

## Revisiting resolution 181 about the partition plan for Palestine: Was it a failure of international law?

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### Abstract:

This paper seeks to revisit the decision of the partition plan of Palestine, it restudies resolution 181 by going back especially to the works of the United nations special committee on Palestine (UNSCOP) which prepared several reports studying the history and circumstances of the conflict and the several solutions that were proposed by the different acting parties. The paper tries to identify the arguments that were laid out by the committee in the reports whether they are legal, political or even biblical in order assess the final outcome and be able to judge if such a plan could be considered as a failure of international law or not.

### key words:

Palestine, partition plan, UNSCOP, international law, resolution 181.

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### **Introduction:**

The discussion regarding whether the partition decision of Palestine was illegal or unsatisfactory has many underlying problems and sub questions, For instance the answer would depend on whether one is a realist which translates into power should shape international law and its absolutely legitimate,<sup>1</sup> in that sense we have no problem answering the question, but if someone is an idealist (constructivist, liberal..) then the decision would pose a problem especially considering that the members of the UNSCOP were mostly liberal.<sup>2</sup> A second point would be whether we are assessing the decision in 2022 or in 1947, this is both a legal and moral question for the corpus of IL changed (there was no self-determination for instance) and the factual situation got reversed. this goes hand in hand with whether one is Palestinian or Jewish because the jews very much welcomed the partition decision as legal at the time I believe it is the Palestinians that would want to go back to the decision at least at this stage of history.<sup>3</sup>

A final note here is whether someone's moral compass is of a consequentialist or categorical character, in the first, one would say that the land is for Arabs by principle, all of it, and jews should be kicked out, but then we would be hurting not just the jews but Palestinians in a sense that its factually impossible, and perhaps this categorical thinking is what led to Palestine not being a state nowadays. but for a consequentialist we need to think of all the Palestinians that could have a state immediately with a substantial gain in land, in the meanwhile we wouldn't have to displace millions of jews as well (this moral side isn't just important because the members of the committee are people and have moral compasses but it will be explained in the following paragraph).<sup>4</sup>

### **Section I: ex ante key points**

There are two reasons why alluding to moral, historical, and generally non-legal claims when assessing an answer of a legal character is important. one needs to know that the corpus of international law was

very undeveloped at the time (even now there are still scholars criticizing this fact let alone at the time of the decision, positivist critique to IL to be noted), most of the major treaties that shape international relations today weren't in place, and in that sense its power not law that still decided most cases. this is clear on a practical level: two world wars this didn't mind any IL norms, maps of countries were being drawn as the big powers wish (*Uti possidetis juris*), but also on a theoretical level when we go back to the UNSCOP report which eludes not only to legal claims but to historical, factual, moral and even biblical/religious arguments, it is in this sense that I believe the best way to assess this decision is by analyzing the reports that made sure it was taken. Take the concept of self-determination for instance although invoked early in the 20th century it isn't until 1960s that it became a legal rule of customary IL and not just a political/moral argument, that is the reason why Arabs couldn't invoke such a concept when they were being colonized, and it is why neither the Jews nor the Arabs eluded to it in the UNSCOP report, in fact Amir Faisal was merely point to the promises made by Britain to give independence to the Arabs that stood by it during WW1-2, it is in this sense that focusing on a technical answer could be misleading.

before diving into the main topic it is important to clear out of the way the fact that the UN had jurisdiction, as it inherited the powers of the organ that designed the mandate (*de facto* and *de jure*) system and which was dividing the territories in the first place, and it is in the same way that the decision should be considered binding and not a mere recommendation, plus the mandate system wasn't a voluntary project, although the historical developments suggest otherwise as professor Crawford pointed out, and perhaps it is here that we see the biggest failure of international law and not in the division itself.

## Section II: the main arguments

Going to the main document before the partition decision, which is the report made by UNSCOP from April to September 1947, it should be noted that it is an elaborate file of 4 volumes that took into consideration the geographic, historic, economic...aspects of the conflict. It visited Palestine and was open to listen to all parties, this is especially important because unlike jews, Arabs refused to deal with it as a matter of principle (categorical morality) as mentioned by the committee,<sup>5</sup> which also explains that there were many works regarding the conflict previously,<sup>6</sup> and it especially uses the Peel royal commission report which at many instances confirms that the mandate became unworkable,<sup>7</sup> impossible and that Britain wont be staying any longer just because Arabs and jews can't agree.

It is on this bases that the committee proceeded to analyze each side's argument as a matter of IL and they could be summarized as follows:

	Argument	Committee's appraisal	Conclusion
Israel	1 Balfour declaration and the mandate system 2 Historical biblical arguments. 3 Humanitarian argument (displaced and forbidden from entry)	1 Does national home mean self-governing institutions? 2 Is there a historic link? 3 a solution is needed	The Balfour and mandate are international commitments
Palestine	1 Numerical majority 2/3 2 Natural right to a land they have been at for centuries 3 Acquired, legal rights based on McMahon-Hussein Anglo-French	1 undisputed, but the number of jews isn't small. 2 there wasn't a sovereign nation to claim the natural right	The legal rights based on treaties dismissed.  What is left is the rights of property and being the

	<p>Declaration of 1918, The Hogarth Message, the Basset letter, and the Declaration to the Seven. (pledge to give Arabs independence including Palestine)</p> <p>4 both the mandate and the Balfour declaration are illegal (against article 22 of the covenant).</p> <p>5 Arab states aren't bound by law made when they weren't party to it</p>	<p>3 note the Arab nationalism and absence of the Palestinian nationalism</p> <p>4 it further discussed every legal document made brought up by the Arabs.</p> <p>5 there I no reason to question the validity of the mandate</p>	<p>indigenous people and owners of the land. (but they have never possessed this land as a sovereign nation.)</p>
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Table 1: all arguments (legal and non-legal) made by both parties, constructed from the UNSCOP report Vol 1.

	Legal document	Committee's Appraisal
Israel	Balfour Declaration	Valid, international commitment
	Mandate	Valid, international commitment
Arabs	McMahon-Hussein	Palestine wasn't among the territories pledged for independence (miscommunication)
	Anglo-French Declaration of 1918	unable to reach agreement upon interpretation of the correspondence
	The Hogarth	Happened 2 months after

	Message	the Balfour declaration which king Feisal accepted
	the Basset letter	unable to reach agreement upon interpretation of the correspondence
	the Declaration to the Seven	unable to reach agreement upon interpretation of the correspondence

Table 2: Legal arguments by both parties according to the UNSCOP report vol 1.

This table illustrates how the main claim of the jews is that the mandatory power in Palestine was created with the specific purpose of creating a national home for the jews, and as such it is a clear international commitment by the league of nations nonetheless, here it is claimed that facilitating immigration is an obligation, and that there would be no displaced Arabs as a result of that, especially that there was no Arab state to begin with, and finally arabs will simply live as a minority once all jews arrive<sup>8</sup>.

The committee's analysis wasn't easy because it was wrestling with the concept of "national home" which as it explained was never used before in IL<sup>9</sup> as for the historic links it went back to the British policy in Palestine 1922 which first recognized such a right of jews to the land "as a matter of right not of sufferance"<sup>10</sup> only to conclude that although national home is ambiguous the mandate and declaration are indeed international commitments and that they didn't forbid the creation of a Jewish state but only it should be within Palestine not the whole of Palestine. having said all that, the committee confirms that there is a chance that immigration can be contrary to article 22 of the covenant and that Arabs will be displaced.<sup>11</sup>

As far as the Arab case goes the committee rejected most of the arguments especially that they boycotted its work, and couldn't elaborate nor defend their claims,<sup>12</sup> so it took their contribution in the general assembly as a basis for the opinion and dismantled it as explained in the table.

Here it is important to note that both parties have rejected the many offered solutions, by various sides, not only agreement wasn't reached, but no party accepted a single offer as the committee states "no solution could ever be devised that would fully satisfy both conflicting parties, and probably not even one party except at the expense of determined opposition by the other"<sup>13</sup> in fact the Arabs rejected even the a constitutional reform according to which Palestinians will be gradually given control over all departments of government, until the transition is complete, the only condition was guaranteeing the right of the Jewish immigrants.<sup>14</sup> Now the jews opposed this furiously and labeled it as surrendering to Arab terrorism, but Arabs rejecting it? it is perplexing.

We could analyze whether the mandate is constitutional or contrary to article 22<sup>15</sup> of the covenant which clearly stipulate the right of the inhabitants not migrants, we could also go over Britain pledges to give independence to all Arabs as explained in table 2 (England denied including Palestine in its promise)<sup>16</sup> but all of that would lead us to Palestine being a special case, or rather what all of this means is that simply realism dominated the picture, in fact nothing says it better than lord Balfour opening statement in the 8<sup>th</sup> session of the council of the league of nations:

"The mandates are not our creation. The mandates are neither made by the League, nor can they, in substance, be altered by the League....Remember that a mandate is a self-imposed limitation by the conquerors on the sovereignty which they obtained over conquered territories"<sup>17</sup> a clear statement that we do whatever we want and if we chose to give you independence that is because we decided to auto-

restrict because of our goodness, to question the ability of IL to act within this framework of brute power would be fruitless after this.

### **Conclusion**

It is all of this that led to mainly one solution which is political partition with economic unity, but besides power, one needs to put him/her self in place of the committee and in the general assembly, faced not only with powers but a factual situation of two peoples present on a single land, with no legal framework that provides the tools to solve it, I doubt that the ICJ would have said anything different, had the demands of the Arabs been met and their questions sent to it, because the general picture would be the same.

If the conclusion is that it was complicated at that time, then it is even worse now, lets imagine saying that it was a wrong decision and then we try to invalidate it, that seems utterly impossible, and its results are hardly reversible, in fact it would even play in Israel's hands which is why perhaps the question to pose instead is whether or not we should consider it a viable solution and demand its activation before it becomes equally impossible to go back to the division of 1947, looking at how Israel keeps on expending, in fact if the partition was a failure for the reasons stated above, not enforcing it and letting the conflict grow and persist, that is the biggest failure of all.

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<sup>1</sup>. Christian Reus-Smit, “The Politics of International Law”, in: Christian Reus-Smit (ed.), *The Politics of International Law*, (Cambridge: Cambridge university press, 2004), p. 15.

<sup>2</sup>. Howard Adelman, *United Nations' First Failure UNSCOP and the Partition of Palestine*, 2009. (yet to be published book on the platform of York University available at: <https://yorkspace.library.yorku.ca/xmlui/handle/10315/2669>).

<sup>3</sup>. For example, the principle of retroactivity (intertemporal law) forbids us from applying self determination in a time where this wasn't law.

<sup>4</sup>. Daniel Mandel alludes to the fact that Evatt might even harbor some anti-Arabism of a sort, and in a time of no clear international law, and it isn't a court that is deciding then this becomes very relevant.

Read more: Daniel Mandel, *H.V. Evatt and the Establishment of Israel: The Undercover Zionist*, (Portland: Frank Cass Publishers, 2004), p. 51.

<sup>5</sup>. UNSCOP, *Report to The General Assembly*, UN Doc. A/364(SUPP), (03 September 1947). para. 156; *Ibid.*, chapter 4, para. 11.

<sup>6</sup>. Peel report, Anglo-American committee, Woodhead commission, high Arab committee...

<sup>7</sup>. UNSCOP, *Report to The General Assembly*, UN Doc. A/364(SUPP), (03 September 1947). para. 73, 122. ( also mentioned in the recommendations several times).

<sup>8</sup>. *Terms of the British Mandate for Palestine confirmed by the Council of the League of Nations*, 24 July 1922, 3 League of Nations Official Journal 1007. (Palestine Mandate).

(Check: Article 2, 4, 6 of the mandate clearly states that.).

<sup>9</sup>. Ibid., para. 141.

<sup>10</sup>. Ibid., para. 143.

<sup>11</sup>. Ibid., para. 135.

<sup>12</sup>. Mohammed Amezzian, The Role of the Arab Regimes in the Assassination of Palestine and the Nakba of 1948, *Journal of Al-Tamaddun*, Vol. 16, n 1, 2021, p. 186; UNSCOP, Report to The General Assembly, UN Doc. A/364(SUPP), (03 September 1947). para. 156.

<sup>13</sup>. UNSCOP, Report to The General Assembly, UN Doc. A/364(SUPP), (03 September 1947). Chapter 4, para. 16.

<sup>14</sup>. Ibid., para. 109.

<sup>15</sup>. League of Nations, Covenant of the League of Nations, 28 April 1919, article 22.

<sup>16</sup>. UNSCOP, Report to The General Assembly, UN Doc. A/364(SUPP), (03 September 1947). para. 169. (**Britain stated the following “Palestine was in fact excluded. But they agree. that the language in which its exclusion was expressed was not so specific and unmistakable as it was thought to be at the time”**) if this shows anything it’s that it’s a game of power not one of law.

<sup>17</sup>. Ibid., Para. 180.