claim that these agreements are positive international law and not customary international law, and that therefore, neither the Yishuv nor Israel after it declared itself a state in May 1948 were bound by the rule prohibiting conquest, Art. 2(6) of the UN Charter compelled the UN to "ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."[125] The only conclusion that can be drawn from the conquest theory, therefore, is that Israel could have obtained the status of a de facto state by virtue of conquest, but not that of a de jure state. Indeed, when U.S. president Harry Truman initially recognized Israel in 1948, he did so on a de facto basis, and on the expectation that Israel would respect the boundaries of the UN Partition Plan.[126]

The secession theory also suffers grave difficulties. In addition to the fact that only a minority of the Yishuv's population were nationals of Palestine, secession is, except for colonized populations or populations under foreign domination, generally considered illegal, or at a minimum, extremely disfavored, under post-World War II principles of international law.[127] Still, some commentators have recognized a right to secede in circumstances where the government of a state does not represent the whole

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122. KATTAN, *supra* note 60, at 141; Victor Kattan, *The Nationality of Denationalized Palestinians*, 74 NORDIC J. INT'L L. 67, 70 (2005); Qafisheh, *supra* note 43, at 35-36 (concluding that only 132,616 persons became naturalized citizens of Palestine pursuant to the Palestine Citizenship Order of 1925, of whom 99% were Jewish).

123. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (entered into force Jul. 24, 1929)

124. U.N. Charter, art. 2(4).

125. *Id.* art. 2(6).

126. KATTAN, *supra* note 60, at 233. Ironically, it was the Soviet Union that first recognized Israel as a de jure state. *Id.* at 234.

127. Alonso Gurmendi, *Israel Does Not Have a Sovereign Claim to the West Bank: A Response to IJL's Legal Opinion*, OPINIO JURIS (Feb. 22, 2024), https://opiniojuris.org/2024/02/22/israel-does-not-have-a-sovereign-claim-to-the-west-bank-a-response-to-ijls-legal-opinion/ (noting that unilateral secession is illegal under international law except in the case of a people under colonial or foreign domination); CRAWFORD, CREATION OF STATES, *supra* note 25, at 389-90 (noting that unilateral secession, even if not illegal under international law, is highly disfavored).

of the people such that "a people is blocked from the meaningful exercise of its right to self-determination internally."[128] Given that the Palestinian Arab majority was willing to grant Palestinian Jews full rights of internal self-determination, including minority rights that would have respected Jewish freedom of religion, the Hebrew language, and proportional representation in the administration of Palestine's government,[129] it would be very difficult to argue that the Yishuv had a de jure right to secede from Palestine in the name of Palestinian Jewish self-determination.[130]

Israel's success on the battlefield, whether viewed as conquest or a successful secession, permitted Israel to satisfy the effectiveness requirements for statehood set out in the Montevideo factors, but did not resolve the questions of the legitimacy of the means by which it came into existence.[131] The Supreme Court of Canada, for example, has noted that while an illegal act *may* obtain some ex post legal recognition in the future, the prospective recognition of some of the legal effects of the illegal conduct do not, retroactively, undo the illegality of the original conduct.[132] Because neither conquest nor unilateral secession is a de jure means for becoming a state, Israel's statehood, and the territory to which it exercises sovereign right, depended largely on ex post recognition of its statehood by other states in the international community.[133] As Kattan has observed, acquiescence to Israel's illegal conduct is far from universal, nor can it be taken for granted that subsequent Palestinian acquiescence to partition on the basis of the 1949 Armistice Lines as a basis for peace is assured.[134]

Accordingly, Israel's best argument for its de jure statehood is its admission to the UN. On careful inspection, however, Israel's admission to the UN was itself based on the assumption that Israel would, in good faith, comply with not only Resolution 181, but also Resolution 194(III), which provided for the return of Palestine's Arabs to the places from which they

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128. Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 134.

129. Hourani, *supra* note 94, at 87 (under the proposal of Palestine's Arabs in 1939, Jews would have been guaranteed "full civil and political rights, control of their own communal affairs, municipal autonomy in districts in which they are mainly concentrated, the use of Hebrew as an additional official language in those districts, and an adequate share in the administration.").

130. Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 126 ("the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases").

131. CRAWFORD, STATE, *supra* note 14, at ¶¶ 13-14.

132. Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 146 ("It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.").

133. KATTAN, *supra* note 60, at 244-45.

134. *Id.* at 245-47.

had fled or been expelled.[135] Indeed, the resolution admitting Israel as a member of the UN specifically mentioned both resolutions *and* that Israel "unreservedly accepts the obligations of the United Nations Charter and undertakes to honour them."[136] During debates over admission of Israel to the UN,[137] Israel acknowledged that the issues set forth in those resolutions—its frontiers, its internal constitution, and the rights of the Palestine's Arab refugees—were not an internal matter for Israel to determine based on its sovereignty.[138]

Israel's recognition, therefore, was conditioned on its good faith attempt to comply with those resolutions. The subsequent steps Israel took—its 1950 law confiscating Palestinian refugees' property, even of those Palestinian refugees who managed to remain in Israel and obtain Israeli citizenship (the so-called "present absentees");[139] transferring confiscated properties to the Jewish National Fund to administer them for the exclusive benefit of Jews;[140] and denationalizing the Arabs it had expelled[141]—were all in violation of the spirit, if not the letter, of its representations to the UN when it gained admission to that body.

V. ISRAEL, PALESTINE, AND THE FOUNDATIONS OF INTERNATIONAL LAW: LAW MAKING BY LAW BREAKING?

The UN Charter represents an explicit attempt to bring the conduct of sovereign states within the rule of law by limiting the sovereignty of states to what international law authorizes.[142] What it means to subject sovereign states to the rule of law, however, is not obvious. The great German legal theorist Hans Kelsen identified and attempted to answer the apparent paradox of international law by reconciling the idea of sovereignty with

135. G.A. Res. 194(III), Art. 11 (Dec. 11, 1948).

136. U.N. GAOR, 3rd Sess., 207th plen. mtg. at 18, U.N. Doc. A/PV.219 (May 11, 1949).

137. Comm. on the Exercise of the Inalienable Rts. of the Palestinian People, Preliminary Note on the Right of Return of the Palestinian People, at § V., U.N. Doc. ST/SG/SER.F/2 ("The representative of Israel had given an assurance that, if that country were admitted as a Member, such matters as the settlement of frontiers . . . and the Arab refugee problem would not be regarded as within its domestic Jurisdiction and protected from intervention under the terms of Article 2, paragraph 7 [of the Charter]. He noted that those matters were being considered by the Conciliation Commission and that the admission of Israel would not change that situation.").

138. U.N. Charter art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state").

139. Absentees' Property Law, 5710-1950, SH 37 (1950) 86.

140. *See generally* Sabri Jiryis, *The Legal Structure for the Expropriation and Absorption of Arab Lands in Israel*, 2 J. PALESTINE STUDS. 82 (1973).

141. Nationality Law, 5712-1952, SH 95 (1952) 146.

142. U.N. Charter art. 1(1) (declaring the organization's purpose to be "to maintain international peace and security . . . in conformity with the principles of justice and international law").

legality.[143] For Kelsen, the answer lies in properly limiting the domain of sovereignty to a state's domestic legal order.[144] Accordingly, a state is sovereign when its domestic law is not subject to the law of any other state and so is autonomous with respect to its internal law.[145] Its status as a subject of international law means that it has rights and duties with respect to how it interacts with other sovereigns, who are understood as exercising autonomy equally with respect to their own domestic legal orders.[146]

Kelsen proposed two arguments for reconciling the sovereignty of the national legal order with the sovereignty of international law: the first anchors the bindingness of international law in the national law of the state recognizing international law ("the primacy of national law" view); the second views international law as authorizing states to exercise sovereignty over the territories in which they are in effective control ("the primacy of international law" view).[147] Both accounts allow for a conception of sovereignty that is constituted by the rules of both national and international law, and crucially, exclude a conception of sovereignty based on power that floats *above* legal rules, whatever their source.[148]

There is an important difference in the two views, however, according to Kelsen. Under "the primacy of national law" view, the highest form of law is national law, with international law merely comprising a part of the internal law of each state.[149] As a result, the "primacy of national law" view, although logically coherent, produces a subjectivist, solipsistic conception of international law.[150] Under the "primacy of international law" view, by contrast, national law is viewed as a partial system of law that is constituted through the *authority* of the superior norms of international law.[151] As a result, the "primacy of international law" view takes on an objective

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143. *See, e.g.*, Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis For International Organization*, 53 YALE L.J. 207 (1944) [hereinafter Kelsen, *Principle of Sovereign Equality*].

144. *Id.* at 208.

145. *Id.* ("A State's legal authority may be said to be 'supreme' insofar as it is not subjected to the legal authority of any other State; and the State is then sovereign when it is subjected only to international law, not to the national law of any other State.").

146. *Id.*

147. Kelsen calls the first account of the relationship of national law to international law using the label "the primacy of national law," and the second account using the label "the primacy of international law." Hans Kelsen, *Sovereignty and International Law*, 48 GEO. L.J. 627, 629 (1960) [hereinafter Kelsen, *Sovereignty*].

148. Kelsen, *Principle of Sovereign Equality*, *supra* note 143, at 208 (criticizing power-based conceptions of sovereignty as "metaphysical" and not "scientific" and based on a confusion between theology and political science); Kelsen, *Sovereignty*, *supra* note 147, at 637 (arguing that on both views of the relationship of national law to international law, state sovereignty—in the sense of its authority to act —is limited by international law).

149. Kelsen, *Sovereignty*, *supra* note 147, at 632-33.

150. *Id.* at 638.

151. *Id.* at 631-32 (international law authorizes particular groups of individuals to establish national legal orders through the principle of effectiveness).

character in which international law begins from the premise of the existence of a plurality of *national sovereigns*,[152] while the primacy of national law view recognizes international law only through the subjective will of a *particular* national sovereignty to constrain itself through international law.[153] While Kelsen notes that the primacy of international law view is prominently associated with pacifism, and the primacy of national law view is prominently associated with imperialism, he denies that there is any substantive difference between the two views in this regard: insofar as a national legal system "recognizes" international law, it has effectively "subjected itself" to its norms by making international law part of its internal law, and thereby has bound itself to act in accordance with international law's positive rules.[154]

For Kelsen, however, the *content* of international law, like all law, is determined not by reference to an external source of value existing outside of the law, such as morality, but by whatever the applicable positive system of law identifies as binding. Kelsen called his approach "the pure theory of law" because it sought to make the study of the law an objective science distinct from other subjects, such as politics, ethics, or sociology.[155] As a liberal democrat who fled Nazi Germany, Kelsen was committed to constraining the arbitrary power of the state.[156] For his critics, however, the pure theory of law failed in that aim because of its entirely formal conception of law.[157] Carl Schmitt, Kelsen's conservative and Nazi-sympathizing rival, saw in this feature of legal positivism an opportunity for authoritarian takeover of the liberal state through capture of the state's law-making apparatus.[158] By contrast, Herman Heller, Kelsen's social democratic critic on the left, feared that Kelsen's content-less legal positivism would sap the capacity of democratic forces to defend the state against authoritarian capture.[159]

While the debates between and among Kelsen, Schmitt, and Heller centered largely around the crisis of democracy in the Weimar Republic, those debates are relevant to understanding both the relationship of sovereignty to international law and the relationship of politics to

152. *Id.* at 638.

153. *Id.* at 634.

154. *Id.* at 637.

155. Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 44 (1941) ("As a theory, its sole purpose is to know its subject. It answers the question of what the law is, not what it ought to be. The latter question is one of politics, while the pure theory of law is science.").

156. HERMANN HELLER, SOVEREIGNTY: A CONTRIBUTION TO THE THEORY OF PUBLIC AND INTERNATIONAL LAW 68 (David Dyzenhaus ed., Belinda Cooper trans., 2019).

157. DYZENHAUS, *supra* note 19, at 173.

158. *Id.* at 73-76 (explaining that Schmitt's reading of the Weimar constitution's provision on presidential powers in an emergency invited the restoration of dictatorship).

159. *Id.* at 163, 173-74.

international law. The spirit of the UN Charter, as well as the system of international law it enshrines as the touchstone of international legality, is quintessentially Kelsenian and aims to tame state sovereignty through law.[160] If the aim of international law is to restrain states from the arbitrary exercise of power, however, can it succeed in that task if it is purely formal? If the indeterminacy of legal norms can precipitate an authoritarian crisis in highly developed domestic legal orders, such as that of Weimar Germany, the indeterminacy of international law[161] would render it even more susceptible to exploitation by actors that reject the normative project of international law as a restraint on arbitrary state power in the international arena.[162]

In the case of Zionism's struggle against the Palestinians, the Jewish Agency and then Israel have consistently relied on the principle of effectiveness to clothe, ex post, illegal actions with legality by relying on the global north—Great Britain in the interwar period and now the United States—to recognize, or at least acquiesce to, its actions. Despite Israel's statehood arising out of either an illegal act of conquest or an illegal secession, Israel successfully obtained the recognition of the former colonial powers, thereby ratifying its illegal conduct.[163]

Israeli exceptionalism is so normalized among some western commentators that even when it is recognized, it can be quickly forgotten.[164] This normalcy should not be surprising. The porousness of international law, as the debates among Heller, Kelsen, and Schmitt show, means that politics and power must always step in to fill the vacuum. But Palestine's continued salience indicates that the principle of effectiveness has not been sufficient to grant Israel the normalized legal condition it seeks, even with the nearly unconditional support it has received from the global north.

Although Heller mocked Kelsen's notion of international law "authorizing" national legal orders as a position thoroughly detached from

160. HELLER, *supra* note 156, at 22-23 (describing the aim of international lawyers in the post-World War I era to create an international community based in law).

161. Statute of the International Court Of Justice art. 36.

162. Gurmendi, *supra* note 127 (describing Israel's claims to sovereignty over the West Bank as based on a bygone era when international law was built "on racial hierarchies and colonial policies, not on self-determination and human rights.").

163. *Id.* ("In theory, therefore, post-independence Israel should have been, at best, in the same situation as modern-day Somaliland (or at worst, Rhodesia). Instead, it was promptly recognised by most of the international community.").

164. For example, prominent international jurist James Crawford acknowledged Israel's exceptionalism when he concluded that Israel was established by unilateral seccession, but later forgot his own conclusion when he categorically stated that the UN has refused to admit any state that came into existence through unilateral secession. CRAWFORD, CREATION OF STATES, *supra* note 25, at 390, 433; Gurmendi, *supra* note 127.

reality,[165] Heller's social conception of law as an "intersubjective, normative binding of wills"[166] offers an explanation for how the Kelsenian institutions of the UN, which are commonly thought to be toothless,[167] have allowed Palestine to survive, despite the overwhelming disparity in power between it and the Zionist movement.[168]

Both Schmitt and Heller agree that Kelsen's attempt to reduce sovereignty to law by removing power is deeply mistaken.[169] Further, they agree that it is a feature of sovereignty that it can, at times, act *against* positive law.[170] Schmitt, however, promotes a personalized theory of sovereignty embodied in the sovereign decision of the executive-cum-dictator who is entitled to suspend the normal operation of the law unbounded by any legal principles other than preservation of the state.[171] Heller, by contrast, identifies the real sovereign as the coalition of individuals whose wills are united by adherence to a set of basic normative principles that orders their political and moral life[172] and who are politically free to exercise their power either to vindicate fundamental legal principles or violate them.[173] According to Heller, these basic normative principles are not only logically, but *morally* and *politically*, superior to the positive legal rules.[174] While a Schmittian sovereign is unconstrained when exercising the sovereign prerogative of the exception by any objective morality, the Hellerian sovereign acts against positive law in furtherance of the higher-order normative principles immanent in the legal order itself. This is what David Dyzenhaus has called Heller's "politics of a commitment to legality."[175]

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165. HELLER, *supra* note 156, at 145 (observing in 1927, prior to the Kellogg-Briand Pact, that "[i]nternational law offers every international law person the opportunity to rid itself of all its legal obligations towards other international law persons by completely eradicating the other persons.").

166. *Id.* at 143.

167. Sandeep Gopalan & Rosalyn Fuller, *Enforcing International Law: States, IOs, and Courts as Shaming Reference Groups*, 39 BROOK. J. INT'L L. 73, 73 (2014) (responding to the claim that international law, including the United Nations, is "ineffective").

168. Dyzenhaus has noted that Heller's skepticism about international law during the interwar period was a result of the absence of international institutions that could make effective decisions in accordance with international legal principles, not a dogmatic rejection, based on the principle of state sovereignty, of the *possibility* that effective international institutions could, at some time in the future, come into existence. *Id.* at 53-54.

169. DYZENHAUS, *supra* note 19, at 162; HELLER, *supra* note 156, at 7-9.

170. DYZENHAUS, *supra* note 19, at 42-43 (describing Schmitt's view that sovereignty entails the right to suspend the ordinary legal order); HELLER, *supra* note 156, at 19-20 (quoting Heller for the proposition that sometimes the sovereign must act "against the law").

171. DYZENHAUS, *supra* note 19, at 173-74.

172. *Id.* at 180-82.

173. *See, e.g.*, HELLER, *supra* note 156, at 185 ("[A]s long as human acts of will constitute the state, they will with sovereign force constantly break legal rules, whether they thereby violate fundamental legal principles or lead them to victory.").

174. For Kelsen, by contrast, all legal norms were equally valid, regardless of the position they occupied in the logical hierarchy of legal rules. DYZENHAUS, *supra* note 19, at 162, 164-67.

175. HELLER, *supra* note 156, at 54.

These different conceptions of the relationship of power to law offer a useful perspective for understanding how different conceptions of international law can produce different theories of the politics of international law and how international law changes. From the Israeli perspective, international law is a system of positive law in which there is no moral connection between a particular rule and its place in the hierarchy of international legal norms. Any illegal act, even if it challenges foundational principles of the post-World War II legal order, such as the inadmissibility of the acquisition of territory by force or even the complete destruction of a legally recognized international person such as Palestine, can be rendered valid if the act is effective and obtains widespread ex post recognition. Thus, Israel's conception of international law is consistent with Theodore Herzl's 19th century conception of international law as one in which "might precedes right."[176] It is also consistent with Schmitt's conception of sovereignty as the power that shapes law to further the existential imperatives of the personalized sovereign.[177]

From the perspective of Palestine, international law by contrast, is a hierarchy of moral principles undergirding a broader legal order. Accordingly, its arguments assume that the foundational principles of post-World War I and World War II international law, such as the territorial integrity of states, self-determination, and the inadmissibility of territory acquired by conquest, reflect an immanent political morality, making them superior to lower-order principles like effectiveness. Because Palestine does not satisfy the Montevideo effectiveness factors or other empirical indicia of effectiveness, its claim to statehood, like Israel's, can also be said to be contrary to the positive rules of international law.[178] However, its claim is consistent with Heller's account of when the sovereign should act against the positive law: when doing so is necessary to vindicate the higher order principles of the law or to "prevent lawmaking by lawbreakers."[179] Indeed, if it is the case, as James Crawford says, that "Palestine [is] an entity which is not sufficiently effective to be regarded as independent, but whose people is entitled to self-determination," then the answer to his question "should international law treat as having been done [i.e., recognition of Palestine] that which ought to be done?" seems obvious.[180]

Crawford here nods to the Schmittian paradox hidden—or not so hidden—in international law when viewed from Kelsen's lens of the pure theory of law: Palestine cannot satisfy the objective prerequisites of

176. THEODOR HERZL, THE JEWISH STATE 76 (Alex Bein & Louis Lipsky eds., 2008).

177. DYZENHAUS, *supra* note 19, at 54, 56-57.

178. Crawford, *Creation of Palestine*, *supra* note 21, at 308-09 (noting the utter empirical plausibility of the Palestinian claim to statehood from the perspective of the Montevideo factors).

179. HELLER, *supra* note 156, at 174.

180. CRAWFORD, CREATION OF STATES, *supra* note 25, at 438-39.

statehood, nor can it ever do so, given the "vehement" objections to that statehood by the only two states that empirically matter, Israel and the United States.[181] Nevertheless, the higher order principles of international law demand that Palestine's statehood *should* exist.

In this context, Heller's conception of sovereignty does important normative and explanatory work. First, it appeals to the higher-order normative ideals of international law against the lower-order rule of empirical effectiveness. Crawford's observation recognizes this logic, but despairs at the empirical futility of implementing what international law demands with respect to Palestine. Further, it calls for creating an alternative coalition of wills that can challenge and ultimately overcome the power of the United States and Israel. But Crawford, as a committed legal positivist who upholds Kelsen's distinction between law and politics, rejects this strategy as distorting law's neutrality.[182] In despairing at the prospect of Palestinian independence, Crawford confirms Heller's criticism of the pure theory of law: it disables supporters of democratic equality in favor of those who would wield power in an arbitrary and personalistic manner.

From Heller's perspective, however, Palestine's political and legal strategy to obtain recognition as an independent sovereign state would be futile if it were based *only* on appeal to the normative ideals of international law.[183] After all, these were insufficient to save it from destruction in 1947-49. What has kept Palestine alive is the existence of a broad coalition of actors—what Heller calls the "intersubjective, normative binding of wills"[184]—that supports its claim to independence. The importance of the UN and the formal legal order it promotes, even if it seems toothless and vulnerable to the most powerful states through the principle of effectiveness, is that it enables the formation of international coalitions comprised not only of states—such as the global south's alliance with

181. Crawford, *Creation of Palestine*, *supra* note 21, at 309. Indeed, the only remaining obstacle to Palestine's admission as a full member of the UN is the continued U.S. opposition to its membership, as shown by the recent U.S. veto of admission of Palestine to the UN. *See US Vetoes Palestine's Request For Full UN Membership*, UN NEWS, (Apr. 18, 2024), https://news.un.org/en/story/2024/04/1148731.

182. Crawford, *Creation of Palestine*, *supra* note 21, at 307.

183. QUIGLEY, *supra* note 22, at 122-24 (discussing continued reference to Palestine in international law after 1948); *id.* at 137-48 (discussing representation of Palestine in the UN General Assembly, Security Council, and other international bodies after 1948); *id.* at 164 (discussing UN's reaction to Palestine's declaration of statehood); *id.* at 192-94 (discussing Palestine as a subject before the ICJ); *id.* at 194-202 (discussing Palestine's interactions with various international organizations, the international community, and the State of Israel). The State of Palestine has also entered numerous international treaties, including the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and the Rome Statute of the International Criminal Court. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966; *State of Palestine*, INTERNATIONAL CRIMINAL COURT (last updated July 23, 2019), https://asp.icc-cpi.int/states-parties/asian-states/Palestine.

184. HELLER, *supra* note 156, at 143.

Palestine—but also of UN agencies, non-governmental organizations, judiciaries, and even dissident officials within the government bureaucracies of states that are otherwise hesitant to give up the prerogatives of power.[185]

Modern international law's capacity to generate a broad "intersubjective, normative binding of wills" that Heller thought necessary "to prevent lawmaking by lawbreakers"[186] is perhaps most powerfully evidenced by South Africa's genocide case against Israel.[187] That suit was itself only possible because of the post-World War II convention prohibiting genocide.[188] The ICJ, by an overwhelming 15-to-2 vote majority that included the American president of the court,[189] ordered provisional measures to prevent the plausible risk of genocide from taking place in Gaza.[190] The *erga omnes partes* character of the obligations in the Genocide Convention gave the ICJ's order a universal legal effect,[191] vindicating Kelsen's contention regarding the importance of an international court to the integrity of international law.[192]

But the order, in and of itself, would be meaningless without the existence of Heller's "intersubjective, normative binding of wills" that complies with the order. One way that international law generates this "intersubjective, normative binding of wills" is by enlisting national courts to vindicate international law. Kelsen noted that, even on the national primacy view of international law, international law becomes a part of a state's internal law and as a result has the potential to limit arbitrary state power. That insight is vindicated in the case of Palestine. As international treaties become incorporated into the domestic legal systems of state parties or are otherwise reflected in various states' domestic legal systems, broad coalitions of citizens can bring actions in local courts to enforce international law against the policies of a recalcitrant executive branch. For example, on the same day that the ICJ ordered provisional measures, a U.S. district court judge held hearings in a suit brought against U.S. president Joseph Biden by an international non-governmental organization, Defense for Children International–Palestine, alleging that his support of Israel's war

185. IMSEIS, *supra* note 2, at 9 (discussing the counterhegemonic potential of the UN).

186. HELLER, *supra* note 156, at 174.

187. S. Afr. v. Isr., Application Instituting Proceedings, (Dec. 28, 2023), https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf.

188. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948.

189. Press Release, ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel): The Court Indicates Provisional Measures (Jan. 26, 2024).

190. S. Afr. V. Isr., Request for Provisional Measures, (Jan. 26, 2024), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf.

191. Oona Hathaway & Alaa Hachem, *The Promise and Risk of South Africa's Case Against Israel*, JUST SEC. (Jan. 4, 2024), https://www.justsecurity.org/91000/the-promise-and-risk-of-south-africas-case-against-israel/.

192. Kelsen, *Principle of Sovereign Equality*, *supra* note 143, at 213.

in Gaza violated the Genocide Convention.[193] While the district court dismissed the suit as non-justiciable under the United States' political question doctrine, the judge agreed with the ICJ's legal conclusion that the allegation of genocide in Gaza was plausible, and therefore concluded his order with a plea to Biden to change course.[194] Now on appeal before the Ninth Circuit, a group of seventeen former U.S. government civilian and military officials have submitted an amicus brief asking the appellate court to reinstate the lawsuit, arguing that the political question doctrine does not apply to a case where a clear legal rule—in this case, the prohibition of genocide—applies.[195]

In Canada, Palestinian Canadians, supported by various non-governmental organizations, have brought suit under the *Export and Import Permits Act*[196] against the Canadian government seeking to prevent it from transferring arms to Israel.[197] Meanwhile, other governments and some firms in the global north have also taken steps to comply with the ICJ's order.[198]

193. *Defense for Children International-Palestine v. Biden*, U.S. CTS. (Jan. 26, 2024), https://www.uscourts.gov/cameras-courts/defense-children-international-palestine-v-biden.

194. Defense for Children International – Palestine v. Biden, No. 23-cv-05829-JSW, 2024 WL 390061, at *1, *5 (N.D. Cal. Jan. 31, 2024) ("Yet, as the ICJ has found, it is plausible that Israel's conduct amounts to genocide. This Court implores Defendants to examine the results of their unflagging support of the military siege against the Palestinians in Gaza.").

195. Brief for Former Diplomats, Service Members, and Intelligence Officers as Amici Curiae Supporting Appellant, Defense for Children International – Palestine at 11, No. 24-704 (9th Cir. Mar. 15, 2024) (arguing that the political question doctrine "does not impede courts' authority to ensure that the political branches' conduct of foreign affairs conforms to the law."). Seven other amici briefs have been entered in support of the plaintiffs. *See Defense for Children International – Palestine v. Biden*, CTR. FOR CONST. RTS. (last modified May 29, 2024), https://ccrjustice.org/home/what-we-do/our-cases/defense-children-international-palestine-v-biden (with links to the briefs of U.S. constitutional law scholars, international law scholars, and a group of international human rights and civil rights non-governmental organizations).

196. *See* Export and Import Permits Act, R.S.C. 1985, c E-19, art. 7.3(1)(b)(i)-(iii) (prohibiting the issuance of export permits for weapons if "they could be used to commit or facilitate" "serious violation[s]" of "international humanitarian law," "international human rights law," or "an act constituting an offence under international conventions or protocols relating terrorism").

197. Darren Major, *Group of Palestinian Canadians Sues Federal Government to Block Military Exports to Israel*, CBC NEWS (Mar. 5, 2024), https://www.cbc.ca/news/politics/canada-lawsuit-israel-military-exports-1.7134664.

198. *See, e.g.*, *Japan's Itochu to End Cooperation With Israel's Elbit Amid Gaza War*, REUTERS (Feb. 5, 2024), https://www.reuters.com/business/japans-itochu-end-cooperation-with-israels-elbit-over-gaza-war-2024-02-05/. Canada and other countries have recently suspended arms sales to Israel. *See Canadian Freeze on New Arms Export Permits to Israel to Stay*, REUTERS (Mar. 20, 2024), https://www.reuters.com/world/canadian-freeze-new-arms-export-permits-israel-stay-2024-03-20/; *Canada Stops Arms Sales to Israel: Who Else Has Blocked Weapons Exports?*, AL JAZEERA (Feb. 15, 2024), https://www.aljazeera.com/news/2024/2/15/which-countries-have-stopped-supplying-arms-to-israel.

Contrary to Crawford's suggestion that politicization of the Israel-Palestine conflict risked undermining international law's legitimacy,[199] subsequent events seem to have vindicated Heller's view that the only way to uphold a formal system of positive law, whether domestic or international, is to marshal politically effective coalitions that are united in support of that legal system's morality. Palestine's continued relevance to international law also vindicates Kelsen's view that international law's incorporation into national systems has the effect, even under the "primacy of national law" view, of constraining states' abilities to reject international law whenever it is inconsistent with their perceived interests by generating positive rules of law that are amenable to judicial enforcement.[200]

VI. CONCLUSION

The unresolved Zionist-Arab, and then Israel-Palestine, conflict has been a central problem of international law since the end of World War I. With Israel's war against Gaza, this conflict has confirmed the deep and profound divisions in the world community regarding not only this conflict but also of the nature of international law. This Essay argues that it is no accident that the Israel-Palestine conflict is so central: it raises fundamental questions about the nature of international law, and the kind of international community that is possible in the post-World War II era. Moreover, the arguments presented by the various parties to this conflict and their supporters illustrate the continued prevalence of abstract jurisprudential debates about the relationship of law to power.

One view, which I have characterized as aligning with Schmitt's conception of sovereignty, understands international law as a tool for furthering the interests of sovereign states, and elevates an enabling condition of international law—effectiveness—into a central method of changing the law through a strategy of law breaking followed by recognition, even when doing so undermines the political morality of international law.[201] Viewed from the perspective of a Schmittian jurist, what is viewed as "exceptional" in international law reveals its true reality as an expression of

199. Crawford, *Creation of Palestine*, *supra* note 21, at 307 (arguing that the partisan deployment of international law risks the law's legitimacy by conflating it with politics).

200. Kelsen, *Principle of Sovereign Equality*, *supra* note 143, at 215-17 (arguing that the idea of state sovereignty does not preclude the logical possibility of courts enforcing international law against states).

201. CRAWFORD, CREATION OF STATES, *supra* note 25, at 429 (noting that, while the argument that the Palestine Mandate was a facial violation of Article 22 of the Covenant of the League of Nations is "substantial," it would have nonetheless become valid by virtue of the League member states' recognition of it in practice).

sovereign power all the way down.[202] Israel has generally adopted this view of international law, as exemplified by Julius Stone's arguments for Israel's statehood. While Schmitt's theory of the sovereign exception can facilitate authoritarian dictatorship in the context of domestic law, it authorizes colonialism, apartheid, or worse in the international context.[203]

The second view, represented by James Crawford, is consistent with Kelsen's conception of the pure theory of law. It views international law as a series of positive rules of equal validity, regardless of their relative moral status. If that produces normative deadlock, as in the case of Palestine, where its right to self-determination is blocked by the refusal of the relevant powers to cooperate to secure it, that simply reflects the tragedy of international law as an undeveloped system of law with no systematic means to resist determined law breakers other than persuasion.

The third view, represented by those advocating for Palestine's independence, is consistent with Heller's view of sovereignty as the conjunction of norms with the wills of a real coalition that is politically committed to furthering the law's immanent morality. Heller's view of the relationship of positive law to the law's own morality provides a response to the dilemma that results from the purely formal conception of law advocated by Kelsen and adopted by jurists like Crawford. Crawford, either out of despair or genuine wonder, gives a nod to the equitable precept that the law deems as done that which ought to be done,[204] but fails to accept the political conclusion that follows from this precept. Palestine advocates, by contrast, actuate this equitable principle by implicitly adopting another equitable precept—no trust fails for a want of a trustee[205]—and thus have taken it on themselves to form an "intersubjective, normative binding of wills" in the hope of securing Palestine's independence, the original object of Article 22's "sacred trust of civilization."[206] Far from subverting law, as Crawford would have it, this kind of politics is indispensable to vindicating the immanent moral commitments of post-World War II international law.

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202. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 15 (George Schwab trans., 2005) ("The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.").

203. The published political program of Israel's current Minister of Finance, Bezalel Smotrich, states that the "'two state' model has led Israel to a dead end" and that Palestinians have, essentially, three options: acceptance of permanent second class status, emigration, or violent subjugation. *See* Bezalel Smotrich, *Israel's Decisive Plan*, השילוח (2017), https://hashiloach.org.il/israels-decisive-plan/ (last visited June 29, 2024).

204. *See* ALBERT H. OOSTERHOFF, ROBERT CHAMBERS & MITCHELL MCINNES, OOSTERHOFF ON TRUSTS 815 (9th ed. 2019).

205. RESTATEMENT (THIRD) OF TRUSTS § 31 (AM. L. INST. 2003).

206. League of Nations Covenant art. 22