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

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1. 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 nationalism – Zionism – and Palestine's Arab population left its mark on the foundational documents of the League of Nations,[1] and has consumed the United Nations until the present.[2] The conflict between Jewish nationalism and Palestine's Arab population, with time, has also became a globalized conflict, and in the post-colonial era, 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 has exposed the radically different reactions of the global north and the global south to Hamas's October 7th attack on Israel, Israel's subsequent assault on the Gaza Strip,[3] and South Africa's suit against Israel before the International Court of Justice[4] accusing Israel of

[1] Avalon Project - The Covenant of the League of Nations, https://avalon.law.yale.edu/20th_century/leagcov.asp (last visited Jan 2, 2024).

[2] ARDI IMSEIS, THE UNITED NATIONS AND THE QUESTION OF PALESTINE: RULE BY LAW AND THE STRUCTURE OF INTERNATIONAL LEGAL SUBALTERNITY 2 (2023), https://www.cambridge.org/core/books/united-nations-and-the-question-of-palestine/E8241B33B6C07028765E5E6785AF5CDE (last visited Jan 2, 2024).

[3] Jorge Heine, *International Reaction to Gaza Siege Has Exposed the Growing Rift between the West and the Global South*, THE CONVERSATION (2023), http://theconversation.com/international-reaction-to-gaza-siege-has-exposed-the-growing-rift-between-the-west-and-the-global-south-216938 (last visited Mar 16, 2024).

[4] The Republic of South Africa, *Application Instituting Proceedings*, (2023), https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf (last visited Jan 7, 2024).

violating the Genocide Convention.[5] The Israel-Palestine conflict has also spawned third-order conflicts within the publics of the global north about the Israel-Palestine conflict, and their own governments' stances on this conflict.[6]

The conflict in civil society is perhaps most acute in United States' universities, where increasingly racially and religiously diverse student bodies[7] are coming into direct conflict with entrenched support for Israel among political and cultural elites who have viewed the Israel-

[5] Convention on the Prevention and Punishment of the Crime of Genocide, (1951), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf; Nosmot Gbadamosi, *Why the Global South Supports Pretoria's ICJ Genocide Case*, FOREIGN POLICY (Mar. 18, 2024), https://foreignpolicy.com/2024/01/17/israel-gaza-icj-genocide-south-africa-namibia-bangladesh-global-south/ (last visited Mar 16, 2024).

[6] Rahul Mukherjee Gordon Shoshana, *Pro-Palestinian Protests on the Rise across the U.S.*, AXIOS (2023), https://www.axios.com/2023/12/09/palestinian-protests-us-israel-gaza-war (last visited Mar 16, 2024); Sammy Gecsoyler, *Tens of Thousands of Pro-Palestine Protesters March through London*, THE GUARDIAN, Mar. 9, 2024, https://www.theguardian.com/uk-news/2024/mar/09/tens-of-thousands-of-pro-palestine-protesters-march-through-london (last visited Mar 16, 2024); Ben Cohen and Joshua Chong Staff Reporters, *'Steeped in Frustration': Pro-Palestinian Protests Enter Eighth Week as Fighting Resumes*, TORONTO STAR (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 (last visited Mar 16, 2024); Erika Solomon, *Germany's Stifling of Pro-Palestinian Voices Pits Historical Guilt Against Free Speech*, THE NEW YORK TIMES, Nov. 10, 2023, https://www.nytimes.com/2023/11/10/world/europe/germany-pro-palestinian-protests.html (last visited Mar 16, 2024).

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

Palestine conflict through the lens of a "special relationship"[8] between the United States and Israel and who have traditionally viewed sympathy for the Palestinian cause in the best of circumstances as a cause for suspicion, and in the worst as prima facie evidence of terrorism or other criminality.[9] The urgency of the conflict is everywhere apparent in the public culture, with the prominent New York Times podcaster, Ezra Klein, for example, devoting for the first time in his journalistic career considerable space in his podcast to the Palestine-Israel conflict.[10]

The intensity of feeling the Israel-Palestine conflict regularly arouses feelings of political paralysis, based on an assumption of the radical and unreconcilable claims of Jewish and Palestinian claims 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. But the space for silence is narrowing, with the International Court of Justice already having granted provisional measures in South Africa's case against Israel, an order that required the Court to

[8] "U.S. Foreign Aid to Israel," *Congressional Research Service*, March 1, 2023, available at https://sgp.fas.org/crs/mideast/RL33222.pdf (last viewed, January 7, 2024).

[9] Anti-Palestinian at the Core: The Origins and Growing Dangers of U.S. Antiterrorism Law, CENTER FOR CONSTITUTIONAL RIGHTS, https://ccrjustice.org/node/10201 (last visited Mar 16, 2024); Darryl Li et al., *Anti-Palestinian at the Core: The Origins and Growing Dangers of U.S. Antiterrorism Law*, (2024), https://ccrjustice.org/sites/default/files/attach/2024/02/Anti-Palestinian%20at%20the%20Core_White%20Paper_0.pdf.

[10] The Ezra Klein Show on Apple Podcasts, APPLE PODCASTS (2023), https://podcasts.apple.com/us/podcast/the-ezra-klein-show/id1548604447 (last visited Jan 4, 2024). Between October 18 and December 19, Klein hosted eleven episodes on the conflict.

conclude that Palestinians in Gaza were plausibly at risk of an imminent genocide.[11] The same court may also rule, perhaps as soon as this summer, that Israel's occupation of the West Bank and Gaza Strip is *per se* illgal.[12]

This Essay asks whether it is possible to learn anything about the nature of international law by a careful study of the Israel-Palestine conflict beyond 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 not accidental that the political conflict over Palestine has become a global conflict: the issues it raises go the heart of the question of whether, in the post-World War II era, law making by law breaking will be tolerated.

This Essay will proceed as follows. Following this Introduction, Part 2 explores the status of Palestine in public international law in the interwar period up to the admission of Israel to the United Nations in 1949. Part 3 provides an overview of the crucial events surrounding the end of the Palestine Mandate and the formation of the State of Israel and the (near) destruction of Palestine. Part 4 centers the doctrine of effectiveness in the context of the larger theoretical

[11] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, January 26, 2024, available at https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-pre-01-00-en.pdf. A federal district court judge agreed with the reasoning of the International Court of Justice. *Defense for Children International – Palestine et al., v. Joseph R. Biden et al.,* (N.D. Cal., Jan. 31, 2024), at p. 8 ("Yet, as the ICJ has found, it is plausible that Israel's conduct amounts to genocide.")

[12] https://www.icj-cij.org/case/186.

discussion about the normative status of the "exception" in law, the relationship of law to sovereignty and politics. It centers the contrasting role the doctrine of effectiveness, in particular, the so-called Montevideo factors, plays in the claims of each to statehood.[13] The Essay argues that Israel's reliance on the doctrine of effectiveness to ratify 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" which the new post-World War II order, as set out in the Charter of the United Nations (the "Charter"),[14] seems to promise.[15] Part 5 unpacks the different roles that effectiveness play in Israel's and Palestine's legal claims and maps them on to different theoretical conceptions of sovereignty and its relationship to law. These deep theoretical disagreements on the relationship of sovereignty to law casts light on why Palestine remains a, if not the, central problem facing the post-World War II legal order.[16] Part 6 concludes.

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[13] James Crawford, *State*, OXFORD PUBLIC INTERNATIONAL LAW, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1473?prd=OPIL (last visited Mar 19, 2024).

[14] United Nations, *United Nations Charter (Full Text)*, https://www.un.org/en/about-us/un-charter/full-text (last visited Jan 2, 2024).

[15] 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 United Nations, in its origin, was intended to serve the interests of empire).

[16] *Id.* at xv ("Writing in 1987, Brian Urquhart, former UN Undersecretary-General for Special Political Affairs, lamented that '[t]he Palestine problem has haunted the development of the United Nations ever since 1948', and that the UN's involvement in the question of Palestine 'has twisted the organization's image and fragmented its reputation and prestige as no other issue has'").

2. 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.[17] Blindness to Palestine's pre-1948 history allows the conflict to be described as taking place, essentially, in a *terra nullius*.

But Palestine was not a *terra nullius*.[18] 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 for independence. A distinct Palestinian nationality existed in public international law distinct from any other nationality. The second 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.[19] This Part 2 deals with the first of these two omissions. Part 3 of this Essay will deal with 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[20] and the 1923 Treaty of Lausanne.[21] Article 22 of the former treaty declared that those territories, "formerly belonging to the Turkish Empire," due to their relatively advanced development, had reached a

[17] See, for example, Noah Feldman, *The New Antisemitism*, TIME (2024), https://time.com/6763293/antisemitism/ (last visited Mar 16, 2024) (stating that Israel came into existence by virtue of a United Nations resolution in 1947 without discussion of its status in the wake of World War I).

[18] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 432 (2nd ed., 1st pbk. ed. ed. 2007).

[19] *Id.* at 427 ("Palestine in 1948 constituted a self-determination unit in international law.").

[20] Avalon Project - The Covenant of the League of Nations, *supra* note 1.

[21] Lausanne Peace Treaty / Republic of Türkiye Ministry of Foreign Affairs, https://www.mfa.gov.tr/lausanne-peace-treaty-part-i_-political-clauses.en.mfa (last visited Feb 15, 2024).

stage "where their existence as independent nations can be provisionally recognized."[22] While Palestine was placed under the supervision of a Mandatory Power, Great Britain, pursuant to the terms of the Palestine Mandate,[23] the relationship between the Mandatory Power and the people of Palestine was one of trust for the "well-being and development of such peoples [i.e., under mandates]."[24]

The Covenant's recognition of the rights of the peoples of what had been the Ottoman Empire to self-government was no accident. It reflected President 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."[25] Although Britain and France, acting pursuant to their own secret agreement, the Sykes-Picot Agreement of 1916,[26] did not fully honor Wilson's promise of "absolutely unmolested opportunity of autonomous development" for the Arabs of the Ottoman Empire, Article 22 of the Covenant placed them in a privileged position relative to other territories then under European rule: unlike other colonial territories, the independence of the Arab provinces of the Ottoman Empire was provisionally recognized, subject only to "administrative advice and

[22] "Avalon Project - The Covenant of the League of Nations," Art. 22, accessed January 2, 2024, https://avalon.law.yale.edu/20th_century/leagcov.asp.

[23] The Avalon Project : The Palestine Mandate, https://avalon.law.yale.edu/20th_century/palmanda.asp (last visited Jan 2, 2024).

[24] Avalon Project - The Covenant of the League of Nations, *supra* note 1. Art. 22.

[25] Ibid., Art. XII.

[26] The Avalon Project : The Sykes-Picot Agreement : 1916, https://avalon.law.yale.edu/20th_century/sykes.asp (last visited Mar 16, 2024).

assistance by a Mandatory until such time as they are able to stand alone."[27] At a time when self-determination had yet to become universally recognized under customary international law, the Arabs of the Ottoman Empire had received recognition of their right to self-determination pursuant to positive international law.[28]

But unlike the other former Ottoman territories, Palestine had not by 1947, the year the United Nations proposed to partition it into two states, achieved the independence it was promised under Article 22 of the Covenant of the League of Nations.[29] Before considering why Palestine did not attain independence as contemplated by Article 22, it is important to consider first the Treaty of Lausanne, the second foundational treaty in the inter-war 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 been formerly subjects of the Ottoman Empire would, *ipso facto*, become nationals of whatever states were formed to succeed the Ottoman Empire.[30] In making the former nationals of the Ottoman Empire, *ipso facto*, nationals of the states that succeeded the Ottomans, the Treaty of Lausanne

[27] Avalon Project - The Covenant of the League of Nations, *supra* note 1.

[28] IMSEIS, *supra* note 2 at 56.

[29] 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.

[30] Lausanne Peace Treaty / Republic of Türkiye Ministry of Foreign Affairs, *supra* note 21.

simply gave effect to what was already the prevailing customary rule of international law at the time.[31]

Article 30 of the Treaty of Lausanne 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, it established that they would not be nationals of any other successor state to the Ottoman Empire.[32] I will return to the significance of this point in Part 3.

b. The Terms of the Palestine Mandate

Palestine's failure to attain independence was not for a lack of capacity or other internal impediment relative to its Arab neighbors; rather, its independence had been deferred because of the idiosyncratic terms of the Palestine Mandate which committed the Great Britain, in its capacity as Mandatory, to facilitate "the establishment *in* Palestine of *a* national home for the Jewish people" (emphasis added).[33] 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*

[31] 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 433–36 (Eights Edition. ed. 2012).

[32] Mutaz Qafisheh, *Genesis of Citizenship in Palestine and Israel. Palestinian Nationality during the Period 1917-1925*, 11 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW = REVUE D'HISTOIRE DU DROIT INTERNATIONAL 1, 3, 7 (2009).

[33] The Avalon Project : The Palestine Mandate, *supra* note 18. The Palestine Mandate only became legally effective as of September 29, 1923. Qafisheh, *supra* note 26 at 16.

Palestine" (emphasis added).[34] That the Jewish National Home, whatever it meant, had to be consistent with rights of non-Jews was an obvious entailment of the duties Article 22 imposed on the Mandatory to exercise their powers as a "sacred trust of civilisation" for the benefit of the Palestine's inhabitants. Were it read otherwise, the Palestine Mandate would arguably have been *ultra vires* the Covenant of the League of Nations itself, and indeed, some authorities have so argued.[35]

Article 2 of the Palestine Mandate required Great Britain, in its capacity as Mandatory, to establish institutions of self-government and "safeguard[] the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."[36] Article 5 of the Palestine Mandate established the legal unity of the territory of Palestine and forbade the Mandatory from ceding any part of its territory to a foreign government.[37] Article 6, while it required Great Britain to facilitate Jewish immigration to Palestine, also required it to "ensure[] that the rights and position of other sections of the population are not prejudiced" as a result of such immigration.[38]

Article 7 of the Palestine Mandate required Great Britain to promulgate a nationality law for Palestine, again, to facilitate Jewish immigration to Palestine by offering immigrating Jews a

[34] The Avalon Project : The Palestine Mandate, *supra* note 23.

[35] Ralph Wilde, *Tears of the Olive Trees: Mandatory Palestine, the UK, and Reparations for Colonialism in International Law*, 25 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW / REVUE D'HISTOIRE DU DROIT INTERNATIONAL 387 (2022).

[36] The Avalon Project : The Palestine Mandate, *supra* note 23.

[37] *Id.*

[38] *Id.*

means to acquire Palestinian nationality.[39] The nationality law Great Britain[40] enacted recognized as Palestinians anyone who had previously been Ottoman subjects, regardless of their religious identity, *ipso facto*, both by virtue of generally applicable principles of international law,[41] and as required by Article 30 of the Treaty of Lausanne.[42] As of 1925, when the Palestine Citizenship Order went into effect, of the total population who received Palestinian nationality automatically, slightly more than 99% were Arabs – largely Muslims and Christians, and small numbers of other religions (Bahais, Druze and Samaries) – and slightly less than 1% were Jews.[43] The number of foreign Jews in Palestine in 1925, however, 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 registered Jewish immigrants who came to Palestine between 1920 and 1925.[44]

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

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[39] *Id.*

[40] For the details of the Palestine citizenship law during the Palestine Mandate, see *Palestine Citizenship Order*, July 24, 1925, available at https://upload.wikimedia.org/wikipedia/commons/a/a5/PalestinianCitizenshipOrder1925.pdf (last viewed, January 2, 2024).

[41] Qafisheh, *supra* note 32 at 31–32; Oliver Dörr, *Nationality*, OXFORD PUBLIC INTERNATIONAL LAW, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e852?prd=MPIL (last visited Jan 2, 2024).

[42] Lausanne Peace Treaty / Republic of Türkiye Ministry of Foreign Affairs, *supra* note 21.

[43] Qafisheh, *supra* note 26 at 32–33 (based on the 1925 British census, concluding that Palestine had 722,730 Arab native citizens and 7,143 Jewish citizens).

[44] *Id.* at 33.

Agency.[45] Courts and other legal institutions during the interwar period recognized the existence of a distinctively Palestinian nationality in recognition of the existence of Palestine as a state.[46] 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.[47] 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, and of these only one-third had acquired Palestinian nationality.[48]

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

[45] JOHN QUIGLEY, THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT 56 (1 ed. 2010). 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 Avalon Project : The Palestine Mandate, *supra* note 18.

[46] QUIGLEY, *supra* note 45 at 56–58.

[47] Qafisheh, "Genesis of Citizenship in Palestine and Israel. Palestinian Nationality during the Period 1917-1925," 5–6 (Supreme Court of Palestine, in 1945 *Jawdat Badawi Shaʿban* case, held that nationals of Palestine and nationals of Transjordan were foreigners to one another).

[48] VICTOR KATTAN, FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949 141 (2009), http://ebookcentral.proquest.com/lib/utoronto/detail.action?docID=3386314 (last visited Dec 31, 2023); Qafisheh, *supra* note 26 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.

accordance with Article 12 of the Mandate.[49] On that basis, Palestine entered numerous multilateral and bilateral international treaties.[50] Great Britain also appeared on behalf of the government of Palestine in 1924 to defend a suit brought by Greece in the International Court of Justice.[51] 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.[52]

3. 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[53] and the United Nations took its place.[54] Part 3 of this Essay begins with the status of Palestine under the new international legal order the 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 Charter.[55] The third section concludes with a discussion of the legal basis for the State of Israel and Palestine,

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[49] The Avalon Project : The Palestine Mandate, *supra* note 23.

[50] QUIGLEY, *supra* note 45 at 53–54.

[51] Mavrommatis Palestine Concessions (Greece v. Great Britain) Permanent Court of International Justice International, JUSTIA LAW (2024), https://law.justia.com/cases/foreign/international/1924-pcij-series-b-no-3.html (last visited Jan 2, 2024).

[52] QUIGLEY, *supra* note 40 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).

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

[54] United Nations, *supra* note 14.

[55] The Avalon Project : UN General Assembly Resolution 181, https://avalon.law.yale.edu/20th_century/res181.asp (last visited Jan 3, 2024).

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 Charter incorporated the terms of existing mandates, and if anything, strengthened the standing of the peoples under mandates and colonial rule.[56] Article 73 of the Charter affirmed the principle that, in cases where states were administering territories that had not attained self-government, e.g., Palestine,

> "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."[57] (emphasis added)

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 on duties such as:

> "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."[58]

The Charter contemplated replacing the then existing mandates with UN trusteeships, but in such a case, Article 77 of the UN Charter provided that such a trusteeship could not alter any of the existing rights of the peoples concerned prior to an agreement with respect to the terms of

[56] United Nations, *supra* note 14.

[57] *Id.*

[58] *Id.*

the proposed trusteeship.[59] Under the Charter, the fate of 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, those who were the "*inhabitants* of those territories" (emphasis added). This promise of independence was declared a "sacred trust of civilization" in the Covenant of the League of Nations, and the Charter reiterated that promise.[60]

Public international law required Great Britain to prepare Palestine for independence as a unitary state. Great Britain, as the Mandatory, 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. The Charter reaffirmed those duties. Both Great Britain and the United Nations 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 Zionism demanded that international law grant legitimacy to its 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

[59] *Id.*, Art. 77.

[60] The International Court of Justice reaffirmed that this 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, 21 June 1971, ICJ Reports 1971, 16 ¶ 53.

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, so to speak, 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.[61] Indeed, so fundamental was international recognition in Herzl's mind for the success of the Zionist project that he opposed the establishment of the Jewish National Fund until such time as the Zionists could obtain international recognition of their plans to settle Palestine.[62] While Herzl failed in obtaining such recognition in his lifetime, Zionists succeeded in enlisting Great Britain to their cause when, on November 2, 1917, the British government adopted the Balfour Declaration, in which it promised to assist the Zionists in their aim to establish a Jewish national home in Palestine.[63] Although the Balfour Declaration lacked any normative status in international law, and it 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.[64]

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[61] MICHAEL STANISLAWSKI, ZIONISM: A VERY SHORT INTRODUCTION 27 (2016) (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"), https://academic.oup.com/book/628 (last visited Jan 15, 2024).

[62] Walter Lehn, *The Jewish National Fund*, 3 JOURNAL OF PALESTINE STUDIES 74, 76 and 79 (1974).

[63] The Avalon Project : Balfour Declaration November 2, 1917, https://avalon.law.yale.edu/20th_century/balfour.asp (last visited Jan 7, 2024).

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

Once Chaim Weizmann, leader of the Zionists, arrived in Palestine in March 1918 (a few months after Palestine came under the military occupation of Great Britain), however, 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,[65] until the effective date of the Palestine Mandate, September 29, 1923.[66] 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,[67] which both the Ottoman Empire and Great Britain had ratified prior to World War I,[68] 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," a duty that the British military in Palestine duly understood and recognized as binding.[69]

Weizmann, however, believing that the Balfour Declaration had placed Palestine under the control of the Zionists,[70] chafed at these restrictions, and lobbied the British to ignore these

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[65] KATTAN, *supra* note 48 at 81–82.

[66] See n.33, *supra*.

[67] 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. The Hague, 29 July 1899., https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899 (last visited Mar 17, 2024).

[68] KATTAN, *supra* note 48 at 81.

[69] *Id.* at 82.

[70] 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), https://doi.org/10.1093/acprof:oso/9780199540839.003.0005 (last visited Jan 7, 2024).

restrictions and change immediately local laws to facilitate the Zionist project.[71] 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 their "attempts to force the hand of the Administration" into "bend[ing] the rules of international humanitarian law, in particular the principle enshrined in Article 43 of the Hague Regulations" requiring the occupying power to respect the status quo.[72] As would occur with increasing frequency in the Zionist-Palestinian conflict, however, Zionist lobbying succeeded in persuading Great Britain to ignore the limitations of Article 43.[73]

There is good reason to believe that Zionist attitudes toward partition generally, and Resolution 181, were no different to their attitudes toward the terms of Palestine Mandate: accept whatever advantages it granted the Zionist movement, but reject any limitations it imposed, create "facts on the ground," and then compel the international community to acquiesce to those facts. When the Peel Commission cautiously proposed partition in 1937, Ben Gurion saw it is a first step toward the "conquest" of Palestine in its entirety.[74] 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.[75]

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[71] 8 CHAIM WEIZMANN, THE LETTERS AND PAPERS OF CHAIM WEIZMANN 200 (Meyer W. Weisgal, Dvorah Barzilay, & Barnet Litvinoff eds., 1977); KATTAN, *supra* note 48 at 84.

[72] KATTAN, *supra* note 48 at 84.

[73] *Id.* at 83.

[74] TOM SEGEV, A STATE AT ANY COST: THE LIFE OF DAVID BEN-GURION 81 (First American edition. ed. 2019).

[75] According to Segev, Ben Gurion wrote in his diary, after reading the Peel Commission report, "'compulsory transfer,' underlining the words in his diary." *Id.* at 82.

There is no reason to believe that the Jewish Agency's acceptance of Resolution 181 was any less strategic than Ben Gurion's approach to the Peel Commission's suggested partition: accept what it gave the Zionists, but reject its limitations. Despite the doubt surrounding the bindingness of Resolution 181 under international law,[76] Ben Gurion had made it plain to the United Nations Special Committee on Palestine ("UNSCOP") that he would view a UN-endorsed partition of Palestine to be a "decision" which, if the Arabs rejected it, would authorize the Yishuv to use military force against them.[77] 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.[78]

When the Arabs rejected the proposed partition, in no small part because of its grossly inequitable terms and possibly unlawful terms,[79] rather than using Resolution 181 as a basis for

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[76] 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 48 at 155 (quoting the noted American scholar of international law and judge on the International Court of Justice, Phillip Jessup, as describing Resolution 181 as merely a "recommendation"); CRAWFORD, *supra* note 18 at 431 (concluding Resolution 181 was only a "recommendation").

[77] IMSEIS, *supra* note 2 at 104.

[78] Albert Hourani, *The Case against a Jewish State in Palestine: Albert Hourani's Statement to the Anglo-American Committee of Enquiry of 1946*, 35 JOURNAL OF PALESTINE STUDIES 80, 81 and 87 (2005); GEORGE ANTONIUS, THE ARAB AWAKENING: THE STORY OF THE ARAB NATIONAL MOVEMENT 410–11 (2010); KATTAN, *supra* note 43 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.").

[79] KATTAN, *supra* note 48 at 151–52 (the plan proposed to give almost 60% 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-

negotiations, the Yishuv launched a war of conquest, just as Ben Gurion had told the UNSCOP it would.[80] Ben Gurion implemented his policy of "compulsory transfer" of Arabs from the territory that the Yishuv's military conquered.[81] 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 guarantees of minority rights,[82] a proposal that mirrored Arab proposals for Palestine.[83] By that time, however, the Yishuv was well on its way to conquering most of Palestine and ignored US calls for a trusteeship, having established a de facto partition by force of arms.[84]

c. Conclusion

Israel would later claim that Resolution 181 was binding,[85] but neither the Yishuv nor Israel after its independence respected either the proposed territorial limits of the Partition Plan, or its

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third of the population and it barely owned 10% of the land) and 156–66 (noting that it 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 45 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.'").

[80] See generally, KATTAN, *supra* note 43, Chapter 7.

[81] *Id.* at 190–91 (Ben Gurion complaining in a December 1947 speech that Resolution 181 left too many Arabs in the territory of the Jewish state, which needed to have a population of at least 80% 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).

[82] *Id.* at 166–68.

[83] *Id.* at 149.

[84] *Id.* at 68.

[85] *Id.* at 155.

substantive requirements, e.g., that the Jewish state adopt a written constitution that fully protected minority rights.[86] Its indifference to minority rights was most clearly evidenced in its expulsion of Arabs in the territory that fell under its control,[87] whether Resolution 181 had allocated that territory to the Jewish state *or* to the proposed Arab state,[88] including territories that it conquered in the weeks *prior* to the declaration of Israeli statehood and the intervention of the military forces from neighboring Arab states.[89]

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.[90] Accordingly, whenever they had the effective power to ignore internation law, they did. By expelling most of Palestine's Arabs from the territories that it

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[86] See, Part B, "STEPS PREPATORY TO INDEPENDENCE," Partition Plan, *supra* note 55.

[87] See, Chapter 2, *Id.*

[88] KATTAN, *supra* note 43 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).

[89] 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.

[90] "Declaration of Israel's Independence, 1948 | American Experience | PBS," accessed January 3, 2024, https://www.pbs.org/wgbh/americanexperience/features/truman-israel/ (Jewish National Council asserting its authority to act based on both the United Nations' 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").

conquered, and confining them to 22% 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 promise given to the people of Palestine, a promise international law described as "a sacred trust of civilization."

4. 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 their declaration of Israel's independence on May 14, 1948.[91] In the Zionists' recitation of these facts, however, these documents are taken as evidencing *recognition* of an already existing right that the Jewish people have to Palestine independent of these instruments. These instruments, from the Zionist perspective, are not constitutive of Israel's legitimacy but only confirm it.

The legal immateriality of the substantive terms of these instruments from the Zionists' vision is further evidenced by what they omitted from Israel's 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,[92] the Zionists set out no reasons for separating from the government of Palestine. Rather, they simply do not recognize its existence as a legal person. Instead, they read Resolution 181 as recognizing their inalienable right to a Jewish nation state in Palestine – understood as an ungoverned geographic space not as the

[91] *Id.*

[92] Declaration of Independence: A Transcription, NATIONAL ARCHIVES (2015), https://www.archives.gov/founding-docs/declaration-transcript (last visited Mar 19, 2024).

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."[93]

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 obtained in Palestine.[94] When it is pointed out that Israel did not confine itself to the territorial limits of Resolution 181, some apologists for Israel invented the dubious legal category of "defensive conquest" to justify not only the Yishuv's, and after May 14, 1948, Israel's, excursions into, and annexation of, territory allocated to the Arab state under Resolution 181.[95] 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.[96] 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, and then adding tendentiously, "as do most other states in the world."[97]

While Stone's statement has the virtue of greater honesty with respect to the events of 1947-48 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

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[93] Declaration of Israel's Independence, 1948 | American Experience | PBS, *supra* note 90.

[94] Feldman, *supra* note 13 ("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.").

[95] KATTAN, *supra* note 48 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.

[96] *Id.* at 180.

[97] JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 59 (1981).

the imperial powers of the global north. The majority of post-colonial states, including the post-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. Nevertheless, the post-colonial states, in reliance on the *Uti Possidetis Doctrine*, and to vindicate the Article 2 principles of the Charter,[98] accepted those boundaries as legitimate *unless* the state parties freely consented to change those boundaries.[99]

Accordingly, once Resolution 181 is excluded as plausible grounds for Israel's statehood, we are left with trying to determine the basis for Israel's statehood. 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 United Nations 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 used the term "conquest" explicitly in describing Zionist ambitions to take control of Palestine in the name of the Jewish people. Likewise, the Jewish National Fund expressly used the term "legal conquest" to describe the

[98] United Nations, *supra* note 14.

[99] Giuseppe Nesi, *Uti Possidetis Doctrine*, OXFORD PUBLIC INTERNATIONAL LAW, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1125?prd=MPIL (last visited Feb 19, 2024).

basis for Israel's claim to sovereign right over the territory it controlled.[100] The demographic composition of the Yishuv lends further support to theory of conquest: of the 300,000 Jews in Palestine in 1947, only a third were Palestinian nationals. The other two-thirds were, legally, foreigners, i.e., nationals of states other than Palestine, and therefore could not plausibly claim to be asserting any right of self-determination against the government of Palestine.[101] If the Yishuv and later Israel rests 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.

International law by 1947-49, however, had already rejected the idea of "legal conquest," first with the Kellogg-Briand Pact of 1928,[102] and the Charter's rejection of the use of force to settle international disputes.[103] Even if one were to take the view that the Kellogg-Briand Pact and the Charter 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 was bound by the rule prohibiting conquest, Art. 2(6) of the Charter compelled the United Nations to "ensure that states which are not Members of the United Nations act in accordance with these Principles

[100] § 6, *The Conciliation Committee for Palestine*, Committee on the Exercise of the Inalienable Rights of the Palestinian People, General Assembly of the United Nations, *Right of Return of the Palestinian People*, https://www.un.org/unispal/document/auto-insert-210170/ (last visited Mar 19, 2024) ("Legal conquest of territory is a powerful factor in determining the frontiers and the sovereignty of a state.").

[101] Kattan, n.48, *supra*.

[102] Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy (the "Kellogg-Briand Pact of 1928"), https://avalon.law.yale.edu/20th_century/kbpact.asp (last visited Mar 19, 2024).

[103] Art. 2(4), United Nations, *supra* note 14.

so far as may be necessary for the maintenance of international peace and security."[104] 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, and indeed, when Truman initially recognized Israel in 1948, he did so on a de facto basis, and on the expectation, given by the representative of the de facto government of Israel at the time, that Israel would respect the boundaries of the UN Partition Plan.[105]

The secessionist theory also suffers grave difficulties. In addition to the already-cited problem that only a minority of the Yishuv's population were nationals of Palestine, secession is, except for colonized populations or populations under foreign domination, illegal under international law.[106] Some commentators have also recognized a right to secede in circumstances where the government of a state does not represent the whole of the people such that "a people is blocked from the meaningful exercise of its right to self-determination internally."[107] 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

[104] Art. 2(6), *Id.*

[105] KATTAN, *supra* note 48 at 233. Ironically, it was the Soviet Union that first recognized Israel as a de jure state. Kattan at 234.

[106] 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/ (last visited Mar 19, 2024) (unilateral secession under international law illegal except in the case of a people under colonial or foreign domination).

[107] Reference Re Secession of Quebec, 2 S.C.R. 217 (1998) at ¶ 134.

government,[108] 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.[109]

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 does not exhaust the questions of the legitimacy of the means by which that state came into existence.[110] 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.[111] Because neither conquest nor unilateral secession is a de jure means for

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[108] Hourani, *supra* note 80 at 87 (under 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.").

[109] *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at ¶ 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").

[110] James Crawford, *State*, OXFORD PUBLIC INTERNATIONAL LAW, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1473?prd=OPIL (last visited Mar 19, 2024) at ¶¶ 13-14.

[111] Reference Re Secession of Quebec, *supra* note 106 at ¶ 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.").

becoming a state, Israel's statehood, and the territory to which it exercises sovereign right, depended largely on recognition of its political effectiveness by other states in the international community.[112] 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.[113]

Accordingly, Israel's best argument for the recognition of its conduct in becoming a state is its admission to the United Nations. On careful inspection, however, Israel's admission to the United Nations 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 had been expelled or fled. 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 honor them."[114] Transcripts of debates from the time[115] make clear that Israel acknowledged that the issues set forth in those resolutions – its frontiers, its internal constitution and the rights of the

[112] KATTAN, *supra* note 48 at 244–45.

[113] *Id.* at 245–47.

[114] UN. General Assembly (3rd sess. : 1948-1949 : Paris, Etc), *Admission of Israel to Membership in the United Nations.* (1949), https://digitallibrary.un.org/record/210373 (last visited Feb 6, 2024).

[115] V. *Israel and the Right of Return*, General Assembly of the United Nations, *supra* note 100 ("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.").

Palestine's Arab refugees – were not an internal matter for Israel to determine based on its sovereignty.[116]

Israel's recognition, therefore, was conditioned on a 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"),[117] transferring confiscated properties to the Jewish National Fund to administer them for the exclusive benefit of Jews,[118] and denationalizing the Arabs it had expelled[119] – were all in violation of the spirit, if not the letter, of its representations to the UN when it gained admission to that body.

5. Israel, Palestine and the Foundations of International Law: Law making by Law Breaking?

The Charter of the United Nations 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.[120] It is not obvious, however, what it means to subject sovereign states to the rule

[116] Art. 7, United Nations, *supra* note 14 ("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").

[117] Absentees' Property Law, 5710-1950, https://www.un.org/unispal/document/auto-insert-209845/ (last visited Jan 20, 2024).

[118] Sabri Jiryis, *The Legal Structure for the Expropriation and Absorption of Arab Lands in Israel*, 2 JOURNAL OF PALESTINE STUDIES 82 (1973).

[119] United Nations High Commissioner for Refugees, *Refworld | Israel: Nationality Law, 5712-1952*, REFWORLD, https://www.refworld.org/docid/3ae6b4ec20.html (last visited Jan 4, 2024).

[120] Art. 1(1), Nations, *supra* note 49 ("to maintain international peace and security . . . in conformity with the principles of justice and international law").

of law. The great German legal theorist, Hans Kelsen, identified and attempted to answer the apparent paradox of international law by reconciling the idea of sovereignty to legality.[121] For Kelsen, the answer lies in properly limiting the domain of sovereignty to a state's domestic legal order. 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 its internal law. 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 understood as exercising autonomy equally with respect to their own domestic legal orders.[122] Kelsen proposed two arguments for reconciling the sovereignty of the national legal order to the sovereignty of international law: the first anchors the bindingness of international law in the law of the national state recognizing international law ("the primacy of national law" view); and, 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).[123] Both accounts allow for a conception of sovereignty that is

[121] See, for example, Hans Kelsen, *THE PRINCIPLE OF SOVEREIGN EQUALITY OF STATES AS A BASIS FOR INTERNATIONAL - ORGANIZATION*, 53 THE YALE LAW JOURNAL 207 (1944).

[122] *Id.* at 208 ("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 the national law of any other State.").

[123] 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 (1959).

constituted by the rules of both national and international law, and crucially, excludes a conception of sovereignty based on power that floats *above* legal rules, whatever their source.[124]

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.[125] Kelsen was a liberal democrat who fled Nazi Germany and was committed to constraining the arbitrary power of the state.[126] For his critics, however, the pure theory of law, because its conception of law was purely formal, failed in that aim.[127] 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

[124] Kelsen, *supra* note 119 at 208 (criticizing power-based conceptions of sovereignty as "metaphysical" and not "scientific" and based on a confusion between theology and political science).

[125] Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARVARD LAW REVIEW 44, 44 ("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.") (1941).

[126] HERMANN HELLER, SOVEREIGNTY: A CONTRIBUTION TO THE THEORY OF PUBLIC AND INTERNATIONAL LAW 68 (David Dyzenhaus ed., Belinda Cooper tran., First edition ed. 2019), http://myaccess.library.utoronto.ca/login?url=https://www.oxfordscholarship.com/view/10.1093/oso/9780198810544.001.0001/oso-9780198810544 (last visited Aug 10, 2020).

[127] DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN, AND HERMANN HELLER IN WEIMAR 173 (1999), https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780198298465.001.0001/acprof-9780198298465 (last visited Jul 14, 2021).

capture of the state's law-making apparatus.[128] Herman Heller, Kelsen's social democratic critic on the left, by contrast, feared that Kelsen's content-less legal positivism would sap the capacity of democratic forces to defend the state against authoritarian capture.[129]

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 the relationship of sovereignty to international law, on the one hand, and the relationship of politics to international law on the other. The Charter, and the system of international law it enshrines as the touchstone of international legality, is a quintessentially liberal Kelsanian project which aimed to tame state sovereignty through law.[130] 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, it would seem that the the indeterminacy of international law[131] renders it even more susceptible

[128] *Id.* at 73–76 (explaining Schmitt's reading of the Weimar constitution's provision on presidential powers in an emergency invited the restoration of dictatorship).

[129] *Id.* at 163, and 173–74.

[130] HELLER, *supra* note 126 at 22–23.

[131] Art. 36, Statute of the Court Of Justice | INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/statute (last visited Mar 20, 2024) (setting out the sources of law the International Court of Justice may use to settle an international dispute).

to exploitation by actors that reject the normative project of international law as a restraint on arbitrary state power in the international arena.[132]

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, but particularly, Great Britain in the interwar period and now the United States, to recognize its actions, or at least to acquiesce in them. Despite Israel's statehood arising either as an illegal act of conquest, or an illegal secession, Israel successfully obtained the recognition of the former colonial powers, thereby ratifying, ex post, Israel's exceptional conduct, whether characterized as conquest or unilateral secession.[133]

Israeli exceptionalism is so normalized among western commentators that even when it is recognized, it can be quickly forgotten.[134] The normalcy of Israel's exceptionalism 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 the continued salience of Palestine 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.

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[132] Israel Does Not Have a Sovereign Claim to the West Bank, *supra* note 105 (describing brief setting forth basis for 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.").

[133] *Id.*

[134] James Crawford, despite characterizing Israel as having been established by unilateral secession nevertheless stated, categorically, that the UN has refused to admit any state that came into existence through unilateral secession, forgetting the example of Israel. CRAWFORD, *supra* note 18; Israel Does Not Have a Sovereign Claim to the West Bank, *supra* note 106.

Although Heller mocked Kelsen's notion of international law "authorizing" national legal orders as a view thoroughly detached from reality,[135] Heller's social conception of law as an "intersubjective, normative binding of wills,"[136] offers an explanation for how the Kelsenian institutions of the United Nations, which are generally thought to be toothless, has allowed Palestine to survive, despite the overwhelming disparity in power between it and the Zionist movement.

Both Schmitt and Heller agree that Kelsen's attempt to reduce sovereignty to law by removing power from the law is deeply mistaken. And they both agree that it is a feature of sovereignty that it can, at times, act *against* the positive law.[137] 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.[138] 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.

For Heller, in contrast to Kelsen, these basic normative principles are not only logically superior to the individual positive rules, they are *morally* and *politically* superior to the positive

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[135] HELLER, *supra* note 127 at 145 (observing in 1927, prior to the Kellogg-Briand Pact, that "International law offers every international person the opportunity to rid itself of all its legal obligations towards other international law persons by completely eradicating the other persons.").

[136] *Id.* at 143.

[137] DYZENHAUS, *supra* note 125 at 73–74 (attributing to Schmitt the view that the liberal attempt to control sovereignty through a closed system of norms is futile); HELLER, *supra* note 124 at 19–20 (quoting Heller for the proposition that sometimes the sovereign must "act against the law").

[138] DYZENHAUS, *supra* note 127 at 173–74.

legal rules as well.[139] The fatal defect of Kelsen's pure theory of law, at least from Heller's perspective, was its failure to account for the normative dimension of law, i.e., the difference between validity and legitimacy.[140] It is law's normative dimension that generates the "intersubjective, normative binding of wills" that makes law and sovereignty possible. Accordingly, while a Schmittian sovereign is unconstrained when exercising the sovereign prerogative of the exception by any objective morality,[141] the Hellerian sovereign acts against the positive law in furtherance of the higher-order normative principles already immanent in the legal order itself.

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 acquisition of territory by force or even the complete destruction of a legally recognized international person, can be rendered valid ex post, if the act is effective and obtains widespread recognition ex post. From this perspective, Israeli conceptions of international law and right are continuous with Theodore Herzl's 19th century conception of international law as one in which

[139] For Kelsen, by contrast, all legal norms were equally valid regardless of the position they occupied in the logical hierarchy of legal rules. *Id.* at 162 and 164–67.

[140] *Id.* at 165.

[141] *Id.* at 164.

"might precedes right."[142] 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.[143]

From the perspective of Palestine, the hierarchy of international law's rules, by contrast *is* relevant, because its arguments rely on the immanent morality of foundational principles of international law, such as the territorial integrity of states, self-determination, and the inadmissibility of territory acquired by conquest and assume their superiority over principles such as effectiveness. Palestine's claims to statehood, despite its failure to satisfy the Montevideo effectiveness factors or other empirical indicia of statehood, can also be said to be contrary to the positive rules of international law;[144] however, they are 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."[145] Indeed, if it is the case, as Crawford puts it, that

> "Palestine [is] an entity which is not sufficiently effective to be regarded as independent, but whose people is entitled to self-determination . . . . In such cases, should international law treat as having been done that which ought to be done?"[146]

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[142] THEODOR HERZL, THE JEWISH STATE 76 (Alex Bein & Louis Lipsky eds., 2008), https://www.gutenberg.org/ebooks/25282 (last visited Jan 7, 2024).

[143] DYZENHAUS, *supra* note 127 at 54, 56–57.

[144] James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUROPEAN JOURNAL OF INTERNATIONAL LAW 307 (1990) (noting the utter empirical plausibility of the Palestinian claim to statehood).

[145] HELLER, *supra* note 126 at 174.

[146] CRAWFORD, *supra* note 18 at 438–39.

Crawford here nods to the Schmittian trapdoor 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 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;[147] nevertheless, the higher order principles of international law demand that its statehood *should* exist.

In this context, Heller's conception of sovereignty does important normative and explanatory work. From the normative perspective, 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. From the political perspective, a Hellerian approach 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 a distortion of law's neutrality.[148] 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 the face of those who would wield power in an arbitrary and personalistic manner.

[147] Crawford, *supra* note 144 at 309.

[148] *Id.* at 307.

Palestine's political and legal strategy to obtain recognition as an independent sovereign state[149] would be futile, of course, if it were based *only* on appeal to the normative ideals of international law. After all, these were insufficient to save it in 1947-49 from destruction at the hands of the Zionist project. What has kept Palestine alive is the existence of a broad coalition of actors – what Heller calls the "intersubjective, normative binding of wills" – that support its claim to independence. The importance of the United Nations, and the formal legal order it promotes, even if it seems toothless, and remains vulnerable to the powerful 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 Palestine, but also of non-government organizations, judiciaries and even dissident officials within the bureaucracies of states that are otherwise hesitant to give up the prerogatives of power.[150]

The capacity for modern international law to generate a broad "intersubjective, normative binding of wills" that Heller thought necessary "to prevent lawmaking by lawbreakers"[151] is

[149] QUIGLEY, *supra* note 45 at 137–48; 164–65; 193–94; 194–206; and, 198–200 (discussing Palestinian legal arguments and diplomatic efforts to obtain recognition of its independence within the UN system). The State of Palestine has also entered numerous international treaties, including, the International Covenant on Civil and Political Rights, OHCHR, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (last visited Feb 18, 2024), the International Covenant on Economic, Social and Cultural Rights, OHCHR, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (last visited Feb 18, 2024), and the Rome Statute of the International Criminal Court, State of Palestine | International Criminal Court, https://asp.icc-cpi.int/states-parties/asian-states/Palestine (last visited Mar 22, 2024).

[150] IMSEIS, *supra* note 2 at 9 (discussing the counterhegemonic potential of the United Nations).

[151] HELLER, *supra* note 126 at 174.

perhaps most powerfully evidenced in South Africa's genocide case against Israel.[152] That suit was itself only possible because of the post-World War II convention prohibiting genocide.[153] The International Court of Justice, by an overwhelming 15-2 vote majority that included the American president of the Court,[154] ordered provisional measures to prevent the plausible risk of genocide from taking place in Gaza.[155] The *erga omnes partes* character of the obligations in the Genocide Convention[156] gave the ICJ's order a universal legal effect, vindicating Kelsen's contention regarding the importance of an international court for the integrity of international law.[157]

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 international law generates this "intersubjective, normative binding of wills," is by enlisting national courts to vindicate international law. As international treaties become incorporated into the domestic legal systems of state parties or are otherwise reflected in various states' domestic legal systems, broad

[152] The Republic of South Africa, *supra* note 4.

[153] Genocide Convention, *supra* note 5.

[154] Press Release, "The Court indicates provisional measures," https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-pre-01-00-en.pdf.

[155] APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP (South Africa v. Israel), (2024), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf.

[156] Oona Hathaway & Alaa Hachem, *The Promise and Risk of South Africa's Case Against Israel*, JUST SECURITY (2024), https://www.justsecurity.org/91000/the-promise-and-risk-of-south-africas-case-against-israel/ (last visited Mar 21, 2024).

[157] Kelsen, *supra* note 121 at 213.

coalitions of citizens can bring actions in local courts to enforce international law. For example, on the same day that the ICJ ordered provisional measures, a United States district court judge held hearings in a suit brought against President Biden by an international non-governmental organization, Defense for Children International – Palestine, alleging that his support of Israel's war in Gaza violated the Genocide Convention.[158] While the court dismissed the suit under the 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 President Biden to change course.[159] Now, on appeal before the Ninth Circuit, a group of seventeen former US government civilian and military officials have submitted an amicus curiae brief asking the court of appeals to reinstate the lawsuit, arguing that the political question does not apply to a case where a clear legal rule – the prohibition of genocide – applies.[160]

[158] Defense for Children International-Palestine v. Biden | United States Courts, https://www.uscourts.gov/cameras-courts/defense-children-international-palestine-v-biden (last visited Mar 21, 2024).

[159] *Defense for Children International – Palestine et al., v. Joseph R. Biden et al.,* (N.D. Cal., Jan. 31, 2024), at p. 8 ("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.")

[160] BRIEF OF *AMICI CURIAE* FORMER DIPLOMATS, SERVICEMEMBERS AND INTELLIGENCE OFFICERS IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL, DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE v. BIDEN ET AL., IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, March 15, 2024, Case No. 24-704 at 11 (the political question doctrine "does not impede courts' authority to ensure that the political branches' conduct of foreign affairs conforms to the law.")

In Canada, Palestinian Canadians, supported by various non-governmental organizations, have brought suit under the *Export and Imports Permits Act*[161] against the Canadian government seeking to prevent it from transferring arms to Israel.[162] Meanwhile, governments and firms, even in the global north, have also taken steps to comply with the ICJ's order.[163]

6. Conclusion

The unresolved Zionist-Arab, and then the 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 of the nature of international law. This Essay argues that it is no accident that the

[161] See S. 7.3(1)(b)(i),(ii) and (iii), RSC 1985, c E-19 | Export and Import Permits Act, https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-e-19/latest/rsc-1985-c-e-19.html (last visited Mar 21, 2024) (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 "constitute an offence under international conventions").

[162] 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 (last visited Mar 21, 2024).

[163] See, for example, 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/ (last visited Mar 21, 2024). 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/ (last visited Mar 21, 2024); Canada stops arms sales to Israel: Who else has blocked weapons exports? | Israel War on Gaza News | Al Jazeera, https://www.aljazeera.com/news/2024/2/15/which-countries-have-stopped-supplying-arms-to-israel (last visited Mar 21, 2024).

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. The arguments that are presented by the various protagonists, moreover, illustrate the salience of otherwise obtuse 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 the furtherance of the interests of sovereign states, and elevates a marginal principle of international law – effectiveness – into a central tool to change the law through a strategy of law breaking followed by recognition.[164] 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 "vehement" refusal of the relevant powers to cooperate to secure it, that simply reflects the tragedy of international law as an undeveloped system of law that has no systematic means to resist determined law breakers other than power. 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 will in furtherance of the law's immanent principles. 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,[165] but fails to accept the political conclusion that follows from this precept. Palestine advocates actuate this equitable

[164] CRAWFORD, *supra* note 18 at 429 (despite granting the "substantial" argument that the Palestine Mandate was a facial violation of Article 22 of the Covenant of the League of Nations, it would have nonetheless become valid by virtue of the member states of the League recognition of it in practice).

[165] A.H. OOSTERHOFF, ROBERT CHAMBERS & MITCHELL MCINNES, OOSTERHOFF ON TRUSTS 815 (9th ed. 2019).

principle through another equitable precept – no trust fails for a want of a trustee[166] – 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 "the sacred trust of civilization."

[166] RESTATEMENT (THIRD) OF TRUSTS § 31 (2003).