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Kaunas to Khan Yunis: Aharon Barak's Dissent, Ontologies of Partition, and the Cunning of Unintended Geography

"An ICJ opinion that would rest on the experience of its author as a survivor of the holocaust may send an ominous message to the readers: it's a zero-sum game. Choose the right side in this war."

—Itamar Mann (on Aharon Barak), January 8, 2024¹

"When we judges sit at trial, we also stand on trial. We will not be judged by hysteria and the fleeting waves of the hour, but by history."

—Aharon Barak, May 24, 2024²

What Weight to Personal Experience?

When South Africa lodged its December 2023 suit for breaches of the 1948 Genocide Convention in the International Court of Justice ("ICJ") regarding Israeli military action in the Gaza Strip following the Hamas-led attacks of October 7, 2023, Israel was faced with a choice: Would it follow the American example and reject the ICJ's jurisdiction?³ Or, would it choose to defend its actions despite its contentious history as an ICJ litigant?⁴ In choosing the latter option, Israel selected Aharon Barak, former president of the Israeli Supreme Court (1995–2006) and an internationally renowned icon of liberal jurisprudence, as its judge *ad hoc*. Unsurprisingly, in the hearing on provisional measures on whether it was plausible that Israel was committing genocide in Gaza, Barak dissented. More surprisingly (except to Itamar Mann, who predicted the dissent's contents with startling accuracy⁵), Barak's dissent went into significant depths regarding his experience as a Holocaust survivor. Here he detailed how, when the Nazis arrived in his home city of Kaunas, Lithuania, Barak only survived by being smuggled out in a potato sack and hidden in a secret room in the home of a Lithuanian farmer.⁶ When he emerged in 1945, he was one of only 5 percent of Lithuania's Jews who survived.⁷ Rare in judicial opinions, Barak's turn to personal experience to reject genocide claims against Israel raises many questions. After all, while the embodied weight of personal experience is a barrier to the complete accuracy of any external interpretation, judicial opinions, as embodiments of authoritative principle, extend far beyond the internalized worlds of their authors. It strains credulity to imagine that a jurist as experienced as Barak was not aware of what he was doing.

My purpose in this article is to read Barak's dissenting turn to personal experience "against the grain." To this end, I argue that, while Barak might have invoked his past for the purpose of claiming (however implicitly) that the suffering that befell him is incomparable to what is occurring in Gaza, he inadvertently invited us to theorize the very

meaningful parallels and connections between the violence that defined the Lithuania of his childhood and the violence that is defining the Gaza Strip of his present. Such is the risk of placing one's personal experience into a judicial opinion—especially in a case such as this one; the author cedes a major measure of control over the interpretable meaning of one's life story. This risk of incorporating autobiography into a judicial opinion is unfortunate for Barak given that he hinged his experience-inflected argument on a particular narrative of Holocaust memory (and its particular legitimization of Zionism) that was as historically contingent as the liberal legalism that cast Barak as a figure of widespread veneration. This narrative, and its embedded exceptionalism, is but one means of explaining the mass violence that Barak experienced. Alternative interpretations that honor the suffering of the Holocaust while refusing to demand submission from the Palestinians are both possible and essential. On this point, Barak's dissent ironically enables the mapping of a path between Kaunas and Khan Yunis (and the rest of Gaza) as spaces connected by continuous patterns of self-perpetuating violence.

In undertaking this reading of Barak “against the grain,” Part I details his dissenting opinions and exposes their questionable presumptions, especially as they concern distinctions between “law” and “politics.” Part II then contextualizes Barak's dissent in relation to the liberal legalism of the 1990s that rendered Barak such a globally iconic figure. Part III turns to the social pathology—generating meta-phenomenon of partition as a profound complication of the liberal Zionist legalism that Barak has long represented. Applying this framework, Part IV turns to the *long durée* of the historic Polish-Lithuanian Commonwealth and how its partition shaped the ethnonationalism that provides much explanation for the horrors Barak experienced during the Holocaust. Adding a layer to this account, Part V connects the legacies of the Commonwealth's partition to visions of partitioning Palestine during the interwar period. Finally, Part IV turns to the ongoing violence in Gaza as a continuity of the very patterns of partition that so profoundly shaped Barak. Through turning to personal experience in his dissenting opinion, Barak made this mapping exercise possible.

Whose “Background Noise” Matters?

Following the recounting of his Holocaust survivor experience in Lithuania, Barak states that “genocide is more than just a word for me . . . It is the gravest possible accusation and is deeply intertwined with my personal life experience.”⁸ On this account, he frames the two great responses to the horrors of the Second World War as the emergence of a individual/humanity-focused transformation of international law and the creation of the State of Israel—two facets virtuously merged by the latter's codification of the former.⁹ From this premise, he proffers numerous instances of Israeli acknowledgement of international law as applied to armed conflict—many of them contained within judicial opinions that he himself authored.¹⁰ Citing his own reflections on this topic, Barak reiterated his longstanding point that Israel's security situation makes its adherence to legal constraints (and the underlying democratic values they uphold) beyond commendable.¹¹ When placing these legal standards in the frames of Israel's code of military ethics and its procedures of adjudication, Barak states that “this is Israel's DNA. Governments have been replaced, new justices may have come to the Supreme Court, but the DNA of Israel's democracy does not change.”¹² Through this biological immutability metaphor, Barak essentially constructs a first principle that Israel is incapable of committing the crime of

genocide. This presupposition forms his touchstone for confronting the question of whether it is plausible that Israel is committing genocide.

From here, Barak charges the Court with failing “to give a complete account of the situation that has unfolded in Gaza since” October 7.¹³ Barak then portrays the violence of that day as one where, among a litany of other horrors, “women’s bodies were mutilated, raped, cut up and shot in the worst possible places . . . [and] [t]hese facts have been largely reported and are indisputable.”¹⁴ On this basis, given Hamas’s vows of repetition, “Hamas is . . . an existential threat to the State of Israel and one that Israel must repel”—a task made all the more difficult by how “Hamas seeks to immunize its military apparatus by placing it within and below civilian infrastructure.”¹⁵ In following this line of reasoning, and despite numerous claims by high-ranking Israeli security figures that Hamas is not an existential threat,¹⁶ in his March dissent, for Barak, the post-October 7 assault on Gaza was nothing short of Israel’s “second war of independence.”¹⁷ Yet, returning to his January dissent, despite seeing Israeli military action as necessary, Barak stated that he has “been personally and deeply affected by the death and destruction in Gaza.”¹⁸ Interestingly, immediately after professing this sympathy, Barak claims that, “the State of Israel was brought before this Court as its leadership, soldiers, and children process the shock and trauma of the attack of 7 October.”¹⁹ Here, “an entire nation trembled and, in the blink of an eye, lost its most basic sense of security . . . [and this] should have played a more central role in the Court’s reasoning.”²⁰

Having set out these varied linkages of past and present, Barak’s dissent asserts that international humanitarian law—not the Genocide Convention—forms the appropriate legal standard for assessing Israeli actions in Gaza.²¹ With this framing, Barak depicts legal violations here as that which “must be investigated and prosecuted by the competent Israeli authorities.”²² Through this narrowing domestication of the evaluation of Israeli conduct via interpretations of law that Israel itself has operationalized, to quote Nimer Sultany, Barak’s reasoning “conceals genocidal acts and intentions and ignores the context of occupation and apartheid in which Israel’s conduct unfolds.”²³ The shortfall of this reasoning, and its privileging of Israeli military perspectives, is further visible in Barak’s disavowal of Israeli genocidal intent—even in light of how extremely high rates of death in Gaza coincide with exterminatory statements by Israeli officials.²⁴ For Barak, in a manner that once again channels and projects personal perception, “to infer intent to commit genocide from these statements, which were made in the wake of horrific attacks against the Israeli population, is plainly implausible.”²⁵ In concluding his January dissent, Barak encapsulates the ethos of his reasoning by stating that “the idea that Israel is now accused of committing genocide is very hard for me personally, as a genocide survivor deeply aware of Israel’s commitment to the rule of law as a Jewish and democratic State.”²⁶

In subsequent provisional measures hearings in March and May of 2024, while Barak agreed that the humanitarian situation had gotten worse, he held firm to the view that Israeli-commissioned genocide was implausible.²⁷ Interestingly, his dissents here raise issues surrounding the relationship between legal and extra-legal considerations seemingly at odds with his January proclamations. In his March dissent, Barak expresses “worry about the turn the Court is taking. Its approach to the case is steadily leaving the land of law and entering the land of politics. The ideas of a judge as a human being should not determine the opinions of a human being when he or she is acting as judge.”²⁸ His May dissent furthers this line of reasoning by concluding that “the only way that I found to be truthful as

a judge was to leave aside ‘background noise’ and focus purely on legal reasoning.”²⁹ If this was his position all along, why then were Barak’s deep turns to personal experience as a means of framing current events something other than “background noise”?

When assessing this question, a return to Mann’s prediction proves insightful. According to Mann, in a thought formation introduced by St Paul, “the point of correspondence between personal suffering and collective deliverance is the body of Christ.”³⁰ Persisting into a secular age (and applying to a polity that defines itself through Judaism), should this Pauline political theology be transposed onto Barak’s dissent, “the very body of the judge and his own personal experience is made to represent the suffering of the respective community.”³¹ However, how one imagines the suffering of their community—and their ability to give voice to this experience through their own life story—can never be separated from the larger structures through which agency inevitably unfolds. This inextricability is especially true of the increasingly besieged attempt to reconcile actually existing Zionism with a system of liberal democracy that affords sacrosanct respect for fundamental human rights—a reconciliation that few have persistently sought as stridently as Aharon Barak.³²

Dissent without Future

When interpreting Barak, it must be noted that judicial dissents possess a particular affinity with a distinct notion of temporality. Through offering an opinion in dissent, a judge is given the opportunity to gain consolation in losing by invoking a future world where today’s dissent might be tomorrow’s precedent.³³ For judicial progressives, a dissent might summon a future in which innovative projects transcend yet-to-be transcended inequities.³⁴ For judicial conservatives, a dissent might call for a return to the strayed-from “truths” that define law as a system.³⁵ Across this spectrum of future purpose, legendary dissents and dissenters populate legal systems the world over.³⁶ Beyond domestic orders where such traditions are characteristically thick, the more diffuse world of international courts and tribunals is not without its own functions of dissent.³⁷ As Mann observes, one need only consider Justice Radhabinod Pal of India, who famously dissented at the International Military Tribunal for the Far East in Tokyo.³⁸ In condemning the impunity of other imperial powers when finding Imperial Japan’s agents not guilty, Pal embraced the axiomatic value of sovereignty when envisioning future contestation between colonial and colonized nations as a struggle exceeding the capacity of international adjudication.³⁹ Amid widespread inequities, and interlinked frustrations with both the postcolonial condition and resurrected project of international criminal justice, Pal’s dissent speaks to many at present.⁴⁰

What future then did Barak invoke through his dissent? A fitting starting point here would be his assertion that the post–October 7 assault on Gaza is Israel’s “second war of independence.” Interpreting this statement requires that we revisit Israel’s “first war of independence” as part of a set of events in 1948 that indelibly included the mass expulsion of over 750,000 Palestinians deemed *al-Nakba*.⁴¹ Had Barak been a Zionist right-winger who views the ethnic cleansing of Palestinians as a necessary completion of what began in 1948, his “second war of independence” would be easy to cast in genocidal terms.⁴² However, as a liberal Zionist who likely sincerely believes Israeli acts (in 1948 and at present) are not genocidal, the outcome of Barak’s “second war of independence” is probably different. Yet, if a purified Jewish ethno-state is not the victory he hopes for, what does he hope for?

While impossible to enter Barak's mind, his postwar ideal would likely be a return to the political/normative ethos defining the 1990s. After all, this timeframe was the intertwined peak of Barak's judicial/intellectual prestige and the liberalism to which he so steadfastly dedicated himself. Relatedly, it was also the age of "redemptive anti-semitism," whereby the end of the Cold War universalized a Holocaust memory regime pioneered in the West that, in casting the Nazi genocide as the supreme incomprehensible evil, elevated moral truth over any political contestation.⁴³ Coupled with the belief that peace between Palestinians and Israelis could finally be achieved via the Oslo Process, in this 90s moment, limitless empathy was offered as a solution to all the world's maladies; and transformed understandings of international law/human rights could entrench said empathy through institutional forms.⁴⁴ Emboldened by this optimism, Barak emerged as a champion of liberal values in the context of the US-led "Global War on Terror"—an effort that gave Israel the opportunity to disclaim the particularities of Palestine and present itself as the frontline defender of Western civilization from radical Islam.⁴⁵ While this post-9/11 transformation empowered the Israeli Right, it also gave Barak a platform to showcase the strength of Israel's liberal democracy. Deciding many iconic cases in this timeframe, Barak set out to prove that terrorism need not cause societies to descend into illiberalism—Israel's example proved otherwise.⁴⁶

The major issue with returning to this world is that the hollow foundations of much 90s optimism has been dramatically exposed over the past two decades. Given his commitments to liberal idealism, Barak cannot readily account for enhanced consciousness of these complicating contextual factors. On this point, as Nimer Sultany has shown, despite his widespread veneration, Barak was an unremarkable jurist, if his jurisprudence is judged by its enabling of social change.⁴⁷ Fixated on an idealistic individualism, the number of post-90s revelations Barak's jurisprudential approach cannot process is staggering. Vitaly, as Seth Anziska has detailed, so much of the Oslo Process was premised on empty assumptions in that the most consequential matters of Palestinian concern (including settlements and Jerusalem) were perpetually evaded as "Final Status Issues."⁴⁸ Deference to political process provided Barak with a means of ignoring these realities when adjudicating matters concerning the Occupied Palestinian Territories.⁴⁹ Relatedly, critical scholars have exposed the myriad ways in which the laws of war and military ethics, enable, as opposed to constrain, the violence of their implementors.⁵⁰ Such exposures demolish the edifice of Barak's position that international humanitarian law inherently limits violence and, in committing itself to applying it, "a democracy must sometimes fight with one hand tied behind its back."⁵¹ That such adherence might be compatible with genocide at a structural level does not seem capable of entering Barak's juridical calculus.⁵²

Given that an ethnic cleansing of Gaza is more likely than any grand return to the 90s, the emotive impotence displayed by Barak's dissent exemplifies a problematic Jack Jackson deems "law without future."⁵³ For Jackson, the rise of a radical right, which dispenses with past-affirming conservatism in the name of timeless assertions of self-justifying will, can easily cause liberal progressives to self-undermine their defining commitments.⁵⁴ For such progressives, responding to the radical right in the name of protecting law from "politicization" leads them to assume the role of traditional conservatives who, in proclaiming themselves guardians of the past, eclipse the possibility of envisioning any improved, let alone emancipated, future.⁵⁵ While Jackson focuses on the United States, his insights ring true for Israel. Faced with an ever-increasing Zionist radical right, the liberal Zionism Barak

promoted through the “least dangerous branch of government”⁵⁶ offers little vision of a future beyond narrow 90s nostalgia.⁵⁷

Given this backdrop, Barak’s turn to his personal experience as a Holocaust survivor in a manner aligned with the faltering hegemonic 90s vision of Holocaust memory is as understandable as it is inadequate. Behind his multilayered invocation is an assumption that the Holocaust is an event of incomprehensible evil and those who would trigger memories of it, as Hamas did on October 7, are indistinguishable from those who perpetrated it.⁵⁸ Thus, as the sovereign entity that understands itself as the negation of this event, Israel is the most moral nation on earth.⁵⁹ On this assumption, no narrative of suffering and survival in Gaza—however harrowing—can ever hope to compare to what Barak had faced himself.⁶⁰ Invoking his experience is thus the last refuge and logical conclusion of a normative order premised on the ultimate question of “whose feelings matter.”⁶¹ To raise this point is not to minimize Barak’s trauma but rather to recognize its extreme power in crafting regimes of meaning so incomprehensibly heavy. That said, contra Barak, it is possible to connect the violence he experienced to the violence unfolding in Gaza in a way that does not treat excruciating emotional differentiation as a zero-sum game. This requires excavating the ideological architecture that culminates in Barak’s futureless dissent.

Partition and the Liberal Zionist Conscience

When contextualizing Barak’s intellectual foundations, it makes great sense to consider them in relation to the presumption of settler colonialism, and its logic of replacement, that has recast Israel-Palestine in recent decades.⁶² However, when considering Zionist settler colonialism, a key distinction must be noted. As Yair Wallach has shown, of all the situations of extra-European settler colonialism, Palestine was the only one where a resolution was overwhelmingly sought through partition.⁶³ According to Wallach, this uniqueness is directly connected to how, for the British authorities governing the post-Ottoman Mandate of Palestine, European Jews, though viewed as superior to local Arabs, were nevertheless inferior to Anglo-settlers.⁶⁴ While these perceptions were central to Jewish “re-establishment” in the Middle East, their hierarchical premise explains why partition was sought in Palestine in a way that it was not in colonies such as South Africa.⁶⁵

Determining how this distinct dynamic of partition in the context of settler colonialism shaped Barak requires some clarification of “partition” as a general concept. While partitions have long-been studied in isolation (Palestine being no exception), scholars are increasingly subjecting partition to comparative/transnational frameworks.⁶⁶ Embracing this expanded conceptual scope, I argue that partition—especially in relation to Zionist settler colonialism—presents a unique array of challenges to the liberal imagination. According to Brendan O’Leary, “partition”—as opposed to secession—can be defined as “a fresh border cut through at least one community’s national homeland, creating at least two separate political units under different sovereigns or authorities.”⁶⁷ In Victor Kattan’s addendum, a key attribute of partition is that it occurs without the consent of the population of the affected territory.⁶⁸ As such, partition is largely a technology of imperial rule where, in addition to creating/governing colonies, it has also been deployed to preserve imperial ends beyond formal imperial rule.⁶⁹ With independence-conditioned (re)partitions by out-going empires surviving the postwar ban on conquest under international law, only condemnation by newly independent Asian and African states rendered partition a

violation of self-determination.⁷⁰ However, partition imaginaries arose once again after the Cold War.⁷¹

This rebirth of partitionist thinking in the 90s seemingly contradicts the liberal democratic universalism that dominated this era. After all, partition's vitiating of consent through its externalization of prerogative undermines the vaunted liberal dictum that the consent of the people is the one true basis for legitimate authority.⁷² This disjuncture cannot be understood outside of history. While acts of partition were not restricted to liberal actors, the fact that the avowedly liberal British Empire executed the iconic partitions of Ireland, India, and Palestine illustrates how animating universalism can be so situationally restricted. This relationship between universalist pronouncements and the ease of their disavowal is readily observable in partition's typical depiction as a "last resort."⁷³ Placed within the greater colonial genealogy of "states of emergency,"⁷⁴ this "last resort" thinking can impute the necessity of partition onto some innate quality of the territory/populations being partitioned in a way that has no reason to consider how colonial processes might have contributed to identities retrospectively deemed "innate."⁷⁵

This rhetoric of normalized exception to otherwise axiomatic consent at partition's pre-enactment level relates directly to another way the post-enactment reality of partition deeply conflicts with liberal ideals. As famously formulated by John Rawls, order within a liberal society can be grounded by stepping behind a "veil of ignorance" whereby the burdens of history/identity can be separated from the assessment of ethical obligation.⁷⁶ While a much-critiqued premise, Rawls's "veil of ignorance" is exceptionally troubling in the context of partition.⁷⁷ Here, the (external) prerogative required to implement partition is highly compatible with the creation of lawless zones where, in the name of security/self-defense, violence (public *and* private) is directed by the very ethnic identity narratives that justified partition in the first instance. With incommensurable founding narratives written in blood, and with bearers of these clashing memories on both sides of the partition-created border, retreating behind "veils of ignorance" is not easily entertainable in entities born of partition.⁷⁸ Thus, by creating and re-creating cycles of violence/retribution in a manner connected to recurring anxieties over majority/minority dynamics, partition cannot be confined to its initial occurrence.⁷⁹ Like invasion from the perspective of Indigenous peoples in settler colonies, partition is a structure, not an event.⁸⁰ On the matter of liberal ideals, given the paranoid ethnicization of political life in a partitioned society, civic engagement premised on abstracted individualism faces an uphill battle of grave proportions.⁸¹

How were post-Cold War liberal internationalists able to re-embrace partition despite such issues informing its past? Importantly, much of their faith stemmed from visions of how a newly empowered international order would overcome previous divisions and gridlocks.⁸² With sovereignty no longer an unquestionable grounding of actually existing borders, for the optimists of this age, there was no reason that potentially redrawn borders could not serve as incentives for divided populations to develop liberal democratic institutions and respect human rights in separation from each other.⁸³ While these models of liberal peacebuilding tasked with potential border reconfiguration operated according to many questionable presumptions,⁸⁴ among the most serious one was who would have the legitimacy to invoke sovereign prerogative if all else failed? These were not easy questions for proponents of a cosmopolitan reasoning that sought to transcend sovereignty and believed an empowered "international" would achieve this goal.⁸⁵ Nowhere was this issue

clearer than in '90s efforts to end the Palestinian-Israeli conflict via the Oslo Process, a process premised on settling the long quest to partition Palestine in a manner aligned with the all-pervasive liberalism of the era.

However, the failure of Oslo revealed just how quickly visions of liberal reconciliation gave rise to sweeping assertions of partitionist prerogative. According to one commentator writing immediately after the collapse of Oslo gave rise to the Second Intifada: "as Israel's only hope for peace, partition should be pursued whether or not the Palestinians agree to it. After the disastrous past several months, something more modest than Oslo is now in order."⁸⁶ While Barak was very much a figure of this timeframe, his ability to see these issues as a structural pathology of partition built on the legacies of earlier partitions is readily obscured by the shroud of abstraction cast by the liberal legalism to which he so steadfastly adheres. However, delving deep into his formative context provides a very different avenue for making connections between the many compounding partitions that shaped Barak and his distinct engagements.

What Was Lithuania?

In broadly centering partition as a touchstone for connecting Barak's Lithuanian experience to his characterization of violence in Gaza, a strangely fitting starting point is that the Lithuanians were Europe's last pagans. By the 1300s, these pagans were a major power that, through their battles with crusaders from the West and absorption of Mongol-devastated Orthodox Slavic lands from the East, built their Lithuanian Grand Duchy as the largest state in Europe.⁸⁷ Eventually allying with the Catholic Kingdom of Poland against Germanic crusaders, the enduring Polish-Lithuanian union became a European great power like no other.⁸⁸ Though Lithuanian rulers converted to Catholicism, ethos of paganism nevertheless defined this composite polity—especially in the domains of decentralized authority and relative religious tolerance.⁸⁹ This unique approach to entrenching power through accommodating diversity was especially true regarding this polity's treatment of Jews, who, fleeing immense persecution in Western Europe, migrated to the Polish/Lithuanian lands (formalized as a Commonwealth in 1569⁹⁰) and created the world's largest Jewish community.⁹¹ While violence against Jews certainly occurred,⁹² these lands did not host the comprehensive expulsions that defined early state-making throughout Western Europe.⁹³

However, everything changed dramatically in 1772 when Austria, Prussia, and Russia executed their first partition of the Commonwealth—and, through two additional partitions, extinguished the Commonwealth entirely in 1795.⁹⁴ According to O'Leary, these events fundamentally altered what "partition" was. While dividing estates without concern for their inhabitants was a hallmark of feudal dynastic politics, true to the contemporaneous influences of the American and French revolutions, the Commonwealth's erasure was widely interpreted as a grave crime against a people.⁹⁵ While contentions here were legion, this situation proved especially troubling for Jews. A bastion of relative Jewish tolerance disappeared and three empires with extensive histories of Jewish persecution had a vast new array of Jewish subjects.⁹⁶

Emboldened by the new spirit of nationality as the basis for political legitimacy, those who resisted partition developed a Polish romantic nationalism seeking to restore the Commonwealth that was ethnically and religiously diverse in its composition.⁹⁷ However, champions of this strategy largely abandoned such efforts following their crushing defeat

in the 1863 January Insurrection against the Russian Empire,⁹⁸ following which, tsarist authorities engaged in processes of “Russification” that eliminated post-partition autonomy and severely restricted non-Russian languages.⁹⁹ With the loss of the Commonwealth restoration agenda that formed the script for reversing partition, the diverse inhabitants of the former Commonwealth increasingly imagined their destinies in ethnonationalist terms. For some, this vision meant assimilation with the partitioning powers. For others, it meant seeking the sovereign independence of an exclusionist ethno-state. In nearly all instances, political goals conflicted with territorial realities in a manner that exemplified the structural logic of partition.

As Orthodox/Greek Catholic Slavs who spoke languages similar to Russian, Belarusians and Ukrainians were major targets of Tsarist Russification policies with varying results.¹⁰⁰ Among prominent Lithuanians, emphasizing themselves as a non-Slavic Baltic people distinct from Russians/Poles, the failed Commonwealth restoration prompted them to embrace an ethnonationalist agenda that disavowed the civic legacies of the Commonwealth and centered on an interconnected revival of the Lithuanian language and veneration of the pagan past.¹⁰¹ Recognizing its value in dividing resistance, Lithuanian identity was simultaneously suppressed and encouraged by Russian authorities.¹⁰² For many Poles, this same failed restoration necessitated a turn from inclusive romantic to exclusive “positivist” concepts of “Polishness,” prompting them to build an ethnonationalist political identity that transcended social class in a society long dominated by noble privilege.¹⁰³ Amid this intertwined backdrop of imperial assertion coupled with varied ethnonationalist integration and resistance agendas, Jews, many of whom supported Commonwealth restoration, were universal outsiders and suspicion of them formed a common presumption among factions otherwise engaged in irreconcilable struggle.¹⁰⁴ Ironically, when faced with this othering, the very Polish positivism that sought to assimilate them provided many Jews with a template for their own constructions of a bounded national self-conception.¹⁰⁵ Partition was the root of this jagged kaleidoscope of identity.

Ethnopolitics in the lands of the former Commonwealth proved captivating to other empires observing events from a distance—particularly the British. Against their long-standing self-styled imperial identity as a progressive force of maritime liberalism,¹⁰⁶ the land-based empires that partitioned the Commonwealth were a convenient foil when condemning imperial impropriety, especially as Britain pursued geopolitical rivalries with these empires in the long-nineteenth century.¹⁰⁷ Such fixations on these lands were only further complicated by British imperial conceptions of Jews and Jewishness. For Britain, Jews were key intermediaries when accessing the Ottoman Empire—akin to the roles Catholics played for France and Orthodox Christians for Russia.¹⁰⁸ As such, the envisioned protection of Jews played a profound role when assessing the legitimacy of forcible intervention.¹⁰⁹ More broadly, the figure of the Jew acted as a key template when assessing majority/minority dynamics as matters of colonial governance.¹¹⁰ For instance, when deeming Coptic Christians unfit for administrative roles in British-occupied Egypt, high commissioner Eldon Gorst stated they “played towards the [Muslim] peasant, the same part as does the Jew in Russia.”¹¹¹ As these comparisons informed larger views of human origins and hierarchy, they planted the seeds for Zionism as a Jewish “re-establishment” in an ancestral homeland aligning with British imperial theories of race and empire.¹¹²

Returning to the former Commonwealth, varied tensions of nationalism and imperialism came to a head with the outbreak of the First World War as clashes between the

German/Austrian and Russian empires catalyzed enhanced identity assertions among the many peoples caught between.¹¹³ Relatedly, as the war quickly revealed the many contradictions of the Russian Empire, radical forces launched their Russian Revolution, which officially ended the war on the Eastern Front.¹¹⁴ The revolutionaries' initial success brought the prospect that they, as some of the most elaborate critics of nationalist/imperialist violence, could build systems dedicated to breaking these recurring cycles of strife. Though far from the only theorist on the matter, central to Vladimir Lenin's conceptualization, the liberation of oppressed nations was central to breaking the ability of oppressor nations to finance the counter-revolutionary division of their working classes.¹¹⁵ This sentiment informed a broader theory of self-determination that, while heavily shaped by Central/Eastern European experience, included Europe's global imperialism and rejected distinction between "civilized" and "uncivilized" nations.¹¹⁶ Action on this basis also meant a serious reckoning with antisemitism as a prejudice that arose within both oppressor and oppressed ideologies.¹¹⁷

These visions captivated many worldwide.¹¹⁸ Yet, despite this optimism, the failure of early revolutionary agents to further actualize their goals on this matter had much to do with the fact that so many powerful forces sought to undermine any "world revolution."¹¹⁹ While the global campaign against the spread of the Russian Revolution was multifaceted, a major theatre of counter-revolutionary action concerned Central/Eastern Europe's "new states," born out of the violent collapse of the Russian, German, Habsburg, and Ottoman empires.¹²⁰ Implementation points of Woodrow Wilson's anti-Bolshevik "right of self-determination,"¹²¹ these new states became major sites of exclusionary-nationalist race theory.¹²² Of particular potency within nationalistic configurations was antisemitism, a prejudice only exacerbated by the widespread association of Jews with the Russian Revolution aptly encapsulated by the all-pervading phrase "Judaean-Bolshevism."¹²³

Exemplifying these dynamics were two states born of this imperial collapse in the form of the former Commonwealth's namesakes, Poland and Lithuania. Another structural legacy of 1772, reversing partition meant different things for Poles and Lithuanians, especially as it concerned the city they respectively called Wilno and Vilnius. The capital of the historic Grand Duchy of Lithuania, by the twentieth century, this city was overwhelmingly Polish and Jewish in its composition—a reality that did not prevent Lithuanian nationalists from viewing it as integral to their identity in a way their provisional capital of Kaunas—Barak's home city—could not satisfy.¹²⁴ Following a successful Polish campaign to capture the city in 1920,¹²⁵ Wilno/Vilnius and its surrounding region formed a contested Polish-Lithuanian borderland hosting recurrent, and identity-shaping, violence between Poles and Lithuanians that spawned defining resentment throughout the interwar period.¹²⁶ This was the world Barak was born into in 1936.

As contentious forces gathered, the lands of the former Commonwealth once again became the site of a would-be meta-partition via the 1939 Hitler-Stalin Pact. The first target was Poland. Here, in an event that mobilized innumerable partition-based memories, the Nazi invasion from the west was joined by a Soviet invasion from the east sixteen days later.¹²⁷ In 1940, the Soviets occupied Lithuania along with Latvia and Estonia. According to Timothy Snyder's *Black Earth*, when considering the zones with the highest numbers of Jewish death during the Holocaust, the overwhelming factor was not preexisting antisemitism, but the destruction of the state institutions that made normal social life possible.¹²⁸ Exemplifying this, the Lithuanian state, where roughly 95 percent of Jews

perished, was destroyed twice—first by the Soviets and then by the Nazis who, upon betraying the Hitler-Stalin Pact, occupied the Baltic states in June 1941.¹²⁹

Insightful as Snyder's argument might be, his equation of state death with Jewish death could more clearly account for how the distinct partition-rooted ethnicization script manifested as it did in the former Commonwealth—a major focus of his earlier scholarship.¹³⁰ These partition legacies are central to understanding why violence against Jews took its particular form here relative to other Holocaust settings.¹³¹ The potency of partition-based existential ethnicization under long-feared conditions of state destruction was exceptionally sharp in Lithuania where the majority of Jews were murdered by Lithuanian auxiliaries of the Nazi occupiers.¹³² While only a small portion of Lithuanians committed the killings, these perpetrators did so as a highly efficient alliance between existing law enforcement officers and once marginal right-wing paramilitary forces who were quickly deputized as law enforcement agents.¹³³ Contextually, this rapid mobilization cannot be separated from a context of social fixation on ethnic precarity born out of more than a century of partition and decades of violence between ethno-nationalists who incommensurably disagreed on what partition's reversal demanded. Compounding these circumstances, the initial Soviet occupation gave rise to widespread perceptions among Lithuanians that Jews were their chief collaborators—a synthesis of partition legacies and “Judaean-Bolshevism” discourse that the Nazis were all too gleeful to exploit.¹³⁴ Taking all these factors into account, Barak's Lithuania exemplified a reality of the Holocaust in Eastern Europe where, in contrast to the mechanized killing in Auschwitz's gas chambers of Jews largely deported from Western Europe,¹³⁵ violence “occurred in its most intimate, personal, and thus also most vicious form, multiplied thousands upon thousands of times as endless communities were transformed into killing fields.”¹³⁶ It is noteworthy that Omer Bartov, the Jewish Israeli Holocaust historian who made this observation, prominently warned of genocide in Gaza in the immediate wake of October 7.¹³⁷

Connected Geographies of Dismemberment

When reflecting on these realities in his dissent, Barak offers the hypothetical that “if Israel had existed in 1939, the fate of the Jewish people might have been different.”¹³⁸ Leaving aside the empirical reality that states offered minimal protection against Nazis bent on state destruction, this depiction speaks to a distinct temporality inhabiting Barak's dissent. Here, the post-Second World War creation of the State of Israel and rise of a humanitarian international legal order (the latter being encoded onto the former's “DNA”) was the grand transcendence of a Jewish exile in Europe that culminated in a genocidal apocalypse. Thus, in Barak's telling, “the rebirth following the Holocaust is the rebirth of the human being, of the centrality of humanity and of human rights for every person.”¹³⁹ Through this rhetorical movement, Barak, operating from the first principle that Israel is incapable of genocide, departs from the idealization so dear to liberal models of reasoning and lodges a selective historicization. As with his turn to personal experience, this turn to selective historicization raises the possibility that the points he seeks to make through invoking context can be vastly complicated through the inclusion of additional context. A very different view thus emerges if, through a historicized embrace of partition as a “structure, and not an event,” one can observe how irreconcilable visions of reversing the partitions of the Polish-Lithuanian Commonwealth were linked to how Palestine was framed as a problem that could be solved through partition.

Returning to the end of the First World War, when visions of reversing partition took on a newfound existential urgency, for many Jews of the former Commonwealth, the ideal of Lithuania as a multi-ethnic/multi-religious space was very different from the considerably smaller nation-state comprised of a majority of Lithuanian-speaking Roman Catholics sought by Lithuanian nationalists.¹⁴⁰ One need only consider the December 1918 statements of Lithuanian Zionist leader Shimshon Rosenboim, who, while affirming commitments to Palestine, viewed Zionism as a Jewish politics best enabled by a multi-ethnic state.¹⁴¹ Seeking an autonomy that “cannot remain closed in the frame of Equality,” according to Rosenboim, “so that Lithuanian Jews should not be divided, we must align ourselves with the Belarusians, as the concept of Lithuania by itself occupies a much larger space than [the majority-seeking] Lithuanians themselves imagine.”¹⁴² In light of “three nations . . . competing against each other,” Rosenboim offered a vision of reversing partition where, in the context of a multi-ethnic state “Jews should become an equalizer, with the help of which conflicts would be solved.”¹⁴³ Yet, if Rosenboim’s Zionism emphasized multi-nationalism, how did Zionism come to be so synonymous with ethnonationalist exclusivity?

When considering this transformation (and its transnational parameters), it makes great sense to center how—contra Rosenboim’s vision—Lithuania (re)emerged on a small-scale as the rest of old Lithuania (namely Belarus) was absorbed into the Soviet Union. Despite their majority, Lithuanians in their newly independent state, until 1940, largely maintained a reduced incidence/intensity of antisemitic violence relative to other former Commonwealth lands.¹⁴⁴ For Lithuanian nationalists, the greater concern was the Poles. Here, with Lithuanian-Polish contention centering on Vilnius/Wilno, Lithuanians viewed support from the Polish-held city’s Jews as a means of strengthening Lithuanian claims that could not be based on Lithuanian demographics.¹⁴⁵ However, this suspicion of Lithuanian-Jewish collaboration to deprive them of Wilno served to heighten Polish antisemitism by posing the question of just how loyal Polish Jews (in Vilnius and beyond) were to the Polish state.¹⁴⁶ Caught between the Poles and the Lithuanians—and their incommensurable visions of reversing partition—many Jews turned to Zionism as a perceived path of salvation. In doing so, they ultimately crafted visions of exclusive Jewish belonging strikingly similar to those who saw little room for Jews in their idealized visions of society.¹⁴⁷

Against this backdrop, Zionist emigration from the former Commonwealth to the British-held Palestine Mandate occurred across multiple levels. Importantly, Zionists—especially the then dominant labor Zionists—proved highly adept in developing transnational networks focused on preparation for and actualization of settlement between Palestine and Eastern Europe.¹⁴⁸ Ironically, the socialistic (if not radical communist) ethos guiding this labor Zionist settlement was fueled in great measure by British Mandatory policies facilitating modes of capital accumulation that vastly benefited Europe-connected Jewish settlers relative to the native Palestinians.¹⁴⁹ Such measures were vital to Zionist designs for land ownership and the distinct settler citizenship this entailed.¹⁵⁰ Zionist emigration in light of these structures were immensely welcomed by a Polish state where the emigration of commercially inclined Jews could create room for Poles in industries/professions with a high Jewish presence. According to the prominent Polish literary scholar Roman Dyboski in 1923:

there is undoubtedly a social and economic struggle between the Polish and the Jewish element going on in the new Poland. It is based on the tendency of the Poles again

to become a nation in the full sense of the word—that is, once more to develop a commercial middle class, the weakening and dwindling of which was one of the diseases of which the old Poland died. In this endeavour the Poles find themselves up against a solid and powerful Jewish middle class in the towns, in possession of what is practically a monopoly of trade and commerce.¹⁵¹

In a related capacity, Zionist settlement also held appeal in Lithuania, where efforts to accommodate its Jewish population through autonomy and a Ministry of Jewish Affairs had collapsed by 1925.¹⁵² Correspondingly, through Lithuanian emigration, the Lithuanian state hoped to generate capital via transnational networks of diaspora merchants/entrepreneurs.¹⁵³ While inclusive of Jewish and non-Jewish emigration, when building a Lithuanian export market in Palestine, the Jewish element of this strategy was unavoidable.¹⁵⁴

In light of these machinations, one force connecting Polish/Lithuanian nationalism and British colonialism was the way in which Zionist emigration was perceived as profoundly unjust within the Arab world as a newfound Arab nationalist consciousness centered Palestine as a core issue.¹⁵⁵ Having aligned with British interests against the Ottomans during the First World War, for these Arab nationalists, Britain's imperial commitment to building a "Jewish national home" in Palestine via the 1917 Balfour Declaration was a grave betrayal.¹⁵⁶ Vaguely analogous to the Jews caught between Poland and Lithuania was the position of the native Jews of Palestine who were claimed by Zionists as evidence of Jewish connection to the land and by Arab nationalists dedicated to showing that their contention was with colonialism and not with Jews.¹⁵⁷ As tensions along these lines built, urgency took on an entirely new dimension as Adolph Hitler came to power in Germany in 1933. With officially mandated antisemitism prompting extensive Jewish migration, "Hitler's Jewish policy forced all the powers to clarify their position on the future of Palestine."¹⁵⁸

While it was in this context that the British first proposed partitioning Palestine via the 1937 Peel Commission Report, those involved had little occasion to consider their proposal as an analogy to—let alone a continuation of—the partitions of the Polish-Lithuanian Commonwealth. Beyond seeing partition here as "state creation" as opposed to "state destruction" (given how the lands from which partition would arise lacked the complete legal personality needed for "state death"), there were key reasons that the significance of the Commonwealth's partitions escaped British consciousness. After all, while the Commonwealth's partitioners were manifestly illiberal, Britain's liberal self-profession vastly set it apart—and it had no shortage of partition experience in its own imperial sphere to draw upon.¹⁵⁹ Eschewing greater connection, for the British, it was liberal pragmatism in their spheres of control that rendered irrelevant the events in Central-Eastern Europe related to nationalist struggle that they viewed with much disdain and condescension.¹⁶⁰ On these grounds, the Peel Commission Report framed partition as a compromise extolling the virtues of liberal problem-solving. According to the report's conclusion: "'Half a loaf is better than no bread' is a peculiarly English proverb; and . . . Partition means that neither will get all it wants. But it seems to us possible that on reflection both parties will come to realize that the drawbacks of Partition are outweighed by its advantages. For, if it offers neither party all it wants, it offers each what it wants most, namely freedom and security."¹⁶¹

Faced with this report, while some Zionists opposed partition as a betrayal of their ambitions, others viewed it—and its ability to create a Jewish-majority state—as an essential means of accommodating refugees from Europe.¹⁶² From this latter standpoint, the problem was not partition in principle—but rather the size of the Jewish state proposed by the Peel Commission.¹⁶³ On this basis, accepting partition could be a short-term measure that left open the possibility of future expansion.¹⁶⁴ On an even broader scale, the discourse prompted by the Peel Commission reached the League Mandates Commission and left an important imprint on how the prospect of partitioning Palestine was imagined according to “majority”/“minority” dynamics disconnected from the greater context of settler colonialism.¹⁶⁵ Beyond the injustices experienced by the colonized, eliding this dynamic also obscured inquiry into how the Eastern European source of Jewish migration might have exposed plans to partition Palestine as a response to an earlier series of partitions.

What was obscure to League officials and the great powers was plainly apparent to the Arab nationalists whose consciousness of (settler) colonialism formed their nigh-universal basis for rejecting partition. Interestingly, one individual who conceptualized an Arab parallel to the partitions of the Polish-Lithuanian Commonwealth was none other than Amin al-Husseini, the Grand Mufti of Jerusalem, whose leading opposition to partition generated a tremendous degree of infamy given his collaboration with the Nazis against the British.¹⁶⁶ Seeking out Polish support when an anti-Soviet German-Polish alliance appeared far more likely than the anti-Polish Hitler-Stalin Pact that actually occurred,¹⁶⁷ al-Husseini sent a letter to the Polish government, that, in addition to claiming a state in Palestine could not accommodate all of Poland’s Jews, called for partition-based solidarity.¹⁶⁸ As recalled by his intermediaries, for al-Husseini: “the Polish nation in particular would understand the fight of the Arabs against the severance of a part of their country, for Poland had been partitioned in the course of history and had fought for decades against the partitioning of their country and for the creation of an independent state.”¹⁶⁹

Though dovetailing with Nazi opposition to a Jewish state in Palestine, al-Husseini’s call nevertheless held limited appeal for Zionism-supporting Poles, even those under no illusion that Palestine emigration would comprehensively solve their “Jewish question.” According to Jerzy Smolenski, while a partitioned Palestine could not be a home to all Jews feeling compelled to leave “their adopted countries”:

the capacity of the Jews for colonisation, as it has been shown in Palestine [where] . . . they have proved their ability to transform themselves from merchants to settlers and farmers, make Jews especially fit for courageous and large-scale pioneering activities in young countries not yet completely developed . . . Jews are [thus] suitable for playing a conspicuous role as the vanguard of the white population in the countries already today marked out as territories for inflow and exploitation by various races.¹⁷⁰

Through Smolenski’s linkage of antisemitism, settler colonialism, global race hierarchies, and the past and future of partition, the limits of al-Husseini’s envisioned Polish-Palestinian solidarity becomes plainly apparent. As the Nazis (motivated by their own grandiose settler colonial vision of Eastern Europe¹⁷¹) brought racialized pathologies to their logical conclusion against Jews, Poles, Lithuanians, and many others, what other grounds could exist for contesting partition in Palestine and beyond?

Following the Second World War and the Holocaust, Zionist leadership overwhelmingly embraced the once controversial option of partition.¹⁷² For the Arab nationalists who disavowed al-Husseini's Nazi collaboration, their task consisted of devising a liberal case against the prospect of partition that had hitherto been defended in liberal terms.¹⁷³ Among these intellectuals was Albert Hourani whose anti-partition arguments before the 1946 Anglo-American Committee of Enquiry (convened to determine the future of Holocaust survivors) were admired for their cogency even by dedicated Zionists.¹⁷⁴ Eschewing standard liberal resorts to abstraction, Hourani, taking the Arab perspective on partition's injustice as axiomatic, made his opposing case in a manner deeply cognizant of how partition's structural logic could not be confined to a singular event.¹⁷⁵ While Hourani did not mention the partitions of the Polish-Lithuanian Commonwealth, given how these lands were now defined by Soviet occupation following their eastward advance into Germany, this omission is eminently understandable given the array of issues already before him.¹⁷⁶

Mindful of how Zionist designs for expansion would not be conclusively settled by partition, according to Hourani, "the establishment of a Jewish State in part of Palestine would not satisfy them, but would strengthen their position and encourage them to ask for more."¹⁷⁷ Moreover, he noted how, by shifting majority/minority dynamics in the context of settler colonization, in a state born of partition, the Zionists "will be forced into conflict with the Arab world by various factors—by the need to deal with their own Arab minority . . . which would rise and protest, and whose protest would be aided actively by surrounding Arab countries."¹⁷⁸ Seeing partition as a tragic erosion of deep bonds between Jews and Arabs as well as a Europe exporting its "Jewish problem" as an abandonment of European ideals of democracy and tolerance, partition would also irreparably damage relations between the Arabs and the West.¹⁷⁹ In his words, "Zionism for the Arabs has become a test of Western intentions."¹⁸⁰ Given this reality, "so long as . . . the intolerable grievance of Zionism exists, it will be impossible for the Arabs to establish that relationship of tolerance and respect, of trust and cooperation, with the world and to live at peace with themselves and their neighbors."¹⁸¹ Despite these warnings from Hourani and others, the partition plan devised by the United Nations Special Committee on Palestine was adopted by the General Assembly via Resolution 181 on November 29, 1947.¹⁸²

The Middle-Eastern Theatre of Unending Partition

When the partition of Palestine did not occur as planned, the first Arab-Israeli War broke out in 1948,¹⁸³ and al-Nakba unfolded, its executioners turned to a practice that, similar to partition, was hailed under prevailing understandings as a "solution" to "intractable" ethnic situations—population transfer.¹⁸⁴ While the new League of Nations pioneered an elaborate (and hierarchical) regime of international minority protection, by the end of the Second World War, while this system was acknowledged as a failure, the ethnic lens remained an entrenched vantage point for understanding rights and conflict. For the Allied Powers, building on earlier examples, mass population transfer (despite its usage by the Nazis¹⁸⁵) commanded influence as a means of building homogenous ethnic states in postwar Europe that could ground a new order of international human rights and prevent the newly articulated crime of genocide.¹⁸⁶ However, in the Palestinian context, and in a manner fundamentally centered on its settler colonial dimensions, this strategy contained a fatal flaw that impacted Palestine in a way that it did not impact Europe. The distinct identity of Palestinians, long denied by the Zionists who viewed them as interchangeably

“Arab,” was rooted in a concrete understanding of place as opposed to any bio-cultural concept of race/peoplehood that could be spatially reconstituted.¹⁸⁷ The Zionist concept of collective identity is thus perpetually frustrated by the Palestinians’ refusal to see themselves through European lenses of ethnicity and racialization—especially as they were shaped by partition and its legacies.

While this base-level reality of partition was socially destructive enough, its innate structural logic was further shaped by varied meta-phenomena that define the Palestinian-Israeli conflict’s fabled “intractability.” Upon declaring the State of Israel, there came the mass influx of Jewish populations from Muslim majority societies—an exemplification of the logic of human movement inseparable from the contemporaneous Nakba.¹⁸⁸ Adding another layer to the Zionist racialization scheme, these largely Arabic-speaking Mizrahim populations became Israelis through processes of de-Arabization, placing them within an intermediate status between the Ashkenazim and the Palestinians who became a dual-source of resentment.¹⁸⁹ Then there was the occupation of Gaza, the West Bank, and East Jerusalem via the 1967 Six-Day War that left Israel as the sole controller of historic Palestine. Notorious for the debates on international legal status it spawned, the occupation must also be considered in relation to its many sociological effects. On one level, through the creation of Israeli settlements and overarching economic integration policies, with many Palestinian residents of the occupied territories employed in Israel, the varied territories became deeply enmeshed in ways disavowed by the preservationist ethos of the international law of occupation.¹⁹⁰ On another level, the Israel Defense Force, already a mechanism for integrating Jews of varied backgrounds into the material/ideological contexts of organized violence, was granted indefinite relevance as an ever vigilant force governing an occupied population.¹⁹¹ Said relevance reached newfound heights during the Palestinian uprisings in the occupied territories via the First Intifada (1987–1993) and, more intensely, the post-Oslo breakdown Second Intifada (2000–2005).¹⁹²

In the fallout of the latter, the status quo shifted dramatically in Gaza where, in the 2005 “disengagement,” Israel unilaterally evacuated its settlements and disclaimed any duties as an occupying power. While much has been written on Israeli reasons for withdrawal, the election of Hamas in the context of its clash with the Palestinian Authority governing the West Bank, and whether Gaza remains occupied as a matter of international law despite Israeli disavowal, there remains ample space to further theorize the disengagement as a meta-phenomenon.¹⁹³ True to the logic of partition and its connected cross-contextual lives, the Gaza disengagement can be deemed nothing short of a “Second Partition of Palestine” whose lineage traces back to the unresolved legacies of the partitions of the Polish-Lithuanian Commonwealth that was so essential to the formation of Zionism.¹⁹⁴ After all, the disengagement was very much a “fresh cut” emblematic of partition given that the Occupied Palestinian Territories hold a right to self-determination under international law, and to unilaterally alter its status without consent can hardly be consistent with a collective right held indivisibly.¹⁹⁵

When considering how this “second partition” was possible, one need only consider how, through the Oslo Process, the prospect of Palestinian self-determination was deeply frustrated in the name of pragmatic political compromise.¹⁹⁶ Oversight on this point can be easily attributed to how the ’90s liberal idealization of law limited law’s ability to confront the political pathologies endemic to partition. When assessing this logic’s legacies, one need not go beyond Barak’s dissent. For Barak, South Africa’s genocide case is highly

counterproductive, for “history has taught that the best attempts at peace in the Middle East have generally been a result of political negotiations and not judicial recourse.”¹⁹⁷ Through this separation of law from politics (whereby liberalism preserves law’s purity), Barak invoked the 1978 Camp David Accords that led to Israeli-Egyptian peace.¹⁹⁸ Neglected in this narrative was how this peace came at the expense of the Palestinians who, given partition’s production of their subaltern legal status, prevented them from accessing the state-centrism that drove negotiations between Israel and Egypt (and Jordan) that paved the way for Oslo.¹⁹⁹ In this long unfolding, whether it was the “autonomy” provisions that undermined the possibility of Palestinian statehood,²⁰⁰ or how Palestinian human rights were stripped of their revolutionary applications,²⁰¹ partition-based subalternity was an ever-present reality.²⁰² Any strict law-politics separation such as Barak’s only compounds the perpetual frustration of Palestinian self-determination that Zinaida Miller deemed “permanent transition.”²⁰³

Given the notorious abstraction-spawning complexity of the legal status of the Occupied Palestinian Territories, especially post-Oslo, framing the disengagement as a second partition must cut through lifeless juridical mazes by understanding *why* partition is illegal. Here it is imperative to remember that zones of partition have historically been zones of mass killing where the script of exclusive identity-based paranoia overcomes existing institutions and creates new ones in its image. Regarding Gaza in this capacity, its status is an effective legal vacuum as the Israeli exercise of control over the Strip and all that enters and exits it contains no corresponding recognition of the rights of its inhabitants.²⁰⁴ As such, the official Israeli denial of occupation provides cause to disclaim the occupier’s legal obligations including the need to uphold international human rights standards and refrain from using military force in the name of self-defense against the occupied population.²⁰⁵

This configuration of Gaza as a zone of presumptively limitless violent infliction can in no way be separated from how partition’s politics of collective memory leads to an array of antagonistic depictions of Gaza.²⁰⁶ For the Gazans (the majority of whom are descended from refugees created by the first partition attempt in 1948), living confined and degraded (pre-October 7) lives at a bare minimum of survival cannot but generate interest in the rage represented by Hamas among a population whose experience can be deemed mass-scale torture.²⁰⁷ For the Israelis, who largely view Gaza as beyond their state’s control, the all-pervasive intensification of inter-generational trauma-invoking existential threats (namely a Hamas-supporting Iran²⁰⁸) as the supreme political technology grants power to those willing to punish Gaza with ever-increasing vitriol in defiance of world opinion. Thus, as the violence on October 7 was unleashed by those convinced that they would die in the prison that is Gaza,²⁰⁹ the pogroms in the lands of the former Polish-Lithuanian Commonwealth could not but serve as the template for Jewish Israeli comprehension of these actions. The violence of October 7 and all that continues is the purest expression of partition as a structure and not an event.

Through Aharon Barak’s dissent we have before us an indictment of the inability of liberal legalism to comprehend the pathologies of unending partition so heart-wrenchingly being displayed for all the world to see. After all, if a figure of judicious sobriety as eminent as Barak is capable of seeing the violence of October 7 not as the devastating outcome of profoundly unjust conditions, but as an existential threat to be vanquished through an unchosen “second war of independence,” then what does this mean in a society where

many view Barak's approach to subjecting military violence to legal constraints as itself an existential threat.²¹⁰ This backdrop must inform any and all assessments of whether Israeli actions justified by "military necessity" cross the genocide threshold in Gaza.²¹¹ Behind these realities are the effects of partition as a force unconsidered, or even advocated for, by those who articulated genocide as the supreme transgression in the 1940s.²¹² Perhaps it was subconscious recognition of his liberal legalist framework's incapacity to reconcile these realities that caused Barak to retreat into his personal experience of victimhood when confronted with actions that defy any liberal achievement of a *modus vivendi* among those bearing the weight of incommensurably unfinished histories. By centering the pathologies of partition and their persistent reinvention, we can see how these histories (and efforts to escape them) became incommensurable in the first instance. Doing so is perhaps our last best hope for envisioning any emancipated future for all.²¹³ Though he did not intend to do so, Barak gave us a map for this undertaking. How then might we learn from his trauma what he himself cannot?

NOTES

1. Itamar Mann, "The Body of the Judge and the Suffering of the Collective: South Africa's Genocide Application and the Power of Minority Opinions," *Verfassungsblog*, January 8, 2024, <https://verfassungsblog.de/the-body-of-the-judge-and-the-suffering-of-the-collective/>.
2. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*—Order of 24 May 2024: Dissenting Opinion of Judge *Ad Hoc* Barak, para. 34.
3. "Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice," *International Legal Materials* 24, no. 1 (January 1984): 246–48.
4. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, July 9, 2004.
5. Mann, "Body of the Judge."
6. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* — Order of January 26, 2024: Separate Opinion of Judge *Ad Hoc* Barak, paras. 3–5.
7. *Ibid.*, para. 5.
8. *Ibid.*, para. 6.
9. *Ibid.*, para. 8.
10. *Ibid.*, paras. 9–14.
11. *Ibid.*, para. 9 (citing Aharon Barak, "International Humanitarian Law and the Israeli Supreme Court," *Israel Law Review* 47, no. 2 (July 2014): 181–89).
12. Barak Separate Opinion (January), para. 13.
13. *Ibid.*, para. 17.
14. *Ibid.*, para. 18. On this broader topic, see Anwar Mhajne, "Understanding Sexual Violence Debates Since 7 October: Weaponization and Denial," *Journal of Genocide Research* (May 2024): 1–19.
15. Barak Separate Opinion (January), para. 20.
16. Nimer Sultany, "A Threshold Crossed: On Genocidal Intent and the Duty to Prevent Genocide in Palestine," *Journal of Genocide Research* (May 2024): 18.
17. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*—Order of March 28, 2024: Separate Opinion of Judge *Ad Hoc* Barak, para. 34.
18. Barak Separate Opinion (January), para. 23.
19. *Ibid.*, para. 24.
20. *Ibid.*
21. *Ibid.*, para. 26.
22. *Ibid.*, para. 28.
23. Sultany, "Threshold Crossed," 4.
24. Barak Separate Opinion (January), paras. 29–41.
25. *Ibid.*, para. 37.
26. *Ibid.*, para. 47.
27. Barak Separate Opinion (March), paras. 12–16; Barak Dissenting Opinion (May), para. 13.
28. Barak Separate Opinion (March), para. 10.
29. Barak Dissenting Opinion (May), para. 34.
30. Mann, "Body of the Judge."

31. A similar rhetorical tactic was available to South Africa's judge *ad hoc* Dikgang Moseneke, who suffered greatly under Apartheid. Ibid.
32. Aharon Barak, "The Values of the State of Israel as a Jewish and Democratic State," *Jewish Virtual Library Publications*, August 2009, <https://www.jewishvirtuallibrary.org/jsource/isdf/text/barak.pdf>.
33. Clare L'Heureux-Dube, "The Dissenting Opinion: Voice of the Future," *Osgoode Hall Law Journal* 38, no. 3 (Fall 2000): 495–518.
34. Paul Kahn, *Origins of Order: Project and System in the American Legal Imagination* (New Haven, CT: Yale University Press, 2019), 13–14.
35. Ibid., 17–18.
36. See Micheal Kirby, "Judicial Dissent—Common Law and Civil Law Traditions," *Law Quarterly Review* 123, no. 3 (July 2007): 379–400.
37. Jeffrey Dunoff and Mark Pollack, "The Road Not Taken: Comparative International Judicial Dissent," *American Journal of International Law* 116, no. 2 (April 2022): 340–96.
38. Mann, "Body of the Judge."
39. "Judgment of the Hon'ble Mr. Justice Pal, Member from India," in *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, ed. Neil Boister and Robert Cryer (Oxford: Oxford University Press, 2008), 903.
40. See Latha Varadarajan "The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal," *European Journal of International Relations* 21, no. 4 (December 2015): 793–815.
41. Cf. Nur Masalha, *The Palestine Nakba: Decolonising History, Narrating the Subaltern, Reclaiming Memory* (London: Zed Books, 2012); Alon Confino, "The Nakba and the Zionist Dream of an Ethnonational State," *History Workshop Journal* 95 (Spring 2023): 131–53.
42. Ilan Pappé, "The '48 Nakba & The Zionist Quest for its Completion," *Socialist Viewpoint*, October 2003, http://www.bintjbeil.com/articles/en/021020_pappe.html.
43. Adam Sutcliffe, "Whose Feelings Matter? Holocaust Memory, Empathy, and Redemptive Anti-Antisemitism," *Journal of Genocide Research* 26, no. 2 (December 2024): 222–42.
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