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Introduction

Owing to its unparalleled representative scope, what the United Nations (UN) says and does globally is widely perceived to be accompanied by an unequalled moral and political legitimacy linked to its status as the principal guardian of the international legal order. In his 12 January 2023 address to the General Assembly, Secretary-General Antonio Guterres affirmed what many of his predecessors had before him: that the 'primacy of the rule of law' is 'foundational to the United Nations' and 'essential to the maintenance of international peace and security'.[1] A lofty proposition, indeed. But what happens when the acts or omissions of the UN do not accord with international law but are rather the result of political expediency, great power politics, or bureaucratic inertia? In such circumstances, what is to be made of the UN's solemn obligation to maintain international peace and security 'in conformity with the principles of justice and international law'?[2] What impact does this have on the UN's legitimacy, particularly from the standpoint of the global south, where most UN operations and the majority of the world's population are located? As part of the growing critique of the UN, there is a general consensus that its value in the twenty-first century will increasingly rest upon its ability to maintain and encourage full respect for international law in the discharge of its functions, thereby enhancing the legitimacy of its actions.[3] While the UN has successfully done this in some spheres, serious doubt remains as to whether its handling of the question of Palestine has been one of them.

[1] Guterres, A. 'Secretary-General's Remarks to the Security Council on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: The Rule of Law among Nations,' 12 January 2023, at: www.un.org/sg/en/content/sg/speeches/2023-01-12/secretary-generals-remarks-the-security-council-the-promotion-and-strengthening-of-the-rule-of-law-the-maintenance-of-international-peace-and-security-the-rule-of-law.

[2] *Charter of the United Nations*, TS 993, 24 October 1945, art. 1(1) ['UN Charter'].

[3] Thakur, R. 'Law, Legitimacy and United Nations' (2010) 11 *Mel. J. Int'l L.* 1 at 4.

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Since its founding in 1945, no other geopolitical conflict has occupied as much time within the UN system as the question of Palestine.[4] As one of the longest-running disputes on the UN's agenda, now in its eighth decade, the conventional wisdom holds that the UN's position on Palestine offers the only normative basis of a just and lasting peace between Israelis and Palestinians grounded in international law. Contrary to this position, this book argues that there has been a continuing though vacillating gulf between the requirements of international law and the position of the UN on the question of Palestine, which has inevitably helped frustrate rather than facilitate the search for a just and lasting peace. To this end, this book examines several areas in which the UN has assumed a leading role in the question of Palestine since 1947. It critically explores the tensions that exist between the positions adopted by the Organization on the one hand and various requirements of international law on the other. If the UN has failed to respect the normative framework of international law in its management of the question of Palestine, what forms has this taken? How long have they persisted? What are the implications, not only for the Palestinian people – whose contemporary leadership has long resorted to the UN as *the* forum within which its international legal entitlements must be pressed – but also for the Organization itself? By addressing these questions, this book aims to critically interrogate the received wisdom regarding the UN's fealty to the international rule of law. It demonstrates that through the actions of the Organization, Palestine and its people have been committed to a condition that I shall call 'international legal subalternity', the defining feature of which is that the promise of justice through international law is repeatedly proffered under a cloak of political legitimacy furnished by the international community, but its realization is interminably withheld.

The choice of Palestine as the focus of this book is valuable for at least two reasons. First, owing to its prolonged nature, the question of Palestine offers a window into the role of international law in UN action over virtually the entirety of the Organization's existence. Temporally, this window covers the major paradigmatic shifts and political divides in the international system that have marked the UN's evolution from its very origins, that is late-empire/post-colonial, East/West, North/South. Second, it is striking that despite the copious international legal literature that exists on the Palestine problem on the one hand and the very rich experience of the UN in dealing with its many aspects on the other, there has yet to be written an independent and critical study that attempts to bring these two strands together in any meaningful

[4] For example, the work of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, especially the Division for Palestinian Rights.

way. To be sure, no sustained scholarly volume on the UN and the question of Palestine exists, as such. The closest one comes to any general treatment of the subject is found in a series of UN and Arab League public information pamphlets, a few monographs that cover aspects of the Palestine problem within the UN but are not focused on the UN as such, and several edited volumes that offer a glimpse of the UN's coverage of the question of Palestine through the narrow prism of partially reproduced UN documents.[5]

While this book cannot reasonably cover every facet of the UN's handling of the question of Palestine, by critically examining key moments of the Organization's engagement with it over time through the prism of international law, an attempt will be made to provide a picture that has yet to be offered. While previous doctrinal legal analyses of some of these moments have been undertaken extensively, and others have not, this book adds to the literature by collectively interpreting the key moments through a subaltern approach which draws and builds upon on the critical international legal theory associated with the Third World Approaches to International Law (TWAIL) school of thought.

1 SUBALTERNITY IN THE INTERNATIONAL SYSTEM

A useful point of departure is to make two separate but related observations about the nature of the international system, each of which is rooted in a subaltern perspective. Before setting them out, however, we must first ask who or what is the 'subaltern'? The origins of the term can be traced to Antonio Gramsci, who understood it to mean that which is in a positional opposite to a 'dominant', 'elite', or hegemonic position of power.[6] To Gramsci, it was the interaction between dominant and subaltern communities that formed the essence of human history.[7] Today, subaltern studies scholars use the term

[5] *See The Question of Palestine and the United Nations* (UN, 2008); *The United Nations and the Palestine Question* (Arab League); Nuseibeh, H.Z. *Palestine and the United Nations* (Quartet, 1981); Tomeh, G.J. *The Palestine Case in the United Nations*; Forsythe, D. *United Nations Peacemaking: The Conciliation Commission for Palestine* (Johns Hopkins, 1972); Hawley, D.C. *The United Nations and the Palestinians* (Exposition, 1975); Hadawi, S., ed. *The Palestine Problem Before the United Nations* (IPS, 1966); Hadawi, S., ed. *United Nations Resolutions on Palestine, 1947–1966* (IPS, 1966); Quigley, J. *The International Diplomacy of Israel's Founders* (Cambridge, 2016); *The United Nations and the Question of Palestine: A Documented History* (Wolf, 2009); Allen, L. *A History of False Hope* (Stanford, 2021). The Nuseibeh monograph is conspicuous in that, despite its title, it offers very little examination of the UN's position on Palestine.

[6] Said, E.W. 'Foreword' in Guha, R. & Spivak, G.C. *Selected Subaltern Studies* (Oxford, 1988) at v–vi.

[7] Hoare, Q. & Smith, G.N., eds. *Selections from the Prison Notebooks of Antonio Gramsci* (Lawrence and Wishart, 1996) at 52–55. *See also id.*, p. vi.

broadly, to connote all those subordinated in global society, whether according to 'traditional' categories such as race, class, gender and religion, or more recently acknowledged categories such as age, sexual orientation, physical ability, etc.[8] Viewed in the positivist context of modern international law and institutions, where the state is the principal actor on the system, individuals, non-self-governing peoples, and, in many respects, developing states, are among those that constitute the subaltern. This includes Palestine and the Palestinian people.

The first observation concerns a point that may seem self-evident, given the subject matter of this book, but one that cannot be taken for granted owing to prevailing skewed and at times anti-Palestinian sentiment in some mainstream circles, particularly in the West:[9] any study devoted to examining Palestine, including before the UN, requires us to take the place and its people *seriously*. One might balk at this proposition, given the inordinate amount of time the UN has devoted to the question of Palestine over the decades. It may also seem inconsistent with the oft-recited mantra (regularly, though not exclusively, expressed within UN circles) that good faith engagement requires 'balance' and 'neutrality' between competing claims in Palestine.[10] But that would miss the point. By taking Palestine seriously, I refer to the imperative that the lived reality of the Palestinian people over the course of its modern history from the late nineteenth century onward – colonized, dispossessed, forcibly exiled, occupied, and discriminated against – must remain at the forefront of any study of it; not as an object to be ignored, casually dismissed, or represented for, but as a subject with a sustained history, presence, and agency of its own. This was well demonstrated by Edward Said, who urged us to view the matter of Palestinian subalternity as an 'issue involving representation', in order to counter the 'blocking operation by which the Palestinian cannot be heard from (or represent himself) directly on the world stage'.[11] The result has been to misrepresent or efface, figuratively and literally, the lived reality of Palestine and its people in order for power to justify its engagement with Palestine, whether for geostrategic purposes (as in the case of Great Britain and the

[8] Guha & Spivak, *supra* note 6. Morris, R., ed., *Can the Subaltern Speak?* (Columbia, 2010).

[9] Edward Said lamented that the 'common discourse of enlightened American liberal democracy' on Palestine was characterized by 'the complete hegemonic coalescence between the liberal Western view of things and the Zionist-Israeli view'. Said, E.W. *The Question of Palestine* (Routledge, 1980) at 37. *See generally*, Chomsky, N. *The Fateful Triangle* (South End, 1999); Said, E.W. & Hitchens, C. *Blaming the Victims* (Verso, 2001).

[10] For a critique of this 'trap of false-symmetry', *see* Sharoni, S. *Gender and the Israeli-Palestinian Conflict* (Syracuse, 1995) at 5.

[11] Said, *supra* note 9 at 39.

United States (US)) or in order to transform it into a settler-colonial state (as in the case of political Zionism and, eventually, Israel).[12] By taking Palestine seriously, it is therefore vital to adopt an approach that critically interrogates how and at what points in Palestine's modern history its position in the international system was superseded and compromised in *legal* terms. This will allow for a better understanding of the UN's engagement with it beyond the realm of the political, humanitarian, and developmental spheres. The character of contemporary Palestine as a place of unfulfilled promise whose people continue to be denied their internationally sanctioned legal rights, yet stubbornly refuse to submit themselves to such fate, is a useful window through which international legal subalternity can be explained and understood. Therefore, while this book necessarily takes account of competing hegemonic claims and interests in Palestine, its recourse to a subaltern view of things allows for greater insight, rejecting the common tendency of power to disregard the lived reality of the indigenous people of that land.

The second observation concerns the nature of international law, not only as a series of rules upon which the international state system is based in the classical positivist sense but also as a legal narrative organically connected to the European imperial setting in which it was constituted and then replicated, to varying degrees, in the international institutions created in the first half of the twentieth century.[13] Critically understanding this pedigree and evolution of modern international law will allow us to shed light on the role of international law in the actions of the UN in Palestine, most particularly in the defining period immediately following World War II (WWII). Central to the argument is the work of the TWAIL network of scholars.[14] In particular, Antony Anghie has focused on the imperial and colonial origins of international law 'to show how these origins create a set of structures that continually repeat

[12] Herzl, T. *The Jewish State* (Sylvie d'Avigdor trans., Dover, 1998) (1896).

[13] Imseis, A. 'Introduction' (2009) XV *Pal. YIL* 1. *See also* Anghie, A. *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005).

[14] *See* Anghie, *id*; Anghie, A, Chimni, B.S., Mickelson, K. & Okafor, O., eds., *The Third World and International Legal Order* (Brill, 2003); Chimni, B.S. 'A Just World Under Law: A View from the South' (2007) 22 *Am. U. ILR.* 199; Fakhri, M. 'Law as the Interplay of Ideas, Institutions, and Interests: Using Polyani (and Foucault) to Ask TWAIL Questions' (2008) 10:4 *Int'l. CLR* 455; Gathii, J.T. 'Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory' (2000) 41 *Harv. ILJ* 263; Gathii, J.T. 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98:8 *Mich. L. R.* 1996; Mutua, M. 'What Is TWAIL?' (2000) 94 *ASIL Proc.* 31; Okafor, O. 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology or Both?' (2010) 10 *Int'l. CLR* 371; Rajagopal, B. 'From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions' (2000) 41:2 *Harv. IL J* 529.

themselves at various stages in the history of international law'.[15] According to him, 'colonialism was central to the constitution of international law' in that many of its 'basic doctrines' going back to the sixteenth century 'were forged out of' Europe's 'attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation'.[16] The fundamental point, according to Anghie, is that international law 'did not *precede* and thereby effortlessly resolve' European/non-European relations; rather, international law was created by imperial Europe in its encounter with its colonial Other.[17] Examples of this hegemonic/subaltern binary, and the process by which the former reconceptualized or created new law to regulate the latter, abound in the annals of public international law and institutions.[18] One of the goals of this book is to demonstrate how this process – what I shall call rule *by* law – has played itself out at key stages of the UN's engagement with the question of Palestine.

What makes this rule by law process intriguing is that it has unfolded at a time when the organizing principle of the post-WWII international community has ostensibly been based upon an international rule *of* law framework, the defining feature of which requires universal application of international law without regard to the power or station of the actors in question. As a central pillar of modern liberal political order, the rule of law posits that 'people in positions of authority should exercise that power within a constraining framework of well-established public norms' to which they are also accountable.[19] By contrast, the rule by law framework is characterized by the exercise of power 'in an arbitrary, *ad hoc*, or purely discretionary manner' on the basis of the 'preferences or ideology' of those in charge.[20] 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. As noted by Brian Tamanaha, on the municipal plane '[r]ule by law carries scant connotation of legal *limitations* on government, which is the *sine qua non* of

[15] Anghie, *supra* note 13 at 3.
[16] *Id.*
[17] *Id.*, at 15.
[18] For instance, it was common for European colonial powers to grant a form of quasi-sovereign authority over non-European peoples to private European agents, settlers and commercial companies to better serve their imperial interests abroad. Anghie, *supra* note 13 at 68–69. Likewise, the dissociation of Latin America from Europe expressed in the 1823 Monroe Doctrine, unilaterally proclaimed by the US against European intervention in the Western hemisphere, served as the legal basis for numerous military interventions by the US in Latin America. Rossi, C. *Whiggish International Law* (Brill, 2019).
[19] 'The Rule of Law,' *Stanford Encyclopedia of Philosophy*, 22 June 2016, at: https://plato.stanford.edu/entries/rule-of-law/.
[20] *Id.*

the rule of law tradition'.[21] Transposing this to the international plane, the rule by law is manifested in the cynical use, abuse, or selective application of international legal norms by hegemonic actors under a claim of democratic rights–based liberalism, but with the effect of perpetuating inequity between them and their subaltern opposites. It is this form of rule by law upon which this book's central claims rest.

Structurally, there appears to be three crosscutting themes that animate subalternity in the international legal system. To the extent that these themes overlap with one another, they inform the episodes examined in these pages. First, is the theme of the Eurocentricity of the modern international legal order as rooted in Europe's imperial and colonial past. In this respect, an important problematic for TWAIL theorists is the notion of *la mission civilisatrice*; the idea that 'justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, underdeveloped people of the non-European world by incorporating them into the universal civilization of Europe'.[22] In juridical terms, this manifested itself in the social-Darwinistic standard of 'civilization', the prime legal determinant for membership and standing in the international system in the imperial age.[23] Although reaching its zenith in the second half of the nineteenth century, use of this standard persisted through the turn of the twentieth century, featuring prominently in the League of Nations mandate system. Second is the theme of the circumscribed nature of Third World sovereignty and international legal personality in the post-decolonization era. The end of WWII ushered in a New World order in which classic forms of European empire ostensibly gave way to more liberal principles set out in the UN Charter. This included the principles of sovereign equality of states, suppression of acts of aggression, equal rights, and self-determination of peoples.[24] Yet for all the promise of the UN, following decolonization a continued tension between the old imperial rule by law structure and these new liberal rule of law ideals remained.[25] 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 post-WWII era, the victorious allied powers have sometimes used international law to further their

[21] Tamanaha, B. *On the Rule of Law* (Cambridge, 2004) at 92.

[22] Anghie, *supra* note 13 at 3.

[23] Wheaton, H. *Elements of International Law*, 8th ed. (Little, Brown & Co., 1866) at 17–18; Oppenheim, L. *International Law*, Vol. 1, McNair 4th ed. (Longmans, 1928) at 36–37; *and* Koskenniemi, M. *The Gentle Civilizer of Nations* (Cambridge, 2008) at 127.

[24] UN Charter, *supra* note 2, art. 1.

[25] The composition and procedural rules of the Security Council and the codification of 'general principles of law recognized by civilized nations' as a source of international law in the ICJ Statute are two examples; UN Charter, *supra* note 2, ch. V; *Statute of the International Court of Justice*, art. 38(1), 33 UNTS 933.

own national interests at the expense of the international rule of law. In this respect, and particularly since the end of the Cold War, the US has played the most significant role under cover of a purported commitment to a progressive, democratic, and rights-based international order.

The above cross-cutting themes span the history of modern international law and institutions, including as embodied in the UN from 1945 to the present. Here, Anghie's analysis of a basic paradox in the evolution of international law and institutions is instructive in helping us understand the hegemonic/subaltern binary in the system itself. A critical reading of the history of international law and institutions reveals that the mechanisms, doctrines, and technologies created as a means of achieving a liberal rights-based global order have at times shown themselves to be the very tools through which that order has been frustrated or undermined to the detriment of subaltern classes. This is 'inherently problematic', Anghie argues, 'because it is sometimes precisely the international system and institutions that exacerbate, if not create, the problem they ostensibly seek to resolve'.[26]

This book attempts to show that perhaps more than any single geopolitical issue the UN's engagement with the question of Palestine stands out as an obvious example of the phenomenon described above. As will be demonstrated, through the acts of some of its principal and subsidiary organs over the course of more than seven decades, the UN has presided over both the unmaking of Palestine (i.e. its attempted partition, military conquest, depopulation and political effacement between 1947 and 1949) and its qualified re-emergence, at least in truncated, fragmented, and subjugated form (i.e. in the occupied Palestinian territory (OPT) post-1967). Throughout this prolonged episode, the failure of the UN to abide by the full range of prevailing international legal norms in its management of the question of Palestine has been demonstrative of a larger failure by the Organization to take Palestine and its people seriously. This has ultimately resulted in the Organization perpetually conceiving of them and their putative membership in the system as subordinate and contingent, thereby reifying, maintaining, and perpetuating their legal subalternity over time.

2 THE COUNTER-HEGEMONIC POTENTIAL OF INTERNATIONAL LAW AND INSTITUTIONS

In recent decades, TWAIL scholarship has become an important part of the critical discourse on modern international law and institutions. Nevertheless, its proponents have for the most part resisted succumbing to a nihilistic view

[26] Anghie, *supra* note 13 at 192.

of the discipline. Foremost among them, Balakrishnan Rajagopal has argued that there remains a counter-hegemonic potential that the Third World can bring through its use of international law and institutions.[27] Thus, while the state-centric nature of international law is what reinforces the inequity inherent in its evolution, lending international law a quality of being nothing more than 'a mask for power relationships' and a tool for the maintenance of the established international order,[28] leading TWAIL thinkers have taken a more accommodating view. Many recognize that in the interdependent UN Charter era, where a multiplicity of actors increasingly engages with one another in infinite ways, international law has come to represent something potentially more than a politics of domination by other means. For subaltern groups, negotiating the state-centric international order has sometimes entailed using the very legal principles that underpin it to challenge that order on its own terms. The great paradox, therefore, is that beyond its utility in the evolution and maintenance of a hegemonic international order, in so far as international law now claims and has the potential to serve as an authentically universal standard for all peoples, it contains what Dianne Otto calls the 'seeds of resistance' for those that remain unable to fully benefit from its promise.[29] Put another way, despite its inequitable origins, elements of which clearly linger on in the contemporary period, international law remains an important means by which to measure, in legal terms, the acts of subjects of the international system.

This critical duality of international law is a theme running throughout this book. All law inherently possesses a duality of this sort. On the one hand, law is the product of the exercise of political power by subjects who wish to impose on society some form of normative order consistent with their interests and worldview. On the other hand, once created, law acts as the embodiment of such normative order under a claim that it stands apart from the very political power and interests of the subjects that created it and whom it now binds. Throughout this process, law operates as both an expression of the values and interests of political authority, and as a check and balance on that very same authority. In the context of international law, Martti Koskenniemi identified this tension as giving rise to law as both an apology for power and a harbinger of a utopia.[30] Always in discord with one another, never definitively cancelling

[27] Rajagopal, B. 'Locating the Third World in Cultural Geography' (1998) *Third World Leg. Stud.* 1 at 3.

[28] Brunnée, J. & Toope, S.J. *Legitimacy and Legality in International Law* (Cambridge, 2010) at 3.

[29] Otto, D. 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' 5:3 *Soc. & Leg. Stud.* 337 at 343.

[30] Koskenniemi, M. *From Apology to Utopia* (Cambridge, 2005).

each other out, the law as apology/utopia dialectic has become a fixed feature of how we understand the international system. This is particularly so when viewed from the vantage point of weaker nations and peoples.

For example, from ancient times, slavery was considered a natural element of the Roman *jus gentium*. It was the very legality of the holding of property in other humans that allowed the trans-Atlantic slave trade to flourish as the economic backbone of the settler colonies of the so-called New World. As Great Britain's engagement with the slave trade became unprofitable and post-Enlightenment philanthropic and populist sentiment emerged in some (but by no means all) quarters eschewing the practice as uncivilized, there emerged sufficient moral resolve to end it through gradual changes in the law based on both naturalist and positivist schools of legal thought. This was embodied in British abolitionist positions at the Congress of Vienna in 1815, American abolitionism following the American Civil War in 1865, and the eventual universal proscription of slavery in a series of international instruments concluded in the late nineteenth and early twentieth centuries, culminating in the *Slavery Convention* of 1926.[31]

A more contemporary example concerns the status of indigenous peoples in international law. While decolonization in the 1960s 'promoted the emancipation of colonial territories' modelled along a distinctly Westphalian standard according to which independence was granted the new territorial states under the principle of *uti possidetis*, it 'simultaneously promoted the assimilation of members of culturally distinctive indigenous groups into the dominant political and social orders that engulfed them'.[32] In response, a rights-based international movement emerged in the 1970s arguing for increased recognition of the human and people's rights of indigenous groups. Led by a host of non-governmental indigenous people's organizations and independent experts, and facilitated by the UN, this effort has made some incremental gains in the realm of *lex ferenda*. Thus, the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms that indigenous peoples 'are equal to all other peoples' and therefore enjoy the right to 'self-determination', a recognition that has allowed for the expansion of self-government in a number of states.[33] This evolution in the rights of indigenous peoples would not have

[31] *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS. 253, Reg. No. 1414. Allain, J. *Slavery in International Law* (Martinus Nijhoff, 2013) at 59–60, 64ff; Drescher, S. 'From Consensus to Consensus: Slavery in International Law' in Allain, J. ed., *The Legal Understanding of Slavery* (Oxford, 2012) at 316–355.

[32] Anaya, J. *Indigenous Peoples in International Law*, 2nd ed. (Oxford, 2004) at 55.

[33] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 13 September 2007, at preamble, arts. 2, 3 ['UNDRIP'].

been possible but for the active reliance on evolving concepts of prevailing human rights law by indigenous rights activists themselves.

These two examples demonstrate international law's duality as both a tool for the maintenance of a hegemonic order and one in which those subaltern classes who are overlooked or ill-served by such order may challenge it on its own terms. In both, criticism of prevailing law by and for subaltern groups was rooted in a critical application of that law against evolving social mores and sensibilities. This in turn produced fresh claims of fairness, ultimately resulting in some form of progressive development of the law.

3 INTERNATIONAL LEGAL SUBALTERNITY AS A LONG-RANGE CONDITION

Does the counter-hegemonic potential of international law and institutions mean that the inequity for legal subalterns at their root can be eliminated? Despite its decentralized, heterogeneous and polycentric nature,[34] TWAIL literature broadly seems to suggest so. According to Anghie and Bupinder Chimni, Third World jurists of the decolonization period to whom the TWAIL moniker has been affixed *post hoc* (TWAIL I) – for example Georges Abi-Saab, Francisco Garcia-Amador, R. P. Anand, Mohammed Bedjaoui, and Taslim Elias – tempered their critique of classical European international law and institutions by adopting a 'non-rejectionist stance'.[35] According to this position, 'the contents of international law could be transformed to take into account the needs and aspirations' of the colonized and newly independent Third World states.[36] This transformation was to be achieved primarily through the UN, and key doctrines of modern international law were to be employed in levelling the playing field between Europe and its former colonies. Foremost of these were the principles of sovereign equality of states and non-intervention.[37]

From the mid-1990s, contemporary TWAIL theorists (TWAIL II) – for example James Gathii, Obiora Okafor, Makau wa Matua, Rajagopal, Otto, Anghie, Chimni, etc. – have critiqued this view. At issue has been TWAIL I's apparent deference to the Third World post-colonial state as a site in which modern international law and institutions have been employed not

[34] Gathii, J.T. 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3:1 *Trade L. & Dev.* 26 at 34.

[35] Anghie, A. & Chimni, B.S. 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chin. JIL* 77 at 81.

[36] *Id.*

[37] *Id.*

to emancipate Third World peoples from the yolk of European colonialism, but to entrench authoritarian and corrupt native elite rule over them. TWAIL II writers have taken issue with their predecessors' failure to see beyond the sovereignty of the Third World state as an emancipatory end in itself, rather than regard it as a tool through which Third World citizens would realize true freedom and equality. TWAIL II writers have accordingly offered deeper theoretical critiques of international law and institutions, focusing on their colonial and imperial origins, to demonstrate a continuing structural bias in the international legal system far more difficult to dislodge than was previously understood.[38]

Yet, despite their more critical approach, TWAIL II scholars appear to take the view that the prospect of dislodging international law's structural bias against subaltern classes remains possible. Thus, to the views of Otto and Rajagopal regarding the counter-hegemonic potential of international law and institutions, Matua has added that TWAIL 'present[s] an alternative normative legal edifice for international governance' distinct from the contemporary international legal system.[39] Likewise, through its 'empowering radical epistemology that liberates international law' from its 'colonial and elitist shackles', Richard Falk argues that TWAIL 'validates the transformative and liberationist potential of international law'.[40] Adopting a Marxist approach, Chimni argues that despite international law's 'imperialist' pedigree, 'the idea of international rule of law continues to make sense' for what he calls the Transnational Oppressed Class, which must rely on various 'foundational principles of international law (e.g. the principle of non-use of force)' to overcome its subaltern status.[41] For him, 'legal nihilism is not the appropriate counter. What is called for is a creative and imaginative use of existing international laws and institutions to further the interests of the "wretched of the earth".'[42] Finally, David Fidler argues that along with its critique of 'the use of international law for creating and perpetuating Western hegemony', TWAIL's *raison d'etre* is necessarily to 'construct the bases for a post-hegemonic global order'.[43]

[38] *Id.*, 82–86; Imseis, *supra* note 13 at 2–3.
[39] Matua, *supra* note 14.
[40] Falk, R. 'Foreword: Third World Approaches to International Law (TWAIL) Special Issue' (2016) 37:11 *TWQ* 1943 at 1944.
[41] Chimni, B.S. 'Prolegomena to a Class Approach to International Law' (2010) 21:1 *EJIL* 57 at 75–76.
[42] Chimni, B.S. 'An Outline of a Marxist Course on Public International Law' in Marks, S. ed. *International Law on the Left* (Cambridge, 2008) at 90–91.
[43] Fidler, D.P. 'Revolt against or from within the West? TWAIL, the Developing World and the Future Direction of International Law' (2003) 2 *Chin. JIL* 29 at 31.

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

An implied acknowledgement of this is found in Gathii's observation that 'a central component of TWAIL is to challenge the hegemony of the dominant narratives of international law … by teasing out encounters of difference along many axes – race, class, gender, sex, ethnicity, economics, trade etc'.[44] For him, this teasing 'create[s] fruitful tensions or new conceptual spaces for richer, subtler and more nuanced renditions of international law'.[45] Far from eradicating these axes of human interaction, however, critical examination of international law and institutions reveals how such axes are reaffirmed, restructured, or regenerated in similar or new forms. This ultimately allows for fresh intellectual terrain to develop, allowing for a more fulsome understanding of the inequity inherent in the discipline. In this sense, international legal subalternity emerges as a distinct category within the international legal and institutional framework, and one that, subject to the maintenance of an international society based upon some form of legal order, must exist in perpetuity.

Two points should be made at this stage. First, it is notable that TWAIL scholarship has yet to clearly identify such a distinct category for the subaltern half of what I have called the hegemonic/subaltern binary. To be sure, the notion of hegemony in international law and organization has been well traversed in both mainstream and critical international legal literature. It connotes the existence of a hyper-concentration of power in one or a few

[44] Gathii, 'TWAIL: A Brief History,' *supra* note 34 at 37.
[45] *Id.*, 40.

states, rendering them capable of arbitrarily ignoring, enforcing or reshaping legal norms through an unapologetic and implacable will to do so.[46] Yet, only a small minority of TWAIL scholars have used the term 'subaltern' in relation to the various classes of groups they have found subjected to the hegemonic effect of the international legal and institutional order.[47] Even then, these authors have curiously failed to find the predicament and features shared by those classes pronounced enough to warrant an acknowledgement that they have given rise to a common condition that must be appropriately diagnosed and named.[48] The closest one comes to what I have identified as international legal subalternity is found in the sociological writings of Boaventura de Sousa Santos and César Rodríguez-Garavito.[49] They posit a sociolegal idea they term 'subaltern cosmopolitan legality'. The aim of this idea is to 'challenge our sociological and legal imagination and belie the fatalistic ideology that "there is no alternative" to neoliberal institutions'.[50] The authors make clear that their notion is not descriptive (i.e. of a class or group sharing a common condition), but rather prescriptive (i.e. of an idea and approach to be employed metaphysically). In addition, they affirm that it is not focused on the international legal and institutional order as much as it is on law in the transnational and domestic perspective *vis á vis* the forces of 'hegemonic, neoliberal globalization'. It therefore seems clear that subaltern cosmopolitan legality is not synonymous with international legal subalternity.[51]

Second, the permanency of international legal subalternity as a condition should not be taken to suggest that it is immutable and fixed on one or more specific groups. The permanency of this condition rests not in the fact that given subaltern groups cannot utilize the potential of international law and institutions to challenge and, at some point, break free from their subservient circumstances. Rather, it is to suggest that even as such groups register

[46] Vagts, D. 'Hegemonic International Law' (2001) 95 *AJIL* 843; Alvarez, J. 'Hegemonic International Law Revisited' (2003) 97 *AJIL* 873; Gathii, J.T. 'International Law and Eurocentricity' (1998) 9 *EJIL* 184.

[47] *See, e.g.*, Otto, *supra* note 29; Rajagopal, 'From Resistance to Renewal,' *supra* note 14; Chimni, 'Prolegomena,' *supra* note 41.

[48] In discussing international law's 'Others', Marks, *supra* note 42 at 16, indicates that scholars have used a number of terms including 'subaltern classes', 'subordinate groups' and 'oppressed classes', or otherwise imply the existence of such groups, in reference to 'those seeking emancipatory change'.

[49] De Sousa Santos, B. & Rodríguez-Garavito, C.A. 'Law, Politics, and the Subaltern in Counter-Hegemonic Globalization' in De Sousa Santos, B. & Rodríguez-Garavito, C.A. eds., *Law and Globalization from Below* (Cambridge, 2005).

[50] *Id.*, 1.

[51] *Id.*, 11.

success in pushing back from time to time, the overall condition of legal subalternity as a structural component of the international system cannot fundamentally be eradicated. Organically, as international law and organizations are challenged and new law is made within and by that structure, the condition of legal subalternity may morph in respect of one or more subaltern groups, or otherwise shift from one or more of them to other, likely new, subaltern groups as part of the law-making/challenging cycle.

Returning to our earlier examples, it is notable that despite the abolition of slavery in international law in the late nineteenth and early twentieth centuries, the racism embedded within the domestic legal structures of former slave-holding states (the paragon being the US) that enabled and sustained slavery in the first place was morphed but not eradicated. For formerly enslaved persons, this structural racism remained basically untouched from an international legal standpoint, given the collective operation of doctrines of non-intervention, the standard of civilization and state-centrism that placed them beyond international legal scrutiny.[52] Likewise, although indigenous peoples are said to enjoy a right of self-determination under the 2007 UNDRIP, this purported right remains limited for two reasons. First, it is curtailed through an express provision of UNDRIP that constricts the exercise of that self-determination to the realm of internal or local affairs within the territorial sphere of existing sovereign and independent states.[53] Second, it is limited by the doctrinal prescription that deprives declarations like UNDRIP of any binding legal force as a matter of positive international law.

The above are examples where the subalternity of the underclass has essentially remained in place under international law, despite some measure of change introduced within that law. Examples where wholly new categories of subaltern classes have been created through changes in international law include the emergence of internally displaced persons (IDPs) and economic migrants, both of which evolved as recognized groups in need of protection *only after* international law had recognized a preceding subaltern group – refugees – as a distinct subject of persons with legally binding rights in relation to states.[54] In a sense, the crystallization of refugee rights under international

[52] Alexander, M. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press, 2010).

[53] UNDRIP, *supra* note 33, preamble, arts. 3, 4, 46.

[54] Contrast the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, a binding international treaty codifying customary international legal obligations on states, with the 1998 *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 and the *New York Declaration for Refugees and Migrants*, A/RES/71/1, 3 October 2016, both of which represent non-binding soft law at most in so far as they deal with IDPs and migrants, respectively.

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

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

4 TWAIL AND THE QUESTION OF PALESTINE

Given the raft of potential issues at play, it is surprising that TWAIL literature on the question of Palestine has only appeared over the past fifteen years. The 2009 volume of *The Palestine Yearbook of International Law* (of which I was then editor-in-chief) was perhaps the first to delve into the area, but it was perforce too cursory a treatment given its thematic journal format.[55] More recently, Noura Erakat has offered a sustained critical assessment of how law has been employed to advance Israeli interests in the struggle over Palestine. Touching on some of the broad themes in this book, she convincingly shows 'how the law's ability to oppress is evidence not of its failure but rather of the fact that it can be strategically deployed' for harmful ends.[56] All in all, while this critical literature dealing with Palestine has broken important ground, at least three shortcomings stand out which this book attempts to fill to some degree.

First, to the extent it critiques the field of international law, as such, as being complicit in the unmaking of Palestine, some of the literature misses the mark by neglecting to account for the catalytic role of hegemonic actors in the equation. As a metaphysical phenomenon, international law is not self-executing. That function is left to the states that create it, almost always in concert with one another. In the context of the question of Palestine, the key

[55] Imseis, *supra* note 13.
[56] Erakat, N. *Justice for Some* (Stanford, 2019) at xii.

international legal institutional protagonists have been the League of Nations and the UN, the latter to a much greater extent than the former. It is therefore striking to find that the current TWAIL literature on Palestine tends to highlight the complicity of international law almost as an actor *suo motu*, over the actions and omissions of those actually responsible for creating and giving it effect. Thus, in her otherwise insightful analysis of Palestinian 'quasi-sovereignty', Laura Ribeiro repeatedly indicts 'international law', as such, for simultaneously having 'colonized' and 'liberated' in Palestine while paying insufficient attention to the acts and omissions of the international actors that made it so.[57]

Second, the TWAIL literature has largely tended to focus on two areas of analysis – namely, criticism of international law as manifested through the League of Nations Mandate for Palestine and the subsequent application and operation of international humanitarian and criminal law in the OPT.[58] This work has been vital in helping us critically understand how international law has been used in these moments to push the Palestinian people to the periphery of the international system. Yet one result of its relatively narrow focus has been to neglect the important role of the UN as not merely a forum within which much of this has taken place, but also as an actor responsible for this outcome in a variety of other areas from 1947 to the present.[59]

Third, although an increasing volume of TWAIL literature on Palestine has engaged in important sociolegal analyses of how international law is articulated by its protagonists in 'narratives' and 'discursive techniques', it tends to neglect how law is created and employed by international institutions for unjust ends. Michelle Burgis has been the most prominent voice in this respect and her ethnographic work on the narratives of statehood as

[57] Ribeiro, L. 'International Law, Sovereignty and the Last Colonial Encounter: Palestine and the New Technologies of Quasi-Sovereignty' (2009) Vol. XIII *Pal.YIL* 67 at 87. *See also* Burgis, M. 'Discourse of Distinction? Palestinians, International Law, and the Promise of Humanitarianism' (2009) Vol. XIII *Pal.YIL* 42.

[58] Ribeiro, *id.*; Burgis, 'Discourse of Distinction,' *id.*; Burgis, M. 'Discourses of Division: Law, Politics and the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (2008) 7:1 *Chin. JIL* 33; Sayed, H. 'The Fictions of the Illegal Occupation in the West Bank and Gaza' (2014) 16 *Oregon. RIL.* 79; Reynolds, J. & Xavier, S. "The Dark Corners of the World': TWAIL and International Criminal Justice' (2016) 14 *Int'l. Crim. Just.* 959.

[59] Although writers such as John Strawson and Victor Kattan have examined some of these moments, the Mandate in particular, they do not identify as TWAIL scholars nor utilize the critical methods typically associated with TWAIL scholarship but have instead favoured positivist doctrinal methodologies. *See* Strawson, J. 'British (and International) Legal Foundations for the Israeli Wall: International Law and Multi-Colonialism' (2004–05) Vol. XIII *Pal. YIL* 1; and Kattan, V. *From Coexistence to Conquest* (Pluto, 2009).

employed by Palestinian legal practitioners in the field, although powerful and novel, is a good example of this.[60]

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

5 A WORD ON THE NATURE OF THE UN

In keeping with this book's exhortation to take Palestine seriously and to critically understand how international law has been employed to opposite effect, it is vital that we take brief critical account of the nature of the UN as the site where both of these phenomena uniquely intersect. The UN is today 'the only truly global institution of a general purpose which approximates universality'.[61] From an original membership of fifty-one states in 1945, the body currently boasts 193 Member States, with two non-Member Observer States, one of which is the State of Palestine.[62] The Organization is comprised of six principal organs, each with its own powers and mandates: the General Assembly, Security Council, International Court of Justice, Economic and Social Council, Trusteeship Council, and Secretariat. In addition, there are a host of other bodies subsidiary to one or another of the principal organs, each mandated to perform specific functions on behalf of the Organization.

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

Simon Chesterman has noted that there are 'divergent views as to whether the UN should be a forum for intergovernmental cooperation or

[60] Burgis-Kasthala, M. 'Over-Stating Palestine's UN Membership Bid? An Ethnographic Study on the Narratives of Statehood' (2014) 25:3 *EJIL* 677. *See also*, Burgis, M. 'Discourses of Division,' *supra* note 58; and Burgis, M. 'The Promise of Solid Ground: Arab Territorial Disputes and the Discourse of International Law' (2008) 10 *Int'l. Comm. LR* 73.

[61] Thakur, *supra* note 3 at 4.

[62] The other is the Holy See.

an independent actor that can lead on issues of global import'.[63] Within both international law and international relations literature these views find expression in the debate between what Veijo Heiskanen identifies as the realist (or reductionist) and idealist (or institutionalist) schools of thought.[64]

For realists, 'international organizations have no independent role or function in international affairs, but are simply extensions of instruments of state power'.[65] As such, international organizations are merely the handmaidens of the states that create and use them to do in concert that which would be more difficult to do unilaterally. Within this statist framework, the only political will of consequence is that which resides within and among states, with international organizations merely serving as *fora* where international laws are collectively dictated in the Gramscian sense, not independently created.[66] 'Consequently, in the realists' view, an excessive focus on formal international organizations and their internal structure is mistaken, as it diverts attention from the real subject matter of international relations: the relationships among states and governments.'[67]

For idealists, the situation is radically different. Although they acknowledge the role of states in their creation, they hold that 'international organizations play a role in international affairs that is somewhat independent of states and governments'.[68] They point to various technical legal and political functions exercised by international organizations – such as the capacity to sue and be sued, or the political independence of officials of the organizations in exercising their functions – as evidence of the fact that these organizations possess an autonomy that separates them from the states responsible for their creation and financial upkeep. As a result, idealists are of the view that 'international organizations have to be understood as players that not only have to be taken into account, but also have to be made accountable'.[69]

Despite the juxtaposition of these two schools of thought, however, what the literature does not appear to contemplate is that the UN actually embodies a mix of *both*. An implicit explanation of this is offered by Jan Klabbers

[63] Chesterman, S. 'Reforming the United Nations: Legitimacy, Effectiveness and Power After Iraq' (2006) 10 *Sing. YIL* 59 at 61.

[64] Heiskanen, V. 'Introduction' in Coicaud, J. & Heiskanen, V. *The Legitimacy of International Organizations* (UN University, 2001) at 5. *See also* Klabbers, J. 'The Changing Image of International Organization' in Coicaud & Heiskanen, *id.* at 224–225.

[65] Heiskanen, V. 'Introduction' in Coicaud & Heiskanen, *id.* at 5.

[66] '[L]egality is determined by the interests of the class which holds power in any society'; Gramsci, A. *Pre-prison Writings* (Cambridge, 1994) at 230.

[67] Heiskanen, V. 'Introduction' in Coicaud & Heiskanen, *supra* note 64 at 5.

[68] *Id.*

[69] Klabbers, *in* Coicaud & Heiskanen, *supra* note 64 at 225.

who, in discussing the relationship between international organizations and their members, emphasizes that it is more than merely symbiotic in so far as the two 'tend, eventually, to fade into each other so as to become indistinguishable'.[70] This derives from the fact that '[w]hatever volonté distincte international organizations may possess, it derives, eventually, from a volonté not their own; and however much states may wish to control organizations, their very creation involves a loss of control'.[71]

Support for this double-sided nature of the UN system is found in the highly varied memberships, powers and functions of the UN's principal organs, the terms of which are set out in the UN Charter itself and therefore legislated within the corpus of international law. For example, the General Assembly and Security Council embody, to varying degrees, intergovernmental cooperation under chapters IV and V of the UN Charter. Likewise, the Secretariat, and by extension the Secretary-General and the staff, are bound to exercise their functions in an independent manner under article 100. However, even the most cursory examination of UN practice reveals the hegemonic/subaltern binary as a common thread that winds its way throughout the Organization in these respects. Thus, as the plenary of all 193 Member States, the intergovernmental representativeness of the General Assembly lends it a political legitimacy that no other organ enjoys, but owing to the generally non-binding character of its resolutions relegates it to a secondary status *vis á vis* the Security Council. Likewise, the fifteen-member Security Council is solely empowered to render decisions that legally bind all other Member States in relation to threats to international peace and security, despite the lack of political legitimacy such decisions can sometimes be perceived as having owing to the Security Council's limited membership and its dominance by the five hegemonic permanent veto-wielding powers. Finally, although the Secretary-General and the staff must not seek or receive instructions from any governments, and Member States undertake not to influence them in the discharge of their functions, the long-standing practice of allocating senior UN posts to the various hegemonic global powers calls these legal requirements into question.

The divide between hegemons and subalterns is therefore manifest in much of the work of the UN. In deference to this, the book takes critical account of the nuanced and multifaceted nature of the Organization and the varying roles, functions, and powers of its constituent parts. At the same time, it assesses the UN against the single standard of international law whereby it is,

[70] *Id.*, 227.
[71] *Id.*

at once, neither the 'captive of its own interests' as an independent actor and 'more than the sum of its parts' as an intergovernmental forum.[72] By juxtaposing certain rule by law practices and features of the UN against its ostensible rule of law organizing principle, it is hoped that new critical understandings of how the Organization has managed long-term conflict in line with international law and justice can be developed using Palestine as the most apt case study.

6 OVERVIEW

Organized along an axis that juxtaposes the international rule of law with the international rule by law, this volume argues that the gulf between international law and UN action in its management of the key moments of the question of Palestine forms part of an arc of history that runs, to varying degrees, from 1947 to the present. Examined through a subaltern lens, this arc of history demonstrates that far from being a consistent standard-bearer of international law when it comes to Palestine, the UN has demonstrated a less than principled approach to it. At times the UN has adopted positions that overtly run contrary to prevailing international law; at others it has sidestepped the full range of international law's stipulations for what appear to be reasons of political expediency. Despite claims to the contrary, the result has been to commit Palestine and its people to a seemingly perpetual state of legal subordination in the international system, where the promise of justice and international law is repeatedly proffered under a cloak of political legitimacy furnished by the international community, but its realization is interminably withheld. This has underscored the international rule by law that lays at the heart of much of the work of the UN and the paradoxical nature of the Organization as the occasional author of the global problems it is mandated to resolve in accordance with principles of justice and international law.

Building on this introduction, Chapter 2 offers a short historical survey of the origins of Palestine's subaltern condition. Rather than within the UN system itself, these origins are located in British secret treaty-making and diplomacy between 1915 and 1947, particularly as institutionalized within the League of Nations system. While the literature on the history of Palestine in this period tends to focus on political themes, this chapter examines this period through the cross-cutting theme of the Eurocentricity of international law and organization then prevailing. It is set against the backdrop of the

[72] Charlesworth, H. & Coicaud, J., eds. *Fault Lines of International Legitimacy* (Cambridge, 2010) at 80.

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global paradigm shift then occurring in the international system, from one based on the norms and values of the late-imperial age grounded in an international rule by law, to one based on those of an emerging liberal Western rights-based discourse ostensibly based on an international rule of law. The main systemic issue that emerges for Palestine at this time is its contingent and subaltern status in the international legal order, a status that was eventually placed before the UN in 1947.

Chapter 3 covers how the UN managed this inheritance through an examination of UN General Assembly resolution 181(II) of 29 November 1947 recommending the partition of Palestine. It undertakes an international legal analysis of resolution 181(II) with specific reference to the work of the United Nations Special Committee on Palestine whose report to the General Assembly in September 1947 formed the basis of the resolution. Contrary to the traditional international legal historiography, this chapter posits that the resolution was neither procedurally *ultra vires* the General Assembly, as argued by some pro-Palestinian legal scholars, nor were its terms substantively consistent with prevailing international law as regards self-determination of peoples, as argued by some pro-Israeli legal scholars. Set against the larger context of the international legal status of Palestine from WWI to the end of the British Mandate, this chapter argues that resolution 181(II) was, in a sense, the opening act in the reification of Palestine's legal subalternity within the newly minted UN system. It demonstrates that the resolution was an embodiment, in legal terms, of the lingering tension between the rule by law of late-European empire and the ostensible rule of law of the post-WWII era. More concretely, it shows that the resolution also helped hasten the dissolution of Palestine and the dispersal of its people, followed by a long series of successive questionable legal moments in UN decision-making thereafter.

Chapter 4 turns to the immediate consequences of the 1948 war for one such moment, namely the UN's response to the Palestinian refugee problem. Set against the international law governing refugee status, it critically examines the distinctive institutional and normative regime created by the UN for the Palestinian refugees in the form of two subsidiary organs of the General Assembly – the United Nations Conciliation Commission for Palestine and the United Nations Relief and Works Agency for Palestine Refugees in the Near East. It then juxtaposes that regime against the international institutional and normative regime applicable to all other refugees in the world, as administered by the United Nations High Commissioner for Refugees. The received wisdom holds the special regime for Palestinian refugees out as demonstrative of the UN's unique responsibility for their plight, given it resulted from a war that was, in part, induced by the General Assembly's own

disregard for the international rule of law embodied in resolution 181(II). Yet a critical examination of the UN record on the early history, mandate, and regulatory framework underpinning this regime 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 resulting 'protection gap' that has consequently emerged for Palestinian refugees, marked by uneven and confused state practice concerning their plight as well as ongoing gender discrimination against them by the UN, is demonstrative of the Organization's role in the maintenance of Palestinian legal subalternity on the international plane.

Chapter 5 examines the issue of the UN's position on the legal status of Israel's prolonged occupation of the OPT. Under international law, occupation of enemy territory is meant to be temporary and occupying powers may not claim sovereignty over such territory. Despite this, since 1967 Israel has systematically altered the status of the OPT with the aim of annexing it, *de facto* or *de jure*. During this time, while the UN has focused on documenting the legality of a range of individual violations of international law by the occupying power, scant attention has been paid by the Organization to the legality of the occupation regime as a whole. Emphasis has instead been placed on encouraging the parties to bring the occupation to an end through continued, though widely discredited and grossly unbalanced, bilateral negotiations. This chapter asks by what rationale can it be said that Israel's prolonged occupation of the OPT remains either legal or legitimate in the absence of good faith on its part in negotiating the occupation's end? What accounts for the UN's failure to definitively identify the occupation as illegal as such in line with its rule of law organizing principle, and how can its end reasonably be made contingent on negotiations between occupier and occupied? This chapter is set against the re-emergence and relative gains made by the Palestinian people within the UN during the decolonization period resulting, *inter alia*, in the UN's explicit acknowledgement of its 'permanent responsibility' for the question of Palestine until it 'is resolved in all its aspects in accordance with international law',[73] including an express recognition of the *erga omnes* right of the Palestinian people to self-determination in the OPT. The conventional wisdom presents this shift as emblematic of the UN's commitment to upholding the international rule of law in Palestine following the ostensible empowerment of the Third World through decolonization. In contrast, this chapter argues that the UN's failure to take a more principled position on the very legality of Israel's half-century 'temporary'

[73] A/RES/70/15, 24 November 2015.

occupation of the self-determination unit of the Palestinian people is demonstrative of the maintenance of Palestine's legal subalternity in the UN system, under a different guise.

Moving to the present day, Chapter 6 examines the issue of Palestine's admission to the UN as a Member State. Following the Palestine Liberation Organization's (PLO) historic acceptance of resolution 181(II) in 1988, and the commencement of over two decades of state-building undertaken as a consequence of the Madrid and Oslo peace processes, Palestine made considerable legal advances on the road to being universally recognized as a state, the *sine qua non* for UN membership. By 2011, this included Palestine's recognition by over 130 other states, and membership in several international intergovernmental entities. Set against this backdrop, this chapter critically examines Palestine's unsuccessful bid for membership in the UN between September and November 2011. It undertakes an international law assessment of the report of the UN Committee on the Admission of New Members, which concluded under the certainty of a US veto that it could not unanimously recommend Palestine's membership in the UN to the Security Council after having examined whether Palestine satisfied the criteria for membership as set out in article 4(1) of the UN Charter. Propelled by this unsuccessful bid, Palestine turned to the General Assembly which upgraded its status to that of a non-Member Observer State on 29 November 2012. While the legal consequences of this upgrade have been considerable, including allowing the State of Palestine to accede to a host of international treaties and multilateral organizations, its juxtaposition against the refusal of the Committee on the Admission of New Members to recommend membership to the Security Council in accordance with the international rule of law is demonstrative, yet again, of the international rule by law principle at work. Over seventy-five years after the UN's initial foray into the question of Palestine, this chapter demonstrates that while the Organization has allowed for a gradual and qualified recognition of some Palestinian legal subjectivity and rights, under the influence of the neo-imperial power of one permanent member of the Security Council, it continues to fail to provide the full range of legal and political foundations upon which those rights may actually be realized, thereby continuing to disenfranchise Palestine and its people.

Chapter 7 concludes this book by summarizing its principal findings and situating them in the larger context of the questions posed at the outset. It will show that, rather than the international rule of law ordering principle, it is the international rule by law principle that finds sustained illustration in the UN's management of the question of Palestine. This phenomenon is

rooted in the clash between hegemonic and subaltern interests that produce and reproduce situations in which the promise of international law is repeatedly presented as the basis of international legitimacy and peaceful coexistence among a citizenry of formally equal nation-states, but which relegates non-self-governing peoples and other subaltern societies to partial and qualified access in the system.[74] The result is the presence of international legal subalternity as a long-range condition, a fixed feature of the international order with wider relevance for a variety of other subaltern actors and regions.

[74] Otto, *supra* note 29 at 337–338, 351.

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