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Session: Opening Plenary – Joseph H.H. Weiler

Title: British Mischief, the Balfour Declaration, and Belligerent Occupation

To kick the conference off, we had the pleasure of hearing Prof Weiler speak to us regarding the Israeli-Palestinian conflict. He spoke of the reciprocal relationship between international law and the conflict. Throughout the conflict, elements of international law have shaped its progression, while aspects of the conflict have shaped international law. And it all began with the Balfour Declaration.

With the 100th anniversary of this historical document soon approaching, Prof Weiler thought it timely to revisit the implications of the Balfour Declaration and to assess the impacts it's had on the conflict today. He calls it the product of 'British mischief' because in 1917 when it was issued, the British had no right over Palestine. They took something that didn't belong to them and sold it to two different buyers. At this time, there was no rule against acquisition of territory by force, and the British only colonized Palestine in 1918.

The Balfour Declaration became significant to international law because it was incorporated into the newly formed League of Nations system and was incorporated into the Palestinian Mandate. In 1947, the League of Nations Committee on Palestine offered the solution of partition. Weiler presents a counter-factual by reminding us that this was not when Israel was born, rather it was not until after the British withdrawal in 1948 that Israel declares itself as an independent state.

When considering the impact of such a declaration, he asks the question: what if Palestine had also declared its independence that same day? It is likely that Palestine would have had a greater number of states recognizing it because they would have had support of the Middle Eastern countries that refused to recognize Israel. If this were the case, Weiler confidently asserts that there is no doubt that the Israeli-Palestinian conflict would have been a wholly different conflict and would not have developed in the same way. This is largely because both parties in the Israeli-Palestinian conflict would be formally recognized states.

A significant aspect of the current conflict arises from the power asymmetries that exist between the formally recognized state of Israel and the ambiguous status of Palestine in the international system. Had this conflict developed state-to-state, Palestine would have had access to international legal resources, many of which they are currently excluded from. Palestine could have been formalized into the international community and benefited from accessing the same international forums as Israel. But, a Palestinian declaration of independence at the time of British withdrawal is a thing of the past. What continues to drive this conflict is the inherent power asymmetries deriving from the parties' differing international legal status.

One way in which the power asymmetry is manifested is through the continued belligerent occupation of Israel in the West Bank and Gaza. At the time of Israeli territorial acquisition of Palestinian, there were new developments in international law establishing the non-recognition to territory acquired by force. . This doctrine of international law was widely being observed, for example, in the case of the Israeli withdrawal from Sinai Province. Another notable example from this period is the United Nations Security Council Declaration regarding the Iraqi invasion in Kuwait. So while we can observe a general trend of compliance, there seems to be a disjuncture when it comes to Israel.

What does this tell us about belligerent occupation? First, it is clear that there has been a failure to uphold the principle of non-recognition. This principle asserts that third party states are legally bound to deny recognition to illegal acquisition of territory through the use of force. States are not meant to have discretion on these matters, the law is clear. Weiler argues that the extent of settlements is inconsistent with the duties of an occupying power. There is a greater need for third party states to denounce these illegal acts.

Second, Weiler asks the question: how long can you remain a belligerent occupier? As Israel uses its legal status as a belligerent occupier to maintain its presence and dominance over the West Bank and Gaza, it begs the question of when, if ever, this will become a norm. Israel's lengthy occupation has displaced the effectiveness of the rules that should govern belligerent occupation. Many of the obligations and responsibilities of the belligerent occupier are no longer being upheld.

According to Weiler, the mandate in international law to end this occupation relies on forcing the parties to negotiate in good faith to sign a peace treaty. Unfortunately, this is one of international law's weakest instruments, as ensuring compliance based on good faith is very challenging. The asymmetrical power imbalance only furthers this problem because it is difficult to persuade the stronger party to come to the bargaining table and act in good faith. The instruments of international law tell the parties what to do, now it's time for political will to make it happen.