



The failed legacy of UN Resolution 181: Sacrificing Palestinian rights for political expediency

Nabil Elaraby, *Former Secretary General of LAS and Former Foreign Minister of Egypt*

Nabil Elaraby is an Egyptian diplomat and lawyer. He served as Secretary General of the League of Arab States from 2011–2016. Prior to his appointment as Egyptian Minister of Foreign Affairs in March 2011, he served as Egypt's Permanent Representative to the United Nations in both New York and Geneva and participated in several peace talks, notably the Camp David Middle East Peace Conference and the Taba dispute negotiations. Previously, he was a judge at the International Court of Justice

70 years after the United Nations General Assembly adopted Resolution 181, on November 29th, 1947, the Palestinian people remain stateless and continue to suffer the consequences of the lack of international action to uphold their inalienable rights.

The ‘Question of Palestine’, one of the longest unresolved conflicts to have appeared on the agenda of the United Nations, is a major test of the integrity and effectiveness of the international organization’s resolve to ensure respect for the rule of international law. Solving the ‘Question of Palestine’ has been contentious, in part, because the law of the United Nations Charter and the agreed norms of international law were repeatedly sacrificed for the convenience of political expediency. In fact, throughout the decades-long debate on Palestine in the United Nations, the international organization deviated time and again from the path which justice, law and ethics would dictate. The legal considerations of the case of Palestine were consistently disregarded when decisions were taken, which had serious consequences on the exercise of the Palestinian right to self-determination and the peace process itself. Thus, discussing the legal aspects of the November 29, 1947 General Assembly resolution recommending the partition of Palestine is imperative to determine a correct assessment of its impact on the ability of the United Nations to maintain international

peace and security and respect for the rule of international law.

The fate of the Palestinians was decided for them by the United Nations, to their detriment, without reference to the rule of law and basic requirements of justice. No impartial observer could, in all fairness, deny that the United Nations rushed into far-reaching actions affecting the lives of nearly two million Palestinians without having given careful and thorough examination to the legal implications involved. The legitimate aspirations and the high hopes of the whole Arab nation were consequently shattered when they saw with deep sorrow that the United Nations, the supposed conscience of mankind, had reached biased conclusions that brought grievous damage to the cause of justice and international morality.

Prior to the passage of the partition resolution, Palestine had been under a system of temporary tutelage entrusted by the League of Nations to a Mandatory Power, Great Britain. Palestine’s provisional independence was legally acknowledged by the Covenant of the League of Nations under which the Mandate system operated. Because the Mandate was foreseen as a means of rendering advice and assistance to the Palestinians “until such time as they are able to stand alone,” it is evident that when the stage of rendering administrative advice and assistance had concluded and the Mandate had come to an end, Palestine was supposed to be declared independent as of that date.

On April 2, 1947, Great Britain indicated its wish to relinquish the Mandate and called upon the newly-formed United Nations to make recommendations for the future government of Palestine. In 1947, the only course of action which the Charter dictated

was for the United Nations to ascertain the wishes of the lawful inhabitants of Palestine. International law and justice required that those Arabs and Jews who, by virtue of birth, length or status of residence, could satisfy the general requirements of “nationals,” should determine the future government of Palestine. It is axiomatic that only legal residents have a legitimate right to participate in any plebiscite. Rules to this effect are embodied in the laws of all countries and are universally accepted. Yet, the United Nations, created to save succeeding generations from the scourge of war and reaffirm faith in fundamental human rights for the maintenance of justice, failed to consider the juridical aspects of the Palestine question.

In 1947, over two-thirds of the Palestinians were Arabs who would unreservedly have opted for independence. Any alteration of their lawful and inalienable right to self-determination would run counter to the principles on which the Charter was founded. Yet, when five Arab states communicated to the Secretary-General their request that the agenda of the General Assembly’s special session include an item entitled “the termination of the Mandate over Palestine and the declaration of its independence,” the General Committee declined to recommend its inclusion.¹ The General Assembly, having refused to include independence for Palestine as a separate item on its agenda, instead, established a Special Committee on Palestine (UNSCOP) to prepare a report for the Assembly. An Ad Hoc Committee was also formed to resolve the issue during the committee stage of the second regular session of the General Assembly. The Committee, which based its work on the UNSCOP report, chose a path that widened the cleavages between pro-ponents of UNSCOP’s majority and minority plans on the partition and federation of the Mandate, respectively. The division between pro-partition delegates and those sympathetic to the Arab cause was such that no serious attention was given to the legitimate aspirations of the Palestinians.

Doubt and confusion persisted among Member States as to the commitments, obligations and responsibilities growing out of the administration of

Palestine. A proposal to seek an advisory opinion from the International Court of Justice on various questions regarding the legality of the partition plan and the competence of the United Nations to recommend and enforce any specific solution without the consent of the inhabitants failed to garner sufficient votes from the member states. Yet the variations in voting patterns on this proposal indicates that legal aspects were not clear in the minds of a substantial number of Member States. It was evident that it was difficult for many delegations to pronounce any judgement without further study and reference to the total dimensions of the problem. Yet, the General Assembly rejected all attempts to postpone the vote on the partition resolution,² denying Member States a reasonable period of time to study the relevant aspects in order to satisfy their conscience. No definite plan should have been endorsed by the United Nations without a comprehensive study of the manifold legal problems involved. True, it might have been somewhat difficult to scrutinize the conflicting claims under the confused and chaotic conditions which prevailed in Palestine in 1947. Nevertheless, this fact should not suggest that such scrutiny was too much to expect from the international community.

On November 29, 1947, the United Nations General Assembly adopted Resolution 181 (II) which called for the creation of two states, one Arab and one Jewish, with Jerusalem to remain under a separate international regime.³ The decision to recommend partition-at least partition under the above-mentioned circumstances-was not the inevitable solution which the Assembly had no alternative but to recommend. What was and is unacceptable was the recommendation of partition of Palestine without clarifying the sound legal objections raised by the Arabs. What was and is inconceivable was the allocation of forty-three percent of the total area of Palestine to two-thirds of the population, while the remaining one-third of the population was granted over fifty-six percent. The complete dereliction by the United Nations of its responsibilities toward the legitimate rights of Palestinians is directly responsible for the bloodshed that has distressed the area for seventy years. According to Articles 10, 11, 12 and 14 of the United Nations Charter, the General

¹U.N. GAOR, 1st Spec. Sess., General Comm. 8z (1947).

²U.N. GAOR Ad Hoc Comm. on the Palestinian Question, Annex 25, at 300-ox, U.N. Doc. A/AC.14/3z and Add. 1 (1947). “Both votes are recorded, id. at 203. 24E.g., id. at 20x (Colombia).

³G.A. Res. 181, 2 U.N. GAOR, Resolutions 131, 132 (1947).

Assembly's powers are recommendatory and do not place binding force on Member States. Hence, the Arab states did not contravene their Charter obligations when they, responding to the will of the Palestine Arab majority, rejected the partition resolution.

Nonetheless, the recommendation to partition Palestine did lead to consequences with far-reaching legal implications. The first consequence being that Israel considered the General Assembly resolution as part of the legal basis for its establishment. Upon its Declaration of Independence on May 14, 1948, Israel declared the establishment of an independent state upon the "strength of the resolution of the United Nations General Assembly."⁴ However, it is to be reiterated, that because the General Assembly could do no more than recommend a solution to the problem in Palestine and because its recommendation was not accepted by an Arab majority in Palestine, it cannot be considered as a valid legal foundation for Israel's unilateral declaration of independent statehood.

To this should be added the fundamental fact that UNGA resolution 181 (II) recommended the partition of Palestine between an Arab and a Jewish state, with an economic union linking them. The General Assembly took great care in drawing their respective boundaries. Although the distribution of land was detrimental to the legitimate rights of the overwhelming majority of the Palestinians, namely the Arabs, the boundaries allotted to the Jewish state constituted a categorical limitation on Israel to claim legitimacy beyond them. Hence, every addition to the 1947 boundaries has been accrued by the use of force contrary to the principles of the United Nations Charter and the rules of the contemporary law of nations.

Israel's independence claim was both unfounded based on UNGA resolution 181 (II) and a violation of the Palestinian peoples' own right to self-determination, which contains its own international legal obligations. Although the partition resolution proposed the establishment of two states, the Arab state envisaged in the resolution has yet to be achieved. The will of the Palestinian people has never been allowed to be exercised because

the partition resolution was interpreted as providing a legal basis for Israeli statehood in violation of both the law of the Charter and Arab majority's own right to self-determination.

The second consequence of partition to be considered is the admission of Israel to the United Nations, which was based, *inter alia*, on the relevant resolution of the General Assembly⁵:

Noting furthermore the declaration by the State of Israel that it "unreservedly accepts the obligations of the United Nations Charter and undertakes to honor them from the day when it becomes a Member of the United Nations,

Recalling its resolutions of 29 November 1947 and 11 December 1948 and taking note of the declarations and explanations made by the representative of the Government of Israel before the *ad hoc* Political Committee in respect of the implementation of the said resolution...

Here again, the General Assembly deviated from the law of the Charter by ascribing legal effects to its recommendation of partition.

Since the General Assembly's partition resolution was taken as a legal justification for both Israel's existence as a state and its subsequent admission to the United Nations, the least which might have been expected from Israel, was to respect and fully abide by all United Nations resolutions and every obligation which emanates from them. Ironically, this has not been the case. Following the outbreak of hostilities between Israel and its Arab neighbors, the Security Council endeavored to mediate the peaceful resolution of the dispute between Arabs and Israelis. The Council adopted a resolution calling for a ceasefire between the parties and the subsequent separate armistice agreements between Israel and Jordan,⁶ Israel and Egypt,⁷ Israel and Syria,⁸ and Israel and Lebanon,⁹ obligated the United Nations to enforce the demilitarized zones. Yet, armed confrontations repeatedly broke out between the parties over the next decades and as a consequence, what the Palestinians could hope to achieve dwindled to less than 22 percent of Mandatory Palestine. In light of the flagrant violations of the armistice agreements, the Security Council has failed to rectify the situation by ordering timely concrete action to be taken on the basis of the

⁴[1948] Laws of the State of Israel, vol. I, p. 3.

⁵G.A. Res. 273, 3 U.N. GAOR, pt. 1, Resolutions 18, U.N. Doc. 900 (1949).

⁶42 U.N.T.S. 303, no. 656; 4 U.N. SCOR, Spec. Supp. I, U.N. Doc. S/1302/Rev. 1 (1949).

⁷20 42 U.N.T.S. 327, no. 657; 4 U.N. SCOR, Spec. Supp. 2, U.N. Doc. S/1353/Rev. 1 (1949).

⁸21 42 U.N.T.S. 251, no. 654; 4 U.N. SCOR, Spec. Supp. 3, U.N. Doc. S/1264/Rev. i (1949).

⁹22 42 U.N.T.S. 287, no. 655; 4 U.N. SCOR, Spec. Supp. 4, U.N. Doc. S/1296/Rv. z (x949).

of the powers enshrined unto it in the Charter nor did the Council demonstrate sufficient concern for the right to self-determination or any other basic human rights of the Palestinian people.

Apart from the United Nations Charter, the 1949 armistice agreements represented the only legal instruments regulating the relationship between Israel and the Arab states. This fact, *per se*, should have added greater weight to the binding force of the agreements. The preambles of the four armistice agreements state that the parties “decided to enter into negotiations under United Nations chairmanship” concerning the implementation of the agreements, emphasizing the resolutions envisaged under Chapter VII of the United Nations Charter. The reference to Chapter VII is of paramount importance for it implies that resolution is a decision and not a recommendation; according to Article 25, United Nations members “agree to accept and carry out the decisions of the Security Council.”

In contrast to the recommendatory nature of General Assembly Resolution 181 (II), the armistice agreements are binding under the law of the Charter. Nonetheless, Israel subsequently flouted the basic principles enshrined in the armistice agreements by conducting a series of military invasions and territorial annexations by force of portions of the demilitarized zones. Additionally, Israel declared that it is no longer bound by the armistice agreements. In November 1956 after the Suez war, Israeli Prime Minister David Ben-Gurion declared that, “[T]he armistice with Egypt is dead, as are the armistice lines, and no wizards or magicians can resurrect these lines.”¹⁰ Thus, Israel claimed for itself the right to repudiate unilaterally an international agreement concluded under the auspices of the Security Council in conformity with Chapter VII powers. However, the provisions of the armistice agreements are such that one party cannot revoke the agreements. Even with mutual consent, both parties concerned cannot terminate the agreements without the endorsement of the Security Council, the organ vested with primary responsibility for the maintenance of international peace and security under the Charter. Because the situation in Palestine is considered a “threat to peace”¹¹,

within the meaning of Article 39 of the Charter, the Council holds the exclusive right of complete supervision of the functioning and eventual termination of the armistice agreements.

It should be recalled that having attacked and subsequently occupied Arab lands, Israel declared its willingness to conclude new agreements with the Arab states using the occupied territories as a lever to extract concessions from the Arabs. According to international law, particularly the Law of Treaties¹², no derogation from a treaty is permitted unless it is in violation of the rules of *jus cogens*. Additionally, Article 49 of the International Law Commission’s draft stipulates that “a treaty is void, if its conclusion has been procured by the threat or use of force in violation with the principles of the Charter of the United Nations.”¹³ Thus, any treaty concluded between the Arab states and Israel that rests on the seizure of territories by force would be considered void and not legally binding.

The paradox of Israel’s treatment of the General Assembly’s partition resolution as a binding legal order and its flouting of the terms of the Security Council’s legally binding armistice agreements demonstrate derision for the rule of international law and order. Israel’s interpretation of the 1947 partition resolution as having legal effect created new facts on the ground with far-reaching legal implications. The United Nations, particularly the Security Council, has failed to uphold its responsibility to maintain and enforce international peace and security in light of Israel’s dereliction of subsequent Security Council resolutions and armistice agreements adopted to solve the ‘Question of Palestine.’

The United Nations should have required strict adherence from all parties to the armistice agreements as a step to establish stability in the Middle East. Justice is never accomplished unless full respect for international agreements is fully maintained. If peace is to be honestly strived for in the Middle East, the key measure undoubtedly lies in the equal application of the rule of law and justice.

Views expressed in this Policy Brief are those of the author(s) and do not reflect the opinion of The American University in Cairo or of the School for Global Affairs and Public Policy. Copyright is held by the author(s) unless otherwise stated. Requests for permission to quote or use contents should be addressed to the author(s) directly.

¹⁰N.Y. Times, Nov. 8, 1956, at 6, col. 8.

¹¹S.C. Res. 62 (1948). The Egyptian-Israeli Agreement also refers in this connection to S.C. Res. 61 (1948).

¹²Chapter 2 of the Report of the International Law Commission on the work of its eighteenth session, Geneva, 4 May-30 July 1966 (in Part R of the Reports of the Commission to the General Assembly, U.N. Doc. A/63/9/Rev. a) (x966), 2 Y.B. INT’L L. COM’n 173, 177 (1966).

¹³Ibid.