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Introduction

This issue of the *Israel Law Review* is dedicated to a contemporary examination of the Palestine Mandate, adopted by the League of Nations in 1922. It features selected articles from two events focusing on the Mandate, held in the Faculty of Law at The Hebrew University of Jerusalem, under the auspices of the International Law Forum and with the support of The Knapp Family Foundation. The first event, held in May 2015, was an international conference on 'Legalities and Legacies: The Past, Present, and Future of the Palestine Mandate in International Law'. The second event was an expert workshop convened in February 2016 under the title 'The Palestine Mandate: Past and Present'. Both events focused on the contemporary significance of the Palestine Mandate, primarily but not exclusively from a legal perspective.

'The League of Nations Mandate System and the Palestine Mandate: What Did and Does It Say about International Law and What Did and Does It Say about Palestine?' by Malcolm Shaw is based on his keynote address at the 2015 conference. The article examines the essential characteristics of the Palestine Mandate in the context of the League of Nations mandate system as a whole, and then considers this Mandate's historical framework and exceptionality. The article posits the distinction between the international allocation of the status of a territory and the determination of its boundaries.

In 'Reinventing a Region (1915–22): Visions of the Middle East in Legal and Diplomatic Texts Leading to the Palestine Mandate', Karin Loevy traces a set of regional images in international legal and diplomatic documents leading to the establishment of the Palestine Mandate. Her analysis suggests that at that important crossroad, when a new world order was imagined and negotiated, a broad, layered and diverse vision of a comprehensive 'region' was actively present in the minds of very different actors within the framework of empire. A vast territory was reconceived in a manner allowing new ways of rule and of influence, for enhanced development and for dealing with strictly European globalised problems. This powerful regional vision was later disregarded because of the weight of the subsequent territorial geopolitics in the Middle East.

Amos Israel-Vleeschhouwer also offers an alternative view to that which the Palestine Mandate eventually provided, through the vision of a representative of the ultra-orthodox community in Palestine who appeared before the international committees which considered the future of the Mandate. In 'The Mandate System as a Messianic Alternative in the Ultra-Religious Jurisprudence of Rabbi Dr Isaac Breuer', Israel-Vleeschhouwer traces the work of Rabbi Dr Isaac Breuer, a German jurist and Jewish rabbi. In his work, Breuer criticised the concept of sovereignty and introduced an alternative regime for global governance of developing peoples. Breuer's model replaces the notions of 'sovereignty' and 'rights' with those of internalised obligations and subservience to law and justice. Limiting any national aspirations to total sovereignty, he implored the UN to refrain from elevating the Jewish national home to statehood. Opposing the Zionist position, he insisted that the Mandatory power and international institutions would enable two nations to develop side by side, in what he termed 'the state of peace', under international trusteeship.

Looking at the role of the Palestine Mandate in contemporary debate, 'The Unique Character of the Mandate for Palestine' by Matthijs de Blois emphasises the Mandate's unique character with respect to both its beneficiaries, the Jewish people, wherever they live, and the obligations of the Mandatory power. After recounting the response to the Palestine Mandate by representatives of Palestinian Arabs and the gradual departure of the British government from its obligations, the article argues that the unique character of the Mandate has been kept under wraps. Some academic writings and legal action by Palestinians now offer a radical revisionism, which uses the Mandate as the legal basis for a Palestinian state. De Blois argues that this trend is not without consequences for the recognition of Israel as a Jewish state and for the right of the Palestinians to self-determination.

Yuval Shany's article 'Legal Entitlements, Changing Circumstances and Intertemporality: A Comment on the Creation of Israel and the Status of Palestine', also considers the continued relevance of the Mandate, in the context of a critical assessment of some of the legal conclusions offered by Professor James Crawford, who, in the second edition of his seminal treatise *The Creation of States in International Law* (published in 2006), discusses the events surrounding the creation of Israel and the status of Palestine. Shany addresses the relationship between the principles of *ex injuria non oritur jus* and *ex factis oritur jus* in the Israeli–Palestinian context. He examines the legal significance of the Palestine Mandate and Crawford's position concerning its validity, as well as those of the 1947 General Assembly Resolution 181 (the 'Partition Resolution') and Israel's 1948 Declaration of Independence. He concludes by briefly examining Crawford's conclusions relating to the status of Palestine.

The Proceedings of the 'Mandate for Palestine: Past and Present' international workshop held in February 2016 include introductory statements and comments from participants. The first session provided a historical backdrop for discussion, looking at the intentions and expectations of the various international actors at the time that the Mandate was adopted. The second session turned to legal questions and concerned local law – namely the administration of the Mandate and its legacy in Israeli law. The third session addressed international law and its relevance to the resolution or regulation of the Israeli–Palestinian conflict, exploring whether and how the passage of time has impacted on the legal relevance of the Mandate. The discussion was held under the Chatham House Rule and the views made during the discussions therefore remain unattributed.

This Palestine Mandate compilation concludes with a review by Robbie Sabel of *Self-Determination, Statehood, and the Law of Negotiation, The Case of Palestine*, authored by Robert Barnidge Jr and published by Hart (2016). The first chapter of this book was introduced at the 2015 conference.

This issue of the *Israel Law Review* concludes with the Annual Lionel Cohen Lecture, given in November 2015 by Judge of the International Court of Justice, Sir Christopher Greenwood, titled 'Magna Carta and the Development of Modern International Law'.

We wish you all an inspiring and enjoyable read.

Professor Sir Nigel Rodley and Professor Yuval Shany
Editors-in-Chief
Professor Yaël Ronen
Academic Editor

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The League of Nations Mandate System and the Palestine Mandate: What Did and Does It Say about International Law and What Did and Does It Say about Palestine?

Malcolm Shaw[*]

This article examines the essential characteristics of the Palestine Mandate in the context of the League of Nations mandate system as a whole, pointing out its particular nature. It commences with a brief look at the Versailles environment and the relevance of the principle of self-determination, with an emphasis upon the development of the mandate system. The article then turns to consider the Palestine Mandate in its historical framework and the exceptionality of this Mandate. The distinction between the international allocation of the status of a territory and the determination of its boundaries is posited.

Keywords: Palestine, Mandate, self-determination, boundaries

1. Introduction

This article seeks to consider the significance of the mandate institution – first, generally, and then with regard to the Palestine Mandate territory. Commencing with a brief review of the essential context surrounding the Versailles settlement and the creation of the mandate system, it proceeds to look at the scope and application of international legal principles in formulating the territorial settlement, focusing upon Palestine. Thereafter, we proceed to examine the particularity of the Palestine Mandate during its currency to see what this meant and to what extent its consequences persist. The relationship between the operation of the system in general and its specific manifestation in Palestine will be surveyed and the distinction between the status of a territory and the question of its boundaries will also be explored. This theme will be apparent both in the original establishment of the spatial limits of the area and in its contemporary resonance. The aim is to set the Palestine Mandate, in terms of both status and of boundaries, in context and see to what extent it may be relevant today.

[*] Senior Fellow, Lauterpacht Centre for International Law, University of Cambridge, UK; Emeritus Sir Robert Jennings Professor of International Law, University of Leicester, UK; Distinguished Visiting Professor, Hebrew University of Jerusalem, Israel, and practising barrister at Essex Court Chambers, London, UK. Associate Member of the Institut de Droit International. shawmalcolm@hotmail.com.
This article is an enlarged version of a keynote speech given at the Conference on the Palestine Mandate at the Hebrew University of Jerusalem, June 2015. I am very grateful for the constructive comments made by the anonymous reviews of this journal, but all responsibility must rest with me.

2. THE VERSAILLES ENVIRONMENT

The Paris Peace Conference convened in Versailles on 18 January 1919 and concluded on 21 January 1920.[1] By that time, five peace treaties had been signed disposing of territories in Central and Eastern Europe, creating a minorities' protection regime, establishing a mandate system for the colonies of the defeated powers and setting up the League of Nations. All in all, a remarkable achievement, if not over time an exceptionally successful one. The challenge faced by the participants was immense. The international scene, unlike 1945, was not dominated by one or two powers. Instead, a group of five powers (Britain, France, the United States, Italy and Japan) steered events and made the recommendations, which were adopted by the conference as a whole. In fact, Japan played little part and so the 'Big Four' took charge, even though over 30 countries sent delegates.[2]

In approaching the topic in general, it is important to keep in mind the chaotic conditions of the time. Russia had collapsed in 1917, leaving the war and making a separate peace with the Central Powers at Brest-Litovsk in early 1918; this shifted Russia's boundary far to the east by renouncing its claims to the Baltic States, Finland, Belarus and Ukraine. By the time that the Peace Conference was in session, Eastern Europe (and beyond into Asia) had subsided into warfare once again as the Russian civil war spread into Poland, Ukraine and the Caucuses, among other areas.[3] To an important extent, therefore, the conference followed the soldiers rather than impose its own solutions *ab initio*. By January 1919, Poland had been re-established, Finland and the Baltic States were virtually independent states and Czechoslovakia was in the process of formation, while the new entity eventually to be termed Yugoslavia was coalescing.[4] As an American military adviser graphically put it: 'The "submerged nations" are coming to the surface and as soon as they appear, they fly at somebody's throat. They are like mosquitoes – vicious from the moment of their birth'.[5] This was all against the background of a torrent of humanitarian catastrophes inadequately addressed. Insofar as the areas beyond Europe were concerned, German colonies such as Kamerun, South-West Africa and Tanganyika were occupied by Allied forces, while in the Middle East British troops had taken over Basra and Baghdad, Syria and Palestine.

Leaving aside the peripheral methods of acquiring title to territory in international law, such as occupation of land belonging to no one or by way of accretion, the primary process by which territory was obtained was by way of cession, that is the formal handing over of an area by one sovereign to another. Conquest as such was insufficient, while long-time effective control of

[1] See, eg, Versailles Peace Treaty (entered into force 10 January 1920) (1919) 13 *American Journal of International Law Supplement* 151, 385; Margaret Macmillan, *Peacemakers: Six Months that Changed the World* (John Murray 2002); Alan Sharp, *The Versailles Settlement: Peacemaking after the First World War, 1919–1923* (2nd edn, Palgrave Macmillan 2008); Erik Goldstein, *The First World War Peace Settlements 1919–1925* (Longman 2002); Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Houghton Mifflin 1921); Ruth Henig, *Versailles and After 1919–1933* (Routledge 1984).
[2] Macmillan, ibid 4–5, 61.
[3] ibid Ch 6.
[4] ibid 66.
[5] ibid.

territory with the consent of the recognised sovereign was rare.[6] Accordingly, what was important for international law was that a clear line could trace the movement of title (or legal authorisation) to territory from one sovereign to another in a way consistent with stability; thus the operation was preconditioned upon the consent of states, even if such consent in reality arose from defeat in war. The formalities were maintained. Sovereignty was protected and sovereignty was coterminous with statehood as formulated by the then European dominated international law, and states were free to cede territory as they wished.

What was really new about the 1919 territorial settlement was the move away from the classical doctrines – not dramatic, but meaningful nonetheless. This occurred in two ways. First, in Europe an attempt was made to configure new boundaries in the light of ethnic or national factors, while, secondly, outside Europe a new mechanism was developed that side-stepped the whole question of sovereignty, something that was totally new. Both flickered around the newly emerging concept of self-determination, a moral and political principle of growing importance, although in its international infancy at this time and founded in politics not in law. In the *Aaland Islands* case, for example, it was clearly accepted by both the International Commission of Jurists and the Committee of Rapporteurs dealing with the situation that the principle of self-determination was not a legal rule of international law, but purely a political concept.[7]

3. SELF-DETERMINATION

The concept of self-determination may be seen essentially as flowing from the French Revolution with its proclamations of human rights and popular sovereignty.[8] The confluence of the concepts

[6] See, eg, Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014) Ch 10; Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963); Victor Prescott and Gillian D Triggs, *International Frontiers and Boundaries* (Martinus Nijhoff 2008); Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (Ashgate 2002); DHN Johnson, 'Acquisitive Prescription in International Law' in Malcolm N Shaw (ed), *Title to Territory* (Ashgate 2005) 273, and Stefan Schwebel, 'What Weight to Conquest?', ibid 393.

[7] 'Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question' (1920) *League of Nations Official Journal Supplement No 3*, 5–6 and League of Nations Council Doc B7/21/68/106 [VII] (1921), 22–23. See also James Barros, *The Aaland Islands Question: Its Settlement by the League of Nations* (Yale University Press 1968). That situation, which concerned the Swedish inhabitants of an island alleged to be part of Finland, was resolved by the League's recognition of Finnish sovereignty coupled with minority guarantees, and not by any international acceptance of an international legal right to secession.

[8] See, eg, Allen Buchanan, *Justice, Legitimacy and Self-Determination* (Oxford University Press 2004); James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Brill 2007); Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002); Thomas Duncan Musgrave, *Self-Determination and National Minorities* (Oxford University Press 1997); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995); Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993); Thomas Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990) 153 ff; James Crawford (ed), *The Rights of Peoples* (Oxford University Press 1988); Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241; Gerry Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255.

of democracy or liberalism and nationality reached a high-water mark in the nineteenth century, when the idea emerged that the state and the nation should be congruent.[9] The unifications of Germany and Italy were taken as examples of that composite, which became known as national self-determination, as were the independence of Greece and other Balkan states. Although this doctrine was to a degree successful in Europe in that century, it begged many questions ranging from the relationship between it and individual rights and between it and the international community, to the key issue of identification of the 'self' in self-determination. By the end of the century, the professed parents of national self-determination were moving towards separation. Not all individuals within a particular community necessarily wanted separate national status in the form of statehood, and the tensions between individual and community were often very apparent. In many cases, a form of national determinism took firm hold and the views of the individual were firmly subordinated to the supposed interests of the nation state. There is a bleak track that leads from self-determination to fascism.

In 1910, Westlake declared that '[n]ationalities though often important in politics, must be kept outside international law',[10] but during the First World War, both Allied and Axis powers sought to undermine their opponents by inciting dissatisfaction and rebellion using the excuse of the suppression of national feeling by the opposing side. Specifically targeted by the Allies were the increasingly incoherent Austro-Hungarian Empire and the decomposing Ottoman Empire. Appeals to non-dominant nations within these empires multiplied and were enhanced by the entry into the war of the United States with its avowed espousal of democracy.

Influential in the elaboration of Allied war aims was the adoption and promulgation of the Fourteen Points by US President Wilson on 8 January 1918 before a Joint Session of Congress.[11] Although the term 'self-determination' was not actually used, the whole orientation of the document was predicated upon the pertinence of this principle. Of particular relevance were the prescriptions that a readjustment of Italy's boundaries should be effected along 'clearly recognizable lines of nationality' (Point IX), that the peoples of Austria-Hungary 'should be accorded the freest opportunity to autonomous development' (Point X), that 'the relations of the several Balkan states to one another [should be] determined by friendly counsel along historically established lines of allegiance and nationality' (Point XI), and that an independent Polish state should be established which 'should include the territories inhabited by indisputably Polish populations' (Point XIII).

That President Wilson espoused the doctrine is not totally surprising in view of his emphasis upon liberal democracy and the concept of the consent of the governed. However, its proposed insertion as a decision-making tool in the determination of the status and territorial future of the areas comprised in the collapsed German, Austro-Hungarian, Russian and Ottoman Empires was

[9] Summers, ibid 155 ff.
[10] John Westlake, *International Law: Part I* (Cambridge University Press 1910) 5.
[11] See Lansing (n 1) App IV, 314; see also Anthony Whelan, 'Wilsonian Self-Determination and the Versailles Settlement' (1994) 43 *International and Comparative Law Quarterly* 99; Mark Mazower, 'Minorities and the League of Nations in Interwar Europe' (1997) 126 *Daedalus* 47; Mark Mazower, *Governing the World: The History of an Idea* (Penguin Press 2012).

indeed problematic. For Wilson, self-determination meant that people were not to be handed from one sovereign to another and that national aspirations had to be respected, peoples could be dominated only with their consent, while territorial settlements had to be made in the interests of the populations concerned.[12] This was a principled approach to the reconstitution of the state system in Central and Eastern Europe, but one replete with difficulties. This is not the place to develop this theme, and we may simply note Lloyd George's comment that the task of the Peace Conference was not to decide what in fairness should be given to the liberated nationalities, but 'what in common honesty should be freed from their clutches when they had overstepped the bounds of self-determination'.[13] This was the point. Central and Eastern Europe was composed of a myriad of differing, overlapping, competing and mutually hostile nationalities. Freed from the bonds of the multinational empires and powered by Wilsonian rhetoric, such groups sought sovereignty and, in the nature of things, over-emphasised the extent of territory they inhabited. No group ever claimed less territory.

However, self-determination for one's group but not for the other's appeared to be the order of the day.[14] The principle of self-determination played a fluctuating and palpably inconsistent part in the Conference and in the resulting settlement. Always present in the background, the actual application of the principle was another matter. Neither explicitly affirmed in Wilson's Fourteen Points, nor the succeeding Four Points, nor present in the League of Nations Covenant (despite a presence in Wilson's first draft thereof),[15] nor mentioned in the peace treaties themselves, it nevertheless constituted a presence. However, it was not as such accepted as a legal rule, as demonstrated in the *Aaland Islands* dispute, noted above. The 1919 settlements concerning Europe (the Treaties of Versailles, St Germain-en-Laye and Trianon) substantially changed the boundaries of Central and Eastern Europe. What is important, however, is that the way in which the boundaries were to be determined under the new dispensation was novel, certainly as to scale. Some form of link between frontiers and ethnicity or nationality was the watchword. This was the theory; the reality was a little more complicated.

Indeed, self-determination was rarely the sole criterion. For example, while it was agreed that Poland should be reconstituted so as to include 'indisputably Polish' populations, that state had also been promised access to the sea. The problem was that this could not be accomplished on the basis of nationality or self-determination. The major relevant port was that of Danzig, which was a German city. Eventually it was given a special status as a Free City under the League of Nations, but in a customs union with Poland and with its foreign relations dealt with by that state. It was not a compromise that lasted long. Indeed, the Polish Corridor cutting across

[12] Woodrow W Wilson, 'An Address to a Joint Session of Congress' in Arthur S Link (ed), *The Papers of Woodrow Wilson, Vol 46* (Princeton University Press 1984) 318–33; see also Rupert Emerson, *From Empire to Nation: The Rise of Self-Assertion of Asian and African Peoples* (Harvard University Press 1960) 217.
[13] Macmillan (n 1) 66.
[14] Macmillan wrote with regard to the Balkans that their statesmen 'talked the language of self-determination, justice and international cooperation and produced petitions, said to represent the voice of the people, to bolster their old-style land grabbing': ibid 131.
[15] David Hunter Miller, *The Drafting of the Covenant, Vol 2* (GP Puttnam's Sons 1928) 12.

Germany and its territory of East Prussia remained a festering sore until the 1945 territorial changes.[16] Similarly, Memel was a German city but was acquired by Lithuania, for which it was the natural port.[17] Overall, the desire to ensure that Germany could not return as a large and threatening power was overarching and this motive militated against a strict application of self-determination throughout Central and Eastern Europe.

The problems of applying the principle of self-determination did not go unnoticed, even within the American ranks. Indeed as Robert Lansing, the US Secretary of State noted, the principle of self-determination was 'simply loaded with dynamite. It will raise hopes which can never be realised'.[18] In many cases the principle was simply not applied.[19] While we can certainly say that self-determination was a yardstick, a reference point, even to some extent a starting point in the determination of the successor states to the collapsed European empires, one can only with difficulty proceed beyond this vague position. Of course, more people ended up being governed by those of their own nationality than before the war, but this was a relative phenomenon and it was not one that was necessarily conducive to stability.

Bearing in mind the relativity of its application, it should be noted in passing that attempts were made in the post-First World War settlements to protect those groups to whom sovereignty and statehood could not be granted. A rather complicated minorities regime was constructed.[20] Persons belonging to racial, religious or linguistic minorities were to be given the same rights as other nationals in the state in question. Such provisions constituted obligations of international concern and could not be altered without the assent of a majority of the League of Nations Council. The Council was to take action in the event of any infraction of minorities' obligations. There also existed a petition procedure for minorities to the League, although they had no standing as such before the Council or the Permanent Court of International Justice.[21] However, the system ultimately collapsed, to a large extent because of the unwillingness of the newly established and militantly nationalist states to treat minorities equally as the interwar period progressed.[22] The UN Charter contained no provision on minorities; it is only later that the international law relating to

[16] Macmillan (n 1) 229 and Sharp (n 1) 130.
[17] Sharp (n 1) 132.
[18] Lansing (n 1) 96–97.
[19] Lansing noted the transfer of large numbers of Germans to Poland and Czechoslovakia and the practical cession to Japan of the Chinese port of Kiao-Chau, the cession of the Austrian Tyrol to Italy and the prohibition of the union of Germany and Austria: ibid 98–99.
[20] This consisted of five special minorities treaties binding Poland, the Serbo-Croat-Slovene state, Romania, Greece and Czechoslovakia; special minorities clauses in the treaties of peace with Austria, Bulgaria, Hungary and Turkey; five general declarations made on admission to the League by Albania, Latvia, Lithuania, Estonia and Iraq; a special declaration by Finland regarding the Aaland Islands, and treaties relating to Danzig, Upper Silesia and Memel: see *Protection of Linguistic, Racial and Religious Minorities by the League of Nations: Provisions Contained in the Various International Instruments at Present in Force* (League of Nations 1927); Patrick Thornberry, *International Law and Minorities* (Clarendon Press 1991) Ch 3.
[21] Note that in the early 1930s several hundred petitions were received but this dropped to virtually nil by 1939: Thornberry, ibid 44–46, and Francesco Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', 1979, UN Doc E/CN.4/Sub.2/384/Rev.1, 20–22. See also Julius Stone, *International Guarantees of Minority Rights: Procedure of the Council of the League of Nations in Theory and Practice* (Oxford University Press 1932).
[22] Thornberry (n 20) 46–48.

minorities has developed and that is upon the clear basis that minority protection is conceptually distinct from self-determination save for indigenous peoples, an exceptional case. Even here, self-determination is phrased in terms of autonomy and not sovereignty or secession.

4. THE DEVELOPMENT OF THE MANDATE SYSTEM

Outside Europe, the post-war territorial settlement took on a particular guise. In past conflicts, traditionally the defeated states conceded territory to the victors by way of a peace treaty and, in the case of overseas or colonial possessions, these simply passed from vanquished to vanquisher as one might hand over a gift. This was what was permitted by the international law of the period. However, driven by the US insistence that it had not entered the war in order to enlarge the British or French empires, another approach needed to be taken.[23]

The new approach was to dilute the cession of colonial areas from one state to another in a straight transfer of territorial title in law by application of a much attenuated form of self-determination. This was to be the determinant of the status of the territory. Wilson's Fourteen Points noted that in determining the question of sovereignty over the colonies of the defeated powers, the interests of the population should have equal weight with what was called the equitable claims of the government in question.[24] General Smuts – a former warrior against British colonialism in South Africa but now the foreign minister of that state – in his influential memorandum on the League of Nations of 16 December 1918, proposed, relying upon Wilson's Fifth Point, a 'mandatory system' of widespread application.[25] Wilson amended this proposal, omitting Russia and Austria-Hungary and adding the German colonies and the territories formerly belonging to the Ottoman Empire.[26]

It was immediately agreed that the territories in question would be detached from their former sovereigns and Germany, for example, formally renounced all of its rights and titles to its overseas possessions in Articles 118 and 119 of the Versailles Treaty.[27] It was similarly agreed that these territories would not be acquired as new colonies by the victors or indeed by the League of Nations itself.[28] No mention was made of sovereignty and thus a major corner in the international law of territory was turned. Various candidates were proposed as to who held title in mandated territories, from the mandatory power administering the territory, to the League, to the Principal

[23] See, eg, Quincy Wright, *Mandates under the League of Nations* (University of Chicago 1930) 35; Duncan Hall, *Mandates, Dependencies and Trusteeship* (Stevens 1948); Norman Bentwich, *The Mandates System* (Longmans 1930); Aaron M Margalith, *The International Mandates* (Johns Hopkins Press 1930); RN Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (Martinus Nijhoff 1955); Hersh Lauterpacht, 'The Mandate under International Law in the Covenant of the League of Nations' in Elihu Lauterpacht (ed), *International Law* (Cambridge University Press 1970) III, 29; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) Ch 3.

[24] See Lansing (n 1) App IV, 314, point V. See also David Hunter Miller, *The Drafting of the Covenant, Vol 1* (GP Puttnam's Sons 1928) Ch IX, 101.

[25] Miller, ibid Ch III.

[26] ibid 111 ff.

[27] ibid 105. See also *International Status of South-West Africa,* Advisory Opinion [1950] ICJ Rep 128, 131.

[28] Miller (n 24) Ch IX, 105.

Allied and Associated Powers, to the inhabitants of the territory itself.[29] No solution was adopted. The best explanation was provided by Judge McNair in his separate opinion to the advisory opinion of the International Court of Justice (ICJ) in the *International Status of South-West Africa* case in 1950. McNair declared as follows:[30]

> The Mandates System … is a new institution – a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other – a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State … sovereignty will revive and vest in the new State.

The key factor concerned the rights and duties of the mandatory power in relation to that territory and this depended on the international agreements that created the system and the rules of law which they attracted. The essence was that the mandatory power acquired only a limited competence with regard to the territory and the measures of its powers focused upon what was necessary for the carrying out of the mandate.[31] The important point, as emphasised by the ICJ, was that the concept of mandates was a 'new international institution'.[32] It was not a creature of domestic law and domestic legal analogies were unhelpful.[33] What counted essentially was the mandate and its specific provisions in each case. The degree of authority, control and administration to be exercised by the mandatory powers was to be explicitly defined in each case by the Council of the League in the various governing mandate agreements. The key element was that sovereignty did not pass to the mandatory power. There is, in passing, an important point here. Territorial sovereignty, so critical then and now in international law, could be bypassed or suspended where the instant political situation so required. This opens the door, perhaps, to creative solutions with regard to situations where the claims of two or more aspirants to sovereignty cannot be reconciled.

Under Article 22 of the Covenant of the League, the mandated territories were to be governed according to the principle that 'the well-being and development of such peoples form a sacred trust of civilisation'. The way in which this principle would be put into effect would be to entrust the tutelage of such people to 'advanced nations who by reason of their resources, their experience or their geographical position' could undertake the responsibility. The arrangement would be exercised by them as mandatory powers or administering authorities on behalf of the League. One question that was implicit in this new structure was the definition of 'such peoples'. At first

[29] Wright (n 23) 500–06. See also Hersch Lauterpacht, 'The Mandate under International Law in the Covenant of the League of Nations' in Elihu Lauterpacht (ed), *International Law: Collected Papers* (Cambridge University Press 1977) 29, 66–69.
[30] *International Status of South-West Africa* (n 27) separate opinion of Sir Arnold McNair, 150.
[31] ibid; see also Anghie (n 23) 147.
[32] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections [1962] ICJ Rep 319, 319, 329.
[33] *International Status of South-West Africa* (n 27) separate opinion of Sir Arnold McNair, 148.

sight and in the vast majority of cases, this meant the actual inhabitants of the territory as colonially defined, but this was not necessarily applicable in all cases.

Three categories of mandated territories were posited in Article 22 of the Covenant. The A Mandates, former territories of the Ottoman Empire, were deemed to be the most advanced. Paragraph 4 of Article 22 noted that '[c]ertain communities formerly belonging to the Turkish Empire' were deemed to have reached a stage of development where 'their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance' by the mandatory power until they were 'able to stand on their own'. In such cases, the wishes of these communities were to be 'a principal consideration in the selection of the mandatory' – not, it should be noted in passing, *the* principal consideration. The B Mandates, primarily those in Central Africa, allowed for greater authority to be exercised by the mandatory powers, while the C Mandates (South-West Africa and South Pacific Islands) were to be best administered by the mandatory power 'as integral portions of its territory', subject to certain safeguards.

The division of the mandated territories into three categories was a consequence of serious disagreements between the various powers and the ensuing compromise.[34] The A Mandates differed considerably from the other classes of mandate and indeed differed extensively from each other.[35] What is important about paragraph 4 is the rather vague term 'certain communities'. It clearly did not mean all communities, however one defined that term. One possibility is that it meant all of the inhabitants within a particular post-Ottoman territory, but that is prescriptive and projects back from the mandate period an understanding that did not exist in Ottoman times. In that period communities were best understood in functional rather than territorial terms in the light of the Ottoman millet system, whereby each religious community enjoyed considerable autonomy in civil and religious matters including education, records of births, deaths, marriages and wills, and taxation within the overall context of the Ottoman Empire. The term 'millet' was deemed to denote a religious community and not a nation in the sovereign Western sense.[36] There were three basic millets: the Greek, the Jewish and the Armenian communities.[37] The number of millets was increased over the years: in 1875 there were nine, by 1914 there were seventeen.[38] However, this leaves open the question of the precise meaning of 'certain communities' as it appears in Article 22. No doubt it was deliberately left vague. It would, however, be an error to simply interpret it to mean the entities or territories created in the 1920s. It would similarly be incorrect to interpret the phrase in such a fashion as to exclude the Jewish community as

[34] Macmillan (n 1) 112; Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2015) 28–29.
[35] League of Nations (ed), *The Mandates System, Origins – Principles – Application* (League of Nations 1945) 31–32, cited in Marjorie Whiteman (ed), *Digest of International Law, Vol 1* (US Department of State 1963) 626–28.
[36] Suraya N Faroqhi (ed), *The Cambridge History of Turkey, Vol 3: The Later Ottoman Empire, 1603–1839* (Cambridge University Press 2006) 525.
[37] Karen Barkey and George Gavrilis, 'The Ottoman Millet System: Non-Territorial Autonomy and Its Contemporary Legacy' (2016) 15 *Ethnopolitics* 24, 26.
[38] Ayla Göl, 'Imagining the Turkish Nation through "Othering" Armenians' (2005) 11 *Nations and Nationalism* 121, 124; Kemal K Karpat, *An Inquiry into the Social Foundation of Nationalism in the Ottoman States: From Social Estates to Classes, from Millets to Nation* (Princeton University Press 1973) 88–97. As Thornberry has noted, it constituted 'a beneficial autochthonous system, not imposed by treaty': Thornberry (n 20) 29.

such a community in the territory that became the Palestine Mandate in the light, not least, of the long and continuous Jewish presence in that land. In other words, the approach adopted by some writers[39] that the term 'certain communities', with regard to the Palestine Mandate, meant only the 'original population' in the territory is a step too far and is, it is believed, inconsistent with the express terms of the Mandate Agreement, an international legal treaty.

The additional wording of Article 22 of the Covenant in relation to A Mandates ('their existence as independent nations can be provisionally recognized') gave rise to some further questions but a guide to its meaning, if not authoritative interpretation, was provided by the actual terms of the Mandate Agreements themselves. Those territories subject to A Mandates differed considerably. Mesopotamia (Iraq) was distinctive in that the draft Mandate was never ratified and the territory came to be regulated rather by treaty.[40] Following a revolt in 1920, Britain recognised the Kingdom of Iraq in 1921 and a treaty between Britain and Iraq, defining British powers with a subsequent protocol, was signed the following year.[41] The Council of the League accepted the treaty on 7 September 1924 as defining Britain's obligations as mandatory, even though there was some doubt as to whether the relationship indeed reflected a mandate.[42] The arrangement went further than any other example of a mandated territory. In 1929, Britain announced that it would recommend Iraq for admission to the League and signed a further treaty with Iraq in 1930. Iraq became independent on 3 October 1932.[43]

As regards Syria, this was distinctive in that the Mandate Agreement provided that the Mandatory power (France) was to frame within three years an organic law 'for Syria and the Lebanon' in agreement with the 'native authorities and shall take into account the rights, interests, and wishes of all the population inhabiting the said territory'. The Mandatory power was to take measures to facilitate the 'progressive development of Syria and the Lebanon as independent states' and 'as far as circumstances permit, encourage local autonomy'.[44] The independence of the Lebanon was recognised from the start and its territory was extended by the Mandatory power beyond the area of Mount Lebanon, recognised by the Ottoman Empire as possessing a special political status for the Maronite community.[45] The distinctiveness of the Palestine Mandate is discussed in the following section.

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[39] See, eg, Michael Akehurst, 'The Arab-Israeli Conflict and International Law' (1973) 5 *New Zealand Universities Law Review* 231, 234. See also John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press 2010) 69–70; Curtis FJ Doebbler, 'Human Rights and Palestine: The Right to Self-Determination in Legal and Historical Perspective' (2011) 2 *Beijing Law Review* 111; cf Howard Grief, *The Legal Foundations and Borders of Israel under International Law* (Mazo 2008) Chs 5 and 6.

[40] Margalith (n 23) 131.

[41] Wright (n 23) 59–60.

[42] ibid 60.

[43] ibid 61; Hall (n 23) 149.

[44] French Mandate, art 1: 'French Mandate for Syria and The Lebanon' (1922) 3(8) II *League of Nations Official Journal* 827, 1013; 'Supplement: Official Documents' (1923) 17 *American Journal of International Law* 177, 177.

[45] Bentwich (n 23) 72–73; Ruth Gordon, 'Mandates' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) para 18.

However the distribution of sovereign competences was allocated or suspended as a matter of theory, what is important to stress is that the authority of the mandatory power was founded upon the mandate agreement, which had an international status. As the ICJ noted in the preliminary objections phase of the *South West Africa* cases, 'the Mandate, in fact and in law, is an international agreement having the character of a treaty or a convention'.[46] As such, both the mandatory power and the League were bound by it. It also flowed from this that the mandatory power acting unilaterally was unable to modify the international status of the territory concerned or indeed any of the other rules applicable under Article 22 or the particular mandate itself.[47] To have effected any valid legal changes in the status of the mandated territory would have required the approval of the Council of the League of Nations, to the extent that such changes were not authorised directly in the mandate agreement itself.

This applied also to territorial boundaries. The system of mandates was created and functioned on the basis that the mandated territories were distinct from other territories and that this status had to be maintained and sustained. Accordingly, the only changes to the international status or territorial definition of the mandated territories were those accomplished by the mandatory power and confirmed by the Council of the League of Nations. Indeed, every mandate expressly stated that 'the consent of the Council of the League of Nations is required for any modification of the terms of this mandate'.[48] A number of arrangements confirmed this system. For example, the boundary between the British and Belgian Mandates in East Africa, agreed by a treaty between the two states in 1921, was found to have split the territory formerly united under the king of Ruanda. After this was pointed out by the Permanent Mandates Commission and the Council,[49] the two states agreed on a modification of the boundary as had been contained in the two Mandate Agreements of 20 July 1922. This change was approved by the Council in 1923.[50] In addition, the excision of Transjordan from key terms of the July 1922 Palestine Mandate (prefigured in Article 25) was accomplished by a British Declaration in September 1922 and confirmed by the Council.[51] The requirement to preserve the territorial integrity of the entity once the boundaries were fixed was included in Mandate Agreements – for example, in Article 5 of the Palestine Mandate and in Article 4 of the Syrian Mandate.[52]

This underlines the point that there was clearly a distinction made between the status of a territory and the boundaries of that territory. This was evident not only in the rule that boundaries once agreed upon could be changed only with the agreement of the League, but also in the way in which these boundaries were determined. In the case of the B and C Mandates, the boundaries

[46] *South-West Africa Cases* (n 32) 330.
[47] *International Status of South-West Africa* (n 27) 141.
[48] Wright (n 23) 119.
[49] ibid 120.
[50] It was only as a result of vociferous Belgian arguments that the British agreed to detach two provinces from its mandated territory, the former German East Africa (Tanganyika): Macmillan (n 1) 115.
[51] See further below text to nn 65–66.
[52] Wright (n 23) fn 120.

were explicitly laid down in the Mandate Agreements,[53] while in the case of the A Mandates, the boundaries were to be agreed by the relevant powers.[54]

5. THE PALESTINE MANDATE

5.1. GENERAL

Turning specifically to Palestine at the relevant time under Ottoman rule, it is important to make two major points.

First, the territory itself had been the subject of commitments made by Britain during the war which tested all attempts to render them consistent and coherent. There were three in all. The correspondence in 1915–16 between the British High Commissioner in Egypt (McMahon) and the Sharif of Mecca (Hussein) appeared to offer the Arabs independence if they engaged in a revolt against the Ottomans. However, certain areas were excluded from this arrangement, primarily land to the west of the Aleppo-Damascus line. This line, it was later maintained – somewhat controversially – by the British government 'as covering the vilayet of Beirut and the independent sanjak of Jerusalem'; it was thereby concluded that '[t]he whole of Palestine west of the Jordan was thus excluded from Sir H. MacMahon's pledge'.[55] Also excluded were the provinces of Mersina and Alexandretta, while special administrative arrangements for the provinces of Basra and Baghdad were to be made.[56]

Set against this, discussions took place between Britain and France over the future of the area, which resulted in the Sykes-Picot Agreement of 1916. This purported to divide up these territories upon victory, giving Britain control over most of modern Iraq and Jordan, and leaving Syria and Lebanon, northern Iraq around Mosul, and a slice of Turkey to the French. Palestine was

[53] See, eg, art 1 of the Tanganyika Mandate Agreement reproduced in Wright (n 23) 611–12; art 1 of the British Cameroon Mandate Agreement reproduced in Wright (n 23) 616–17; art 1 of the Nauru Mandate Agreement reproduced in Wright (n 23) 618–19.

[54] The Palestine Mandate (confirmed by the Council of the League of Nations on 24 July 1922 (1922) 3 *League of Nations Official Journal* 1007) preamble, para 1 states: 'The Principal Allied Powers have agreed … to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them …': reproduced in Wright (n 23) 600. The same phrasing appears in the Syria and the Lebanon Mandate Agreement, preamble, para 1: reproduced in Wright (n 23) 607. No such provision appears in the relevant documentation concerning Iraq, but see *Interpretation of Article 3, paragraph 2 of the Treaty of Lausanne* (*Frontier between Turkey and Iraq*), Advisory Opinion (1925) PCIJ Rep (Ser B, No 12) 4.

[55] 'Palestine: Correspondence with the Palestine Arab Delegation and the Zionist Organisation', Cmd 1700, June 1922, 20, cited in J Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates* (Longmans, Green 1928) 7. See also Hansard, 'Pledges to Arabs', HC Deb 11 July 1922, cc 1032–34 (statement by Winston Churchill, the Colonial Secretary at the time).

[56] Macmillan (n 1) 398 ff; UN Information System on the Question of Palestine (UNISPAL), 'The Origins and Evolution of the Palestine Problem', pt 1 1917–1947, and pt II 1947–1977; UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, 'The Right of Self-Determination of the Palestinian People', 1 January 1979, ST/SR/SER.F/3. See also Stoyanovsky (n 55) 5 ff and the text of the exchange of letters, http://www.udel.edu/History-old/figal/Hist104/assets/pdf/readings/13mcmahonhussein.pdf.

apparently to have an international administration.[57] As if these wartime manoeuvrings did not suffice, in 1917 the British government issued the Balfour Declaration, promising to establish a 'Jewish national home' in Palestine.[58] These promises sat uneasily with each other.[59]

However, all of these conflicting engagements fell away in the legal sense before the Mandate provisions, as will be noted in the following section, although politically they continue to resonate. An attempt by Feisal to take control of Syria and proclaim independence was defeated by French troops, who had entered upon the withdrawal of the British.[60] Feisal was eventually rewarded by being made King of Iraq by the British in 1921, while his brother, Abdullah, became Emir of Transjordan (once it had been withdrawn from the Palestine Mandate). Palestine and Iraq duly became British Mandates, while Syria and Lebanon became French Mandates. This was stage one of the final drawing of the lines in the sand.

5.2. THE EXCEPTIONALITY OF THE PALESTINE MANDATE

The second major point is that the Palestine Mandate was exceptional and this exceptionality was reflected and engrained in binding international documents. Unlike the other mandates, the Palestine Mandate incorporated specific obligations deriving from an incorporated instrument. It was expressly agreed in the Resolution of 25 April 1920 at the San Remo Conference of the Allied Powers (Britain, France, Italy and Japan, with the United States as an observer), by which mandates were officially allocated, that the Balfour Declaration, initially a statement of British policy, was to be incorporated in the Mandate for Palestine.[61] The San Remo resolution,

[57] See Macmillan (n 1) 394; Stoyanovsky (n 55) 8 ff.

[58] Macmillan (n 1) 427 ff. The Declaration was in the form of a letter to Lord Rothschild, written by the British Foreign Secretary and approved by the Cabinet, stating: 'His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country': Letter from the United Kingdom Foreign Secretary, Arthur James Balfour, to Baron Walter Rothschild, 2 November 1917 (*The Times*, 17 November 1917) (Balfour Declaration).

[59] See, eg, 'The Right of Self-Determination of the Palestinian People' (n 56) 14 ff. It is interesting to note in passing that on 3 January 1919, Feisal (the son of Hussein, the Sharif of Mecca) on behalf of the Kingdom of the Hejaz, and Weizmann on behalf of the Zionist Organization, signed an agreement in which the former agreed to the application of the Balfour Declaration and, in particular, a large immigration of Jews into Palestine and their settlement on the land. However, this agreement was conditioned upon Arab independence in other relevant areas of the Middle East and, since this did not happen, this significant milestone evaporated. Indeed, for historical interest, when Feisal addressed the Peace Conference Supreme Council on 6 February 1919, he was prepared to exempt the Lebanon and Palestine from the general demand for Arab independence: Macmillan (n 1) 402.

[60] Pedersen (n 34) 35–40.

[61] Stoyanovsky (n 55) 22–23. The preamble to the Resolution, and of the Mandate therefore, declared inter alia: 'Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed

which also covered the French Mandate over Syria and the British Mandate over Iraq, was incorporated in the Treaty of Sèvres, 1920.[62] However, as Turkey never ratified this treaty (which was later superseded by the Treaty of Lausanne, 1923–24), the Conference's decisions with regard to the Palestine Mandate were approved and ratified by the Council of the League of Nations on 24 July 1922 and came into force on 29 September 1923.[63]

Thus the terms of the Balfour Declaration were expressly incorporated into the Mandate Agreement, both in the Preamble and in Article 2.[64] In the Mandate Agreement recognition was explicitly given in a binding international document to the historical connection of the Jewish people with Palestine, coupled with recognition given to the grounds for reconstituting the Jewish national home in that country. These are not principles of historical import solely. They resonate today. They may also be seen in the context of the growing Jewish population of the territory. Further, in the Mandate Agreement it was emphasised that Britain as the Mandatory power had undertaken to carry out the Mandate on behalf of the League of Nations in conformity with provisions which expressly included placing the country under such conditions as would secure the establishment of the Jewish national home as laid down in the Preamble and in Article 2. In particular, Article 6 of the Mandate declared that the Palestine government, 'while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage … close settlement by Jews on the land, including State lands and waste lands not required for public purposes'. Thus was principle allied to the practical means of implementation.

5.3. The Boundaries of the Mandate

The boundaries of the mandated territories in the area were not settled in the Mandate Agreements but were left for future determination. How the boundaries in the Middle East were actually drawn is a fascinating tale of Anglo-French argument, debate and intense pressure. It may also be seen as a salutary manifestation of the limitations of the mandate system, particularly in the way in which some of the boundaries were constructed. It is of interest also in underlining the difference between the determination of the status of the territory by the Principal Allied

by Jews in any other country; and Whereas recognition has thereby been given to the historical connexion of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country': Palestine Mandate (n 54).

[62] Treaty of Peace with Turkey, 1920, Cmd 964, pt III, s VII, arts 94–97; see also Stoyanovsky (n 55) 23–27; art 95 provided that '… the Mandatory will be responsible for putting into effect the declaration originally made on November 2, 1917 by the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people …'.

[63] Palestine Mandate (n 54); see also James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 423. Note that the French Mandate for Syria and the Lebanon (n 44) was approved in August 1922: (1922) 3 *League of Nations Official Journal* 802 and 1013.

[64] The Palestine Mandate (n 54) art 2 provided that '[t]he Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion'.

Powers and the League of Nations and the establishment of its internationally recognised frontiers by agreement between the Mandatory powers for Palestine and Syria and the Lebanon. Whereas the former process bore some of the hallmarks of the progressive or idealist approach then current in terms particularly of the rights and interests of the relevant peoples, the latter was accomplished in a more traditional colonial manner. The distinction between the two methodologies has, it is believed, resonance today.

First and foremost and as a result of the upheavals in the area, the collapse of an independent Arab state and the establishment of French and British control, it was decided to recompense Abdullah by recognising him as Emir of Transjordan, over the area east of the Jordan river and the Arava valley removed from the Palestine Mandate to which the application of the obligation to secure the Jewish national home was withdrawn. This was pursuant to the power so to do in Article 25 of the Mandate Agreement[65] and with the consent of the Council of the League of Nations on 16 September 1922.[66]

The northern border of Palestine turned out to be the most complex and difficult of boundary delimitations at that time and at that place, and for that reason mention may usefully be made of it at this point, in the context of both the establishment and evolution of mandates generally and with particular regard to the spatial identification of the Palestine Mandate. An extensive range of players put forward their views, ranging from various military and political British authorities, to various French governments, the French regimes in Syria and Lebanon, Middle East Arabs led by Feisal, Arabs from Palestine, nationalists from Lebanon and the Zionist Organization representing Jewish interests and aspirations regarding the territory. Further, unlike Palestine's boundaries to the south and east, the northern frontier was to delimit an international boundary between territories under the control of Britain and France respectively.[67] Extra care was thus demanded.

The starting point was the Sykes-Picot Agreement, which proposed a line much further south than the current Israel–Lebanon border, essentially being a line drawn westwards from the Sea of

[65] Palestine Mandate (n 54) art 25 provided: 'In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18'.

[66] (1922) 3(11) II *League of Nations Official Journal*, 1188, 1188–89, accepting the British Memorandum on Transjordan; and Official Documents (1923) 17 *American Journal of International Law Supplement* 133, 172.

[67] Gideon Biger, *The Boundaries of Modern Palestine, 1840–1947* (Routledge Curzon 2004) 101. See also Grief (n 39) Ch 2; Guillaume Vareilles, *Les Frontières de la Palestine 1914–1947* (L'Harmattan 2010) Ch 4. It is to be noted that with regard to the south, the Agreement of 1 October 1906 between Britain and the Ottoman Empire laid down the boundary between Egypt and what became the Palestine Mandate: Agreement signed and exchanged at Rafeh, 1 October 1906, between the Commissioners of the Turkish Sultanate and the Commissioners of the Egyptian Khediviate, concerning the fixing of a separating administrative line between the Vilayet of Hejaz and Governorate of Jerusalem and the Sinai Peninsula, (1905–06) *British and Foreign State Papers*. See, eg, Nurit Kliot, 'The Evolution of the Egypt–Israel Boundary: From Colonial Foundations to Peaceful Borders' (1995) 1(8) *Boundary and Territory Briefing*; US Department of State, 'International Boundary Study: Israel-Egypt (United Arab Republic) Boundary' No 46, 1 April 1965, http://archive.law.fsu.edu/library/collection/LimitsinSeas/IBS046.pdf. See text to nn 72–73 with regard to the Palestine/Transjordan border. See also the Anglo-Transjordanian Treaty of 20 February 1928, and the Israel-Jordan Peace Treaty, 26 October 1994, 2042 UNTS 395.

Galilee (Lake Kinneret) to just north of the port of Acre.[68] After the war, the British sought to extend the line further north and the French to keep it as it had been proposed. British military control in fact extended to the line from Hula to Ras al Nakura, roughly the current Israel–Lebanon boundary, a line apparently in conformity with earlier Ottoman divisions. Discussions between the British and French were difficult, but after his visit to London in December 1918 to a rapturous reception,[69] Clemenceau, the French leader, was prepared to accept Lloyd George's biblical prescription describing the frontiers of ancient Israel 'from Dan to Beersheba',[70] Dan being an ancient settlement close to the current Lebanese/Syrian/Israeli tripoint in the northern part of the Hula valley in Upper Galilee (now Tel Dan). From this point westwards, the line was contended. The British sought to argue, with the support of the Zionist Organization – which was acting within the framework of the, by now internationally accepted, Balfour Declaration provision for a Jewish national home – for a line deep into modern Lebanon. However, this clashed with the strongly asserted French policy of creating an expanded area under Christian Maronite control. French attempts to create a Greater Lebanon carved out of Syria were critical at this stage at a time when Feisal had proclaimed himself king in Syria and had appeared to have reached an agreement with Weizmann in 1919. This induced the French to demand extensive areas to the south of Beirut. In fact, French troops drove Feisal out of Damascus on 24 July 1920 and annulled the independent state of Syria.[71]

Constant debates, accompanied by a military disposition of British troops out of Syria and what is today southern Lebanon, south of the Litani river, coupled with the desire to secure Haifa's water supply coming from the Ras El Nakura ridge (Rosh Hanikra) combined to produce today's boundary. It is also to be said that the negotiations took account of existing Jewish settlements in the Upper Galilee.[72] All manner of strategic, economic (particularly with regard to access to water), and historic arguments were displayed in the delimitation between British and French mandated territories. The boundary was finally delimited and then demarcated in the Franco-British agreements of 23 December 1920 and 7 March 1923 respectively, and this line was confirmed in 1934 by the Council of the League of Nations. The armistice agreement between Israel and Lebanon on 23 March 1949 followed the international boundary.[73]

6. IMPACT OF THE PALESTINE MANDATE TODAY

Thus, what the Mandate said about Palestine *then* amounted to an additional layer placed upon the responsibilities and obligations contained in Article 22 of the Covenant, such supplementary rights and duties being essentially the terms of the incorporated Balfour Declaration, which, in

[68] Biger (n 67) 102.
[69] Sharp (n 1) 189.
[70] Stoyanovski (n 55) 205.
[71] Biger (n 67) 128.
[72] ibid 113, 122–23.
[73] US Department of State, 'International Boundary Study, Israel-Lebanon Boundary' (1967). The 1920 and 1923 instruments concerned also the border between the Palestine Mandate and Syria.

addition to the Jewish people's nexus with Palestine, also established that nothing should be done which might prejudice the civil and religious rights of the existing non-Jewish communities.

However, the Jewish nexus was in the realm of putative sovereignty: that is, it marked the potentiality of moving from 'national home' to statehood. This was inchoate or embryonic, a seed rather than a fully grown plant. Nevertheless, it placed the link between the Jews and the territory upon the track of territorial title one way or another. In addition, it marked an unusual, indeed exceptional, definition of the term 'peoples' as used in Article 22 of the Covenant. However, it was a definition promulgated by international agreement and by the Council of the League of Nations, and thus legitimate and legal. It is within this context that the sentence in Article 22 that '[c]ertain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized' must be understood.

The question is whether the Palestine Mandate has anything to say to us *now*. It is to be noted that Article 80 of the UN Charter preserved explicitly in its chapter on trusteeship territories (the successor to mandated territories) 'the rights … of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties'. This carried over the legal framework from the formal end of the League in April 1946 until the termination of the Palestine Mandate.[74] It thus ensured that, for example, the rights granted to the Jewish people in the territory of the Palestine Mandate were not extinguished and, indeed, the rights pertaining to the Arab people in the territory were to be protected.

There is a long-standing and fascinating debate as to the termination of the Mandate and the creation of Israel, and the position consequentially of the inhabitants of Mandatory Palestine, who ended up in 1949 under the control of Jordan and Egypt. The distinction between the end of the Mandate arrangement and the persistence of rights, interests and claims thereunder does need to be underscored at this point. What is indisputable, it is believed, is that the internationally valid Mandate was brought to an end by the deliberate and intentional relinquishing of its authority by Britain at midnight on 14–15 May 1948, as validated or authorised by UN General Assembly Resolution 181(II), the Partition Resolution, which declared that the Mandate would terminate as soon as possible and not later than 1 August 1948.[75] Both elements were critical for this process. The UN had taken over the supervisory functions of the mandate system after the demise of the League.[76] In the absence of an agreed solution to, or outcome of, the Palestine Mandate on the part of the League and the Mandatory power, it is difficult to see how the Resolution as such imposed a binding decision beyond termination, especially bearing in mind that the Arab side robustly rejected the Resolution, which was accepted by the Jewish side. However, the Resolution did mark a recognition, or confirmation, of the existence of two peoples (inherent to some extent in the Mandate Agreement) and the need in the circumstances for a non-unitary solution. Indeed, partition as a solution to inter-communal strife in mandated or trust

[74] Crawford (n 63) 429.
[75] ibid 430 ff.
[76] *International Status of South-West Africa* (n 27) [137].

territories, while rare, was not unknown – the examples of Ruanda-Urundi, British Cameroons and, more widely, India–Pakistan being significant in this context.[77] In this sense also, the definition of mandate 'peoples' was interpreted in particular circumstances as having a meaning different from the simple totality of the population at the moment of independence. It could also mean two peoples who, because of the situation, required two states.

The refusal of the Arab side to accept the Partition Resolution and the unlawful invasion by Arab states of the territory of Mandatory Palestine necessarily affected the realisation of the Resolution. The result of the war was a series of armistice lines, expressly stated not to constitute frontiers and to remain subject to express reservations of rights. This ties in with the distinction between the termination of the Mandate as an institution and the persistence of relevant rights, interests and claims. Article 5(2) of the Egypt-Israel Armistice Agreement of 24 February 1949, for example, underlined that '[t]he Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question', while Article 9 noted that '[n]o provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question'.[78]

Israel consolidated itself on the territory it effectively controlled at the conclusion of hostilities and became a member of the United Nations, while the West Bank and the Gaza Strip were placed under military occupation by Jordan and Egypt respectively. Israel denied that it was the successor to the British Mandate in law. Its effective control of territory behind the 1949 armistice lines matured by way of international acceptance over time.

The purported annexation of the West Bank by Jordan was opposed by the Arab League and recognised only by Britain, Iraq and Pakistan – hardly sufficient to be effective under international law.[79] Indeed, Jordan withdrew its claims to the West Bank in 1988.[80] It is important to note that at no time was an attempt made to establish the envisaged Palestinian state by the two occupying powers during their period of control from 1949 to June 1967.

One may conclude that during that period, sovereignty with regard to the West Bank and Gaza was suspended (or rather continued to be suspended), while the expectation evolved over time that the projected Arab Palestinian state would be created on the West Bank and Gaza. Since June 1967 and the establishment of Israeli control over these areas, the primary

[77] See, eg, Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (Clarendon Press 1986) 112–13; Joshua Castellino, *International Law and Self-Determination* (Martinus Nijhoff 2000) Ch 4 and 151.

[78] Israel-Egypt General Armistice Agreement (with annexes and accompanying letters), 24 February 1949, 42 UNTS 251. See also Israel-Jordan General Armistice Agreement (with annexes), 3 April 1949, 42 UNTS 303, arts 2(2) and 6(9); Israel-Lebanon General Armistice Agreement (with annex), 23 March 1949, 42 UNTS 287, art II; and Israel-Syrian General Armistice Agreement with annexes and accompanying letters), 20 July 1949, 42 UNTS 327, arts II(2) and V(1).

[79] See, eg, Eyal Benvenisti, *The International Law of Occupation* (2nd edn, Oxford University Press 2012) 204. Israel regarded the purported annexation as illegal: see Meir Shamgar, 'The Observance of International Law in the Administered Areas' (1971) 1 *Israel Yearbook of Human Rights* 262, 264.

[80] Cherif Bassiouni (ed), *Documents on the Arab–Israeli Conflict, Vol 2* (Brill 2005) 586–90.

significant event has been the signature of the agreements known collectively as the Oslo Accords. These agreements manifested a mutual recognition as between the State of Israel and the Palestine Liberation Organization (PLO) as representative of the Palestinian people, established the Palestinian Authority, divided jurisdiction as between areas A, B and C and in essence saw the withdrawal of Israeli administration from the main Arab cities. It was agreed that a number of particularly sensitive issues would be held over for final status negotiations, including Jerusalem, the settlements, and military locations.[81] Accordingly, and very briefly and simplistically, the way forward was identified during the period 1993–95 with core principles established. In addition to the above, it was agreed that the West Bank and Gaza would constitute a single territorial unit, while neither side would take any step to change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations. While these arrangements could not as such alter the title to the territory, which continued in suspension, it marked a critical division of responsibility and jurisdiction which continues to be adhered to by the parties.

To this one must add the right of self-determination of the Palestinian people, long recognised in the UN, by the ICJ and by most states, including (implicitly at least) by Israel. The ICJ, in its advisory opinion in the *Construction of a Wall* case, noted that the term 'legitimate rights' of the Palestinian people had been used in the Interim Agreement of 1995 and interpreted this to include the right of self-determination,[82] while the UN General Assembly had adopted numerous resolutions affirming this right.[83] Such a right has been accepted by Israel and the PLO as one to be manifested in the light of a particular procedure, the Oslo process, to which both sides appear still to adhere. Nevertheless, it is a right now internationally accepted as pertinent to the Palestinian people. Of course, claims to the territory by the Palestinian Arab population from the inception of the Mandate persisted. While resonant in the political sphere, in legal terms the explicit and exceptional provisions of the Mandate, coupled with the internationally recognised absence of a legal right of self-determination at that time, combine to take such claims out of the juridical framework. Rights may be determined only on the basis of the law at the time they were claimed.[84] As the ICJ made clear in 1971, 'the subsequent development of

[81] See, in particular, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, 36 ILM 557, under which Israel transferred particular powers and responsibilities, while art 1(1) specifically provided that 'Israel shall continue to exercise powers and responsibilities not so transferred'. See, eg, Eugene Cotran and Chibli Mallat (eds), *The Arab–Israeli Accords: Legal Perspectives* (Kluwer 1996); Geoffrey R Watson, *The Oslo Accords* (Oxford University Press 2000). This agreement was witnessed by the US, the Russian Federation, the Arab Republic of Egypt, the Hashemite Kingdom of Jordan, the Kingdom of Norway and the European Union. These states and organisations thus gave their approval to the arrangements agreed.

[82] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [118].

[83] See, eg, UNGA Res 58/163 (22 December 2003), 'The Right of the Palestinian People to Self-Determination', UN Doc A/RES/58/163; UNGA Res 67/19 (29 November 2012), 'Status of Palestine in the United Nations', UN Doc A/RES/67/19.

[84] See further on the rule of intertemporal law, *Island of Palmas* (1928) 2 *Reports of International Arbitral Awards* 829, 845; *Western Sahara*, Advisory Opinion [1975] ICJ Rep 12, [38]–]39]; TO Elias, 'The Doctrine of Intertemporal Law' (1980) 74 *American Journal of International Law* 285; Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, Vol I* (Cambridge University Press 1986) 135; Hugh Thirlway,

international law in regard to non-self-governing territories' rendered the principle of self-determination as a legal right applicable to all of them, including remaining mandate and trust territories.[85] It did not say that the right of self-determination applied as a rule of law to mandate territories at the time of their inception or indeed at any time prior to 1947. It was the Mandate Agreement which established in international law the right of the Jewish people to a 'national home' in Palestine with attendant consequential rights, and which recognised the 'civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion'[86] – all within the framework of a process leading to eventual self-government and independence, and one internationally monitored.[87] Self-determination as a legal right as such arose after 1947. Nevertheless, the aim and purpose of the mandate system, and particularly the A Mandate territories, was self-government and ultimately independence. The UN Partition Resolution, in terminating the Mandate (taken with the Mandatory power's withdrawal), concretised this right and marked the international acceptance of the culmination of the process in the formation of two states, absent agreement between the peoples concerned.

The question of boundaries, however, is a matter for bilateral decision. It has long been accepted in international law that only the two (or more) states existing on both sides of the border can make a binding determination as to the line between them. It cannot be decided unilaterally.[88] The issue of boundaries is distinct from that of self-determination and statehood, and cannot be conflated.

There is one further point. One consistent element, threading its way through recent history, has been the sustaining of rights and claims maintained as at the date of the termination of the Mandate arrangement. As noted above, it was a common feature of the armistice agreements that neither side was to be taken to have renounced any rights or claims,[89] while a relevant holding provision appeared in the peace treaties with Egypt[90] and Jordan.[91] The point was also clearly and expressly made in the Oslo Accords.[92] The freezing of the rights-claims situation at the

'The Law and Procedure of the International Court of Justice 1960–1989 (Part One)' (1990) 60 *British Yearbook of International Law* 1, 128. See also Rosalyn Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 *International and Comparative Law Quarterly* 501; DW Greig, *Intertemporality and the Law of Treaties* (British Institute of International and Comparative Law 2001).

[85] *Legal Consequences for States of the Continued Presence of South Africa in South-West Africa (Namibia) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, [31].

[86] Palestine Mandate (n 54) art 2.

[87] As to the nature and operations of the Permanent Mandates Commission, see Pedersen (n 34).

[88] See, eg, *Fisheries Case* (*United Kingdom v Norway*), Judgment [1951] ICJ Rep 116, [132].

[89] See above n 78 and accompanying text.

[90] The Peace Treaty between Egypt and Israel, 1979, 1138 UNTS 72, arts I(2) and II, provided for the withdrawal of Israeli forces and civilians from the Sinai behind the international boundary between Egypt and mandated Palestine 'without prejudice to the issue of the status of the Gaza Strip'.

[91] The Israel-Jordan Peace Treaty, 1994 (n 67) art 3(1) and (2) provided that the boundary between the two states was determined 'with reference to the boundary definition under the Mandate … without prejudice to the status of any territories that came under Israeli military government control in 1967'.

[92] The Interim Agreement (n 81) art XXXI(6) declared that '[n]othing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP [Declaration of Principles, 1993]. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions'.

conclusion of the Mandate arrangement in so far as the West Bank and Gaza were concerned (since no sovereign disposition of these areas has as yet occurred, while the State of Israel has been virtually universally recognised within the 4 June 1967 lines), coupled with the internationally accepted right of self-determination for the Palestinian people and the provisions of the Oslo Accords, essentially continues. These may be related to those topics determined by the parties to be for final status negotiations (such as Jerusalem, the settlements, final frontiers).[93]

7. CONCLUSIONS

One may conclude with the following propositions. First, the institution of the mandate system was critical in marking the transition from colonialism to self-determination. It was a half-way house, very tentative at the outset, but of increasing importance on the road to the universalisation of the right of self-determination. This was exemplified and characterised by the ICJ advisory opinions in the *Namibia*[94] and *Western Sahara*[95] cases, for example. Its deliberate bypassing of territorial title was innovative and enabled the shift from colonial title to the rights of the people. It established a new territorial status determined by the Principal Allied Powers and the Council of the League of Nations.

The device of the mandate – the sacred trust of civilization with international supervision – was introduced in order to mitigate colonial domination and to hasten self-government. In reality and on the ground, however, it differed little from the earlier model utilised by the European powers. In terms of the definition of the boundaries – that is in order to determine the territorial extent of the new entities – recourse to self-determination appeared in practice sparse and exceptional. What counted were the strategic and economic interests of the dominant powers. To that extent, the old system of colonial activity was not displaced. Indeed, the Mandate Agreements for the A Mandates specifically allowed for the relevant powers to fix the frontiers.

The modern legal right of self-determination was recognised first with regard to mandate (and trust) territories and thence to non-self-governing territories generally and beyond in various manifestations. No-one today envisages a revival of the mandate system; its importance today therefore is primarily historical, a step towards the right of self-determination as it evolved in international law. Nevertheless, it was an important stage in heralding the onset of decolonisation. However, the mandate system also stands today as an example whereby intractable problems and conflicts of ideology may be mitigated by creative thinking, including as one element international supervision, management or guidance. There is an indisputable nexus between the mandate system and modern manifestations of the international administration of territory by, for example, the United Nations.[96]

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[93] See text to n 81 above.

[94] *Legal Consequences for States of the Continued Presence of South Africa in South-West Africa* (n 85) [31].

[95] *Western Sahara* (n 84) [31]–[33].

[96] See, eg, Bernhardt Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (Cambridge University Press 2008); Carsten Stahn, *The Law and Practice of International Territorial Administration* (Cambridge University Press 2008); Ralph Wilde, *International Territorial*

Secondly, as regards Palestine, the Mandate, a binding international instrument, was seminal in recognising the existence of the connection of Jews with that land and in recognising the obligation to reconstitute the Jewish national home there, and this on the plane of international law. Thus, the 'people' of the mandated territory were defined not only in terms of the existing population at the date of the establishment of the Mandate but also existentially and prospectively to include those Jews wishing to partake of the 'national home'. The institution of the mandate, therefore, was critical in the evolution of the modern Middle East. It marked an international (and binding) acknowledgement of an international Jewish title to a national home, a concept accepted today as having the potential of leading to statehood. Such title was explicitly linked with respect for the civil and religious rights of the existing non-Jewish communities.

As to its meaning today, it may be pointed out that the rights given expressly to the Jewish community then cannot be gainsaid or contradicted now. The book that was opened in international legal terms in 1922 continues. The concept of Israel as a Jewish state flows in an evolutionary sense from the provisions of the Mandate as concretised in the Partition Resolution, by subsequent practice and, indeed, by the Oslo Accords. Therefore, it is not, in the circumstances, an unusual or unjustified entitlement to be sustained in any international negotiations over the future of the region. However, Israel is but one part of the story. In somewhat different terms, the Arab population of Palestine was also internationally recognised and such rights continue and have coalesced with the right of self-determination. This is the road we are still on today.

Administration: How Trusteeship and the Civilizing Mission Never Went Away (Oxford University Press 2008); Crawford (n 63) 501 ff; Malcolm Shaw, 'Territorial Administration by Non-Territorial Sovereigns' in Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity; Essays in Honour of Professor Ruth Lapidoth* (Oxford University Press 2008) 369.

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Reinventing a Region (1915–22): Visions of the Middle East in Legal and Diplomatic Texts Leading to the Palestine Mandate

Karin Loevy[*]

The article traces a set of regional images in international legal and diplomatic documents leading to the establishment of the Palestine Mandate (1915–22). The analysis suggests that at that important crossroad, when a new world order was imagined and negotiated, a broad, layered and diverse vision of a comprehensive 'region' was actively present in the minds of very different actors within the framework of empire. A vast territory was reconstructed as opening up for new ways of rule and of influence, for enhanced development and for dealing with strictly European globalised issues. That this powerful regional vision has been disregarded because of the weight of the subsequent territorial geopolitics in the Middle East is not surprising. Today, however, when classic international law responses – the state on the one hand and international cooperation on the other – prove weak and unstable, and especially vulnerable to 'new regional threats', it may be worthwhile to look back at a period in which the region was still imagined as a place of political possibility.

Keywords: regional order, Middle East history, Sykes-Picot Agreement, Balfour Declaration, Article 22 of the Covenant of the League of Nations, Palestine Mandate

> Our mutual tasks are exceedingly difficult and require all the statesmanship and goodwill that it is possible to bring to bear. But so much has been achieved, so conciliatory a spirit has shown itself on all hands, that I have confidence that the deepest wish of my life will be realized and that is that peace and justice should at last reign from the Taurus to the Persian Gulf and from the Mediterranean to the Persian Frontier and all that vast area as interdependent fiscally and politically. If one element is sacrificed or abandoned the whole fabric subsides. Short of a settlement which is satisfactory to the three peoples, there are only two alternatives: Turkish tyranny or anarchy, either the one or the other signifies that Jew, Armenian, Syrian, Mesopotamian, Palestinian and the people of the Arabian Peninsula must return to the hideous night of misery from which we strive that they shall emerge.
>
> Sir Mark Sykes
> Address to the Syria Welfare Committee, February 1918[1]

[*] Research Scholar with the Institute of International Law and Justice (IILJ) New York University (NYU) School of Law and Manager of the JSD Program at NYU School of Law. JSD, NYU School of Law; LLM, NYU School of Law and National University of Singapore; LLB, Tel Aviv University, Buchmann Faculty of Law. karinloevy@nyu.edu.

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[1] Doreen Ingrams, *Palestine Papers (1917–1922): Seeds of Conflict* (Eland 2009) 22, PRO Cab 27/25. The Syria Welfare Committee was set up in Cairo towards the end of 1917 by General Gilbert Clayton, Director of British Intelligence; it included Arabs, Zionists and Armenians.

No man therefore can conceive anything, but he must conceive it in some place.

Thomas Hobbes[2]

1. INTRODUCTION: A FORGOTTEN REGIONAL MOMENT

The conventional narrative about the political, legal and diplomatic path leading from the First World War to the Palestine Mandate is often told from the hindsight of ensuing and ongoing national conflicts in the region. According to that narrative, during the war Britain made conflicting assurances regarding the region's future and thus created expectations for independence that informed the violent conflicts that followed. In the McMahon-Hussein correspondence (14 July 1915 to 30 January 1916) it promised an independent Arab state to be established in the vast area that consists of today's Syria, Israel, Jordan, Iraq and the Arabian Peninsula. In the Sykes-Picot Agreement (16 May 1916) it pledged to divide the influence over this same vast area with France. In the Balfour Declaration (2 November 1917) it promised to facilitate a Jewish home in Palestine, a territory which at the time was understood to consist of an important part of the same vast area. The Palestine Mandate legalised the latter commitment but, while the British Empire was torn between commitments to the national aspirations of both groups, it actually frustrated both, creating opportunities for the escalation of a violent conflict right up to its decision to end the Mandate in 1947, and well into the new regional geopolitics of independent sovereign states characterised by wars and displacement.[3]

This legacy of the politics of empire, according to the narrative, is responsible for the poor geopolitical state of the region that we recognise today.[4] The Middle East is widely seen as the paradigmatic example of the failure of regional cooperation and integration. While other regions have developed institutional tools for the enhancement of economic and security coordination, the Middle East is dangerously lagging behind.[5] Middle Eastern states, with their

[2] Thomas Hobbes, *Leviathan* (first published 1651, Cambridge University Press 1996), Ch III.

[3] Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891–1949* (Pluto Press 2009); Michael J Cohen, *The Origins and Evolution of the Arab-Zionist Conflict* (University of California Press 1987); Gideon Biger, *The Boundaries of Modern Palestine, 1840–1947* (Routledge 2004); Isaiah Friedman, *Palestine, A Twice-Promised Land?* (Transaction 2000); Sahar Huneidi, *A Broken Trust: Herbert Samuel, Zionism and the Palestinians, 1920–1925* (St Martin's Press 2001); Nick Reynolds, *Britain's Unfulfilled Mandate for Palestine* (Lexington Books 2014) 4–25.

[4] Roger Owen, *State Power and Politics in the Making of the Modern Middle East* (3rd edn, Routledge 2000) 10: 'It was at this period [referring to the period starting from the Ottoman defeat and through the carving up of the Middle East] that the basic framework for middle eastern political life was firmly laid – together with many of its still unsolved problems involving disputed boundaries, ethnic and religious minorities which either failed to obtain a state of their own (like the Kurds) or were prevented from doing so, like the Palestinians'; and Ch 1 generally. See also Raymond Hinnebusch, *The International Politics of the Middle East* (Manchester 2003) and Louise Fawcett (ed), *International Relations of the Middle East* (Oxford University Press 2013).

[5] Scholars of international relations generally agree that neither political nor economic regional arrangements have materialised in the Middle East. This seems to exemplify the Middle East as the eternal exceptional case, being out of step with history and immune to the trends affecting other parts of the world. '(T)he Middle East remains a peculiar exception to the overall trend of regionalism. Among various regions, the Middle East is not only the least integrated into the world economy but is also characterized by the lowest degree of regional economic

troubled history of colonial meddling, have been until now deeply engulfed in crises of political legitimacy, and can hardly be expected to respond effectively to 'new regional threats'.[6]

In this article I claim that this historical narrative is too captivated by the bleak and pressing realities of post-mandatory Middle East conflicts and instabilities. In the period that led to the establishment of the mandate system, while different actors negotiated their visions for a new world order, the Middle East was understood to be a very different territorial and political entity from how we understand it today. In fact, the regional structure that we are so used to, consisting of independent states, jurisdictionally divided, each with its own government, laws and institutions, was not even a remote fantasy in the minds of the officials, politicians and commentators who, between 1915 and 1922, were deeply engaged in negotiating such ideas as world peace, Arab independence, British–French influence, or a Jewish national home. What is for us a basic descriptive and explanatory structure for understanding the Middle East's past, its worrying present and its future possibilities – that it is made out of sovereign jurisdictions – was for them not even an abstract aspiration. What then for these actors were the concrete spatial structures by which they imagined and negotiated a new world order in this area?

To be sure, the epistemological context for answering this question is that of empire.[7] At that point in time, all the actors that had anything to do with negotiating the future of the region were necessarily talking in the language of imperial rule. Whether they were Arab leaders and former functionaries in the Ottoman Empire or nationalist revolutionaries and subjects of that empire, whether they were Zionist leaders discussing the prospects of a Jewish national home with British officials over large maps in a London office, and of course if they were British policy

cooperation': Ali Çarkoğlu, Mine Eder and Kemal Kirişci, *The Political Economy of Regional Cooperation in the Middle East* (Routledge 1998) 30; see also Charles Tripp, 'Regional Organization in the Arab Middle East', in Louis Fawcett and Andrew Hurrell (eds), *Regionalism in World Politics* (Oxford University Press 1995); Helena Lindholm-Schulz and Michael Schulz, 'The Middle East as an Exception or Embryonic Regionalism?' (1998) 3 *Politea* 17; Marianne Laantza, Helena Lindholm-Schultz and Michael Schulz, 'Regionalization in the Middle East?' in Michael Schulz, Fredrik Soderbaum and Joakim Ojendal (eds), *Regionalization in a Globalizing World* (Zed Books 2001).

[6] 'Apart from the ongoing conflict between Israel and its Arab neighbours, which makes any attempt to achieve an all-embracing regionalism meaningless, Arab countries have not created any long term regional unity among themselves. The Middle East has remained a region of conflict and instability. Structures for regional security and stability have not been created': Bezen Balamir Coskun, 'Regionalism and Securitization: The Case of the Middle East' in Cilja Harders and Matteo Legrenzi (eds), *Beyond Regionalism? Regional Cooperation, Regionalism and Regionalization* (Ashgate 2008) 89; for the regional implications of the Arab Spring see Bahgat Korany, 'The Middle East after the Cold War' in Fawcett (n 4) 77–102; Silvia Ferabolli, *Arab Regionalism: A Post-Structural Perspective* (Routledge 2015).

[7] Over the last few decades there has been a turn in the historiography of empire to questions of interconnectedness and of scale. Historians (under the impact of post-colonialism, culture studies and feminism) have self-consciously set out to rethink the relationship between different parts of empire, and to produce a way of thinking about empire that can account for the experiences of both colonial elites and those subjected to the colonial rule. An important facet of this type of imperial history has been the rejection of the colonial or nation state as the dominant analytical framework for considering the relations of persons and places in the empire: see Zoe Laidlaw, 'Breaking Britannia's Bounds? Law, Settlers, and Space in Britain's Imperial Historiography' (2012) 55 *The Historical Journal*, 807–30; Shaunnagh Dorsett and John McLaren (eds), *Legal Histories of the British Empire: Laws, Engagements and Legacies* (Routledge 2014). My analysis in this article is driven by the same intuitions as it attempts to unearth alternative spatial concepts that are significant to imperial experiences of governing.

makers and administrators directly dealing with the management of imperial desiderata or international diplomats attempting to constrain imperial power – everybody understood the language of empire, and had to converse in it in order to be intelligible.

However, 'states' and national 'jurisdictions' beyond the confines of (mainly western) Europe were not a part of the language of empire. Outside Europe imperial agents saw vast areas, domains and dominions, colonies and protectorates, and geographical spheres of influence. They saw territories and populations, not independent jurisdictions and not even nations. Surely, this will soon change, but at the period we are considering, when a 400-year-old empire was shaken to the ground, and the victorious powers were to plan what will come in its place, it was large and penetrable geographical areas that they envisioned, and certainly not sovereign territorial states. All new ideas that they had to confront, the principle of self-determination of nations, the idea of no annexation, and the prospect of world peace had to be considered within this broad and open spatial framework.

This study is an attempt to track the details of a proactive and powerful regional image, trespassing state and sovereign boundaries, that was very much alive in the minds of the different actors involved in legally ordering the post-war world. It uses legal and diplomatic texts to uncover a regional moment of international law in the Middle East, a moment in which 'the region' was not yet divided into separate jurisdictions behaving according to the prediction of a realist theory of international law.[8] Instead, it was being constructed by the expression of different layers of landscapes, 'mental maps'[9] of possibilities for the reconstruction of vast, non-territorial areas.

In the following pages I re-read a set of well-known and well-studied documents that influenced the diplomatic and legal politics on the road to the Palestine Mandate – using them as textual maps that express different images of concrete regional significance. In these documents – the McMahon-Hussein correspondence (June 1915 to January 1916),[10] the Sykes-Picot Agreement

[8] Realist imagery dominates the understanding of regionalism in Middle East politics as Arab politics, it is argued dominantly, 'best fits the realist view of international politics': Joseph Nye, *Understanding International Conflicts: An Introduction to Theory and History* (HarperCollins 1993) 147; 'The Arab states do not coordinate; to the contrary, they compete. In the foreseeable future, the dominant strategy will be bilateralism, not regionalism or multilateralism': Paul Aarts, 'The Middle East: A Region Without Regionalism or the End of Exceptionalism?' (1999) 20 *Third World Quarterly* 911, 921.

[9] For the idea that at that period various western and non-western boundary makers involved in the politics of creating a new world order were designing 'mental maps' of 'virtual macro-spaces', see Thomas Scheffler, '"Fertile Crescent", "Orient", "Middle East": The Changing Mental Maps of Southwest Asia' (2003) 10 *European Review of History* 253, 255. In this period, Scheffler claims, 'imperialist ambitions, military technology and the availability of printed modern maps had made inventing and engineering new and larger "spaces" a fashionable trade among politicians, geographers and journalists': ibid. He relates it to 'a trend in Western politico-geographical thought that tended to overwrite the classical geographical distinctions between continents, countries and landscapes (*Großraum*), which powerful actors, such as "empires", "civilizations" or "races", were bound to invest with meaning, histories and functions': ibid 255. See also Mark Polelle, *Raising Cartographic Consciousness: The Social and Foreign Policy Vision of Geopolitics in the Twentieth Century* (Lexington Books 1999). My analysis uncovers within legal and diplomatic documentation a set of visions that were being expressed while prescribing meaning to such 'large spaces'.

[10] The full text of the correspondence (consisting of ten letters) can be found at: http://www.jewishvirtuallibrary.org/jsource/History/hussmac1.html.

(May 1916),[11] the Balfour Declaration (November 1917),[12] Article 22 of the Covenant of the League of Nations (April 1919),[13] and the Mandate for Palestine (July 1922)[14] – a vast territory is being opened, in the minds of their creators and negotiators, for a wide-ranging regional politics: for new ways of rule and for opportunities of influence, for enhanced economic development, for the solution of globalised European problems such as the Jewish question, and for the promise of a legalised jurisdictional order. Within and between these layers of images the framers of the documents endeavour to reinvent a region in their shape and to ascribe to it normative meaning. The article concludes by suggesting that the regional image projected in the Palestine Mandate, the image of legalised separated jurisdictions, served to close up the vast regional space that was being virtually opened in the confused regional politics that preceded it.[15]

A number of definitional and methodological interventions are immediately required.

First, what is it that I mean by the term 'region'? The concept is tremendously vague and elastic. Is it a territorial term relating to a geographical area and delineated by geographers? Is it a legal or political term?[16] I do not believe that a general definition will be of particular use for this study; regions are or may become institutional facts, but they are first and foremost ideas, constructions and images that shape the spatial reality of our political and economic life.

[11] British Government, 'The Sykes-Picot Agreement', *World War I Document Archive,* May 1916, https://wwi.lib.byu.edu/index.php/Sykes-Picot_Agreement.

[12] Letter from the United Kingdom Foreign Secretary, Arthur James Balfour, to Baron Walter Rothschild, 2 November 1917 (*The Times*, 17 November 1917) (Balfour Declaration).

[13] Covenant of the League of Nations (entered into force 10 January 1920) (1920) 1 *League of Nations Official Journal* 3.

[14] The British Mandate for Palestine confirmed by the Council of the League of Nations, 24 July 1922, (1922) 3 *League of Nations Official Journal* 1007 (Palestine Mandate).

[15] This article is a partial and preliminary attempt to uncover the relevant spatial concepts in the minds of the agents involved in negotiating orders in the Middle East in the aftermath of the war. It is partial not only because there were many important concrete spatial and jurisdictional images relevant to the negotiations which had very little to do with the 'region' (layers of local as well as global images that are beyond the scope of this article), but also because the selection of sources in focus here is limited to the most influential and well-known documents on the historical trail to the Palestine Mandate. It is a background for a future book project, which would attempt a broader categorization of different layers of regional visions on the basis of a larger pool of documents.

[16] Scholarly attention to regions is divided over different academic disciplines and sub-disciplines. First, there are the geographers who have been studying different forms of regions for many years: see, eg, Preston E James, 'Towards a Further Understanding of the Regional Concept' (1952) 42 *Annals of the Association of the American Geographers* 195; but regions are commonly understood as more than territorial spaces; they have political, legal and institutional aspects beyond the geographical: Anssi Paasi, 'The Region, Identity, and Power' (2011) 14 *Procedia Social and Behaviourial Sciences* 9. In international relations studies, attention goes to processes of regional integration: see, eg, Mary Farrell, Bjorn Hettne, and Luk Van Langenhove, *Global Politics of Regionalism: Theory and Practice* (Pluto Press 2005). For a recent overview of these different perspectives, see Timothy M Shaw, J Andrew Grant and Scarlett Cornelissen, *The Ashgate Research Companion to Regionalisms* (Ashgate 2012). Economists' definitions also divide between (supranational) regional trade arrangements (see, eg, Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge University Press 1999)), while others focus on (subnational) regional policies (eg, Rune Dahl Fitjar, *The Rise of Regionalism: Causes of Regional Mobilisation in Western Europe* (Routledge 2010)). Sociologists have also looked at regions: Pierre Bourdieu, 'L'identité et la representation. Eléments pour une réflexion critique sur l'idée de région' (1980) 35 *Actes de la recherche et sciences sociales* 63–72. What combines these diverse literatures is the insight that 'regions are central to our understanding of world politics': Amitav Acharya and Alastair Iain Johnston (eds), *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge University Press 2007) 629.

Abstract definitions of regions are of limited value when in fact what makes regions concrete and real is the content of commitments expressed towards them, and the discursive activities constructing and reconstructing them.[17]

Another contested term that I use in this article, when referring generally to 'the region', is the 'Middle East'. The invention and subsequent use of the term 'Middle East' was not rooted in historical considerations but corresponded with the strategic needs of western geopolitics.[18] Backed by military power, institutions, and economic incentives, the concept, however, became a reality imposed upon and sometimes accepted by the region's political actors.[19] In the period under consideration in this article, however, the term 'Middle East' had not yet evolved to its current use, as a geopolitical concept that influences how governments approach the region in terms of their foreign policy, foreign aid, and military assistance or intervention. Many other terms were used more or less interchangeably, with no clear boundaries, depending on the function of the speech, its tone and the speaker's affiliation: the 'Near East', 'Asiatic Turkey', 'Asia Minor', 'Arabia', the 'Fertile Crescent', the 'Orient' are only some of them.[20] In that sense the 'Middle East' is an anachronistic concept which I use for convenience rather than accuracy, while fully aware that it is a complicated and changing term with conflicting definitions. However, as the term becomes more and more of regular usage, conflated with Islamic extremism on the one hand and the Arab Spring on the other, it is even less clear today where exactly the 'Middle East' is located, if it is a valid way to conceptualise and understand this region, and what are the impacts and consequences of this abstract category and its use.

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[17] Luk Van Langenhove, 'What is a Region? Towards a Statehood Theory of Regions' (2013) 19 *Contemporary Politics* 474–90. In regional studies, regions are identified as geographical areas that 'constitute a distinct entity, which can be distinguished as a territorial subsystem (in contrast with a non-territorial subsystem) from the rest of the international system': Bjorn Hettne and Fredrik Soderbaum, 'The New Regionalism Approach' (1998) 17 *Politea* 6, 9. For the most part, new approaches to regionalism (NRA) argue that it is best 'to maintain eclectic and open-minded definitions of regions, particularly in the lower stages of regionness and as far as their outer boundaries are concerned, which often tend to be the most blurred. There are thus many varieties of regions, with different degrees of regionness. This eclectic understanding of regions is made possible because the problematique of the NRA is not the delineation of regions per se, but rather to determine the role of regions in the current global transformation and analyse the origins, dynamics and consequences of regionalism in various fields of activity; that is, increasing and decreasing levels of regionness': Hettne and Soderbaum, ibid.

[18] The term was invented in 1902 by an American navy captain writing about the Persian Gulf in international relations, to describe the area north west of India and to distinguish it from the Near East and the Far East: Roger Adelson, *London, and the Invention of the Middle East: Money, Power and War* (Yale University Press 1995) 6–22; Scheffler (n 9) 253–72. In an article on 'The Persian Gulf and International Relations', published in 1902, Alfred Thayer Mahan (1840–1914), author of a much acclaimed study *The Influence of Sea Power upon History* (1890), argued that the Russian advances in Central Asia and the projected German Berlin–Baghdad railway might put Britain's control of the maritime communication lines between Suez and India in jeopardy. Britain, Mahan argued, would be well advised to secure its control of the Persian Gulf region, a vaguely defined area he referred to as the Middle East: 'The Middle East, if I may adopt a term which I have not seen, will some day need its Malta, as well as its Gibraltar …. The British Navy should have the facility to concentrate in force, if occasion arises, about Aden, India, and the Gulf': Alfred Mahan, 'The Persian Gulf and International Relations', *National Review (London)*, September 1902, 27, 27–28.

[19] Scheffler (n 9) 253. See also Michael Bonine, Abbas Amanat and Michael Gaspe (eds), *Is There a Middle East? The Evolution of a Geopolitical Concept* (Stanford University Press 2012) Introduction.

[20] James Renton, 'Changing Languages of Empire and the Orient: Britain and the Invention of the Middle East, 1917–1918' (2007) 50 *The Historical Journal* 645–67; Scheffler (n 9).

Methodologically this article conforms, at least partially, to a constructivist approach which asks how agents and the structures of their activities and their narratives are involved in processes of creation and reproduction – that is, how structure, broadly defined, shapes the nature of ideas and of actors' capacities, how their interaction is constrained by that structure and, at the same time, serves either to reproduce or transform that structure.[21] The spatial, geographic narratives that are expressed in the documents analysed here are structures that shape the interaction between the agents involved in negotiating a new world order during and towards the end of the war. In turn, their interaction transforms these structures, ultimately reproducing a rather stable construction in the Palestine Mandate. The diverse and layered regional images are expressed here as horizons of political possibility for regional reconstruction. The subsequent construction expressed in the Palestine Mandate, however, of a region legally divided into separate jurisdictions, effectively replaced these layers to such an extent that we are today unaware of there ever existing other regional imaginations and over-pessimistic as to the possibilities of regional cooperation in the Middle East.[22]

The Middle East was reconstructed in the years leading to the Palestine Mandate, and especially in the years that followed, as a region of nations awaiting independence. At the same time, the regional images that existed before the new world order faded away in the turmoil, violence, hope and distress that this new order initiated; waned and faded away until very little was left of them and 'the region' was and still is imagined as a failure of trade and coordination. It is, in that sense, still waiting to be reconstructed in ways more viable and more beneficial for its own population.

2. THE MCMAHON-HUSSEIN CORRESPONDENCE – A VAST TERRITORY OPENING UP FOR RULE

The McMahon-Hussein correspondence (July 1915–March 1916) consists of a number of letters exchanged between Sir Henry McMahon, the British High Commissioner in Egypt, and Sharif Hussein, the custodian of the holy cities of Mecca and Medina. Very early on, the correspondence became the subject of conflicting interpretations and for more than half a century it 'haunted

[21] Nicholas Greenwood Onuf, *World of Our Own Making* (University of South Carolina Press 1989); Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press 1999); Emanuel Adler, 'Seizing the Middle Ground: Constructivism in World Politics' (1997) 3 *European Journal of International Relations* 319.

[22] For an exception to the pessimistic realist approach to regional relations in the Middle East see Albert Hourani, 'How Should We Write the History of the Middle East' (1991) 23 *International Journal of Middle Eastern Studies* 133; and Michael Barnett, *Dialogues in Arab Politics: Negotiations in Regional Order* (Columbia University Press 1998), who apply a constructivist narrative approach to show that Arab politics is organised according to ongoing negotiations about the desired regional order. States and non-state agents can be understood as engaged in a never-ending process of negotiating the norms that are to govern their relations. Regional order, in his view, emerges not only because of a stable correlation of military forces but also because of stable expectations and shared norms. The article subscribes to such an approach.

Anglo-Arab relations'.[23] The correspondence became part of the Palestine dispute, as Arab leaders, commentators and delegates to the Palestine conferences of 1938–39 claimed that in it McMahon promised Palestine to the Sharif.[24]

When McMahon and Hussein were secretly writing to one another between 1915 and 1916, the Balfour Declaration had not yet been written; there was no mandate in Palestine and no dispute between British, Zionists and Arabs over the control of Palestine. The letters were a part of a different story of Arab-British wartime diplomacy. The correspondence therefore cannot be properly understood as the first step in the dispute over the future of Palestine. It is, however, a part of broader regional politics that was overshadowed by the later conflict. In the following I claim that the intense debates over the wording of the documents, lawyerly in their essence,[25] conceal in their focus on the later national controversy an important aspect of pre-Mandate diplomacy: the broad perspectives that the authors rather naturally held with regard to the 'region'.

The first letter, dated 14 July, was written by Abdullah, the second son of the Sharif and addressed to Ronald Storrs, Oriental Secretary at the British residency in Cairo. In it the British were asked to acknowledge: (i) Arab independence in an extensive territory; (ii) Britain's responsibility for the defence of this independent realm; and (iii) British approval of a proclamation of an 'Arab Kalifate of Islam'.[26] The area that was announced by Abdullah engulfed the Levant, Mesopotamia and Arabia, a fantastically large portion of territory. The Sharif demanded[27] that:

> England will acknowledge the independence of the Arab countries, bounded on the north by Mersina and Adana up to the 37th degree of latitude, on which degree fall Birijik, Urfa, Mardin, Midiat, Jezirat

[23] Elie Kedourie, *In the Anglo-Arab Labyrinth: The McMahon-Husayn Correspondence and Its Interpretations, 1914–1939* (Routledge 2000) 3. The book documents the genesis and interpretations of the McMahon-Hussein correspondence.

[24] Details of the correspondence were first made public less than a year after the end of the war by *The Daily Telegraph* (signed by the journalist Perceval Landon, but actually written by TE Lawrence). In 1923 a full account was published in a book by J de V Loder, *The Truth about Mesopotamia, Palestine and Syria* (Allan & Unwin 1923). In 1934, the text was published in Arabic in a work by Amin Sa'id. In 1938 most of the letters were first published in English in the appendix to George Antonius, *The Arab Awakening: The Story of the Arab National Movement* (H Hamilton 1938). The British government refused to officially publish the letters until 1939, when they came out in a White Paper: Kedourie (n 23) 3.

[25] In the words of Elie Kedourie, 'as lawyers, say, would argue over the wording of a contract or the proper construction of a statute': Kedourie (n 23) 4.

[26] In 1914 Amir Abdullah contacted Storrs in Cairo (through Lord Kitchener, then Consul General in Egypt) to request British support for an Arab revolt against the Turks. This plea was answered cautiously by the British government, which at that time was still exercising friendly relations with the Ottoman Empire, under the pre-war conception that Ottoman rule over the Levant will prevent an escalation of European imperialism in the Near East. Six months later when war broke out and as the Sultan proclaimed a Jihad against the British government, Lord Kitchener approached Abdullah to induce him to support an Arab revolt: Kedourie (n 23) 17–19; for more on the pre-McMahon-Hussein diplomacy between Cairo, Mecca and London see ibid 3–31. In December 1914 another letter, composed by Storrs, addressed as a 'Proclamation to the Natives of Arabia and the Arab Provinces' read: 'This is a message of peace and consolation from the Empire of Great Britain to the Natives of Arabia, Palestine, Syria, and Mesopotamia – the Countries lying between the Red Sea, Bahr El Arab, Persia Gulf, frontiers of Persia and Anatoli[a] and the Mediterranean Sea': Kedourie, ibid 22.

[27] McMahon-Hussein correspondence (n 10) translation of a letter dated 14 July 1915.

> (Ibn 'Umar), Amadia, up to the border of Persia; on the east by the borders of Persia up to the Gulf of Basra; on the south by the Indian Ocean, with the exception of the position of Aden to remain as it is; on the west by the Red Sea, the Mediterranean Sea up to Mersina. England to approve the proclamation of an Arab Khalifate of Islam.

After another short exchange in which McMahon attempted to delay the recognition of these boundaries[28] and Hussain strongly protested,[29] finally, on 24 October, McMahon wrote back, approving with some specific limitations, the territorial horizon asked for:[30]

> The two districts of Mersina and Alexandretta and portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo cannot be said to be purely Arab, and should be excluded from the limits demanded.
>
> With the above modification, and without prejudice of our existing treaties with Arab chiefs, we accept those limits.
>
> As for those regions lying within those frontiers wherein Great Britain is free to act without detriment to the interest of her ally, France, I am empowered in the name of the Government of Great Britain to give the following assurances and make the following reply to your letter.

Here, the British recognise Arab independence, guarantee the inviolability of the holy places, give the Arabs advice and assist them in 'what may appear to be the most suitable forms of government in those various territories'; they also require the Arabs to seek advice from Britain only and recognise its interests and its position in Baghdad and Basra where it envisions British administration.[31]

Thus unrolls the first regional image in our story: a vast continental territory designated for Arab independence, to which the British reluctantly adhere, specifying limited exceptions informed by specific commitments that they hold, towards the French and Arab Chiefs.[32]

What was the basis for such a broad territorial demand? How could the Emir of Mecca, a rather ambitious Ottoman-nominated administrator (guardian of the holy cities of Mecca and Medina), demand in the name of 'the Arab nation' a protected rein over a massive span of territory and its, arguably, homogeneous population? A further inquiry into the spatial, territorial perceptions that the British and the Arabs conveyed in the pre-correspondence negotiations may clarify that.

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[28] 'With regard to the questions of limits and boundaries, it would appear to be premature to consume our time in discussing such details in the heat of war, and while, in many portions of them, the Turk is up to now in effective occupation': McMahon-Hussein correspondence (n 10) translation of a letter from McMahon to Hussein dated 30 August 1915.

[29] 'As the limits and boundaries demanded are not those of one person whom we should satisfy and with whom we should discuss them after the war is over, but our peoples have seen that the life of their new proposal is bound at least by these limits and their word is united on this': McMahon-Hussein correspondence (n 10) translation of a letter from Hussein to McMahon dated 9 September 1915.

[30] McMahon-Hussein correspondence (n 10) translation of a letter from Hussein to McMahon dated 24 October 1915.

[31] ibid.

[32] Kedourie (n 23); Renton (n 20).

In September 1914, the intelligence department of the Egyptian war office in Cairo produced a paper titled 'Appreciation of Situation in Arabia'. The paper stressed the Turkish government's declining authority and its difficulty in keeping the country quiet:[33]

> There seems little doubt that there has been a distinct tendency towards combination on the part of the more powerful chiefs such as: Ibn Sa'ud of Nejd, the Idrisi of Asir, the Sharif of Mecca, and possibly also Ibn Rashid, with a view to throwing off the Turkish domination and working towards Arabia for the Arab.

The paper warned that the Ottoman government:

> has made great efforts to come to an arrangement with the principal Chiefs in Arabia in order to secure, if not their active assistance, at least their friendly neutrality … In any case it seems almost certain … that the Sharif of Mecca has now definitely thrown in his lot with Turkey.

This paper was designed to sound an alarm over Ottoman activities in Arabia and to push British policy towards greater involvement therein.

This warning was already lurking in the imagination of British policy makers on 31 October 1914 – the day of the formal declaration of war between Britain and the Ottoman Empire. That day, Lord Kitchener drafted a message (approved by Foreign Secretary, Sir Edward Grey) to Abdullah, attempting to persuade him, as a representative of the Arab Nation, to assist England in the war:[34]

> If the Arab nation assists England in this war that has been forced upon us by Turkey, England will guarantee that no internal intervention takes place in Arabia, and will give Arabs every assistance against external foreign aggression. It may be that an Arab of true race will assume the Khalifate at Mecca or Medina, and so good may come by the help of God of all the evil that is now concurring.

This message already contains a very wide, far-reaching perception of the Mecca caliphate to include the Arabs, or the 'Arab nation'. That the image of an Arab caliphate is brought up by Kitchener, unsolicited by the Sharif, shows that the war unlocked in the mind of the British a wide range of regional threats and possibilities.

The letter that transmitted this message (dated 1 November 1914) went even further. Apart from a promise to guarantee independence from external aggression, in particular the Ottoman and wishes for a 'true Arab race' caliphate, the letter also promises to replace Turkey with the Arab nation in religious recognition:[35]

> Till now we have defended and befriended Islam in the person of the Turks; henceforward it shall be in that of the noble Arab…. It would be well if Your Highness could convey to your followers and

[33] Kedourie (n 23) 13.
[34] ibid 18, FO 371/2139, 65589/44923.
[35] ibid 19, FO 371/1973, 87396, probably written by Storrs.

> devotees, who are found throughout the world, in every country, the good tidings of the freedom of the Arabs, and the rising of the sun over Arabia.

The stress in this letter is on a wide and general Arab movement of which the Sharif was the head. It is read as an unqualified expression of support for an already existing movement and an Arab caliphate, led by the Emir Hussein, to replace the Ottoman Empire – in return for Arab support in the English war. In the reply to the letter, Hussein asserted openly that the Ottoman caliphate no longer existed[36] and, in a letter to Storrs, Abdullah advised that he is taking the letter of 1 November as a basis for action and 'a reference for the present and the future'.[37]

On 4 December 1914, another British letter, in the form of a proclamation, was authored in London:

> This is the message of peace and consolation from the Empire of Great Britain to the natives of Arabia, Palestine, Syria, Mesopotamia – the countries lying between the Red Sea, Bahr El Arab, Persian Gulf, frontiers of Persia and Anatolia and the Mediterranean Sea. The Government of Great Britain informs you hereby that she has decided not to attack you or initiate war against any of you – nor does she intend to possess any part of your country neither in the form of conquest and possession, nor in the form of protection or occupation.

If the Arabs were to get rid of the Turks 'and take the reins of the Government of their country into their hands, we will give up those places for them, at once'. Great Britain, the proclamation added, 'had always defended the caliphate, even if it was a caliphate of conquest and necessity, as the Turkish Kaliphate'. The Arabs, the proclamation went on, 'are more powerful than the Turks in the administration of the government and are better prepared to uphold the elements of progress and civilization'…[38]

> The Government of Great Britain therefore promises you help if you help yourselves and take steps to establish an Empire for the Khalifate to administer your vast countries and she should not require of you in return to help in fighting the Turks or others, but she wishes you to work for yourselves and unite in serving your cause and interests.

Not only does this proclamation imagine a unified Arab nation in its 'vast countries', it also, independently of any requests by the Husseins, suggests the boundaries that would soon figure in the correspondence. British propaganda addresses its proclamations not simply to the Arab nation, not to the natives of Hijaz, but to those occupying the vast landscape that is soon to be opened up for a new type of rule: Arabia, Palestine, Syria, Mesopotamia, the borderless territories stretching out across the open landscapes that lie between the Red Sea, Bahr El Arab, the Persian Gulf, the frontiers of Persia and Anatolia and the Mediterranean Sea. So, the British, imagining

[36] ibid 19, FO 371/2139, 81133/44923.
[37] ibid.
[38] ibid 22, PRO FO 141/170 file 3156.

the threat of unified Arab chiefs roaming the Ottoman territory in support of the Turks, reframe that same territory in an attempt to promise them independent and religious rule, a real caliphate of truth to replace the caliphate of necessity, and a new empire to replace the old.[39]

In these grand promises the British did not earnestly recognise a concrete Arab sovereign state to be independent in its broad acknowledged territory. They used, sometimes carelessly and often intentionally, broad and vague concepts to lure their interlocutors to favour British promises over those of Turkey and Germany. Storrs, for example, was very clear in a telegram, commenting on an Arabic leaflet (probably from 14 May 1915), when he explained that the grand concepts were not serious indications of British commitments:[40]

> The expression 'Arab Empire', 'Kingdom', 'Government', 'Possessions' etc. is used throughout the Sherifial correspondence, on both sides, in a general and undefined sense: and is variously rendered by the words Hukuma (Government) Mamlaka (Possessions) and Dawla (Power, Dynasty, Kingdom). Neither from these terms, nor from any phrase employed by H.M.G. throughout the negotiations, is it possible to elaborate any theory as to the precise nature of this vaguely adumbrated body.

However, there were many in the government who were less light-hearted about these commitments. 'I doubt if the Foreign Office quite realizes wherein the caliphate consists and what it implies', commented Sir Thomas Holderness of the India Office. 'Unlike the Papacy it must, if it is to be more than an empty claim, have extensive temporal empire'. The Secretary of State, Lord Crew, observed: 'It is dangerous to mix up the Kalifate and the Sharifate or to suppose that the latter can be easily transformed into the former'.[41] In fact, even the eagerness to lure the Arabs was not consistent as during this period the British policy was shaky at best. On 16 December 1915, Grey minuted in his reaction to a French Embassy report on the Arab revolt and the proclamation of an Arab Caliphate (which he approved): 'We must not stir the dangerous question of the caliphate'.[42]

To be sure, the claim in this section was not that the British envisioned an independent Arab territory exercising state-like sovereignty in a defined jurisdiction; their promises were vague and they quite consciously moved between different visions of rule that was to occupy the vast terrain (kingship, suzerainty, caliphate, empire, were just a few of them). Instead, I claim that they were negotiating, as were their Arab counterparts, under the assumption that Turkish Asia, a large and vague territory, was going to open up for new types of rule.

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[39] Another indication of British enthusiasm to attract the Emir, and also of Britain's perception that his caliphate is expected to replace the Ottoman Empire and be vast in territory, was expressed in the instructions given by Edward Grey (with Asquith's approval) to McMahon (14 April 1915) to let it be known, if he thinks it desirable, 'that his Majesty's Government will make it an essential condition of any terms of peace that the Arabian Peninsula and its Muslim holy places should remain in the hands of an independent sovereign Moslem State': ibid 23.
[40] ibid 25, FO 141/461, file 1198.
[41] ibid 31.
[42] ibid 28–29, FO 371/2147, 87764.

3. THE SYKES-PICOT AGREEMENT: A REGION OPENING UP FOR DEVELOPMENT

On 16 May 1916, Great Britain and France concluded a secret agreement, commonly and unofficially, known as the Sykes-Picot Agreement.[43] The Agreement divided Ottoman territory into British and French spheres of influence. Key provisions included the partition of the entire Fertile Crescent into several zones, which influenced directly the eventual delineation of most of the other areas of former Ottoman Arab lands.[44] Neither the British–French agreement nor the rather arbitrary delineations on maps affixed to the document were known to the Arabs when the Arab Revolt began, with the military and financial support of Great Britain, on 10 June 1916. The agreement was kept secret because the role Britain and France hoped to reserve for themselves would have angered the Arabs and jeopardised their collaboration, but Tsarist Russia had been kept informed. When the Bolsheviks came to power they published the document, and on 26 November 1917 it was printed in the *Manchester Guardian*.[45]

The publication of the secret agreement startled Arab leaders and many in the western world, and is still considered a classic mark of imperial dishonesty and betrayal. It had, no doubt, an immense impact on the British need to reassert legitimacy, vis-à-vis the Arabs and through its implementation of the mandate system, on eventual jurisdictional boundaries in the Middle East.[46] Yet, these dramatic implications obscure another aspect of the Sykes-Picot Agreement that its secrecy made possible. Since it was not intended for publication, the drafters of the Agreement were quite free to express through this document their true imperial sentiment. By that I do not necessarily mean their greed and exploitation, accompanied by disregard for native aspirations; these are obviously expressed in the document and are manifested in its commonplace interpretations. Instead, I mean to refer to a powerful imperial image of a region that is opening up for innumerable future possibilities for development.

France and Britain opened the region's map and drew lines. They not only surveyed the territory as a vast and open space available for division among them, of course, but also for many

[43] Sykes-Picot Agreement (n 11).

[44] '1. That France and Great Britain are prepared to recognize and protect an independent Arab state or a confederation of Arab states (a) and (b) marked on the annexed map, under the suzerainty of an Arab chief. That in area (a) France, and in area (b) Great Britain, shall have priority of right of enterprise and local loans. That in area (a) France, and in area (b) Great Britain, shall alone supply advisers or foreign functionaries at the request of the Arab state or confederation of Arab states. 2. That in the blue area France, and in the red area Great Britain, shall be allowed to establish such direct or indirect administration or control as they desire and as they may think it to arrange with the Arab state or confederation of Arab states. 3. That in the brown area there shall be established an international administration, the form of which is to be decided upon after consultation with Russia, and subsequently in consultation with the other allies, and the representatives of the sheriff of Mecca': ibid ss 1–3.

[45] On 23 November 1917 *Pravda* and *Izvestia* began to publish the secret agreements, including the various plans to partition the Arab provinces of the Ottoman empire and the proposal to hand over Constantinople and the Straits to Russia: see James Bunyan and HH Fisher, *The Bolshevik Revolution 1917–1928: Documents and Materials* (Stanford University Press) 24.

[46] For a detailed description of the impact on Anglo-Arab relations see Kedourie (n 23) 159–84; and Jukka Nevakivi, *Britain, France and the Arab Middle East, 1914–1920* (Athlone 1969); for the impact of the Agreement on the shape of subsequent borders and regional relations see Fawcett (n 4).

other types of productive activity. What, in the minds of its imperial architects, was this massive territory capable of? What could it contain? The list of the activities that the agreement superimposes on the map is long and ambitious. Among others, the region is being opened to the protection of independent indigenous rule,[47] enterprise and local loans,[48] the supply of expertise,[49] the establishment of direct and indirect administration or control,[50] and the conduct of international[51] and regional[52] relations.

However, this broad territorial space can also accommodate much more detailed, administrative and governmental constructions: the expansion and emancipation of ports,[53] the establishment of trade and transportation norms and their harmonisation over the territory,[54] the transfer of water,[55] negotiation with allies over neighbouring territories,[56] the establishment of

[47] 'That France and Great Britain are prepared to recognize and protect an independent Arab state or a confederation of Arab states': Sykes-Picot Agreement (n 11) s 1.
[48] 'That in area (a) France, and in area (b) Great Britain, shall have priority of right of enterprise and local loans': ibid.
[49] 'That in area (a) France, and in area (b) Great Britain, shall alone supply advisers or foreign functionaries at the request of the Arab state or confederation of Arab states': ibid.
[50] 'That in the blue area France, and in the red area Great Britain, shall be allowed to establish such direct or indirect administration or control as they desire and as they may think fit to arrange with the Arab state or confederation of Arab states': ibid s 2.
[51] With Russia: 'That in the brown area there shall be established an international administration, the form of which is to be decided upon after consultation with Russia, and subsequently in consultation with the other allies, and the representatives of the sheriff of Mecca': ibid s 3. Also with Italy and Japan: 'the conclusion of the present agreement raises, for practical consideration, the question of claims of Italy to a share in any partition or rearrangement of Turkey in Asia, as formulated in Article 9 of the agreement of the 26th April, 1915, between Italy and the allies. His Majesty's government further consider that the Japanese government should be informed of the arrangements now concluded': ibid, eschatocol.
[52] 'It shall be agreed that the French government will at no time enter into any negotiations for the cession of their rights and will not cede such rights in the blue area to any third power, except the Arab state or confederation of Arab states, without the previous agreement of His Majesty's government, who, on their part, will give a similar undertaking to the French government regarding the red area': ibid s 9. 'The British and French government, as the protectors of the Arab state, shall agree that they will not themselves acquire and will not consent to a third power acquiring territorial possessions in the Arabian peninsula, nor consent to a third power installing a naval base either on the east coast, or on the islands, of the Red sea. This, however, shall not prevent such adjustment of the Aden frontier as may be necessary in consequence of recent Turkish aggression': ibid s 10 ; 'The negotiations with the Arabs as to the boundaries of the Arab states shall be continued through the same channel as heretofore on behalf of the two powers': ibid s 11.
[53] 'That Alexandretta shall be a free port as regards the trade of the British empire, and that there shall be no discrimination in port charges or facilities as regards British shipping and British goods … That Haifa shall be a free port as regards the trade of France, her dominions and protectorates, and there shall be no discrimination in port charges or facilities as regards French shipping and French goods … There shall be freedom of transit for French goods through Haifa and by the British railway through the brown area, whether those goods are intended for or originate in the blue area, area (a), or area (b), and there shall be no discrimination, direct or indirect, against French goods on any railway, or against French goods or ships at any port serving the areas mentioned': ibid s 5.
[54] 'There shall be freedom of transit for British goods through Alexandretta and by railway through the blue area, or (b) area, or area (a); and there shall be no discrimination, direct or indirect, against British goods on any railway or against British goods or ships at any port serving the areas mentioned' – and repeated for France in its areas: ibid ss 4–5.
[55] '… guarantee of a given supply of water from the Tigres and Euphrates in area (a) for area (b)': ibid.
[56] 'His Majesty's government, on their part, undertake that they will at no time enter into negotiations for the cession of Cyprus to any third power without the previous consent of the French government': ibid.

railroads and control over their path,[57] the monopolisation of rail routes and their distribution according to economic needs,[58] transportation of troops,[59] control over rates of customs and tariff,[60] the regulation of customs barriers between the different zones and into the area,[61] and arms control.[62]

This is a startling example of imperial regionalism. In secret, when the Empire is able to speak freely, it sees the world as divided into regions, to be opened up for influence, for a variety of activities of protection, control, development, political and administrative creation, and for detailed engineering of space and populations. In fact, when we read the Sykes-Picot Agreement as an expression of imperial sentiment for regional development, it may be easier to understand why the British did not see an explicit contradiction between their promises to the Arabs and their commitments to the French. Indigenous self-rule is just one developmental goal that they commit to as part of their regional strategy. An agreement with the French on its terms and boundaries is necessary in order to manage the political landscape that will enable it.[63]

4. THE BALFOUR DECLARATION (NOVEMBER 1917) – A NEW HOME FOR A EUROPEAN ISSUE

On the face of it, the Balfour Declaration – stating in November 1917 that the British government 'view with favour the establishment in Palestine of a national home for the Jewish people, and will use its best endeavours to facilitate the achievement of this object' – is devoid of any concrete regional vision.[64] From the viewpoint of almost 100 years of national conflict that it

[57] 'That in area (a) the Baghdad railway shall not be extended southwards beyond Mosul, and in area (b) northwards beyond Samarra, until a railway connecting Baghdad and Aleppo via the Euphrates valley has been completed, and then only with the concurrence of the two governments': ibid s 6.

[58] 'That Great Britain has the right to build, administer, and be sole owner of a railway connecting Haifa with area (b) … It is to be understood by both governments that this railway is to facilitate the connection of Baghdad with Haifa by rail, and it is further understood that, if the engineering difficulties and expense entailed by keeping this connecting line in the brown area only make the project unfeasible, that the French government shall be prepared to consider that the line in question may also traverse the polygon Banias-Keis Marib-Salkhad Tell Otsda-Mesmie before reaching area (b)': ibid s 7.

[59] 'That Great Britain … shall have a perpetual right to transport troops along such a line at all times': ibid.

[60] 'For a period of twenty years the existing Turkish customs tariff shall remain in force throughout the whole of the blue and red areas, as well as in areas (a) and (b), and no increase in the rates of duty or conversions from ad valorem to specific rates shall be made except by agreement between the two powers': ibid s 8.

[61] 'There shall be no interior customs barriers between any of the above mentioned areas. The customs duties leviable on goods destined for the interior shall be collected at the port of entry and handed over to the administration of the area of destination': ibid.

[62] 'It is agreed that measures to control the importation of arms into the Arab territories will be considered by the two governments': ibid s 12.

[63] Jukka Nevakivi sees the Sykes-Picot Agreement as a direct continuation of British attempts to manage their relations with the Arabs: Nevakivi (n 46) 22–26.

[64] Balfour Declaration (n 12). The official text continues: 'it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country'.

arguably initiated, it is seen to express a strictly territorial politics with no regional significance: the Jews wish to establish a national home within the limited jurisdictional boundaries of Palestine, and the British Empire will help them to achieve that purpose while protecting the rights of local communities. The vast landscape that we saw in the McMahon-Hussein correspondence and in the Sykes-Picot Agreement seem to vanish as the focus moves to the much more constrained (and modest) map of 'Palestine'.[65]

A closer look at the political context of the Declaration may nonetheless uncover here too a distinct and broad regional image that is active in the document but obscured by its traditional place in the historiography of the conflict. Here, a new and promising geographical space was being opened for the resolution of the Jewish question, an urgent and painful European problem that was at the same time being globalised.

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The idea that a territorial space within the framework of empire could be an effective solution to Europe's Jewish question had already animated Zionist leaders in the early days of the movement. In his 1876 programme, *The Jewish State*, Theodor Herzl made a direct plea to the European empires: 'Let sovereignty be granted us over a portion of the globe large enough to satisfy the rightful requirements of a nation; the rest we shall manage for ourselves'.[66] The sovereignty that he calls for seems like a stage of emancipation – only not in Europe, but in the European territories or in those territories under their influence. He suggests a way for the European governments to rid themselves of their Jewish question by exporting it to the colonies while, at the same time, promoting their development objectives in those territories. The benefit is described on a large scale – a solution to a European problem, advancement of European interests in the territories, local and regional development with the assurance that the neighbouring countries will also enjoy its added value:[67]

> The Society of Jews will negotiate with the present masters of the land, putting itself under the protectorate of the European Powers, if they prove friendly to the plan. We could offer the present possessors of the land enormous advantages, assume part of the public debt, build new roads for traffic, which our presence in the country would render necessary, and do many other things. The creation of our State would be beneficial to adjacent countries, because the cultivation of a strip of land increases the value of its surrounding districts in innumerable ways.

[65] The territoriality of 'Palestine', however, was at the time of the Declaration highly ambiguous to the effect that the image expressed is actually devoid of any specific bounded significance. 'Where exactly is Palestine?' was a question to which no one could give a straightforward answer, not even the Zionists. Under Turkish rule Palestine was neither a geopolitical nor an administrative unit. Moreover, both Zionists and Arabs had quite divergent and vague notions of the territorial extent of 'Palestine'. For example, the King Crane Commission, which conducted interviews in former Ottoman territories in 1919 in order to inform American policy about the region's people and their desired future, indicated that both Christians and Muslims do not separate Syria from Palestine and that Jews talk about Palestine together with 'Transjordania': 'The King-Crane Commission Report', 28 August 1919, http://www.hri.org/docs/king-crane.

[66] Theodor Herzl, *The Jewish State* (1876) Ch 2 'The Jewish Question'.

[67] ibid.

Herzl draws a grandeur image of the role of the Jews in the region. They are not coming there to occupy a small land and live discretely; they are coming with 'marvelous potency' to manage, in the interest of the European powers and the possessors of the land, vast issues. They will regulate the whole finances of the Turks. They will form a European fortification of Europe 'against Asia, an outpost of civilization as opposed to barbarism'.[68] They will remain in contact with Europe and live under its guaranteed protection. They will be a sanctuary of Christendom with an extraterritorial status. They will develop the country and the region.[69] As the Zionist movement developed, the idea of a colonial solution to the Jewish question continued to arouse the imagination of its leaders. The Jewish question is described as a universal problem that needs to be resolved on a universal platform – it makes sense that the colonised territories would also be incorporated in the solution; as Dov Ber Borochov, one of the founders of the Zionist labour movement, explained in 1906: 'The Jewish problem migrates with the Jews. Thus a universal Jewish problem is created which involves not only Jewish philanthropists but also the political powers of the civilized nations'.[70]

When the war with Turkey was declared, Zionist leaders saw an opportunity to realise their aspirations. Chaim Weizmann, then a prominent Zionist leader and soon after President of the English Zionist Federation, recalled that in December 1914, when he met Lloyd George (then Chancellor of the Exchequer) and Herbert Samuel (then MP and President of the Local Government Board), the latter said that he was preparing a memorandum for the Prime Minister (Asquith) on the subject of a Jewish state in Palestine.[71]

However, the Balfour Declaration, almost two years later, was the immediate outcome that was less of the Zionist propaganda that Samuel echoes in his memoranda, and more of British wartime propaganda. 1917 was a critical year for the Allies. The Russian Revolution weakened the struggle against Germany in the east and German troops were about to transfer from Russia to

[68] ibid.

[69] 'Palestine is our ever-memorable historic home. The very name of Palestine would attract our people with a force of marvelous potency. If His Majesty the Sultan were to give us Palestine, we could in return undertake to regulate the whole finances of Turkey. We should there form a portion of a rampart of Europe against Asia, an outpost of civilization as opposed to barbarism. We should as a neutral State remain in contact with all Europe, which would have to guarantee our existence. The sanctuaries of Christendom would be safeguarded by assigning to them an extra-territorial status such as is well-known to the law of nations. We should form a guard of honor about these sanctuaries, answering for the fulfillment of this duty with our existence. This guard of honor would be the great symbol of the solution of the Jewish question after eighteen centuries of Jewish suffering': ibid.

[70] Ber (Dov) Borochov, *The Poalei Tzion Platform* (1906).

[71] Chaim Weitzmann, *Trial and Error: The Autobiography of Chaim Weizmann* (Jewish Publication Society of America 1949) 192. In fact Samuel wrote three. In January 1915 he submitted the first: 'The course of events opens a prospect of change, at the end of the war, in the status of Palestine. Already there is a stirring among the twelve million Jews scattered throughout the countries of the world. A feeling is spreading with great rapidity that now, at last, some advance may be made, in some way, towards the fulfillment of the hope and desire, held with unshakable tenacity for eighteen hundred years, for a restoration of the Jews to the land to which they are attached by ties almost as ancient as history itself … It is hoped that under British rule facilities would be given to Jewish organizations to purchase land, to found colonies, to establish educational and religious institutions, and to spend usefully the funds that would be freely contributed for promoting the economic development of the country. It is hoped also that Jewish immigration, carefully regulated, would be given a preference so that in course of time the Jewish people, grown into a majority and settled on the land, may be conceded such degree of self-government as the conditions of that day may justify': PRO Cab 37/123/43, cited in Ingrams (n 1) 5.

the Western front.[72] On 13 June 1917, Ronald Graham, Assistant Under-Secretary of State for Foreign Affairs, submitted in a memorandum to Lord Hardinge, Permanent Under-Secretary of State for Foreign Affairs, that:[73]

> … the moment has come when we might meet the wishes of the Zionists and give them an assurance that His Majesty's Government are in general sympathy with their aspirations. This might be done by a message from the Prime Minister or Mr. Balfour to be read out at a meeting, which could be arranged for at any time. Such a step would be well justified by the international political result it would secure.

Arthur Balfour, Foreign Secretary for Lloyd George's wartime administration, minuted on the document: 'I have asked Ld Rothschild and Professor Weizmann to submit a formula'.[74]

Curiously, the quick process that followed and culminated in the Balfour Declaration of 2 November 1917 had nothing to do with an actual British policy plan for the post-war future of Palestine. In fact, in those critical war months of the second part of 1917, the British had no such plans.[75]

The principal aim of the Declaration was to win the allegiance of world Jewry for the Allied cause, especially in the United States and in Russia, under the false assumption that the Jews were predominantly Zionists and that they wielded great influence in American society and politics and among the Russian revolutionary circles.[76] If the Jews could be persuaded that the *entante* was committed to securing their interests, then the British government would win a powerful pro-war ally wherever Jews were to be found.[77] The belief that Jews were both Zionist and powerful stemmed not only from anti-Semitic myths but also from a trend in the British Foreign Office circles of viewing ethnic groups as powerful races focused on the goal of self-determination.[78] This trend resulted in a series of nationalist propaganda policies during the war that were designed to win over racial power in the US and Russia predominantly. A Jewish Section in the Department of Information was set up in December 1917 with a far-reaching propaganda operation using press, pamphlets, books and films.[79] The aim of these operations was not to actually develop the national movement but to win 'the imagined global war asset of Jewish power';[80] there was no discussion of whether support for Zionism will secure

[72] James Renton, 'Flawed Foundations: The Balfour Declaration and the Palestine Mandate' in Rory Miller (ed), *Britain, Palestine and Empire, The Mandate Years* (Ashgate 2010).
[73] PRO FO 371/3058, cited in Ingrams (n 1) 8–9.
[74] ibid.
[75] Renton (n 72) 16, 18–19. See also John J McTague, *British Policy in Palestine, 1917–1922* (University Press of America 1961) 240; Leonard Stein, *The Balfour Declaration* (Simon and Schuster 1961); Malcolm Yapp, 'The Making of the Palestine Mandate' (1995) 1 *Middle Eastern Lectures* 9.
[76] Mark Levene, 'The Balfour Declaration: A Case of Mistaken Identity' (1992) 107(422) *English Historical Review* 54–77.
[77] For more on the assumptions behind the British Zionist wartime policy, see James Renton, *The Zionist Masquerade: The Birth of the Anglo-Zionist Alliance, 1914–1918* (Palgrave Macmillan 2007) 1–22.
[78] ibid 23–42; see also Jacob Norris, *Land of Progress: Palestine in the Age of Colonial Development, 1905–1948* (Oxford University Press 2013) 63–91.
[79] ibid ch 5.
[80] Renton (n 72) 18.

British interests in Palestine, because there were no definite plans for British control over Palestine; nor was there a clear policy for the future of the Middle East as a whole.[81]

Corresponding with the principal aim of the Declaration – to impress world Jewry, rather than to implicate British post-war interest in the region – Zionist leaders were asked to draft it themselves.

In this context the outward silence of the Zionist regional image in the Declaration can be understood. In their imagination and, to a great degree, in the imagination of their British and generally European interlocutors, the region was becoming meaningful, and indeed a powerful wartime asset as a key to the solution to European problems. In the Balfour Declaration, the region opens up for occupation as a European territory, designed to create a pragmatic and just solution to the pains of European society. In fact, the whole world suffers because the Jews are away from their old territory. That is why it seemed useful to declare in 1917 that Britain will back Zionist aspirations in the region – because a geographically remote solution to the European Jewish question is potentially a valuable idea in European politics. A national home for the Jewish people in a new and open space means a home in which Europe can finally rest its Jewish question.

But how would a Jewish home elsewhere work as a solution to a European minority problem? Is it not the problem that Jews seek equality of rights in their own home countries? This question was strongly adhered to by non-Zionist Jews and others opposed to the Declaration. On 4 October Lord Balfour took up the case before the War Cabinet. He saw:[82]

> nothing inconsistent between the establishment of a Jewish national focus in Palestine and the complete assimilation and absorption of Jews into the nationality of other countries. Just as English emigrants to the United States became, either in the first or subsequent generations, American nationals, so, in future, should a Jewish citizenship be established in Palestine, would Jews become either Englishmen, Americans, Germans, or Palestinians.

The Jewish question will be evened up when Jews become a nation like any other in their own territory. Objections to the Declaration took the shape of claims that a Jewish home would only worsen the position of the Jews in their countries of origin:[83]

> How would he [asked Edwin Montegue, then Secretary of State for India, of Jewish descent] negotiate with the people of India on behalf of his Majesty's Government if the world has just been told that his majesty's government regarded his national home as being in Turkish territory? … the Cabinet's first duty was to English Jews.

[81] ibid 19; see also John Fisher, *Curzon and British Imperialism in the Middle East 1916–1919* (Frank Cass 1999).
[82] Ingram (n 1) 11.
[83] ibid 11–12. Lord Curzon objected, stating that Palestine was not well conditioned as a seat for the Jewish race because of the country's barren desolation and the Muslim population: ibid 11.

The Jewish question was not – claimed the anti-Zionist minister – to be resolved in any other territory but in the European home. A new draft was suggested as a response to such objections, a draft which emphasises the pressing racial question involved:[84]

> His Majesty's Government views with favour the establishment in Palestine of a national home for the *Jewish Race* … it being clearly understood that nothing shall be done which may prejudice … the rights and the political status enjoyed in any other country by such *Jews who are fully contented with their existing nationality and citizenship*.

This draft was submitted with confidentiality to the leaders of the Zionist movement and to anti-Zionist Anglo-Jewry. Replies were received during October. Many of the replies were strongly affirmative of the safeguards provided, both internal (for Jews all over the world), and external (for non-Jewish inhabitants of the land). Rejections were framed in the language of concern that the Jewish question cannot effectively be resolved in a new territory:[85]

> For the true well-being of the Jewish race emancipation and liberty in the countries of the world are a thousand times more important than a 'home'. In any case only a small fraction of the Jews could be collected together in Palestine.

Strongly stressing the issue of a Jewish home and Jewish homelessness in Europe, Leonard Cohen, the Chairman of the Jewish Board of Guardians warned:[86]

> The establishment of a 'national home for the Jewish race' in Palestine presupposes that the Jews are a nation, which I deny, and that they are homeless, which implies that in the countries where they enjoy religious liberty and the full rights of citizenship, they are separate entities unidentified with the interests of the nations of which they form parts, an implication which I repudiate.

The Jewish opposition to the Declaration responded directly to its attempt to resolve the European Jewish question in a new home territory. The real solution must be in Europe – in their real 'home'.

Following these reactions and many more letters from Jews in Britain and abroad that were received in the Foreign Office in favour of the Declaration, the War Cabinet met on 31 October. Additional delays, pressed the Foreign Office, will throw the Zionists into the arms of the Germans:[87]

> [T]he vast majority of Jews in Russia and America, as indeed all over the world, now appear to be in favor of Zionism. If we could make a declaration favourable to such an ideal, we should be able to carry an extremely useful propaganda both in Russia and America.

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[84] ibid 13 (emphasis added).
[85] CG Montifiore, President of the Anglo-Jewish Association: ibid 15.
[86] LL Cohen, Chairman Jewish Board of Guardians: ibid 16.
[87] Lord Balfour's statement, minuted from 31 October meeting: ibid 16.

The concerns about the Declaration, Balfour explained, were twofold: (i) that Palestine is inadequate to form a home for the Jews; and (ii) the future position of Jews in Western countries. In his replies, Balfour makes an important connection between the two problems – the condition of the territory and the condition of Jews in Europe.

First, he agrees, Palestine under 'Turkish misrule' may not be adequate for Jewish immigration, but under scientifically developed conditions it could sustain a large population. Second, the idea of a national home, he explains, should not be exaggerated. He understood it to mean:[88]

> [S]ome form of British, American or other protectorate, under which full facilities would be given to the Jews to work out their own salvation and to build up, by means of education, agriculture, and industry, a real centre of national culture and focus of national life.

He then repeated his argument about the connection between Jewish assimilation and citizenship. A British citizen can easily move to the United States and become a full citizen, but having no national citizenship, Jewish assimilation is incomplete.[89]

In other words, the Jewish question as a European and global issue of assimilation will be resolved in the new territory by creating a European protectorate over a Jewish 'home'. Home signifies a place of protection, rather than a place for independent statehood, and it is this protected space, which they lack in Europe, that is provided for them in the new territory. The colonised territory will be transformed into the European home that is needed in order to resolve Europe's Jewish question. With the help of a European protector in occupying that territory, the Jews can finally be at home – in Europe and all over the world.[90] After some more reservations from Lord Curzon regarding the fit of Palestine for Jewish settlement, the War Cabinet authorised the Declaration.[91]

Under this reading of the Balfour Declaration as envisioning a space in the region for the resolution of the European/Jewish problem of homelessness, it is interesting to geographically contrast the promise to the Arabs in the McMahon-Hussein correspondence and the promise to the Jews in the Balfour Declaration. While both were clear acts of wartime propaganda, they took place in very different imaginary spaces. The promises to Arabs were aimed at influencing the inhabitants of the region to take action against the Ottoman Empire, which is why the

[88] ibid 17.
[89] ibid.
[90] In December 1917, Middle East experts in the Foreign Office Political Intelligence Department, AJ Toynbee and Lewis Namier, wrote a note responding to a concerned Report on Zionism by the US Consulate in Geneva. The worry expressed in the Report was that the Zionist leadership sought to establish 'special rights' for the Jewish minority and a Jewish state. The response from Toynbee and Namier was that undemocratic restrictions on the rights of non-Jews while under British or US rule need only last 'until there was a sufficient population in the country fit to govern it on European lines': Renton (n 72) 29. At that moment, when the question of the forms of rule for this region was very much open, a Jewish form of rule following 'European lines' would have looked like one particularly tempting vision. In that way Europe would resolve its Jewish problem, in a civilised European way, outside the impossibilities of European limited borders.
[91] PRO Cab 23/4, the letter embodying this Declaration was sent to Lord Rothschild on 2 November 1917: Ingram (n 1) 18.

regional image that was expressed in them was one of a vast territory, open for local, self-determined (though ambivalent and vague) rule. The latter was meant to influence the Jews in the United States and in Russia to influence their governments to join the war, which is why the region seemed empty and silent – it was only a new space for the resolution of old and particularly European social issues.[92]

5. ARTICLE 22 OF THE COVENANT – LEGALISING IMPERIAL SPHERES OF INFLUENCE

Whereas the Balfour Declaration is part of a story about wartime diplomacy, Article 22 of the Covenant of the League of Nations is part of the story of post-war diplomacy for peace. The impact of the disclosure of the secret treaties by the Bolsheviks proved even greater than the Bolsheviks had anticipated.[93] France and Britain attempted damage control. On 5 January 1918, British Prime Minister David Lloyd George said that Britain was reassessing its plans for a post-war disposition in the Ottoman territories. He said: 'Mesopotamia, Syria and Palestine are in our judgment entitled to recognition of their separate national conditions'.[94] In a joint Anglo-French declaration in November 1918, Britain and France pledged that they would 'assist in the establishment of indigenous governments and administrations in Syria and Mesopotamia' by the 'setting up of national governments and administrations deriving their authority from the free exercise of the initiative and choice of the indigenous populations'.[95]

Pressure on Britain and France over how they would treat the Ottoman territories came not only from the East, but from the United States too.[96] In a speech to a joint session of the US

[92] Maybe this is also why there is no real sense of contradiction to be found in the government debates leading to the Balfour Declaration. The two commitments were intended to be heard in completely different places – and they could, in the mind of the British propaganda architects, easily be aligned.

[93] Trotsky said that the secret treaties revealed the Entente's 'dark plans of conquest': J Degras (ed), *Soviet Documents on Foreign Policy, Vol 1* (Oxford University Press 1951) 8–9. F Seymour Cocks, *The Secret Treaties and Understandings: Text of the Available Documents* (Union of Democratic Control 1918) 11.

[94] Cocks, ibid 47.

[95] Anglo French Declaration, 7 November 1918: 'The goal envisaged by France and Great Britain in prosecuting in the East the War let loose by German ambition is the complete and final liberation of the peoples who have for so long been oppressed by the Turks, and the setting up of national governments and administrations deriving their authority from the free exercise of the initiative and choice of the indigenous populations. In pursuit of those intentions, France and Great Britain agree to further and assist in the establishment of indigenous Governments and administrations in Syria and Mesopotamia which have already been liberated by the Allies, as well as in those territories which they are engaged in securing and recognizing these as soon as they are actually established. Far from wishing to impose on the populations of those regions any particular institutions they are only concerned to ensure by their support and by adequate assistance the regular working of Governments and administrations freely chosen by the populations themselves; to secure impartial and equal justice for all; to facilitate the economic development of the country by promoting and encouraging local initiative; to foster the spread of education; and to put an end to the dissensions which Turkish policy has for so long exploited. Such is the task which the two Allied Powers wish to undertake in the liberated territories'.

[96] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 139; Hersch Lauterpacht, 'The Mandate under International Law in the Covenant of the League of Nations' in Elihu Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht, Vol 3* (Cambridge University Press 1977) 29, 32.

Congress on 18 January 1918, President Woodrow Wilson declared principles that should guide a post-war settlement. He railed against the Europe-dominated order that he saw as a cause of the Great War and, in the same breath, he denounced control of foreign territories: 'The day of conquest and aggrandizement is gone by; so is also the day of secret covenants entered into in the interest of particular governments and likely at some unlooked-for moment to upset the peace of the world'.[97] Wilson listed fourteen propositions, which became known as his 'Fourteen Points', for a just post-war order. Wilson's fifth point focused on colonialism. He demanded:[98]

> A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

In his twelfth point, Wilson dealt specifically with the Ottoman territories:[99]

> The Turkish portions of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development.

With its progressive impetus, Wilson's document reveals a fourth image of the region, or more generally, of imperial regionalism, that would also prevail over the subsequent Article 22 of the Covenant of the League of Nations which founded the League's mandate system. This was not a new image but it would be legalised anew in the instrument for the mandate system. Traditionally, empire does not relate to sovereign jurisdictions outside (western) Europe, but to territories and populations. Accordingly, the imperial world is divided into vague and wide geopolitical spheres of influence, large borderless territories over which empires negotiate their claims. A close spatially sensitive reading of the Wilsonian principles raises exactly this image. The proclamation starts from the United States' perspective and looks at 'the world' as a big and open map, which is to be reformed:[100]

> What we demand in this war … is nothing peculiar to ourselves. It is that the world be made fit and safe to live in … All the peoples of the world are in effect partners in this interest, and for our own part we see very clearly that unless justice be done to others it will not be done to us.

From this grand perspective a programme for world peace evolves. After some universal principles (opening up secret documents, opening the seas to navigation, and opening the world to free trade: Points I to III), the plan requires a more detailed perspective. Here the proclamation moves, not from people to people or from issue to issue – it moves instead across large territories,

[97] 'The Fourteen Points', address by President Woodrow Wilson to the US Congress, 8 January 1918.
[98] ibid.
[99] ibid.
[100] ibid.

from region to region, and everywhere it goes it dispels injustice, as if it sweeps it away off the map of the world: point VI clears Russian territory; point VIII reaffirms French territory; point IX adjusts the frontiers of Italy; point X the freedom of the peoples of Austro-Hungary; point XI brings justice to the Balkans. Finally, point XII focuses on the territories of the Ottoman Empire and confirms sovereignty to Turkey, and security of life and autonomous development to all other nationalities, leaving an open space in the Dardanelles for free passage for the ships and commerce of all under international guarantees.[101]

This legacy of Wilson's proclamation passed on to Article 22 of the Covenant by way of the practical translation of a number of international commentators, architects of the League and the mandate system. One of the most prominent of them was the South African General, Jan Smuts.[102] In his December 1918 pamphlet, which had tremendous influence on the final draft of Article 22 of the Covenant, Smuts starts from the assumption that the League will have to occupy the 'great position' of the old European Empires subsequent to the 'passing away of the old European order' and become the foundation for a new international system.[103] As the epitome of western civilisation, the League becomes, in Smuts' proposal, the heir to the great imperial estates. However, the people in these great estates, in the territories of Russia, Austria and Turkey, are 'untrained politically; many of them are either incapable of or deficient in the power of self-government; they are mostly destitute and will require much nursing towards economic and political independence'.[104] To prevent a new scramble for the territories, the League of Nations must become 'the reversionary in the broadest sense of these empires'.[105] To fulfil the task, the League must enact its territorial policy according to the principles of 'no annexation and the self-determination of nations'.[106]

What is the territory upon which those principles will be applied? How does Smuts see the subject of the League's progressive territorial policy? The image of the new and just world that Smuts envisions is, not surprisingly, an imperial image of vast geographical domains and spheres of influence. Smuts, not unlike Wilson, moves from one region to another and reorganises the world and its 'peoples' as just, rational and peacefully reformed. Smuts starts from *Russian territories*; Finland, Poland, Czechoslovakia and Yugoslavia, he considers, will probably be found sufficiently capable of statehood to be recognised as individual states.[107] The *Transcaucasian and Transcaspian* provinces of Russia, however, are as yet deficient in the qualities of statehood and may need to settle for internal autonomy. From these, Smuts moves down the imperial map to

[101] It is interesting that when (in point V) the proclamation addresses imperial right, there are no more references to 'nations', only to 'populations'. In the context of colonial claims, nationalities are irrelevant as the interests of 'populations' replace them.
[102] Jan C Smuts, 'The Smuts Plan: The League of Nations, A Practical Suggestion' (reprinted in David Hunter Miller, *The Drafting of the Covenant,* vol 2 (GP Putnam's sons 1928) 23) has been termed 'the most effective contribution made by individual enterprise': Frederick Pollock, *The League of Nations* (Stevens and Sons 1920) 77–78.
[103] Smuts, ibid 23, 24.
[104] ibid 26.
[105] ibid.
[106] ibid 27.
[107] ibid 29.

Turkish territories: Upper and Lower Mesopotamia, Lebanon and Syria are also capable of autonomy but not of complete statehood. Of course, there are delicate variations in each of these vast domains: 'At the one end a territory may be found barely capable of autonomy: at the other end the approach to complete statehood is very near. Mesopotamia would probably be a case of the former kind; Syria of the latter'.[108] Some populations within these territories, such as those in Palestine and the Armenian Vilayets, may be too heterogeneous for administrative cooperation and so autonomy is out of the question at least for some time;[109] and some domains (the former German colonies in the South-Pacific and South-West Africa) are inhabited by barbarians and cannot possibly govern themselves.[110]

So, the great principles of self-determination and no annexation are superimposed on an imperial landscape. Territories are vast and populations are many, and the task of the heirs to the dying empires, each in its own sphere of influence,[111] is – as it always was – to impose order and justice and, by that, to unify and pacify a world of anarchy and barbarism.[112]

Not surprisingly, the later drafts of Article 22 were very much influenced by Smuts' scheme.[113] The final text expresses the same imperially infused regional image, construing territories and populations within broad areas of influence under a (sacred) protection scheme rather than within jurisdictions and by sovereign states.[114] The imperial powers who will be nominated as tutors and protectors are also portrayed beyond borders; they are 'advanced nations who by reason of their resources, their experience or their geographical position', rather than by reason of their sovereignty, can best exercise the League's mandates.[115] The world map is open and the empires are deepening their spheres of influence as advisers, administrators or (in exceptional cases of remote territories) sovereign protectors.

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[108] ibid.

[109] ibid. It is interesting that Smuts often uses 'people' and 'territory' interchangeably – eg, when he claims that the people or the territory will determine the form of its internal self-government: ibid 31.

[110] ibid 28.

[111] Individual states will be nominated to administer each territory, preferably on historic grounds: 'In the case of most peoples not yet risen to complete statehood there is some power which in the past has taken an active interest in their affairs and development': ibid 31.

[112] The British Empire is the example for the proper operation of such task: 'In the British Empire the common policy is laid down at conferences of the imperial Cabinet, representing the United Kingdom, the Dominions and India, while executive action is taken by the individual government of the Empire. In the second place, the minor constituents of the Empire, consisting of Crown Colonies, protectorates and territories, are not represented directly at the Imperial Cabinet, but are administered or looked after by the individual principal constituent states referred to, just as it is here proposed that the Powers should under the league look after the autonomous undeveloped territories. In the third place, the economic policy of the open door and the non-military police policy here advocated for these autonomous or undeveloped territories are in vogue in the analogous British crown colonies, protectorates and territories': ibid 36.

[113] Miller (n 102) contains documentation produced in the drafting of the future art 22; Miller reproduces the drafts of the Covenant and its development, echoing Smuts' plan, is observable: see 654–56 for the draft of 26 March 1919 (art 18), 679–81 for the draft of 5 April 1919 (art 21), and 691–92 for the 21 April 1919 version (art 22).

[114] 'To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form *a sacred trust of civilisation*': art 22(1).

[115] art 22(2).

Like Wilson's proclamation and Smuts' plan, the text of Article 22 hovers from region to region and reorganises domains, territories and populations. The former Turkish Empire is seen as a large territorial continuum with 'communities' possessing different levels of development, to be administrated under the advice of a mandate.[116] From Asiatic Turkey the text drifts to Central Africa,[117] and then across the continent to another territory, Smuts' former German territories of barbaric dependency which must be directly ruled as an integral portion of the mandatory power's territory 'in the interest of the indigenous population'.[118] The League is thus seen as taking responsibility and dealing 'with the great territorial questions which must arise from the break-up of those empires'[119] and these questions are understood and responded to within the framework of a regional imperial image in which the world outside western Europe is made of vast domains of concern.

6. MANDATE FOR PALESTINE: A JURISDICTIONALLY DIVIDED SPACE

The Palestine Mandate was a legal and administrative instrument; it did not specify the borders of a geographical territory. The territorial jurisdiction of the Mandate was subject to change by treaty, capitulation, grant, usage, sufferance or other lawful means.[120] For all practical purposes the text that founded the Palestine Mandate was a jurisdiction-establishing document, creating a

[116] 'Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone': art 22(4).
[117] 'Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic': art 22(5).
[118] 'There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population': art 22(6).
[119] Smuts (n 102) 36.
[120] The preamble to the establishing document 'Mandate for Palestine' states that the boundaries of the Palestine Mandate may be fixed by the League of Nations (The League of Nations, 'Mandate for Palestine', together with a Note by the Secretary-General relating to its application to the Territory known as Trans-Jordan, 1923, under the provisions of Article 25, Cmd 1785). In fact, the Paris Peace Conference came to an end without a treaty being signed with Turkey and without a decision being made as to the future of the former Turkish territories. In April 1920, the Allied Supreme Council met in the Italian town of San Remo and agreed on a formula to be presented at the conference at Sèvres, and to be confirmed in the final peace treaty. The Treaty of Sèvres of 10 August 1920 tracked art 22 of the Covenant and the San Remo decisions on the future status of these territories. France was to be a Mandatory power in Syria, Britain in Palestine and Mesopotamia. The treaty included a section headed 'Syria, Mesopotamia, Palestine', which read, in part: 'Article 94. The High Contracting Parties agree that Syria and Mesopotamia shall, in accordance with the fourth paragraph of Article 22, Part I (Covenant of the League of Nations), be provisionally recognized as independent States subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone … The determination of the other frontiers of the said States, and the selection of the Mandatories, will be made by the Principal Allied Powers'. The provision on Palestine, however, did not use the term 'state' (art 95): see John Quigley, *Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press 2010) 32–33.

closed, legally bounded, territorial jurisdiction under British administrative control. In this respect, the Mandate for Palestine, formally confirmed by the Council of the League of Nations on 24 July 1922, represents a tremendous shift in the imperial regional image that we saw in Article 22, from which it drew its authority. In fact, it represents a shift from all the documents that we have inspected hitherto, and that led to it.

In the Mandate for Palestine we no longer find a vast region, divided into spheres and dominions of influence and being opened up for rule, control or development. In fact, in this document, the image of imperial officials and policy makers, standing over large maps and roaming from one region to another in search of imperial interests, threats and opportunities, seem to have disappeared. Instead, the document frames and closes up a space for legal administration and governance. Instead of open and vague opportunities for rule, we now have a concrete territorial jurisdiction. Instead of vast domains of influence we now have a legally governed state.

This new image of a closely-knit jurisdiction is created by detailed and systematic construction of administrative authority. The first article establishes full powers of legislation and administration. A legal and administrative jurisdiction is thereby erected where legal authority is neither questioned nor shared.[121] The second article frames the purpose of this authority:[122]

> [P]lacing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home … and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

Thus we have an authority with a determined purpose within a particularly defined jurisdiction.

From this point the document goes on to stipulate what will be the mechanisms that the authority will consider, recognise, facilitate or enact in order to realise its purpose: local autonomy (Article 3); a Jewish agency (Article 4); Jewish immigration and land settlement (Article 6); a nationality law (Article 7); an equitable judicial system (Article 9); a commission of inquiry on religious rights (Article 14); freedom of conscience, religion and religious education (Article 15); equitable conditions of trade (Article 18); a law of antiquity to include regulating and authorising excavations and expropriation of land (Article 21); official languages and official rest days (Articles 22 and 23).

The Mandated authority will also engage, according to the document, in characteristically jurisdictional activities such as establishing foreigners' immunities and enforcing rules of extradition (Articles 8 and 10); establishing a land system, regulating public ownership and private development of natural resources, public works, services and utilities, and regulating their revenue (Article 11); controlling foreign relations, issuing exequaturs for foreign consuls and protecting citizens abroad (Article 12); protecting religious sites and their immunities and supervising religious bodies (Articles 13 and 16); organising a defence force (Article 17); imposing taxes

[121] 'The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate': ibid art 1.
[122] ibid art 2.

and customs duties and concluding customs agreements in the region (Article 18); applying international law treaties and principles and cooperating with international bodies (Article 19); submitting international disputes for settlement before the Permanent Court of International Justice (Article 26).

A fully fledged modern state jurisdiction is being created, replacing any former ambiguities of rule. A home for the Jews is being anticipated as a powerful administrative reality of legal government. All previous regional dreams of a vast territory, vaguely governed by suzerains, kings, religious leaders, economic developers or democratic self-governed nations, will from now on be undermined and obscured by the persuasive totality of the new regional image that is being established in a Mandate for Palestine – a region of divided unitary centralised jurisdictions, representing national claims.[123]

7. CONCLUSION: CLOSING UP REGIONAL OPPORTUNITIES

The article explored and highlighted a 'forgotten regional moment' in the negotiations over the fate of the Middle East after the First World War. It claimed that at the pre-formative transitional period, leading to the Palestine Mandate, many actors involved in negotiations over its future settlement envisioned the region as a vast space open to different types of political possibility. In the McMahon-Hussein correspondence the region was seen as opening for Arab self-rule. In the Sykes-Picot Agreement it was expressed as a vast space open to development; in the Balfour Declaration it was constructed as a European space of protection for the resolution of European and global problems. In Article 22 it was seen as a sphere of influence for European management of civilisations. In the Palestine Mandate all of these vast and open visions were replaced. For the first time, the idea of the jurisdictional separation of quasi-constitutional states was introduced to shape the reality of the region.

How and why did the transition happen? Why did the classic imperial regional image that still figured strongly in the minds of all those involved in negotiating a new world order during the war vanish in the document that was supposed to operationalise this order? How and why did the urge to open up territories for opportunities of many sorts culminate in a completely opposite impetus towards jurisdictional division and enclosure?

These important questions have not been answered in this article and require further historical inquiry. One reason may be that a closed jurisdictional mandate and a divided region were the solution to the growing pressures of confused British regional politics. This political situation at once created and frustrated expectations and heightened the pressure that strongly affected British policy makers. Thus, British involvement in the 'region' caused a critical escalation by a multiplicity of responders (Arabs, Zionists, US delegates and the French). The solution was found in the Palestine Mandate – it was a solution not only because it allowed British control over large parts of the former Ottoman territories with international legitimacy, but also because

[123] For the Mandates of Mesopotamia, Iraq and Syria see Isaiah Friedman, *British Pan-Arab Policy 1915–1922* (Transaction 2010); Quigley (n 120) 28–33.

it sealed the door of the broad 'regional' ambitions and pressures, creating, by legal means, a jurisdiction, a space that functions in a controllable, governable way.

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In 1937, the Palestine Royal Commission Report (the Peel Commission, which was sent to Palestine after the Arab Revolt of 1936) concluded that the obligations to the well-being and development of the peoples in the mandate system, in the opening paragraph of Article 22 of the Covenant, were contradictory in Palestine and impossible to implement. The bitter conflict between fundamentally different national communities in this land can be resolved only by the creation of two separate, sovereign states.[124] In that, a further enclosure was taking shape. The open region, full of political possibility, was being reshaped by the Palestine Mandate in the image of ever more firm and neatly defined borders for 'fundamentally different communities'. Now, a new set of images arose to influence the historical horizon – a vision of jurisdictional partition, a division – as the foundation of peace.

[124] Peel Commission, 'The Force of Circumstances', Palestine Royal Commission Report, July 1937, Cmd 5479, 370–96.

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The Mandate System as a Messianic Alternative in the Ultra-Religious Jurisprudence of Rabbi Dr Isaac Breuer

Amos Israel-Vleeschhouwer[*]

Dr Rabbi Isaac Breuer, a German jurist and Jewish rabbi, represented the ultra-orthodox community in Palestine before the international committees which considered the future of the Palestine Mandate. In his work, Breuer criticised the concept of sovereignty and introduced an alternative regime for global governance of developing peoples. His unique position, as analysed in this article, can contribute to contemporary debates surrounding the role of sovereigns as trustees of humanity, sovereignty and international law and ways of promoting global peace and human welfare.

By introducing Breuer's thought, this article seeks to contribute additional sources – both Jewish and universal – to these ongoing debates. Letting these neglected voices in international legal history enrich the debate can convince us, once again, of the importance of the periphery and of peripheral voices for the development, vitality and relevance of international law.

Breuer's model replaces the notions of 'sovereignty' and 'rights' with those of internalised obligations and subservience to law and justice. Limiting any national aspirations to total sovereignty, he implored the United Nations to refrain from elevating the Jewish national home to statehood. Opposing the Zionist position, he insisted that the Mandatory power and international institutions would enable two nations to develop side by side, in what he termed 'the state of peace', under international trusteeship.

We carefully draw on Breuer's insights to reflect on present debates on trusteeship, sovereignty and the management of areas devastated by conflict.

Keywords: Rabbi Breuer, sovereignty, Mandate, trust, Israel, Palestine, Judaism, League of Nations

1. Introduction

The United Nations (UN) trusteeship system, established to replace and extend the mandate system, recruited mandatory powers to administer territories and populations 'on behalf of the League'.[1] Its responsibility was to foster 'international peace and security'[2] by maintaining 'law and order within

[*] Research Fellow, Faculty of Law, Bar Ilan University. Amos.israel@biu.ac.il.
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[1] Covenant of the League of Nations (entered into force 10 January 1920) Cmd 153 (1920) *League of Nations Official Journal* 3, art 22; Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2008) 306–07.

[2] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS 16, art 76(a); Covenant of the League of Nations, ibid, preamble. For the transition from the mandate system to UN trusteeship see Wilde, ibid.

the trust territory',[3] and to guide the local population towards self-sufficiency and independence. The latter objective sought to bring non-administrated areas, *terra nullius*, and indigenous populations, into the League of (civilised) Nations.

The trustee/mandate system thus reinforces the established international order based on nation states. It follows that the administration of each administrated entity is temporary, as was the role of the Trusteeship Council. Indeed, the Council suspended operation in 1994, because there were no longer any trust territories.[4] Nevertheless, the UN decided to preserve the Council's structure, primarily because of the difficulty of amending the Charter, but perhaps also in anticipation of future needs. Arguably, the number of disintegrating states, states in major transition processes, and post-state non-governed territories that have emerged in recent years (Syria and Iraq, among others) may provide good reasons to rekindle debates on mandates and trusteeships.

Professor Benvenisti, in his article regarding sovereigns as trustees of humanity,[5] argues that sovereigns owe responsibility to distant non-citizen humans, to humanity and to the world. This article has spurred a renewed interest in the idea of trusteeship in international law in a globalised context. Even though the subsequent debate focuses mainly on contemporary obligations of sovereign states in international interventions, sharing resources and the treatment of non-citizens in states, the debate has also rekindled some interest in the mandate system and the Trusteeship Council.[6]

This article will introduce an alternative interpretation of the mandate/trusteeship system based on a critique of sovereignty. Unlike Benvenisti, who takes sovereignty for granted but reinterprets its legal and moral base and meaning, I will present the concept of 'sacred trust of civilisation'[7] as an *alternative* to sovereignty, and also suggest a different goal for these 'trusts' – that of preparing peoples for specifically non-sovereign national independence, rather than for national sovereignty.

This is the view championed by Rabbi Dr Isaac Breuer, a German-trained jurist and practising international lawyer who represented the Jewish ultra-orthodox communities (Agudat Yisrael) in Palestine before the international committees until his death in 1946.[8] In this article, I will also present Breuer's messianic perception of the mandate as an antecedent of contemporary global trusteeship, and discuss some of the implications of this peripheral and utopian reading of the mandate.

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[3] Charter of the United Nations (n 2) art 84.
[4] United Nations, 'Trusteeship Council', http://www.un.org/en/mainbodies/trusteeship.
[5] Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295.
[6] Benvenisti's article inspired a conference and a topical issue in (2015) 16(2) *Theoretical Inquiries in Law*.
[7] Covenant of the League of Nations (n 1) art 22.
[8] Rivka Horwitz, 'Introduction' in Isaac Breuer, *Tsi'yunei Derech* [*Roadsigns*] (Mossad Harav Kook 2007) (in Hebrew); Alan Mittleman, 'Two Orthodox Jewish Theories of Rights: Sol Roth and Isaac Breuer' (1991) 3 *Jewish Political Studies Review* 97; Matthias Morgenstern, *From Frankfurt to Jerusalem: Isaac Breuer and the History of the Secession Dispute in Modern Jewish Orthodoxy* (Brill 2002); Rivka Horwitz (ed), *Yitschak Breuer: I'yunim Be'Mishnato* [*Isaac Breuer: The Man and his Thought*] (Bar Ilan 1988) (in Hebrew). All translations from Hebrew are mine.

Breuer was the grandson of Rabbi Samson Rafael Hirsch, founder of the German neo-orthodox movement. He was ordained as a rabbi at age 20 and learned law and philosophy at the universities of Strasburg and Marburg,[9] coming to define his philosophy of Judaism as neo-Kantian[10] with a strong emphasis on insights from history. He participated in the First World War from 1915 to 1918 and practised law in Frankfurt until his emigration to Palestine in 1936.[11] From its very beginning, he was involved with Agudat Yisrael, a political organisation of ultra-orthodox Jews founded in Kattowitz (Poland) in 1912. He also founded and led the sub-organisation for orthodox workers, Poalei Agudat Yisrael, and represented the ultra-orthodox communities in Palestine as well as this organisation before the Peel and Anglo-American commissions on Palestine.[12]

Although Breuer's views were not accepted by most ultra-orthodox rabbis and activists, and are not representative of these communities or organisations, he was chosen and trusted to act as a political leader and represent Poalei Agudat Yisrael on his own terms.[13] In fact, in retrospect, his political positions did faithfully represent the ultra-orthodox position, although his philosophy was largely ignored by his contemporaries. It seems that with regard to the Mandate, his anti-Zionist critique and his critique of sovereignty, which are the focus of this article, he represents an authentic voice within the ultra-orthodox discourse of the time.

2. THE MANDATES AS A CRITIQUE OF SOVEREIGNTY

The International Court of Justice (ICJ) has stated that 'the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned'.[14] This is commonly understood to mean sovereign statehood.[15] Thus, the mandate/trusteeship system is commonly presented as not simply based on the sovereignty of the trustee but as also promoting the sovereignty of those entrusted nations that are considered to be so prepared. An alternative reading would focus on the somewhat ambiguous formulation of Article 22 of the Covenant of the League of Nations,[16] which promotes 'the principle that *the well-being and development of*

[9] His dissertation was published as Isaac Breuer, *Der Rechtsbegriff auf Grundlage der Stammlerschen Sozialphilosophie* (Reuther and Reichard 1912) (in German).

[10] George Y Kohler, 'Is there a God *an Sich*?: Isaac Breuer on Kant's *noumena*' (2012) 36 *American Jewish Studies Review* 121 (and the literature in note 1).

[11] According to one version, an earlier visit to Palestine convinced him of the messianic meaning of living in Israel, seeing the fulfilment of the prophecy of Ezekiel (36:8): 'But you, mountains of Israel, will produce branches and fruit for my people Israel, for they will soon come home'. Other accounts stress the inability to practise law, and the persecution by the Nazis.

[12] Alan L Mittleman, *Between Kant and Kabbalah: An Introduction to Isaac Breuer's Philosophy of Judaism* (State University of New York 1990). A detailed bibliography appears in Isaac Breuer, *Concepts of Judaism* (Israel Universities Press 1974) 339.

[13] Eliezer Schweid, 'Medinat HaTora Bemishnato Shel Yitschak Breuer' ['The State of Torah in Isaac Breuer's Writings'] in Horwitz (n 8) 125, 146 (his views do not represent the Agudat Yisrael consensus).

[14] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971], ICJ Rep 16, [53].

[15] Wilde (n 1); regarding Palestine see UNGA Res 181(II) (29 November 1947), 'Future Government of Palestine', UN Doc A/RES/181(II).

[16] Covenant of the League of Nations (n 1) (emphasis added).

such peoples form a sacred trust of civilisation'. A similar ambiguity, in which neither statehood nor sovereignty are clearly defined as a goal, can be found in another ICJ ruling which states that the mandates were created 'in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilization'.[17]

This section will introduce Breuer's general critique of sovereignty, his alternative ideal of non-sovereign nationhood and its submission to law and justice, and its application to international law and the mandate system.

2.1. The Evil and Heresy of Sovereignty

As the terms 'heresy' and 'evil' imply, Breuer's argument is embedded in religious thought, but he did not perceive his argument to be strictly 'Jewish'. Breuer held that God is universal, that '[t]he God of Israel is the god of all humanity'[18] and, further, that Judaism has a legacy for all humanity. On this matter, he wrote: 'Judaism can only be an historical phenomenon if it has unique answers to the great questions that bother the peoples of the world'.[19] The argument is 'Jewish' in that it is based on Breuer's reading of the Bible, Jewish sources, and his analysis of history which focuses on Jewish destiny and a Jewish interpretation of the world's history.[20] However, Breuer's argument should appeal to adherents of other religions who place the ideas of God, justice or the law above that of the king, state or people. He believed it would also be convincing (if to a lesser extent) to non-religious people who place justice and humanity before states and individuals (as can be deduced from his arguments before the UN Commission, discussed below). For them, religious vocabulary would have to be replaced with equivalent terms.

Breuer's point of departure is that as sovereignty does not allow any supreme commanding law, sovereign individuals and sovereign states constitute heresy against any rule of law, especially divine law. State sovereignty is the root of war[21] and the basis for social injustice, because 'the sovereign has no morality … between sovereigns there cannot be law and justice'.[22] Further, as the power and magnitude of states increases, so does the heresy and evil resulting from sovereignty. Therefore, 'when nations declare sovereignty, that they are goals, war is

[17] *International Status of South-West Africa*, Advisory Opinion [1950] ICJ Rep 128, 132.
[18] Isaac Breuer, *Moria: Foundations for Jewish Religious National Education* (Nezach 1945) 48 (in Hebrew); compare with the Introduction to *Moria*, and with Breuer (n 8) 111.
[19] Isaac Breuer, *HaKuzari HaHadash: Derech El HaYahadut* [*The New Kuzari*] (Isaac Breuer Foundation 2008) 364 (in Hebrew, original in German, *Der Neue Kusari: Ein Weg zum Judentum* (Verlag der Rabbiner Hirsch Gesellschaft 1934)).
[20] See in his biography, *Mein Weg* (first published 1946, Hebrew trans Michael Shwarz 1988) and the books detailing his historio-philosophical reading in Breuer (n 18); Isaac Breuer, *Nahliel* (Mossad Harav Kook 1982) (in Hebrew). See David N Myers, *Resisting History: Historicism and Its Discontents in German-Jewish Thought* (Princeton University Press 2003) 136, 141; Shoval Shafat, 'The Political Theology of Isaac Breuer' in Christoph Schmidt and Eli Sheinfeld (eds), *God Was Not Silent: Jewish Modernism and Political Theology* (Van Leer Jerusalem Institute 2009) 122 (in Hebrew).
[21] Isaac Breuer, 'Die Wurzel des Krieges' in *Jüdische Monatshefte III* (1916) 214–28.
[22] Breuer (n 18) 47.

unavoidable. … Social peace becomes utopia. The blood of humanity is [the responsibility of] nationality. Nations are the world's animals of prey'.[23]

In the world of sovereign states, politics trumps justice. In politics, power trumps law. Accordingly, sovereignty and law are in constant conflict. Breuer seems to accept Carl Schmitt's[24] famous analysis,[25] but draws an opposite conclusion,[26] preferring law over sovereignty. He argues that strong sovereignty is also a basis for church–state tensions, but instead of creating religious rights to protect religions and religious people, he proposes to weaken the state.

Sovereignty tends to ignore justice and law, as is evident both in international problems (war) and in intrastate evil ('social peace', 'the social problem'). A sovereign state is not committed even to its own citizens, and may change its attitude towards them as it sees fit, repeatedly disadvantaging the weak. Breuer repeatedly connects these internal and external injustices as unavoidable consequences of national sovereignty,[27] insisting that sovereign states endanger the well-being of every individual, community and society, and indeed world peace and humanity in general.

Taking the notion that sovereignty is evil to its logical conclusion, Breuer argues that in the interest of 'the people's well-being' (one goal of the mandate), the mandate cannot and will not lead to full sovereignty, as such sovereignty also harms the interests of humanity in general and contradicts the 'sacred trust of civilisation'. Breuer noted that all of the documents – Article 22, the Balfour Declaration and the Palestine Mandate – omitted the expressions 'state' and 'sovereign'. The Palestine Mandate stated the goal to be 'self-determination and independence', and the Balfour Declaration[28] used the term 'a *national home* for the Jewish people'. Thus, in addition to his critique and alternative proposal, Breuer presents his position as a genuine and legitimate alternative interpretation of the mandate documents.

2.2. NON-SOVEREIGN 'SELF-DETERMINATION AND INDEPENDENCE'

Breuer objects to the idea of a single universal global society under one government, as such a government would be sovereign and therefore inevitably heretical and evil.[29] Moreover, he feels

[23] Breuer (n 19) 56, see also 59: nations being formed by blood.
[24] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (first published 1922 in German, University of Chicago Press 1985).
[25] Udi E Greenberg, 'Orthodox Violence: "Critique of Violence" and Walter Benjamin's Jewish Political Theology' (2008) 4 *History of European Ideas* 324, 332.
[26] We do not know much about the interactions between Breuer and Schmitt, nor about the extent of Breuer's familiarity with Schmitt's ideas and writings: Shafat (n 20).
[27] cf Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998); Giorgio Agamben, *State of Exception* (University of Chicago Press 2005).
[28] Letter from the United Kingdom Foreign Secretary, Arthur James Balfour, to Baron Walter Rothschild, 2 November 1917 (*The Times*, 17 November 1917), incorporated (with full text) into the Treaty of Peace between the British Empire and Allied Powers and Turkey (signed 10 August 1920), art 95. This treaty was later annulled. The preamble to the British Mandate for Palestine (confirmed by the Council of the League of Nations on 24 July 1922, effective 28 September 1923, (1922) 3 *League of Nations Official Journal* 1007) incorporates the Declaration without citing it: Avalon Project, http://avalon.law.yale.edu/20th_century/palmanda.asp; Leonard Stein, *The Balfour Declaration* (Simon and Schuster 1961) 470.
[29] See below, 3.1.

that legal variation between nations is crucial for the application of justice on earth. There are, and should be, he claims, different ways of implementing the 'good' according to different conditions, cultures and preferences,[30] and the only way in which these various visions can be justly implemented is through and by law. The goals of 'self-determination' and 'independence' of various nations are crucial, and local cultures, populations and institutions have to be developed towards just legal systems and forms of governance.

Modern legal theory promoted man-*centred* law, human-*made* law. Such law, by definition, requires en*force*ment, requiring a sovereign, necessarily descending to *violent force*.[31] As these laws serve to balance power and not to serve justice, they are only 'just' in a limited way, and will result in human suffering. Breuer warns of the danger of tyranny, which exists in any sovereign state.[32] He explicitly refutes reliance on democracy – the sovereignty of sovereign people – as sufficient protection from such a deterministic descent into violence.[33] Instead, Breuer offers an alternative social and political organisation. Rather than law serving society, he conceives of society as created by law and shaped by it. Law and justice thus precede both individuals and states, and trump their interests. Thus, the creation of non-sovereign, law-abiding states would permit the expression of particular cultures as unique forms of human organisation, while escaping the dangers of tyranny.

The term 'non-sovereign states' is senseless in some political philosophies for which sovereignty is a necessary component of statehood. This term, however, expresses Breuer's intention with precision – for he uses the term 'the state of the Torah' to describe a well-developed self-government, committed to global justice, restricted by the rule of law, and voluntarily ready to serve humanity.[34] While for others, like Carl Schmitt, 'partial' or 'limited' sovereignty is senseless, as the essence of sovereignty is its limitlessness,[35] Breuer uses these terms explicitly and intentionally. 'Non-sovereign' in this article should be perceived as the negation of full sovereignty, while 'limited' or 'restricted' sovereignty refers to governments that negate 'full' sovereignty. In the same way, I will use 'limited' nationality to indicate national identity and ideology which is not total, and which is subservient to justice and an inherent and cooperating member of humanity. As I understand it, Breuer uses the restricting terms to allude to both a certain form of limited nationality and sovereignty, and to a whole range of forms of government. Although most contemporary states have varying levels and forms of limited sovereignty (such as a strong rule of law, de jure obligations under international law and extensive de facto compliance with its norms, recognition of human rights and environmental laws), in Breuer's time the options were more

[30] 'A state is needed, so human interaction can be directed to serve divine justice': Breuer (n 8) 127.
[31] cf Thomas Hobbes, *Leviathan* (first published 1651, Yale University Press 2010).
[32] '[A] bit of Nazism is present in each sovereign nation, each sovereign state': Breuer (n 18) 238; cf Breuer (n 8) 146.
[33] 'Just divine justice can restrain these forces, as even democracy is not enough': Breuer (n 18) 241; cf ibid 14–15; Breuer (n 19) 377–78.
[34] Schweid (n 13).
[35] Hobbes (n 31); Schmitt (n 24); 'Sovereignty', *Encyclopædia Britannica*, http://www.britannica.com/topic/sovereignty; Jorge Emilio Núñez, 'About the Impossibility of Absolute State Sovereignty: The Early Years' (2014) 27 *International Journal for the Semiotics of Law* [*Revue internationale de Sémiotique juridique*] 645.

limited. Breuer's notion of a limited state certainly included a full legal system expressing local culture and preferences as well as legal, administrative and governing institutions.[36]

Breuer argues that relative nationality is the direct result of the divine revelation of an infinite and good law. This law and the rule of law are then freely accepted and internalised by all individuals and inherently restrict any form of government formed by them.[37] This divine revelation puts human power hierarchy into perspective, and causes those in power to restrict themselves and serve God, justice and society.[38] It appears that Breuer recognises that despite his preference for divine law, a strong tradition of natural law, voluntarily accepted and widely recognised, has a similar (if somewhat weaker) potential of restricting sovereignty,[39] as it can lead to a widely accepted and internalised rule of law with a deep commitment to justice, whether global or local. Breuer's recognition that just and restricting law is not confined to the Jewish or divinely revealed law is evident in his analysis of the French Revolution as a rare moment in history when public commitment to ideas succeeded in opposing the sovereign, and the submission of any future government to the Revolution's triad of values was widely accepted. According to his analysis, the Revolution failed as a result of a combination of personal interests and extreme nationalism, which undermined its stated commitment to law and justice.[40] However, he sees the temporary success of the Revolution as a first step for future political organisations to build on, without the need to wait for divine revelation.[41]

Breuer himself did not wait for divine revelation. He took it upon himself to analyse and publish the failures and dangers of sovereignty, and to present an alternative. His commitment to advancing utopia by human action, instead of waiting for a messiah from heaven, is one of the issues that caused friction between him and his ultra-orthodox surroundings (and explains some of his appeal to religious Zionists). He focused on education and using his unique position to set a political example – either by creating the 'Torah-state' he envisioned or by at least presenting a position of selflessness in service of justice in international fora. Indeed, Breuer's preference for divine law does not imply that he perceived such law to be monolithic, clear and never changing. Rather, Breuer understood Jewish law as celebrating controversy and variations, and as adapting and evolving.[42] Thus, Breuer envisioned the Torah-state's jurisprudence, and any future just transnational divine law, as inclusive of multiple legitimate legal options.

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[36] 'The nation as society carries law, and the state is the ultimate servant of the law': Isaac Breuer, 'Shnei Maklot HaRo'im' ['The Two Sticks of the Herders'] in Breuer (n 18) 123, 127.

[37] 'When a nation experiences revelation total nationality disappears. Instead, a relative nationality appears. It submits itself readily to god, then to justice and law': Breuer (n 8) 197, 193 for strong relative nationality.

[38] Deuteronomy 17: 14–20; Micha Goodman, *Moses' Final Oration* (Kinneret Zmora-Bitan Dvir 2014) 63–80 (in Hebrew).

[39] The decline of natural law and its replacement by positive law emphasised the self-centredness of the state; cf Breuer (n 19) 107, 285. The bureaucratic and military power of the state brought about new proportions of human suffering in both its domestic and international actions.

[40] Breuer (n 18) 193.

[41] 'Since the French Revolution … the question of the rule of law between nations is constantly on the table …. [t]urning the state of power and tyranny … into a state of law and justice, that preserves its citizens rights and subsumes the relations of states that swallow each other as predators, *under a supra-national and supra-governmental* … these are two sides of the problem of law': Breuer (n 8) 131 (emphasis added).

[42] A treatment of Breuer's Jewish law is beyond the scope of this article: cf Breuer (n 18) 70–71.

2.3. INTERNATIONAL LAW AND THE MANDATE SYSTEM

Breuer refers to the First World War as the 'First Messianic War' because it forced nations to realise the need for an alternative way in which to organise humanity.[43] Both the collapse of the old order based on sovereignty and the immense suffering thus engendered were undeniable: 'From this atmosphere grew the League of Nations' whose goal was to 'eradicate evil and let law and justice reign'.[44] It strove to organise all states under one law, which Breuer saw as similar to the prophecies of all kings living under divine law.[45] Taken together, the goals of the League of Nations were revolutionary: (i) the goal of global peace; (ii) ensuring that the peace and well-being of the weak was equal to that of the strong;[46] and (iii) preferring law and justice over interests.[47] Unfortunately, the sovereign states could not accept that '[l]aw and justice do not accept any higher authority'. As states were the centre of the new international legal regime, the new system reverted to the previous order.[48] The resulting peace was therefore a *peace of victors,* which continued the war by political means.[49]

Breuer criticised the international law created in this atmosphere, declaring it not law at all, as 'law' demands subservience from individuals, nations and states: 'Really, [international law] is no law at all … not formally and not essentially. Formally only an enforceable order is law. Essentially only law that is directed to justice is law. … Inter-state law is very weak'.[50]

Despite its deficiencies, the League of Nations was a great step forward in that it sought to let 'law and justice rule the world, and protect everybody'.[51] This greatness is evident in the innovative idea of the mandate system, as perceived by Breuer. For Breuer, the mandate system enabled people to create national homes, yet remain outside the world's violent political relations. He refused to see the mandate as a phase in a transitory process to statehood. The mandate system could have been a permanent solution for people entitled to self-determination, who want to be culturally and legally self-sufficient, and who seek independence without using force. This was exactly the goal, purpose and quest of the Jewish people, as Breuer saw it, in coming home to God's land. He perceived the willingness of the international powers to offer, safeguard and promote such a homeland as a miracle and a revelation.[52]

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[43] Breuer (n 18) 194 preceded Kennedy in arguing that the First World War was not a break in a process of progress, but a direct continuation of the preceding processes: David Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo Law Review* 841.
[44] Breuer (n 18) 195–97.
[45] Breuer (n 8) 131–33, 199–200.
[46] ibid 125–26, 200. Note that Breuer proposes to judge international law (and any legal system) through its treatment of its weakest subjects, an idea now promoted by feminist and third world critical approaches to international law.
[47] Breuer (n 18) 195–96.
[48] ibid 230–36.
[49] Breuer, *Mein Weg* (n 20) 91. ('States bowed to [so-called] law and justice only *after* they filled their bellies with the peace agreement … Also animals of prey love law and justice – when they are not hungry').
[50] Breuer (n 18) 30; cf therefore, '[t]he League of Nations is not a *legal* league, but a *contractual* one – and agreements cannot save humanity – only law and justice can': ibid 233–36.
[51] ibid 196.
[52] ibid.

3. DECLINING SOVEREIGNTY AND THE NON-SOVEREIGN TRUSTEE

As Benvenisti himself noted,[53] the focus on the sovereign trustee may increase the danger of colonialism, and the concept of trust should include furthering the interests, culture and voices of the entrusted peoples.[54] Breuer, however, goes further and raises the possibility that some people will want to redefine the goals, the structure and the essence of the trust system itself. Accepting that a nation might decline sovereignty would require a change in the essence of the mandate as generally understood. It would also change the role and actions of the trustee and the structure and role of international institutions. One of the more radical results of such a redefinition of the mandate would be Breuer's concept of a non-sovereign trustee, as discussed in the second part of this section.

3.1. WHEN PEOPLE WANT A NON-SOVEREIGN NATIONAL HOME

Breuer argued that Jews are prohibited from striving for sovereignty.[55] Because Jewish law and politics are inherently subservient to a universal divine law, the mandate/trustee system must be developed into a permanent structure of governance.

In Breuer's religious view of history, the creation of the League of Nations divinely coincided with the Jewish return to Palestine, and the convergence of these two developments is the mandate system.[56] He saw this as a sign of divine providence, because '[t]he problem of the Jews and the problem of law in international relations – are one problem',[57] and the Mandate is a solution to this one problem. Jews were to be the first nation seeking non-sovereign self-determination, inherently subservient to international law and to external legal institutions and systems. The Jewish organisation would not crave independent power, and would dedicate its communal organisation to the implementation and promotion of justice.[58]

Breuer anticipates critique and stresses the legitimacy of his perception of sovereignty and its utility. He holds[59] that limited sovereignty 'is the legitimate sovereignty'. He then adds that such

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[53] Eyal Benvenisti, 'The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks' (2015) 16 *Theoretical Inquiries in Law* 535.

[54] Evan J Criddle, 'Three Grotian Theories of Humanitarian Intervention' (2015) 16 *Theoretical Inquiries in Law* 473; Evan Fox-Decent and Ian Dahlman, 'Sovereignty as Trusteeship and Indigenous Peoples' (2015) 16 *Theoretical Inquiries in Law* 507.

[55] Schweid (n 13) based on 1 Samuel 8: 5; 12–15. cf Goodman (n 38). There is controversy in Jewish law and philosophy regarding sovereignty: Aviezer Ravitsky, *Dat U'Medina Bemahshavet Yisrael* [*Church and State in Jewish Thought*] (The Israel Democracy Institute 1998) (in Hebrew); David M Feuchtwanger, 'Between Theology and Politics: Two Biblical Models as a Basis for Jewish Political Thought' (2012) 72 *Daat* 195 (in Hebrew). Breuer seems to identify with Abravanel's critique of kings, even if he only partially accepts his preference for a self-perfecting anarchist society: Benzion Netanyahu, *Don Isaac Abravanel: Statesman and Philosopher* (5th edn, Cornell University 1998) 189–94.

[56] Breuer (n 18) 195–97.

[57] Breuer (n 8) 125–27.

[58] The 'Jewish state that is the organization of the visionary will … the state has no passions … and is far from all unholiness because death does not reach it. Power and force have no value in its eyes. The vision of justice is its decisive value': Breuer, *Nahliel* (n 20) 311–15.

[59] Breuer (n 8) 202.

sovereignty is 'the true liberty'. I argue that he means that the restriction of sovereignty enhances and ensures the freedoms of the people. In this, he alludes to *Mishna Avot*: 'There is no free man except one that involves himself in Torah learning',[60] interpreting this to mean that only in being commanded is one free. The voluntary submission of the self to what are perceived to be 'good' laws, enables individuals and states to act, innovate and expand human experience without fear of doing wrong or hurting, without fear of being wronged as a result of one's actions and without feeling restricted. Such 'good' laws thus expand one's freedom to pursue worthy goals, desires and ambitions. Additionally, limited sovereignty is stronger and more durable than total sovereignty, as exemplified by Jewish endurance outside 'normal' history, seemingly untouched by history's destructive forces.[61]

The Mandate frees the Jews from having to use force because it includes the commitment to create a Jewish homeland, while ensuring the peaceful resolution of conflicts through (international) law.[62] Thus, for Breuer, the presence of Palestinians/Arabs in Palestine is not a problem, but a moral and religious opportunity. Their presence creates the potential to set an example, showing how a Jewish concept of self-restricted nationality can converge with the values and principles of the mandate system. If only both Jews and Arabs would agree to disarm,[63] create non-sovereign institutions of self-government and settle all disputes under just transnational law, they could live together as two nations, expressing their cultures and preferences side by side, and in peace. Such an example, set in the Holy Land,[64] would have great impact on the world at large.[65]

As the main challenge of the Mandate is the peaceful resolution of a nationalist conflict, Breuer argued that the Jewish community should tone down its nationalism. It should accept, and actively seek, international jurisdiction and governance, forgoing any striving for Jewish sovereignty in favour of the promotion of justice.[66] Breuer convinced his party and presented exactly this

[60] Mishna Avot, 6.2.

[61] Breuer (n 8) 193; Myers (n 20) 146. This endurance and non-reliance on territory and sovereignty interested the Dalai-Lama and the Tibetan leadership: Roger Kamenetz, *The Jew in the Lotus: A Poet's Rediscovery of Jewish Identity in Buddhist India* (Harper 1994).

[62] Breuer (n 18) 197.

[63] In his principled opposition to using violence for national conquest, Breuer was not alone. For concurring national religious opinions, see Eli Holzer, *A Double-Edged Sword: Military Activism in the Thought of Religious Zionism* (Hartman Institute 2009) (in Hebrew).

[64] 'The mandate is the result of wonderful optimism. The vision of law and justice will bring eternal peace to the land of the king of peace': Breuer (n 18) 235–36. Rabbi Dr Breuer uses the expression 'the land of the king of peace', 'the king of peace' being one of the Jewish names for God. As he also refers to it as 'the land of the League of Nations' (this is repeated throughout his writings, eg, Breuer (n 18) 230–36, especially 235, see also 197), the expression invokes the association that the League is the king of peace and even semi-divine. As Jewish law prohibits selling the land of Israel to non-Jews, recognising the League's authority over the land, and preferring it to Jewish sovereignty, is a significant concession. Finally, superimposing the real ownership by God on practical international ownership is a courageous religious, cultural, educational and political step.

[65] Breuer (n 18) 230–36: 'Two nations – law and justice will decide between them – and will let them live in peace and fraternity side by side. This land will be the epitome for all lands, showing the harmony of justice, and the *practical* force of law. … The idea was inspiring, the dream beautiful'.

[66] Breuer promotes the creation of a Jewish homeland, a religious, idealistic Torah-state, and supports concentrating a significant part of the Jewish people in one location. In this sense, his solution is different from the network structure of nationality, which was another Jewish solution at that time; cf Moria Paz, 'States and Networks in the Formation of International Law' (2011) 26 *American University International Law Review* 1241; Moria Paz,

position when appearing before the international committees. However, it seems that these committees did not fully understand this radical position.[67] I therefore quote his words at some length in the accompanying notes.

He challenged the members of the UN Commission to change their frame of mind and implement his vision.[68] The Commission should act as an international tribunal, seeking a just solution that will create two national, self-sufficient, independent and vibrant entities, able to fully express their culture, having significant but limited self-governance. These entities will submit themselves to international rule as implemented by a semi-mandatory power. Breuer challenged the Commission to make just decisions without regard to politics, whether 'favouring' the Jewish or the Arab side. Indeed, when a Commission member remarked that if a nation will not submit to the Commission's decision, the United Nations would be obliged to make the Mandatory power enforce the decision, Breuer readily agreed. Justice should be voluntarily accepted, but if not, it should be enforced. Indeed, only by using force to enforce justice can the crude use of force by sovereigns be avoided.[69]

Breuer not only demanded that the Jewish state be limited by international law; he also made an important symbolic request before the Commission regarding the name of a Jewish state. He urged them to refrain from declaring it a 'Jewish' state or calling it a Jewish nationalistic name (like 'Israel'), and instead suggested that the name of the state in Palestine should be 'Peace', the 'state of the peace'.[70]

Breuer laments the reaction of the Jewish community in Palestine to the Mandate, and its development under it. Instead of embracing the idea of relative and limited sovereignty, the community strove for sovereign independence.[71] Instead of submitting to justice, it turned to force

'A Non-Territorial Ethnic-Religious Network and the Making of Human Rights Law: The Alliance Israélite Universelle' (2010) 4 *Interdisciplinary Journal of Human Rights Law* 1.

[67] Anglo-American Committee of Inquiry Report to the United States Government and His Majesty's Government in the United Kingdom, 20 April 1946, Lausanne (Switzerland), Cmd. 6808 (HMSO 1946) (especially Ch v), available at the Avalon Project, http://avalon.law.yale.edu/20th_century/angcov.asp.

[68] 'We [the international Agudat Yisrael organization and the Jewish ultra-orthodox community in Israel] believe that our demand is the demand of international law and international justice. … The Arab-Jewish problem is not a question of international politics nor a question of power, but a question of law … only law can bring peace to this land … hopefully you will decide according to objective law what is just and enforce your decision': Testimony before the UN Commission, 1946, cited in Horwitz (n 8) 200–08.

[69] ibid 207–8: 'I believe that this will be the role of the United Nations. If the decision is that a certain solution is just, then justice should be enforced. … enforcement of justice is not violence … . that is the (only) legitimate role of force. … We are against using force … using force will bring us all to be the victims of atomic weapons. If law and justice will not rule in this world, we are all doomed. We request to start in this land the implementation of law and justice between two peoples'.

[70] 'We [Agudat Yisrael] demand [to call it] the state of peace. The state that insists on the name of justice, and on the name of justice alone. Therefore she [Agudat Yisrael] declines using in the name of the state the name of any nation [like Israel] … The commission cancels the absolute nation state, and enables to think about a state of Justice. The people of Israel declared that it does not want to control the Arab people, therefore the name of the state also needs to separate itself from any suspicion of conquest': Breuer (n 8) 231–32.

[71] Breuer (n 19) 154–55; cf Breuer (n 8) 199–201. Breuer says that limited sovereignty is easy in the desert but difficult in a territory and state (ibid 198), especially under the influence of other people's striving for sovereignty: Mordechai Breuer, 'People and State in Isaac Breuer's Theory' in Horwitz (ed) (n 8) 163, 170.

and violence. Even though Breuer acknowledges the parallel role of the Palestinian partners in this turn of events, he focuses on the choices of the Jewish population.

Breuer's position, of course, contradicts the goals and ideas of the Zionist movement, in both its secular and religious forms. He repeatedly states that 'there is no bigger contradiction than between Judaism and the sovereign state'.[72] In addition to its potential, or even inevitable evil, Zionism is, of course, also heresy in his eyes. In criticising Zionism as heresy, Breuer continues and re-enacts Rabbi Hirsch's struggle against the Reform movement.[73] In distancing the orthodox community from the majority Zionist movement, he reminds us of the *Austrittgemeinde* (the separate community) his grandfather had promoted in Frankfurt. Breuer's opposition to Zionism is unlike that of the Satmar Rabbi, Yoel Teitelbaum, who opposed Zionism because of its reliance on human actions. Breuer supported human action in history, held that God reveals itself in history, and acknowledged the success of the return of Jews to Zion and its religious significance. He urged the orthodox leaders to take responsibility and lead the Jewish community in Palestine and cope with the technological, cultural, legal and political changes, expressing his confidence in their ability to do so from an orthodox point of view and his total commitment to their rulings.

Neither Benvenisti nor his critiques can envision a people entitled to sovereignty in contemporary legal terms, but not wanting it. Such a people – choosing to depend on permanent active international involvement – might also be perceived as a burden, requiring institutional investment and an ongoing effort. For jurists from strong sovereign nations it would be difficult to imagine the benefits of non-sovereignty. From the periphery, as a member of a minority community which had long suffered at the hand of sovereign states, Breuer enriches the debate. He insisted that the Jewish people would contribute significantly to global peace and prosperity exactly from such a non-sovereign position, the benefits outweighing the costs.

3.2. The Non-Sovereign Trustee and International Law

Breuer also details the implications of his vision for the Mandatory power and for international institutions. Instead of deciding between the relative rights of the Palestinian and Jewish people for a state, the UN Commission should decide to evolve the Mandate into a permanent form, and supplement it with substantial laws, just institutions and international forces to enable this evolution and enforce it, as needed.[74] Bringing Palestinian–Jewish disputes before the League of Nations and subsequently before the UN would then force these institutions to take on additional responsibility, to acquire

[72] Breuer (n 8) 196; Breuer, *Mein Weg* (n 20) 58–59. In a prophetic paragraph he criticises Zionism: 'Who guarantees that Zionism won't become a small nation that will have eternal struggles and constant spilling of blood? Nationalism will taint Israel with innocent blood, as it has the English nation': Breuer (n 19) 57, 59, Pt IV.

[73] With similar motivation to Samson Raphael Hirsch, who wrote his book (*Horeb: A Philosophy of Jewish Laws and Observances* (7th edn, Soncino Press 2002)) to strengthen the belief of young people of his time and prevent their exit to reformism, Breuer wrote *The New Kuzari* (n 19) with Zionism in mind.

[74] 'We hope both nations will agree that law should decide … we want to start the rule of law and justice here in this land … not the power will decide what justice is, but justice will decide who can use power and for what it might be used': Testimony before the UN Commission, 1946 (n 68) 203–08. Breuer adds 'how difficult is it to explain this concept of statehood [to the peoples and my people alike]'.

experience and to prepare themselves for achieving justice and enforcing it. The Jewish side of the dispute should model acceptance of the rulings – either willingly or by submission to legitimate enforcement.[75]

I will raise a few questions regarding Breuer's perception of mandatory powers, following his critique of sovereign power:

(1) The mandate system gave power to sovereign states (such as the United Kingdom) over people. With Breuer's inherent and justified suspicion of states, who guards the guardians?[76]
(2) How far does Breuer's trust in international legal systems and institutions extend? Are they infallible? If not, how can a nation achieve justice when wronged?
(3) Is the mandate system sufficiently stable and viable in the long term? If not, into what might such a system evolve?

Before answering these three questions, it is important to note that Breuer was very aware of the failures of the League of Nations and the dire consequences for the Jewish people. At least from late 1942 onwards, Breuer seems to know not only about the persecution he himself has suffered but also about the pursuit of the total extermination of the Jews. As a methodological aside, I note that while Breuer explicitly answers these questions only from an exclusively ideological position, he also had a practical side. This being the case, I will seek to derive his more practical answers from his actions, his legal political arguments as expressed in international fora,[77] and his religious, political and legal arguments in the internal Jewish discourse.[78]

1. Who will guard the guardians?

Breuer stresses that the mandatory power serves as the trustee of humanity and of civilisation, more than for the parties involved,[79] who are the trust's beneficiaries.

According to Breuer, the correct locus for defining justice is humanity at large rather than a specific society. It focuses on the common humanity of all individuals, rather than the rights of each and every individual. Man is not the ultimate end, nor is the state. Only the idea of serving God or justice (or both) is a worthy end. The concept of service, trust and the focus on humanity and justice lead to a regime of obligations.[80] Accepting power as an obligation inherently limits the trustee's sovereignty, thus preventing abuse. Where only law can wield power, an imbalance

[75] Breuer, *Our Grandfather* (private publication 1996, on file with author) 77; Breuer (n 18) 148.
[76] Benvenisti (n 53) assigns trust to the trustee, because a sovereign trustee is not to be trusted.
[77] Agudat Yisrael, although probably not Breuer himself, was deeply involved in the creation of the national minorities system in Poland after the First World War. For the Jews as minority see Oscar Isaiah Janowsky, *The Jews and Minority Rights (1898–1919)* (Columbia University Press 1933); for the influence of Breuer's peers see Tobias Grill, 'The Politicisation of Traditional Polish Jewry: Orthodox German Rabbis and the Founding of Agudas Ho-Ortodoksim and Dos yidishe vort in Gouvernement-General Warsaw, 1916–18' (2009) 39 *East European Jewish Affairs* 227.
[78] Schweid (n 13) 143.
[79] Yacov Baror, 'Breuer the Jurist' in Horwitz (ed) (n 8) 67, 73.
[80] Breuer (n 8) 97.

of power becomes less threatening.[81] People and states then both exist in society by submitting to certain rules, with limited and relational sovereignty.[82] I will now present Breuer's view regarding people, and then extrapolate to states and international law.

Breuer held that in a utopian world the obligations and roles of different groups (men vis-à-vis women; Jews and non-Jews) are different.[83] These differences will not be based on power relations and oppression, but will develop from the various ways in which people act out their voluntarily internalised roles in the world and express them. Those with power will never abuse it, but feel obligated to care – *noblesse oblige.* Apparent differences in status will not be a cause for shame, because such status differences will be negligible in the context of communally serving God and justice, and will only serve to define one's obligations to others.[84]

Similarly, in a global mandate system, nations have varying levels of status and different roles in the international arena. Nations that internalise limited sovereignty might shoulder the burden and obligation of mandatory trusteeship without abusing it (*noblesse oblige*), and foster the full development of national societies under international governance. As they would only employ legally legitimised power in the name of justice, they would be able to do so without descending into tyranny.

Breuer regards the United Kingdom and the Allies who fought the Nazis as such selfless trustees of humanity, who have earned a level of trust so that their United Nations will operate more effectively than did the League of Nations. His belief in the trustees is optimistic in the same way that Chapter 7 of the UN Charter, the collective use of power and the UN Security Council are based on the same appreciation of the Allies.[85] Having sacrificed so much, carried the obligations so far and given up so much of their own sovereignty for the combined war effort, they had Breuer's trust. It is with such trustees and a developed global mandate system that some nations – first and foremost the Jewish nation – might choose to remain powerless, under this protection, in order to fulfil *their* role in the international orchestra.

Breuer saw multiple parallel processes reinforcing and balancing each other:

(1) Trusteeship includes carrying responsibilities, investing selflessly in others, experiencing power-as-obligation on a continuous basis, interaction with international bodies

[81] ibid: 'If morality reigns alone in the governance of human society, then the concept of legally achieved power has no place'.

[82] For more see Mittleman (n 8); Mittleman (n 12) last chapter.

[83] Breuer's version of a regime of obligations is non-liberal, opposing human 'rights', even as he envisions it as non-oppressive. For Breuer, law precedes society. Therefore, there are no inherent rights of man, as there are if man precedes society. Values such as equality, liberty and 'human rights' are very important, but they are not rights. Obeying laws and fulfilling obligations willingly is the supreme mission – equality, and even more so fraternity, being one of the important obligations. He specifically endorses differences between men and women, Jews and non-Jews, and even free men and *slaves*. Women, non-Jews and slaves will accept their 'different' 'roles' voluntarily (see nn 80–81).

[84] Breuer (n 8) 97–120.

[85] The expression 'trustee of civilisation' invokes elitism and colonialist connotations. I think Breuer would agree to the expression 'trustee of humanity' in terms of goals and justifications, but he would add that 'humanity' is an amorphous entity, devoid of power, while 'civilisation' invokes the image of institutions and power – thus giving important roles to both expressions.

and accountability towards them. Benvenisti held that trusteeship enhances the trustee's sovereignty, or at least depends on its existence.[86] Following Breuer, I offer that the continuous experience would influence the states holding the trusts, limiting their sovereignty.

(2) Having multiple trustees, and varied trusts, might create a race to the top between the trustees, hopefully not in terms of gaining global influence, but in terms of the best subservience to the international community, institutions and justice.[87] These two together will influence changing the concept of sovereignty in the international community of nations, promoting its limitation in the service of justice.[88]

(3) A third congruent process would be an abundance of peoples who seek only limited sovereignty – non-sovereign national homelands societies and restricted states which enable peoples to develop side by side, with peaceful conflict resolution between them.

(4) International tribunals will gain experience in ruling in conflicts, acquiring legitimacy and reputation.

(5) International institutions (such as the Trusteeship Council) will gain experience, legitimacy and reputation in global and local governance.

(6) Successful enforcement by third parties in the service of the tribunals and institutions will promise quick and exact implementation of the rulings, ensuring the rule of justice.[89]

Both voluntarily limiting sovereignty as trustees and choosing powerlessness under law for the sake of justice are very powerful actions, but their viability relies on education. Only if the majority of a nation's population perceives justice as a supreme interest, and only if law (whether divine, natural or international) is perceived as self-evidently binding, will people agree to voluntary submission and compliance with the law. On the international level, one nation's readiness would also depend on the degree of education in the bordering nations, as well as the global situation in general. Breuer criticised the absence of law and justice in national curricula. In order to educate so as to comply with global law and justice, a curriculum of law and justice would need to be formulated and enacted. However, the same powers that refuse to submit the state to justice will typically refrain from educating their citizens about such ideas.[90] Breuer

[86] Benvenisti (n 5).

[87] eg, which peace force has the best human rights record, which power has the best track in human intervention, etc.

[88] Breuer (n 8) 195; Breuer, *Nahliel* (n 20) 311; Breuer (n 19) 366 and all of Pt III.

[89] I think this is the kind of process envisioned by the drafters of the UN Charter (n 2). States will disarm themselves, refrain from using force and minimise their actions of self-defence only if there is a strong, effective and evidently just usage of collective power. Every such voluntary weakening would reduce the costs of the collective system, making it more effective and creating a positive feedback mechanism. However, distrust and reluctance to disarm and voluntarily weaken oneself lead to inability to act collectively, and raises the cost of each intervention. Thus, failure to initiate such a positive feedback mechanism actually initiated an opposing, negative feedback mechanism.

[90] Breuer (n 18) 234–36; Breuer, *Nahliel* (n 20) 426–28. Breuer thought that the lack of real international law prevented education based on such law. We now know that even with a significant body of recognised and legitimate law, education can still be a problem.

invested effort in influencing his fellow Jews and the members of the international committees, desperately trying to make them listen to his distinctive voice.

2. Injustice

Breuer takes into account that the Jewish collective might lose cases in the international legal processes.[91] He declares that willingly submitting to justice should be perceived as a guaranteed win.

Breuer explicitly holds[92] that the Jewish community and other people should yield to the international tribunals and institutions even if they are wrong, in the name of subservience to justice. He trusts institutions that strive for justice, and correct themselves. More deeply, he holds that the injustice and human suffering from sovereign states – wars and internal injustice – will always, inherently and substantially, be more harmful than any wrong of the trustee system or international tribunals could be. Therefore, Breuer urges the Jewish community to accept, and even to encourage, forceful enforcement of judgments on themselves.

3. Stability and viability

Breuer holds that any time under the mandate system is better than any sovereignty. He acknowledges the tendency of systems to collapse into tyranny and sovereignty (like the French Revolution and the League of Nations).

Breuer stresses the flexibility of the mandate system. It enables and facilitates *multiple forms* of mandate that fit the nations that submit to the mandates and the trustee states. Each decision on a mandate, agreements between parties and agreements between international organisations and trustees can and should be tuned and adapted to meet specific cultural needs.[93] Such adaptation is crucial in order to enable the maximum contribution of unique national traits to global prosperity and justice. This adaptation will also foster compliance by the trustee and the cooperation of the regulated nations.

Surely Breuer did not perceive the mandates as utopian. His utopia is the rule of divine law, most likely without states at all. There are multiple possible paths between the Palestine Mandate and this global non-sovereign utopia, and these paths are to be revealed and *tested* in history. He offers clear criteria for testing such political and legal arrangements, institutions and systems: any proposal based on sovereignty would be considered a regression, while any subsequent development which opposes sovereignty and fosters limited nationality under law and justice would be considered a legitimate heir of the Trustee Council/mandate system, and any advance towards those goals would be considered a step forward.

[91] Isaac Breuer, 'Testimony before the Anglo-American 1937 Inquiry Commission on Palestine' in Horwitz (ed) (n 8) 203–08.
[92] See nn 69–70, 74 and accompanying text.
[93] Criddle (n 54) and Fox-Decent and Dahlman (n 54) stressed this regarding the entrusted peoples. To this, I would add the need to tailor the mandates to the various trustees as well.

4. INSIGHTS FROM THE JEWISH PERIPHERY

This section seeks to enrich the idea of the 'trustee of humanity' by introducing additional sources for the idea.[94] Because of the importance of history in Breuer's theory and theology, he based his argument on readings of human history:[95] the Bible (4.1. below) and Jewish and global history (4.2.). In section 4.3. I will revisit the role of peripheral thinking regarding the trustee idea.

4.1. BIBLICAL SOURCES FOR NON-SOVEREIGNTY

Proposing biblical sources for modern western political ideas is part of two greater projects: (i) political Hebraism,[96] and (ii) the engagement of religion and religious sources in international jurisprudence.[97] Breuer held that the first chapters of Genesis deal with the question of sovereignty, assigning great universal value to this universal message.

Genesis starts with the creation of the first human. His singularity is the basis for humanism, justice and fraternity, which are embedded in nature. However, individuals might derive a different conclusion from their singularity, with each regarding himself as sovereign.[98] For Breuer, the sin of Eden, of *disobeying law* by eating, had as its goal to 'be like God' – that is, to be a human sovereign not to be commanded.[99] Therefore sovereign individualism is heresy.[100] It is also the basis for evil, because 'between sovereigns there cannot be law and justice, and the sovereign has no morality'.[101] In Genesis, the land quickly fills up with such sovereigns, who fight and commit evil (Genesis 6, 1–13) – humanity in the state of nature. Into *this* world of sovereigns

[94] The *Theoretical Inquiries in Law* theme issue on trusteeship (n 6) was subtitled: 'Historical Antecedents and Their Impact on International Law'. One could, of course, also add biblical and rabbinic sources supporting sovereignty and enriching trusteeship in other ways.

[95] Breuer (n 18).

[96] Fania Oz-Salzberger, 'The Political Thought of John Locke and the Significance of Political Hebraism: Then and Now' in Gordon Schochet, Fania Oz-Salzberger and Meirav Jones (eds), *Political Hebraism: Judaic Sources in Early Modern Political Thought* (Shalem Center 2008) 231; Jonathan Jacobs, 'Return to the Sources: Political Hebraism and the Making of Modern Politics' (2006) 1 *Hebraic Political Studies* 328.

[97] Mark W Janis and Carolyn Evans, *Religion and International Law* (Martinus Nijhoff 2004); Amos Israel-Vleeschhouwer, 'Engaging Religious Laws, Players and Communities: Confronting Religious Dis-Empowerment' in Kyriaki Topidi and Lauren Fielder (eds), *Religion as Empowerment: Global Legal Perspectives* (Routledge 2016) 149–81.

[98] Jewish sources derive multiple meanings from the fact that the first human was singular, created last: 'every human has to say – the world was created for me' and 'if one would say, for me the world was created – the response would be – even the mosquito was here before you': Maimonides, Code Mishne Tora, the book of Judges, the laws of Sanhedrin 12:3.

[99] ' [A]s soon as you eat … you will be like God who knows good and bad' (Genesis 3, 5, JPS trans 1985); Breuer (n 18) 46. Seeing oneself as sovereign in relation to the divine creates 'human history [that] is the history between the will of the blessed holiness and the will of (hu)man': ibid.

[100] 'Breuer … assert(s) that neither rights nor persons precede a social reality constituted by duties and obligations seeking to ground personhood in moral relationality rather than autonomy. … [He] thereby negate[s] the modern project of ascribing rights': Mittleman (n 12) 97.

[101] Mentioned above, text to note 22; here cited in its original context: Breuer (n 18) 47. Breuer expounds on this insight, and connects it with contemporary jurisprudential and philosophical literature.

God brought the flood. The divine reaction to the state of nature between sovereigns is to start from scratch, this time prefacing the creation of society with the seven Noahide laws on which society can be built: 'The flood broke the pride of his sovereignty … [and] God revealed the seven laws of Noah that are the goal – the minimal needed for every moral social life'.[102] Breuer stresses that the laws were a prior requirement to restarting humanity, positing the idea of law as the basis for society.[103]

However, according to the biblical text, humans did not give up so easily and reacted to God's power by combining their forces against God, attempting to create a global sovereign state in one tower of all humanity. Breuer employs a close reading[104] of Genesis: 'They did not call it (the tower) in Gods' name, but in their own – we will make *ourselves* a name'.[105] For Breuer, a single global state (a term he uses) can be based only on hubris, heresy and evil. Individual sovereignty can be conquered only by a stronger sovereignty,[106] which is inherently more dangerous and heretical.

A global state is also untenable in the long term because of human diversity, and the story of Babel ends with the dispersion and division of humanity into nations, which starts 'history' as defined by the struggle between sovereign states. Breuer explains, in a typically ironic expression, that there is no need for another flood because states bring floods of blood upon themselves: 'The cruel and vicious waters of the states, stormy with and in their sovereignty, are enough. These waters turn to – blood'.[107]

Breuer traces the development of sovereignty and anti-sovereignty in the Bible through the books of Judges, Samuel and Kings, leading up to the prophets who posit themselves as the opposition to sovereign kings. They speak up in the name of law and justice, calling on the Kings to restrict themselves, to submit to God and to serve Him and humanity by ensuring social justice, thereby creating a world without war.[108]

The kingdom of Israel – the pure example of total sovereignty – collapsed, its tribes dispersed, never to be known again. The Judean kingdom included kernels of the alternative ideal of Jewish restricted nationhood, subservient to the prophets and God. A limited nationhood, independent of political power and sovereignty, was further developed under the Hellenistic and Roman conquests, and beyond. Despite the atrocities and disasters of these periods, this development enhanced Jewish resilience and cultural power. As opposed to pro-monarchy and pro-sovereignty Jewish traditions, this Jewish reading that opposes sovereignty, monarchy and statehood in the Bible has been under-represented.[109] It is precisely the return to Israel without

[102] ibid 48, 'Introduction'; cf Breuer (n 8) 111.
[103] Remember that in Genesis (18: 25), Abraham accuses God of not doing justice. God, and therefore all authorities, kings and states, are subservient to law and accountable.
[104] Julian Wolfreys, *Readings: Acts of Close Reading in Literary Theory* (Edinburgh University Press 2000).
[105] Breuer (n 18) 49, 29. Naming is significant for Breuer (cf text accompanying n 70).
[106] cf Hobbes (n 31) I, Ch 13.
[107] Breuer (n 18) 29; to be more precise, they shed the blood of individuals and humanity for the state.
[108] A detailed analysis of Breuer's readings is beyond the scope of this article.
[109] These are two competing Jewish narratives regarding sovereignty and trusteeship. King David is presented as a philosopher-king who accepts rebuke from the prophets and is under the law. This kingdom's sovereignty

the return of the Jewish kingdom (and the development of international law and state accountability) that convinces Breuer that this is a messianic process.

This tradition has many implications for the discourse regarding states as trustees for humanity, as detailed above. As opposed to 'sovereignty as trusteeship', obligations stem from subservience, not from power and sovereignty, and only justice can justify the enforcement and the overall importance of the rule of law.

4.2. JEWISH READINGS OF HISTORY AS A SOURCE FOR THE DISCOURSE ABOUT SOVEREIGNTY

Breuer's historical analysis is based on a Jewish view of history, the view of an experienced non-player, a spectator and, arguably, of an object and victim of the unfolding events. Throughout Breuer's career the Jewish voice was the voice of a minority, and the ultra-orthodox voice was a minority vis-à-vis the voices of Jewish Zionism.

For Breuer, the Jewish people represented the opposite of sovereign nationality, in its laws and throughout its history in exile. With no territory,[110] no will for expansion and refusing any coercive force, it lived in, with, by and for the law. It developed that law and sought to build communities around the idea of subservience to law and justice. Its perception of nationhood, connecting the dispersed communities, was built on this unifying law and legal discourse.[111] In Breuer's words, Jewish nationalism 'does not serve itself as a god, but is ready to submit itself to the divine will'.[112]

Breuer understood that totalitarian Nazism sought to destroy both the idea of law and the Jews who carry the idea of law without sovereignty, of a relative nationality that serves humanity. The war of the Allies against the Nazis is also the war against the ideas the Nazis held, and against the potential that exists in all cultures.[113] Breuer yearns for an ideological victory over the Nazis, in which the idea of tyrant sovereignty will be replaced by a global community of societies serving justice.[114]

Following historical processes from the periphery, events repeatedly reinforce his convictions. Breuer's position is a periphery within a periphery, a minority within a minority, and this influences his point of view. He is not part of the Jewish national political leadership and is therefore less influenced by the processes initiated by the Mandate that push the Jewish population towards

collapsed and was lost. Jewish liturgy includes craving for kingship in both the selfless and serving version and the strong and sovereign version. Besides the prayer for the return of kingship, the liturgy emphasises the yearning for the direct and exclusive sovereignty of God.

[110] cf 'Geist und Epochen der Jüdischen Geschichte', *Franz Rosenzweig: Der Mensch und Sein Werk, Gesammelte Schriften, III* (Martinus Nijhoff 1984) 527, stating that Jewish history, as opposed to that of most nations, does not start in its 'homeland'; nor is the law revealed in it. Thus, Jewish identity did not originate in the territory of Israel; nor does it depend on living within it. Breuer agrees that Jewish identity does not depend on sovereignty and territory, but he repeatedly states the importance of the connection of Jews with the land of Israel, and the development of the Jewish community in Palestine, disagreeing with Rosenzweig's more diasporic worldview.

[111] As said the tenth century Rabbi Saadia Gaon: 'Our nation is a nation only by virtue of its Torah (law)': Saadia Gaon, *The Book of Beliefs and Opinions* (Yale University Press 1987), Pt III, Ch 7. In its original context it is part of the proof that the Torah is eternal. Because the Jewish people are promised eternity, and because the nation's existence depends on the Torah, *ipso facto*, the Torah is eternal.

[112] Breuer (n 8) 197; Shafat (n 20) 124–25.

[113] Breuer (n 18) 241.

[114] Breuer (n 8) 129.

statehood. He also experienced the League of Nations from the perspective of a member of a national minority, seeing the protection mechanism take shape, develop and fail. Thus, his enchantment does not blind him to the institution's inherent and systemic deficiencies, as seen from his flawed 'Jerusalem'; yet he cannot help but see the even worse consequences of sovereignty.

4.3. The Peripheral View of International Law and Trusteeship

This 'view from the periphery' could potentially contribute to a richer and more nuanced understanding of the mandate system, in theory and in practice.[115] Breuer acted at the periphery of the nexus between Zionism, the United Kingdom and the international community, and felt like a minority within a minority (and even there, in his own community, he was in the minority). His double periphery enabled him to see and emphasise aspects less obvious to other players enchanted by sovereignty. Neglected at the time, his writings could shed light on current debates that reflect on the mandate system. Can we attribute his unique contribution to the peripheral view? We could suggest other characteristics such as his Jewishness and religiosity[116] as alternative or supplemental causes. Both have been offered as factors that influence jurists, in theory and in practice.[117] Breuer himself characterises his position as Jewish in origin, but applicable in other traditions, religious or otherwise. I argue that his peripheral point of view had a significant impact on his understanding of the mandate system.

It is hard to differentiate between the factors, as many Jews were and are influenced by Jewish culture, by religiosity and by being on the periphery of the international events; all may have contributed to the special perception of international law. My argument for the impact of the peripheral point of view is based partially on the similarities between Breuer and two other rabbis who discussed international law before the Second World War, and the differences between these three and other jurists – theoreticians and practitioners – from Jewish descent, who acted in both Jewish and international centres. Living in the centre of events of a Westphalian system, most Jews – religious and secular alike – tended to accept its basic assumptions. Therefore, without discounting the impact of religion in general, and the huge impact of Jewish sources and culture on Breuer in particular, I argue that looking at a system from the periphery reveals aspects which are hard to notice from the centre, as I will now briefly discuss.

In my research regarding prevailing attitudes in Jewish law towards international law, I found only three rabbis who formulated a coherent and comprehensive opinion before 1940. All three lived or acted at the periphery of the Jewish political events of their time (1900–46). All three

[115] cf the role of the semi-peripheral jurist in universalising international law in Arnulf Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 *Harvard International Law Journal* 475. Ideas, instruments or institutions from the periphery can transform the centre: Loveday Hodson, 'Women's Rights and the Periphery: CEDAW's Optional Protocol' (2014) 25 *European Journal of International Law* 561, 567.

[116] Another factor is the German context, which certainly influenced Breuer.

[117] For jurists from Jewish descent see Reut Yael Paz, *A Gateway Between a Distant God and a Cruel World: The Contribution of Jewish German-Speaking Scholars to International Law* (Martinus Nijhoff 2012). For religion and international law see above (n 97); Richard A Falk, *Religion and Humane Global Governance* (Palgrave 2001).

were influenced by the culture and jurisprudence in their respective localities, much like Breuer was influenced by his studies and experiences in Germany. Consequently, they disagree on many theoretical, religious and practical issues regarding the Jewish attitude towards international law. However, all three share the following positions:

- they all criticised international law as overly state-centric, neglectful of individuals and preferring states over peoples, groups and justice;
- they all celebrated the idea of the League of Nations but criticised its weaknesses; and
- all three promoted the subservience of the Jewish people and state to the idea of world peace, and to international justice and governance.[118]

The similarities between the three rabbis are striking. All support international law, international institutions and limited sovereignty, anticipating subsequent trends in international law. They were heavily influenced by their surroundings but reached similar (though not identical) conclusions, based on different Jewish sources and different forms of argument. Their Jewishness cannot explain this, as most Jews at the time were very nationalistic, mostly missing the significance of international law. Others, especially international jurists of Jewish descent, supported universal international law, based on the sovereignty of states. This is true also for most non-Jewish religious jurists of the time. It is the peripheral viewpoint of these three rabbis, I argue, which was crucial for their unique positions, in the same way that it contributed to their ability to recognise the significance of the development of international law for the Jews and the world. On this basis, this article joins the call to listen to peripheral voices in international legal discourses. Multiple views of legal institutions attest to the way in which a rule or institution is perceived throughout societies. Peripheral perceptions, interpretations and implementations of international law can help us to understand to what extent international norms are accepted, as well as the range of interpretations given to them.

Religious texts and communities are an important sub-type of periphery, offering multiple ideological lenses through which to look anew at concepts and entrenched convictions in international law. As non-state actors, religious leaders and communities are less invested in accepted and mainstream discourse and are influenced by different political incentives,[119] their unique peripheral views on international norms and institutions can accentuate certain aspects (which exist or potentially exist) and ignore or downplay others.

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[118] Amos Israel-Vleeschhouwer, *The Attitudes of Jewish Law towards International Law: Analyzing the Jewish Legal Materials and Processes*, PhD thesis, Tel Aviv University, 2012, Ch 1; Amos Israel-Vleeschhouwer and Dafna Bezalel-Horev, 'The Redemption of Man, Israel and the World: Local Leadership and Transnational Legal Views of Rabbi Chalfon Moshe HaCohen from Gerba' (2013) 29 *Dinei Israel* 217 (in Hebrew); Amos Israel-Vleeschhouwer and Shaya Rothberg, 'International Law, the State and Man in the Philosophy and Psika (Jewish Legal Decisions) of Rabbi Hayim Hirschenson' in Aviad HaCohen, Elishai Ben-Yitshak and Hagai Vinizky (eds), *Tehilat Olam: Principles in Jewish Laws of State* (forthcoming 2016) (in Hebrew).

[119] Those on the periphery do not suffer from the endowment effect. It is easier to see the advantages of limited sovereignty from the position of no sovereignty than from a position of power. That is, it is easier to agree to restrict oneself if by this, you gain power and recognition, than to give up power and endanger your status by restricting your existing sovereignty: Daniel Kahneman, Jack L Knetsch and Richard H Thaler, 'Experimental Tests of the Endowment Effect and the Coase Theorem' (1990) 98 *Journal of Political Economy* 1325.

5. CONCLUDING THOUGHTS

One could argue that the 'golden rule' – 'What is hateful to you, do not do unto others' – is the most commonly agreed moral rule. However, when it comes into conflict with one's own interests it is also relatively rarely adhered to, or at least very difficult to uphold. Jewish lore presents a version of the rule as the essence of the whole law of the Torah.[120] If people let law reign supreme over interests and feelings, a just society is a viable and achievable goal. Adhering to the golden rule in international relations requires subordinating the sovereignty of the state. Breuer argues that the mandate system is a tool to develop nationality without developing an insatiable thirst for power, which would not necessarily result in war and injustice. Willing subservience to an international mandate is trading power for strength and endurance, replacing nationalist pride for national integrity and ensuring not only world peace, but also social justice.[121] In this conclusion I will discuss the practical implications of making this trade.

5.1. BETWEEN IDEALISM AND PRAGMATISM

Breuer's ideal of peoples willingly giving up the idea of sovereignty is difficult for a non-religious audience to accept; it seems that Breuer offers a Utopia only for believers. While some students, opponents and academics have presented him as stern, ideological, separatist and perfectionist, this misses his activism and political career, which include a pragmatic and realist aspect. In fact, Breuer worked hard, with all of the time and resources he had available to him, in pursuit of his utopian vision. This is evident in his recognition of the mandate system, born out of necessity, as a potential divine revelation, even without regarding the international institutions of his time as utopian.

Breuer's support for these partial solutions, and partial theoretical and moral advances, is not merely pragmatism. It was based on the notion of these ideas and institutions as a possible path between the 'is' and the 'ought'. Breuer fully recognised these partial improvements and solutions if, *and only if*, he felt they correctly analysed the problem. If they opposed total sovereignty and paved a way to further alternatives, these solutions, imperfect as they are, were considered good enough to be enforced.

5.2. POSSIBLE CONTEMPORARY IMPLICATIONS

5.2.1. EUROPE

The conditions set by the European Union (EU) for the eastern European states to join the EU[122] convey a contemporary manifestation of limited sovereignty. While UN membership required merely that states be 'peace-loving states', 'which accept the obligations contained in the present

[120] Babylonian Talmud, Shabbat 31a.
[121] This basic jurisprudential insight was revealed in the Jewish traditional text (ibid) through the question of a non-Jew, answered by a Jew who came from the periphery (Babel) to the Jewish centre in Palestine (see, eg, Babylonian Talmud, Yoma 35b.).
[122] EC Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (December 1991) (1993) 4 *European Journal of International Law* 72.

Charter … able and willing to carry out these obligations',[123] the EU established new standards.[124] Becoming part of the EU requires subscribing to 'the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, *especially with regard to the rule of law, democracy and human rights*'.[125] Note the order of commitments, which I will discuss below. Joining the EU not only includes subscribing to supranational laws and norms (such as a commitment to respect minorities), but also submission to powerful regional judicial review and compliance with rulings of the European Court of Human Rights (ECtHR).

In the ensuing vetting process, strong sovereign states convinced weak states to give up an element of their sovereignty in order to enjoy the benefits of EU membership. In effect, this was a manifestation of benevolent strong states using their power to guide nations, without violence or exploitation, to limited but strong national political expression, without striving for full sovereignty.

However, this is only part of the picture. The established states, now in the role of guides, underwent a similar process voluntarily. The United Kingdom's subscription to membership of the EU and the jurisdiction of the ECtHR changed the well-established British legal and political system by restricting the sovereignty of its Parliament.[126] The EU states restricted their own sovereignty, intervened in a major conflict (Yugoslavia) in the name of humanity and justice, and then used soft power[127] vis-à-vis the candidate states.

EU members have set an example by relinquishing some of their sovereignty in creating the EU, and thus could easily recommend and demand the same from aspiring candidates. This is an interesting manifestation of the idea of voluntary weakness as a source for political and cultural (non-violent) power, and is also precisely what Breuer urged the Jewish people in Palestine to do. Breuer, who championed the establishment of strong international institutions that promote justice and hold states accountable, would see the high status of the ECtHR as an important evolution of his ideas.

5.2.2. THE TRUSTEESHIP COUNCIL AND THE MANDATE SYSTEM

I think that Breuer would see the resurgence of the idea of 'trustees of humanity' as very positive. He would less like its connection with sovereignty, even though contemporary sovereignty is (a little) more restricted by international rule of law and global justice than the term implied in his time. Breuer can be seen as an antecedent to voices in contemporary debates, and as a voice still worth listening to across the years.

For Breuer, obligations towards humanity and justice stem neither from agreement regarding the distribution of power nor from the sovereignty of the state. It is obligation, rather than power,

[123] UN Charter (n 2) art 4(1).
[124] The recognition of states also became a question of norms and law, not simply a question of policy: Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4 *European Journal of International Law* 36.
[125] EC Declaration (n 122) (emphasis added).
[126] Vernon Bogdanor, *The New British Constitution* (Hart 2009) 57.
[127] For the concept of soft power see Joseph S Nye, *Soft Power: The Means to Success in World Politics* (PublicAffairs 2004).

that precedes the state and is the *raison d'etre* of its establishment. It is the existence of major problems and needs, which can be addressed only by states, which justifies the creation of states and should guide their development and use of power.

In the case of humanitarian intervention,[128] use of force raises questions of the justification and prevention of excessive force and the abuse of power. Two developments – the trend towards coalitions and the growing need for an institutional decision – seem to be congruent with Breuer's analysis. Both serve to restrict each state's power, and give a legal justification for the restricted and regulated use of power. The coalitions, which replace the mechanism in the UN Charter for collective use of force, require negotiation and compromise, ensuring more rational decision making, and restricting abuse for particular domestic interests. Further, the publication involved enables global oversight, political and juridical review and feedback from public opinion. The Russian demand to precede the action to disarm Syria of its chemical weapons with a decision by the Security Council also served to achieve similar objectives.[129] I argue that these are manifestations of Breuer's principles of limited sovereignty, the supremacy of justice, humanity and the importance of the institutions that seek to promote them. Following Breuer, I would, however, suggest the need to change terms. In contemporary discourse it seems self-evident and justified for states to further their own needs and interests, and express their sovereignty. This is why now, more than ever, we might benefit from a reframing such as that proposed by Breuer, in which citizens of states will perceive global obligations, and the subservience of state needs to international needs and norms, as self-evident.[130]

In light of these developments, the international reaction to the collapse of states and the re-emergence of areas without effective government poses a different global challenge, mentioned in the introduction to this article. These areas are the focus of humanitarian crises, war crimes and crimes against humanity. The present article supports proposals to renew the concept of the Trusteeship Council and assign to it a significant role in managing those territories, using evolved versions of the original trustee system.[131] As both the question of the sovereignty of the trustee

[128] cf Benvenisti (n 5).

[129] UNSC Res 2118 (27 September 2013), UN Doc S/RES/2118; and UNSC Res 2235 (7 August 2015), UN Doc S/RES/2235; Vladimir V Putin, 'A Plea for Caution from Russia', *The New York Times*, 11 September 2013, http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?_r=0; Julian Borger and Patrick Wintour, 'Russia Calls on Syria to Hand Over Chemical Weapons', *The Guardian*, 9 September 2013, https://www.theguardian.com/world/2013/sep/09/russia-syria-hand-over-chemical-weapons.

[130] Some of these processes are already happening in states like the Netherlands. Serving international justice and humanitarian needs is portrayed as one of the three goals and responsibilities of the army, https://www.rijksoverheid.nl/ministeries/ministerie-van-defensie.

[131] Saira Mohamed, 'From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council' (2005) 105 *Columbia Law Review* 809; Paul Kennedy, 'UN Trusteeship Council Could Finally Find a Role in Postwar Iraq', *Global Policy Forum*, 9 May 2013, https://www.globalpolicy.org/component/content/article/168-general/34794.html; 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty', December 2001, 43, http://responsibilitytoprotect.org/ICISS%20Report.pdf; Lou Pingeot and Wolfgang Obenland, 'In Whose Name? A Critical View on the Responsibility to Protect', May 2014, https://www.globalpolicy.org/images/pdfs/images/pdfs/In_whose_name_web.pdf.

and the sovereignty of the administrated populations and territories loom large in this debate, Breuer's critique and insights, developed and adapted through historical analysis within his theoretical framework as proposed in this article, have the potential to enrich this debate.

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The Unique Character of the Mandate for Palestine

Matthijs de Blois[*]

The Mandate for Palestine has a unique character regarding both its beneficiaries, the Jewish people, wherever they live, and the obligations of the Mandatory power. At the same time it has been a burdensome stone right from the beginning. Representatives of Palestinian Arabs have rejected it as being incompatible with their right to self-determination. The policies of Great Britain, the Mandatory power, show a gradual departure from its obligations. The establishment of the Jewish national home became, instead of the primary obligation, just one of the duties of equal weight and content as others under the Mandate. Following the establishment of the State of Israel, the relevance of the mandatory system in the light of Article 80 of the UN Charter has been recognised, inter alia, by the International Court of Justice. The unique character of the Palestine Mandate, however, has been kept under wraps. Some academic writings and legal actions by the Palestinians now offer a radical revisionism, which uses the Mandate as the legal basis for a Palestinian state. This trend is not without consequences for the recognition of Israel as a Jewish state and for the right of the Palestinians to self-determination.

Keywords: Mandate for Palestine, uniqueness, beneficiaries, obligations of the mandatory power, revision

> It had to be recognized that the Palestine mandate was absolutely unique. There was no analogy in any other mandate for the proposal to set up in Palestine, a country where there was already a considerable population of Arabs, a national home for another people – the Jews.
>
> Malcolm MacDonald, Secretary of State for the Colonies,
> before the League of Nations Permanent Mandates Commission, 29 June 1939.[1]

1. Introduction

On 25 July 2014, the Minister of Justice of the State of Palestine and the General Prosecutor at the Court of Justice of Gaza filed, in accordance with Articles 15(1) and 53 of the Statute of the International Criminal Court,[2] a 'complaint'[3] referring to the occupation of Palestinian territories by Israel, the blockade of the Gaza Strip as well as the military operations therein. The document starts with general information on Palestine. A striking element of this information is that the recognition of Palestinian sovereignty is based on the Mandate for Palestine of 22 July 1922, created

[*] Assistant Professor, School of Law, Utrecht University. m.deblois@uu.nl.

[1] League of Nations Permanent Mandates Commission, Minutes of the Thirty-Sixth Session, held at Geneva (Switzerland), 8–29 June 1939, Fourteenth Meeting, 16 June 1939, https://unispal.un.org/DPA/DPR/unispal.nsf/9a798adbf322aff38525617b006d88d7/d54db2b34342ae5d052565e9004f24df?OpenDocument. The remark was made at the closure of a debate in which Mr MacDonald used all his rhetorical skills to prove that the Palestine Mandate was unique.

[2] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90.

[3] The Statute refers to 'information' which may induce the Prosecutor to open an investigation *proprio motu.*

by the League of Nations by virtue of Article 22 of the Covenant of the League of Nations.[4] The clear suggestion is that Palestinian sovereignty is embodied in the 'Palestinian state' represented by the 'complainants'. Not a single word is said about the contents of the Palestine Mandate, let alone a reference to the idea of the 'Jewish national home', which is the central obligation under the Mandate included in Article 2. This approach is an example of a relatively new trend to see the Mandate as the foundation of a Palestinian state, ignoring the unequivocal contents of the Mandate for Palestine, which provides the legal basis of the eventual creation of a state for the Jewish people. Nowadays it seems useful to stress the relevance of the Palestine Mandate as the legal basis of a Palestinian state, including a reference to Article 80 of the UN Charter,[5] to underline the continuing relevance of the rights under the mandate system.[6] This is possible only because of a radical revision of the meaning of the Mandate. This revisionism cannot simply be traced in a political document; it is also implied in the *Wall* advisory opinion of the International Court of Justice (ICJ)[7] and in writings by legal scholars such as, inter alia, James Crawford,[8] John Quigley,[9] Victor Kattan[10] and John Dugard.[11] This new approach is arguably a serious attack on the legitimacy of the State of Israel as the expression of the self-determination of the Jewish people. Therefore, it is more than worthwhile to reflect on the unique character of the Mandate for Palestine compared with all the other mandates under Article 22 of the League of Nations Covenant. The uniqueness, above all, is that its beneficiaries are a people the greater part of which were not yet living in the territory concerned. This was, of course, not by chance, but the very objective of the Mandate as the legal elaboration of the Balfour Declaration.[12] It was the international community's response to the injustice suffered by the Jewish people in a long history in many parts of the world, while also guaranteeing the rights of the other inhabitants of the territory. The Mandate was part of the mandate system of the League of Nations, which also accommodated the Arab aspirations for self-determination in other mandates.[13]

Following this introduction, we focus first on the unique character of the Mandate: its origin and justification, its meaning and the legal implications. The policies of the Mandatory power, the British government, leading to a de facto denial of the unique character of the Mandate,

[4] Covenant of the League of Nations (entered into force 10 January 1920) (1920) 1 *League of Nations Official Journal* 3.
[5] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.
[6] Francis Boyle, 'The Creation of the State of Palestine' (1990) 1 *European Journal of International Law* 301, 301–02.
[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.
[8] James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press 2001) 7, 14.
[9] John Quigley, 'The Palestine Declaration to the International Court: The Statehood Issue' in Chantal Meloni and Gianni Tognoni (eds), *Is There a Court for Gaza?* (TMC Asser Press 2012) 429.
[10] Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict*, (Pluto Press 2009) 117–45.
[11] John Dugard, 'Britain's Betrayal of the Sacred Trust in Palestine', *Middle East Monitor*, 4 May 2015.
[12] Letter from the United Kingdom Foreign Secretary, Arthur James Balfour, to Baron Walter Rothschild, 2 November 1917 (*The Times*, 17 November 1917).
[13] Partly also by the Palestine Mandate as far as Transjordan was concerned.

will then be examined. This is followed by a discussion of the denial of the unique character of the Mandate after its termination, both in the ICJ's advisory opinion in the *Wall* case and in some recent academic writings. Finally, some possible legal consequences of the denial of the Mandate's unique character will be discussed.

2. THE UNIQUE CHARACTER OF THE MANDATE FOR PALESTINE

Article 22 of the Covenant of the League of Nations is the legal basis of the mandate system. It distinguishes three types of mandate, which are known as A, B and C Mandates. The A category refers to the following:

> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Without a doubt the League of Nations considered the Mandate for Palestine to be a Class A Mandate. In the first paragraph of its Preamble the text of the Mandate refers to 'Palestine, which formerly belonged to the Turkish Empire'. At the same time it recognised its 'very special character' because it contained 'a number of provisions designed to apply the policy defined in the "Balfour Declaration"'.[14] That brings us to the background to the Mandate.

2.1. BACKGROUND OF THE UNIQUE CHARACTER: BASEL PROGRAM, BALFOUR, SAN REMO, TREATIES OF SÈVRES AND LAUSANNE

The unique character of the Mandate for Palestine is rooted in the Basel Program of the First Zionist Congress 1897, where it was expressed that '[t]he aim of Zionism is to create for the Jewish people a home in Palestine secured by public law'.[15] This political ambition of the Zionist movement was presented to various Great Powers in search of support. Eventually the Zionist leadership was successful in winning the backing of the British government, which was engaged in deliberations on the future of the remnants of the Ottoman Empire. This support was expressed in the Balfour Declaration issued on 2 November 1917 in a letter from the British Minister of Foreign Affairs, Arthur James Balfour, to Lord Rothschild.[16] It stated:

> His Majesty's Government views with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly

[14] 'League of Nations, The Mandates System: Origin – Principles – Application', Series of League of Nations Publications, April 1945, UN Doc LoN/1945.VI.A.1.
[15] Cecil Roth and Geoffrey Wigoder (eds), *The New Standard Jewish Encyclopedia* (Massada Press 1975) 247.
[16] n 12; Walter Laqueur, *A History of Zionism* (Schocken Books 1978) 181–205; Martin Gilbert, *Israel: A History* (Black Swan 1998) 34–35. cf also Jonathan Schneer, *The Balfour Declaration: The Origins of the Arab-Israeli Conflict* (Bloomsbury 2010) 75–86.

> understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

The Balfour Declaration was discussed at a conference of the Supreme Council of the Principal Allied and Associated Powers[17] (Britain, France, Italy, the United States and Japan) in San Remo in April 1920, which was convened to decide on the future of the territories captured from the Ottoman Empire at the end of the First World War. This conference was an extension of the Paris Peace Conference of 1919. At San Remo the Allies decided on 25 April 1920 not only to adopt the Balfour Declaration, but also to make Palestine a Mandate territory under Article 22 of the Covenant. Britain was to be the Mandatory power.[18]

The allocation of parts of the former Ottoman Empire under the League of Nations' mandate system was subject to an agreement of the Allied Powers with Turkey. Initially this was embodied in the Treaty of Sèvres (10 August 1920). From its relevant provisions it is clear that the Palestine Mandate had a character that was different from the mandates over other parts of the former Ottoman Empire. Article 94 determined, in respect of Syria and Mesopotamia (now Iraq), that these territories were to be recognised provisionally as independent states, subject to administrative advice and assistance by a Mandatory power. Without doubt this refers to the territories of these states and their inhabitants. In respect of Palestine, Article 95 provided that the Mandatory power was to be responsible for the implementation of the Balfour Declaration of 2 November 1917: the establishment of a national home for the Jewish people in Palestine. This refers not only to the Jewish inhabitants of Palestine in 1922, but also to those members of the Jewish people not yet established there.[19] The Treaty of Sèvres was never ratified, as a result of a regime change in Turkey, although the new Turkish government accepted the Treaty of Lausanne (24 July 1923), which left the future of the former parts of the Ottoman Empire to be settled by the parties concerned.[20] This implied that there was no obstacle to the implementation of the arrangements included in the Treaty of Sèvres;[21] it was in a sense an acceptance *ex post facto*. The Mandate for Palestine had already been adopted by the Council of the League of Nations on 24 July 1922 and entered into force on 29 September 1923.[22]

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[17] The United States (US) was also present at the San Remo Conference as an Associated Power, having joined the First World War in April 1917. cf Cynthia D Wallace, *Foundations of the International Legal Rights of the Jewish People and the State of Israel: And the Implications for the Proposed New Palestinian State* (Creation House 2012) 4.

[18] The text is included in Wallace, ibid 55–56.

[19] J Stoyanovsky, *The Mandate for Palestine* (Longmans, Green and Co 1928) 41–42

[20] Treaty of Peace with Turkey, 24 July 1923, Cmd 1929 (Treaty of Lausanne), art 16: 'Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned'.

[21] Stoyanovsky (n 19) 24–27.

[22] (1923) *League of Nations Official Journal* 1355. cf also Howard Grief, *The Legal Foundation and Borders of Israel under International Law* (Mazo 2008) 121.

2.2. The Beneficiaries and Their Rights

2.2.1. Provisions of the Mandate

The unique character of the Palestine Mandate follows, first, from the beneficiaries of the rights granted and, secondly, from the corresponding duties of the Mandatory power.[23]

With regard to the beneficiaries of the rights under the Mandate, from the text it is obvious that the Jewish people are its primary beneficiaries. The central obligation in Article 2 reads as follows:

> The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

This provision imposes a duty on the Mandatory power ('His Britannic Majesty') to secure the establishment of the Jewish national home in the country (Palestine). The Preamble refers to 'a national home for the Jewish people'. The term 'Jewish people' refers both to Jews living in the territory of Palestine – which, in 1922, was a rather small minority of the total population of Palestine – *and* to Jews still living elsewhere.[24] This is confirmed by Article 6 of the Mandate, which imposes the duty on the administration of Palestine (the Mandatory power) to facilitate Jewish immigration under suitable conditions and close settlement by Jews on the land. In the same vein, Article 7 provides for the facilitation of the acquisition of Palestinian citizenship by Jews. Article 4(1) obliges the Mandatory power to recognise a Jewish agency as a public body for the purpose of advising and cooperating with the Palestinian administration in matters affecting the establishment of the Jewish national home and the interests of the Jewish population in Palestine. The Jewish Agency is also mentioned in Article 6 as the institution which is the partner for the administration of Palestine to encourage close settlement of Jews on the land. Along this line Article 11(2) provides for the possibility for the administration to make an arrangement with the Jewish Agency to construct or operate public works, services and utilities, and to develop natural resources in the country. It is interesting to observe that Article 4(2) provides that '[t]he Zionist organization … shall be recognized as such agency'. It further underlines that this organisation is to take steps to secure 'the cooperation of all Jews who are willing to assist in the establishment of the Jewish national home'. The reference here is to the Zionist Organization, established in 1897, which represented Zionists belonging to local federations throughout the world. The executive of the Zionist Organization was composed

[23] Norman Bentwich, 'Mandated Territories: Palestine and Mesopotamia (Iraq)' [1921–22] *British Yearbook of International law* 48, 51; Manka Spiegel, *Das Völkerrechtliche Mandat und seine Anwendung auf Palästina* (Verlag Der Universitäts – Buchhandlung Leuscher & Lubensky 1928) 74.
[24] Stoyanovsky (n 19) 41–42.

of members residing partly in Palestine and partly in London. Both the London and the Palestine branches of the Executive were responsible to the Congress of the Zionist Organization.

All of this illustrates that the Mandate for Palestine differs from the other mandates, which were created for the benefit of the population of the various territories. For example, the Preamble to the French Mandate for Syria and the Lebanon refers to the territory of these former parts of the Turkish Empire and subsequently to the rendering of administrative advice and assistance to the population. In the first article it refers to 'all the population inhabiting the said territory'.[25] These Mandates are a direct implementation of Article 22 of the Covenant of the League of Nations, which refers in its first paragraph to 'territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves'. In the letter from the Colonial Office to the Palestine Arab Delegation of 1 March 1922 it is indicated that the Principal Allied Powers 'were well advised in applying to Palestine a somewhat different interpretation of paragraph 4 of Article 22 of the Covenant than was applied to the neighbouring countries of Iraq and Syria'. The different interpretation, as it is referred to, was motivated by the pledge made by the British government to the Jewish people.[26] Stoyanovski observed:[27]

> The Jewish people as a whole may be considered … as forming virtually part of the population of Palestine. The mandates system has been applied to Palestine not merely on account of the inability of its present population to stand alone, as is the case with other mandated territories, but also, and perhaps chiefly, on account of the fact that the people whose connection with Palestine has been recognized is still outside its boundaries. The Mandatory power thus appears … as a kind of a provisional administrator of the interest of an absent people. …. the Mandatory has assumed an obligation not towards the actual but the virtual population of Palestine.

From that perspective it is possible to understand the Mandate for Palestine as being in harmony with the purposes of the mandate system as formulated in Article 22 of the Covenant of the League of Nations. The focus of the objectives of the mandate system in respect of Palestine is the development towards independence of the Jewish people. The rights under the Mandate which eventually should emerge into independence are bestowed on the Jewish people.

2.2.2. The Jewish national home

In this connection it is appropriate to refer to the fact that the Mandate uses the term 'Jewish national home' rather than 'Jewish state'. It followed in this respect the Balfour Declaration. The United Nations Special Committee on Palestine (UNSCOP) suggested in its 1947 report

[25] French Mandate for Syria and the Lebanon (1923) 17 *American Journal of International Law*, Supplement: Official Documents, 177.
[26] 'Palestine: Correspondence with the Palestine Arab Delegation and the Zionist Organisation', Cmd 1700, June 1922.
[27] Stoyanovsky (n 19) 41–42.

that this was a compromise resulting from different views within the British cabinet regarding the establishment of a Jewish state.[28] Whether or not a state would be established depended on the efforts of the Jewish people. For key players involved in formulating the Balfour Declaration, it was clear from the beginning that the ultimate objective was the creation of a Jewish state. Lord Balfour declared three months after the issue of the Declaration: 'My personal hope is that the Jews will make good in Palestine and eventually found a Jewish State'.[29] He also stated that the goal was to bring the national status of the Jews in line with that of other races, by giving them what all other nations possess: a land to live in and a national home.[30] This refers to the recognition of national aspirations that were to result in an independent state. In a conversation with Chaim Weizmann in 1921, Balfour and Prime Minister Lloyd George declared that they both had intended the ultimate creation of a Jewish state.[31] Comments by other members of the British government reflected the same opinion.[32] The South African Prime Minister and one-time member of the Imperial War Cabinet, Jan Christiaan Smuts, told an audience in Johannesburg in November 1919: 'You will see a great Jewish state rising there once more'.[33] Colonial Secretary Ormsby Gore confirmed in 1937 that the Balfour Declaration and the British Mandate were binding documents, and that their binding character was to remain until replaced by an independent Jewish state.[34] A similar view was expressed on the other side of the Atlantic. A commission created by the US President Woodrow Wilson to elaborate his famous Fourteen Points in 1919 expressed its favour for the establishment of a Jewish state:[35]

> If the Jews, being given full opportunity, make it such. It was the cradle and home of their vital race, which has made large spiritual contributions to mankind, and is the only land in which they can find hope to find a home of their own, they being in this last respect unique among significant peoples.

2.2.3. THE NON-JEWISH COMMUNITIES

The non-Jewish communities in Palestine, as they are referred to in the Preamble, are not overlooked in the Mandate. In line with the Balfour Declaration, Article 2 stipulates that the Mandatory power is responsible for the safeguarding of the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion. It is clear from the Minutes of the Palestine meeting of the Supreme Council of the Allied powers at San Remo on 24 April

[28] UNSCOP, Report to the General Assembly, 3 September 1947, Vol 1, UN Doc A/364, 3, para 76 (UNSCOP Report, September 1947) (based on the 1936 Peel Commission Report).
[29] Quoted by Benny Morris, *1948: A History of the First Arab-Israeli War* (Yale University Press 2008) 10.
[30] See the Foreword of Lord Balfour in Nahum Sokolow, *History of Zionism* (2 vols, London 1919) xxxiii, as quoted by Stoyanovski (n 19) 70.
[31] Martin Gilbert, *Churchill and the Jews* (Pocket Books 2007) 71.
[32] ibid.
[33] Quoted by Martin Gilbert, *Exile and Return: The Emergence of Jewish Statehood* (Steimatzky's Agency Ltd 1978) 127.
[34] cf Nathan Feinberg, 'The Recognition of the Jewish People in International Law' in John Norton Moore (ed), *The Arab-Israeli Conflict, Vol I* (Princeton University Press 1974) 59, 69.
[35] Quoted by Nathan Feinberg, 'The Arab-Israel Conflict in International Law' in Norton Moore, ibid 386, 431.

1920 that there had been a French proposal on the table to refer also to the 'political rights' of the non-Jewish communities. However, France apparently did not insist on the inclusion of this term.[36] The San Remo Resolution, and subsequently the Mandate, referred only to civil and religious rights. These civil and religious rights are further elaborated in Articles 9, 11, 13, 14, 15, 16, 22 and 23 of the Mandate. In Article 6 there is another reference to the rights of the non-Jewish inhabitants. It provides that the facilitation of Jewish immigration and close settlement of Jews on the land should not prejudice the rights and position of other sectors of the population. It is obvious that this does not refer to political rights, but to rights in the economic sphere, which may be affected by immigration and settlement. Having regard to the foregoing, Kattan's remark that 'it was never agreed that Palestine's indigenous Arab population did not have political rights on a par with the Jews'[37] is incomprehensible. There is, moreover, no provision concerning the establishment of an Arab national home; nor is the recognition of an Arab Agency included in the Mandate. Its establishment, despite the lack of a legal basis in the Mandate, had been proposed by the British government, but was forthwith rejected by the Arabs.[38] The right of immigration of Arabs from other parts of the world into Palestine was completely beyond the scope of the Mandate.

2.2.4. SUMMARY

To sum up, the provisions of the Mandate leave no doubt about the different character of the obligations assumed vis-à-vis, on the one hand, the Jewish people and, on the other hand, the non-Jewish inhabitants of Palestine. The Norwegian member of the Permanent Mandates Commission, Valentine Dannevig, comparing the rights of the Jews and the Arabs in Palestine, aptly remarked that the Arabs as a people had received full rights elsewhere. They were freed from Turkish domination and obtained sovereign rights in five large territories. The only exception was Palestine. A Jewish national Home was to be established there, with all that that meant to the people already settled there. It was obvious to her that, in this respect, the Arabs of Palestine were regarded in a different light from the other peoples referred to in Article 22 of the Covenant.[39]

If we characterise the objective of the mandate system under Article 22 of the Covenant as the implementation of the principle of self-determination, it is clear that the Palestine Mandate was created to ensure the self-determination of the Jewish people.[40] With reference to a topical

[36] Minutes of the Palestine Meeting of the Supreme Council of the Allied Powers, held in San Remo at Villa Devachan, 24 April 1920, Office for Israeli Constitutional Law (2015), http://www.israellegalfoundation.com/sanremominutes.html.
[37] Kattan (n 10) 61. cf also Natasha Wheatley, 'Mandatory Interpretation: Legal Hermeneutics and the New International Order in Arab and Jewish Petitions to the League of Nations' (2015) 227 *Past and Present* 205, 207, who observes that the text of the Mandate denied the Arabs all political rights.
[38] Laqueur (n 16) 455.
[39] Permanent Mandates Commission (n 1) Fourteenth Meeting, 16 June 1939, https://unispal.un.org/DPA/DPR/unispal.nsf/9a798adbf322aff38525617b006d88d7/d54db2b34342ae5d052565e9004f24df?OpenDocument.
[40] cf also Grief (n 22) 116–35.

discussion, it can be remarked that the unique character of the Mandate is supportive of the claim that Israel is a Jewish state. Other Mandates, such as that for Syria and the Lebanon, were concerned with the self-determination of Arab nations.

2.3. THE POWERS AND DUTIES OF THE MANDATORY POWER

The Palestine Mandate is unique because of its beneficiaries, in comparison with all the other mandates under the mandate system. Even compared with the other A Mandates (former parts of the Ottoman Empire), it is also unique because of the powers of the Mandatory power. There is a close connection between both aspects. Article 1 determines that '[t]he Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate'. This provision vested the British government with powers close to full governmental powers. There are striking differences with, for example, the Mandate for Syria and the Lebanon. The first Article of that Mandate provided for the adoption of an organic law for Syria and the Lebanon, to be framed in agreement with the 'native authorities', taking into account the rights, interests and wishes of the inhabitants. It also refers to the facilitation of the progressive development of Syria and the Lebanon as independent states.[41] This is different from the powers of the British government under the Mandate for Palestine. It is not surprising that these powers were the target of criticism by the Palestine Arab delegation, who had the opportunity to comment upon the draft of the British Palestine Order in Council, which was to be promulgated to implement the Mandate.[42] The delegation rejected the Balfour Declaration, which was included in the Preamble to the Order in Council, and requested the creation of a national independent government. They pointed in that connection to Article 22(4) of the Covenant of the League of Nations, which refers to 'the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone'. The Colonial Office replied by stating that the 'creation at this stage of a national government would preclude the fulfilment of the pledge made by the British government to the Jewish people'.[43] The Principal Allied powers, therefore, followed a 'somewhat different interpretation' of the relevant provisions. That is comprehensible. It would have been impossible to implement the obligation to ensure the establishment of a Jewish national home if the governance of Palestine were to be entrusted to a body composed of the representatives of the inhabitants of the territory at that time. It was clear from the very beginning that they would never accept the right of Jews to immigrate, as guaranteed by the Mandate; nor would they be prepared to ensure the creation of a Jewish national home as such. In other words, recognition of the unique beneficiaries of the Mandate also required a unique approach towards the powers of the Mandatory power.[44] Its extended powers were necessary precisely because of the special difficulties to be expected

[41] French Mandate (n 25) 177.
[42] Palestine Correspondence (n 26) letter dated 21 February 1922.
[43] ibid, letter dated 1 March 1922.
[44] cf also Kattan (n 10) 78–98.

when establishment of the Jewish national home had to be implemented. The League of Nations was forced to impose an 'autocratic order' – the expression used by Spiegel – which could realise the purpose of the Mandate for Palestine, even against the will of the majority of the population at that time.[45]

2.4. JUSTIFICATION OF THE UNIQUE CHARACTER OF THE MANDATE FOR PALESTINE

In the 1922 White Paper the British Secretary of State, Winston Churchill, declared against the background of the Balfour Declaration that the Jewish people are in Palestine 'as of right and not on the sufferance'.[46] This right is recognised in the Preamble to the Mandate. It gives two related justifications for its unique character.

2.4.1. HISTORICAL CONNECTION

The Preamble first mentions the historical connection of the Jewish people with Palestine. This is a reference to the Biblical history of the people of Israel,[47] from the time of the exodus to the Promised Land, its nationhood in the times of the Judges and Kings, the establishment of Jerusalem as its religious and political centre with the First Temple, the division into the two Kingdoms of Israel and Judah, the exiles and the return from Babylon, and the building of the Second Temple. The successful struggle of the Maccabees to restore the Jewishness of the nation should also be mentioned. The dispersion after the fall of Jerusalem in 70 CE and the revolts against the Romans did not end the connection of the people with the territory – *Eretz Israel*; nor could the malicious renaming of the Land as 'Paleastina' by the Roman Emperor Hadrian, thereby referring to Israel's arch-enemies, the Philistinians, put an end to it. There have always been Jews living in the territory, and there have always been Jews returning to the Land. Furthermore, the longing for the return to the Land of the fathers never disappeared from the religious life. As it is said in the Passover Haggadah: '… next year in Jerusalem, the rebuilt'. As Stoyanovski observed: 'It may be asserted that the Jewish people as a whole has never ceased to consider Palestine as the Land of Israel (*Eretz Israel*), as various aspects of its daily life, religious or other, clearly indicate'.[48] From the second half of the nineteenth century it was, for many, obvious that the future Jewish national home should be in Palestine. It was the expression of a self-evident truth when the First Zionist Congress in Basel in 1897 mentioned Palestine as the location of the future Jewish national home. The allurement of other territories (such as Uganda) were short lived, precisely because they lacked any relationship with the unbroken historical relationship of the Jewish people with the land of their ancestors. This was the case not only within the Zionist movement. We need think only of the expression used by David Lloyd

[45] Spiegel (n 23) 74.
[46] British White Paper, 3 June 1922, Yale Law School, Avalon Project, 'Documents in Law, History and Diplomacy', 2008, http://avalon.law.yale.edu/20th_century/brwh1922.asp (Churchill White Paper).
[47] Later from post-exilic times, in general, called Jews.
[48] Stoyanovski (n 19) 66.

George, the British Prime Minister, using the Biblical phrase 'from Dan to Beersheva' when referring to territory destined for the Jewish national home.[49]

2.4.2. GROUNDS FOR RECONSTITUTING THEIR NATIONAL HOME

The second justification in the Preamble to the Mandate is the reference to the 'grounds for reconstituting their national home' in Palestine. The word 'reconstituting' is directly linked to the 'historical connection': it assumes that there was a national home before, namely in Biblical times. The grounds for reconstituting it in the first half of the twentieth century relate to the historical developments that explained the urgency of the emigration to Palestine, recognised by the Zionist movement. Herzl and others concluded, with good reasons, that the position of Jews in many parts of Europe was far from safe, to say the least.[50] This was first because of the brutal pogroms in Russia and Romania, as well as the persistent anti-Semitism in many other parts of Europe, including France and the Austrian-Hungarian double monarchy. The backgrounds to the various *aliyahs*[51] are directly linked to the pogroms. The First *Aliyah* (1882–1903) included immigrants who fled from the pogroms in Russia and Romania. The Second (1904–14) brought groups escaping from the pogroms in Russia in 1903 and 1905 to the Land. The Third *Aliyah* (1919–23) was stimulated, on the one hand, by the Balfour Declaration (1917) and, on the other, by the pogroms in the years of the Russian Civil War and the war between Russia and Poland (1919–20).

It is not only the attempts to exterminate Jews at the end of the nineteenth and the beginning of the twentieth centuries that should be taken into account. The grounds for reconstituting the national home of the Jewish people can be found in some two thousand years of persecution. They were eloquently expounded by Lord Balfour in a speech in the House of Lords on 21 June 1922, when he defended the Mandate of Palestine against strong opposition from the Lords.[52] Balfour recalled the unique position and history of the Jewish people and their connection with world religion and world politics. He then drew attention to how 'they have been treated during long centuries'.[53] He mentioned tyranny and persecution and asked the Lords to consider 'whether the whole culture of Europe, the whole religious organisation of Europe, has not from time to time proved itself guilty of crimes against this race'.[54] He referred to persecution by the Church, while the ideas of Jewish philosophers were embodied in its religious doctrine. 'As it

[49] Grief (n 22) 25.
[50] Theodor Herzl, *Der Judenstaat* (Leipzig und Wien 1896); cf also Shlomo Avineri, *Theodor Herzl and the Foundation of the Jewish State* (Weidenfeld & Nicolson, trans Haim Watzman 2013).
[51] From the Hebrew word for 'ascent', meaning in this connection the return to *Eretz Yisrael* – the Land of Israel, *The New Standard Jewish Encyclopedia* (n 15) 71–74.
[52] The text can be found in Israel Cohen (ed), *Speeches on Zionism by the Right Hon. The Earl of Balfour* (Arrowsmith 1928) 40–73. cf also Laqueur (n 16) 203.
[53] Cohen, ibid 60.
[54] ibid 60.

was in the Middle Ages, as it was in earlier times, so it is now'.[55] His appeal to his noble friends is unequivocal:[56]

> Do not your Lordships think that if Christendom, not oblivious of all the wrong it has done, can give a chance, without injury to others, to this race of showing whether it can organise a culture in a Home where it will be secured from oppression that it is not well to say, if we can do it, that we will do it.

Spiegel similarly observes:[57]

> By the granting of this home, a nation which has been persecuted and deprived of its rights will receive justice and the anti-Semitism, this arch evil, that has so far poisoned the living together and cooperation of peoples with the Jews, will lose its sharp edge.

The sacred trust of civilisation towards the Jewish people, mentioned in Article 22 of the Covenant of the League of Nations, is the reparation for the injustice of two millennia.

3. The Retreat of the Mandatory Power

From the very beginning the pledge made in the Balfour Declaration was controversial within British political circles. We have already seen that it met fierce opposition in the House of Lords. The Zionist ideal expressed in the Mandate always had friends and foes, and many others were indifferent to it. All successive British governments had to cope with the consistent and unconditional rejection of the Mandate by Arab leaders in and outside the territory, as well as by representatives of the millions of Muslims in the British Empire, which had inevitable consequences in political and economic fields. All this was reflected in the policies of the Mandatory power over the years. One observes a gradual retreat by Britain from its obligations. The British policies undermined the unique character of the Mandate and, in doing so, paved the way for its ultimate denial. This development is marked by the subsequent White Papers produced by the British government.

3.1. The Churchill White Paper

In June 1922 the then Colonial Secretary, Winston Churchill, set out the policies to be followed under the yet to be officially adopted Mandate in the first White Paper in this sequence, which became known as the Churchill White Paper.[58] Its purpose was to address concerns expressed by

[55] ibid 61–62.
[56] ibid 62.
[57] My translation from the original: 'durch die Gewährung dieser Heimstätte soll einer seit zwei Jahrtausenden verfolgten und entrechten Nation Gerechtigkeit widerfahren und den Antisemitismus, jenem Erzübel, das Zusammenleben und die Zusammenarbeit der Völker mit den Juden bisher vergiftet hat, die Spitze abgebrochen werden: Spiegel (n 23) 76. Manka Spiegel was a lawyer from Graz (Austria).
[58] Churchill White Paper (n 46).

both the Arab and Jewish representatives on the future of Palestine. One the one hand it underlined that the purpose was not to create a wholly Jewish Palestine, but to found a Jewish national home *in* Palestine. It also excluded any provision that the Zionist Organization in Palestine would have any share in the administration of the country. The 'special position' of this organisation related only to measures affecting the Jewish population and to assistance in the general development of the country. At this stage some doubts may already have arisen as to the full recognition of the unique character of the Mandate, but the White Paper continued by underlining the commitment of the British government to the Balfour Declaration, confirmed in San Remo and the Treaty of Sèvres, which was 'not susceptible of change'. It then expanded on the development of the flourishing Jewish community in Palestine, referring to its own political organs and emphasising that the Jewish people are in Palestine 'as of right and not on the sufferance'. The government also underlined that in order to fulfil its policy, it was necessary for the Jewish community to be increased by immigration, although this should not exceed the economic capacity of the country. This criterion – which is not found in the Mandate itself, which refers in Article 6 only to 'suitable conditions' – was used officially, until 1939, as the argument to restrict immigration. In short, while the commitments which founded the unique character of the Mandate are confirmed, the White Paper is at the same time an early example of the balancing exercise which eventually would undermine the unique character of the Mandate.

3.2. THE PASSFIELD WHITE PAPER

3.2.1. CONTENT

The second step in the development is marked by the Passfield White Paper, issued in October 1930 – not long after the August 1929 riots in Jerusalem at the Western Wall and in Hebron and in Safed, which left many Jews dead. Following these disturbances, the British High Commissioner in Palestine, John Chancellor, proposed that his government should first reaffirm the validity of the Balfour Declaration along the lines of the Churchill White Paper, while stipulating restrictions on the growth of the Jewish community (*Yishuv*). Secondly, he suggested that the government propose to the League of Nations an amendment of Articles 2, 4, 6 and 11 of the Mandate in order to remove the provisions 'which give or appear to give the Jews a privileged position'.[59]

The government did not go that far, but a change of policy can be derived from a declaration made by Prime Minister Ramsay MacDonald in the House of Commons on 3 April 1930. He started with a reference to the Mandate as 'an international obligation from which there can be no question of receding'.[60] After quoting the central obligation under the Mandate (Article 2), the Prime Minister proceeded by stating that 'a *double undertaking* is involved, to

[59] Gabriel Sheffer, 'Intentions and Results of British Policy in Palestine: Passfield's White Paper' (1973) 9 *Middle Eastern Studies* 43, 44.
[60] Prime Minister's Statement, HC Deb 3 April 1930, vol 237, cc 1466–7, 1466.

the Jewish people on the one hand, and to the non-Jewish population of Palestine on the other'. He continued by stating that 'it is the firm resolve of His Majesty's Government to give effect, in equal measure, to both parts of the Declaration [apparently meaning the Balfour Declaration] and to do equal justice to all sections of the populations of Palestine'.[61] The reference to 'both parts of the Declaration' and to 'double undertaking' strongly suggests, without spelling it out, that the obligations of the Mandatory power under the Palestine Mandate towards the Jews and the Arabs are of an identical nature. The White Paper of Lord Passfield, the Colonial Secretary at that time, elaborated on the principle of the 'double undertaking'.[62] The suggestion was made that the failure to recognise this double undertaking was the background to the agitation of previous years. The idea that the principal feature of the Mandate is formed by the obligations regarding the Jewish national home, and that the safeguarding of the rights of the non-Jewish community are merely secondary considerations, was qualified by Passfield as totally erroneous. The White Paper quotes the statement of the British representative made before the Permanent Mandates Commission, who emphasised that the obligations in the Mandate with regard to the two sections of the population are of equal weight and are not irreconcilable. The White Paper envisaged the introduction of a form of self-government which takes into account the interests of the community as a whole, and in that connection refers to the creation of a new legislative Council, to include unofficial members from all sections of the population. Article 6 of the Mandate (concerning immigration) was used to underline the duty of the Mandatory power to reduce or if necessary suspend immigration until the unemployed from the 'other sections' (meaning non-Jewish) of the population were in a position to obtain work.[63]

The White Paper concluded with an appeal to Arabs for recognition of the facts of the situation and for a sustained effort at cooperation. Jewish leaders were asked to recognise the necessity of making some concessions 'in regard to independent and separatist ideals which have been developed in some quarters in connection with the Jewish National Home'.

3.2.2. CRITICISM

It is easy to read the Passfield White Paper as a major step towards erasing the unique character of the Palestine Mandate and to make it look similar to the other A Mandates. It has been qualified as the first attempt to limit the Jewish national home.[64] It can be imagined that the White Paper aroused indignation in Zionist circles and among British politicians who were committed to the original ideals of the Balfour Declaration. Churchill published an article on 2 November 1930 (the anniversary of the Balfour Declaration) stating that Lord Passfield overlooked or ignored that the obligations under the Mandate to Jews and Arabs were totally different in character.

[61] ibid 1466 (emphasis added).
[62] 'Palestine: Statement of Policy by His Majesty´s Government in the United Kingdom', HMSO, October 1930 (Passfield White Paper).
[63] ibid para 28 (quotation marks in the original).
[64] Carly Beckerman-Boys, 'The Reversal of the Passfield White Paper, 1930 – I: A Reassessment' (2015) 51 *Journal of Contemporary History* 1, 2.

He stressed that his White Paper of 1922 had recognised that the Mandate included an obligation to the Zionist movement all over the world.[65] The criticisms of the Passfield White Paper urged Prime Minister Ramsay MacDonald to remove 'certain misconceptions and misunderstandings' in a letter to Dr Chaim Weizmann dated 13 February 1931. In this letter – presented as an authoritative interpretation of the White Paper, but recently characterised as its reversal[66] – he confirmed the concept of the double undertaking. At the same time he underlined that the undertaking in the Mandate was towards the Jewish people everywhere and not only to the Jewish population of Palestine. He stressed his commitment not only to the Articles but also to the Preamble to the Mandate, and the remaining positive obligation to facilitate Jewish immigration and close settlement of Jews on the land. The objective to control immigration was, in his view, not something new and it would be guided by the absorptive principle. At least on paper, the uniqueness of the Mandate was preserved. The situation on the ground, however, deteriorated and the pressure to restrict immigration of Jews was growing. The criterion of economic absorptive capacity during the Arab Revolt (from 1936) was extended to political concerns.[67] In response to the continuing or even growing animosity, the Peel Commission published a report at the request of the government, which included the proposal to terminate the Mandate and to replace it by a 'Partition Plan'.[68] This plan was immediately rejected by the Arabs, and in its proposed design also by the Zionist Congress.[69] It met serious opposition both within and outside the government and was eventually abandoned.

3.3. THE MACDONALD WHITE PAPER

3.3.1. CONTENT

The final blow by the British government to the unique character of the Mandate came with the third White Paper in 1939.[70] It identified four main obligations under the Mandate, suggesting that they had the same rank:

- protection of the Holy Places (on which there was no dispute);
- the establishment of the Jewish national home;
- protection of the civil and religious rights of all inhabitants; and
- the development of self-governing institutions.

The government now unequivocally made clear that it was not part of its policy that Palestine should become a Jewish state; that would be against both the obligations to the Arabs under the Mandate and the assurances given to them in the past. The government's objective was self-

[65] Gilbert, *Churchill and the Jews* (n 31) 93–94.
[66] Beckerman-Boys (n 64) 1–2.
[67] Rory Miller, 'Introduction' in Rory Miller (ed), *Britain, Palestine and Empire* (Ashgate 2010) 9.
[68] 'Palestine Royal Commission Report, Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty', HMSO, July 1939.
[69] TG Fraser, 'A Crisis of Leadership: Weizmann and the Zionist Reactions to the Peel Commission's Proposals, 1937–8' (1988) 23 *Journal of Contemporary History,* 657, 670–71.
[70] Churchill White Paper (n 46).

government for the people of Palestine and eventually the establishment of an independent Palestinian state for both Arabs and Jews. The immigration of Jews should no longer be subject only to economic absorptive capacity, but also to political concerns. The immigration had to be limited to 75,000 in the first five years, subject to economic absorptive capacity. After this five-year period no further Jewish immigration should be permitted, unless the Arabs of Palestine were prepared to accept it.

3.3.2. Defence and criticism in the Permanent Mandates Commission

The departure from the obligations because of the unique character of the Mandate is even more clear in the defence of this change of policy by the Colonial Secretary, Malcolm MacDonald, before the Permanent Mandates Commission of the League of Nations in Geneva in June 1939.[71] There he used all his rhetorical skills in an effort to convince the members of the Commission that the new policy remained within the limits of the obligations under the Mandate. He elaborated upon the concept of 'civil and religious rights' in Article 2 and that of 'rights and position' (of the non-Jewish population) in Article 6 of the Mandate, and tried to prove that these expressions referred to all political and social rights of a free people (which meant in this connection the Arabs in Palestine).

He sought support for this interpretation in the spirit of Article 22 of the Covenant of the League of Nations and in a message delivered to King Hussein (of the Hejaz) in 1918 by Commander Hogarth on behalf of the British government, as he had a few days earlier in the House of Commons.[72] This message not only explained the significance of the Balfour Declaration to the Arab ruler, but also that its ideal should be realised only in so far as it was compatible with the freedom of the existing population, both in economic and political terms, and also that no group of people should be subject to another.

It is an understatement to say that members of the Commission were surprised that this message was delivered, after 17 years of silence, to justify a new interpretation of the rights of the non-Jewish population in Palestine,[73] as the Hogarth message did not play a role in earlier debates. In addition, the new interpretation was criticised in the strongest terms by members of the Commission. According to the Swiss member, William Rappard, it led to an interpretation of the Mandate which was self-contradictory: it is not possible to recognise the right to a national home of the Jewish people while, at the same time, recognising a similar right of another people within the same country. The Norwegian member, Valentine Dannevig, asked how the promise that neither people should be subjected to the other could be kept if the Arabs were given a right to decide on the admission of Jews to the territory. According to the Dutch member, Baron Van Asbeck, 'the emphasis has been shifted from the Jews to the Arabs'.[74] The 'new interpretation'

[71] League of Nations Permanent Mandates Commission, Minutes (n 1).
[72] HC Deb 22 May 1939, vol 347, cc 1937–2056, col 1951; on the Hogarth message cf also Kattan (n 10) 47.
[73] League of Nations Permanent Mandates Commission, Minutes (n 1) Fourteenth Meeting.
[74] ibid.

proposed by the British government was, in his view, contrary to both the Balfour Declaration and the Mandate, because it no longer distinguished between the paramount obligation – the establishment of the Jewish national home – and the subordinate obligation – the protection of the civil and religious rights, but not the political rights, of the non-Jewish peoples in Palestine. The Commission concluded that the 1939 White Paper was not in accordance with the interpretation of the Mandate it had always followed.[75] The majority of four did not feel able to state that the White Paper was in conformity with the Mandate, having regard to its terms and the intentions of its authors. The minority of three concluded that the existing circumstances would justify the policy of the White Paper.

3.3.3. CRITICISM FROM CHURCHILL AND WEIZMANN

Earlier, in May 1939, the White Paper had been approved and adopted by the majority of the members of the British Parliament. Winston Churchill voted against it. He stressed that the paramount duty of the government was the establishment of a Jewish national home. The proposals in the White Paper were qualified as 'a breach of a solemn obligation', 'a violation of the pledge … [and an] abandonment of the Balfour Declaration'.[76] He underlined that his own White Paper of 1922 intended to make the establishment of self-governing institutions subordinate to the paramount pledge to establish a Jewish national home.[77] In a letter of 31 May 1939, to the High Commissioner for Palestine (to be forwarded to the Permanent Mandates Commission), Chaim Weizmann gave his reaction on behalf of the Jewish Agency for Palestine. He qualified the White Paper as a virtual repudiation of the Balfour Declaration and remarked that the document abrogated the recognition of the special status of the Jewish people as a whole in relation to Palestine, as recognised in the Balfour Declaration and the Mandate. It no longer recognised the *sui generis* character of the Palestine Mandate. The new policy contradicted the trend and purpose of the Mandate, ignored its Preamble and was in conflict with various Articles.[78] Particularly interesting is the point he made in respect of the reference to self-governing institutions in Article 2 of the Mandate. In his view this was a direct corollary of the provision of the Jewish national home, and not a pledge to the Arabs.[79] In the Memorandum on the Legal Aspects of the White Paper, which supplemented Weizmann's letter, it was underlined that the reference to 'suitable conditions' in connection with Jewish immigration in Article 6 of the Mandate could not be used as justification for subjecting Jewish immigration to an Arab veto, which would be the consequence of the implementation of the White Paper.[80] It is not difficult to conclude that,

[75] Grief (n 22) 208.
[76] Gilbert (n 33) 230.
[77] Quoted in UNSCOP, Report to the General Assembly, 'Continuation of the Discussion of the Question of Palestine', 29 November 1947, Vol. 1, UN Doc A/PV.128, 42, para 79.
[78] Jewish Agency for Palestine, 'The Jewish Case Against the Palestine White Paper, Documents Submitted to the Permanent Mandates Commission of the League of Nations', 1939, 5.
[79] ibid 8.
[80] ibid 26–27.

notwithstanding the British government's efforts to present the White Paper as a policy which remained within the framework of the Mandate, it represented a denial of its unique character and thereby a policy at odds with both the words and the spirit of its obligations.

4. The Unique Character of the Mandate: Challenges After its Termination

4.1. United Nations Special Committee on Palestine (UNSCOP)

In 1947 Britain decided to give up its responsibilities under the Mandate and engaged the United Nations to find a resolution of the question of Palestine. In its report UNSCOP, which had been established to advise on this issue, recognised in a sense the uniqueness of the Palestine Mandate. It acknowledged that the Mandate involved international commitments to the Jewish people as a whole.[81] It also observed that the reference in the Balfour Declaration (and therefore in the Mandate) to the civil and religious rights of the non-Jewish communities was different from Hogarth's message, which promised political freedom for the Arabs.[82] However, the recommendation by UNSCOP was not to preserve the Mandate but to terminate it, because the obligations to establish the Jewish national home in Palestine and to develop self-governing institutions appeared in practice to be incompatible. The Report led to Resolution 181(II) adopted by the General Assembly of the UN (Partition Resolution), which included the Partition Plan, enabling the termination of the Mandate and the establishment of a Jewish and an Arab state.[83] However, rejection of the Resolution by the Arabs made the implementation of the Resolution impossible. The Resolution had no binding character, and it could not be regarded as a trusteeship agreement concerning Palestine in terms of Article 79 of the UN Charter. It was simply beyond the powers of the General Assembly to decide on the future of the people and territory subject to the Mandate for Palestine.

4.2. Article 80 Charter of the United Nations

The departure of the Mandatory power and the dissolution of the Mandator (the League of Nations) in 1946, and even the proclamation of the State of Israel on 14 May 1948, did not make the original Mandate irrelevant from a legal perspective. This relevance is the consequence of Article 80 of the UN Charter, the provision covering the consequences of the transition from the mandate system to the UN trusteeship regime. Its first paragraph[84] reads:

> Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded,

[81] UNSCOP Report, September 1947 (n 28) para 146.
[82] ibid para 172.
[83] UNGA Res 181(II) (29 November 1947), 'Future Government of Palestine', UN Doc A/RES/181(II).
[84] UN Charter (n 5) art 80(1) (emphasis added).

> nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any *peoples* or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

Article 80 of the UN Charter is often referred to as 'the Palestine Article' or the 'Palestine Clause', which indicates that it was drafted with the Mandate for Palestine in mind.[85] From the drafting history it is clear that a Jewish delegation present at the San Francisco Conference in 1945 intended to protect the right of settlement of the Jewish people guaranteed by the Mandate.[86] It was successful in having the word 'peoples' included in the text, which was missing in the original draft. All participants in the discussions on the draft knew that the term 'peoples' referred to the Jewish people.[87] By including this term the drafters of the UN Charter explicitly observed the general principle of law of respect for acquired legal rights. As already indicated, in respect of Palestine a trusteeship agreement has never been concluded.

4.3. THE INTERNATIONAL COURT OF JUSTICE

The ICJ has also underlined in several cases the relevance of the rights bestowed by a mandate on the people concerned. The Court argued in 1950, in its *South West Africa* advisory opinion, for the continuing relevance of the obligations and rights under a mandate as follows:[88]

> Their raison d'être and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.
>
> This view is confirmed by Article 80, paragraph 1, of the Charter, which maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System.

In its 1971 *Namibia* advisory opinion, the Court again emphasised the relevance of a mandate, long after the dissolution of the League and its mandate system.[89] In its *Wall* advisory opinion in 2004[90] the Court in general terms mentioned again the objectives of the mandate system, namely the interest of the inhabitants of the territory, and of humanity in general. It described the

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[85] Grief (n 22) 257.

[86] cf Shabtai Rosenne, 'Israel and the United Nations: Changed Perspectives, 1945–1976' (1978) 78 *American Jewish Year Book*, 3, 4–5; Eugene Rostow, *The Future of Palestine*, National Defense University, McNair Paper 24, November 1993, 10 and n 15; Grief (n 22) 255–57; Jerold Auerbach, 'How Benzion Netanyahu Helped Put in the UN Charter a Clause that Could yet Save the Jewish State', *The Sun* (*New York*), 2 May 2012, http://www.nysun.com/foreign/how–bezion–netanyahu–helped–put–in–the–un/87809.

[87] Grief (n 22) 257.

[88] *International Status of South-West Africa Case*, Advisory Opinion [1950] ICJ Rep 128, 133.

[89] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, [55].

[90] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 7). For a critical appraisal of this Opinion cf Matthijs de Blois, 'Bad Law and a Hard Case? The Impact of the *Wall* advisory

Mandate as an international institution with an international object, a sacred trust of civilisation. The ICJ, however, ignored the central objective of the Mandate, laid down in its Article 2, namely the establishment of a national home for the Jewish people in the geographical area called Palestine in those days, which not only concerned the interests of the inhabitants of the territory of Palestine, but also of the members of the Jewish people not yet living there. The provision was not even mentioned. Implicitly the ICJ seems to have adopted a revision of the contents of the rights and obligations under the Mandate, which denies its unique character, an approach which had already surfaced in the gradual adaptations of British policies in the 1930s. This is exemplified by the Court's approach to the principle of self-determination, which is one of the cornerstones of its Opinion. In that connection it refers to the basis of the League of Nations mandate system.[91] These general remarks are then applied to 'the Palestinian people'.[92] Without stating it in explicit terms, the suggestion is very strong that the Palestinian people qualifies as a subject of the right to self-determination under the Mandate.[93] That was also the conclusion of the Dutch international lawyer, Paul de Waart, in his comment on the advisory opinion. He observes:[94]

> The Court recalled in the *Wall* case its findings in the *Namibia* case that the current developments in international law regarding non-self-governing territories leave little doubt that the ultimate objective of the sacred trust referred to in Article 22, paragraph 1, of the LoN Covenant was the self-determination of the peoples concerned. This confirms that the right of the Palestinian people to self-determination is rooted in the LoN Mandate.

With satisfaction, he observes the advisory opinion's 'outdated ideas … among Jewish and Christian Zionists that the territory of Eretz Israel, including the Palestine Mandate, still belongs to the Jewish people because of the Old Testament Land Promise'.[95] The silence of the Court as to the central provision of the Mandate is all the more surprising as we see that it was willing to quote Article 13 of the Mandate on free access to the Holy Places.[96] This provision is quoted in the context of freedom of movement, which purportedly was restricted by the construction of the Wall. The Court seems to have taken seriously the civil and religious rights of all the inhabitants, also mentioned in Article 2 of the Mandate, while overlooking the establishment of the Jewish national home.

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opinion of the ICJ' in Cedric Ryngaert, Erik Molenaar and Sarah Nouwen, *What's Wrong with International Law? Liber Amicorum Alfred HA Soons* (Brill/Nijhoff 2015) 94–113.

[91] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 7) [88].

[92] ibid [118].

[93] This was more explicit in the Separate Opinion of Judge Elaraby, who, basing himself primarily on Article 22 of the Covenant of the League of Nations, also makes no mention of the specific obligation in Article 2 of the Mandate: ibid, separate opinion of Judge Elaraby 246, [2.1].

[94] Paul de Waart, 'International Court of Justice Firmly Walled in the Law of Power in the Israeli–Palestinian Peace Process' (2005) 18 *Leiden Journal of International Law* 467, 484.

[95] ibid 478, referring to Genesis 12:7.

[96] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 7) [129].

4.4. ACADEMIC WRITINGS

The 'revisionism' in the Court's reading of the Mandate can also be found in some academic writings, as already exemplified by the case comment of De Waart. Another notable example is John Quigley, who defends the thesis that the State of Palestine – as aspired to by Palestinian Arabs – derives its legitimacy from the Mandate for Palestine.[97] The Mandate, based upon Article 22 of the Covenant of the League of Nations, recognised the 'people', referring apparently to the inhabitants of the territory of Mandatory Palestine, as the ultimate holder of sovereignty. His views are rooted in a particular view of history, which sees the Palestinians as descendants of the Canaanites, and which were the majority population 'even during brief periods when the Hebrews controlled certain areas'.[98] From this perspective it is understandable that there is a strong urge to disregard the unique character of the Mandate. However, it remains surprising that a lawyer ignores the explicit provisions of the Mandate itself. Of course, Quigley is aware of the fact that the Palestine Mandate, by incorporating the Balfour Declaration, was creating rights for a potential immigrant population, but that is held to be in conflict with the League's philosophy regarding the mandates, namely, to promote the self-determination of a territory's inhabitants.[99] He seems to overlook that the Council of the League itself adopted the Mandate for Palestine with its unique character. The 'League's philosophy' is more likely to be the philosophy of the author. In the writings of Francis Boyle we find a similar reading of the Palestine Mandate.[100] This writer defends the idea of the continuing relevance of the Mandate, referring to Article 80 of the UN Charter as a legal basis for the State of Palestine, but he ignores the unique character of the Mandate. He refers to Article 2 only in connection with the safeguarding of the civil and religious rights of all the inhabitants.[101] This ignores the unique character of the Mandate, which may not be a surprise in a book that strongly advocates the case for a Palestinian state.

The same could be said of the approach of Victor Kattan. In his book *From Coexistence to Conquest* he, on the one hand, emphasises the Arab opposition to the Balfour Declaration and the Palestine Mandate;[102] on the other hand, he defends the position that the Mandate supports the right to self-determination of the Palestinian Arabs.[103] That was already clear from his earlier related assumption that the 'civil rights' referred to in its Article 2 included political rights. The specific reference to the establishment of the Jewish national home in Article 2 and the references to rights of Jews in other provisions are not overlooked, but are interpreted as being

[97] cf inter alia Quigley (n 9) 429–40.
[98] John Quigley, 'The Oslo Accords: More than Israel Deserves' (1997) 12 *American University International Law Review* 285. His view of the history of Palestinian Arabs is not only uncommon, but also incorrect; cf inter alia Joan Peters, *From Time Immemorial: The Origins of the Arab-Jewish Conflict over Palestine* (Harper and Row 1984).
[99] John Quigley, 'Competing Claims to the Territory of Historical Palestine' (2002) 59 *Guild Practitioner* 76, 79.
[100] Francis Boyle, *Palestine, Palestinians and International Law* (Clarity Press 2003). cf also Boyle (n 6) 301.
[101] Boyle, ibid 38.
[102] Kattan (n 10) 78–98.
[103] ibid 117–45.

necessary because the vast majority of Jews were not yet resident in Palestine. This approach may even be interpreted as a recognition of a kind of unique character of the Mandate for Palestine, but it is definitely at odds with the interpretation of the uniqueness related in previous paragraphs. It differs fundamentally from what in my view was intended not only by the Zionist movement, but also by the drafters of the Mandate and the Permanent Mandates Commission of the League of Nations.

John Dugard also appears to feel sympathy for the new approach to the meaning of the Mandate.[104] He concludes from the ICJ's advisory opinion that the 'sacred trust' contained in the Mandate for Palestine did not terminate with the dissolution of the League. From this sacred trust he subsequently derives the duty to support Palestinian statehood. He accepts the legitimacy of the State of Israel, but the sacred trust in respect of the Palestinian people is still waiting for compliance. Finally, in the findings of the Russell Tribunal on Palestine, which included John Dugard as one of its prominent members, it was even stated that the creation of the State of Israel 'violated the principle of self-determination in respect of the mandate territory of Palestine'.[105] That is the unique character of the Mandate upside down. Instead of being the legitimate outcome of the implementation of the Mandate, which embodied the self-determination of the Jewish people, the creation of Israel is seen as a violation of the principle of self-determination.

5. Legal Consequences

5.1. The Legitimacy of Israel as a Jewish State

The denial of the unique character of the Mandate for Palestine is not just an interesting reappraisal of historical facts, or perhaps an enlightening new interpretation of an obscure legal provision which may vivify the academic debates of historians or lawyers; it may also have legal consequences in practice. In its most extreme version it seems to imply the ignorance of the 'birth certificate' of the State of Israel, which could affect the legitimacy of Israel as a Jewish state. This kind of idea might have inspired what, from the beginning, was the very controversial Conference on 'International Law and the State of Israel: Legitimacy, Responsibility and Exceptionalism', which was scheduled to take place in April 2015 at the University of Southampton. It was cancelled by the university for security reasons. For our purposes it is important to point to one of the three main pillar themes of the Conference – namely the legality, validity and legitimacy of what is referred to as the Israeli state:[106]

[104] Dugard (n 11); John Dugard, 'A Tale of Two Sacred Trusts: Namibia and Palestine' in Tiyanjana Maluwa (ed), *Law, Politics and Rights: Essays in Memory of Kader Asmal* (Martinus Nijhoff 2014) 287.
[105] 'Findings of the Final Session of the Russell Tribunal on Palestine', Brussels, 16–17 March 2013, http://www.russelltribunalonpalestine.com/en/full-findings-of-the-final-session-en.
[106] Oren Ben-Dor, 'CfP: International Law and the State of Israel: Legitimacy, Responsibility and Exceptionalism', University of Southampton, 17–19 April 2015, *Critical Legal Thinking* 10 April 2014, http://criticallegalthinking.

> A state whose very nature, indeed its *raison d'être,* is based on constraining both the egalitarian, transformative potential that constitutes the impulse of international law as well as any free internal constitutional reflection; giving as it does constitutionally entrenched, privileged citizenship to Jews.

Without mentioning the Mandate, it refers in fact to its unique character and the statement seems to imply that because of that the State of Israel as a Jewish state has no legitimacy under international law. In a sense that is no surprise considering that years ago one of the initiators of the Conference had claimed that Israel has no right to exist as a Jewish state.[107]

5.2. 'OCCUPIED TERRITORIES' AND SETTLEMENTS

Even if the legitimacy of the State of Israel as such is not called into question, the denial of the unique character of the Mandate for Palestine may have legal consequences. That is exemplified by the advisory opinion of the ICJ in the *Wall* case. We have already seen that the ICJ did not pay attention to the central obligations and rights under the Mandate. This brought the Court to the underpinning of the Palestinian right to self-determination by reference to the mandate system. The approach of the Court also affects other important legal issues. Attention to the unique character of the Mandate could have informed the conclusions as to the status of the so-called 'occupied territories', meaning the territories of Judea and Samaria, or the 'West Bank', which came under Israeli control in June 1967. The Court, without much ado, concluded that these territories are occupied territories in terms of international law. Taking the rights under the Mandate seriously could have supported the conclusion that the territories, as part of the original Mandated territory, were part of the area destined for the establishment of the Jewish national home, and which were occupied by Israel after aggression by Arab states. Therefore, arguably they are not typical occupied territories. Respect for the unique character of the Mandate could also have brought the Court to a different approach towards the Jewish settlements in these territories. The Court, referring to Article 49(6) of the Fourth Geneva Convention, concluded that the settlements were illegal. While this interpretation of Article 49(6) in itself is disputable, the Court could, apart from that, have come to a different conclusion if it had kept the unique character of the Mandate in mind. The right of settlement of Jews guaranteed by Article 6 of the Mandate extends to Judea and Samaria, as parts of the original mandate territory. For that reason it is hard to conclude forthwith that the settlements are illegal.[108] It is rather obvious that the conclusions of the Court as to the legality of the security barrier are based on a denial of the Mandate's unique character. Although the opinion is not binding, it dominates legal and political debates on the conflict between Israel and the Palestinians. It is seen by many as the undisputable standard for the legal aspects of the Israeli–Palestinian conflict. It also inspires actions by civil society and gives support

com/2014/04/10/cfp-international-law-state-israel-legitimacy-responsibility-exceptionalism (emphasis in the original).

[107] Oren Ben-Dor, 'Why Israel Has No "Right to Exist" as a Jewish State', *Counterpunch,* 20 November 2007, http://www.counterpunch.org/2007/11/20/why-israel-has-no-quot-right-to-exist-quot-as-a-jewish-state/print.

[108] cf also Eugene V Rostow, 'Notes and Comments' (1990) 84 *American Journal of International Law* 717.

to the so-called BDS campaign against Israel. Even more importantly, the ICJ's advisory opinion influences the appreciation of the position of Israel in its relations with foreign states and international organisations. The rebuttal of standard assumptions on the territories and the settlements, with arguments derived from the Mandate, has become more difficult.

5.3. PALESTINIAN SELF-DETERMINATION

Maybe the most remarkable consequence of the denial of the unique character of the Mandate is its recent use by representatives of Palestinian Arabs. From the very beginning those who spoke on their behalf were very critical of the Mandate and its predecessor, the Balfour Declaration. In the 1922 correspondence with the British Colonial Secretary, Winston Churchill, they vociferously objected to the undertaking to establish a Jewish national home as implied by these texts.[109] Time and again over the following years they submitted that the Mandate was not in conformity with Article 22(4) of the Covenant of the League of Nations, precisely because of the former's unique character.[110] It is therefore not surprising that the Palestinian National Charter, in both its 1964 and the 1968 versions, rejects the validity of the Mandate. Article 20 of the most recent version states:[111]

> The Balfour Declaration, the Mandate for Palestine, and everything that has been based upon them, are deemed null and void. Claims of historical or religious ties of Jews with Palestine are incompatible with the facts of history and the true conception of what constitutes statehood. Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own; they are citizens of the states to which they belong.

It has to be admitted that this approach of the Mandate takes its unique character seriously. For that very reason the Mandate is rejected. In the Palestinian Declaration of Independence of 14 November 1988, there is no reference to the Mandate. It states only that the international community in Article 22 of the Covenant of the League of Nations of 1919 and in the Lausanne Treaty of 1923 had recognised that the Palestinian Arab people, like the other Arab peoples that had broken away from the Ottoman Empire, was a free and independent people. From this development it may be concluded that initially the qualification of the Mandate as being null and void or completely outdated was seen as the best political strategy to criticise the existence of Israel or, at least, to defend a two-state solution. Apparently, having regard to the application before the International Criminal Court of 25 July 2014, referred to above in the Introduction, the strategy has been changed. The Palestinian Authority now uses the Palestine Mandate as an important argument for the pre-existence of Palestine to the creation of Israel.

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[109] Palestine Correspondence (n 26)

[110] cf Henry Cattan, *Palestine and International Law* (Longman 1973); Division of Palestinian Rights, *The Origins and Evolution of the Palestine Problem: 1917–1988* (United Nations 1990).

[111] The Palestinian National Charter: Resolutions of the Palestine National Council, 1–17 July 1968, The Avalon Project, Yale Law School, 2008, http://avalon.law.yale.edu/20th_century/plocov.asp#art20.

It presents Palestine as having during the Mandate 'the legal order of a State under international law that was distinct and independent from any other States'. It is clear that the denial of the unique character of the Mandate paved the way for this *volte face.* The new Palestinian light on the Mandate is likely to have its effects on negotiations with Israel. It will give them an additional argument to oppose recognition of Israel as a Jewish state. That the foregoing focuses on the change of the Palestinian position with regard to the Mandate does not mean that it is unique in the changing views on the legal meaning of the relevant texts in the framework of the conflict with Israel. Another example, which is beyond the scope of this contribution, is the variation in the Israeli position on the status of 'disputed territories' over the years, more specifically as to the applicability of the Fourth Geneva Convention.[112]

6. FINAL REMARKS

The Mandate for Palestine has a unique character, regarding both its beneficiaries, the Jewish people, wherever they live, and the obligations of the Mandatory power. It provides a strong argument for the legitimacy of Israel as a Jewish state. By virtue of Article 80 of the UN Charter, it is an argument that still has a legal basis in international law. At the same time we have seen that the unique character of the Mandate has been a burdensome stone right from the beginning. Representatives of Palestinian Arabs have rejected it as being incompatible with their right to self-determination. The policies of the Mandatory power, the British government, show a gradual departure from its obligations. The establishment of the Jewish national home, instead of being the primary obligation, became just one of the duties of equal weight and content as others, under the Mandate. After the establishment of the State of Israel, the relevance of the mandatory system in the light of Article 80 of the UN Charter has been recognised inter alia by the ICJ. The unique character of the Mandate for Palestine, however, has been kept under wraps. That is arguably not without consequences for the recognition of Israel as a Jewish state and for the right of the Palestinians to self-determination.

[112] cf, eg, Nissim Bar-Yaacov, 'The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip' (1990) 24 *Israel Law Review* 485.

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Legal Entitlements, Changing Circumstances and Intertemporality: A Comment on the Creation of Israel and the Status of Palestine

Yuval Shany[*]

The events surrounding the establishment of the State of Israel in 1948 and the ensuing Palestinian naqba *(disaster) have generated an abundance of legal literature. It is beyond the ambitions of this article to revisit all or most of the existing literature, or to strive and comprehensively discuss the various legal propositions they consider. Instead, it offers a critical assessment of some of the legal conclusions offered by one of the most influential experts in the field – Professor James Crawford – who, in the second edition of his seminal treatise* The Creation of States in International Law, *discusses at some length the events surrounding the creation of Israel and the status of Palestine. Section 2 of the article offers some general observations on the continued relevance of the events surrounding the creation of Israel. In particular, it raises the question of the relationship between the principles of* ex injuria non oritur jus *and* ex factis oritur jus *in the Israeli–Palestinian context. Section 3 examines the legal significance of the 1922 League of Nations Mandate and Crawford's position concerning its validity. Sections 4 and 5 adopt a similar examination with regard to two other historic events of potential legal significance, namely the 1947 UN General Assembly Resolution 181 (the Partition Resolution) and Israel's 1948 Declaration of Independence. Section 5 also briefly examines Crawford's conclusions relating to the status of Palestine, and Section 6 concludes.*

Keywords: Palestine Mandate, self-determination, title over territory, Israel/Palestine, legal history

1. Introduction

An abundance of literature addresses the events surrounding the establishment of the State of Israel in 1948 and the Palestinian *naqba* (disaster), and their legal implications.[1] This literature exhibits a great diversity of opinion on what actually happened in those formative years and on what legal norms should be employed for the purposes of drawing legal conclusions about these events. The ongoing nature of the Israeli–Palestinian conflict sustains the relevance of this historical legal debate and invites a discussion of the way in which it may affect the contemporary legal entitlements of Jews and Arabs in the land of Israel–Palestine.

[*] Hersch Lauterpacht Chair in Public International Law, Faculty of Law, Hebrew University of Jerusalem. yshany@mscc.huji.ac.il.
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[1] eg, Jean Allain, *International Law in the Middle East: Closer to Power than Justice* (Ashgate 2004) 73–100; Henry Cattan, *The Palestine Question* (Saqi Books 1988) 3–53; Nathan Feinberg, *The Arab-Israel Conflict in International Law: A Critical Analysis of the Colloquium of Arab Jurists in Algiers* (Oxford University Press 1970); Nathan Feinberg, *Some Problems of the Palestine Mandate* (Tel Aviv 1936); Ernst Frankenstein, *Palestine in the Light of International Law* (The Nord Press 1946).

It is beyond the ambitions of the article to revisit all or even most of the existing literature, or to comprehensively discuss the various legal conclusions presented therein. Even more so, I certainly do not intend to try and recreate an independent narrative of facts on the basis of my own evaluation of primary documents and testimonies. Instead, I offer a critical assessment of some of the legal conclusions offered by one of the most influential experts in the field – Professor James Crawford – who has analysed at some length, in the second edition of his treatise *The Creation of States in International Law*, the legal consequences of the events surrounding the creation of Israel.[2] The main advantage of discussing the creation of Israel and the status of Palestine under international law through the prism of Professor Crawford's seminal work is found in the broad context of his analysis; since Crawford deals in his book with the Israeli–Palestinian conflict as one 'case study' among many others, his approach to the relevant legal issues promises to be more principled than some of the other writers on the topic, who sometimes tend to discuss the Israeli–Palestinian conflict in isolation from other twentieth century conflicts, thus treating it as a *sui generis* case raising an exceptional set of questions that warrant exceptional solutions. A principled international law approach to these most delicate questions is less vulnerable to accusations of politicisation by outside observers, and could offer a more impartial basis for evaluating the contribution of international law to resolution of the Israeli–Palestinian conflict.

Section 2 of the article offers some general observations on the contemporary relevance of the historic events surrounding the creation of Israel. In particular, it raises the question of the relationship between the principles of *ex injuria non oritur jus* and *ex factis oritur jus* in the Israeli–Palestinian context. Section 3 then examines the legal significance of the 1922 League of Nations Mandate and discusses Professor Crawford's position concerning its validity. Sections 4 and 5 discuss two other historic events of potential legal significance, namely the 1947 UN General Assembly Resolution 181 (the Partition Resolution) and Israel's 1948 Declaration of Independence. Section 5 also briefly examines Crawford's position relating to the status of the State of Palestine, and Section 6 concludes.

2. LEGITIMACY VERSUS EFFECTIVENESS

Before revisiting the events leading up to the creation of the State of Israel in 1948, it is useful to consider *in abstracto* the contemporary legal implications of events which occurred in the quite distant past. Such a consideration may help us in developing a principled approach to the specific issues placed at the heart of the Israeli–Palestinian conflict. In particular, it may help us to determine whether we are confronted with a debate of mere historical significance but devoid of any practical *legal* meaning, or whether we can draw valid legal inferences from these historical events that would strengthen or weaken the international legitimacy of Israeli or Palestinian

[2] James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 421–48. The discussion of the events surrounding the creation of Israel was omitted from the first edition of the book, published in 1979.

legal claims for statehood or sovereign title over contested territory. In other words, do past events control the state of law in the present, or merely provide some lessons for the future?

Among the most important principles of law framing the debate over the relevance of past events to contemporary legal analysis, one may note the principle of intertemporal law and the principles of *ex injuria non oritur jus* and *ex factis oritur jus*. The first principle – which is relatively uncontroversial – prescribes that the lawfulness of past events should be examined in accordance with the law applicable at the time in which these events took place, and not on the basis of subsequent legal developments.[3] Consequently, the very *creation* of rights needs to be assessed in light of the legal conditions prevalent at the time when the factual elements, the confluence of which gave rise to the right, had occurred. By contrast, examination of the *continued effect* of certain rights may be periodically re-evaluated, pursuant to changes in the law which occurred after the right was created.[4] Hence, for example, before the eighteenth century, the mere discovery of new land mass may have sufficed for the creation of title over the discovered territory, pursuant to the then prevailing legal doctrine of acquisition of territory through occupation. Yet, from the eighteenth century onwards, customary international law developed to add an additional requirement of effective control as a condition for maintaining existing title.[5] Consequently, different standards, generated at different points in time, may apply to the analytically separate question of the creation and loss of legal rights, governing the existence of sovereign title over territory.

Applied to the Israeli–Palestinian conflict, the principle of intertemporality probably means, for example, that the lawfulness of the very creation of Israel should be examined in the light of the rules of international law applicable in 1948. At the same time, the right to self-determination – a right that is potentially of a continuing nature (especially with regard to territories that do not constitute an integral part of any sovereign state)[6] – should be analysed in accordance with subsequent changes in the status and content of the right to self-determination under international law, up to this very day. The contemporary legal status of the right to self-determination may thus affect our evaluation of the legal validity of existing claims of sovereign title over the territory in which self-determination could be exercised.

Another legal principle relating to the legal effect of past events, which merits a preliminary discussion is the *ex factis oritur jus* principle. This principle captures a notion that is reflected in

[3] TO Elias, 'The Doctrine of Intertemporal Law' (1980) 74 *American Journal of International Law* 285; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 218–19; Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014) 366–67.

[4] *The Island of Palmas* (*United States/Netherlands*) (1928) 2 RIAA 829, 845 ('As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law'). For criticism, see Philip C Jessup, 'The Palmas Island Arbitration' (1928) 22 *American Journal of International Law* 735.

[5] As of the nineteenth century, only discovery coupled with effective control could confer valid title: *Island of Palmas*, ibid 846.

[6] eg, David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 228.

rules of prescription and some other time-dependent legal rules (such as procedural time limits and the legal presumption that lengthy possession over certain property bestows title over it), according to which 'social reality' should control the operation of law in circumstances in which the factual status quo can be relied upon by reasonable people, and the implications of altering it would be prohibitively expensive or grossly unfair.[7] It thus stands in marked contrast to the competing principle – *ex injuria non oritur jus* – which precludes the upholding of claims stemming from past unlawful circumstances.[8] The precise relationship between these two competing principles is, however, difficult to establish *ex ante.* It may depend on the precise context in which the application of the two principles is sought, and on factors such as the nature of the rights in question, the length of time that has passed, the practical consequences of reversing unlawful situations, and the extent to which the new situation has been acquiesced in or relied upon by the immediate parties to a conflict and by third parties.

As a result, a degree of prudence is necessary when assessing the influence of past events on contemporary international law situations, notwithstanding the continued political significance of these events. Had it been any different, the geopolitical map of the world, consisting of many states and state boundaries established under highly questionable legal conditions (especially when evaluated according to contemporary international law standards), might need to be redrawn. Such a radical solution may, however, introduce considerable havoc, and might lead to more suffering and injustice than maintaining a highly problematic status quo (the precise contours of which are often the product of past suffering and injustice).

3. THE 1922 MANDATE

In *The Creation of States in International Law*, Professor Crawford identifies three principal legal issues relevant to the assessment of the lawfulness of the creation of the State of Israel:

- the validity of the 1922 Mandate for Palestine;
- the legal effects of UN General Assembly Resolution 181 of 1947 (the Partition Resolution); and
- the establishment of Israel on 14–15 May 1948.[9]

In the pages below, I will discuss his position on these three legal developments in chronological order.

The 1922 Mandate for Palestine – a binding resolution of the Council of the League of Nations[10] – required Great Britain to implement the terms of the 1917 Balfour Declaration

[7] eg, Sir Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947, 2013 reissue) 426–27.
[8] eg, Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92(II) *Recueil des Cours* 5, 117.
[9] Crawford (n 2).
[10] Terms of the British Mandate for Palestine confirmed by the Council of the League of Nations, 24 July 1922 (1922) 3 *League of Nations Official Journal* 1007 (Palestine Mandate).

(a unilateral statement issued on 2 November 1917 by Lord Balfour, the British Foreign Secretary, to the Zionist Organization, in which the UK undertook to create in Palestine a 'national home' for the Jewish People, while safeguarding the civil and religious rights of all the inhabitants of Palestine).[11] Thus, Article 2 of the Mandate provided:

> The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

Furthermore, Article 4 prescribed that a Jewish Agency would be consulted and encouraged to cooperate in the development of the Jewish national home; Article 6 provided for Jewish immigration to Palestine 'under suitable conditions'; and Article 7 provided for the naturalisation therein of Jewish immigrants.[12]

Despite the ambiguous nature of some of its provisions, the Palestine Mandate has generally been viewed as a strong political endorsement of the objectives of political Zionism, and was criticised for allegedly doing so at the expense of the local Arab population of Palestine (which in 1922 constituted about 90 per cent of the entire population of the territory).[13] This assessment is borne out by the juxtaposition in Article 2 of the *political* rights of the Jewish community in Palestine (the creation of a Jewish national home) and the *civil* and *religious* (but not the political) rights of Palestine's non-Jewish inhabitants,[14] in a manner suggesting that the latter rights constituted a mere constraint on the realisation of the Jewish national home project, the primary objective of the Mandate. Further support for this proposition derives from the unique role of the Jewish Agency (which was, according to Article 4, the *alter ego* of the Zionist Organization) in facilitating the implementation of the Mandate, and the explicit reference to the facilitation of Jewish immigration into Palestine.[15] Finally, one cannot ignore the historical background to the conclusion of the terms of the Mandate – an instrument that emerged from a lengthy political negotiation process involving Great Britain, other powerful states and prominent Zionist leaders, and which endorsed the Balfour Declaration, which was the product of earlier rounds of negotiation between Great Britain and the Zionist movement.[16]

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[11] The full text of the Balfour Declaration (named after Lord Arthur Balfour, the British Foreign Secretary) is as follows: 'His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country'.

[12] Palestine Mandate (n 10).

[13] eg, Beverley Milton-Edwards, *The Israeli-Palestinian Conflict: A People's War* (Routledge 2009) 36; Adel Manna and Motti Golani, *Two Sides of the Coin: Independence and Nakba 1948* (Republic of Letters 2011) 32. For information on the various accounts of the size of the population groups in Palestine before and after 1922, see http://www.mideastweb.org/palpop.htm.

[14] eg, Frankenstein (n 1) 17.

[15] Palestine Mandate (n 10) arts 4, 6.

[16] Cattan (n 1) 26.

Hence, the Mandate appeared to have conferred on Great Britain, the Mandatory power, a 'sacred trust of civilisation'[17] of administering a territory on behalf of a future beneficiary – the Jewish people. The latter group was correspondingly designated as having either an existing, though suspended, legal title over the territory of Palestine, or as having secured a pledge for future legal title over the territory to be realised upon the termination of the Mandate. So, at the very least, the Palestine Mandate seems to represent an international commitment to facilitate a future transfer to the Jews of title over the territory of Palestine, which was not regarded by the members of the League of Nations as falling under either Ottoman or British sovereignty. In this respect, the Palestine Mandate is comparable with other territorial dispositions that were practised in the post-First World War era involving territories put under international administration, and with other mandated territories created with a view to eventually transferring sovereignty to the local inhabitants.[18]

The legality of the Palestine Mandate, however, has been challenged by a number of writers and politicians who have also called into question its capacity for conferring on the Jewish people a valid legal title. These challenges rest on three main grounds:

- the alleged incompatibility of the Palestine Mandate with Article 22 of the League of Nations Covenant,[19] which identified the empowerment of the local inhabitants in mandated territories – their political self-determination – as the ultimate object of the mandate system;[20]
- the alleged breach of Turkish sovereignty perpetrated by the Palestine Mandate, the terms of which Turkey never formally accepted;[21] and
- the violation of the sovereignty rights of the Arab population in Palestine as a result of the Mandate.[22]

Crawford summarily dismisses the last two challenges.[23] The 1923 Treaty of Lausanne (which, unlike the preceding Treaty of Sèvres, did enter into force) implied the renunciation by Turkey of

[17] Covenant of the League of Nations (entered into force 10 January 1920) (1920) 1 *League of Nations Official Journal* 3, art 22. See also *International Status of South-West Africa*, Advisory Opinion [1950] ICJ Rep 128, 132 ('The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilization').

[18] For a discussion of the power of international organisations to dispose of territories, see Crawford (n 2) 246–49.

[19] Covenant of the League of Nations (n 17) ('To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant … Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory').

[20] Allain (n 1) 84–87. See also Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 237.

[21] eg, Henry Cattan, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* (Longman 1973) 66–67.

[22] eg, Cherif Bassiouni, 'The "Middle East": The Misunderstood Conflict' in John Norton Moore (ed), *The Arab-Israeli Conflict*, *Vol II: Readings* (Princeton University Press 1974) 175, 182.

[23] Crawford (n 2) 428–29.

all of its rights to its previous Middle Eastern territories.[24] Thus, he maintains that such a renunciation cured any breach of Turkey's sovereign rights over these territories that might have been caused by the 1922 Mandate. In addition, Crawford asserts that since no legal right to self-determination existed under international law in the 1920s,[25] and since there was no Arab state in Palestine in the 1920s, there is no basis to argue that the local Arab population in Palestine had any sovereignty rights which were violated by the 1922 Palestine Mandate.

Indeed, I agree with Crawford that the first challenge – relating to the 'constitutionality' of the Mandate under the League of Nations Covenant – is by far the most serious of the three challenges to the legality of the Palestine Mandate. On this issue, Crawford takes the view that decisions of the Council of the League of Nations as to the disposition of mandated territories had 'definitive legal effect' and created 'an insuperable barrier' to any challenge to the validity of these decisions.[26] He draws in this respect an analogy between the definitive effect of League of Nations decisions over the legal disposition of mandated territories and the position taken by the International Court of Justice (ICJ) in *Northern Cameroons* in relation to the conclusive effect of decisions taken by the United Nations (UN) on the disposition of territories subject to international trusteeship.[27]

How can one support Crawford's position, which appears to endorse the legal effects of a decision by one of the principal organs of the League of Nations regardless of its constitutionality?[28] One possible theory that could be invoked in support of his position on the irrelevance of the constitutional challenge to the Palestine Mandate is to view League of Nations Council resolutions, which deviate from the language of the Covenant, as de facto amendments thereof.[29] Since the 1922 decision of the Council of the League to approve the Mandate was adopted unanimously, it might be regarded as a new agreement shared by all members of the Council (it is harder, however, to attribute such an agreement to all members of the League).[30] In addition, Article 80 of the UN Charter appears to reaffirm the validity of pre-1945 instruments adopted by the members of the United Nations in their capacity as members of the League of Nations, including instruments that established international mandates and the rights derived therefrom

[24] Treaty of Peace with Turkey (entered into force 6 August 1924) 28 LNTS 11 (Treaty of Lausanne), arts 16, 28.
[25] For support, see Harold S Johnson, *Self-Determination within the Community of Nations* (AW Sijthoff 1967) 32–34; Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff 1982) 1–8; Crawford (n 2) 127–28; Feinberg (1970) (n 1) 44–51.
[26] Crawford (n 2) 429.
[27] *Northern Cameroons* (*Cameroon v United Kingdom*), Preliminary Objections, Judgment [1963] ICJ Rep 15, 32 ('there is no doubt – and indeed no controversy – that [GA Resolution 1608 (XV)] had definitive legal effect'). See also Joseph Weiler, *Israel and the Creation of a Palestinian State: A European Perspective* (Croom Helm 1985) 59.
[28] For the view that the UN Charter and the League of Nations Covenant are constitutional instruments, see Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529.
[29] cf Carolyn L Willson, 'Changing the Charter: The United Nations Prepares for the Twenty-First Century' (1996) 90 *American Journal of International Law* 115, 117–20; Bruno Simma and others, *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002) 1346–47.
[30] Note that a subsequent challenge to the legality of the Palestine Mandate was rejected by the Council in 1924: Allain (n 1) 87.

to any state or people. It could be claimed that the reaffirmation of the rights created by such instruments does not appear to depend on whether or not they conformed with the Covenant.[31] Moreover, there is no indication that the drafters of the UN Charter were of the view that any of the instruments that had created international mandates failed to conform with the League of Nations Covenant.

A second possible approach to the relationship between the Palestine Mandate and Article 22 of the Covenant, which appears to me to be more legally sound, is to regard resolutions adopted by the principal organs of the League of Nations as providing an authoritative interpretation of the provisions of the Covenant. In fact, a similar approach was taken by the ICJ in the *Wall* advisory opinion, where it was accepted that Article 12 of the Charter should be interpreted in accordance with the 'evolving practice' of the General Assembly and Security Council.[32] So while it is difficult to contest that the Palestine Mandate was very exceptional in that it deviated from the general post-First World War practice of according preference to the political aspirations of the majority of the local population when configuring international mandates,[33] this might simply mean that the Council chose to construe Article 22 of the Covenant in a flexible fashion, allowing for both policies (that is, empowering either a majority or minority group). The fact that the Council understood key terms found in Article 22 – such as 'peoples' who 'inhabited' the 'colonies and territories'[34] – as authorising it to create a mandate for the benefit of a people constituting a minority in the mandate territory does not entail, in my view, the conclusion that the Council intended to violate the terms of Article 22, or that it had actually done so.

Indeed, much of the criticism directed against the Mandate for Palestine, which preferred the interests of the Jewish minority in Palestine over those of the Arab majority, stems from a vision of the principle of self-determination which comprises both majoritarian and territorial features. According to such a vision, the mandate system was designed to implement the political rights of national groups consisting of the majority in specific and identifiable territorial units; a decision to grant sovereignty over territory to a minority group thus allegedly conflicts with the self-determination principle. While such a vision tends to coincide with the scope of the modern *legal* right to self-determination,[35] one should note that no such legal right existed in 1922. Instead, the application of the political principle of self-determination took place during the

[31] Charter of the United Nations and Statute of the International Court of Justice (entered into force 24 October 1945) 1 UNTS XVI (UN Charter), art 80 ('… nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties'); Feinberg (1970) (n 1) 40; but see a narrower reading of art 80 in Simma (n 29) 1120–21.

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [25]–[28].

[33] Memorandum by Lord Balfour, British Government, Public Records Office, Foreign Office No. 371/4183, 1919, cited in Cassese (n 20) 233 ('Palestine present[s] a unique situation. We are dealing not with the wishes of an existing community but are consciously seeking to reconstitute a new community and definitely building for a numerical majority in the future').

[34] Covenant of the League of Nations (n 17).

[35] eg, Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963) 104.

interwar period on a highly selective basis: the principle was implemented only with regard to some peoples who inhabited certain specific territories (sovereignty over which was lost as a result of the war), and even with regard to peoples to whom self-determination was offered, the speed with which the principle was to be realised varied greatly according to their stage of political development (hence, only '*certain* communities' would be eligible under Article 22 for a type A Mandate).[36] It is also worth noting that the manner in which the principle of self-determination was applied in post-First World War Europe (outside the context of the mandate system) also varied greatly, in accordance with the particular circumstances of the territories involved. For example, in some territories plebiscites were undertaken,[37] whereas title to other territories was granted against the wishes of the local population in accordance with overriding geopolitical considerations.[38] In addition, the creation of 'nation states' – viewed as an important element in realising the principle of self-determination – was facilitated at times through massive involuntary population transfers (see, for example, the transfer of almost two million Greeks and Turks in the 1920s).[39] Consequently, it may be asserted that the content of the self-determination principle was far more permeable and open-ended in 1922 than it is today (although, even today, considerable uncertainty still surrounds some aspects).[40] In particular, it is difficult to maintain that the principle, as it was understood then, necessarily involved a commitment to the political empowerment of a pre-existing majority group residing in an objectively identifiable territory.

It is in light of this factual and normative background that a flexible reading of the text of Article 22 of the League of Nations Covenant becomes plausible. Such a reading is clearly supported by the aforementioned principle of intertemporality, which directs lawyers to evaluate the legality of a right-creating legal instrument according to the state of international law at the time at which the relevant rights had been created. Applied to the Palestine Mandate, this would mean that a 'nation-building' project involving the designation of a minority group within the mandated territory as the beneficiary *people* around which a new nation state will be formed, and to facilitate, by way of immigration, a demographic transformation of the minority into a majority, would not have exceeded the scope of powers of the Council as it was understood at the time. In the concrete circumstances of the Palestine Mandate, this implied a policy of transforming the Jews of Palestine from a small minority, comprising in 1922 approximately 10 per cent of the overall population in Palestine (which totalled around 750,000), to a solid majority through a massive influx of Jewish immigration during the life of the Mandate (the potential for Jewish

[36] eg, Weiler (n 27) 59; Frankenstein (n 1) 24.
[37] eg, the plebiscites undertaken in Schleswig, Upper Silesia, East Prussia and Carinthia.
[38] eg, the decision to reject claims for Ukrainian independence, and to accept many of the territorial claims of Serbia and Romania, who fought on the side of the victorious allies: Margaret MacMillan, *Paris 1919: Six Months that Changed the World* (Random House Trade Paperback 2001) 226, 261, 361–62.
[39] eg, Klejda Mulaj, *Politics of Ethnic Cleansing: Nation State-Building and Provision of In/Security in Twentieth-Century Balkans* (Lexington Books 2008) 29.
[40] eg, Milena Sterio, *The Right to Self-Determination under International Law: 'Selfistans', Secession, and the Rule of the Great Powers* (Routledge 2013) 22; Fernando R Tesón, 'Introduction: The Conundrum of Self-Determination' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 1, 6–8.

immigration was estimated by senior British politicians at the time to be around three to four million people).[41]

I should note in this regard that the mandate system appears to have been designed to accommodate a range of policy concerns other than 'self-determination' (a term which does not even appear in the Covenant).[42] Such concerns included, inter alia, the promotion of political stability and economic development for developing areas.[43] Indeed, the decision to support the Zionist agenda in the critical years leading up to 1922 seemed to have derived from the broad political goals pursued by influential British politicians: mitigating animosity against the Jews in Europe and consequently increasing the stability and homogeneity of European nation-states;[44] drawing away Jews from active involvement in Bolshevism (contributing thereby, again, to the political stability of Europe);[45] and drawing Jewish capital and skilled personnel to Palestine to facilitate its economic development.[46] Significantly, this last set of concerns was also tied closely with the explicit objective of the mandate system of creating conditions under which the inhabitants of mandated territories would be able 'to stand by themselves under the strenuous conditions of the modern world'.[47]

Another relevant factor in assessing the compatibility of the Palestine Mandate with Article 22 of the Covenant is its attempt to promote the well-being and development of the other *people* of Palestine – the Arab majority. As already noted, Article 2 of the Palestine Mandate required Great Britain – the Mandatory power – to safeguard 'the civil and religious rights of all the inhabitants of Palestine' (illustrating that the drafters of the Mandate were not completely oblivious to the existence of the local Arab population in Palestine and to their 'well-being').[48] However, supporters of the Mandate had reason to believe that at least some parts of the Arab community in Palestine would benefit from the economic development of the territory by the Zionists and would therefore not object to the Jewish 'national home' project. Such a view certainly found support in the 1919 Agreement between the Hashemite Emir Feisal and Chaim Weizmann, President of the World Zionist Organization, which endorsed the Balfour

[41] Winston Churchill, 'Zionism versus Bolshevism: A Struggle for the Soul of the Jewish People', *Illustrated Sunday Herald*, 8 February 1920, 5.
[42] The only explicit reference found in art 22 to the wishes of the population of the mandated territory is made in connection with the choice of the mandatory power for 'class A' Mandates ('The wishes of these communities must be a principal consideration in the selection of the Mandatory').
[43] eg, Jerome Wilson, 'Ethnic Groups and the Right to Self-Determination' (1996) 11 *Connecticut Journal of International Law* 433, 458 ('Wilson's aim in propagating the right of self-determination was to secure peace in Europe by preserving (and creating, out of the defeated German, Austro-Hungarian and Ottoman empires) a system of ethnically homogeneous nation states'); Feinberg (1970) (n 1) 42–43; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34 *New York University Journal of International Law and Politics* 513, 561–62.
[44] eg, Mark Levene, 'Nationalism and Its Alternatives in the International Arena: The Jewish Question at Paris, 1919' (1993) 28 *Journal of Contemporary History* 511.
[45] eg, Mark Levene, 'The Balfour Declaration: A Case of Mistaken Identity' (1992) 107 *The English Historical Review* 54, 75; Churchill (n 41) 5.
[46] Scott Atran, 'The Surrogate Colonization of Palestine, 1917–1939' (1989) 16 *American Ethnologist* 719, 720–21.
[47] Covenant of the League of Nations (n 17) art 22(1).
[48] eg, Weiler (n 27) 59.

Declaration and supported Jewish immigration to Palestine,[49] and in the relatively pro-Jewish positions presented by Feisal at the Peace Conference in Versailles.[50] While today we may have reason to doubt seriously the assumption that the long-term interests of Jews and Arabs in Palestine would coincide, such assumptions may have been regarded as plausible in 1922 – a period in which colonialism was still credited by some for bringing to 'backwards people' the blessing of civilisation.[51]

Finally, the proposal by Great Britain, which was endorsed by the League in 1922, to separate Mandatory Palestine into two territorial units – Transjordan (covering 77 per cent of the original territory of Mandatory Palestine) and Palestine (covering the remaining 23 per cent of the territory located west of the Jordan river) – also demonstrates a willingness to accommodate through the mandate system the 'well-being' and political aspirations of the Arab population subject to the original Palestine Mandate, further suggesting that the Council was not blind to the problematic ramifications of empowering a minority group in the territory. In fact, the 1922 division of Palestine into two mandated territories sits well with the general proposition that the application of self-determination to territories the population of which is ethnically diverse could entail the division of the territory between the different ethnic groups inhabiting it (as opposed to granting political rights over the entire territory to the majority group).[52] The upshot of my analysis is that whereas the Palestinian Mandate proved to be highly controversial from a political perspective (and unjust from a Palestinian perspective), I believe that it did not violate the letter and spirit of Article 22 of the Covenant of the League of Nations.

However, even if the Palestine Mandate was legally flawed, as its critics claim, it is questionable whether the principle of *ex injuria non oritur jus* should be preferred in the prevailing circumstances over the *ex factis oritur jus* principle.[53] Given the passage of considerable time since the conclusion of the Palestine Mandate, the broad international recognition the Mandate attracted in 1922 and in subsequent years (including the implicit support of the Arab delegation to the Peace Conference), and the dramatic changes in the demographic composition of Palestine since the 1920s, which transformed Jews from a small minority into the majority group in Palestine, one may argue that reversing the consequences of the Mandate is not only politically unrealistic, but would entail grossly unjust consequences. In other words, it is hard to accept that any formal legal defect that the international community would now attach to the Palestine

[49] Agreement between Emir Feisal Ibn al-Hussein al-Hashemi and the President of the World Zionist Organization, Dr Chaim Weizmann (entered into force 3 January 1919), http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/The+Weizmann-Feisal+Agreement+3-Jan-1919.htm.

[50] Memorandum from the Emir Feisal, presented to the Council of Ten at the Peace Conference on 6 February 1919, http://www.ctevans.net/Versailles/Diplomats/Lawrence/Appendices.html. For a discussion, see Feinberg (1936) (n 1) 35–45 (noting also the agreement to Jewish immigration to Palestine of the Syrian delegate to the Conference, Chekri Ganem).

[51] For a comparable contemporary debate about the advantages and disadvantages of the economic development associated with British colonialism for local populations, see Matthew Lange, *Lineages of Despotism and State Power: British Colonialism and State Power* (University of Chicago Press 2009) 1–2.

[52] Crawford (n 2) 434.

[53] eg, Ebere Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations' (1983) 77 *American Journal of International Law* 239, 247.

Mandate could prevent reliance on its validity almost a hundred years later, after the lives of generations upon generations of Jews and Arabs who relied on its legal effects have been irreversibly changed. Thus, the principles of both intertemporality and *ex factis oritur jus* support Crawford's conclusion that the legality of the Palestine Mandate is not open to challenge.

4. THE PARTITION RESOLUTION

After dealing with the legality of the 1922 Palestine Mandate, Crawford addresses the legal effects of the 1947 'Partition Resolution' (UN General Assembly Resolution 181), which purported to establish three political entities in Palestine: a Jewish state, an Arab state, and international administration of a *corpus separatum* in the Jerusalem area (for a period of ten years).[54] According to Crawford, the UN General Assembly inherited de facto, if not de jure, the powers of the League of Nations to alter the terms of the Palestine Mandate or to terminate it,[55] and by accepting the request of the Mandatory power to relinquish the Mandate, the General Assembly had rendered Britain's termination of the Mandate on 15 May 1948 legally valid.

The more difficult question Crawford raises, however, is whether the General Assembly disposed of the legal title over the territory of Palestine following the termination of the 1922 Mandate. This question is premised on the possibility that the General Assembly was operating, when adopting Resolution 181, not only as guardian of the terms of the Mandate, but also as the depositary of sovereignty powers over mandated territories, and was therefore competent to adopt a binding resolution on the manner of their disposition.[56] According to this possible approach, a decision on the disposition of mandated territory could be legally binding even though resolutions of the General Assembly as a rule are not binding in nature. Crawford, however, rejects this possibility and opines that the lack of agreement on the part of the General Assembly and the Mandatory power over the binding effect of the Resolution must lead to the conclusion that Resolution 181 was merely recommendatory in nature. Such an interpretation is supported, in his view, by post-1947 developments – in particular, the reluctance on the part of the Security Council and Britain to enforce the terms of Resolution 181.[57]

To my mind, Crawford's analysis on this point is less than fully persuasive (although I share his ultimate conclusion). In particular, it is difficult to accept his suggestion that after Great Britain referred the situation of Palestine to the UN, either the formal termination of the Mandate or Britain's consent to the Partition Resolution should have been sought before the territory could have been disposed of.[58] If one accepts that the General Assembly had, in principle, the authority to dispose of the territory *after* revocation of the Mandate, then it appears to follow that the General Assembly also had the power to authoritatively decide, *prior* to the termination

[54] UNGA Res 181(II) (29 November 1947), 'Future Government of Palestine', UN Doc A/RES/181(II), Pt III, A.
[55] Crawford (n 2) 430–31.
[56] ibid.
[57] ibid 431–32.
[58] ibid 431.

of the Mandate, on the disposition of title over Palestine *after* its termination. This is especially so, since the UN General Assembly was acting in the situation in Palestine at the request of Great Britain, which was seeking to bring about the termination of the Mandate by placing the matter before the UN.[59] As a practical matter, it would be highly undesirable to construe the powers of the General Assembly to regulate the post-mandatory political transition as coming to life only upon the actual termination of the Mandate in an unregulated fashion.

The implausibility of conditioning the validity of the General Assembly Resolution on the consent of the Mandatory power becomes even more apparent were we to consider the latter's status as a non-sovereign trustee, operating on behalf of the international community in order to prepare the local inhabitants for political independence – that is, merely as an agent of the international community rather than a principal in its own right.[60] As a result, the legal effect of the Partition Resolution cannot turn, I believe, on the consent of Great Britain, but rather on the text of the Resolution and on its subsequent treatment by the United Nations and its member states.

The text of Resolution 181, the procedural and institutional context in which it was passed and its subsequent treatment by the international community do, nonetheless, support Crawford's conclusion relating to its non-binding nature. This is because the preamble to the text strongly suggests a mere recommendatory design: the General Assembly '[*r*]*ecommends* to the United Kingdom, as the Mandatory power for Palestine, and to all other Members of the United Nations the adoption and implementation, with regard to the future Government of Palestine, of the Plan of Partition with Economic Union set out below'.[61] Of course, such a legal outcome is also consistent with the very exceptional nature of the General Assembly's power of issuing binding legal decisions.[62] The half-hearted international follow-up to Resolution 181 (which was, however, somewhat more ambiguous than Crawford suggests[63]) also supports the above interpretation.

Finally, even if, *arguendo*, the Resolution was meant to be binding at the time of its adoption, subsequent events suggest that it had fallen into desuetude,[64] inviting again the application of the *ex factis oritur jus* principle: the Resolution eventually had been rejected by all parties to the conflict in Palestine (including by the Jews, who initially supported it) and by many of their allies,[65]

[59] For a different view, see Allain (n 1) 97; Cattan (n 1) 38.
[60] eg, Frankenstein (n 1) 16.
[61] Res 181(II) (n 54).
[62] eg, Simma (n 29) 269.
[63] eg, JC Hurewitz, 'The United Nations Conciliation Commission for Palestine: Establishment and Definition of Functions' (1953) 7 *International Organization* 482; Henry Cattan, 'The Status of Jerusalem under International Law and United Nations Resolutions' (1981) 10 *Journal of Palestine Studies* 3, 8.
[64] For a discussion of the operation of the desuetude rule, see Michael J Glennon, 'How International Rules Die' (2005) 93 *Georgetown Law Journal* 939, 960.
[65] As is well known, the political representatives of the Arab group in Palestine rejected the Resolution and Arab states invaded Palestine following the termination of the Palestine Mandate on 15 May 1948 in order to prevent its implementation: see, eg, Abdel Monem Said Aly, Shai Feldman and Khalil Shikaki, *Arabs and Israelis: Conflict and Peacemaking in the Middle East* (Palgrave Macmillan 2013) 51. Subsequently, the State of Israel also rejected the Partition Resolution as 'null and void': David Ben Gurion, 'Statement before the Knesset', 3 December 1949

and its increased irrelevance in the eyes of the General Assembly[66] suggests that it cannot be deemed to have the power of a binding legal norm entailing a legally valid act of disposition of title over territory with continuing legal effect. Nor can the terms of the Resolution be considered an effective and just legal framework, given the dramatic post-1947 developments which created new realities on the ground, which vary greatly from the situation which underlay the terms of the Resolution. Here, too, returning to a status quo *ex ante* appears to be unfeasible and grossly unjust for the millions of persons who could be affected thereby. Hence, the *ex factis oritur jus* principle should be preferred over the *ex injuria non oritur jus* principle.

5. THE ESTABLISHMENT OF ISRAEL

The third significant event relating to the creation of Israel, the legality of which has been challenged, is Israel's unilateral Declaration of Independence, issued on 14 May 1948 (one day before the expiry of the Palestine Mandate pursuant to its relinquishment by Great Britain). Since, as explained above, I agree with Crawford that Resolution 181 was non-binding in nature, this Resolution and its support for the establishment of a Jewish state in Palestine could not serve as a legal basis for Israel's Declaration of Independence. Other possible legal bases that could validate the legality of the Declaration should therefore be explored.

One legal construction which Crawford discusses and implicitly rejects is Professor Yehuda Blum's 'missing reversioner' theory.[67] According to this theory, following the departure of the British forces, the status of Palestine became analogous to that of *terra nullius* – a territory without a sovereign (like a newly discovered island). Such a sovereign-less territory may be subject to the acquisition of territory through the assumption of physical control by any state acting in a manner that is not unlawful in nature (that is, in conformity with the *ex injuria non oritur jus* principle). Crawford notes, however, that the *Western Sahara* advisory opinion by the ICJ has introduced a very high factual threshold for the application of the *terra nullius* rule,[68] which excludes, in effect, territories in which some form of organised society existed. Since the pre-1948 status of Palestine would hardly qualify as one lacking in societal structure under the legal standard introduced by the ICJ, Crawford does not consider it suitable for application of the *terra nullius* rule.[69] Instead, Crawford suggests that we should view Israel's establishment as an act of secession from an existing political unit – Palestine – which led to the effective creation of a new state – the State of Israel.[70] According to Crawford, the creation of this new state did not contravene the principle of self-determination as it stood at the time (as a result of the

('[W]e can no longer regard the UN Resolution of 29th November as having any moral force. After the UN failed to implement is [sic] own resolution, we regard the resolution of the 29th November concerning Jerusalem to be null and void').

[66] See Crawford (n 2) 432.

[67] Yehuda Z Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 *Israel Law Review* 279.

[68] *Western Sahara*, Advisory Opinion [1975] ICJ Rep 12.

[69] Crawford (n 2) 432–33.

[70] ibid 433.

principle of intertemporality), but rather presented a plausible way in which to implement this right. Arguably, in the circumstances ruling in Palestine in 1948, the division of the land into two political entities met the loose requirements of self-determination as they stood at the time (a position whose general acceptability by the international community is borne out by the rather broad support enjoyed by the Partition Resolution in 1947).[71] Moreover, Crawford's position on the creation of Israel through an act of secession (for which the Partition Resolution has merely lent some political support) may have real implications for delineating the boundaries of the Jewish state: under a theory of secession, the State of Israel's title to territory appears to cover all the land it lawfully and effectively seized in the 1948–49 War; it would thus go considerably beyond the far more limited area allocated to the Jewish state under the terms of the Partition Resolution.[72]

While accepting the ultimate conclusion that the establishment of Israel constituted an application of the principle of self-determination as it stood at the time, I would, nevertheless, question some specific aspects of the legal construction proposed by Crawford. First, Crawford seems to downplay any link between the validity of the 1922 Palestine Mandate and the lawfulness of the establishment of Israel, thus viewing the latter development as a disruptive event (secession) and not a form of implementation of the Palestine Mandate. However, if the Mandate designated Palestine as the location in which the Jews were to build their 'national home' (subject to the need to protect the civil rights of the Arab population), and provided for temporary British administration of the territory until the goal of the national home had been attained, then the de facto termination of the Mandate in 1948 should, by implication, have resulted in the creation of such a 'national home' in any area effectively controlled by the nascent State of Israel. In other words, the 1922 Mandate, which the Partition Resolution could not have revoked since it did not have a legally binding effect, could be said to have provided for a suspended or future title for a Jewish state over Palestine; and the termination of the Palestine Mandate merely lifted the said suspension or perfected the disposition of title. Hence, one might argue that any Palestinian state established after the end of the Palestine Mandate should have seceded from the State of Israel – the self-determination unit representing the internationally designated beneficiary or legal successor to the British Mandate – and not vice versa. Applying Crawford's approach to such an act of secession, one could deem the establishment of an Arab state in Palestine in 1948 a plausible application of the principle of self-determination as it stood at the time, which could have led, already in the late 1940s, to the creation of another internationally recognised state.

Note that the question of who seceded from whom (Israel from Palestine or Palestine from Israel) is not purely semantic in nature or one having a purely historical value. Rather, it might have important legal consequences for delineating the contemporary borders between Israel and the nascent Palestinian state. According to Crawford, Israel's boundaries crystallised in the 1949 Armistice Agreements, which consolidated the effective authority of Israel over

[71] Resolution 181 was supported by a majority of 33 to 10 (with 13 states abstaining).
[72] Crawford (n 2) 434.

all land west of the Green Line.[73] One can thus assume that the remainder of the territory should be designated to the Palestinian state. However, if the burden rested during the 1948–49 War on the seceding Palestinian side to justify its own acquisition of territory, then the boundaries of the Arab state should have been limited only to those areas over which the new state or its allies had exercised effective control in a lawful manner. This may mean, for instance, that areas over which no party exercised effective control at the end of the 1948–49 War (the Latrun and Jerusalem areas designated as 'no-man zones') would remain under the sovereignty of the residual title holder – the State of Israel – and not under the sovereignty of the seceding Arab entity, which never exercised continuing effective control over them.

Furthermore, if Crawford is right that the application of the *ex injuria non oritur jus* principle constrains the exercise of the right to secession, then one can accept the legitimacy of the exercise of self-determination over areas not subject to the control of the Jewish state upon the expiration of the Mandate, but may question the legality under *jus ad bellum* of any territorial gains obtained by Palestinian militias and its Arab state allies over areas controlled by post-independence Israel (such as some areas seized by Syria in the war in the vicinity of the Sea of Galilee). Under this approach, I would maintain that no valid title appears to have been attached to territory seized by the Arab side in the 1948–49 War after 15 May 1948.

I also believe that some further nuancing may be introduced into Crawford's treatment of Blum's 'missing reversioner' theory. Although I agree with Crawford that the *terra nullius* doctrine could not have been made directly applicable to the situation in Palestine, Crawford does concede that the principle of self-determination did have a very imprecise meaning in 1948, and that the effective control exercised by the State of Israel over certain areas of Palestine did have the effect of conferring on Israel a valid title over these parts. This seems to me as roughly equivalent to taking the position that any exercise of effective control by the two competing political communities in Palestine, which would be broadly compatible with the principle of self-determination, would have filled the sovereignty gap created on 15 May 1948 in ways not dissimilar to the old *terra nullius* doctrine. The only strict limit attaching to the application of the self-determination principle to Palestine in 1948 appears to be, according to Crawford, the lack of power of any of the two communities to seek sovereignty over the entire territory of Mandatory Palestine. Thus, any partition of the land that would have enabled both communities to form independent political entities could satisfy the self-determination principle and provide the basis for a plausible sovereignty claim by each of the two peoples, transforming both communities into de facto missing reversioners.

[73] ibid 434. This is notwithstanding the famous provision incorporated in the Armistice Agreement between Israel and the Jordan which specified that '[t]he Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto': Hashemite Jordan Kingdom-Israel, General Armistice Agreement (with annexes) (entered into force 3 April 1949) 42 UNTS 303, art VI(9). See also Egypt-Israel, General Armistice Agreement (with annexes and accompanying letters) (entered into force 24 February 1949) 42 UNTS 251, art V(2) ('Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question').

Finally, falling back again on the *ex factis oritur jus* principle, it would be difficult to accept that the circumstances surrounding the creation of Israel in 1948 would definitively control the legality of its existence in 2016 when developments on the ground and changes in the legal landscape (first and foremost, the further development of the principle of self-determination) render the situation practically irreversible. Jews now constitute a well-entrenched majority in Israel, the State of Israel is now widely recognised, and its continued existence is validated by international law, including by applying the principle of self-determination.[74] Hence, any fault that one may ascribe to the method of creation of Israel in 1948 must have been remedied since then by the passage of time, the changed demographic circumstances, and the general acceptance by the international community of Israel's lawful existence and sovereignty over its 1949 borders.

While Israel was created as an application of the right to self-determination of the Jewish people, the correlative right to self-determination of the Arabs of Palestine remains largely unfulfilled to this very day.[75] Application of the principle of intertemporality would suggest that to the extent that the right to self-determination is a continuing right,[76] its application to the Palestinians should be analysed on the basis of current international law doctrine. Such a doctrine, at the very least, entitles all peoples residing in territories situated outside the lawful territorial sovereignty of existing states to the right to determine their political status, including opting for an independent state if they so choose.

Crawford is no doubt correct in noting that the 1988 Declaration of Palestinian Independence did not have the effect of implementing a Palestinian right to self-determination, because Palestine failed to meet the conditions of statehood under international law (such nominal statehood conflicts with the *ex factis oritur jus* principle).[77] It is more plausible, however, that upon its application in 2011 to join the UN as a member state,[78] Palestine did meet the said conditions, namely control over some territory of a population, effective governance and capacity to exercise international relations. The widespread recognition of Palestinian statehood (including its upgrade to observer state status in the UN)[79] are additional indications of statehood under international law. Although the Oslo Accords that established the Palestinian Authority in parts of the West Bank and Gaza did not confer upon Palestinians enough legal powers to enable its qualification as an independent state, the continued validity of these provisions of the Oslo Accords is increasingly open to question. This is because de facto compliance with their terms

[74] See, eg, UNSC Res 242 (22 November 1967), UN Doc S/RES/242; UNSC Res 1397 (12 March 2002), UN Doc S/RES/1397; *Wall* Advisory Opinion (n 32) [159]–[162].
[75] Crawford (n 2) 435.
[76] On the debate whether or not the right to self-determination provides for a single or multiple acts of determination, see Raič (n 6) 232–34; Cassese (n 20) 55.
[77] For the general conditions of statehood under international law, see the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (entered into force 26 December 1933) 165 LNTS 3802, art 1. The failure of Palestine to meet the objective conditions of statehood had been cured by General Assembly Resolution 43/177, as the Assembly did not have powers to bring new states into being: UNGA Res 43/177 (15 December 1988), 'Question of Palestine', UN Doc A/RES/43/177.
[78] UN General Assembly, 'Application of Palestine for Admission to Membership in the United Nations', 23 September 2011, UN Doc A/66/371-S/2011/592.
[79] UNGA Res 67/19 (29 November 2012), 'Status of Palestine in the United Nations', UN Doc A/RES/67/19.

and provisions by the respective parties appears to be quite limited and because, in actuality, Palestine operates much like an independent state.[80]

Consequently, the *ex factis oritur jus* principle would militate in favour of accepting an independent Palestinian state as the holder of sovereignty rights over the parts of Mandatory Palestine it effectively controls. In addition, it may still hold, by virtue of the principle of self-determination, valid sovereignty claims vis-á-vis those parts of the West Bank and Gaza Strip which it does not yet control, but which have not been incorporated within the sovereignty of the competing political entity that emerged from the Palestine Mandate – the State of Israel. With regard to these areas, the situation still appears to be reversible in the sense that some modality of the two-state solution, involving land swaps and the evacuation of small Israeli settlements in the West Bank, may still be feasible. If this is indeed the case, considerations of legality, justice and pragmatic dispute settlement may be reconcilable, obviating the need to choose between a strict application of the *ex injuria non oritur jus* and *ex factis oritur jus* principles.

6. CONCLUSION

Israel's right to exist as a Jewish state is couched in the 1922 Mandate, which gave precedence to implementing the self-determination interests of the Jewish minority in Palestine over those of the Arab majority. While the rights of the Jewish people under the 1922 Mandate were not formally abrogated by the 1947 Partition Resolution, that Resolution is indicative of greater awareness on the part of the international community of the need to reconcile Jewish and Palestinian national aspirations in Palestine, and of the choice of territorial partition as the solution to these conflicting self-determination claims under international law, as it developed in the mid-twentieth century. The establishment of Israel in 1948 probably did not constitute an act of secession from Mandatory Palestine, as suggested by Crawford, but rather an implementation of the right to self-determination of the Jewish people in parts of Mandatory Palestine pursuant to the 1922 Palestine Mandate. Furthermore, the *ex factis oritur jus* principle suggests that over time the effective exercise of sovereign powers by Israel over the specific territories and populations it controls meets the requirements of statehood under international law, conferring legal validity on the State of Israel over the territory it controlled at the end of the 1948–49 War regardless of the particular method by which the state was created.[81] As for the Palestinians, they are entitled, in my view, to exercise a right to self-determination over those parts of Mandatory Palestine to which Israel has no valid sovereignty claim. The 2011 application by the State of Palestine to join the UN appears to represent a significant step in the direction of realising this entitlement.

[80] eg, Geoffrey R Watson, 'The "Wall" Decisions in Legal and Political Context' (2005) 99 *American Journal of International Law* 6, 22–24.
[81] See Allain (n 1) 99.

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The Mandate for Palestine: Past and Present

Proceedings of an international workshop held at the Hebrew University Faculty of Law, 11 February 2016

Introduction

Professor Yaël Ronen (Sha'arei Mishpat Academic Center for Law and Science, and Minerva Center for Human Rights at the Hebrew University of Jerusalem) welcomed participants. She noted that the workshop was the second in a series of events on legalities and legacies of the Palestine Mandate of 1922 held at the Hebrew University's Faculty of Law. The first event was a conference in the spring of 2015. These events were held with the financial support of The Knapp Family Foundation, under the auspices of the International Law Forum. The current workshop focused on the legal legacy of the Mandate. Its first session would provide a historical backdrop for discussion, looking at the intentions and expectations of the various international actors at the time that the Mandate was adopted. The second session would turn to legal questions and concern local law, namely the administration of the Mandate and its legacy in Israeli law. The third session would concern international law and its relevance to the resolution or regulation of the Israeli–Palestinian conflict. A perusal of legal scholarship reveals that very little reference has been made to the Mandate over the years, but in the last decade there has been renewed interest in the matter. The final session would explore whether and how the passage of time has impacted on the legal relevance of the Mandate. Professor Ronen reminded participants that the discussion would be held under the Chatham House Rule.

Mr Charles Knapp (President of the Board of Directors of The Knapp Family Foundation) proposed that the Mandate for Palestine was a binding instrument under international law and therefore it has important implications in the ongoing debate. For the first time in history, the Mandate had delimited a specific geographic area which it identified as the historical homeland for the Jewish people, thereby recognising the Jewish people as the indigenous people of the area. The termination of the Mandate in 1948 was the equivalent of a trust being terminated, and the benefits of the trust went to the beneficiaries, which in this case were the Jewish people. Applying the settled doctrine of *uti possdetis juris,* Israeli sovereignty extends throughout the Mandate's internationally recognised frontiers as they existed in 1948. As long as Israel does not waive any of its territorial rights, as it arguably did with respect to the Gaza Strip, Israeli sovereignty remains intact. Mr Knapp held that this argument was important for present international discourse on legal rights to counter the popular view of Israel as a thief without rights to the territories in question. Relying on historical facts and documents, the argument becomes what it

should be: if international law is applied impartially, then Israel has sovereignty over these 'disputed' territories but remains willing, in its search for peace, to give up part of what it possesses as of right. Mr Knapp observed that, if justice is to be the touchstone, 99.7 per cent of the Ottoman Empire in the Middle East is now under the rule of Arab sovereigns, and Israel accounts for the remainder. Moreover, the lands under Israeli control have already been reduced by over three-quarters from what was originally allotted by the League of Nations in 1922. He concluded that it was important for the workshop to explore further the strengths and weaknesses of these arguments and how best they could be presented, especially with international pressure mounting to recognise a State of Palestine.

FIRST SESSION: THE MANDATE AS A TOOL OF INTERNATIONAL GOVERNANCE

A VIEW FROM OUTSIDE

Professor Alon Confino, History, University of Virginia and Ben-Gurion University

Professor Confino began by emphasising the need to view the Palestine Mandate as part of the international system. The Great War was not a European war, but a global war. The mandate system was established in order to resolve the question of the former colonies of the German and Ottoman Empires. None of the Allies contemplated giving the colonies back to Germany; nor did Britain and France intend to give away the Middle East. Yet President Wilson insisted that a simple annexation was also not acceptable. Reluctantly, the Allies agreed to establish the mandate system under the League of Nations. Three kinds of mandate were agreed upon, allegedly based on the stage of development of the people of the territories in question, which therefore predicted their ability to self-govern. Middle East territories was designated as A Mandates, which meant, in theory, that the local people could soon exercise self-government. Most of German Africa became B Mandates. The territories too remote to be of importance to the Allies were designated C Mandates. This status was the most ambiguous, as the mandatory power was permitted to govern these territories as integral to itself. The Mandate for Palestine was thus part of a global political history.

Moving to the meaning and interpretations of the mandate system, Professor Confino stated that when this system was first established, people viewed it as a significant change from the imperial system, namely as a possibility for the development of and progress for the conquered people. In the last few decades this interpretation has been challenged, and the mandate system is now perceived as colonial rule in a different guise, especially because of Article 22 of the Covenant of the League of Nations, which explicitly stated that the mandate territories were inhabited by peoples not yet able to govern themselves and should be governed by the civilised nations. More recent historical discourse casts the mandate system in a new light: not as a political institution, because it was not an effective administrative system, but as a mechanism for introducing new language about governance. It generated norms and offered the mandatory powers legitimacy through an international sphere wherein they spoke of rights, governance

and sovereignty. The mechanism that allowed such legitimacy was the petition system, which created a perception of legitimacy for the empire to govern those people. Between the two World Wars, powerful states had no difficulties in ruling but faced problems of legitimacy to rule. Naked imperialism was not enough, and there was a need for a structure that would appear to be different, although in reality the powers applied to the territories under mandate the same political structures of former colonies. By allowing others to challenge them, they opened a space to subvert their own rule. This was the role of the League and of the Commission of the League. In this way, the League and the mandate offered a new narrative. They allowed people to form and substantiate their political demands for the present on narratives drawn from the League and the Charter. This is the way in which Arabs and Jews now justified their own historical narratives.

Professor Confino concluded by noting that most of the petitions that had been brought before the Mandate Commission came from Palestine, from both Zionists and Arabs. Until 1929 the Zionists argued that the Mandate was not being enforced because Great Britain had not established the Jewish national home that was envisaged under the Balfour Declaration. The Arabs had more difficulties: they could not rely on the Mandate, because it did not recognise their collective political rights. Nonetheless, this legal text became important in forming the historical rights of both parties.

THE ZIONIST VIEW

Professor Aviva Halamish, History, Philosophy and Judaic Studies, The Open University

Professor Halamish presented the Zionist conception of the obligations of the Mandatory power, namely Great Britain. From the Zionist perspective, the fundamental document was the Balfour Declaration of 1917, incorporated into the Mandate for Palestine of 1922. The Declaration is obviously asymmetrical, being very clearly pro-Zionist, and termed by some even as Zionist-biased.

With respect to the Jews, the Balfour Declaration used the adjective 'national', while the term 'Arabs' did not appear at all. The Jews were recognised as a people on their own merit, while the Arabs were referred to as 'existing non-Jewish communities in Palestine'. The Jews are a people and the Arabs are communities. The Jewish rights are national and collective and phrased in active form (the British government 'will use their best endeavour to facilitate the achievement'), while the rights of the Arabs are individual, civil and religious, expressed in passive form ('nothing shall be done which may prejudice' them). The text of the Balfour Declaration gave the impression that the Jews were the majority in Palestine, and steps were to be taken to protect the civil and religious rights of the Arabs, in a way usually applied to minority groups.

The Zionists considered the Balfour Declaration to be the cornerstone of the Mandate, expected the British to adhere to its principles, and used it as a yardstick by which to judge the deeds of the Mandatory power. From this perspective, the Mandate period was a process of retreat from the policy of the Balfour Declaration until its final abandonment in May 1939. The Zionists struggled against the evolving approach of the British of regarding their obligation in Palestine as being dual in nature.

The Balfour Declaration was addressed to the Zionist Organization (although officially it was sent to Lord Rothschild), which Article 4 of the 1922 Palestine Mandate recognised as the legitimate and sole representative of the Jewish people in all matters concerning Palestine. The British respected the statutory status of the Zionist Organization and thus strengthened certain parts of the Zionist leadership within the Zionist movement.

The Zionists conceived the major obligations of the Mandatory power as elements concerning three major issues. The first related to the establishment of a legislative council. While the Arabs wanted a council that reflected the demographic composition of the Palestine population, the Zionists were afraid that such a council would prevent the achievement of a Jewish majority in the country. The British actually sided with the Zionists, by proposing a council consisting of eight Muslims, two Christians, two Jews and ten representatives of the Mandatory government. A legislative council never materialised.

The two other obligations related to land purchase and immigration, which from the Zionist point of view were the most crucial. The British policy, clearly stated in the 1922 White Paper (defined as the official interpretation of the Mandate for Palestine), was that Jewish immigration should not exceed the economic absorptive capacity of Palestine; that immigrants should not be a burden upon the people of Palestine as a whole; and that immigrants should not deprive any section of the present population of their employment. The principle guiding the Mandatory immigration policy was economic absorptive capacity, customarily defined as the annual rate at which a country can receive immigrants without causing friction and serious economic disturbance. The Zionist Organization accepted economic absorptive capacity as the yardstick for regulating Jewish immigration to Palestine, but disputed its interpretation and implementation. The Organization differed from the British position on two basic points. The first was whether the calculations should be based, as the British maintained, on the economic absorptive capacity of Palestine as a whole, or of the Jewish sector alone. In fact, the British accepted the Zionist stand; otherwise not a single Jewish immigrant would have entered Mandatory Palestine since, paradoxically, the absorptive capacity of the Jewish labour market was greater than that of the entire Palestine economy. The British also maintained that Jewish immigration should not be a cause for dismissing Arab employees from their jobs. They nonetheless conceded that Jewish immigration could be allowed even if it prevented Arab employees from entering the Jewish labour market, admitting that Jewish capital was invested in Palestine in order to enable Jewish workers to find jobs. However, in 1937 the British relinquished the economic absorptive capacity principle in practice by fixing a ceiling of 12,000 Jewish immigrants per year – a number determined by political (demographic) considerations with the aim of maintaining the existing composition of the population, namely two-thirds Arab and one-third Jewish. In 1939 Britain abandoned the principle of absorptive capacity officially and publicly.

The other point of disagreement between the Zionists and the British was the linkage between the situation of Jews abroad – mainly in Eastern Europe and, from 1933, also in Central Europe – and the notion of Palestine as the Jewish national home. The British stance all along was to separate the two issues; however, the Balfour Declaration contained reference to the Jewish people as a whole and was not restricted to the Jews residing in Palestine at the time it was made.

The Zionists also insisted that the right of the Jews to establish their national home in Palestine be recognised internationally. The League of Nations accepted this demand, as manifested in the Palestine Mandate, as did the British in the 1922 White Paper. It is well known that the Zionists wanted the Balfour Declaration to recognise Palestine as *the* Jewish national home and had to settle for a 'Jewish national home *in* Palestine' (emphasis added). Did they and, more importantly, did the British envision the national home as a prelude to a Jewish state in Palestine? Members of the 1937 Palestine Royal Commission (the Peel Commission) came to the conclusion that 'His Majesty's Government evidently realized that a Jewish State might in course of time be established, but it was not in a position to say that this would happen, still less to bring it about of its own motion'. Its conclusion was in the spirit of what David Lloyd George, who was Prime Minister at the time of the Balfour Declaration, informed them in evidence.

Professor Halamish concluded by highlighting that the Mandate for Palestine had both universal and particular aspects and, in order to fully understand this complexity, it was helpful to use a comparative perspective, comparing the British Mandate over Palestine with the French Mandate over Syria and Lebanon, paying particular attention to the preamble and the first article of each document.

THE PALESTINIAN VIEW

Professor Hillel Cohen, Islam and Middle East Studies, Hebrew University of Jerusalem

Professor Cohen explained that the Palestinians put the emphasis in their evaluation of past events on principles of justice. In terms of justice, international law, the Mandate and the Balfour Declaration should guide us only insofar as their moral value can be established.

He then considered the reasons for the British issuance of the Balfour Declaration. One common explanation is that it was an aspect of the war with Germany, an attempt to win the hearts of Jews in the United States and in Russia. Another explanation concerned the Suez Canal and its strategic importance. Great Britain wanted to ensure its control over the eastern part of the Canal and therefore it wanted to ensure that its allies, the Jews, control Palestine. There is also the myth that British Prime Minister Lloyd George was fond of Weizmann for his work and services for the British Empire, and that the Balfour Declaration was a way to reward Weizmann. According to another important explanation, it was a matter of affiliation between Judaism and Christianity. The idea of the return of the Jews to Zion was part of a biblical prophecy and tradition. However, none of these explanations is about justice. They are about imperial interests, war efforts and religion. According to the Palestinian view, the Balfour Declaration was merely an exercise of power and not an expression of justice. When law is based upon power and not upon justice, it is doomed to be replaced by new powers that will rise.

Professor Cohen noted that there were Jews such as Ehad Ha'am, who insisted that the Balfour Declaration recognised Palestine as a national home for the Jews, yet understood that the only way to establish a Jewish national home in Palestine was to give a national home to

the Arab Palestinians as well. This was also true for Yehuda Leib Magnes, who opined that the Zionists should give up the Balfour Declaration in light of its consequences. The idea of co-existence must be based on equality. If Jews want to establish their national home in Palestine, they must respect the people already inhabiting it. Another opinion was that of Yosef Haim Kastell of Hebron, who suggested to Haim Weizmann that Arab Palestinians needed to be cared for and their needs taken into consideration. He practically suggested urging Britain to issue an additional Balfour Declaration according to which Palestine would also be the national home of the Palestinian Arabs.

The Jewish voices that suggested amending the Declaration, as well as the Arab opposition to it, were silenced and ignored. However, today most historians would agree that the Balfour Declaration was a crucial moment in creating and shaping the Zionist-Arab conflict. Its notion of Jewish domination in Palestine put an end to the idea of a shared homeland. Back to our main argument: although Palestinian and Arab experts in international law have argued that the Mandate was legally invalid, their main argument is that the Mandate and the Balfour Declaration were based on power and oppression, rather than ideas of justice, and this by itself invalidated these documents.

DISCUSSION

One participant pointed to the disappearance of the Palestine Mandate from the Zionist narrative, while the Balfour Declaration remains highly dominant. From a legal point of view, the Balfour Declaration is not that significant, while the Mandate substantiates an accepted legal structure and therefore is legally far more important. Another participant added that the Israeli education system presents a very partial history. It also ignores the instruments of 1922 and 1937, and the acceptance by the Zionist Congress of the principle of partition, which goes all the way to 1947. In addition, despite the British role and efforts, the narrative that Israeli children are taught is that the British were the 'bad guys', although the current trend in historical research is that the British Mandate was a political umbrella which facilitated significant Jewish immigration to Palestine.

One participant commented that the Balfour Declaration was not issued in disregard of justice. Rather, as the Permanent Mandates Commission observed in its 1937 Report, the Zionist cause was 'a measure of higher justice which cannot be carried out without a sacrifice from [the Arab] side'. It added that 'the collective suffering of Arabs and Jews are not comparable, since vast spaces in the Near East are open to the former whereas the world is increasingly being closed to settlement by the latter'. Another participant commented that 'justice' is a matter of narrative. It is also in the letter of the law that people find justification for their claims. We pick and choose the international resolutions that we want, and ignore others (such as 'Zionism as racism'). The Zionists picked the legal instruments that supported their narrative, while minorities often choose the concept of equality in order to justify their own narrative.

SECOND SESSION: THE ADMINISTRATION OF THE MANDATE

MANAGING DANGEROUS POPULATIONS: THE LEGACIES OF CENSUS CATEGORIES IN MANDATORY PALESTINE

Dr Yael Berda, Sociology and Anthropology, Hebrew University of Jerusalem

Dr Berda began by emphasising that administrative practices and technologies and their epistemic and practical effects are not only the outcomes of political decision making. They are more than the means, procedures, and institutional arrangements according to which modern states manage populations. Administrative practices have an important role in shaping legal categories of political membership. An example is the practices of the British Mandate government in implementing the Palestine Mandate, particularly Articles 4 and 6, which also impacted upon population management and institutional relationships within government after Israel became independent.

The practices during the Mandate created the political struggle between the Jewish Agency and the Jewish National Fund, the Bureau of Statistics and the Ministry of Interior. Census categories in Mandate Palestine reflected the rapid change in political conditions that occurred between the Balfour Declaration, stating Britain's commitment to building a 'Jewish national home' in Palestine in 1917, and the Arab Revolt in 1936. During these two decades, British colonial strategy for population management changed numerous times.

The census was a major bureaucratic battleground for interpreting the Mandate. In 1931, in the questionnaire schedule for the enumerators, a new classification was added to citizenship, religion and sect. After entering a person's citizenship, the enumerators were instructed to add 'Jew' or 'Arab' for persons so describing themselves. National identity had clearly become a subjective question of affiliation. This represented a change from objective classification according to religion. The binary path led to concerns among Zionists and Arabs alike. It resulted in the establishment of two advisory subcommittees for the census, one Jewish and the other Arab. The Jewish subcommittee was adamant that questions of landlessness and unemployment should be avoided in the census, as these would expose the extent of the land acquisition process and could jeopardise the entire Zionist project.

The census of 1931 was a highly contested project in the eyes of Palestinian communities as well as of the Zionist leadership of the Jewish community. For the government of Palestine, the census was an exercise in maintaining the authority of British rule, and in managing recalcitrant parties that did not seem to appreciate the need for statistical information as a way of benefiting the progress of the state.

Two legacies of the Mandate were crucial in shaping population management after independence: the legacy of cooperation between the Mandate and the Jewish Agency, and the legacy of the binary 'Jews' versus 'Arabs' population categories, and its effects on population management by contemporary Israel's Ministry of Interior. The binary categories represented an important shift away from the Ottoman millet system that categorised people by their religion.

The battle over the census categories that surrounded the 1931 census is a tale of love, hate, statistics and boycott in Palestine. It is a way of exploring the various interpretations of managing the population of Palestine in cooperation with the Jewish Agency in accordance with Articles 4 and 6 of the Mandate.

MANDATORY LAND LAW AND ITS IMPACT ON THE STATE OF ISRAEL'S RELATIONSHIP WITH THE BEDOUINS

Dr Sandy Kedar, Law, University of Haifa

Dr Kedar opened by noting that his presentation was based on a book project in progress, written with Ahmad Amara and Oren Yiftachel, titled *Terra Nullius in The Negev? Indigenous Bedouin Land and Contested Legal Geographies of Southern Palestine/Israel*. He then moved to offer a short overview of scholarship on critical legal geography of settler societies on the basis of a book he had co-edited (*The Expanding Spaces of Law*, Stanford University Press 2014). He stressed that expropriating indigenous lands does not always involve the use of physical force. The real conquest often takes place in papers, maps and the law, all used together as an organised process of denial and forgetting.

He then offered a short overview of the demographic and spatial changes that took place after 1948 in the Negev. Until 1948, between 70,000 and 95,000 Arab-Bedouins had lived in the Negev, most of whom were expelled or fled the violence of 1947–48; about 13,000 remained in the Negev. Today, they number about 220,000, with approximately half living in unrecognised villages.

As is typical with settler societies, the Israeli state created a legal doctrine which facilitates settlement and land nationalisation. It employed land settlement through the Torrens titling system as a way of erasing past rights. It is one of the tools that Israel inherited from the British Mandate administration. The Israeli Supreme Court also played a role in land nationalisation.

By describing Bedouin villages as 'open areas', in a way that leads them to become transparent, the state deprives them of protection. The reality is that approximately 110,000 Bedouins live in unrecognised villages (in addition to another 110,000 Bedouins living in recognised communities).

By 1948, the British had registered five million *dunums* of land in Palestine. The State of Israel continued the settlement process in the Negev in the 1970s. In parallel with the transfer of Bedouin tribes to particular areas in the Negev, Israel adopted the 'Dead Negev Doctrine', which is a method similar to that used by other settler societies. The legal logic of the doctrine resembles that of *terra nullius*, thus allowing Israel to carry out land nationalisation.

The state argues that it is protecting public interests and that it is maintaining legal continuity from the Ottoman and British regimes. It maintains that until recently the Negev was almost empty; that the Bedouins were nomadic tribes who had never enjoyed any legal autonomy and did not register their *mewat* (dead) lands when they had the opportunity to do so (by no later than 16 April 1921).

As far as legal continuity is concerned, the British did, in fact, continue to register *mewat* lands after 1921 and recognised the Bedouins' land rights in the Negev. Furthermore, Jews acting in their private capacity and Zionists organisations (such as the Jewish National Fund (Keren Kayemeth LeIsrael)) bought approximately 100,000 *dunums* of land from Negev Bedouins before the establishment of Israel. According to the Israeli interpretation of intertwined Ottoman and British Mandate laws, unauthorised possession of *mewat* land constitutes trespass, regardless of how long the land is held. The state claims that the Negev lands were unsettled in the second half of the nineteenth century and the beginning of the twentieth century, and hence should be classified as *mewat*. Since the Bedouins were nomadic tribes who did not engage in cultivation, the argument goes, the only possible legal conclusion is that the Bedouins have no rights in the 'dead' Negev desert.

As is illustrated in detail in a co-written article, 'Re-Examining the "Dead Negev Doctrine": Property Rights in Arab Bedouin Regions'[1] (with Oren Yiftachel and Ahmad Amara), the Israeli interpretation of British Mandate laws, jurisprudence and practice was only one of a range of possible interpretations. The interpretation chosen by Israeli legal actors was that which most limited the potential rights of Bedouin landholders, leading to their definition as trespassers. Other legitimate interpretations were ignored, thereby leading to a simultaneous Bedouin dispossession and its denial.

THIRD SESSION: THE MANDATE AS A SOURCE OF RIGHTS AND OBLIGATIONS UNDER INTERNATIONAL LAW

THE LEGAL RELEVANCE OF THE MANDATE FOR PALESTINE TO THE ISRAELI–PALESTINIAN CONFLICT: MAPPING THE DEBATE

Professor Yaël Ronen, Law, Sha'arei Mishpat Academic Center for Law and Science and Minerva Center for Human Rights

Professor Ronen canvassed the contexts in which legal arguments have been based on the Palestine Mandate, and considered why specifically the Mandate was being invoked. She began by examining the references to the Mandate in Palestinian arguments. The 'traditional' Palestinian position has been a rejection of the Mandate as altogether illegal. Perhaps the strongest legal objection to the Mandate was that of Henry Cattan, who represented the High Arab Committee before the United Nations in 1947, and later presented his view in academic literature. He argued that the Mandate violated the right of the Palestinians to self-determination, sovereignty and independence. Its administration was also illegal, because it allowed immigration which modified the demographic composition of the population in the territory of Palestine, and no self-government institutions were created despite the legal provisions to that effect. A similar view was expressed in a colloquium of Arab jurists which took place in Algiers in 1967. They

[1] (2012) 14 *Mishpat Umimshal [Law and Government]* 7–147 (in Hebrew).

concurred that the provisions of the Mandate relating to the national home for the Jewish people (Articles 2, 4 and 6) were invalid, but held that otherwise the Palestine Mandate had legal effect.

The question arises why the (in)validity of the Mandate (and other documents) was of interest in the 1960s and 1970s, when so much legal water had passed under the bridge. Cattan himself said that his case was not academic. The argument about the Mandate was part of a wider argument: that every legal and practical step in the path to Israel's independence was unlawful. Cattan therefore demanded that 'right and justice' be restored, through the dissolution of Israel.

By the twenty-first century the main question is not whether Israel may exist or not, but whether Palestine does, and the Mandate is once again being invoked. In 2010, John Quigley published *The Statehood of Palestine*,[2] in which he aims to demonstrate that Palestine became a state in the Mandate era, albeit without independence. Quigley finds support for the existence of Palestinian statehood in the League of Nations Covenant. In light of Article 80 of the UN Charter, which provides for the continuation of rights acquired under the mandate system, Quigley concludes that Palestine continues to be a state. Querying why it was important for Quigley to ground Palestinian statehood in the Mandate rather than, for example, in the PLO's 1988 Declaration of Palestine in Tunis, Professor Ronen suggested that the answer was related to the international norms relating to statehood and occupation: if the West Bank and Gaza Strip (where Quigley locates the state of Palestine) already constituted a state of Palestine in 1967, the Israeli occupation could not extinguish its statehood.

Moving to use of the Palestine Mandate in Israeli argumentation, Professor Ronen noted that prior to and immediately after Israel's Declaration of Independence it is difficult to find statements which refer to the Mandate as a source of legal right to statehood or to a national home. In 1947, appearing before the UN Special Committee on Palestine (UNSCOP), Ben Gurion used cautious terminology, speaking of a 'promise', 'justice' and 'equity'. In Israel's Declaration of Independence, what is attributed to the Mandate is a reflection of 'humanity's consciousnesses'. In contrast, jumping forward to 2012, the Levy Report states that, by approving the Mandate, the League of Nations 'recognized, as a norm enshrined in international law, the right of the Jewish people to determine its home in the Land of Israel, its historic homeland, and establish its state therein'.

However, Professor Ronen distinguished the non-reliance on the Palestine Mandate to ground the right to statehood from its role as a legal basis for the rights of immigration and settlement. Zionist agencies clearly relied on the Mandate as a source of legal rights with respect to immigration and settlement under Article 6 of the Mandate in March 1948 when speaking in the UN Security Council. Also, appearing before UNSCOP, Ben Gurion spoke of Britain preventing immigration as 'force being used against people exercising their *rights'* (emphasis added) and Sharett notes that the 1939 White Paper 'violated the Mandate'.

Upon Israel's independence, reference to Article 6 of the Palestine Mandate ceased. This is not surprising: the state had come to exist, and immigration and settlement were within the

[2] John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press 2010).

new state's sovereign powers and no longer required any international approval. They re-emerged in the 1970s with regard to settlement in the West Bank and Gaza Strip. In 1979, Eugene Rostow opined that since Jordan and Egypt have never had sovereignty over the West Bank and Gaza Strip, these areas remained Mandate territory until sovereignty was established. Since, in his words, Article 6 of the Palestine Mandate 'granted [the Jews] the right to … settlements', he concluded that the UN as trustee must allow settlement.

A quarter of a century later came Judge Levy's dissent in the disengagement ruling, *Gaza Coast Municipality*, in 2005. Judge Levy stated that the main commitment under the Palestine Mandate was to realise the Balfour Declaration and that the means to do so was, inter alia, by settlement. He also stated that the right to a national home consists of two aspects: the right to immigrate and the right to settle. Judge Levy concludes that 'the right of Jews to settle in Judea, Samaria and the Gaza Strip derives from the same source that granted Jews the right to settle in Naharia, Ashdod, Ramla and Lod'.[3] What the Judea and Samaria settlements have in common with the other places is that they are all within the territory of Mandatory Palestine but outside the Jewish state envisaged by the 1947 Partition Plan, but the latter locations are within Israel's internationally claimed and recognised territory. By equating the Judea and Samaria settlements with them, Judge Levy eliminated Israel's independent existence as a relevant factor in determining its rights over territory.

The Levy Report of 2012 makes a similar, if less elaborate, proposition. The report states that what Israel did in 1967 was to restore the legal status of the territory to its original status – that is, 'territory designated to serve as the national home of the Jewish people'. It states that Israel chose not to claim sovereignty over the territory but has allowed Israelis to live in the area voluntarily, a policy which is not unlawful under international law.

Again, asking why is it important to revert to the Palestine Mandate as a source of rights, Professor Ronen held that the assertion that the West Bank is Mandated territory serves a number of goals. First, it supports a territorial claim that, like Quigley's claim regarding Mandate-based Palestinian statehood, appears invincible. If Mandatory Palestine is designated to serve as the national home for the Jewish people, no adverse possession or claim can detract from that right: neither Jordan's possession of it in 1948, nor later Palestinian claims to a state. Second, to the extent that the present controversy revolves specifically on the legality of the settlements and the prohibition under Article 49 of the Fourth Geneva Convention, the invocation of an explicit provision calling for settlement means that the conflict is not between a legal norm and a contrary policy, but between two contradictory legal norms.

In conclusion, Professor Ronen observed that one would expect that what one side of a conflict embraces, the other would reject, and vice versa. Surprisingly, however, supporters of both Palestinian statehood and Israeli expansionism have, in recent years, turned to the Mandate for support.

[3] HCJ 1661/05 *Gaza Coast Regional Council v The Israeli Knesset* 2005 PD 59(2) 481, dissenting opinion of Judge Levy, para 15.

THE RIGHT TO SELF-DETERMINATION AND THE 1922 LEAGUE OF NATIONS MANDATE FOR PALESTINE

Professor Robbie Sabel, Law, Hebrew University of Jerusalem

Professor Sabel first questioned whether under international law the League of Nations was authorised to 'dispose' of Palestine. He pointed out that the legal basis of the arrangements was the authority granted by international law to Britain and France as the victorious powers in the First World War and not any supranational power of the League of Nations. Under international law, certainly as it was at the time, Britain and France were entitled to sovereignty over those parts of the Ottoman Empire they had occupied during the war; in the Treaties of Sèvres and Lausanne Turkey renounced, in favour of Britain and France, any claims it had over the Ottoman Empire. It was thus Britain and France who had the power to dispose of the Ottoman Empire, including Palestine. It was, again, Britain and France who decided not to turn the territories at issue into British and French colonies but rather to administer them in accordance with a Mandate to be issued by the League. Britain and France, of course, drafted this Mandate themselves. Therefore, the Covenant of the League of Nations granted the League no rights of sovereignty over territories or power to determine sovereignty of the former Ottoman Empire. This legal situation is reflected in the wording of the Preamble to the Palestine Mandate.

Professor Sabel then proceeded to discuss the principle of self-determination as 'the act by which a people determine its future international status and liberates itself from "alien" rule'. He noted that although the right to self-determination was famously declared in UNGA Resolution 1514 in 1960 and in the 1970 UN Declaration on Friendly Relations between States (UNGA Resolution 2625), there is no agreed definition of a 'people'. There was one delegation to the Third Committee of the UN General Assembly which suggested that 'whenever a people became conscious of being a people, all definitions were superfluous'.

As for the evolution of the concept of self-determination, he noted that it is the near unanimous opinion of jurists that in 1922 the principle of self-determination was indeed an accepted political principle applied in some cases, mainly with regard to the former Austria-Hungarian Empire. However, it was not accepted as a binding principle of international law until after the Second World War, and even then with the qualification that the principle should not authorise or encourage 'any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent states …' (UNGA Resolution 2625 (1970)).

There is little dispute that at the end of the First World War self-determination was not yet a legal principle. Cattan himself writes that in 1917 'self-determination was, at best, a political principle' and Feinberg also reaches the conclusion that it was a purely political factor.

Interestingly, Wilson's 'Fourteen Points' do not refer explicitly to a right of self-determination, and only in 1918 did Wilson begin to use the phrase 'self-determination'. Although he declared that '[s]elf-determination is not a mere phrase, it is an imperative principle

of action which statesmen will henceforth ignore at their peril', the phrase does not appear in the Covenant of the League of Nations. In fact, in an earlier draft presented to the Versailles Conference in 1919 Wilson explicitly used the phrase 'the rule of self-determination' but Wilson himself dropped the phrase from a later draft. Inis Claude comments that '[t]he principle was convenient in that it assisted during the war to weaken the resisting power of Germany's allies' and that 'in no case was national self-determination recognized to the detriment of the victorious allies'.

The Covenant of the League contains no explicit reference to self-determination. However, Article 22 of the Covenant resolved that '*[c]ertain communities* formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory' (emphasis added) (The A Mandates). To these communities '… there should be applied the principle that the well-being and development of such peoples form a *sacred trust of civilisation* and that securities for the performance of this trust should be embodied in this Covenant …' (emphasis added). On this basis Feinberg held that the League of Nations reached the conclusion that it was in the interest of humanity that a solution be found for the national problem of the homeless Jewish people.

Turning to the 1922 Palestine Mandate, Professor Sabel noted that it referred to 'a national home for the Jewish people' and to the obligation on Britain to 'secure the establishment of the Jewish national home'; its reference to the Arab population was to 'the civil and religious rights of existing non-Jewish communities in Palestine'. As Stone commented, the Palestine Mandate studiously avoided referring to their political rights or political standing.

The Preamble to the Palestine Mandate repeated the text of the 1917 Balfour Declaration and the question arises whether the phrase 'national home' implied self-determination. The phrase 'national home' was in fact suggested to the British government by the Zionist Federation, following earlier references to 'internal autonomy of the Jewish population in Palestine' and, even earlier, to 'a temporary British protectorate'.

The 1937 Peel Commission found that the words 'the establishment in Palestine of a national home' were

> the outcome of a compromise between those Ministers who contemplated the ultimate establishment of a Jewish state and those who did not. It is obvious in any case that His Majesty's Government could not commit itself to the establishment of a Jewish State. It could only undertake to facilitate the growth of a Home. It would depend mainly on the zeal and enterprise of the Jews whether the Home would grow big enough to become a State.

The Commission noted that Lloyd George, who was Prime Minister at the time, informed it that the idea was that a Jewish state was not to be set up immediately by the peace treaty without reference to the wishes of the majority of the inhabitants.

> On the other hand, it was contemplated that when the time arrived for according representative institutions to Palestine, if the Jews had meanwhile responded to the opportunity afforded them by the idea of a national home and had become a definite majority of the inhabitants, then Palestine would thus become a Jewish Commonwealth.

The Commission concluded that the government evidently realised that a Jewish state might in course of time be established, but it was not in a position to say that this would happen, still less to bring it about of its own motion.

Another question is the geographical extent of the promise of a 'national home'. The draft presented to the British government by the Zionist federation used the phrase 'Palestine should be reconstituted as the National Home of the Jewish people'. This phrase was changed by Sir Alfred Milner, the British War Minister to 'the establishment in Palestine' of a national home for the Jewish people. This phrase remained in the text. It enabled the British government to maintain its position that not the whole of Palestine was promised as a national home. The area of Transjordan was, at the request of Britain, excluded from the area destined for a Jewish national home by a 1922 decision of the Council of the League of Nations.

Turning to the Arab view, Professor Sabel said that the claim of Palestine's indigenous Arab inhabitants to self-determination was based on effective occupation and continuous habitation, whereas the Zionists' claim was aligned with British imperialism. The Jewish people were not a 'people' for the purpose of international law, and lacked any collective connection with territory. Victor Kattan reasons that both Palestine's indigenous Jewish and Arab inhabitants had a claim to Palestine on the basis of the principle of self-determination. However, in the event of conflict between the interests of the two communities, international law would give precedence to the interests of the original and indigenous inhabitants over those who had recently migrated there from overseas. He adds that the Balfour Declaration did not apply to the whole of Palestine. Rather, the national home was to be established *in* Palestine.

Professor Sabel noted that the British attitude to self-determination was cynical in the extreme. Charles Hardinge, Permanent Under-Secretary of State for Foreign Affairs, wrote in an internal memo in 1920 that 'the programme of "self-determination" is in full swing everywhere, and we must make the best we can of it'. Balfour wrote to Lloyd George on 19 February 1919:

> The weak point of our position, of course, is that in the case of Palestine we deliberately and rightly decline to accept the principle of self-determination. If the present inhabitants were consulted they would unquestionably give an anti-Jewish verdict. Our justification for our policy is that we regard Palestine as being absolutely exceptional; that we consider the question of the Jews outside Palestine as one of world importance and that we conceive the Jews to have historic claim to a home in their ancient land; provided that home can be given to them without either dispossessing or oppressing the present inhabitants.

Effectively, Arab self-determination in Palestine was being temporarily *postponed* so as to give the Zionists an opportunity to create their home. Chaim Weizmann was aware of this problem and he wrote, prior to the 1920 San Remo conference, to Robert Vansittart:

> The other Mandated areas are to be administered in the national interests of the present inhabitants but the Mandate of Palestine is to have as its guiding objects the establishment of the Jewish national home, the rights of the present inhabitants, of course, being adequately safeguarded.

Professor Sabel concluded that self-determination was not a legally binding principle at the time of the adoption of the Palestine Mandate, but it was accepted as a political matter. The objective of the Zionist movement was self-determination, but for political purposes it used the term 'national home'. The Arab population perceived Zionism as an infringement of its rights to self-determination as the majority in Palestine. The British made a decision to grant self-determination to most of the Arab population in the former Ottoman Empire, but to defer self-determination in Palestine until the Jews became the majority and could form their own national home.

DESUETUDE AND THE MANDATE[4]

Professor Yuval Shany, Law, Hebrew University of Jerusalem

Professor Shany said that a discussion of the Mandate's relevance today raises two issues of the temporality of international law. The first is how to deal with changes in law when evaluating the legality of past events. The arbitration of the *Island of Palmas* case distinguished between questions relating to the creation of rights under international law, where the relevant body of law is that which existed at the time of the events in question, and matters such as the continued existence of certain rights which may be affected by subsequent changes in the content of the law. For instance, the principle of self-determination has gone through very dramatic changes from 1922 to 2016. On one hand we must be careful not to apply it retroactively to the creation of rights, but we may have to apply some of the developments to evaluate the continued existence of some rights or the emergence of rights which did not exist at the time.

A second temporal tension is when facts and legality diverge. One view is that no valid right derives from an event which originated in a wrong; the opposite approach maintains that factual changes over time may cure an originally flawed title. We have in both domestic law and international law rules which exemplify both approaches and the discussion of their application in specific situations must involve contextual issues – the time period, the ramifications of reinstating a factual status quo ante, and the reaction of the relevant parties or third parties.

In his leading text, *The Creation of States in International Law*, Professor James Crawford raises three questions regarding the creation of the State of Israel: (i) the legality of the 1922 Mandate under international law; (ii) the effect of the Partition Resolution under international law and, as a result of these two preliminary questions, (iii) the validity of the creation of Israel in 1948 under international law.

[4] Yuval Shany's presentation appears as a full length article in this issue: 'Legal Entitlements, Changing Circumstances and Intertemporality: A Comment on the Creation of Israel and the Status of Palestine'.

Professor Shany noted three main objections to the validity of the 1922 Palestine Mandate, which clearly favoured the interests of the Jewish community. One is a breach of Turkish sovereignty, which Crawford quickly dismisses, stating that Turkey had lost the war and relinquished the land. The second is the infringement of the sovereign rights of the indigenous population, an argument which is hard to reconcile with the state of international law at that time and the lack of a strong sense of self-determination. A third, and the most serious contention against the validity of the Palestine mandate, is that it was a violation of the Covenant of the League of Nations, which introduced the mandate system as a way of implementing the Versaillesian notion of self-determination, as a sacred trust of civilisation. Professor Shany noted that Crawford deals with the issue on a somewhat technical level – namely that, in the absence of a procedure under the Covenant according to which 'unconstitutional' decisions of the Council could be struck down, their legality stands. Professor Shany suggests that the authoritative interpretation idea is perhaps more appropriate – namely that the implementation of a treaty by a body which is entrusted with implementing it constitutes an important and maybe an authoritative source of interpretation. The argument could be made that the conduct of the Council of the League of Nations with respect to the Palestine Mandate is not a violation of Article 22 but a construction of self-determination at that time. Another aspect of Article 22 was to design the conditions under which the inhabitants of a territory could govern themselves. From that perspective, a project in which a group of inhabitants – even a minority, but which could over time become the majority – is empowered because that group could attract capital and skilled personnel into the area, falls within the logic of Article 22. It can be said that between 1917 and 1922 it was not as clear to the drafters of the Covenant as much as it is clear now that this process of empowering minorities at the expense of the majority might infringe the right to self-determination, and it was believed that the development of Palestine in this way would be beneficial for all populations.

As for the Partition Resolution, Professor Shany noted Crawford's view that the partition plan did not create a legally binding outcome because it was adopted before the termination of the Mandate and, according to Crawford, the only way in which the UN could have validly disposed of the territory at that time was by agreement with the Mandatory power, which did not exist. Professor Shany criticised this as a formalistic argument which could be a recipe for catastrophe, since the logic of transition is to make arrangements before the expiration of the regime. He offered other grounds to doubt the legal effects of the Partition Resolution, primarily its language and its use of the term 'recommend'.

The final issue which Professor Shany examined in Crawford's analysis was the establishment of the State of Israel. Crawford takes the view that the termination of the legal Mandate has created a sovereignty vacuum which could have been filled by lawful and effective exercise of control over the territory. Crawford disagrees with the determination that Palestine was *terra nullius*, but concludes that under international law as it stood in 1948 self-determination was an emerging principle which, under the particular circumstances of Palestine, could plausibly be realised through partition. He considered that Israel validly seceded from Palestine, invoking the right to self-determination, using lawful and effective control. Professor Shany expressed

doubt about the secession theory. Israel did have a claim, partly because the Jewish national home was realised in territories over which the Jewish population had effective control. However, the other party also had a right to exercise the right to self-determination and, to the extent that a Palestinian state had been created in 1949 in the areas of Mandatory Palestine, the same logic that Crawford applied with regard to Israel would apply to validate the rights of that unit under international law. The question of who seceded from whom is important, for instance, to determine title over areas in the pre-1967 no-man's lands between Israel and Jordan. It also affects whether the Arab occupation of 1948, especially in the old city of Jerusalem, can be regarded as a lawful and effective exercise of control.

DISCUSSION

One participant suggested that self-determination might not be a legal right even in 2016. It runs counter to the goal of a united world, and to the principle of territorial integrity. Moreover, international recognition of self-determination is selective and is based on interests much more than on the legalities. It has remained a political principle, which is being managed and misused on many occasions.

Another participant commented that self-determination was accepted during President Wilson's administration because it was agreed that nations should be homogeneous. Self-determination was a racial concept in the interest of stability of states, and therefore the stability of the international system. This created the problem of minorities. There were two solutions available: either to accord minorities special rights, or to transfer them as a humanitarian act in order to allow them to be part of a majority. The Jews and the Arabs both knew that there were precedents for population transfers, as also suggested by the Peel Committee.

Another participant opined that it is very difficult to argue nowadays that there is no legal right of self-determination in international law. In *Mauritius v United Kingdom*, James Crawford argued for Mauritius that the right to self-determination came into being in international law around 1960, and the United Kingdom argued that it was recognised only in 1970. The key date in this case was 1965. The Arbitral Tribunal did not, in fact, find it necessary to determine these questions.

With respect to termination of the Palestine Mandate, one participant drew attention to the similarity between the US Constitution and the Mandate in that neither contains a termination provision. The issue was left vague under the Mandate, so the question remains as to what would happen if the beneficiaries of the Mandate petitioned the League of Nations claiming their readiness for self-government. In the US, the question whether a state can leave the Union was answered in the negative in the Civil War. The first mandate to be terminated was the mandate over Mesopotamia when the Iraqi monarchy was established by Great Britain, and no one contested that. The issue of Jordan was a little more complex, yet it was resolved by 1946. Therefore, the answer to how the Mandate should have been terminated is an open one.

With respect to the Partition Resolution, a participant pointed out that not only was it not binding, but also the UN had no other alternative but to phrase it as a recommendation, in

light of Article 80 of the UN Charter, according to which the UN has no power to diminish any rights of people that exist under the mandate system.

FOURTH SESSION: CONCLUDING REMARKS

Michael Wood (barrister, 20 Essex Street) offered a few concluding observations. He advocated the simplification of the arguments. It seems clear that the Mandate was an agreement between the League of Nations and the Mandatory power, based on Article 22 of the Covenant of the League. Therefore, the two documents must be read together. This eliminates the 'Mandate was invalid' argument. One can read the Mandate in many ways, but some of the expressions have their reasons. For example, the choice of 'national home in Palestine' over 'Palestine as a national home' is essential to the argument. On the other hand, some of the expressions are ambiguous, and some will say this was deliberately so. An example is the Mandatory territory issue. An argument that the Mandate included the whole of Palestine, and that consequently Israel in 2016 has sovereignty or an entitlement to sovereignty beyond the 1967 borders would never receive international approval, either legally or politically. As far as legacies left by the Mandate are concerned, there is influence on domestic law for sure. Another interesting legacy is the possible Commonwealth membership of Palestine and other states in the region.

Rapporteurs: Mr Eitan Cohen, Ms Tom Nachtigal, Professor Yaël Ronen

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Book Review

Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine

Robert P Barnidge, Jnr
Hart Publishing, 2016, 238 pp, £55
ISBN: 9781849468121

There is an old anecdote about the Troubles in Ireland which tells of a terrorist poking a gun into the window of a car and demanding to know whether the passengers were Catholic or Protestant. On being told that the passengers were Jewish, the terrorist hesitated for a moment and then wanted to know whether they were Jewish Protestants or Jewish Catholics. I quote this in the context of the conundrum as to whether it is possible to write a completely non-partisan anodyne book on legal aspects of the Arab–Israel conflict. I am not sure it is possible. What is possible, however, is to write a book that is partisan and yet academic. Julius Stone's 1982 book[1] provided an academic analysis of the legal issues from a Zionist perspective and Victor Kattan attempted to do this in 2009 from a Palestinian viewpoint.[2] Barnidge's tour de force of academic research into the role of international law in the Arab–Israel conflict is therefore a very welcome development. To a large extent, the book presents the legal aspects from a Zionist point of view, but does so in a scholarly manner with meticulous research, buttressing every point with legal and academic references.

Like ancient Gaul, the book is divided into three parts. The first part is a chronological history and analysis of the international law issues involved in the Arab–Israel dispute. The second part deals with the role of negotiation in settling the dispute. The third and final part discusses the attempts by the Palestinians to achieve membership of the United Nations (UN). Although the link between the three parts is fairly tenuous, each part is, in itself, innovative, thoughtful and thoroughly referenced.

The first part of the chronological study commences with the dissolution of the Ottoman Empire after the First World War and the institution of the League of Nations mandate system. Barnidge makes the point that, at the time, the concept of self-determination 'had not juridically crystallised' (p 13) and 'did not (yet) exist as *lex lata*', and that therefore 'it is doubtful that the

[1] Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (Johns Hopkins University Press 1981).
[2] Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891–1949* (Pluto Press 2009).

principle of self-determination existed in general international law at the time the Covenant was adopted' (p 14). The author sees the mandate system as basically no more than 'political self-government for the concerned populations' (p 16). Barnidge raises the possibility that the non-application of the Jewish national home clauses to Transjordan may have been illegal since it was 'a constructive transfer of a part of Palestine to a foreign power' (p 19) and a 'truncation of the Jewish national home' (p 20).

The book emphasises that, at the time the Mandate was created, the Arab population of Palestine regarded itself as 'part of Syria as a whole, as part of the Arab world' (p 22), considered that 'any distinct national identity for Palestinian Arabs *qua* Palestinian Arabs was, at best, in *statu nascendi* during the Mandate' (p 26), and that in fact all the Arabs of the Ottoman Empire saw themselves as one people and viewed the borders laid out by Britain and France as being 'arbitrary' (p 21). Interestingly the author reports that the 1937 Report of the Peel Commission reinforced the view that the Arabs of Palestine, as late as 1937, still saw themselves as part of 'Southern Syria' (p 30). The author continues to note that the 1947 UN Special Committee on Palestine report demonstrates that even after the Second World War, the Arab population of Palestine did not see itself as being a 'distinct people' (p 37) and that 'the Mandate years were a period in which Palestinian Arab national identity was primarily pan-Arab, and more specifically, pan-Syrian' (p 42). The book goes on to provide extensive academic references to the fact that the Arabs of Palestine and the Arab states were not willing to accept any Jewish political entity in Palestine and used force to try and prevent the creation of Israel.

This reviewer believes the author makes a very cogent argument that there was no legal right of self-determination at the time the 1922 Mandate was created and that the Arab inhabitants of Palestine at the time did not consider themselves to be a separate people. This is important as a counter to the argument that the Mandate stipulation of creating a Jewish national home in Palestine was a violation of the right of self-determination. I am not sure, however, how relevant the issue still is today as, since the end of the Second World War, self-determination is clearly a legal right and all states, including Israel, recognise the Arab Palestinians as a people.

Although the author states clearly that 'the Arab side was unwilling to entertain a negotiated settlement with its Jewish counterparts, much less any other peaceful means of dispute settlement' (p 52), nevertheless efforts were made to reach a settlement and the second part of the book enumerates these international efforts. The first major international attempt referred to in the book was the appointment of a UN Mediator, Count Bernadotte who, in September 1948, presented a 'Progress Report'.[3] The Report affirmed,[4] inter alia, that:

> [T]he right of innocent people, uprooted from their homes by the present terror and ravages of war, to return to their homes, should be affirmed and made effective, with assurance of adequate compensation for the property of those who may choose not to return.

[3] 'Progress Report of the UN Mediator on Palestine', UN Doc A/648 (1948), 89.
[4] ibid, Conclusions 3(e).

The Report called for transferring the southern part of the country, the Negev, to Arab control[5] and maintaining Jerusalem under effective UN control. A final recommendation of the Report was to set up a UN conciliation commission. Bernadotte, however, was assassinated by members of the Lehi group a day after he completed his report. The UN General Assembly, in its Resolution 194,[6] adopted to a large extent the recommendations of Bernadotte's Progress Report, including his recommendation to set up a conciliation commission. The author comments that the mandate of this commission 'was as confused as it was vague' (p 61). I think the author's criticism is an understatement. The conciliation commission set up by the UN General Assembly in 1948 was very far in its concept from the accepted idea of a conciliation commission; it was created without consultation with the parties; its members were official representatives of states who clearly represented the political position of the states that appointed them. Above all, the commission was given a mandate that reflected the political view of the UN General Assembly. This mandate, which included the internationalization of Jerusalem, was totally unacceptable to Israel – hardly a promising premise for conciliation.

Another clause in the mandate of the conciliation commission was Article 11, which read: 'refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date'.[7] This Article has come to bedevil anybody trying to reach an agreed resolution of the Israel–Palestinian dispute. In the experience of this reviewer, Article 11 has made it extremely difficult to reach a pragmatic solution to the refugee problem as the Palestinians always insist on some reference to implementing the Article, a non-starter as far as Israel is concerned. The reference to Resolution 194 in the, otherwise very promising, 2002 Arab League peace initiative[8] has made it impossible for Israel to accept the initiative as an agreed premise for negotiations. An interesting footnote to this issue is, as pointed out by the author, that 'it is not clear whether this [Article 11] was meant to benefit Arab or Jewish displaced persons, or perhaps both' (p 62). As part of the meticulous research reflected in the book, the author points out that at least one delegation to the UN General Assembly, New Zealand, explicitly referred to 'most generous compensation to all those who had been displaced, both Arabs and Jews' (p 62, n 150).

In his concluding chapter to the book, Barnidge writes that 'it is not altogether clear how the intervention of outside actors actually contributes to peace settlements' (p 182). This reviewer thinks that might be too negative a statement. United States mediation was undoubtedly helpful, if not vital, in achieving the Israel–Egypt Peace Treaty. There might even be room for a process of conciliation in the future. Perhaps the classic definition of the task of a conciliation commission is as follows:[9]

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[5] ibid, Conclusions 4(i).
[6] UNGA Res 194 (III) (11 December 1948), 'Palestine – Progress Report of the United Nations Mediator', UN Doc A/RES/194 (III), art 2.
[7] ibid, art 11.
[8] League of Arab States Peace Initiative, 2002, art 2, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empa/dv/1_arab-initiative-beirut_/1_arab-initiative-beirut_en.pdf.
[9] Geneva General Act for the Pacific Settlement of International Disputes (entered into force 28 April 1949) 71 UNTS 101, art 15(1).

> The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

The International Law Institute defined the task of a conciliation commission more succinctly as to 'proceed to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted'.[10] Conciliation, when undertaken by the parties and not dictated by an international organisation, can be a very useful mechanism for settling disputes. It requires abiding by the regular procedure by which each side appoints a conciliator and three or more 'neutral' conciliators are appointed by agreement. The object of conciliation is to make recommendations which, in the opinion of the conciliators, are likely to be acceptable to both parties.[11] The conciliators' report is not binding on the parties thus, unlike arbitration, it leaves the final decision to the parties themselves. Sometimes, however, it may be politically easier for a party to accept a compromise proposed by a neutral body than to propose one itself or to accept a proposal by the other side. Barnidge concludes his book with the statement that 'Israel and the PLO [Palestine Liberation Organization] will have to forego certain claims and cure certain breaches if they are to reach a final settlement' (p 188). It may be recalled that the 'Oslo' Declaration of Principles stipulates: 'Disputes which cannot be settled by negotiations may be resolved by a mechanism of conciliation to be agreed upon by the parties'.[12] In view of the difficulties encountered by Israel and the Palestinians in attempting to reach agreed compromises, there might be room, in the future, for the parties to agree to consider a conciliation procedure.

The author provides numerous authorities to make the point that the 1967 Arab League Khartoum declaration of 'no peace with Israel, no recognition of Israel, no negotiations with it'[13] was a reflection of the consistent rejectionist position of the Arab states and of the Palestinians. The author sees, I believe correctly, UN Security Council Resolution 242[14] as a turning point where, for the first time, the Arab states accepted the principle of a peaceful settlement to the dispute, albeit without specifying a particular means of dispute settlement. The lack of specificity as to procedure was remedied six years later, after the Yom Kippur War, when UN Security Council Resolution 338[15] spelt out the need for 'negotiations' 'under appropriate auspices' in order to implement Resolution 242. The author concludes his summary of the period up to 1973 by stating (p 77):

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[10] Regulations on the Procedure of International Conciliation, 11 September 1961, Annuaire, Institut de Droit International, art 1, http://www.justitiaetpace.org/idiE/resolutionsE/1961_salz_02_en.pdf.

[11] *Handbook on the Peaceful Settlement of Disputes between States*, UN Office of Legal Affairs, Codification Division, UN Doc OLA/COD/2394 (1992), paras 140–67.

[12] Israel-PLO Declaration of Principles on Interim Self Government Arrangements, 13 September 1993, art XV(2).

[13] League of Arab States, Khartoum Resolution, 1 September 1967, http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20khartoum%20resolutions.aspx.

[14] UNSC Res 242 (22 November 1967), UN Doc S/RES/242.

[15] UNSC Res 338 (22 October 1973), UN Doc S/RES/338.

> The Arab World no more recognised the legitimacy of Jewish self-determination at the end of this period, in 1973, than it did at the beginning, in 1948. From an Arab perspective, the Jews remained a religious minority in a land that was both foreign to them and where they were unwelcome, not a 'people' with a right to self-determination.

In a subsequent chapter the author analyses the emergence of the Palestinian people, represented by the PLO as a recognised international legal entity. The author points out that the frequent UN General Assembly resolutions affirming the Palestinian right of self-determination invariably failed to mention the Jewish right of self-determination and by such refrain the resolutions 'effectively endorsed Palestinian self-determination at the expense of Jewish self-determination' (p 87). The author even surmises that the absence of an explicit reference to a Jewish right of self-determination 'conflicted with self-determination as a *jus cogens* norm' (p 84).

The survey of the 1978 Camp David Accords points out that the Israeli recognition of the 'legitimate rights' of the Palestinian people was 'juridically significant' (p 90) but that there was no reference whatsoever to a right of self-determination. This reviewer adds that the Egyptian position, however, had always been that Palestinian rights included the right of self-determination.[16] For those who place their belief in UN political bodies it is perhaps salient that the author reminds readers that the UN General Assembly roundly condemned the Camp David Accords.[17] Many have seen the 1988 PLO Declaration of Independence as the beginning of Palestinian recognition of the need to accept Israel's presence in the Middle East. The Declaration was indeed the first time the PLO apparently endorsed UN Security Council Resolution 242; however, the author points out that the PLO Declaration also described Israel as a 'colonialist, racist Fascist State' and that such language was 'hardly a convincing olive branch to the Jewish State' (p 98). It may be of interest in the present political dialogue that the PLO 1988 Declaration referred to a 'Jewish State'; however, as the author writes, the PLO was undoubtedly 'using the phrase as a statement of fact (as to what Resolution 181 had intended to have ushered into being) rather than with a view to bestowing legitimacy upon the State of Israel as a self-described Jewish State' (p 99).

In his analysis of the 1993 Israel–PLO 'Oslo' Declaration of Principles and the 1995 Interim Agreement, Barnidge reaches the conclusion that what was involved was only 'internal self-determination for the Palestinians' (p 107) and points out that there was no explicit reference in the agreements to independence or even to self-determination. The analysis also examines the legal status of the Oslo Agreements, reaching the conclusion – correct in the opinion of this reviewer – that although they were not treaties in the classic sense, they 'inaugurated a legal relationship between Israel and the PLO that both parties intended to be governed by international law' (p 141).

[16] See, eg, the Egyptian proposal for an agreed draft statement, 17 January 1978, item 7, reported at https://history.state.gov/historicaldocuments/frus1977-80v08/d180#fn:1.3.2.1.184.5.2.

[17] 'Question of Palestine', 12 December 1979, UN Doc A/RES/34/65 (B–D).

In the chapter dealing with the mechanisms for peaceful settlement of disputes, the author devotes most of his study to the process of negotiations, arguing that there is an international law of negotiations. Included in such law are the principles of 'due diligence', 'estoppel', 'acquiescence' and 'unilateral declarations' (p 184). There is undoubtedly an obligation that negotiations should be conducted in good faith, although this reviewer has doubts that we can, as yet, talk of a law of negotiations as such. The book quotes the Permanent Court of International Justice dictum that 'an obligation to negotiate does not imply an obligation to reach an agreement'.[18] The author argues that the Oslo Accords and subsequent agreements 'reaffirm a process of negotiation' (p 151) but do not specify a fixed result. Although there is no general requirement in international law to negotiate disputes, the author analyses cases where there was an explicit requirement to negotiate. He further studies the issue of the obligation to act in good faith and when negotiations can be said to have taken place and failed. This issue, of course, has relevance to the Arab–Israel dispute. The author postulates interestingly (p 152):

> While Israel and the PLO remain obliged not to act prejudicially with respect to such permanent status issues as the final status of the territories and settlements, they remain free to make claims with respect to them when doing so cannot reasonably be said to preclude a final settlement and when the assertion of such claims takes place within the context of negotiations.

However, the author makes clear that '[i]t is difficult to see how a party that has agreed to negotiate a dispute can be said to be in compliance with the international law of negotiations when it, in this case, the PLO, openly refuses to engage with this body of law' (p 170). In the opinion of the author, the PLO's negotiating tactics have been in violation of the law of negotiations. Furthermore, the author adds: 'For one party to precondition the resumption of negotiations upon its prior positions having been addressed would be to fall foul of the international law of negotiations' (p 171).

As regards the Palestinian application for admission to the United Nations in autumn 2011, Barnidge notes that it 'reflected Palestinian frustration with the bilateral negotiation imperative' (p 162), and that 'Palestinians continue to claim that negotiations have proved futile and what is required is international intervention' (p 169). He then proceeds to examine international law regarding permissible counter-measures in response to a violation of an agreement. The author examines whether it was a lawful Palestinian counter-measure against Israel, setting out that counter-measures are intended to induce the other party to comply with its obligations. He reaches the conclusion that since the Palestinian actions 'were lodged, quite calculatedly, in defiance of negotiations with Israel, it is difficult to see how the Palestinian applications can be properly seen as inducements to Israeli compliance' (p 177). Barnidge reaches the unequivocal conclusion that 'the Palestinian applications were internationally wrongful' (p 175).

An interesting final note in the book is the author's comment that neither side has claimed that 'the other party's actions had amounted to a material breach' of the Oslo Accords. (p 179). Such

[18] *Railway Traffic between Lithuania and Poland*, Advisory Opinion (1931) PCIJ (Ser A/B) No 42, 12.

a claim would have justified a position that the Oslo Accords are no longer in force; neither side apparently wants to cross this Rubicon.

Barnidge's book should be on the bookshelf of every reader who follows legal issues in the Middle East. This reviewer, for one, will be placing it, along with a book reflecting the Palestinian legal narrative, on the required reading list for all students studying courses on the role of international law in the Arab–Israel conflict.

PROFESSOR ROBBIE SABEL
Hebrew University of Jerusalem
robbie.sabel@mail.huji.ac.il

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Magna Carta and the Development of Modern International Law

Lionel Cohen Lecture 2015, Jerusalem, 23 November 2015

Christopher Greenwood[*]

1. Introduction

It is both an honour and a pleasure to be invited to give this year's Lionel Cohen Lecture. Looking at the long list of distinguished jurists who have given this lecture, it is impossible not to feel a sense of privilege – and trepidation – at being asked to follow in their footsteps. However, it is also a real pleasure to be able to pay tribute to the late Lord Cohen here in the university which meant so much to him and in the presence of members of his family. I did not have the opportunity of knowing Lord Cohen: his last judgment, in *Boardman v Phipps* – and it was a very great judgment with which I later struggled as a law student – was delivered when I was only eleven years old, and he died just before I embarked on the study of law.[1] He stood for that tradition of integrity, inclusiveness and public service which attracted me to law as a career when I was a teenager. Though my brief attempt at playing golf was a failure, now in the distant past, I cannot help but admire a man who could combine a distinguished legal career with a golf handicap of almost professional standards. Lionel Cohen was obviously a man with what we describe today as 'a hinterland' beyond the law. In an age of narrow specialists, that is something we should admire and try to emulate, whether on the golf course or elsewhere.

I spoke of a sense of trepidation. That trepidation mounted steadily when I actually sat down to write this lecture. I chose my title several months ago. It seemed like a good idea at the time! Magna Carta appeared an obvious choice on this, its 800th, anniversary, and linking it to international law would allow me to play at home, as it were. Yes, it was an obvious choice and I noted it down with pleasure, and then forgot all about it until I started to prepare the text, several months later.

At that point I realised there were a number of problems with my choice. First, as Jonathan Sumption has pointed out,[2] so many English lawyers and historians have spoken or written about Magna Carta this year that it is almost impossible to say anything remotely original. If Jonathan Sumption – as fine a mediaeval historian as he is a jurist – thinks that, then it is hardly likely that

[*] Judge, International Court of Justice. This article is an amended version of the 2015 Lionel Cohen Lecture, delivered at the Hebrew University of Jerusalem on 23 November 2015.

[1] *Boardman v Phipps* [1967] 2 AC 46.

[2] Jonathan Sumption, 'Magna Carta: Then and Now', Address to the Friends of the British Library, 9 March 2015, 1, https://www.supremecourt.uk/docs/speech-150309.pdf.

someone who has no claim to be a mediaevalist, and whose career has been largely outside the world of English law can do so. Secondly, there is real doubt about whether Magna Carta can properly be described as having had any serious impact upon English law, let alone international law. While most of this year's books and lectures on the subject have – understandably, and perhaps pardonably – followed the lead of Lord Denning in lauding the Charter as 'the foundation of all our liberties',[3] others – including Lord Sumption in his memorable lecture to the Friends of the British Library – have dismissed it as an historical relic of little importance even in its own day, and largely misunderstood and misrepresented ever since. Lastly, even if Magna Carta *is* important to common lawyers, there is the difficulty of linking what happened between the king and a group of barons and prelates at Runnymede 800 years ago with the international law of today.

So what seemed like a good idea at the time began to seem rather less good when I sat down to write, but twenty years at the Bar defending a range of acts of various governments before different courts means that one develops a liking for challenges. Let us therefore venture forth regardless and consider, first, what Magna Carta has meant for the development of common law and the constitutional traditions of the English-speaking world, and then what impact, if any, it may have had on international law.

2. MAGNA CARTA AND THE COMMON LAW

The English like their centenaries so it was only to be expected that we have made a fuss about the 800th anniversary of Magna Carta. Indeed, since the 700th anniversary coincided with the First World War, the 600th with the Battle of Waterloo and the 500th with the first Jacobite uprising, Magna Carta could reasonably feel it has already waited a long time to be the centre of attention.

There are, however, two problems with the way in which it has been lauded during this anniversary year. The first is that most people have never read Magna Carta. That is hardly surprising. It is not one of those texts that trips off the tongue. There is nothing like the resounding words of the American Declaration of Independence:[4]

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness;

or the opening words of the Charter of the United Nations:[5]

> We, the Peoples of the United Nations, Determined to save succeeding generations from the scourge of war …

[3] Simon Lee, 'Lord Denning, Magna Carta and Magnanimity' (2015) 27 *Denning Law Journal* 106.
[4] United States Declaration of Independence, 4 July 1776.
[5] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, preamble.

Magna Carta opens with a recital of King John's impressive list of titles – not just King of England but also Duke of Normandy, Count of Anjou, and so on – and follows them with a cast list of the leading prelates and barons who had turned up at Runnymede. Those inspired by the anniversary to persevere beyond this mediaeval *Who's Who* will find such clauses as Article 25:[6]

> All shires, hundreds, wapentakes and ridings shall be at the ancient farm without any increment, except our demesne manors,

or Article 33, which proclaims:

> Henceforth all fish-weirs shall be completely removed from the Thames and the Medway and throughout all England, except on the sea coast.

Unlike the US Constitution, the UN Charter, or the Universal Declaration of Human Rights, Magna Carta is not the kind of text one carries around in one's pocket for inspiration.

The second problem is that far too many people make absurd and extravagant claims for Magna Carta. One commentator has recently claimed that Magna Carta was incorporated into international law by the European Convention on Human Rights[7] – a kind of 'Magna Carta for foreigners'. Moreover, if they have not already done so, I am sure that some of the more learned among those who campaigned for the United Kingdom (UK) to leave the European Union will urge Britons to rally round Magna Carta as an early example of the defence of English liberties against the intrusions of Europe in the form of the foreign King John. The fact that Magna Carta was annulled by the Pope only weeks after it had been sealed will only reinforce that view.

Geoffrey de Mandeville and the other barons would probably have enjoyed a hearty laugh at that idea – once, that is, someone had translated the joke for them since, so far as we can tell, none of them spoke English, even in the form in which the language then existed. Norman-French by origin, French-speaking by preference, they had just invited a French invasion in support of their claims against King John. It was not the liberties of Englishmen against foreigners that was their priority, and the idea that they were early champions of human rights would have struck them as ludicrous. Most of them wanted to be left alone by the king so they could get on with persecuting and exploiting their tenants and serfs in peace.

Most of the provisions of Magna Carta seem to have nothing to do with modern notions of human rights. They are the creature of their time, reflecting the concerns of a tiny oligarchy. Some provisions were plainly intended to be transient: for example, the opening clause of Article 59 by which King John undertook to 'treat with Alexander King of the Scots concerning the return of his sisters'. Others may have been seen as permanent but concerned issues of feudal

[6] All quotations from Magna Carta are taken from the translations which appear in Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Hart 2015).

[7] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222.

duties and rights, civic self-government and such pressing matters as fish weirs on the Thames and Medway, which have no resonance today. As for the liberties of the Church, which received particular prominence in Magna Carta (perhaps thanks to Stephen Langton, the Archbishop of Canterbury, who may have a claim to be regarded as the true father of the Charter), their guarantee did not stop Henry VIII and Elizabeth I nationalising Christianity in England; nor did the pledge to respect free elections in the Church prevent them from making the appointment of bishops a matter of political patronage well into my lifetime.

Even the handful of provisions which do resonate today are not so straightforward when looked at in their historical context. Take what is arguably the most important provision in the Charter, Article 39:[8]

> No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled or deprived of his standing in any other way, nor will we proceed with force against him or send others to do so except by the lawful judgment of his peers or by the law of the land.

Now we seem to be getting there. This clause (invoked, incidentally, by the US Supreme Court in relation to detention at Guantanamo Bay)[9] seems to echo through the centuries: calling for due process of law, habeas corpus and trial by jury, foreshadowing Article 5 of the European Convention on Human Rights[10] and similar provisions on liberty of the person in other contemporary treaties. Except that it was not intended to be anything of the kind. It is not about trial by jury, at least not as we know the jury today, which did not come into being in England until much later; nor did habeas corpus. The concept of 'lawful judgment of his peers' was a great deal more elastic then than we imagine hundreds of years later. Nor is it quite the bulwark against arbitrary arrest that it might appear. It says that no 'free man' (it did not apply to the serfs any more than the US Constitution originally applied to slaves[11]) shall be penalised 'except by the law of the land'. It does not place limits on what laws might be enacted or for what forms of detention or punishment they might provide.

Moreover, the king never had any intention of complying with the promises he made in Magna Carta. He probably knew that the Pope – to whom he had sworn fealty only a year earlier – would annul the Charter, much as legislators in some countries today vote for statutes in which they have no faith, knowing that the courts will save them from themselves by invalidating the measure on constitutional grounds. As for the barons – T S Eliot called their fathers 'the raw nobility, whose manners matched their fingernails',[12] and it is unlikely that either the manners or the personal hygiene had greatly improved when the sons assembled at Runnymede. They were no fools, though, and it is unlikely that they had any high expectation regarding John's likely behaviour.

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[8] Arlidge and Judge (n 6) 59.
[9] *Rasul v Bush* 124 S Ct 2686 (2004); *Boumediene and Others v Bush* 128 S Ct 2229 (2008).
[10] (n 7).
[11] *Scott v Sandford* 60 US 393 (1857).
[12] TS Eliot, *Murder in the Cathedral* (Harcourt Brace & Co 2014) 45.

Magna Carta was reissued by William the Marshal (a much better man than John) when he was regent for the young Henry III in 1216.[13] It was reissued once more, in a different and somewhat watered down form, by the adult Henry III in 1225, and was relied on before the courts during the succeeding decades,[14] although less frequently as the years went by. When one comes to the Tudor era, it is hardly mentioned: Shakespeare did not think it worth a reference in his *King John*. Only three of the 63 clauses in the original 1215 Magna Carta as reissued are still in force and references to it in the English courts (though not in the courts of the United States) are generally rhetorical flourishes rather than serious parts of the legal reasoning.

And yet, and yet! There are things there that may have been unintended – or, at least, understood differently from the way we think today – that have mattered very deeply in the development of the common law tradition.

First, there is the notion, however imperfect, that governance is a pact between governor and governed, not a matter of autocratic whim or fancy. Jonathan Sumption has rightly pointed out that this idea was not new. Henry I and other kings, even the awful King Stephen, had issued charters at their coronation or on other occasions, making promises to observe the laws and customs of the land – usually with a reference back to 'the laws of King Edward the Confessor', the 'good king' who reigned just before the Norman invasion of 1066.[15] Nor was the Charter uniquely English. This was an age of charters; they were granted by the Holy Roman Emperor and the King of Hungary at about the same time as Magna Carta. Yet, that it had been done before, and that it had been done elsewhere, should not detract from the fact that in 1215 the then leaders of England compelled a particularly dreadful and recalcitrant monarch to concede, once more, a series of liberties based on the notion that governance was not mere autocratic fancy. Nor should it prevent us from recognising the significance of the fact that, once the emergency that John had created was past, those pledges were largely re-enacted in the 1216 and 1225 Charters.

When Sir Edward Coke, dismissed as Chief Justice for his opposition to James I, raised the banner of Magna Carta 400 years after it was first adopted, and used it as the rallying point for those who argued that the powers of the monarch were already limited by law, he may have misunderstood Magna Carta, or even misrepresented it. However, he was not entirely wrong in suggesting that it embodied a concept of limited sovereignty, which was precisely what James I and Charles I believed was incompatible with their divine right to rule. Parliament's victory in the ensuing civil war was the victory of this view of Magna Carta, and the restoration of the monarchy in 1660 did not undermine that victory. The same philosophy inspired the American lawyers who invoked Magna Carta when they hurled a shipment of tea into Boston Harbour and drafted a declaration of independence, and then a constitution, based upon ideas of representative government and limited powers.

Secondly, even if they were very limited in their scope, there are early glimmerings in Magna Carta of what we now think of as human rights. I have already quoted Article 39 requiring a basis

[13] Arlidge and Judge (n 6) xiv, Ch 15.
[14] ibid xv, 103–04.
[15] Lord Sumption (n 2).

in law for arrest or punishment. Limited it might have been, but the requirement of a legal basis for arrest and imprisonment is a great improvement on a world in which detention can be decreed at whim and no kind of legal authority is required. Once you require a basis in law for the detention of a person, it becomes possible to fashion a remedy by which a court may inquire whether such a legal basis exists. That was what eventually happened with the development of habeas corpus – the writ that required a gaoler to produce the prisoner and show cause for the detention. That development came long after 1215, but it was an innovation that was the work of judges and lawyers who considered it to follow from the language of Article 39.

There is more. Article 40 provides that 'to no one will we sell, to no one deny or delay right or justice'.[16] It might indeed be, as Jonathan Sumption has argued, a bit of a stretch to say that this precludes reductions in the scope of a legal aid scheme which did not come into existence until 735 years after Magna Carta,[17] but it is surely reasonable to argue that Article 40 is incompatible with setting court fees at a level designed to make the courts a 'profit centre'. The provisions which require that punishments be proportionate to the crime also echo in the law of today. Even some of the clauses which plainly address the issues of the past can still resonate today, however faintly. Thus, the provision in Article 23 that 'no vill[ein] or man shall be forced to build bridges at river banks except those who ought to do so by custom and law' is a precursor of modern objections to forced labour. These were certainly limited beginnings but the point is that later common lawyers found inspiration here for a far more substantial development of individual rights.

In their different ways, Coke and the Parliamentarians of the early seventeenth century, and the US founding fathers in the eighteenth, invoked these provisions as the inspiration for their own ideas of civil rights. They, in turn, have been seized upon by later generations of lawyers to develop modern concepts of civil or human rights which would probably have amazed Coke or Jefferson as much as Coke or Jefferson would have surprised Geoffrey de Mandeville and Stephen Langton. Coke, Jefferson, Madison and the others thought they were building on Magna Carta – or, at least, they crossed their fingers and pretended that they were. Whether they were right, or even honest, about what they saw in Magna Carta is not really the point. There was something there on which they could, and did, build; and later generations built on their work in ways I doubt they could have imagined.

That is why it does not matter so much that Magna Carta is invoked today in defence of ideas that would have been inconceivable to the barons of 1215. No, they did not envisage that Article 39 of their Charter would one day be cited as the basis for prohibiting the arbitrary arrest and detention of anyone, irrespective of social standing and, for some commentators, irrespective of what Parliament might enact. The founding fathers who wrote the US Constitution apparently saw no contradiction between their declarations of liberty – far more eloquent than anything in Magna Carta – and the fact that many of them, and many of their countrymen, owned slaves. That does not stop us invoking the principles of the US Constitution and the Bill of Rights

[16] Arlidge and Judge (n 6) 59.
[17] Lord Sumption (n 2).

today; nor does the fact that Magna Carta was not observed in the immediate aftermath of its adoption diminish its significance today. The Declaration of the Rights of Man and the Citizen adopted in France in 1789 was followed not by a golden age of liberty but by the Terror and the guillotine. Yet it is rightly cited today as an important step in the development of ideas of human rights and civil liberties.

Ideas, if they are good enough, outlive and outgrow the circumstances of their adoption; and they develop with time. Moreover, legend is a form of reality. Coke and Jefferson may have been wrong in what they saw in Magna Carta. They may not have been honest when they told the world what they saw there, but their deductions from Magna Carta survived and eventually prospered. They created a legend based around some small grains of reality in Magna Carta, and that legend in its turn led to some of the most important developments in common law. As Erwin Griswold, then Dean of Harvard Law School, said, 'Magna Carta is not primarily significant for what it was, but rather for what it was made to be'.[18]

That is why when we ask what influence Magna Carta has had on the common law – first in England, then in the US, and later in all of the English-speaking world – we are really asking not about the one document sealed 800 years ago but about the series of charters from 1215 to 1225 and, even more importantly, the way in which they have been interpreted, misinterpreted and applied ever since. Lord Judge, the former Lord Chief Justice of England and Wales and one of my most distinguished predecessors in the Lionel Cohen Lecture series, chose his words carefully – and, if I may say so, wisely – when he described Magna Carta as 'the banner, the symbol, of our liberties'.[19] Described in this way, rather than as a foundation, we see Magna Carta's influence in its true light, and that influence has been considerable.

3. MAGNA CARTA AND INTERNATIONAL LAW

Let me turn, therefore, to the relationship between Magna Carta and the development of international law. In doing so, I want to begin with two notes of caution. First, international society is markedly different not just from that of England in the time of King John but from that of any country at any time. Its central institutions are of comparatively recent origin and, even today, hold far less power than the more powerful of the just under two hundred states. It is controlling the activities of the barons – the states – that is the principal concern for international law, rather than enabling them to control an overmighty monarch. That difference makes any attempt to transplant constitutional concepts from any country into international law a very difficult task and one which has to be undertaken very warily indeed. That is particularly true of Magna Carta. I am not saying that national constitutional traditions have had no influence on

[18] 'Introduction' in Samuel Thorne, *The Great Charter: Four Essays on Magna Carta and the History of our Liberty* (Pantheon Books 1965) viii.

[19] Igor Judge, 'Magna Carta: Luck or Judgement', Address to the Middle Temple, 19 February 2015, 12, http://www.middletemple.org.uk/sites/default/files/documents/about-us/i-judge-magna-carta.-luck-or-judgment.pdf.

international law, but that influence is oblique and never amounts to the wholesale transfer of one country's constitutional maxims into international law.

Secondly, while English lawyers are always keen to claim that we got there first with concepts of human rights, it is important to bear in mind that many countries and various legal traditions have contributed to the development of the international law of today. When I was teaching at the Hague Academy of International Law in 1989 I attended an excellent lecture by the late René-Jean Dupuy on 'The Spirit of 1789 in International Law'.[20] It is certainly not my purpose tonight to play down the influence of the French tradition, or that of any other tradition, on the development of international law. I want to consider the influence of Magna Carta in the context of an international legal system that has drawn, and continues to draw, inspiration from many different sources. One of those sources – which has been particularly influential at certain times – has been that of the common law tradition, which itself has drawn heavily on the legend of Magna Carta.

I have no hesitation, therefore, in dismissing the extravagant claims that a contemporary human rights treaty, like the European Convention on Human Rights, is no more than the incorporation into international law of the principles of Magna Carta or that, because we have Magna Carta, the United Kingdom has no need for the European Convention. The debate about whether or not the UK should remain party to the European Convention has nothing to do with Magna Carta. One of the problems with extravagant claims about the influence of Magna Carta on international law – as with the overblown claims about its impact on common law – is that not only are such claims patently false, they blind us to the more limited, yet still important, influences which can be traced back to Magna Carta. I see three respects in which those influences can be detected; others might see more.

First, there is an influence on methodology. Like other English Charters, Magna Carta was not advanced as the creation of a new order but rather as the restoration of ancient liberties believed to have existed for nearly two hundred years before the meeting at Runnymede in 1215. Those liberties were said to derive from the laws of King Edward the Confessor and the customs of the land. Custom tends to be important in most early legal systems because legislation is generally sparse and rudimentary, while courts have not yet developed much by way of case law. As time goes by, the development of a jurisprudence and the increased volume of legislation – particularly where it takes the form of something like the Napoleonic codes – tend to push custom to the margins or even exclude it altogether. Even in the common law world, where there has been some suspicion of comprehensive codes, custom now plays a peripheral part at best.

That is not at all true of international law, where custom remains of fundamental importance as a source of law. Article 38 of the Statute of the International Court of Justice[21] directs the Court to apply, inter alia, 'international custom, as evidence of a general practice accepted as

[20] Published as 'La Révolution Française et le Droit International Actuel' (1989) 214 *Recueil des cours* 9.
[21] Statute of the International Court of Justice (entered into force 24 October 1945) USTS 993, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

law'. The Court, other tribunals and every foreign ministry legal adviser has applied customary international law.[22] What has that to do with Magna Carta? I think the answer lies in the recognition that two rather different traditions drawn from national legal systems have had an impact on international law over the years. One has tended to see the development of law in terms of bold new statements of principle – a fresh start in response to the wrongs of a recent past. The other, prominent in the common law world, has tended to respond to crisis first and foremost through a reaffirmation of core principles which – or so, at least, it is claimed – have already been established. That tradition is partly a product of Magna Carta and its attempt to deal with a crisis in mediaeval English life by insisting on respect for values which it was believed were already to be found in the laws and customs of the land. That same concept is evident in the Bill of Rights of 1689 and even the American colonists, though making a radical break with the past in one respect, went out of their way to retain as much as possible of the existing legal order and strengthen it as a reaction to what they perceived to be its breach by the government of George III.

This reaffirmation tradition has had some important ramifications for international law. You see it, for example, in the development of what we now call international humanitarian law. When a series of particularly shocking battles in the mid-nineteenth century led to attempts to ensure better protection for the victims of war, an essential part of that campaign was a series of attempts to codify and reaffirm the existing customary law on the subject. That process started with the Lieber Code[23] during the US Civil War and continued through texts such as the Oxford Manual of the Institut de Droit International and the various Hague Conventions of 1899 and 1907.[24] While the Geneva Conventions of 1949[25] and their Additional Protocols of 1977[26] contain numerous important provisions designed to change and improve upon the existing corpus of law, another important feature of those Conventions was the reaffirmation of the core principles already found in the laws and customs on the subject. Most recently, diverse bodies such as the

[22] Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 5.

[23] Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field', promulgated as General Orders No 100 by President Lincoln, 24 April 1863, reprinted in Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (4th edn, Martinus Nijhoff 2004) 3 (Lieber Code).

[24] Christopher Greenwood, 'International Humanitarian Law (Laws of War)' in Frits Kalshoven (ed), *The Centennial of the First International Peace Conference: Reports & Conclusions* (Kluwer 2000) 161.

[25] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.

[26] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

International Committee of the Red Cross[27] and the San Remo Institute of International Humanitarian Law[28] have tried to strengthen respect for humanitarian principles by emphasising and reaffirming the existing customs of war, just as Archbishop Langton and the barons sought to bring King John under control by reaffirming and compelling respect for existing customs and liberties.

One sees another echo of this reaffirmation approach which we can trace back to Magna Carta – or to the Magna Carta legend – in the fact that the International Law Commission set up just after the Second World War was given a mandate for the codification, as well as the 'progressive development', of international law.[29] One of its current projects is to improve understanding of the means by which customary international law is created and shaped.

Of course, there are many reasons for the continued importance of custom in international law that have nothing to do with traditions inspired by Magna Carta, but the fact that the Magna Carta tradition is not *the* cause of that importance does not mean it is not *a* cause. Moreover, I think it is the influence of common lawyers, drawing on a tradition of which Magna Carta forms an important part, which has been an important cause of the tendency of international law to emphasise the reaffirmation of existing customs, even when it has also attempted to bring about ambitious change.

Secondly, I believe that Magna Carta has had an influence – however indirect – on the way in which we think of the rule of law in international society. One way in which it has achieved this was by inspiring a constitutional tradition that sovereignty is not unlimited. Once it is grasped that that is so *within* a state, it is not an enormous leap to the proposition that it should also be so between states.

Moreover, Magna Carta was concluded against the backdrop of impending civil war within England and international conflict between England and France. Those who ensured its adoption considered that, even in those circumstances, a reaffirmation of the legal obligations of the different parties to one another was worthwhile. They also considered that that reaffirmation should make clear when a repudiation by the king of his obligations became so bad that it released his subjects from their duties of obedience and left them free to use force to assert their rights. That idea took a long time to take hold but Magna Carta lit a powder trail that would have important implications in establishing the rule of law in the common law world and, in turn, influence that group of states in their attitudes towards the rule of law – even in matters of war and peace – in international law.

One of the least noticed provisions of Magna Carta, Article 41, stipulates that foreign merchants are to be safe and secure in entering and leaving England and travelling therein, and

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[27] The ICRC study of customary humanitarian law is by Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009).

[28] Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995).

[29] United Nations Charter (n 5) art 13(1); UNGA Res 94(I) (11 December 1946), 'Progressive Development of International Law and its Codification', UN Doc A/RES/94(I).

that if they come from an enemy country in time of war, they may be detained only until it has been established whether English merchants in the enemy country were being properly treated and kept safe; if so, reciprocity was to be applied and the enemy merchants accorded the same treatment in England. That provision – which I am sure Napoleon would have considered typical of what he decried as a 'nation of shopkeepers' – was remarkably enlightened for its time and has had echoes in developments of humanitarian law in a much later age.

Lastly, there is what I consider to be by far the most important contribution of Magna Carta to international law: its influence on the development of human rights law. Magna Carta – and the tradition it helped to create in the common law world – have influenced international human rights law in at least three ways.

First, its rejection of the idea of absolute sovereignty of the king over his people and the idea of limited powers which developed from that rejection helped to steer the common law countries towards a similar rejection of the concept of absolute sovereignty in international law. It is easy today to forget that until quite recently many states maintained that the way in which a state treated its own people was no business of international law, or indeed of any other state or institution. Overcoming that concept of absolute sovereignty has been one of the most important triumphs of international law since the end of the Second World War and it has been indispensable to the creation of an international law of human rights.

In this respect, an important provision is tucked away towards the end of Magna Carta. Article 60 provides:

> All these aforesaid customs and liberties which we have granted to be held in our realm as far as it pertains to us towards our men, shall be observed by all men of our realm, both clerk and lay, as far as it pertains to them, towards their own men.

Like much of the document, this clause can be understood only in the context of feudalism. Just as the barons were the feudal underlings of the king, other men – knights and free men – were the feudal underlings of each baron. They were his 'men'. Article 60 requires the baron to accord to his men the same customs and liberties the king was now required to show his barons. Feudalism involved a series of petty sovereignties. The significance of Article 60 – which can hardly have been a great delight to the barons – is that the existence of feudal sovereignty did not exclude the law of the wider community from the relationship between the feudal lord (the petty sovereign) and those who owed him allegiance. No form of sovereignty – whether that of the king or that of a baron – was to give carte blanche for the ill-treatment of their subjects. In many ways it is that underlying principle, rather than the specific provisions on liberties, which is the chief contribution of Magna Carta to modern human rights law.

Secondly, as we have seen, Magna Carta *did* contain some provisions which have elements, however limited, of rights which are now important elements of any human rights treaty. Still more significant was the attachment to the idea of individual rights which Magna Carta helped to inspire and which, as I have tried to show, was developed in seventeenth century England and then eighteenth century America. Those concepts of rights have come a very long way from the

provisions of Magna Carta but they became an essential feature of the attitude of generations of those trained in the common law to the relationship between the state and the individual. In the critical years just after the Second World War, many people brought up in that tradition (or, like Hersch Lauterpacht, adopted by it) played decisive roles in the development of the human rights instruments which are so important to us today. Eleanor Roosevelt – who played such an important part in the adoption of the Universal Declaration of Human Rights – expressed the hope that it might become the Magna Carta for the international community.

Thirdly, Magna Carta eventually gave rise to another element of common-law thinking about human rights which has over time influenced international law. That is the importance attached to remedies. I have already referred to the fact that the requirement of legal cause for arrest or detention led to the evolution of habeas corpus, joined in time by other remedies for the vindication of rights. That has been a particular feature of the common law contribution to international human rights law: an insistence on remedies for the vindication of rights. Without the ability to seek a remedy before the various international human rights bodies – the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court and Commission of Human Rights, the Committee against Torture and many others – the rights enunciated in the treaties would have been mere hollow statements in many countries. Magna Carta deserves some part of the credit for the development not just of rights but of the remedies to give effect to them.

4. CONCLUSION

In conclusion, then, let us set aside the extravagant claims that have been made for Magna Carta. A pact between king and barons 800 years ago is not the chief foundation for the modern law of civil rights in England or America. Still less is it the source to which all our modern international law of human rights can be traced. Today's international law owes debts to many legal systems: to the bold declarations of principles beloved of the French tradition, the constitutional detail of the German, as well as the pragmatic focus on problems and remedies of common law. Indeed, it is probably precisely that mixture which has produced such important progress in our own time. However, if we see Magna Carta in perspective, and concentrate not so much on what it said and did at the time as on the tradition to which it gave rise, what we see is something worth celebrating. Archbishop Stephen Langton, the barons and bad King John would doubtless be amazed at what they started. We, today, have reason to be grateful to them.