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Palestine, the UN and International Legal Subalternity

Ardi Imseis discusses his work on the United Nations and the question of Palestine with John Reynolds of the TWAIL Review editorial collective.

Ardi's new book *The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity* (Cambridge University Press, 2023) draws on TWAIL ideas and scholarship to examine the UN's management of the question of Palestine and to interrogate the received wisdom of the UN as the standard-bearer of the international rule of law.

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John: In examining the role of the UN in the question of Palestine since the 1940s, you suggest that there has been 'a vacillating gulf' between the claims and requirements of international law on one hand, and the positions adopted by the UN on the other. What forms has that taken, how has it played out?

Ardi: The starting point of the book is the widely held representation and belief that the UN is the standard bearer of the rules-based international legal order. This is something that has regularly been proclaimed by a succession of Secretaries-General of the Organization, to say nothing of being propagated throughout the UN Charter system. Based upon a close examination of the UN record, however, as well as my own first-hand 12-year career as a UN Official in occupied Palestine, my book interrogates this received wisdom by demonstrating that there exists a vacillating gulf between what international law requires and what the UN has actually done on the question of Palestine when it has mattered most. The forms this gulf has taken have been varied. They include both actions and omissions, they cover a variety of sub-sets of international law and practice, and they span an unusually long period of time, from 1947 to the present. Despite the breadth and expanse of this sordid story, it is marked

by a singular experience of Palestine and its people: to have been consigned to a seemingly permanent state of deprivation and disenfranchisement in the international legal order.

Following a brief international legal history of Palestine during the interwar years (chapter 2), the book examines four key moments in the UN's handling of the question of Palestine. The analysis of the 1947 UN plan of partition and the work the UN Special Committee on Palestine (UNSCOP) is probably the most important of the empirical chapters (chapter 3). This is because those fateful actions led to the imposition, in both normative and discursive legal terms, of the two-state paradigm that would thereafter underpin the UN's position on the question of Palestine – a paradigm that was, and continues to be, inherently inequitable for Palestine's subaltern natives. It shows that although partition violated the prevailing law and practice on self-determination of peoples in class A mandated territories, and it displayed an unadulterated contempt for principles of democracy, it was driven by hegemonic European states and their settler-colonial affiliates who wished to rectify Europe's centuries-old Jewish question in the wake of the Holocaust. The result was for the UN to have reified Palestine's contingent status on the international legal plane, with consequences that helped pave the way for the 1948 Nakba.

Another demonstration of Palestine's contingent status emerged with the UN's creation of a distinctive institutional and normative regime for the Palestinian refugees following the 1948 Nakba (chapter 4). This was in the form of two subsidiary organs of the General Assembly – the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) – aimed at providing protection and assistance, including a search for durable solutions, to their plight. This chapter juxtaposes that regime against the international institutional and normative regime applicable to all other refugees in the world, as administered by a third subsidiary organ of the UN, the United Nations High Commissioner for Refugees (UNHCR). While the received wisdom holds the special regime for Palestinian refugees out as demonstrative of the UN's unique responsibility for their plight, a critical examination of the UN record reveals that it was never intended to give effect to Palestinian refugee rights as established under prevailing international law, including as affirmed by the UN itself, the negative consequences of which remain in place to this day.

Yet another example of Palestine's enervated status in the international legal order is found in the UN's position on the OPT in the post-1967 era (chapter 5). Conventional wisdom presents the UN's copious documentation of the human rights and humanitarian law violations in the OPT as demonstrative of the Organization's commitment to supporting Palestinian legal rights, including to self-determination. The fact that this has taken place largely as a result of the effect of decolonization and the rise of the Third World in the Organization would suggest a trajectory of gradual empowerment for Palestine. Nevertheless, under this approach, the UN has satisfied itself merely with documenting a wide variety of discrete violations by Israel, the occupying power, of international humanitarian and human rights law in the OPT without definitively addressing the legality of the very regime giving rise to those violations themselves. Instead, the UN has insisted on negotiations as the only means through which the occupation can be brought to an end, despite the plethora of evidence in its own record to demonstrate that the occupation is itself unlawful and therefore must be ended forthwith and unconditionally.

A final example of Palestine's contingency on the international legal plane concerns its 2011 application for UN membership. UN admission has long been marked by a liberal, flexible and permissive interpretation of the test for membership in Article 4(1) of the UN Charter. In contrast, an assessment of the UN Committee on Admission's consideration of Palestine's 2011 application demonstrates that it was subjected to an unduly narrow, strict and resultantly flawed application of the Article 4(1) criteria. An examination of the contemporaneous debates of the Security Council demonstrates that the main driver of this approach was the United States, which used the legal authority vested in it as a permanent member of the Council to block membership for political reasons thinly veiled as sound legal ones. Despite the General Assembly's 2012 upgrade of Palestine's status to non-member observer state, failure to secure full membership of the UN has only further disenfranchised Palestine in international law and world order.

John: Your central argument then, as I read it, is that this tension between normative promise and political practice creates a situation whereby the UN is not so much the guardian of an international rule of law, but the purveyor of an international rule *by* law. The UN provides a mirage of international justice to the global underclass, but repeatedly withholds the possibilities for this to be made real. This produces what you describe as a long-range condition of 'international legal subalternity' – what do you mean by this?

Ardi: Your question captures the essence of it. The UN's purported role as the guardian of the international legal order means that its actions should always be consistent with the international rule *of* law. Under the rule of law framework, all subjects of the international system – including States, individuals, and the UN itself – are to be held to the same legal standards, as applicable, without regard to their relative power or station. What the case of Palestine demonstrates, however, is that the UN has all too often been governed by a rule *by* law framework, which has been characterized by the exercise of power in an arbitrary, *ad hoc* or purely discretionary manner, including on the basis of political preferences or ideology. In this sense, law becomes a tool to further the interests of power under the guise of legality, while encouraging and relying upon double-standards in its application or non-application.

In turn, the rule by law framework ultimately produces a condition that I have identified as international legal subalternity, the defining feature of which is that international law is repeatedly held out by the UN to the global underclass as offering a promise of delivery from injustice, but its activation is repeatedly and paradoxically withheld through operation of the Organization itself. To my mind, no other case exemplifies this condition better than that of Palestine and its people. At the same time, when its essential features and operation are considered, international legal subalternity is clearly an affliction that impacts other subaltern groups. Although the book does not go into great depth about these other examples, it briefly highlights the situation of refugees, indigenous peoples, internally displaced persons, and persons subjected to slavery.

The structure of international legal subalternity is characterized by three cross-cutting and related themes. I examine these themes through a TWAIL lens, and they will be readily cognizable by your readership. First, is the theme of the Eurocentricity of the modern international legal order, rooted in Europe's imperial and colonial past. Second, is the theme of the circumscribed nature of Third World sovereignty and international legal personality in the post-decolonization era. Third, is the theme of neo-imperial power and the role it has played in perpetuating the contingency and marginalization of global subaltern classes in the contemporary period. These themes run like a thread, to varying degrees and across time, through the problems that legal subalterns face on the international plane today. And the challenge for us is to figure out ways of confronting the condition of international legal subalternity while being mindful of its structural and continuing character.

John: You refer to 'TWAIL's blind spot' in the context of international legal subalternity – suggesting that due to its insistence for the most part (in spite of its own structural critiques) on the counter-hegemonic potential of international law, TWAIL literature may suffer from a blind spot of sorts?

Ardi: Indeed. For all of its vital critique of the history and praxis of public international law from the standpoint of the global south, TWAIL's blind spot appears to be that it has yet to identify and name the common condition that afflicts those whom its progenitors wish to liberate from the shackles of international law's violence. What's more, in its interrogation of the tension between law as the tool of hegemony and law as holding some form of counter-hegemonic promise for subaltern classes, TWAIL appears to have failed to appreciate that this common condition is in fact a fixed feature of the international legal order, one that cannot be eradicated. This derives from the fact that although some change in international law can be brought about through the creative use of elements of that law to challenge it on its own terms, as new law is created, and the position of global subalterns is either wholly or partially assuaged, new subalterns invariably emerge who were never part of the initial equation, and whose legal contingency *vis à vis* the new law must then be addressed. What we are left with is a cycle of law-making and law-challenging that transfers the burden of legal contingency from one group to another, but never really comes to a close itself. This is why I have concluded – on the basis of the example provided by the UN's management of the question of Palestine over various time periods and political paradigms – that international legal subalternity is a long-range condition and a fixed feature of the international legal order.

John: You make the point that the UN has presided over both the unmaking of Palestine (its attempted partition, military conquest, depopulation and political effacement between 1947 and 1967) and its qualified re-emergence, at least in truncated, fragmented and subjugated form (in the occupied Palestinian territory post-1967). One of the core arguments you put forward in this context is about the illegality of Israel's continued presence in the 1967 territories. This is also now the question pending before the International Court of Justice. Why did you feel it was important to zoom in on this element, what is the basis for the occupation's illegality as you see it, and what are the implications of the illegality?

Ardi: The reason why I felt it important to address the issue of the legality of Israel's occupation of the OPT is because since 1967 the UN has taken what I call a managerial

approach to the issue rather than an emancipatory one. As noted above, this has entailed the documentation of discrete violations by the occupying power of international humanitarian and human rights law in the OPT without paying sufficient attention to the legality of the very regime giving rise to those violations themselves. Rectification of Israel's respect for IHL and IHRL would not necessarily lead to an end of the occupation. In contrast, a determination that the occupation is in itself an internationally wrongful act would help in this regard. General Assembly resolution 77/247 of 30 December 2022 was therefore a watershed moment for having put the question of the legal status of Israel's 'temporary' 56-year occupation of the OPT before the ICJ. This resolution did not come out of the blue, however, as a number of others – academics and UN special procedures – have in recent years argued that Israel's occupation is unlawful and have encouraged recourse to the Court to confirm it. I did this in an article I wrote in 2020 in the *European Journal of International Law*, which forms the basis of chapter 5 of my book.

Some regard Israel's occupation of the OPT as unlawful *ab initio* because it was the result of an impermissible use of force in 1967. I sympathize with this view, but because the UN record is silent on who was legally to blame for beginning the war in 1967, one must find another way to arrive at the same conclusion if recourse is to be had to the ICJ on the matter. To that end, building on the growing literature in the area, I argue that the occupation is illegal because over time it has become inextricably connected to the violation by the occupying Power of three *jus cogens* norms, derogation from which is not permitted: (1) the inadmissibility of the acquisition of territory through the use of force; (2) the violation of the right of peoples to self-determination; and (3) the imposition of a regime of widespread and systematic racial discrimination and/or apartheid. Since 1967, the UN record is replete with evidence of Israel's violations of all three of these norms. Today, it begs incredulity to suggest that a situation that is meant to be temporary and provisional, and which is existentially reliant of the violation of these core peremptory norms, can in any way be lawful. The implications of this would be considerable as under the law of state responsibility Israel would be required to withdraw from the OPT immediately, unconditionally and totally if its presence in that territory were to be declared to be illegal. This would remove what I have called the 'negotiations condition', according to which the freedom of Palestine and its beleaguered people has been made subject to the non-existent will of an occupying power which has manifestly acted in bad faith in its administration of the territory over many decades. To this extent, the upcoming ICJ advisory opinion proceedings represent a good example of the subaltern class making counter-

hegemonic use of prevailing legal mechanisms to mitigate their contingent status in the international legal order. It remains to be seen what comes of it.

John: Israel is currently waging a devastating genocidal war and ethnic cleansing campaign against Palestinians in Gaza, with the full backing of many western powers. (How) does Palestine's international legal subalternity reveal itself again in this moment, and what is the UN's responsibility?

Ardi: Without exaggeration we are now witnessing the greatest calamity faced by the Palestinian people since 1948. As at the time of writing, according to the UN there are almost 15,000 Palestinians in Gaza killed, 2/3 of whom are women and children, another 6,500 missing, including at least 4,400 children, and a further over 36,000 injured. The wholesale and indiscriminate bombardment of the Gaza strip has targeted homes, hospitals, schools, churches, mosques and UN shelters, with at least 45% of the housing stock in Gaza having been destroyed or damaged as part of a declared scorched earth tactic aimed at rendering return of displaced persons impossible. On day 2 of the hostilities, starvation as a tool of warfare was openly declared by the Israeli Minister of Defence, including the cutting off of all water, food, fuel and electricity to the whole of the Gazan population whom he called 'human animals', and which threatens to usher in waterborne disease and famine. On day 5 of the hostilities, the Israeli military ordered over 1.1 million Palestinians in northern Gaza to move to purportedly 'safe zones' in the south, only to find themselves bombarded on the way there or upon arrival in the south. Over 1.7 million people (80% of the Gazan population) have now been forcibly transferred within the Strip, and that number promises to grow. The prospect of the complete transfer of the whole population out of the Gaza Strip is a clear and present danger, given that it has been declared as an operational goal of the Israeli intelligence ministry and numerous members of government, to say nothing of the historical record in this regard. Even more startling, all of these criminal actions have been undertaken with apparent genocidal intent, as expressed in numerous harrowing public statements of the Israeli leadership, from the Prime Minister on down. In the West Bank, the occupying power and its armed settler auxiliaries have been steeply increasing their use of violence, terror and pogroms on Palestinians, killing approximately 200, arbitrarily incarcerating thousands, and aiming to drive Palestinians off their land while the world's eyes are focused southwards. This has included psychological warfare, including through the distribution of leaflets across the West Bank warning the Palestinian population of another Nakba if they do not flee to Jordan.

In the face of all of this, one would think that the UN would have, virtually from the start of Israel's operation given its devastating blitzkrieg-like scope and disproportionate effect, expressly called for a ceasefire in line with the duty of its Member States to ensure respect for international humanitarian law and to prevent the crime of genocide from taking place. As at the date of writing, however, this has yet to happen. The closest one has come is Security Council resolution 2712, passed on 15 November – over *five* weeks from the outbreak of hostilities – calling merely for 'humanitarian pauses' in the fighting, thereby signaling that the Council accepts that the onslaught of Palestinians will continue into the foreseeable future.

While political stalemate is a natural feature of the Security Council's work, at the very least one would have expected the Organization's Secretary-General as chief administrative officer of the Secretariat to have behaved differently. Nevertheless, to this day the Secretary-General has yet to call for a general ceasefire. The most he has been willing to go has been to call for a 'humanitarian ceasefire', and this after 11 days of fighting. All of this while the State of Palestine has daily called upon the UN to call for a complete end to the hostilities and invited the Organization to deploy appropriate mechanisms on its territory to protect its people and assist it, as it is legally entitled to do and to receive.

While events in the OPT are still unfolding, it is difficult to come to a final assessment as to whether these current events portend yet another instance of the international legal subalternity of Palestine and its people. At first glance, however, it is hard not to see them ultimately doing so when one considers the multiplicity of legal obligations of UN Member States, of the Organization itself, and of the State of Palestine's ostensible rights under prevailing international law, none of which seem to be respected.

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