

Britain in Palestine (1917-1948) - Occupation, the Palestine Mandate, and International Law

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ABSTRACT: At a time when there are not even negotiations between Israel and the Palestinians in order to resolve their longstanding dispute, this article seeks to explain the origins of the conflict by examining Britain’s conduct in Palestine from 1917-1948, first as an occupier, then as the responsible mandatory, under international law. Although at first sight dealing with a purely historical issue, a discussion of British conduct in Palestine is relevant at a time when the realization of a viable two-State-solution to the conflict between Israel and the Palestinians is becoming ever more urgent and concurrently less likely. This article analyses the developments in Palestine as of 1917 and the legality, in international law, of (mainly) British actions. It will be argued that British attempts at implementing the Balfour Declaration –which, as will be shown, had no standing in international law- while being occupiers of enemy territory were contrary to the Hague Regulations as acknowledged by leading British officials at the time. It will then be explained that the Palestine Mandate, as confirmed by the League of Nations’ Council, contravened Article 22 (4) of the League of Nations Covenant, and that British efforts to implement it as of 1920 –and thus four years before the peace treaty with Turkey came into force- were similarly inconsistent with the Hague Regulations. Far from believing in the legality of their actions, leading British officials and politicians were, as will be documented, well aware of their conduct’s “legal imperfections”. It will be concluded that British conduct in Palestine could rarely, if at all, claim to be accordance with the new international legal order the UK had helped to create following WWI. Repeatedly ignoring international law did not benefit the British: their rule in Palestine was to end in humiliating defeat in 1948. Almost seventy years later the world is still trying to resolve a conflict the British set in motion in 1917 with the issuance of the Balfour Declaration.

KEYWORDS: *Palestine (1917-1948); United Kingdom; Public International Law*

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*The contradiction between the letters of the Covenant and the policies of the Allies is even more flagrant in the case of 'independent' Palestine...
What I have never been able to understand is how it can be harmonized with the declaration, the Covenant, or the instructions to the Commission of Enquiry...*¹

1. INTRODUCTION

The conflict in Palestine is one of the most enduring in the world. To many, it remains a mystery why the parties cannot reach a just and sensible agreement based on international law. Some claim this is due to the conflict parties' "legal fundamentalism" and accuse mainly the Palestinian Arabs of constantly reverting to legal arguments, thereby making compromise impossible.² This article, however, will show that the Palestinian Arab position is more understandable when Palestine's history under British rule is considered.

Although it is true that a just solution for the future cannot be found by dwelling on the past, it seems obvious that if wrongs committed are not at least acknowledged during negotiations the party subjected to them –in this case, the Palestinian Arabs– will continue to perceive any solution as unjust. Furthermore, ignoring past illegal actions does nothing more than highlight the weakness of the contrary legal arguments, and can only increase distrust on the part of those to whose disadvantage such a course of action is.

Beginning with the Balfour Declaration in 1917, and ending with the recognition of the State of Israel in 1948, virtually all the steps undertaken by Britain were contrary to the international legal order it had helped create. Palestinian Arabs suffered the consequences of British actions, which culminated in the creation of a new state. The statements accompanying these actions, however, stressed their legality or, more commonly, ignored legal issues.

The story of Palestine and international law begins in the First World War. Palestine, still under Ottoman rule at that time, became the "too much

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¹ British Foreign Secretary Arthur Balfour in a Memorandum (dated 11st August 1919) to Earl Curzon; extracts reprinted in Doreen Ingrams, *Palestine Papers 1917-1922, Seeds of Conflict*, London: John Murray Publishers Ltd. (1972), 73 (PRO. FO. 371/4183).

² See JOHN STRAWSON, *PARTITIONING PALESTINE, LEGAL FUNDAMENTALISM IN THE PALESTINIAN-ISRAELI CONFLICT* (2010).

promised land”.³ Britain and France had agreed it would be under an international regime in the event of victory, while the British might have promised the Arabs that Palestine or parts of Palestine would be included in an independent Arab state. Moreover, the British government “viewed with favour” the establishment of a “Jewish national home” there.

Britain, having become reliant on the Suez Canal as a vital transport link, mainly wanted to create a reliable European outpost near the Canal by establishing such a “homeland” and hoped that by gaining Jewish favour the outcome of the First World War could be influenced in a positive way. The United Kingdom did not achieve these objectives. Far from creating a stable outpost near the Suez Canal, Britain, burdened by having made too many contradictory promises, would scramble to remain in control of Palestine. After thirty years of futile attempts at restoring order, Britain, in 1947, at last acknowledged its defeat.

This sorry story began in 1917. Following Palestine’s occupation Britain went on to assure itself of the Palestine Mandate, based on the newly developed mandates system. Irreconcilable promises and safeguards in the Mandate soon meant that Britain was having ever more difficulties in adhering to its provisions. The attempt at remaining within the terms laid down after the First World War finally was abandoned in the late 1930s, when it proved too arduous for Britain to keep unrest at bay.

This article will demonstrate that none of the major British actions in Palestine was consistent with international law. After briefly explaining and interpreting the Balfour Declaration of 1917, and showing that it had no standing in international law, the British regime of occupation in Palestine will be examined. First attempts at implementing the Balfour Declaration as of 1920 will be shown to have been contrary to the 1907 Hague Regulations to which Britain was a party.

Following an analysis of the mandates system conceived by the victorious First World War Allies, which will illustrate why that system fell short of U.S. President Wilson’s much heralded principle of self-determination,

³ A. E. Prince, *The Palestine Impasse*, 1 INT’L J. 122, 125 (1946); Robert Gale Woolbert, *Pan Arabism and the Palestine Problem*, 16 FOREIGN AFF. 309, 311 (1938).

the Palestine Mandate will be examined in some detail. It will be argued that the terms of that mandate could not be reconciled with Article 22 (4) of the Covenant of the League of Nations (hereinafter the Covenant).

By 1947, the British had realized they would not be able to fulfil their obligations. Various earlier U-turns based on contradictory commission reports had foreshadowed this result. In the end, violating international law had become the norm. Nevertheless, this course of action had not benefitted Britain, instead culminating in a humiliating defeat.

It should be noted that this article will not deal extensively with historic Arab and Jewish claims and counter-claims on Palestine, which frequently go back thousands of years,⁴ as these can –at best– be described as providing a “dubious prescriptive right” in international law,⁵ or, more accurately, as not providing any legal entitlement at all.⁶ Furthermore, this article does not deal

⁴ For a more detailed look at these claims, see: Carsten Wieland, “Thousands of Years of Nation-Building? Ancient Arguments for Sovereignty in Bosnia and Israel/Palestine” in *NATION BUILDING BETWEEN NATIONAL SOVEREIGNTY AND INTERNATIONAL INTERVENTION*, BADEN-BADEN: NOMOS VERLAGSGESELLSCHAFT 81, 86–97 (Henriette Riegler ed., 2005); see also John A. Collins, *Self-Determination in International Law: The Palestinians*, 12 *CASE W. RES. J. INT’L* 137, 155 (1980); (he briefly describes Jewish claims going back to 1800 B.C. (Abraham) and Arab claims relating to the Canaanites, dating back to about 3000 B.C.); Prince, *supra* note 3, at 122–123; ELI MURLAKOV, *DAS RECHT DER VÖLKER AUF SELBSTBESTIMMUNG IM ISRAELISCH-ARABISCHEN KONFLIKT* 35–38 (1983).

⁵ Felix Frankfurter, *The Palestine Situation Restated*, 9 *FOREIGN AFF.* 409, 411 (1931) (it should be noted that Frankfurter was President of the American Zionist Organization).

⁶ The King-Crane Commission, sent to the Middle East by the United States in 1919 in order to determine what local feeling was, pointed out: “For the initial claim, often submitted by Zionist representatives, that they have a “right” to Palestine, based on an occupation of two thousand years ago, can hardly be seriously considered.”; see Recommendations of the King-Crane-Commission, para. 5 (Aug. 28, 1919),

<http://www.jewishvirtuallibrary.org/jsource/History/crane.html>; similarly, the I.C.J. in a case concerning title to islands off the coast of Jersey, declared, referring to a judgment from 1202 France was relying on: “To revive its legal force to-day by attributing legal effects to it after an interval of more than seven centuries seems to lead far beyond any reasonable application of legal principles”; later on in the judgement the court added: “What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups”; see also *The Minquiers and Ecrehos Case (France v. United Kingdom)*, Judgment, 1953 *I.C.J. Rep.* 47, 57 (November 17); Lord Curzon (at the time British Foreign Secretary), responding to a draft of the Palestine Mandate, in a minute of 6th August 1920: “I do not myself recognise that the connection of the Jews with Palestine, which terminated 1200 years ago, gives them any claim whatsoever. On this principle we have a stronger claim to parts of France.”; reprinted in Ingrams, *supra* note 1, at 98 (PRO. FO. 371/5245); VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT 1891-1949*, at 50–52 (2009); J.B. McGeachy, *Is it Peace in Palestine?*, 3 *INT’L J.* 239, 241 (1948); Collins, *supra* note 4, at 156; JEREMY SALT, *THE UNMAKING OF THE MIDDLE EAST: A HISTORY OF WESTERN DISORDER IN ARAB LANDS* 124 (2009); Phillip J. Gendell & Paul G. Stark, *Israel: Conqueror, Liberator, or Occupier Within the Context of International Law*, 7 *SW. U.L. REV.* 206, 216 (1975); they seem to disagree. Without offering any explanation, they assume that there was a legal right of self-determination prior to the Second World War; they claim that this “most important concept” was “the right of the Jewish People to self-determination within the confines of the historical land of Israel”; Murlakov, *supra* note 4, at 50; he argues that the historical

with the legality of the creation of the State of Israel against the backdrop of the situation in Palestine in mid-1948.⁷

2. THE BALFOUR DECLARATION

2.1. THE LETTER

The so-called Balfour Declaration is actually a letter by the British Foreign Secretary addressed to a prominent supporter and benefactor of the Zionist movement, Lord Rothschild, dated November 2nd, 1917.

Its contents are as follows:

Dear Lord Rothschild,

I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet:

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

connection of the Jews to Palestine justifies the realization of their right of self-determination there. This frequently repeated argument is to be rejected. Authors who put forward this argument invariably justify the treatment of the Palestinian Arabs on the grounds that there was no legal right of self-determination at that time (a notion supported here). It then, however, seems contradictory to base Jewish claims to Palestine on such a right. Furthermore, accepting the "historical connection" argument in international law would self-evidently lead to chaos, as many borders worldwide would have to be redrawn. It also seems obvious that religious notions should not determine international law, as there are five "world religions", apart from many others, that would have to be respected. Furthermore, the fact the Zionist movement even contemplated alternatives, such as Argentina or Uganda, undermines the argument. These arguments also militate against accepting Sol M. Linowitz's argument in Sol Myron Linowitz, *Analysis of a Tinderbox: The Legal Basis for the State of Israel*, 43 AM. B. ASS'N J. 522, 524 (1957) who -based on ancient history- argues that the Jews were "deprived" of their "sovereignty by force" and had "never renounced it".

⁷ See JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 62 (1987); he makes a similar point when he states: "The meaning of the Balfour Declaration, the validity of the Partition Plan approved in Resolution 181 (II), and the moral basis of the State of Israel are still a cause for debate. However, this debate does not affect Israel's position as a State in the international community..."; see also JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* 120-21 (2010).

Palestine, or the rights and political status enjoyed by Jews in any other country.

I would be grateful if you would bring this declaration to the knowledge of the Zionist Federation.

Yours, Arthur James Balfour⁸

2.2. BACKGROUND

Many developments during the First World War came together to facilitate the adoption of this pro-Zionist statement by the British government. Its approval of Zionist aspirations was mainly due to two rather different considerations: the religious beliefs of many of the decisive politicians,⁹ and, more importantly, strategic concerns in the context of the First World War and its aftermath.¹⁰

Many of the most influential supporters of Zionism were ardent Protestants.¹¹ Balfour and the Prime Minister, Lloyd George, were “brought up on the Bible” and –similar to Christian fundamentalists in the United States nowadays– believed the return of the Jews to Palestine was inevitable.¹² These strongly held beliefs led them to be natural supporters of Zionist aspirations.¹³

⁸ “The Balfour Declaration”, <http://news.bbc.co.uk/1/hi/in_depth/middle_east/israel_and_the_palestinians/key_documents/1682961.stm>.

⁹ Frankfurter, *supra* note 5, at 413 (he mentions “the sway that the Old Testament and thereby Palestine exercised over British imagination” as one of the motives for British policies in Palestine); see also ANTHONY PARSONS, *FROM COLD WAR TO HOT PEACE: UN INTERVENTIONS 1947-1995*, at 3 (1995); Salt, *supra* note 6, at 123; DAVID FROMKIN, *A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST* 267-68, 274, 283, 298 (2000); Ingrams, *supra* note 1, at 5; Kattan, *supra* note 6, at 70; Strawson, *supra* note 2, at 28; Avi Shlaim, *Israel and Palestine*, London: Verso (2009), 11; JOHN KEAY, *SOWING THE WIND: THE MISMANAGEMENT OF THE MIDDLE EAST 1900-1960*, at 79, 82 (2004).

¹⁰ See Herbert Louis Samuel, *Alternatives to Partition*, 16 *FOREIGN AFF.* 143 (1937); Chaim Weizmann, *Palestine’s Role in the Solution of the Jewish Problem*, 20 *FOREIGN AFF.* 324, 336 (1941); ALAIN GRESH, *DE QUOI LA PALESTINE EST-ELLE LE NOM?* 63 (2010).

¹¹ See Ilan Pappé, *Clusters of history: US involvement in the Palestine Question*, 48 *RACE & CLASS* 1, 3-8 (2007); (he describes the pro-Zionist influence of leading Protestants in America as early as the late nineteenth century, based on ideas derived from Scottish and Irish Protestants).

¹² See KENNETH YOUNG, *ARTHUR JAMES BALFOUR* 387-88 (1963); Fromkin, *supra* note 9, at 267-268, 274, 283, 298; Ingrams, *supra* note 1, at 5; Gresh, *supra* note 10, at 66-67 (he refers to the South African Smuts’ religious beliefs; General Smuts was a member of the Imperial War Cabinet and instrumental in developing the whole concept of the mandates system); MARGARET MACMILLAN, *PEACEMAKERS: SIX MONTHS THAT CHANGED THE WORLD* 425-26 (2002).

¹³ Young, *supra* note 12, at 387-388; Fromkin, *supra* note 9, at 267-268, 274, 283, 298.

Nevertheless, for most of the project's supporters, political reasons were decisive. Some had the suspicion that Jews had enormous influence within the Ottoman Empire, especially among the Young Turk movement.¹⁴ Many also thought that Jewish Russians might be decisive in keeping Russia in the war in support of the allies before and after the Tsar had been overthrown:¹⁵

It is clear that at that stage His Majesty's Government were mainly concerned with the question of how Russia . . . was to be kept in the ranks of the Allies The idea was that such a declaration [of sympathy for Jewish national aspirations] might counteract Jewish pacifist propaganda in Russia.¹⁶

Moreover, some believed that Jewish Americans might persuade the US Government to enter the war, and that this subsequently might persuade some of the wealthy among them to support the Allied cause financially:¹⁷ "It was supposed that American opinion might be favourably influenced if His Majesty's Government gave an assurance that the return of the Jews to Palestine had become a purpose of British policy."¹⁸

¹⁴ Fromkin, *supra* note 9, at 92; Kattan, *supra* note 6, at 70-71; see also JONATHAN SCHNEER, *THE BALFOUR DECLARATION: THE ORIGINS OF THE ARAB-ISRAELI CONFLICT* 153-154 (2010).

¹⁵ Fromkin, *supra* note 9, at 286-288, 296; Quigley, *supra* note 7, at 13; Kattan, *supra* note 6, at 70-71, 75-76; Schneer, *supra* note 14, at 153-154, 214; Shlaim, *supra* note 9, at 9; see also FRANK OWEN, *TEMPESTUOUS JOURNEY: LLOYD GEORGE, HIS LIFE AND TIMES* 427 (1954); Macmillan, *supra* note 12, at 427.

¹⁶ William Ormsby-Gore, Parliamentary Under Secretary of State for the Colonies, in a 1922 Memorandum (on the origins of the Balfour Declaration) for Winston Churchill, then Secretary of State for the Colonies; extracts reprinted in Ingrams, *supra* note 1, at 7-8 (PRO. CAB. 24/158). In a Memorandum by Ronald Graham, Assistant Under Secretary of State for Foreign Affairs, to Lord Hardinge, this view is expressed as follows: "We ought therefore to secure all the political advantage we can out of our connection with Zionism and there is no doubt that this advantage will be considerable, especially in Russia"; reprinted in Ingrams, *supra* note 1, at 8 (PRO. FO. 371/3058). Fears remained even after the war: during a meeting of the Eastern Committee on December 5th, 1918, the Director of Military Intelligence, General Macdonogh, declared that he had heard that "if the Jewish people did not get what they wanted in Palestine we should have the whole of Jewry turning Bolsheviks and supporting Bolshevism in all the other countries as they have done in Russia"; reprinted in Ingrams, *supra* note 1, at 50 (PRO. CAB. 27/24).

¹⁷ See William Ormsby-Gore, Parliamentary Under Secretary of State for the Colonies, in a 1922 Memorandum (on the origins of the Balfour Declaration) to Winston Churchill, then Secretary of State for the Colonies, *supra* note 16; Fromkin, *supra* note 9, at 286-288, 296; Quigley, *supra* note 7, at 14; see also Günther Weiß, *Die Entstehung des Staates Israel Teil 1*, 13 ZAÖRV 146, 146-172 (1950); JEAN ALLAIN, *INTERNATIONAL LAW IN THE MIDDLE EAST: CLOSER TO POWER THAN JUSTICE* 76 (2004); Parsons, *supra* note 9, at 3; Kattan, *supra* note 6, at 70-71, 75-76; Schneer, *supra* note 14, at 154-155; Shlaim, *supra* note 9, at 9; Owen, *supra* note 15, at 426, 427; Macmillan, *supra* note 12, at 427.

¹⁸ William Ormsby-Gore, Parliamentary Under Secretary of State for the Colonies, in a 1922 Memorandum (on the origins of the Balfour Declaration) for Winston Churchill, then Secretary of State for the Colonies; *supra* note 16. In a meeting of the War Cabinet on 3rd September 1917, during a debate on whether to proceed with the Declaration, the Acting Foreign Secretary, Lord Cecil, declared that "there was a very strong and enthusiastic organization, more particularly in the United States, who were zealous in this matter, and his belief was that it would be of most

During a debate in the House of Commons, Winston Churchill partly confirmed this analysis of British motives:

They [the pledges] were made because it was considered they would be of value to us in our struggle to win the War. It was considered that the support which the Jews could give us all over the world, and particularly in the United States, and also in Russia, would be a definite palpable advantage.¹⁹

These assumptions were based on unfounded illusions and rumours;²⁰ however, they were decisive in persuading a majority of the British cabinet to support the issuance of the Balfour Declaration.

Other strategic concerns seem more rational. Realizing the Suez Canal's potential for trade, and recognizing Palestine as a vital link in the route between the British possessions in Africa and India via the British-dominated Egypt, some politicians believed that it might be useful to have a "European people" –and the prospective Jewish settlers were, of course, mostly European– settle in Palestine post-victory. Generally, Arabs were seen as less trustworthy.²¹ Ronald Storrs, Military Governor in Palestine as of 1917, described this policy as creating "a little loyal Ulster in the heart of a fundamentally hostile Arabia."²² Furthermore, Palestine was viewed as an ideal buffer between any other foreign presence in the Middle East and Egypt with its canal:²³

substantial assistance to the Allies to have the earnestness and the enthusiasm of these people enlisted on our side."]; extracts reprinted in Ingrams, *supra* note 1, at 10 (PRO. FO. 23/4); also quoted in Quigley, *supra* note 7, at 14.

¹⁹ Winston Churchill, Secretary of State for the Colonies, during a debate in the House of Commons on 4th July 1922; Hansard, Commons Sitting, ser 5 vol 156, Colonial Office, cc221-343, c329; (July 4, 1922).

²⁰ Shlaim, *supra* note 9, at 10-11; Kattan, *supra* note 6, at 75; Schneer, *supra* note 14, at 152-153, 343, 366.

²¹ Allain, *supra* note 17, at 77; Parsons, *supra* note 9, at 3; Quincy Wright, *Legal Aspects of the Middle East Situation*, 33 L. & CONTEMP. PROBS. 5, 12 (1968); Salt, *supra* note 6, at 123; KONRAD W. WATRIN, MACHTWECHSEL IM NAHMEN OSTEN: GROSSBRITANNIENS NIEDERGANG UND DER AUFSTIEG DER VEREINIGTEN STAATEN 1941-1947, at 58-59, 66 (1989); Fromkin, *supra* note 9, at 281, 295; Kattan, *supra* note 6, at 64, 70-71; Gresh, *supra* note 10, at 48-49, 57, 62-63; JAMES BARR, A LINE IN THE SAND: BRITAIN, FRANCE AND THE STRUGGLE THAT SHAPED THE MIDDLE EAST 56 (2011); see, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 141-44 (2005) (more generally on the European economic interests behind the establishment of the mandates system).

²² Ronald Storrs, quoted in Keay, *supra* note 9, at 195; Weizmann is alleged to have described a future Jewish Palestine as an "Asiatic Belgium" (Macmillan, *supra* note 12, at 427).

²³ Shlaim, *supra* note 9, at 9; Ingrams, *supra* note 1, at 36; Kattan, *supra* note 6, at 30, 38-39; Keay, *supra* note 9, at 81, 195, 244; Gresh, *supra* note 10, at 57, 62-63; Gresh views the Declaration partly as a British attempt to extricate itself from its obligations towards France arising from the Sykes-

Palestine adjoins the Sinai Peninsula, the Suez Canal, and Akaba, and a British railway from Akka-Haifa to Iraq would traverse Palestine in its first section. It is therefore a British desideratum that if the effective government of Palestine demands the intervention of a single outside power in its administration, that Power should be either Great Britain or the United States²⁴

The consequences for the Muslim and Christian Arabs –who formed the vast majority of the population–²⁵ of creating a Jewish national home in Palestine, did not figure prominently among British politicians’ concerns.²⁶ As the Prime Minister, Lloyd George, later put it: “We could not get in touch with the Palestinian Arabs as they were fighting against us.”²⁷

Their “religious and civil rights” were protected in the Declaration, but not much more thought was given to local reaction. Since at the time Arab states did not exist in the area ruled by the Ottomans, some politicians might have convinced themselves that the putative independent Arab state(s) would be getting so much territory that the Arabs ultimately would be indifferent to the establishment of a Jewish home in Palestine.²⁸

Picot-Agreement of 1916; a point also made by Wright, *supra* note 21, at 12; Barr, *supra* note 21, at 56; Macmillan, *supra* note 12, at 427.

²⁴ Arnold Toynbee (Political Intelligence Department at the Foreign Office) in a memorandum of October 1918; extracts reprinted in Ingrams, *supra* note 1, at 40-41 (PRO. FO. 371/4368); similar sentiments were expressed by the Minister without Portfolio, Chamberlain, during a meeting of the War Cabinet on 15th August 1918: “With regard to Mesopotamia, Palestine and East Africa, the question resolved itself into one of the security of the British Empire and of its allies.”; reprinted in Ingrams, *ibid*, 38-40 (PRO. FO. 800/221). During a meeting on 10th September 1919, General Shea pointed out that “from the point of the air he thought it essential to have Palestine. The necessity of this was to break up an air attack on the Suez Canal.”; Minutes reprinted in Ingrams, *ibid*, 75-78 (PRO. CAB. 21/153).

²⁵ On 6th December 1918, Sir Gilbert Clayton, Chief Political Officer Egyptian Expeditionary Forces, estimated the population in Palestine to be as follows: “Moslems 512,000; Christians 61,000; Jews 66,000”; reprinted in Ingrams, *supra* note 1, at 43-44; Mahmoud Cherif Bassiouni, *Self-Determination and the Palestinians*, 65 AM. SOC’Y INT’L L. 31, 35 (1971) (90%); Ilan Dunskey, *Israel, the Arabs, and International Law: Whose Palestine Is It, Anyway?*, 2 DALHOUSIE J. LEGAL STUD. 163, 168 (1993) (85%); Prince, *supra* note 3, at 125 (90%).

²⁶ In a record of a meeting between the British Foreign Secretary Balfour and the leader of the British Zionists, Chaim Weizman, on 4th December 1918, it is stated that “Mr Balfour agreed that the Arab problem need not be regarded as a serious hindrance in the way of the development of a Jewish National Home.”; reprinted in Ingrams, *supra* note 1, at 46 (PRO. FO. 371/3385); Fromkin, *supra* note 9, at 297.

²⁷ Lloyd George; quoted in Fromkin, *supra* note 9, at 297; the Military Governor in Palestine as of 1917, Ronald Storrs, later remarked: “The Declaration . . . took no account of the feelings or desires of the actual inhabitants of Palestine.” [in: Sir Ronald Storrs, *Orientations* 352 (1943)].

²⁸ See SAMI HADAWI, *PALESTINIAN RIGHTS AND LOSSES IN 1948*, at 6-9 (1988); he demonstrates how ridiculous such an assumption was, when he details resistance to Zionist landowners developing as early as the late nineteenth century. Nevertheless, even after the Second World War, this argument was still being put forward: Abba Solomon Eban, *Israel: The Emergence of a Democracy*, 29

Some, among them many Zionists, also believed that the local “backward” population could only benefit from the colonisation by a “civilized”, mainly European people.²⁹ It was argued repeatedly that the Arabs of Palestine would probably become the wealthiest Arabs in the area, thanks to future Zionist efforts.³⁰ Colonel Meinertzhagen, British Chief Political Officer in Syria and Palestine, probably summarized these feelings best in a report of 31st March 1920 to the British Foreign Secretary, Lord Curzon:

It is not doubted that Zionism will and must succeed to the benefit of Palestine and all its inhabitants. Should the Arab, as is inevitable, fail to compete with a superior civilisation, and from his nature it is probable he will not compete, is it fair that Palestine with its undeveloped resources, should be refused progress because its inhabitants are incapable of it? The Arabs will be compelled under Zionism to enjoy increased prosperity and security³¹

2.3. CONTROVERSIES SURROUNDING THE BALFOUR DECLARATION

Nearly everything regarding the Declaration –issued against this backdrop– is highly controversial. Its status in international law, and the fact that Great Britain entered into other agreements, which did or may have applied to

FOREIGN AFF. 424, 434 (1951), argues that Arab states should accept Israel as Israel only occupied “one hundredth” of the area in which Arabs had gained independence; accord JULIUS STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* (1981); he provides the same statistics (at 16), and concludes that any Arab right to self-determination had therefore been fulfilled (at 17-18). Some within in the British establishment may also have deluded themselves that, no matter what they did, the local population would prefer British rule to a return of the Ottomans. That is implied by what Sir Valentine Chirol, one-time *Times* journalist and British diplomat, wrote in 1922. In “Islam and Britain” [Sir Ignatius Valentine Chirol, *Islam and Britain*, 1 FOREIGN AFF. 48 (1923).] he acknowledges Arab disappointment at unfulfilled Allied promises (at 57-58), and specifically mentions Palestine, but goes on to state: “Hatred of the Turk as a ruler is stronger than the tendency to sympathize with him as a brother in the Faith.”; some within the British Establishment also accused the Arabs of “ingratitude”. The British having liberated them from the Turks, the Arabs would surely “not begrudge that small notch [Palestine].”; Macmillan attributes this statement to Foreign Secretary Balfour (*supra* note 12, at 432).

²⁹ Frankfurter, *supra* note 5, at 409-413, 415 (Frankfurter states that “no wise friend of Arab aspirations would seek to charge the Arab with responsibility for composing the delicate religious and racial problems in Palestine”); see also DAVID BEN-GURION, *ISRAEL: YEARS OF CHALLENGE* 14-15 (1964); Shlaim, *supra* note 9, at 11; Macmillan, *supra* note 12, at 431.

³⁰ Frankfurter, *supra* note 5, at 418; Winston Churchill, then Secretary of State for the Colonies and on a visit to Palestine in March 1921, remarked that he believed Jewish immigration into Palestine “will be good for the world, good for the Jews and good for the British. But we also think it will be good for the Arabs who dwell in Palestine”; reprinted in Ingrams, *supra* note 1, at 118-119 (PRO. CO. 733/2); Strawson, *supra* note 2, at 31-32.

³¹ Colonel Meinertzhagen, Chief Political Officer in Syria and Palestine, to Lord Curzon, British Foreign Secretary, in a report of 31st March 1920 on the situation in Palestine; reprinted in Ingrams, *supra* note 1, at 82-83 (PRO. FO. 371/5034).

Palestine, has led some to view the Declaration as invalid. Due to its ambiguous terms, attempts at interpreting the Declaration's actual meaning have caused even more controversies.

2.3.1. THE "TOO MUCH PROMISED" LAND

The Palestine position is this.³² If we deal with our commitments, there is first the general pledge to Hussein in October 1915, under which Palestine was included in the areas as to which Great Britain pledged itself that they should be Arab and independent in the future Great Britain and France -Italy subsequently agreeing-committed themselves to an international administration of Palestine in consultation with Russia, who was an ally at the time A new feature was brought into the case in 1917, when Mr. Balfour, with the authority of the War Cabinet, issued the famous declaration to the Zionists that Palestine should be the national home of the Jewish people³³

2.3.1.1. SYKES-PICOT-AGREEMENT (1916)

In late 1915, the British and the French began negotiations on the fate of the Middle East in the aftermath of the First World War. Regarding Palestine, the British representative, Sykes, and the French negotiator Picot, achieved a compromise: two ports and a stretch of land, enabling the construction of a railway line to Mesopotamia, should become British-administered territory, while the rest of the territory was to be under an international regime.³⁴ In early 1916, both governments approved the Sykes-Picot-Agreement, but kept it secret. The Russians, in April 1916, also agreed to the outlines of the agreement.³⁵

³² Prince, *supra* note 3, at 125; Woolbert, *supra* note 3, at 311 (quote in the paragraph's title).

³³ Lord Curzon, Lord President of the Council, member of the Inner War Cabinet and future British Foreign Secretary, at a meeting of the "Eastern Committee" (previously the Middle Eastern Committee) on 5 December 1918; Minutes of the meeting reprinted in Ingrams, *supra* note 1, at 48 (PRO. CAB. 27/24).

³⁴ Quigley, *supra* note 7, at 12-13; Kattan, *supra* note 6, at 40-41; Schneer, *supra* note 14, at 75-86; Barr, *supra* note 21, at 31.

³⁵ Quigley, *supra* note 7, at 13; Schneer, *supra* note 14, at 80; Barr, *supra* note 21, at 60.

When the British government started contemplating its expression of support for Zionist intentions in Palestine, it was indeed the Sykes-Picot-Agreement, and possible adverse French reaction to any such venture, that worried officials most.³⁶ However, Zionist supporters managed to enlist French support. On 4th June 1917, Cambon, a leading official in the French Foreign Ministry, gave a Zionist representative a written confirmation that France felt “sympathy” for the Zionist endeavours in Palestine.³⁷ Subsequently, the Sykes-Picot-Agreement no longer was seen as an obstacle to British support of Zionism.³⁸

2.3.1.2. MCMAHON-HUSSEIN CORRESPONDENCE (1915/1916)

As mentioned earlier, the British government never took the possibility of Arab opposition to the Declaration seriously. Nevertheless, the correspondence of 1915/1916 between the British High Commissioner in Egypt, McMahon, and the Sharif Hussein of Mecca -who was viewed as one of the main leaders of Arab resistance against Ottoman rule- was to trouble the British government for many decades, as it dealt with post-war Arab independence.³⁹

Indeed, it has been argued frequently that the Balfour Declaration is invalid because the British had already promised the Arabs that Palestine would be part of an independent Arab state’s territory. In exchange for Arab support against the Ottomans, the British had promised the Arabs independence. Up to this day it is, however, highly controversial whether the territory promised to Hussein included Palestine or not.⁴⁰

Based mainly on a letter by McMahon of 24th October 1915,⁴¹ many argue that Palestine was included in the territory to be under Arab rule.⁴²

³⁶ Fromkin, *supra* note 9, at 291, 297; Schneer, *supra* note 14, at 159-160, 218-219, 232-236.

³⁷ Fromkin, *supra* note 9, at 292-293; Quigley, *supra* note 7, at 18; he mentions a secret agreement between British Prime Minister Lloyd George and the French in December 1918, whereby Palestine should be British.

³⁸ Young, *supra* note 12, at 391-392; he also mentions Foreign Office efforts to convince the French; Schneer, *supra* note 14, at 86.

³⁹ Report of a Committee set up to consider certain correspondence between Sir Henry McMahon and The Sharif of Mecca in 1915 and 16, Cmd. 5974, (March 16, 1939), http://www.gwpda.org/1916/mcmahon_sharif.html as evidenced by the Committee set up to investigate the correspondence in the late 1930s); Strawson, *supra* note 2, at 55-56.

⁴⁰ Schneer, *supra* note 14, at 64, 74.

⁴¹ For a translated version of the letter, see <http://www.jewishvirtuallibrary.org/jsourc/History/hussmac1.html>. It is the two statements: “The two districts of Mersina and Alexandretta and portions of Syria lying to the west of the

Among others, a British Foreign Secretary and various civil servants in the Foreign Office supported that view.⁴³ Furthermore, in June 1922, a large majority in the House of Lords passed a motion, which declared the Palestine Mandate “inacceptable” because, among other things, “it directly violates the pledges made by His Majesty’s Government to the people of Palestine in the Declaration of October, 1915”.⁴⁴ This provides a strong indication that many in the House of Lords also believed Palestine to have been included in the territory promised to Hussein.

Officially, the British government always maintained that Palestine was not part of the territory promised to the Arabs, but had instead been explicitly excluded.⁴⁵ McMahon himself,⁴⁶ who is usually given credit for having

districts of Damascus, Homs, Hama and Aleppo cannot be said to be purely Arab, and should be excluded from the limits demanded” and “Subject to the above modifications, Great Britain is prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca” which have led to the controversy. It has remained in dispute whether Palestine was excluded from the area in which Arabs were to be independent or not.

⁴² See, e.g., Hillary Harry St. John Bridger Philby, *The Arabs and the Future of Palestine*, 16 FOREIGN AFF. 156, 157 (1937), (he claims that only Aden was excluded from Arab independence in the correspondence); Prince, *supra* note 3, at 125; implicitly Woolbert, *supra* note 3, at 311 (“contradictory promises during the World War”); Günther Weiß, *Die Entwicklung der Palästina-Frage seit dem Peel-Bericht*, 9 ZAÖRV 382, 416-17 (he offers a linguistic interpretation based on Turkish and Arab terms for “district”, and concludes that the Arabs were justified in assuming Palestine was included); and *supra* note 17, at 148; DAVID HIRST, *THE GUN AND THE OLIVE BRANCH* 160 (2nd ed. 1984); Allain, *supra* note 17, at 78; Hadawi, *supra* note 28, at 11-14; Watrin, *supra* note 21, at 60; Strawson, *supra* note 2, at 3-4; Kattan, *supra* note 6, at 45-46, 98-111.

⁴³ Lord Curzon, Lord President of the Council, member of the Inner War Cabinet and future British Foreign Secretary, at a meeting of the “Eastern Committee” (previously the Middle Eastern Committee) on 5th December 1918; he declared that Palestine was “included in the areas as to which Great Britain pledged itself . . . in a general pledge to Hussein in October 1915 . . . that they should be Arab and independent in future”; Minutes of the meeting reprinted in Ingrams, *supra* note 1, at 48 (PRO. CAB. 27/24); J. RUSSELL GAINSBOROUGH, *THE ARAB-ISRAELI CONFLICT: A POLITICO-LEGAL ANALYSIS* 5 (1986) he refers to a note on a map (Foreign Office Minute of 1918, also mentioned by Kattan, *supra* note 6, at 40), PRO. FO. 371/4352, which states: “Palestine was implicitly included in King Hussein’s original demands and was not explicitly excluded in Sir H. McMahon’s letter of 24.10.1915. We are therefore, presumably, pledged to King Hussein by this letter that Palestine shall be ‘Arab’ and ‘independent’”; a further memorandum, prepared by the Political Intelligence Department at the Foreign Office in preparation for the negotiations at Versailles states: “With regard to Palestine, H.M.G. are committed by Sir Henry McMahon’s letter to the Sherif on October 24th, 1915, to its inclusion in the boundaries of Arab independence”; see: *Light on Britain’s Palestine Promise*, THE TIMES, APR. 17, 1964, at 15; also quoted in Kattan, *supra* note 6, at 38 (FO. 608/92); Quigley, *supra* note 7, at 11-12; Frankfurter, *supra* note 5, at 414-415; though a leading Zionist, he only mentions the controversy without expressing an opinion; he only claims it is in the Arabs’ own best interest not to rule Palestine.

⁴⁴ Hansard, Palestine Mandate, H.L. Deb. vol 50 cc994-1033, c994; (June 21, 1922).

⁴⁵ Ben-Gurion, *supra* note 29, at 11; Quigley, *supra* note 7, at 12.

⁴⁶ McMahon (in 1937); quoted in “Report of a Committee set up to consider certain correspondence between Sir Henry McMahon and The Sharif of Mecca in 1915 and 16”, 16th March 1939, Cmd. 5974, para. 13 e, *supra* note 39: “I feel it is my duty to state, and I do so, definitely and emphatically, that it was not intended by me in giving the pledge to King Hussein to include Palestine in the area in which Arab independence was promised”.

expressed himself as vaguely as possible in his correspondence with Hussein, supported this view.⁴⁷ In later times, nevertheless, the British government somewhat modified its position regarding the promises made.

In the Arab-U.K. Committee Report of 1939, the U.K. representatives declared:

16. Both the Arab and the United Kingdom representatives have tried (as they hope with success) to understand the point of view of the other party, but they have been unable to reach agreement upon an interpretation of the Correspondence, and they feel obliged to report to the conference accordingly.

17. The United Kingdom representatives have, however, informed the Arab representatives that the Arab contentions, as explained to the committee, regarding the interpretation of the Correspondence, and especially their contentions relating to the meaning of the phrase “Portions of Syria lying to the west of the districts of Damascus, Hama, Homs and Aleppo”, have greater force than has appeared hitherto.

18. Furthermore, the United Kingdom representatives have informed the Arab representatives that they agree that Palestine was included in the area claimed by the Sharif of Mecca in his letter of the 14th July, 1915, and that unless Palestine was excluded from that area later in the Correspondence it must be regarded as having been included in the area in which Great Britain was to recognise and support the independence of the Arabs. They maintain that on a proper construction [sic] of the Correspondence Palestine was in fact excluded. But they agree that the language in which its exclusion was expressed was not so specific and unmistakable as it was thought to be at the time.⁴⁸

Faced with this controversy, the British opted for a compromise regarding Palestine, which resulted in its later partition and the creation of Trans-Jordan. In his White Paper of 1922, Colonial Secretary Winston Churchill already outlined the partition in the following terms:

⁴⁷ Barr, *supra* note 21, at 22-29.

⁴⁸ “Report of a Committee set up to consider certain correspondence between Sir Henry McMahon and The Sharif of Mecca in 1915 and 16”, 16 March 1939, Cmd. 5974, paras. 16-18 (*supra* note 39).

With reference to the Constitution which it is now intended to establish in Palestine, the draft of which has already been published, it is desirable to make certain points clear. In the first place, it is not the case, as has been represented by the Arab Delegation, that during the war His Majesty's Government gave an undertaking that an independent national government should be at once established in Palestine. This representation mainly rests upon a letter dated the 24th October, 1915, from Sir Henry McMahon, then His Majesty's High Commissioner in Egypt, to the Sherif of Mecca, now King Hussein of the Kingdom of the Hejaz. That letter is quoted as conveying the promise to the Sherif of Mecca to recognise and support the independence of the Arabs within the territories proposed by him. But this promise was given subject to a reservation made in the same letter, which excluded from its scope, among other territories, the portions of Syria lying to the west of the District of Damascus. This reservation has always been regarded by His Majesty's Government as covering the vilayet of Beirut and the independent Sanjak of Jerusalem. The whole of Palestine west of the Jordan was thus excluded from Sir Henry McMahon's pledge.⁴⁹

The precise meaning of the McMahon-Hussein-correspondence has remained controversial.⁵⁰ The feeling of betrayal on the Arab side, caused by the differing interpretations of the McMahon-Hussein correspondence, certainly seems justified, when it is considered that, privately, many British officials agreed with the Arab interpretation.⁵¹

Nevertheless, this discussion is, as far as international law is concerned, largely irrelevant. As will be explained shortly, the fact that Palestine later was categorized as an "A"-Mandate, and as such was subject to Article 22 (4) of the Covenant and the Palestine Mandate (hereinafter the Mandate), makes this controversy obsolete.⁵²

⁴⁹ Winston Churchill, "The British White Paper", (June 3, 1922).

⁵⁰ Schneer, *supra* note 14, at 64-74; Tom Segev, *Mohammed und Herr Cohen*, SPIEGEL GESCHICHTE 82, 83 (2011).

⁵¹ Chirol, *supra* note 28, at 57; he states: "The dream of a great Arab state which the Allies encouraged by their lavish promises during the war has vanished into thin air with the separate mandates which Britain and France agreed to confer upon themselves".

⁵² According to Article 20 (2) of the Covenant, the obligations under the Covenant took precedence over prior obligations that were contrary to its provisions. Member states were to extricate themselves from such obligations. Furthermore, there are doubts as to Britain's right to dispose of

2.3.2. INTERNATIONAL LEGAL STATUS OF THE BALFOUR DECLARATION

This leads on to the Balfour Declaration's status in international law. Some have argued that it represented a binding agreement between the Allies and the Zionists. In exchange for Zionist support during the First World War, the Allies had agreed to provide the Jewish people with a national home.⁵³ The latter contention is based on American government approval of the Declaration's text prior to the British government's issuance, while the French and Italian governments expressed their support in February and May 1918, respectively.⁵⁴

However, there can be no doubt that the Declaration did not have any status in international law.⁵⁵ The Allies may have generally approved the text of the Declaration. Nevertheless, as the text evidences, it is only "His Majesty's Government" making any pledges -whatever their content may be. Furthermore, the British were making pledges regarding a territory they had not even occupied at the time.⁵⁶ Palestine was still Ottoman-ruled, and the outcome of the First World War was still uncertain.⁵⁷

Moreover, states do not enter into public international law obligations in what was formally a letter to an individual, even if that person was prominent within the Zionist movement.⁵⁸ Furthermore, the Zionists at that

territory it had not even yet occupied, and as to Hussein's right to represent the Arabs. In that sense, the McMahon-Hussein Correspondence suffers from similar defects as the Declaration (which will be explained shortly).

⁵³ Murlakov, *supra* note 4, at 59-61; W. T. Mallison Jr., *The Zionist-Israel Juridical Claims to Constitute The Jewish People Nationality Entity and to Confer Membership in it: Appraisal in Public International Law*, 32 *GEO. WASH. L. REV.* 983, 1002-1005 (1963) (although he limits the obligation to Great Britain).

⁵⁴ See *Palestine Royal Commission Report*, July 1937, Cmd. 5479, 22, Chapter II, para. 14; <https://palestinianmandate.files.wordpress.com/2014/04/cm-5479.pdf>; Leonard Stein, *The Jews in Palestine*, 4 *FOREIGN AFF.* 415, 420 (1926); Strawson, *supra* note 2, at 45; Owen, *supra* note 15, at 428; Keay, *supra* note 9, at 79.

⁵⁵ Dunskey, *supra* note 25, at 167; Frankfurter, *supra* note 5, at 414 ("The Mandate explicitly recited the Balfour Declaration . . . Thus was the Balfour Declaration made part of the law of nations"); Allain, *supra* note 17, at 73, 78; Shabtai Rosenne, *Directions for a Middle East Settlement - Some Underlying Legal Problems*, 33 *L. & CONTEMP. PROBS.* 44, 48 (1968) ("legal status . . . may be open to discussion"); Gendell, Stark, *supra* note 6, at 217; they seem to disagree.

⁵⁶ See Muhammad H. El-Farra, *The Role of the United Nations vis-à-vis the Palestine Question*, 33 *L. & CONTEMP. PROBS.* 68, 68 (1968); Mallison, *supra* note 53, at 1002; Linowitz, *supra* note 6, at 522; Kattan, *supra* note 6, at 44; Strawson, *supra* note 2, at 35; Shlaim, *supra* note 9, at 4, 8.

⁵⁷ See DAWOUD EL-ALAMI & DAN COHN-SHERBOK, *THE PALESTINE-ISRAELI CONFLICT* 144 (3rd ed. 2008); Kattan, *supra* note 6, 44.

⁵⁸ Strawson, *supra* note 2, at 35; Kattan, *supra* note 6, at 58-59. Even if the Declaration were construed to be an agreement between the British and the Zionists, it would not be governed by public international law. Its status would be similar to that of a concession granted by a state to a private company. The Zionist organization -certainly at that time- had no status in public international law. Regarding concessions, also see *Anglo-Iranian Oil Co. Case* (United Kingdom v.

time were not anything approaching a majority among the Jews worldwide. Therefore, their right to represent the Jewish world population in general must be disputed.⁵⁹

The only conclusion can therefore be that the Balfour Declaration is “not a legal document, and has no standing in international law.”⁶⁰

2.3.3. INTERPRETATION OF THE TEXT

Due to its vagueness, the interpretation of the Balfour Declaration has always been extremely controversial. Although the Declaration itself never had any “Standing in international law”, it, nevertheless, was later included in the Mandate for Palestine, which was approved by the League of Nations. This makes it necessary to examine more closely what was actually meant by the phrases “His Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people” and “it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine”.⁶¹

Some have claimed that the wording of the Declaration can only mean that Palestine in its entirety (including what is nowadays Jordan) was to become *the* Jewish National Home, resulting in the creation of a “Jewish Commonwealth”.⁶² The so-called “Safeguard Clause”, dealing with the non-

Iran), Judgement, 1952 I.C.J. Rep. 93, 111-113 (July 22). The I.C.J. declined its jurisdiction also on the basis that the Concession granted to the Anglo-Iranian Oil Co. by Iran did not create any rights as far as the United Kingdom was concerned.

⁵⁹ Mallison, *supra* note 53, at 1004 (also quoting Weizmann, who acknowledged that fact); see also Anis F. Kassim, *The Palestine Liberation Organization’s Claim to Status: A Juridical Analysis under International Law*, 9 DENV. J. INT’L L. & POL’Y 1, 13-14 (1980); he rightly points out that the first time the Zionist Organization was internationally recognized as a public body was in the Mandate which established the Jewish Agency.

⁶⁰ Dunsky, *supra* note 25, at 167; Mallison, *supra* note 53, at 1030; Mallison disagrees. He argues that the Declaration has become part of customary international law. This position can hardly be reconciled with his own interpretation of the Declaration (he concludes that it contained only a “political promise clause”).

⁶¹ “The Balfour Declaration”, *supra* note 8.

⁶² HOWARD GRIEF, *Legal Rights and Title of Sovereignty of the Jewish People to the Land of Israel and Palestine under International Law*, NATIV ONLINE (2004), <http://www.acpr.org.il/English-Nativ/02-issue/grief-2.htm>; 1-12, 1, 2; Dunsky, *supra* note 25, at 170; Dunsky makes a related argument; he claims that the mandates system meant that the international community had made “an explicit decision” that the Jews “were to achieve self-determination” in the part of Palestine that was not Trans-Jordan. This seems contradictory, given Dunsky’s argument in the previous sentence, according to which the concept of self-determination at that time was “purely political ...and not binding”.

Jewish communities, is argued to obviously envisage their future minority status within a new Jewish entity.⁶³

The then Prime Minister, Lloyd George, supported this interpretation – in general terms. Before the “Peel Commission” in 1937, he declared, when giving evidence:

The idea was, and this was the interpretation put upon it at the time, 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.⁶⁴

On the other hand, in his White Paper of 1922, Winston Churchill, the Colonial Secretary, had declared:

Unauthorized statements have been made to the effect that the purpose in view is to create a wholly Jewish Palestine. Phrases have been used such as that Palestine is to become "As Jewish as England is English." His Majesty's Government regard any such expectation as impracticable and have no such aim in view. Nor have they at any time contemplated, as appears to be feared by the Arab Delegation, the disappearance or the subordination of the Arabic population, language or culture in Palestine. They would draw attention to the fact that the terms of the Declaration referred to do not contemplate that Palestine as a whole should be converted into a Jewish National Home, but that such a Home should be founded in Palestine.⁶⁵

Later, when the troubles in Palestine were threatening to overwhelm Britain, the British government sought to distance itself even further from the view that the Balfour Declaration had created any definite obligations:

⁶³ Linowitz, *supra* note 6, at 523.

⁶⁴ Lloyd George, quoted in *Palestine Royal Commission Report*, July 1937, Cmd. 5479, 24, Chapter II, para. 20; *supra* note 54; Shlaim, *supra* note 9, at 14.

⁶⁵ Winston Churchill, “*The British White Paper*”, *supra* note 49.

The Balfour Declaration, in itself a compromise document, was not expressed in definitive political terms. It was a gesture, the expression of a hope then existing that the Jews and Arabs would compose their differences and eventually coalesce into a single commonwealth united in Palestinian citizenship. That evolution had not taken place⁶⁶

A literal understanding of the Declaration would seem to imply that Winston Churchill's interpretation –as described in his White Paper of 1922– is correct.⁶⁷ Neither is a “Jewish state” mentioned in the Declaration, nor is Palestine described as “the” Jewish National Home. ⁶⁸ As both Shlaim and Strawson point out, at that time the term “national home” –in contrast to the word “state”– had no defined political or legal meaning whatsoever.⁶⁹ When, on the other hand, assessing Lloyd George's contrary interpretation it is necessary to bear his strong pro-Zionist bias in mind.

Certainly, Lord Curzon, also a member of the Cabinet at the time it passed the Declaration, and by now Foreign Secretary, took a different view from that of the Prime Minister. When presented with a draft of the Mandate, which included the phrase “Will secure the establishment of a Jewish National Home and a self-governing Commonwealth”, Curzon responded by commenting: “Development of a self-governing Commonwealth’. Surely most dangerous. It is a euphemism for a Jewish State, the very thing they accepted and that we disallow.⁷⁰

⁶⁶ William Ormsby-Gore, Secretary of State for the Colonies, before the *Permanent Mandates Commission* in 1937; Thirty-Second (Extraordinary) Session, Devoted to Palestine, Held at Geneva from July 30th-August 18th, 1937, twenty-second meeting; <https://unispal.un.org/DPA/DPR/unispal.nsf/0/FD05535118AEF0DE052565ED0065DDF7>.

⁶⁷ Kattan, *supra* note 6, at 5; without offering any explanation, Dunsky, however, views this interpretation as “unlikely” (*supra* note 25, at 173).

⁶⁸ Collins, *supra* note 4, at 157; Kattan, *supra* note 6, at 59-63; Strawson, *supra* note 2, at 36; Shlaim, *supra* note 9, at 14, 23.

⁶⁹ Shlaim, *supra* note 9, at 14 (“never clearly defined and . . . no precedent in international law”); Strawson, *supra* note 2, at 36 (“it [the term ‘national home’] was unknown in international law” and “in political discourse”); Kattan, *supra* note 6, at 61-62; he agrees, and goes on to argue that the Zionist drafters of the first version of the Declaration deliberately avoided the term “state”, because they realized that any such commitment would be rejected by the British government.

⁷⁰ Comment by Lord Curzon on a draft of the Mandate, March 1920; reprinted in Ingrams, *supra* note 1, at 94 (PRO. FO. 371/5199); Eric Forbes Adam (Diplomatic Service) responded to this comment on 18th March 1920, by stating that “the use of the phrase did not, to our mind, imply any acceptance in the mandate of the Jewish idea that the Palestinian state set up by the mandate would ever become a Jewish state”; reprinted in Ingrams, *ibid*, 94-95 (PRO. FO. 371/5199).

In the ensuing discussion, Curzon went on to point out that the creation of a Jewish State, if included in the Mandate, was “Contrary to every principle upon which we have hitherto stood, I at any rate cannot accept it.”⁷¹

Further illumination is provided when the draft “Declarations” *not* adopted by the British government before the Balfour Declaration was issued are examined. The British cabinet actually had already rejected four previous drafts before approving the Balfour Declaration on 31st October 1917.⁷² The *first* draft (July 1917), prepared by Zionists, was comparatively straightforward. It provided that the British government “accepts the principle that Palestine should be reconstituted as the National Home of the Jewish people”.⁷³ No safeguard clause was included. The *second* draft (August 1917), authored by Balfour, was more or less identical to the Zionist draft. Milner’s *third* draft (August 1917) already included a much weaker statement which declared that the British government “accepts the principle that every opportunity should be afforded for the establishment of a home for the Jewish people in Palestine”. However, a safeguard clause still was not included.

By the time the *fourth* draft (the so-called “Milner-Amery Draft”) was presented on 4th October 1917, the original, Zionist proposal had been “watered down” considerably.⁷⁴ In it, the British government only “viewed with favour the establishment in Palestine of a national home for the Jewish race”. For the first time a safeguard clause protecting the “non-Jewish communities’” rights was included.⁷⁵ With two minor amendments this fourth draft was to become the Balfour Declaration.

It is therefore understandable that the Zionist leader Dr Weizmann described the Milner-Amery draft, more or less identical to the Declaration, as a “painful recession”;⁷⁶ a comment which cannot be easily reconciled with the

⁷¹ Response by Lord Curzon to minutes prepared by Eric Forbes Adam, 19 March 1920; reprinted in Ingrams, *supra* note 1, at 95 (PRO. FO. 371/5199).

⁷² For the text of all four drafts, see: LEONARD STEIN, *THE BALFOUR DECLARATION*, 664 (ACLS Humanities E-Book 2008) (1961); for evidence of the discussions within the British Cabinet, also see: Ingrams, *supra* note 1, at 7-18; Kattan, *supra* note 6, at 59-63; Strawson, *supra* note 2, at 29-30; Schneer, *supra* note 14, at 334-336, 339-341.

⁷³ Ingrams, *supra* note 1, at 9.

⁷⁴ Mallison, *supra* note 53, at 1014; Kattan, *supra* note 6, at 62-63.

⁷⁵ Ingrams, *supra* note 1, at 12-13 (PRO. CAB. 23/4).

⁷⁶ Dr Chaim Weizmann, as quoted by Mallison, *supra* note 53, at 1013; and Kattan, *supra* note 6, at 61; Fromkin, *supra* note 9, at 297; Fromkin describes the final version as a “much diluted” version

arguments put forward by those who claim that the Balfour Declaration had clearly promised the Zionists the creation of a Jewish state. The British government only “favoured” the establishment of “a” national home for the Jews. Any “reconstitution” of such a home that might have implied acknowledgement of ancient Jewish rights was not mentioned, and, finally, the safeguard clause in favour of the “non-Jewish communities” was included.⁷⁷

Considering this evolution of the Balfour Declaration, it becomes clear that the British cabinet in its totality –no matter what Lloyd George’s and Balfour’s intentions had been– was at pains to avoid any precise legal obligations, and certainly did not want to guarantee the future establishment of a Jewish State or Commonwealth in Palestine.⁷⁸ Obviously, the British government would not have wished to antagonize the local inhabitants unnecessarily at a time when the planning for a British invasion of Palestine was in its last stages.⁷⁹

Schneer adds another twist. According to him, leading British politicians were actually willing to drop the pledges in the Balfour Declaration towards the end of the First World War. In an effort to persuade Turkey to desert the Central Powers, negotiations with individual Turkish politicians ensued in early 1918, during which Lloyd George seemed willing to grant Turkey at least nominal sovereignty over Palestine.⁸⁰ That is why Schneer has

and claims Weizmann was unhappy with the result.

⁷⁷ Strawson, *supra* note 2, at 36.

⁷⁸ Allain, *supra* note 17, at 79; Owen, *supra* note 15, at 427, 428; he (a “George Lloyd” Liberal M.P. in 1929, and biographer of Lloyd George) points out that “rifts” developed in the War Cabinet as far as the Declaration was concerned which were to continue for a long time afterwards. One of the consequences being that the Declaration did not answer the question what British policy actually was; see Norman Bentwich, *The Mandate for Palestine*, 10 BRIT. Y.B INT’L L. 137, 139 (1929), he states: “A national home connotes a territory in which a people, without receiving the rights of political sovereignty, has, nevertheless a recognized legal position”; this statement by Bentwich is quoted by Frankfurter (President of the American Zionist Organization), and described as the comment of a “leading authority” (*supra* note 5, at 417); Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT’L L. & POL’Y 27, 36–37 (1997); Mallison, *supra* note 53, at 1018; Mallison describes the Declaration as “having a very restricted political meaning”; Grief, *supra* note 62, at 2; Grief disagrees. Without providing any evidence, he argues that the British Cabinet had meant a “state” when it used the term “Jewish National Home” – a state that encompassed all of Palestine. However, there are only few who share Grief’s extreme interpretation. Rather, the fact that the Holy Sites were situated in what was then Palestine makes it highly unlikely that the British Cabinet would have agreed to a Jewish state being created that was identical to Palestine (This assertion does, however, not necessarily preclude the argument –opposed here– that some kind of Jewish state was envisaged in Palestine, see above).

⁷⁹ Mallison, *supra* note 53, at 1014; Kattan, *supra* note 6, at 255.

⁸⁰ Schneer, *supra* note 14, at 347–361.

concluded that Palestine, in fact, was promised “four times”.⁸¹ Nothing came of these negotiations, but the episode certainly does demonstrate that leading British politicians were not inhibited by any commitments undertaken in the Balfour Declaration.

The conclusion must therefore be that the Balfour Declaration did not include the promise of the creation of a Jewish state in Palestine.⁸² Its content was more in line with the original Foreign Office sentiment, which was the establishment, in Palestine, of “a sanctuary for Jewish victims of persecution”.⁸³ This view was shared within the U.S. State Department. In a memorandum of 22 September 1947, Loy Henderson wrote to the Secretary of State:

We are under no obligation towards the Jews to set up a Jewish State. The Balfour Declaration and the Mandate provide not for a Jewish State but for a Jewish national home. Neither the United States nor the British Government has ever interpreted the term “Jewish national home” to be a Jewish national state.⁸⁴

Nevertheless, and undoubtedly, a promise to allow Jewish immigration into Palestine in the case of British occupation was made.

How the British government wanted to reconcile the creation of a Jewish national home with its desire not to prejudice the existing “non-Jewish communities’” rights remains open to question. All the indications are that the possible consequences were not analysed in detail, and that the Balfour Declaration was a politicians’ compromise: as vague as possible in order to please as many as possible, if only superficially. Accordingly, Kermit Roosevelt, a Middle East expert who worked for the C.I.A., described the Declaration’s content as being “of the poetical obscurity of the Delphic Oracle” due to its many “deliberate ambiguities”.⁸⁵ Certainly, detailed concepts of how to proceed

⁸¹ Schneer, *supra* note 14, at 368.

⁸² This is further evidenced by Frankfurter’s (President of the American Zionist Organization) comment in 1930 (*supra* note 5, at 415): “But authoritative Jewish demand is not for a Jewish state; it does not ask to govern others.”; Macmillan, *supra* note 12, at 427-428; she points out that the British government “insisted repeatedly” that a national home “did not mean a state”.

⁸³ Mallison, *supra* note 53, at 1012.

⁸⁴ *The Director of the Office of Near Eastern and African Affairs (Henderson) to the Secretary of State, September 22nd, 1947*; U.S. Department of State, F.R.U.S., 1947, *The Near East and Africa, 1947*, 1153-1158, 1157.

⁸⁵ Kermit Roosevelt, quoted in Keay, *supra* note 9, at 80.

in Palestine after the war are nowhere to be found which, in turn, by 1939, had led to eleven British commissions having been sent to Palestine in order to figure out how to reconcile the conflicting aims of the Balfour Declaration.⁸⁶ In the end, Britain could only acknowledge its failure to do so. Lord Cecil was to be proved right in his prediction, made during a discussion on who should administer Palestine, that “whoever goes there will have a poor time.”⁸⁷

3. BRITISH OCCUPATION OF PALESTINE (1917-1923)

By Christmas 1917, the British had occupied Jerusalem. General Sir Edmund Allenby placed the area under military administration. Military rule in the “Occupied Enemy Territory” lasted until 30th June 1920.⁸⁸ Regarding Jewish immigration into Palestine, a ban was in place, which the Ottoman rulers had imposed.⁸⁹ However, Hebrew immediately became one of Palestine’s official languages, which caused an influx of Jewish inhabitants into the local civil service.⁹⁰ In Britain, meanwhile, the “Zionist Commission” was set up with the task of advising the British administration in Palestine.⁹¹ It soon became an “Administration within an Administration.”⁹²

⁸⁶ Kattan, *supra* note 6, at 44; Shlaim, *supra* note 9, at 17-19.

⁸⁷ Lord Robert Cecil, Assistant Secretary of State, at a meeting of the “Eastern Committee” (previously the Middle Eastern Committee) on 5th December 1918; Minutes of the meeting reprinted in Ingrams, *supra* note 1, at 48-50, 50 (PRO. CAB. 27/24).

⁸⁸ See Norman Bentwich, *Mandated Territories: Palestine and Mesopotamia (Iraq)*, 2 Brit. Y.B. Int'l L. 48, 50 (1921); see also Norman Bentwich, *The Legal Administration of Palestine Under the British Military Occupation*, 1 Brit. Y.B. Int'l L. 139-148 (1920).

⁸⁹ A law from 1882 prohibited all foreign Jews from visiting Palestine, except as pilgrims. The sale of land to foreign Jewish settlers was prohibited in 1883, and, in 1892, the Department of Land Registration prohibited the sale of any land to any Jews. The laws stayed in force until the end of the Ottoman Empire. However, they were not very successfully enforced. For more details, see: Mim Kermal Öke, *The Ottoman Empire, Zionism, And The Question of Palestine (1880-1908)*, 14 INT. J. MIDDLE E. STUD. 329-341 (1982).

⁸⁹ Storrs, *supra* note 27, at 302, 354.

⁹⁰ Storrs, *supra* note 27, at 302, 354.

⁹¹ “Plans Zionist Commission, England will aid Repatriation of Jews and Restoration”; *The New York Times*, (Feb. 13, 1918) http://query.nytimes.com/mem/archivefree/pdf?_r=1&res=9807EED7103FE433A25750C1A9649C946996D6CF&oref=slogin.

⁹² Letter by General Bols, Chief Administrator in Palestine, to the Foreign Office (1920); reprinted in Ingrams, *supra* note 1, at 85-86 (PRO. FO. 371/5119).

A Civil Administration took over subsequent to a Resolution passed at the San Remo Conference⁹³ on 25th April 1920,⁹⁴ which stated that Britain should be the mandatory power for Palestine. While the Resolution included the provisions of the Balfour Declaration, it also noted that the terms of the mandate had to be approved by the Council of the League of Nations. This approval was received on 24th July 1922, and the Mandate for Palestine came into effect on 29th September 1923. Nevertheless, based on the San Remo Resolution, the Ottoman ban on Jewish immigration was lifted by the Civil Administration under High Commissioner Sir Herbert Samuel.

The decision to introduce an immigration law,⁹⁵ and to simplify land transfer⁹⁶ in Palestine “in anticipation of the definite granting of the Mandate” was not simply “imperfect in its legal foundation” –as the Legal Secretary of the Government of Palestine (later Attorney-General) Bentwich admitted in 1922.⁹⁷ Rather, it contravened Article 43 of the 1907 Hague Regulations,⁹⁸ which requires the occupier of “the territory of the hostile state” to respect “unless absolutely prevented the laws in force of the country”. These Ottoman laws included a ban on Jewish immigration and on transfers of land to foreign Jews.⁹⁹ In 1920, the Chief Administrator in Palestine, General Bols, acknowledged the legal difficulties:

This Administration has loyally carried out the wishes of His Majesty's Government, and has exceeded in doing so the strict

⁹³ The San Remo Conference was a meeting of the *Allied Supreme Council* (Britain, France, Italy, and Japan). The United States insisted on not being referred to as an “ally”, but instead preferred the term “Associated Power”. It should be noted that the United States never declared war on the Ottoman Empire, so that it was also not represented in San Remo.

⁹⁴ For the text of the San Remo Resolution, see http://ecf.org.il/media_items/299.

⁹⁵ *Immigration Ordinance* (1920).

⁹⁶ See *Land Transfer Ordinance* (1920), *Mahlul Land Ordinance* (1920) and *Mawet Land Ordinance* (1921).

⁹⁷ Bentwich, *supra* note 88, at 50, 52; Berriedale Keith, *Mandates*, 4 J. COMP. LEGIS. & INT'L L., 71, 72–73 (1922); he describes the legal situation in the “A”- Mandates in 1922 as “anomalous” due to the lack of a peace treaty with Turkey: despite Britain’s “lack of title”, the British were “exercising large powers of government”, irrespective of the fact that British and French rights on Turkish territory only “rest on the fact of occupation and conquest”; Elihu Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law – Survey and Comment*, IV, *State Territory*, 6 INT'L COMP. L. Q. 513, 514 (1957); Malcolm M. Lewis, *Mandated Territories, Their International Status*, 39 L.Q. REV 458, 460 (1923) (“somewhat anomalous”).

⁹⁸ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Convention), Oct. 18, 1907; 36 Stat. 2277.

⁹⁹ For details, see note 89; Öke, *supra* note 88.

adherence to the laws governing the conduct of Military Occupant of Enemy Territory, but this has not satisfied the Zionists¹⁰⁰

In his subsequent recollections of his time in Palestine, the Military Governor in 1917, Roland Storrs,¹⁰¹ was even more forthright as to the “admitted departure from the Laws and Usages of War”:¹⁰² “The Military Administration notably contravened the Status quo, in the matter of Zionism For these deliberate and vital infractions of military practice O.E.T.A. [Occupied Enemy Territory Administration] was criticized both within and without Palestine.”¹⁰³

Furthermore, Turkey, successor to the Ottoman Empire, never ratified the original peace treaty, the *Treaty of Sèvres* of 10th August 1920. The final peace treaty, the *Treaty of Lausanne*, was concluded only on 24th July 1923. Therefore, Palestine, at the time of the enactment of the new immigration and land transfer laws, was still “territory of the hostile state”. The British government subsequently acknowledged that only ratification of the *Treaty of Lausanne* in August 1924 “regularized the international status of Palestine as a territory detached from Turkey and administered under a Mandate entrusted to His Majesty's Government.”¹⁰⁴

That there was no “absolute” necessity to act¹⁰⁵ in fulfilment of the Balfour Declaration before the League of Nations had approved the envisaged Mandate and it had come into effect is self-evident. British measures to enable the implementation of the Balfour Declaration, undertaken before the ratification of the *Treaty of Lausanne*, were therefore inconsistent with international law.¹⁰⁶

¹⁰⁰ Letter by General Bols, Chief Administrator in Palestine, to the Foreign Office (1920); reprinted in Ingrams, *supra* note 1, at 85–86 (PRO. FO. 371/5119).

¹⁰¹ Ronald Storrs was Military Governor of Jerusalem between 1917 and 1920, and then Civil Governor between 1920 and 1926.

¹⁰² Storrs, *supra* note 27, at 354.

¹⁰³ Storrs, *supra* note 27, at 301; Storrs goes on to point out that the British Administration in Palestine was supposed to act as a “Military Government and not as Civil Reorganizers”, and would consequently have been obliged to “administer the territory as if it had been Egypt.”

¹⁰⁴ *Report of His Britannic Majesty's Government on the Administration under Mandate of Palestine and Transjordan for the year 1924*, Section I (Dec. 31, 1924); for full text also see: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/A87D21F4E57F2D0F052565E8004BACE0>.

¹⁰⁵ Hague Convention, *supra* note 98, art. 43.

¹⁰⁶ Allain, *supra* note 17, at 80–81; Macmillan, *supra* note 12, at 435; referring to the difficulties in concluding a peace treaty with “Ottoman Turkey”, she continues: “The British simply carried on as though Palestine was officially theirs.”

4. THE PALESTINE MANDATE

4.1. THE MANDATES SYSTEM

The introduction of the mandates system in the aftermath of the First World War was a legal novelty,¹⁰⁷ usually attributed to the South African General Smuts, member of the Imperial War Cabinet.¹⁰⁸ Although similar to a protectorate in some respects, the mandate had unique implications as far as the mandatory power was concerned, as specific obligations towards the League of Nations were imposed.¹⁰⁹

From the outset, the mandates system was very controversial. Many, especially in the United States, viewed the system as nothing more than a “cloak for annexation” by the European powers.¹¹⁰ Besides isolationism, this was one of the main reasons the United States refused to take on the Palestine Mandate –as suggested by some–, and turned down the mandate for Armenia.¹¹¹

4.1.1. SELF-DETERMINATION AND PRESIDENT WILSON

In 1916, Wilson had outlined his vision of national self-determination, when he declared in an address to the *League to Enforce Peace* “that every people has a right to choose the sovereignty under which they shall live.” He emphasized his beliefs when he added that “no peace can last or ought to last which does not accept the principle that governments derive all their just powers from the

¹⁰⁷ Grief, *supra* note 62, at 1; Henry Goudy, *On Mandatory Government in the Law of Nations*, 1 J. COMP. LEGIS. & INT'L L., no. 3, 1919 at 175; Keith, *supra* note 97, at 72; Donald S. Leeper, *International Law: Trusteeship Compared with Mandate*, 49 MICH. L. REV. 1199-1210, 1199 (1951); Lewis, *supra* note 97, at 458; Mark Carter Mills, *The Mandatory System*, 17 Am. J. INT'L L. 50, 50-62.

¹⁰⁸ Based on his “Practical Suggestion” of December 1918; Anghie, *supra* note 21, at 119-120; Quigley, *supra* note 7, at 20-22; Strawson, *supra* note 2, at 37-39; Owen, *supra* note 15, at 549.

¹⁰⁹ See Percy E. Corbett, *What is the League of Nations?*, 5 BRIT. Y.B. INT'L L. 119, 130 (1924); Lewis, *supra* note 97, at 459, 474.

¹¹⁰ Mills, *supra* note 107, at 54; he claims that the U.S. Secretary of State Lansing shared that view; Watrin, *supra* note 21, at 61; Keith, *supra* note 97, at 74; Keith claims that many mandatory powers' governments assumed that the “C”-Mandates allowed “virtual annexation”, and agrees with that assessment (at 76); 75 (American attitude); Bassiouni, *supra* note 25, at 34; he describes the mandate system in Palestine as a “colonial regime”; Corbett, *supra* note 109, 133; Corbett cites M. Rolin (later to be a judge at the *Permanent Court of International Justice*, 1931-1936) as stating that the mandates system was a disguise for annexation; Goudy, *supra* note 107, at 175; Philby, *supra* note 42, at 158; Philby argues that the “system of Mandates” differed “only in theory from annexation”; Stefan Tolin, *The Palestinian People and Their Political, Military and Legal Status in the World Community*, 5 N. CAROLINA. CENT. L. J. 326, 328 (1973-1974) (“colonial device”); Hadawi, *supra* note 28, at 19 (“a form of colonization”).

¹¹¹ Mills, *supra* note 107, at 57.

consent of the governed”, and that “no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.”¹¹²

In his address to a Joint Session of Congress in January 1918, President Wilson then announced his famous “Fourteen Points”, which he deemed to be the “only possible program” for the “world’s peace”.¹¹³ In six of the fourteen points, Wilson dealt with aspects of self-determination. In particular, regarding “colonial claims”, he maintained that “the interests of the populations concerned must have equal weight with the equitable claims of the government”.¹¹⁴ As far as the non-Turkish parts of the Ottoman Empire were concerned, they were to enjoy “an absolutely unmolested opportunity of autonomous development”.¹¹⁵ Wilson described the principle underlying his “Fourteen Points” as “the principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another, whether they be strong or weak”.¹¹⁶

Despite this attitude towards colonized peoples seeming innovative, it is notable that self-determination, as envisaged in the “Fourteen Points”, appears to be a more limited concept than in previous statements made by President Wilson. The seemingly hierarchical distinction made between “assuring sovereignty” –with regard to Belgium or Turkey–, “assuring autonomous development”, as outlined in the case of non-Turkish parts of the Ottoman Empire, and the mode for settling “colonial claims” by giving “equal weight” to “the interests of the populations concerned” as far as other areas are concerned, is conspicuous.¹¹⁷

Soviet attitudes to self-determination should be mentioned briefly.¹¹⁸ Lenin’s *Decree on Peace* of 26th October 1917, was much more far-reaching than

¹¹² President Wilson, “Civil War and Imperialism”, Encyclopedia of the New American Nation; <http://www.americanforeignrelations.com/O-W/Self-Determination-Civil-war-and-imperialism.html>.

¹¹³ “President Wilson’s Fourteen Points”, World War I Document Archive, 1-5; http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points; Quigley, *supra* note 7, at 16-17; Kattan, *supra* note 6, at 48-49; Gresh, *supra* note 10, at 64.

¹¹⁴ Point V.

¹¹⁵ Point XII.

¹¹⁶ “President Wilson’s Fourteen Points”, World War I Document Archive, 4; *supra* note 113.

¹¹⁷ Points VII and XII (Belgium and Turkey); *supra* note 115 (non-Turkish parts of the Ottoman Empire); *supra* note 114 (colonial claims); L.C. Green, *Self-Determination and Settlement of the Arab-Israeli Conflict*, 65 AM. SOC’Y INT’L L. PROC. 40, 41-42 (1971); Quigley, *supra* note 7, at 17.

¹¹⁸ For more details, see: Quigley, *supra* note 7, at 15-16; Kattan, *supra* note 6, at 118-119; Anghie,

Wilson's concept of self-determination.¹¹⁹ Although at that time Soviet influence on international law's development was minimal, it seems likely that worries about the Bolshevik programme's attractiveness helped persuade European powers to be more receptive to Wilson's more limited version of self-determination.¹²⁰

4.1.2. COVENANT OF THE LEAGUE OF NATIONS

With President Wilson, the only true supporter of the principle among the First World War victors, toning down his rhetoric on self-determination, it was inevitable that –given the complete lack of enthusiasm for the concept on the part of the victorious European powers– it would be watered down further and only applied selectively, once the peace agreement would be negotiated.¹²¹ Indeed, the result was that the concept of self-determination would be applied only in Europe. Conveniently, in Europe, the principle of self-determination had the decisive advantage of seemingly justifying the dismemberment of the Central Powers that had lost the war.¹²²

Non-European areas, formerly dominated by the Central Powers, on the other hand, were deemed to require “tutelage” of varying degrees on the part of the “advanced nations” which were, of course, generally synonymous with the victors.¹²³ Regarding allied or other colonial possessions, no adjustments regarding self-rule were deemed necessary.¹²⁴

supra note 21, at 139.

¹¹⁹ *Decree on Peace*; delivered at the *Second All-Russia Congress of Soviets of Workers' and Soldiers' Deputies*, 26th October 1917, and published by *Izvestiya*, (Oct. 27, 1917) <http://www.historyguide.org/europe/decree.html>.

¹²⁰ Kattan, *supra* note 6, at 118–119; Anghie, *supra* note 21, at 139.

¹²¹ Collins, *supra* note 4, at 140; he warns against “blithely accepting” Wilson's and the Allied statements on self-determination; Huntington Gilchrist, *V. Colonial Questions at the San Francisco Conference*, 39 AM. POL. SCI. REV. 982, 989 (1945); he points out that even in 1945 “certain imperial powers maintained that many colonial peoples preferred dependence”; Anghie, *supra* note 21, at 119–120, 139–140.

¹²² Green, *supra* note 117, at 41; Gresh, *supra* note 10, at 36, 48–49.

¹²³ League of Nations Covenant art. 22 (2).

¹²⁴ Green, *supra* note 117, at 42; he points out that the United States made it plain that it “would never concede to the local inhabitants the right of deciding upon the proposed transfer” when the Danish West Indies became American. The Danish West Indies were sold to the United States by way of a treaty in 1916 (Convention between the United States and Denmark, Cession of the Danish West Indies, August 4, 1916, U.S.T. 629). The islands are now referred to as the U.S. Virgin Islands.

4.1.2.1. ARTICLE 22

These considerations are reflected in the *Covenant of the League of Nations*, signed at the Paris Peace Conference on 28th June 1919. Its Article 22 contains the mandates system's "constitution". "On behalf of the League" the mandatory powers were to "exercise" their "tutelage" of "peoples not yet able to stand by themselves under the strenuous conditions of the modern world".¹²⁵ Based on the different "stages" of "development" the peoples concerned had reached, three categories of mandates were established.¹²⁶

The "A-Mandates", as outlined in Article 22 (4) of the Covenant, were applicable to "certain communities" formerly under Ottoman rule. Their "existence as independent nations" was "provisionally" recognized. They were to receive only "advice and assistance" until they could "stand alone". The "B-Mandates", outlined in Article 22 (5) of the Covenant, were to apply especially to "peoples of Central Africa". They envisaged "administration" by the mandatory power. Finally, the "C-Mandates", outlined in Article 22 (6) of the Covenant, were applicable to South-West-Africa and "certain South Pacific Islands". These areas were to be "administered under the laws" of the mandatory powers as "integral part" of their "territory".

Article 22 of the Covenant further required the mandatory powers to file annual reports on the mandated territories, established the *Permanent Mandates Commission*, and set out the Council of the League's responsibility for drafting the mandate's precise terms in cases when the League of Nations had not yet agreed on them.¹²⁷

4.1.2.2. SOVEREIGNTY

One of the most hotly debated issues surrounding the mandates system, which has remained controversial, is where sovereignty over the mandated territories was to reside.¹²⁸ The Covenant does not provide an explicit answer,¹²⁹ which has

¹²⁵ League of Nations Covenant art. 22 (1) and (2).

¹²⁶ *Id.* article 22 (3).

¹²⁷ *Id.* article 22 (7)-(9).

¹²⁸ Mills, *supra* note 107, at 54; Mills points out that, during the peace negotiations, U.S. Secretary of State Lansing repeatedly (and unsuccessfully) tried to bring to President Wilson's attention the

led to a proliferation of theories on the topic,¹³⁰ further complicated by the different categories of mandate.

There were those who concluded that the old-fashioned concept of sovereignty was ill suited to the legal novelty of the mandates system. They maintained that the question was unanswerable or that sovereignty was “in abeyance”.¹³¹ Others argued that sovereignty lay with the mandatory power as evidenced, for example, by that power’s control of the mandated territories’ foreign relations.¹³² Others, again, argued that the League of Nations retained sovereignty and the mandatory was simply acting on its behalf, as evidenced by the League’s supervisory role.¹³³ Another school of thought adhered to the

fact that it was not clear where sovereignty would reside as far as the mandated territories were concerned; Lauterpacht, *supra* note 97, at 514; Leeper, *supra* note 107, at 1204; Arnold D. McNair, *Mandates*, 3 CAMBRIDGE L.J. 149, 158-159 (1928); T.J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 80-82 (7th ed. 1923); WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 162-163 (8th ed. 1924); Quigley, *supra* note 7, at 66-75; Kattan, *supra* note 6, at 56-58; Anghie, *supra* note 21, at 125-127, 133, 147-156.

¹²⁹ The fact that the issue of where sovereignty resided was not regulated explicitly in the Covenant should, perhaps, not be surprising. Many contemporary scholars and international lawyers would not have been unduly perturbed by this. As Craven has explained, as early as in the nineteenth century any definition of the term “state” necessitated the explanation of a vast array of different arrangements: “sovereign” and “semi-sovereign” states, vassals, unions, protectorates, etc.. By the middle of the century, a minimum of eleven different categories of states was recognized. This situation became even more complicated at the turn of the century, as treaties with non-European states and tribes seemed to require further differentiation based on a gradation of sovereignty. While non-European states could not be denied sovereignty completely, without rendering the treaties European states had concluded with them invalid, it was inconceivable to attribute to those states the kind of sovereignty European states enjoyed. Only when such non-European states had “demonstrated their ‘civilized’ credentials” was the “badge of imperfect membership” in the international community of sovereign states removed. As Craven has therefore concluded, the mandates system thus merely gave this belief “institutional form”, based as it was on the “tutelage” of the peoples in the mandates by the “advanced nations” until they “were able to stand by themselves” see (Matthew Craven, *Statehood, Self-Determination, and Recognition*, in *INTERNATIONAL LAW* 203, 210-214 (Malcolm D. Evans ed., 3rd ed. 2010).

¹³⁰ See Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *Isr. L. Rev.* 279, 282 (1968); Lawrence, *supra* note 128, at 80-82 (he believed there should be a case-by-case evaluation of where sovereignty resides based on the texts of the Mandate); Hall, *supra* note 128, at 162-163 (he believed sovereignty over the mandates to be divided between the mandatory power and the League of Nations); Quigley, *supra* note 7, at 66-75; Anghie, *supra* note 21, at 147-156.

¹³¹ Blum, *ibid*, 282; Leeper, *supra* note 107, at 1208 (“best solution”); *International Status of South-West Africa*, Advisory Opinion, 1950 I.C.J. Rep.128 (July 11) (separate Opinion by Sir Arnold McNair, J.).

¹³² See Lord Balfour, Statement, 18th Session of the Council, 1922, 3 *League of Nations O.J.* (1922) 547.

¹³³ Bentwich, *supra* note 88, at 48; he seems to be inclined to agree with this view, when he states that the “League of Nations becomes the general guardian of three infant nations” who “delegates the care of the minor to a Power who is termed the Mandatory”. In later articles, he seems more doubtful, especially regarding Palestine. He repeatedly points out that the “Mandatory exercises full power of legislation and administration”; Norman Bentwich, *Nationality in Mandated Territories Detached from Turkey*, 7 *BRIT. Y.B. INT’L L.* 97, 100 (1926).

notion that sovereignty rested in the inhabitants of the mandated territories, albeit temporarily exercised by others.¹³⁴

Many others argued that assuming shared sovereignty (in various combinations) was the correct solution, and some argued that the answer to the question where sovereignty rested was dependent on the category of mandate concerned.¹³⁵ The *International Court of Justice* (hereinafter I.C.J.), when later dealing with mandated territories, avoided taking an unequivocal stand on the issue.¹³⁶

4.1.2.3. ASSESSMENT

Assuming sovereignty of the mandatory powers is incompatible with the Covenant of the League of Nations.¹³⁷ Although there is no doubt that the

¹³⁴ ICJ, Legal Consequence for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 69 (June 21) (separate opinion by Vice-President Ammoun, J.); Judge Ammoun refers to Stoyanovsky's view "of virtual sovereignty residing in a people deprived of its exercise by domination or tutelage" as the "more accurate view"; Anghie, *supra* note 21, at 179-180; Corbett, *supra* note 109, at 129-130 (Corbett, however, limits this to "A" mandates).

¹³⁵ McNair, *supra* note 128, at 159-160; he, writing in 1927/1928, argues that sovereignty was divided between the League and the mandatory, the distribution dependent on the category of mandate. Later, when he was a Judge at the I.C.J., he seems to have changed his mind (I.C.J., International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. Rep.128 (July 11) (separate Opinion by Sir Arnold McNair, J.); Corbett, *supra* note 109, at 129, 134 ("A"-Mandates: sovereignty inhabitants, some powers divided between Mandatory and League; "B" and "C" Mandates: sovereignty divided between Mandatory and League; Palestine as a special case); Charles Henry Alexander, *Israel in Fieri*, 4 INT'L L. Q. 423, 423-426 (1951); Alexander offers another explanation, which, however, fails to convince. He argues that sovereignty with regard to the mandated territories lay with the Principal Allied and Associated Powers. He bases that on Article 118 of the *Treaty of Versailles*. This theory is fraught with difficulties. The Allied Powers never claimed sovereignty regarding the mandated territories. Moreover, referring to the problem of the dissolution of the Supreme Council, which made the administration of any shared sovereignty impossible, he claims that this made no difference to the legal situation. Lastly, in order to justify his post-World War II conclusions, he implies that the "powerful nations" -and therefore presumably the states that shared sovereignty- changed with the times. This view seems extremely far-fetched; Leeper, *supra* note 107, at 1204-1205; he points out that only the United States ever claimed that sovereignty "resided in the Allied and Associated Powers"- a view that was so overwhelmingly rejected at the time that the United States dropped this position.

¹³⁶ See 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 I.C.J. Rep.16, 28-30 (June 21)- the I.C.J. explicitly rejected the notion that sovereignty resided in the mandatory powers. An implicit rejection by the I.C.J. of the idea that the League of Nations retained sovereignty over the mandated territories can be seen in the court's statement, after having rejected the notion that the League of Nations' function amounted to that of a "mandatory": "It [the League of Nations] had only assumed an international function of supervision and control." (in: International Status of South-West Africa, *supra* note 135, at 132) The I.C.J., however, avoided a conclusive statement on where it believed sovereignty actually did reside.

¹³⁷ See I.C.J., Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276, *supra* note 136 (the I.C.J.

mandatory powers exercised many sovereign functions for the mandated territory, especially in the case of the “C”-Mandates, it is widely assumed that the mandatory power did not have a unilateral right of annexation or territorial adjustment.¹³⁸ Furthermore, some argue that the League of Nations, theoretically at least, was empowered to withdraw the Mandate in cases of persistent violations of the Mandate’s terms on the part of the mandatory power.¹³⁹ This cannot easily be reconciled with assuming the mandatory power’s sovereignty.

Further indications that sovereignty over mandated territories did not rest in the mandatory are: a) the obligation of the mandatory powers to provide annual reports to the League of Nation; b) the role of the *Permanent Mandates Commission* in supervising the mandatory power; c) the compulsory role of the *Permanent Court of International Justice* (hereinafter P.C.I.J.); d) the *League of Nations’ Council’s* -at least theoretical- role in drafting the mandates; e) and the fact that even inhabitants of the “C”-Mandates did not become nationals/subjects of the mandatory power.¹⁴⁰ Regarding “A”-Mandates - whose “existence as independent nations” was “provisionally recognized” and where the mandatory’s role was reduced to “advice and assistance”- the notion that sovereignty resided in the mandatory becomes untenable.¹⁴¹

rejected that notion even in the case of “C”-mandates); Lauterpacht, *supra* note 97, at 514; Lewis, *supra* note 97, at 469, 470; McNair, *supra* note 128, at 151; Quincy Wright, *Sovereignty of the Mandates*, 17 AM. J. INT’L L. 691, 695-696 (1923); Kattan, *supra* note 6, at 134-135.

¹³⁸ Corbett, *supra* note 109, at 134-135; Goudy, *supra* note 107, at 180; Quigley, *supra* note 7, at 66-68.

¹³⁹ See I.C.J., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276*, *supra* note 136, at 47-50; Goudy, *supra* note 107, at 180; Wright, *supra* note 137, at 702-703; Kattan, *supra* note 6, at 144-145; Corbett, *supra* note 109, at 135; he disagrees, and argues there was no right of “revocation” on the part of the League; McNair, *supra* note 128, at 157-158, fn. 7; he acknowledges that the issue is “controversial”.

¹⁴⁰ See Norman Bentwich, *Palestine Nationality and the Mandate*, 21 J.COMP. LEGIS. & INT’L L., no. 4, 1939 at 230; when dealing with the issue of nationality, Bentwich argues that Palestine citizens were not British subjects, precisely because Palestine had “not been transferred” to Britain. He points out that Palestinians do not “owe allegiance to the Crown”. This is confirmed by the fact that the issue of Palestine nationality was dealt with in an *Order in Council*, dated 24th July 1925, under the *Foreign Jurisdiction Act*; Bentwich, *supra* note 133, at 100; Leeper, *supra* note 107, at 1206; Lewis, *supra* note 97, at 469-470; Wright, *supra* note 137, 695; Quigley, *supra* note 7, at 66-68; Kattan, *supra* note 6, at 136; Anghie, *supra* note 21, at 151-153, 182-186 (he describes how intrusive the questionnaires were, which the *Permanent Mandates Commission* sent out to the mandatory powers annually).

¹⁴¹ I.C.J., *International Status of South-West Africa, Advisory Opinion*, 1950 I.C.J. Rep 132 (11 July); Quigley, *supra* note 7, at 66-68.

Discussions during the Paris Peace Conference confirm this. President Wilson, rejecting a French proposal that differed from the mandatory system, declared that the French proposal “implied definite sovereignty, exercised in the same spirit and under the same conditions as might be imposed upon a mandatory”, while the mandatory system presumed “trusteeship on the part of the League of Nations”.¹⁴² Lloyd George described the mandates system as a “general trusteeship”.¹⁴³ Accordingly, the I.C.J. has rejected the assumption that sovereignty was “transferred” to the mandatory even when “C”-Mandates are concerned. With the exception of South Africa, no mandatory power ever claimed sovereignty over the mandated territories.¹⁴⁴

The League of Nations’ role regarding the mandated territories was certainly significant.¹⁴⁵ However, it is questionable whether that role amounted to sovereignty over the mandated territories.¹⁴⁶ The mandatory powers were to provide their “tutelage” to the mandated territories “on behalf of the League”, and the League was to perform considerable supervisory functions as already outlined. The *Permanent Mandates Commission* certainly took its supervisory tasks very seriously and adopted “the widest possible interpretation” of its rights. The I.C.J. has repeatedly stressed the importance of these supervisory functions.¹⁴⁷

Nevertheless, given the following facts, it is difficult to sustain the argument that sovereignty over the mandated territories rested in the League: a) the fact that the mandates system’s official goal was that all mandated territories should become independent states; b) the fact that the question of who should become mandatory power had already been decided by the Allies prior to the League taking up its functions; and c) the fact that the mandatory power only was to provide administrative assistance on the behalf of the

¹⁴² President Wilson, U.S. Department of State, Papers relating to the Foreign Relations of the United States, *The Paris Peace Conference*, 1919, Volume 3, 765.

¹⁴³ Lloyd George, U.S. Department of State, Papers relating to the Foreign Relations of the United States, 770.

¹⁴⁴ Leeper, *supra* note 107, at 1207.

¹⁴⁵ Lauterpacht, *supra* note 97, at 514; Lewis, *supra* note 97, at 474.

¹⁴⁶ For the I.C.J.’s view, see *supra* note 136 and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep 29 (21 June); Leeper, *supra* note 107, at 1205; he points out that the League never claimed sovereignty; Wright, *supra* note 137, at 697.

¹⁴⁷ See I.C.J., International Status of South-West Africa, *supra* note 141, at 136.

League, as far as the “A”-Mandates were concerned.¹⁴⁸ Moreover, this is confirmed by the discussions surrounding Iraq’s future independence (the former Mandate for Mesopotamia/Iraq) in 1931: the question of a *transfer* of sovereignty from the League –for example, by way of a treaty– was never discussed.¹⁴⁹

The correct view of the mandates system seems to be that sovereignty already rested in the nations under mandate, but it was exercised temporarily by the mandatory power under the League of Nations’ supervision on behalf of these nations.

Early statements made by officials in the Foreign Office regarding Britain’s aims confirm this. In December 1918, a future member of the delegation to the Peace Conference in Versailles described it as the “foundation” of British policy regarding Palestine that there should be “a Palestinian State with Palestinian citizenship for all inhabitants, whether Jewish or non-Jewish.”¹⁵⁰ Accordingly, citizens of “A”-Mandates, including Palestine, not only had a nationality separate from that of the mandatory, but actually had their own nationality.¹⁵¹

Furthermore, once the mandates were in place, the mandatory powers and third states tended to treat the mandated territories as future states, even though the governmental functions were exercised by the mandatory. Among other things, the mandatory powers concluded treaties with third states for the mandated territories. The United Kingdom concluded a number of treaties on

¹⁴⁸ Lauterpacht, *supra* note 97, at 514-515; Wright, *supra* note 137, at 697; Quigley, *supra* note 7, at 66.

¹⁴⁹ The *Permanent Mandates Commission*, in September 1931, enumerated the general prerequisites regarding the termination of a mandate (which it examined in connection with Iraq’s prospective independence). These principles were subsequently approved by the *Council of the League of Nations*; a transfer of sovereignty was not among the requirements; see *Permanent Mandates Commission*, League of Nations Doc. C.830M.411 1931 VI (1927).

¹⁵⁰ Arnold Toynbee (Political Intelligence Department of the British Foreign Office); Minutes of 2 December 1918; reprinted in Ingrams, *supra* note 1, at 43 (PRO. FO. 371/3398); furthermore, Treaty of Peace with Turkey (Treaty of Lausanne) art. 30, Jul. 24, 1923, 28 L.N.T.S 11 (concluded after the *Covenant of the League of Nations* had come into force) stated: “Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become ipso facto, in the conditions laid down by local law, nationals of the State to which such territory is transferred.”

¹⁵¹ Quigley, *supra* note 7, at 54-58; Kattan, *supra* note 6, at 137.

behalf of Palestine,¹⁵² including, in 1922, a bilateral treaty between itself and the mandated territory.¹⁵³

Third states took a similar view of the relationship between the mandatory power and the Mandate. In 1932, the British government sought to grant Palestine trade concessions, and enquired of states it already had concluded Conventions of Commerce with as to their response to such a move.¹⁵⁴ Spain disapproved and declared that, as far as Palestine was concerned, “the territory in question could in no way be considered as imperial territory, but solely as a foreign country From this point of view, it was in a situation with regard to the mandatory power analogous to other sovereign states.”¹⁵⁵ In their responses the United States and Italy both insisted that Palestine was a “foreign country” in relation to the United Kingdom, and went on to point out that this, in their view, also applied to all the other territories under British mandate.¹⁵⁶

These reactions are also in line with the *Permanent Mandates Commission’s* view, expressed in 1937, that the “Palestinians formed a nation, and that Palestine was a state, though provisionally under guardianship.”¹⁵⁷ The Chairman of the Commission, when responding to an Iraqi statement on unrest in Palestine, expressed his views even more clearly:

For the Mandates Commission, Palestine had never ceased to constitute a separate entity. It was one of those territories which, under the terms of the Covenant, might be regarded as "provisionally independent". The country was administered under

¹⁵² Quigley, *supra* note 7, at 53–54 (listing many examples, mainly of treaties concluded between Palestine and Egypt); *see also* John Quigley, “The Palestine Declaration to the International Criminal Court: The Statehood Issue” (2009) 1–11, 6 (he lists a number of bilateral and one international treaty Palestine acceded to), http://iccforum.com/media/background/gaza/2009-05-19_Quigley_Memo_on_Palestine_Declaration.pdf.

¹⁵³ Agreement between the Post Office of the United Kingdom of Great Britain and Northern Ireland and the Post Office of Palestine for the Exchange of Money Orders, UK–Palestine, Jan. 10–23, 1922, 13 L.N.T.S. 9; Quigley, *supra* note 7, at 54.

¹⁵⁴ Quigley, *supra* note 7, at 61–64.

¹⁵⁵ *The Ambassador in Spain (Laughlin) to the Secretary of State*, 28th October 1932; U.S. Department of State, F.R.U.S., Diplomatic Papers, 1932, The British Commonwealth, Europe, Near East and Africa, 36–37.

¹⁵⁶ *See The Secretary of State to the British Chargé (Osborne)*, 27th August 1932; *The Chargé in Italy (Kirk) to the Secretary of State*, 22nd October 1932; U.S. Department of State, F.R.U.S., Diplomatic Papers, 1932, *ibid*, 32, 35–36.

¹⁵⁷ Permanent Mandates Commission, Minutes of the Thirty-Second (Extraordinary) Session, Tenth Meeting, League of Nations, Jul. 30–Aug. 18 (1937); *supra* note 66.

an A mandate by the United Kingdom, subject to certain conditions and particularly to the condition appearing in Article 5: "The Mandatory shall be responsible for seeing that no Palestine territory shall be . . . in any way placed under the control of the Government of any foreign Power".

The Chairman would not go so far as to say that the Iraqi Government was making a deliberate attempt to control Palestine; but a foreign Power was intervening in Palestine's internal affairs, and it was difficult to distinguish between intervention and control.

Palestine, as the mandate clearly showed, was a subject under international law. While she could not conclude international conventions, the mandatory Power, until further notice, concluded them on her behalf, in virtue of Article 19 of the mandate. The mandate, in Article 7, obliged the Mandatory to enact a nationality law, which again showed that the Palestinians formed a nation, and that Palestine was a State, though provisionally under guardianship. It was, moreover, unnecessary to labour the point; there was no doubt whatever that Palestine was a separate political entity.¹⁵⁸

This understanding of the mandates system only seems compatible with the notion that sovereignty already rested in the inhabitants of the mandated territory. However, their exercise of that sovereignty was suspended to a varying degree, according to the class of mandate, until such a time when the peoples concerned "were able to stand by themselves".¹⁵⁹ During this interim

¹⁵⁸ Permanent Mandates Commission, *supra* note 66.

¹⁵⁹ I.C.J., Legal Consequence for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 69 (June 21) (separate opinion by Vice-President Ammoun); Gainsborough, *supra* note 43, at 14; very similar to this line of argument, as far as "A"-Mandates, and especially Syria and Mesopotamia, are concerned: Corbett, *supra* note 109, at 129-130. He argues that sovereignty was "vested" in Syria and Mesopotamia themselves, except for certain "powers" that were divided between the Mandatory and the League of Nations; Leeper, *supra* note 107, at 1206; he concurs as far as "A"-Mandates are concerned, but not as far as "B"- and "C"- Mandates are concerned; Grief, *supra* note 62, at 6; referring specifically to Palestine. However, he implausibly argues that sovereignty was vested only in the Jewish people; Wright, *supra* note 137, at 696; his position is somewhat unclear; after having rejected the notion that sovereignty resided in the "mandated communities", he goes on to state that "communities under 'A' mandates doubtless approach very close to sovereignty"; Peter Mansfield, *A History of the Middle East*, 2d ed., London: Penguin Books Ltd. (2003), 183 (he refers to the "A"-Mandates as "five new states"); Lewis, *supra* note 97, at 464; he disagrees (he refers to the "A"-Mandates as "caricatures of independent states"); Alexander also disagrees (*supra* note 135, at 425). He bases his argument on the principles of the English concept of trusts. He, however, overlooks the fact that there is

period, the mandatory power exercised the functions of sovereignty under the League of Nations' supervision.

As far as the "A"-Mandates according to Article 22 (4) of the Covenant are concerned any other interpretation is untenable. After all, these peoples were already explicitly "provisionally" recognized as "independent nations", and their wishes were to be the "principal consideration" when choosing the mandatory.¹⁶⁰ But even as far as the "B"- and "C"- Mandates are concerned, the fact that these peoples were only "entrusted" to the mandatory power until they were able to stand on their own, implies that sovereignty resided in them. Due to the fact that these peoples were viewed as not yet able to properly exercise their sovereignty, it must be assumed that, during the period of the mandate, sovereignty and the full exercise of its functions fell apart. This interpretation has the further advantage of providing an identical answer to the question of where sovereignty resided for all three types of mandate - a state of affairs, which would normally be a treaty drafter's goal when drafting one single article such as Article 22 of the Covenant.

The way Article 22 (4)-(6) of the Covenant were phrased, nevertheless, makes it obvious that -contrary to the rhetoric- only the "A"-Mandates were ever considered to be worthy of true independence in the foreseeable future.¹⁶¹ There seems little room for doubt that nobody drafting or ratifying the *Covenant of the League of Nations* truly envisaged the "C"-Mandates ever being

widespread agreement that the mandates system was not based on the English concept of trusts, but only included elements of it. Since Italy, France, and Japan -all civil law countries- were among the victorious allies anything else would also be surprising (see also: ICJ, International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128 (July 11); Goudy, *supra* note 107, at 177-182; Goudy persuasively argues that the mandates system was "derived from" Roman law - hence the name- and that there were "numerous differences between the English law on trusts and the mandates system; a point also made by Keith, *supra* note 97, at 75).

¹⁶⁰ Amos S. Hershey, *The Essentials of International Public Law and Organization*, 2d ed., New York: The Macmillan Company (1927), 187-191, especially at 189, fn. 34; Hershey views mandated territories of the "A"-Class as comparable to the "most liberal" kind of "protectorate" and believes their status to be similar to that of Cuba. As far as Cuba (at 168, fn. 33) is concerned, Hershey states that the United States-Cuba treaty of 1903-1904 imposes "legal limitations upon sovereignty", and that U.S.-Cuban relations are therefore best described as being those of a "Protectorate". It should be noted that Cuba was at that time already a member of the League of Nations (at 169, fn. 33 cont'd.). Nevertheless, according to Hershey, it is not a "fully sovereign state". His comparison allows the conclusion that Hershey believed the "A"-mandates to be states, although not yet "fully sovereign"; a view shared by Quigley, *supra* note 7, at 26-31, 70-79.

¹⁶¹ Dajani, *supra* note 78, at 34; he argues that "A"-Mandates were recognized as already existing "nations", which "B"- and "C"-Mandates were not; Strawson, *supra* note 2, at 40-41.

more than completely dependent territories.¹⁶² Their inhabitants' sovereignty was most likely going to be "suspended" forever.

4.1.3. PRESIDENT WILSON'S CONCEPT OF SELF-DETERMINATION AND THE COVENANT

For the peoples subjugated to the mandates system self-determination proved to be a rather hollow promise. During the League's existence, only Iraq (formerly Mesopotamia) managed, in 1932, to become an independent state, albeit politically tied to the United Kingdom. The French attempted to grant Syria independence in 1936. However, the French parliament never ratified the relevant treaty so that Syria only became independent in 1946. Under considerable -war-time- pressure, the French agreed to grant Lebanon independence in 1941, although the process only was completed "in stages".

By devising a complicated novel legal system of governing "backward" territories, Europe had managed to cling on to the "Fertile Crescent".¹⁶³ Old European ideas about other nations had obviously triumphed in Paris.¹⁶⁴ Further evidence of this is provided by the way territories were placed into different categories of mandates.

Based on their "stages of development" there was no objective reason for granting the Arabs in what is now Saudi Arabia independence, while insisting on an "A"-Mandate for Mesopotamia, Palestine, Syria, and Lebanon.¹⁶⁵ There was no reason to place the Palestinian Arabs -who formed the vast majority of the population in Palestine and invariably were described as "backward" when praising Jewish colonizing efforts- in the "A"-Mandate category, while denying that category to the whole of Africa.

¹⁶² Strawson, *supra* note 2, at 40-41; Anghie, *supra* note 21, at 121.

¹⁶³ Philby, *supra* note 42, at 158; Strawson, *supra* note 2, at 40-41.

¹⁶⁴ See Dankwart A. Rustow, *Defense of the Near East*, 34 FOREIGN AFF. 271, 286 (1955); writing in 1955, he states: "The West must rid itself of the habit of thinking of Near Eastern countries as wayward or compliant children rather than as free agents in international politics"; Strawson, *supra* note 2, at 40-41; Anghie, *supra* note 21, at 137-139; Mansfield, *supra* note 159, at 174.

¹⁶⁵ Hirst, *supra* note 42, at 160; Hirst makes the point that "the most backward parts of the Arab world" were to become independent states, while the more "mature and advanced were to come under 'direct or indirect' rule"; Mansfield, *supra* note 159, at 183-184, 188; he makes a similar point in respect of Yemen which became independent in 1918 - a country he describes as "remote" and "backward".

These completely arbitrary categorizations only served to mask European strategic goals and racial prejudice. The mandates system reflected the racial hierarchy as seen in Europe at the time.¹⁶⁶ As Anghie has commented, the only difference was that nations and cultures were no longer officially divided into “civilized” and “uncivilized”, but instead into “advanced” and “backward”.¹⁶⁷ Lloyd George’s contribution to the discussion on the mandates system during the Paris Peace Conference confirms this: he declared that the system for areas where “the population was civilized but not yet organized” had to be different from “cannibal colonies where people were eating each other.”¹⁶⁸

Differences in treatment of the same “race”, notably the varied treatment of the Arabs, were due to strategic concerns.¹⁶⁹ Oil-rich and strategically situated Mesopotamia could not be granted independence before securely tied to Britain. Both Syria and Lebanon were always viewed as part of the French sphere of influence; the French were frequently intervening in the area under the guise of protecting the relatively high number of Christians in Lebanon. Palestine, of course, required “tutelage” due to the holy sites in Jerusalem, its strategic location and, last but not least, the Balfour Declaration.

The way Palestine was dealt with would -in the coming decades- provide clear evidence for the thesis that imperialism, not the rights of peoples had triumphed at Versailles: although far removed from any concept of self-determination, colonization of the territory by European, and therefore alien, white settlers was deemed compatible with the mandates system. Balfour

¹⁶⁶ Examples of such views are to be found in Lewis, *supra* note 97, at 459 (“a formula for dealing with the tribes of Africa who enjoyed not a different civilization, but no civilization”); see also David Hunter Miller, *The Origin of the Mandates System*, 6 FOREIGN AFF. 277, 277 (1927-1928) (“... it involved the principle that the control of uncivilized people ought to mean a trusteeship or wardship”). Miller (at 281) also quotes General Smuts, credited with having invented the mandates system, as saying that it was not meant to apply to the “barbarians of Africa”; Anghie, *supra* note 21, at 168-178, 189-190; Mansfield, *supra* note 159, at 174.

¹⁶⁷ Anghie, *supra* note 21, at 189; Gresh, *supra* note 10, at 64; he makes a similar point by arguing that European imperialism could no longer be justified on the basis of a “divine right” and was therefore now justified as “tutelage”.

¹⁶⁸ Lloyd George, U.S. Department of State, Papers relating to the Foreign Relations of the United States, *The Paris Peace Conference, 1919, Volume 3*, 786; a similar view is reflected in Bentwich’s article, *supra* note 88, at 48. In it, he refers to the mandated territories as “infant nations” requiring a “guardian” and compares the mandates system to a “tutor/ward” relationship. He also describes these territories’ status as similar to that of “minors”.

¹⁶⁹ Miller, *supra* note 166, at 281; Philby, *supra* note 42, at 158; Mansfield, *supra* note 159, at 174; he describes the European view of the Arabs at that time as them being a “subject race” rather than a “governing race”.

admitted as much in 1919: “In the case of Palestine we deliberately and rightly decline to accept the principle of self-determination.”¹⁷⁰

The mandates system therefore did not truly reflect the principle of self-determination, but instead reflected the compromises the Europeans deemed necessary in order to appease the Americans.¹⁷¹ The novel idea of creating a supportive system that helped peoples towards independence, while acknowledging their sovereignty –albeit suspended– is in some ways easier to reconcile with old imperialist notions than with any modern concept of self-determination.¹⁷²

Owen rightly concluded that, as far as non-European areas were concerned, the “conflicts between the claims of race and language, the desires of the populations concerned, and the requirements of strategy, economics and national politics produced results which were neither admirable, nor, as it turned out, even workable.”¹⁷³ The United States, understandably distrustful as far as the Europeans’ motives were concerned, therefore only extended recognition to those mandates it had explicitly agreed to.¹⁷⁴

¹⁷⁰ Letter from British Foreign Secretary Balfour to the British Prime Minister Lloyd George of February 19th, 1919; reprinted in Ingrams, *supra* note 1, at 61-62 (PRO. FO. 371/4179); Strawson, *supra* note 2, at 40-41; Gresh, *supra* note 10, at 36, 48-49; he explains how the treatment of the actual inhabitants of Palestine was typical of imperialism. They and their culture were virtually invisible and therefore non-existent.

¹⁷¹ Wright, *supra* note 137, at 691.

¹⁷² Mansfield, *supra* note 159, at 174, 180 (he describes the mandate system as a “thinly disguised form of colonial administration”); Owen, *supra* note 15, at 550; he describes how President Wilson was at one time so frustrated during the discussions on the mandates system that he threatened to leave the peace conference. Nevertheless, some were happy to use almost poetic language in order to describe the virtues of the mandates system. Bentwich (*supra* note 88, at 56) states:

“It is the very basis of the new world order which is realised by the League of Nations, that the attention of the world is focused directly and systematically on the tutelary government of the younger and less advanced nations; . . . not that international law will be enforced by new physical sanction, but that it will be based upon a firmer and more systematic moral foundation; . . .”.

¹⁷³ Owen, *supra* note 15, at 554.

¹⁷⁴ Keith, *supra* note 97, 72; the USA recognized the Palestine Mandate in the Anglo-American Convention on the Recognition of the Palestine Mandate (1924), UK Treaty Series 054/1925; Cmd. 2559.

4.2. THE PALESTINE MANDATE IN DETAIL

4.2.1. FIRST DECISIONS

Palestine, as a former part of the Turkish Empire, was an “A”-Mandate. At their conference in San Remo in April 1920, the Allies decided that Great Britain should be the mandatory.¹⁷⁵

How that was to be reconciled with Article 22 (4) Covenant of the League of Nations, which by then already had come into force,¹⁷⁶ and which stated that the “wishes of the communities must be a principle consideration in the selection of the Mandatory”, remained a very controversial issue. Balfour always had opposed consulting the Palestinians, as he made clear in a memorandum to Lord Curzon: “Whatever deference should be paid to the views of those living there, the Powers, in their selection of a mandatory do not propose, as I understand the matter, to consult them.”¹⁷⁷

The Americans,¹⁷⁸ on the other hand, did try to determine what local feeling was. In March 1919, the Americans had proposed that a commission be sent to Syria (which at that time included Palestine) in order to investigate how best to administer the area in future. The French, however, refused to participate, and the British withdrew.¹⁷⁹ Realizing that the European powers had probably made secret deals regarding the area, the Americans, nevertheless, decided to send their own fact-finding mission, the “King-Crane-Commission” (hereinafter the Commission).¹⁸⁰ The Commission concluded that 60% of the petitions received were in favour of an American

¹⁷⁵ San Remo Resolution, 25/04/1920, para. (c), *supra* note 94; France was to be granted Syria; Britain was to be the mandatory power for Mesopotamia.

¹⁷⁶ 10th January 1920.

¹⁷⁷ British Foreign Secretary Balfour in a memorandum addressed to Lord Curzon, dated 11st August 1919; reprinted in Ingrams, *supra* note 1, at 73 (PRO. FO. 371/4183).

¹⁷⁸ As has already been pointed out, the Americans insisted on not being an “ally”. They claimed to be an “Associate Power”, also because the United States had never declared war on the Ottoman Empire.

¹⁷⁹ Ingrams, *supra* note 1, at 70; in a letter Balfour had sent to Herbert Samuel in early 1919, he had already expressed “great hopes that Palestine will be eliminated from the scope of any Commission”; reprinted in Ingrams, *supra* note 1, at 66 (PRO. FO. 800/215); Mansfield, *supra* note 159, at 180; Barr, *supra* note 21, at 81-84.

¹⁸⁰ Pappé, *supra* note 11, at 8-10; Kattan, *supra* note 6, at 49.

mandate. No other power had received more than 15% support, and there was least support for a French mandate.¹⁸¹

The disregard shown towards this local feeling would come to haunt the British. During the next few decades, numerous British commissions were sent to Palestine in order to deal with the fragile situation there. They were invariably confronted by the Palestinian Arabs who rejected the legitimacy of the British mandate on the grounds that Article 22 (4) Covenant had been violated, when Britain was chosen as the mandatory power for Palestine.¹⁸² However, it cannot be ignored that Britain *did* emerge as the local inhabitants' second choice during the Commission's investigations,¹⁸³ and that, by April 1920, the Americans had made it plain they would not be taking on the Mandate.

The fact that the Allies ignored the wishes of the local inhabitants that Syria remain unified,¹⁸⁴ and that no part of the area be placed under French "tutelage",¹⁸⁵ was an early indication of the Allies' attitude towards the newly created international legal order. Adherence to the new norms was going to be an opportunistic affair.

Furthermore, the Allies, in San Remo, agreed that the "mandatory" was going to be responsible for "putting into effect" the British declaration "in favour of the establishment in Palestine of a national home for the Jewish people". The safeguard clauses contained in the Balfour Declaration were to be respected.¹⁸⁶

This, too, evidenced complete disregard for the local inhabitants' wishes as described in detail by the Commission in 1919:

5. We recommend, in the fifth place, serious modification of the extreme Zionist Program for Palestine of unlimited immigration of

¹⁸¹ "Recommendations of the King-Crane-Commission", 28/08/1919, para. 6 (3), *supra* note 6; Barr, *supra* note 21, at 84-86.

¹⁸² Dajani, *supra* note 78, at 35; Weiß, *supra* note 17, at 154; he also cites the Iraqi Foreign Secretary making a statement to this effect in 1947 (fn. 20).

¹⁸³ "Recommendations of the King-Crane-Commission", 28/08/1919, para. 6 (6), *supra* note 6.

¹⁸⁴ A unified Syria consisting of Syria, the Lebanon, and Palestine; "Recommendations of the King-Crane-Commission", 28/08/1919, para. 2, *supra* note 6.

¹⁸⁵ The Commission claimed that more than 60 % of the petitions had protested "strongly and directly" against the French taking on any role in the area; "Recommendations of the King-Crane-Commission", 28/08/1919, para. 6 (6), *supra* note 6.

¹⁸⁶ San Remo Resolution, 25/04/1920, para. (b), *supra* note 94.

Jews, looking finally to making Palestine distinctly a Jewish State . . .
. (3) The Commission recognized also that definite encouragement had been given to the Zionists by the Allies in Mr. Balfour's often quoted statement, in its approval by other representatives of the Allies. If, however, the strict terms of the Balfour Statement are adhered to- favoring "the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine"-it can hardly be doubted that the extreme Zionist Program must be greatly modified. For a "national home for the Jewish people" is not equivalent to making Palestine into a Jewish State; nor can the erection of such a Jewish State be accomplished without the gravest trespass upon the "civil and religious rights of existing non-Jewish communities in Palestine."

In his address of July 4, 1918, President Wilson laid down the following principle as one of the four great "ends for which the associated peoples of the world were fighting": "The settlement of every question, whether of territory, of sovereignty, of economic arrangement or of political relationship upon the basis of the free acceptance of that settlement by the people immediately concerned, and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery." If that principle is to rule, and so the wishes of Palestine's population are to be decisive as to what is to be done with Palestine, then it is to be remembered that the non-Jewish population of Palestine -nearly nine-tenths of the whole- are emphatically against the entire Zionist program. The tables show that there was no one thing upon which the population of Palestine was more agreed than upon this. . . .¹⁸⁷

The Commission's report can be seen as a prescient prediction of Palestine's fate. Nevertheless, the Americans and the Allies suppressed it.¹⁸⁸ The original justification for this was that the report might deter Congress from ratifying

¹⁸⁷ "Recommendations of the King-Crane-Commission", 28/08/1919, para. 5 (emphases by author), *supra* note 6.

¹⁸⁸ Pappe, *supra* note 11, at 10; Wright, *supra* note 21, at 5; Kattan, *supra* note 6, at 49; Macmillan, *supra* note 12, at 434 (she claims that "nobody paid the slightest attention" to the commission's report).

the Peace Treaty of Versailles. However, even though the Americans had rejected the treaty much earlier, it was not until 1922 that the Commission's findings were published.¹⁸⁹

The Allies' conduct at San Remo concerning the wishes and aspirations of Palestine's inhabitants again exposed the hollowness of all the promises of self-determination.¹⁹⁰ Nevertheless, it also needs pointing out that many leading Arabs did not take the Palestinians' wishes very seriously either. Faisal, son of the Sharif of Mecca and later King of Iraq, repeatedly expressed his sympathy for Zionist aspirations in Palestine.¹⁹¹ In the "Faisal-Weizmann-Agreement" of 3rd January 1919, it was agreed that: "In the establishment of the Constitution and Administration of Palestine all such measures shall be adopted as will afford the fullest guarantees for carrying into effect the British Government's Declaration of the 2nd of November, 1917."¹⁹²

However, Faisal conditioned this agreement on achieving Arab independence as promised by the British. Of course, the implementation of parts of the Sykes-Picot-Agreement meant that this promise would not materialize to the extent envisaged by the Arab leaders, so the "Faisal-Weizmann-Agreement" never came into force.¹⁹³

Faisal, however, also wrote a letter, dated 3rd March 1919, to Felix Frankfurter, President of the American Zionist Organisation, declaring that

The Arabs, especially the educated among us, look with the deepest sympathy on the Zionist movement. Our deputation here in Paris is fully acquainted with the proposals submitted yesterday by the Zionist Organization to the Peace Conference, and we regard them as moderate and proper. We will do our best, in so far as we are

¹⁸⁹ Mansfield, *supra* note 159, at 181; Kattan, *supra* note 6, at 49; they both also mention strong British and French resistance to publication.

¹⁹⁰ McGeachy, *supra* note 6, at 241; he describes the "Jewish occupation of Palestine" as "a conquest against the will of the inhabitants - made possible and respectable by the military support of a Great Power".

¹⁹¹ Samuel, *supra* note 10, at 143; Weizmann, *supra* note 10, at 335; Strawson, *supra* note 2, at 43; Barr, *supra* note 21, at 70; Macmillan, *supra* note 12, at 433.

¹⁹² Faisal-Weizmann-Agreement, art. 3 (Jan. 3, 1919), <http://www.mideastweb.org/feisweiz.htm>.

¹⁹³ Macmillan, *supra* note 12, at 433; Fromkin, *supra* note 9, at 324-325.

concerned, to help them through: we will wish the Jews a most hearty welcome home.¹⁹⁴

For Arab leaders, too, the advancement of their personal ambitions was much more important than trying to ascertain, let alone respect local feeling in Palestine.¹⁹⁵

4.2.2. TURKEY

The legality of the decisions taken at San Remo, including those on Palestine, is further put into doubt by the fact that at the time there was no peace treaty with Turkey.¹⁹⁶

The *Treaty of Sèvres*, concluded in 1920, dealt with Palestine in Articles 95 and 96. Article 95 specifically referred to the Mandate and the terms of the Balfour Declaration. Turkey, however, never ratified the treaty.¹⁹⁷ When peace finally was agreed in the *Treaty of Lausanne* in 1923,¹⁹⁸ Turkey's declaration was much vaguer.¹⁹⁹ In Article 16 it was agreed that

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.

The *Treaty of Lausanne* came into force on 6th August 1924, at a time when the Mandate already had been approved and was being implemented. Such a sequence of events can hardly be reconciled with the 1907 Hague Regulations,

¹⁹⁴ Letter from Emir Faisal to Felix Frankfurter, 03/03/1919. For the text of the letter, see: <<http://www.jewishvirtuallibrary.org/jsourc/Histroy/FeisalFrankfurterCorrespondence.html>>; Frankfurter himself also quotes the letter (*supra* note 5, at 413-414).

¹⁹⁵ El-Alami, *supra* note 57, at 180; Shlaim, *supra* note 9, at 7-8.

¹⁹⁶ Keith, *supra* note 97, at 72; he describes the legal situation in the "A"-Mandates in 1922 as "anomalous" due to the lack of a peace treaty with Turkey; Lewis (in 1923), *supra* note 97, at 460; he states that "the position in respect of Palestine and Syria is somewhat anomalous . . . Turkey has neither ceded them formally nor recognized their independence".

¹⁹⁷ See *The Treaty of Peace Between the Allied and Associated Powers and Turkey* (Treaty of Sèvres), Aug. 10, 1920, 113 B.F.S.P. 652; for Articles 1-260, <http://wwi.lib.byu.edu/index.php/Section_I,_Articles_1_-_260>.

¹⁹⁸ See *The Treaty of Peace with Turkey* (Treaty of Lausanne) (24 July 1923) 28 LNTS 11; for full text <http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne>.

¹⁹⁹ Lauterpacht, *supra* note 97, 514.

especially Article 43, as, formally, the British position in Palestine at that time was that of a military occupier of “hostile” territory and no more. The British government implicitly acknowledged this anomalous situation in its Report on the Mandate for the year 1924 in which it stated: “The ratification of the Treaty of Lausanne in August, 1924, finally regularised the international status of Palestine as a territory detached from Turkey and administered under a Mandate entrusted to His Majesty's Government.”²⁰⁰

4.2.3. THE MANDATE'S PROVISIONS

The League of Nations approved the text of the Palestine Mandate on 24th July 1922 and it came into force on 29th September 1923. The United States explicitly recognized the Mandate and its contents in the American-British Palestine Mandate Convention of 3rd December 1924.²⁰¹

Its main provisions were that the mandatory was to have “full powers of legislation and administration”²⁰² and be “entrusted” with Palestine’s “foreign relations”.²⁰³

However, many of the articles dealt with the creation of a Jewish homeland in Palestine. The Balfour Declaration was reaffirmed in the Preamble. Arguably, its scope was extended by the statement that: “recognition has . . . been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country.”²⁰⁴ That was language rejected by the British cabinet when the Balfour Declaration was being drawn up.²⁰⁵

The mandatory was to be responsible for creating the necessary conditions for a Jewish national home in Palestine;²⁰⁶ Jewish immigration was

²⁰⁰ *Report of His Britannic Majesty's Government on the Administration under Mandate of Palestine and Transjordan for the year 1924*, Section I; *supra* note 104.

²⁰¹ Mandate for Palestine, League of Nations Doc. C.529.M.314 1922 VI (1927); Anglo-American Convention on the Recognition of the Palestine Mandate, *supra* note 174.

²⁰² Mandate for Palestine, *supra* note 201, art. 1

²⁰³ *Id.* art. 12.

²⁰⁴ *Id.* Preamble.

²⁰⁵ Allain, *supra* note 17, at 83; Strawson, *supra* note 2, at 46; Mallison, *supra* note 53, at 1033; he argues that the Mandate must nevertheless be interpreted in line with the Declaration; as does Weiß, *supra* note 17, at 152.

²⁰⁶ *Id.* art. 2

to be encouraged, also by enacting a suitable nationality law and allowing “close settlement”;²⁰⁷ Hebrew was to be one of the official languages,²⁰⁸ and the Zionist organisation was recognized as the “Jewish Agency” the mandatory was to cooperate with.²⁰⁹

However, due to a late amendment proposed by the British, they were released from their obligation to help establish a Jewish national home in the territory of Palestine *east* of the Jordan.²¹⁰ This area was later to become the state of Trans-Jordan (now the Hashemite Kingdom of Jordan).

The Mandate was thus the moment when the content of the Balfour Declaration definitely had arrived in international law.²¹¹ From now on, the British government officially could claim that any move by it in favour of establishing a Jewish national home in Palestine was not simply in accordance with international law, but actually an international legal obligation. The terms of that obligation arguably went beyond what the majority of the British cabinet had envisaged when it approved the Balfour Declaration. Nevertheless, the British had agreed to undertake the mission and achieved a considerable reduction in territory to which the Mandate’s terms applied.

4.2.4. THE MANDATE’S LEGALITY

Many have argued that the Mandate was illegal. While some have argued that it contravened the principle of self-determination,²¹² others argue that its terms simply cannot be reconciled with Article 22 (4) of the Covenant. Before analysing these claims, it should, however, be pointed out that neither the

²⁰⁷ *Id.* art. 7 (nationality law), art. 6 (settlement); regarding Article 6, the Military Governor of Palestine (1917-1920), Ronald Storrs, later commented: “The thinking Arab regarded Article 6 as Englishmen would regard instructions from a German conqueror for the settlement and development of the Duchy of Cornwall, of our Downs, commons and golf-courses, not by Germans, but by Italians “returning” as Roman legionaries . . .” (*supra* note 27, at 356).

²⁰⁸ Mandate for Palestine, *supra* note 201, art. 22.

²⁰⁹ *Id.* article 4.

²¹⁰ Mandate for Palestine, *supra* note 201, art. 25; Grief, *supra* note 62, at 6; he argues that this was a “false interpretation”, invented by Churchill, that “sabotaged” the Mandate.

²¹¹ Dunskey, *supra* note 25, 167; Frankfurter, *supra* note 5, 414; Allain, *supra* note 17, 78; El-Alami, *supra* note 57, 147; Strawson, *supra* note 2, 46.

²¹² Keith, *supra* note 97, 78; Quincy Wright, “The Palestine Conflict in International Law” in *Major Middle Eastern Problems in International Law*, Majid Khadduri (ed.), Washington D. C.: American Enterprise Institute for Public Policy Research (1972), 13-36, 26.

P.C.I.J.,²¹³ nor the *Permanent Mandates Commission*,²¹⁴ or the United Nations ever questioned the Mandate's legality.²¹⁵

4.2.4.1. SELF-DETERMINATION

As has already been pointed out, the concept of self-determination, certainly when applied to "backward peoples", was comparatively novel to European politicians at the end of the First World War. The *Covenant of the League of Nations* reflects this. The American President had to compromise in order to avoid friction with former allies. The subsequent American withdrawal from multilateral engagement made a bad situation worse, by encouraging the Europeans to continue as far as possible on their well-trodden path of acquiring ever more power and influence in vital regions.

Notwithstanding the development or not of self-determination as a political principle, however, there can be little doubt that, by 1923, it had not yet become a *right* recognized in international law.²¹⁶

²¹³ See *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30); *Mavrommatis Jerusalem Concessions* (Greece v. U.K.), 1925 P.C.I.J. (ser. A) No. 5 (Mar. 26). Arguably, the Court implicitly confirmed the Mandate's legality by not questioning the British Palestine Administration's right to make the necessary decisions regarding the concessions at stake.

²¹⁴ The *Permanent Mandates Commission* declared (when dealing with a petition from the Palestinian Arab Congress that alleged the Mandate's terms were contrary to Article 22 Covenant of the League of Nations):

"... (b) Secondly the petitioners protest against the terms of the Mandate itself, as established by the Council of the League of Nations on July 24th, 1922 the Commission, considering its task is confined to supervising the execution of the Mandate in the terms prescribed by the Council, is of the opinion that it is not competent to discuss the matter."

Observations by the Permanent Mandates Commission on the Petition Discussed at its Fifth Session, 6 League of Nations O.J. (1925) 219; the *Permanent Mandates Commission's* stance was subsequently approved by the Council, *32nd Session of the Council*, 6 League of Nations O.J. (1925) 133.

²¹⁵ When the General Assembly of the United Nations attempted to find a solution to the problems in Palestine, Sub-Committee 2 of the *Ad hoc Committee on the Palestinian Question* suggested referring the question of the legality of the Palestine Mandate to the *International Court of Justice*. In a narrow vote, this proposition was rejected. For the report of Sub-Committee 2, see: "Ad hoc Committee on the Palestinian Question, Report of Sub-Committee 2", U.N. Doc. A/AC.14/32; see <http://unispal.un.org/pdfs/AAC1432.pdf>.

²¹⁶ I.C.J., *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, ¶ 79, 82 (Jul. 22); the court pointed out that the right of self-determination had "evolved" only in the "second half of the twentieth century"; Bassiouni, *supra* note 25, at 32; he describes the 1914-1945 period as one of "unfulfilled declarations on 'self-determination'"; Dunsky, *supra* note 25, at 170; Dunsky views the principle as "not part of international law" in 1919/1920, and as "a purely political factor, not binding in nature"; Collins, *supra* note 4, at 140; he describes the concept of self-determination post-World War I as only "theoretically based" but "gaining acceptance"; Green, *supra* note 117, at 46; writing in 1971, he argues that even then there was no right of self-determination in international law; Murlakov, *supra* note 4, at 86 (no right of self-determination

As the *International Commission of Jurists*, reporting on the Aaland Island issue, stated in 1920:

Although the principle of self-determination of peoples plays an important role in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.²¹⁷

Although the jurists, in their subsequent examination of the principle, did allow for specific exceptions to this categorical statement,²¹⁸ the text of the Covenant proves that their conclusion was fundamentally correct. When contrasting President Wilson's statements on self-determination outlined above with the failure even to mention "self-determination" in the Covenant, it becomes obvious that the majority of states did not recognize this principle as a *legal* principle, let alone an obligation.²¹⁹ Consequently, the I.C.J., too, has described the *right* of self-determination as having "evolved" only "during the

even in 1947); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 108, 428, 433 (2nd ed. 2006); he describes the developments in the inter-war period regarding self-determination as demonstrating "the political force of the principle Nonetheless there was little general development before 1945" (at 112); Strawson, *supra* note 2, at 88; Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 *INT'L COMP. L.Q.* 241, 257 (1994); Kattan, *supra* note 6, at 120-121, 140-141; Kattan, however, wants to make an exception for "A"-Mandates under Article 22 (4) of the Covenant. He argues that these "communities" were granted the right of self-determination by the Covenant. That argument is difficult to sustain. It was, after all, not up to the "communities" to decide whether they had "progressed sufficiently" to be independent, but up to the mandatory power and the League of Nations. Article 22 (4) is perhaps best seen as holding out the promise to these "communities" that they will at some point in the future, to be determined by others, be able to claim a right to self-determination.

²¹⁷ 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, League of Nations O.J., Special Suppl. 3, 5th October 1920.

²¹⁸ 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, *ibid*, 5, 6; Koskenniemi, *supra* note 216, at 246-247.

²¹⁹ Green, *supra* note 117, at 42; Gainsborough, *supra* note 43, at 11; he cites Feinberg as offering a completely different explanation, whereby it remains unclear whether Palestine was ever included in the "A"-Mandates category; furthermore, 22 (4) only contained "permissive, not obligatory" rules as implied by the sentence "where their existence". This argument has no merit. It is self-evident that Palestine was an "A"-Mandate. The majority of writers at the time, Britain, and the League of Nations referred to it as such (certainly until 1939). The discussions of the wartime allies provide ample evidence that all the former Turkish territories that were not granted independence were to be "A"-Mandates. Interpreting the language in Article 22 (4) Covenant of the League of Nations as optional is also beyond any reasonable interpretation. The text simply provides no basis for Feinberg's arguments.

second half of the twentieth century”, something it describes as “one of the major developments of international law.”²²⁰

The whole concept of the mandates system could not have been reconciled with the existence of a *right* to self-determination, as it was not up to the peoples in the mandated territories to decide when they could “stand alone”, but up to the mandatory power and the League of Nations. For peoples “not yet able to stand on their own” self-determination was therefore limited to an aspiration for the future.²²¹ The conclusion therefore must be that the Mandate did not violate the Palestinians’ *right* to self-determination because there was no such right in contemporary international law.²²²

4.2.4.2. ARTICLE 22 (4) COVENANT OF THE LEAGUE OF NATIONS

Many have advanced the argument that the terms of the Mandate, without doubt an “A”-Mandate, cannot be reconciled with Article 22 (4) of the Covenant.²²³

Besides not having been consulted by the Allies on the choice of mandatory (as already described above), the inhabitants of Palestine were subject to a system whereby the “full powers of legislation and administration” were exercised by Britain. Britain only was obliged to “encourage local autonomy so far as circumstances permit.”²²⁴ Articles 1 and 3 of the Mandate therefore clearly violated the provisions of Article 22 (4) of the

²²⁰ ICJ, *supra* note 216.

²²¹ As Marc Weller, points out, the E.C. Arbitration Commission on Yugoslavia *even in 1991/1992* “found that in actual practice international law did not define the precise consequences of that right or its scope of application . . . the commission . . . defined the right to self-determination not as a people’s right to independence but as a human right of minorities and groups”. See Marc Weller, *The International Responses to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 *AM.J.INT’L.L.* 569, 569-607, 592 (1992).

²²² Stone, *supra* note 28, at 17-18; Stone argues that it is irrelevant whether there was a right of self-determination in international law at that time or not, as Arab demands for self-determination were fulfilled by gaining independence in an area 100 times greater than Palestine. That argument, however, fails to take account of the rights of the Arabs actually living in Palestine, then 90% of the population, whose country, according to Stone was to be sacrificed to allow Jews to achieve self-determination there - after all, the Jewish population amounted to only 10% of the whole population in Palestine.

²²³ Dajani, *supra* note 78, at 34.

²²⁴ Mandate for Palestine, *supra* note 201, art. 3.

Covenant, which only allowed for the “rendering of administrative advice and assistance” by the mandatory.²²⁵

That Palestine was to have little in common with a “provisionally recognized independent nation” is evidenced by the detailed and extensive description of the mandatory’s powers and obligations: without any reference to the locals’ wishes, the mandatory was to facilitate Jewish immigration, enact a nationality law, and secure the Holy sites.²²⁶ Obviously, such a course of action would only be viable if British conduct went way beyond “rendering advice” – rather, British usurpation of all executive functions in Palestine would have to be considered a *conditio sine qua non*.

Article 22 (8) of the Covenant does not help reconcile the Mandate with Article 22 (4) of the Covenant either, as any decision of the Council on the “degree of authority exercised by the Mandatory” must, of course, itself be in accordance with the type of mandate concerned. The “degree of authority” conferred to the mandatory in Palestine could only be within the limits set out in 22 (4) of the Covenant, which evidently were not respected in the Mandate.

A comparison with the Iraq Mandate, approved by the League of Nations on 27th September 1924,²²⁷ further illustrates the special treatment of Palestine.²²⁸ The Iraq Mandate incorporated the Anglo-Iraqi “Treaty of Alliance”, signed 10th October 1922,²²⁹ and the “Protocol of April 30th, 1923, and the Agreements subsidiary to the Treaty with King Feisal”.²³⁰

²²⁵ Bentwich, *supra* note 78, at 140; he acknowledges this fact and explains it as a result of the “Jewish National Home” policy; Quigley, *supra* note 7, at 48; Keay, *supra* note 9, at 193, 203–204; Gresh, *supra* note 10, at 69; Macmillan, *supra* note 12, at 436; she concludes: “In place of the duty of the mandatory power to develop a self-governing commonwealth, they [the British] substituted ‘self-governing institutions.’”

²²⁶ Mandate for Palestine, *supra* note 201; Stein, *supra* note 54, at 418; he, however, claims that the Mandate differed from the other “A”-mandates only in as far as the “trusteeship” was deemed “to be of indefinite duration”.

²²⁷ For the text of the Iraq Mandate, and its approval by the League of Nations, see: British Mandate for Iraq, League of Nations Doc. C. 412. M. 166. 1924 VI (1924).

²²⁸ Bentwich, *supra* note 78, at 137 (“the mandate for Palestine has a distinctive character”); *supra* note 88, at 50 (“markedly different”); Keith “Mandates”, 78 (“differentiate this from all other mandates”); Quigley, *supra* note 7, at 48–51; Keay, *supra* note 9, at 203–204.

²²⁹ For the text of the Treaty between Great Britain and Iraq, G.B.-Iq., Dec. 1922, League of Nations O.J. C. 717 M. 429. 1922. VI.

²³⁰ For the text of the “Protocol”, see: Treaty between Great Britain and Iraq, G.B.-Iq., July 1923, League of Nations O.J. C. 373. M. 168. 1923. VI.

In the “Treaty of Alliance” Britain recognized Feisal as the “constitutional King of Iraq”.²³¹ “At the request” of Iraq’s King, the British government promised to “provide the State of Iraq . . . advice and assistance”, however without prejudice to Iraq’s “national sovereignty”, however without prejudice to Iraq’s “national sovereignty”.²³² Furthermore, Iraq was permitted to have representations abroad,²³³ and both parties agreed to submit any disagreements on the treaty’s interpretation to the P.C.I.J.²³⁴ The Iraq Mandate itself included the statement that Britain had recognized the Iraqi government as “independent”,²³⁵ and mentions the possibility of Iraq’s future admission to the League of Nations.²³⁶

Although the “Treaty of Alliance” also contained provisions severely restricting Iraq’s ability to act independently,²³⁷ the language used is strikingly different from the language employed in the Palestine Mandate.²³⁸ While it was easy to claim that the Iraq Mandate adhered to the letter and spirit of Article 22 (4) Covenant of the League of Nations, the same was not possible with respect to the Palestine Mandate, although both were “A”-Mandates.

The Mandate’s terms’ (and subsequently Britain’s) lack of compliance with Article 22 (4) of the Covenant was acknowledged implicitly by the Secretary of State for the Colonies MacDonald before the *Permanent Mandates Commission* in 1939:

Mr. MacDonald reiterated that the Palestine mandate was different from all the others; but it was, nevertheless, a mandate and had to embody the spirit and principles of the mandate system. It was not so different that its provisions could contradict those principles. If the Arabs of Palestine, alone among all the populations of territories under mandate, were to be deprived of normal political rights, it

²³¹ Preamble, *supra* note 229.

²³² Preamble, *supra* note 229, article I.

²³³ Preamble, *supra* note 229, article V.

²³⁴ Preamble, *supra* note 229, article XVII.

²³⁵ British Mandate for Iraq, League of Nations, Doc.C. 412. M. 166. 1924 VI (1924).

²³⁶ *Id.* article VI.

²³⁷ The Iraqi King agreed to be “guided” in “all important matters” affecting British “financial and international interests” (*supra* note 229, art. IV), and no non-Iraqi was to be employed by the Iraqi government without prior “concurrence” on the part of the British government (Article II, *supra* note 229).

²³⁸ Quigley, *supra* note 7, at 42-44; Keay, *supra* note 9, at 203-204.

would amount to saying that the Palestine mandate contradicted the spirit of the mandates system

In reply to Mlle. Dannevig's remark about the premature introduction of self-governing institutions, he would remind the Commission that the Arabs and Jews in Palestine were fairly advanced peoples. It remained true, however, that, in twenty years, no progress whatever had been made with the establishment of even the most modest form of central self-government, apart from local government bodies. Palestine was, in fact, behind some other parts of the world where the people were actually more backward²³⁹

There is therefore little doubt that the Mandate *did* violate Article 22 (4) of the Covenant.²⁴⁰ Although Palestine was an “A”-Mandate, its treatment at best was equivalent to “B”-Mandate status.²⁴¹ This “special treatment” of Palestine had been foreshadowed in the defunct *Treaty of Sèvres*. While “Syria” and “Mesopotamia” were to be “provisionally recognized as independent States”,²⁴² there was no such provision for Palestine, which was simply to be administered in accordance with Article 22 of the Covenant.²⁴³

The fact that the mandates themselves generally are viewed as international treaties in their own right –a view supported by the I.C.J.–²⁴⁴ does not justify the violation of international law.²⁴⁵ According to Article 20 (1) of the Covenant, member states undertook the obligation not to enter into treaties “inconsistent” with the Covenant’s provisions.²⁴⁶ Whether the League of Nations’ approval of the Mandate can be viewed as an implicit abrogation, either of Article 20 (1) or of Article 22 (4) of the Covenant, is rather doubtful. There is no evidence of that being a consideration at the time.

²³⁹ Malcolm MacDonald before the *Permanent Mandates Commission*, Minutes of the Thirty-Sixth Session, Held at Geneva from June 8th to 29th, 1939, including the Report of the Commission to the Council, Fourteenth meeting; <<http://ismi.emory.edu/home/resources/primary-source-docs/1939minutes.pdf>>.

²⁴⁰ Allain, *supra* note 17, at 87.

²⁴¹ Corbett, *supra* note 109, at 131; he describes Palestine as “a regime peculiar to itself” that “for the purposes of legal definition” falls “within the same group as ... countries under mandates “B” and “C””; Dajani, *supra* note 78, at 35.

²⁴² *Supra* note 197, art. 94; for Articles 1-260, *supra* note 197.

²⁴³ *Id.* article 95.

²⁴⁴ See *South-West Africa Cases*, Preliminary Objections, 1962 I.C.J. Rep. 319, 330-331; Quigley, *supra* note 7, at 37.

²⁴⁵ Rosenne, *supra* note 55, at 48; Rosenne seems to disagree, without giving any reasons.

²⁴⁶ The Covenant came into force on 10th January 1920. The Palestine Mandate was approved by the League of Nations on 24th July 1922 (and came into force on 29th September 1923).

The more convincing conclusions are that the Mandate was –as Bentwich would have presumably put it–²⁴⁷ “imperfect in its legal foundations”, and that its terms violated Article 22 (4) of the Covenant, and therefore also Article 20 (1).²⁴⁸

Nevertheless, some have contended that this conclusion faces four “insuperable barriers”:²⁴⁹

1.) The League of Nations’ approval of the terms of the Mandate had “definitive legal effect so that no other body could question its legality.”²⁵⁰

2) The P.C.I.J. and the *Permanent Mandates Commission* had never raised the issue of the Mandate’s alleged unlawfulness, despite having the opportunity to do so.²⁵¹

3) All members of the League and “interested parties” had treated the Mandate as legal,²⁵² and, lastly,

²⁴⁷ Bentwich, *supra* note 88, at 52 (referring to the implementation of new immigration laws before the Palestine Mandate had been approved); Bentwich was Legal Secretary, then Attorney General in the Government of Palestine.

²⁴⁸ This is to some extent also confirmed by discussions that took place within the American Delegation, which participated in the drafting of the U.N. Charter and was responsible for working out the American response to suggested amendments to the *Dumbarton Oaks Proposals*. The Trusteeship system that was to be introduced in the U.N. Charter was to maintain the status quo as far as the mandates were concerned. In this connection, the U.S. Delegation in the end decided to reject an Arab League proposal, which would have explicitly included Article 22 (4) of the Covenant in the articles dealing with the Trusteeship system. As the discussions demonstrate, this rejection was due almost exclusively to the situation in Palestine. Although all the delegates agreed that the United States was in favour of retaining the status quo there, inclusion of Article 22 (4) of the Covenant in the U.N. Charter would, it was feared, be strongly opposed by the Jewish representatives. As Representative Bloom pointed out the phrase “the wishes of these communities must be a principal consideration” might actually mean “the majority wishes” and that “the Arabs were in a substantial majority”. According to Bloom, the Arabs wanted inclusion of Article 22 (4) in order to “obtain something for their own protection”. He concluded his assessment with the warning that incorporation of Article 22 (4) “might be equally dangerous to other territories than Palestine”. On the other hand the discussions included various references by different delegates to the importance of retaining the Palestine Mandate itself, and ensuring that the “maintenance of the status quo be mandatory”. This seems to indicate that –certainly among the U.S. delegates– there was a feeling that, while the continued implementation of the Mandate would ensure the desired retention of the status quo, application of Article 22 (4) of the Covenant might endanger that goal; *Trusteeship*, U.S. Department of State, F.R.U.S., Diplomatic papers, 1945, General: the United Nations, 1945, 950–954.

²⁴⁹ An additional argument is advanced by Grief, *supra* note 62, at 3; he argues that the rights contained in Article 22 Charter of the League of Nations only applied to the Jews, as far as Palestine is concerned. This is evidently not correct as all the ensuing discussions at the League of Nations and in the British Cabinet demonstrate. There was agreement that the problems in Palestine resulted from the fact that Palestinian Arabs –by having lived in the territory when the British arrived– could claim the rights under Article 22 of the Covenant and that this was difficult to reconcile with the promises made to the Zionist Jews.

²⁵⁰ Crawford, *supra* note 216, at 429.

²⁵¹ Rosenne, *supra* note 55, 48; Crawford, *supra* note 216, 429.

4) Article 80 (1) U.N. Charter had “legalized” all mandates retroactively.²⁵³

None of these arguments is convincing. The League of Nations’ approval of the Mandate did not automatically legalize inherent violations of the Covenant. Since it is very doubtful that any League of Nations organ was legally competent to rule on the Mandate’s adherence to the Covenant,²⁵⁴ it follows that the Council’s approval cannot have been a judgement on whether the Mandate’s provisions actually were in accordance with the Covenant. Rather, the League’s organs’ lack of jurisdiction/competence to adjudicate on the Mandate’s legality reinforces the point that there were severe doubts on the part of the Allies as to what the result of any such legal analysis would be.²⁵⁵ Furthermore, as all mandates generally were seen as treaties, Article 20 (1) of the Covenant barred the United Kingdom from entering into a treaty that contravened Article 22 (4), whatever the Council decided, especially as there is no indication that the Council had the competence to overrule Covenant provisions.

However, it is true, as argued by some, that the P.C.I.J. and the *Permanent Mandates Commission* never questioned the Mandate’s legality. Nevertheless, it does not automatically follow that the Mandate’s content was legal. The P.C.I.J. was never asked to explicitly rule on the conformity of the

²⁵² Green, *supra* note 117, at 47; Wright, *supra* note 21, at 12; Crawford, *supra* note 216, at 429 (“general practice”).

²⁵³ Rosenne, *supra* note 55, at 49; Wright, *supra* note 21, at 12; Crawford, *supra* note 216, at 429.

²⁵⁴ See Lord Balfour, Statement, 18th Session of the Council, 3 League of Nations O. J. (1922) 547 (referring to the Council); implicitly: M. Hyman, Report to the 8th Session of the Council, 1 League of Nations O.J. (1920) 339 (describing the Council’s difficulty in determining appropriate terms for the Mandate and asking the Allies for “proposals”); also implicitly: *Letter to the Secretary of State of the United States of America, adopted by the Council on March 1st, 1921*, 2 League of Nations O.J. (1921) 142-143 (Responding to U.S. protests against the terms of a “C” mandate awarded to Japan, the Council refers to its limited freedom of action due to the fact that the Mandate had already been approved by it). The *Permanent Mandates Commission* declared (when dealing with a petition from the Palestinian Arab Congress that alleged the Mandate’s terms were contrary to Article 22 Covenant of the League of Nations): “. . . . (b) Secondly the petitioners protest against the terms of the Mandate itself, as established by the Council of the League of Nations on July 24th, 1922 the Commission, considering its task is confined to supervising the execution of the Mandate in the terms prescribed by the Council, is of the opinion that it is not competent to discuss the matter”; *Observations by the Permanent Mandates Commission on the Petition Discussed at its Fifth Session*, 6 League of Nations O.J. (1925) 219; Keith, *supra* note 97, at 81; he, writing in 1922, argues that the P.C.I.J. had no jurisdiction to decide whether the Mandate conformed to Article 22

²⁵⁵ Keith, *supra* note 97, at 75; he points out that even a mandate approved by the Council could nonetheless contravene Article 22 Covenant of the League of Nations.

Mandate with Articles 20 (1), 22 (4) of the Covenant.²⁵⁶ The *Permanent Mandates Commission* declared an Arab request to debate the Mandate's conformity with Article 22 of the Covenant inadmissible due to its own lack of competence.²⁵⁷ If it were correct that no League of Nations organ had the competence to examine the Mandate's legality after approval by the Council,²⁵⁸ the omission to do so on the part of the Court and the Commission is not only explained easily, but also devoid of legal consequence.

Another argument sometimes put forward is that, by acquiescing in the Mandate's terms and their application, the League of Nations' member states and the "interested parties" may have created customary international law with regard to Palestine.²⁵⁹

Although there is arguably some state practice in support of that proposition,²⁶⁰ no corresponding *opinio juris* can be discerned, because no state ever claimed that Palestine was subject to any rules of international law that went *beyond* the Covenant's provisions. On the rare occasions the legality of the Mandate was debated officially, its conformity with Article 22 of the Covenant was stressed.²⁶¹ Britain, too, always insisted that this was the case.²⁶² Furthermore, before 1939,²⁶³ no state and no League of Nations' organ officially

²⁵⁶ *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30); *Mavrommatis Jerusalem Concessions* (Greece v. U.K.), 1925 P.C.I.J. (ser. A) No. 5 (Mar. 26), *supra* note 213; Keith, *supra* note 97, at 81; Keith, however, argues that the P.C.I.J. had no competence to decide whether the Mandate conformed to Article 22.

²⁵⁷ See *supra* note 214.

²⁵⁸ See *supra* note 254.

²⁵⁹ Green, *supra* note 117, at 47.

²⁶⁰ On at least two occasions Balfour explained the British policy of refusing to "accept the principle of self-determination", as far as Palestine was concerned, by claiming that the situation in Palestine was "absolutely exceptional" or "unique"; Letter from Balfour to British Prime Minister Lloyd George; 19th February 1919; and Minutes of a conversation between Balfour and Justice Brandeis (leader of the American Zionists) in mid-1919; both reprinted in Ingrams, *supra* note 1, at 61-62, 71-73 (PRO. FO. 371/4179; PRO. FO. 800/217).

²⁶¹ The League of Nations Council, for example, when dealing with the mandated territories, including Palestine, declared in 1924: "Expresses itself...satisfied that the mandated territories...are in general administered in accordance with the spirit and letter of Article 22 and the terms of the mandates"; 32nd Session of the Council, League of Nations Doc. C.386M.132 1925 VI (1927); for the requirement of *opinio juris* in the creation of customary international law, see: *North Sea Continental Shelf Case* (Federal Republic Of Germany v Denmark and v Netherlands), 1969 I.C.J. Rep. 3, ¶173-74 (Feb 20).

²⁶² Officially, Balfour declared that the terms of the Palestine Mandate were "in conformity with the spirit" and "in compliance with" Article 22 of the Covenant; *The Chief of the British Delegation, Council of the League of Nations (Balfour), to the Secretary General of the League of Nations (Drummond)*, December 6th, 1920; available at: U.S. Department of State, F.R.U.S., 1921, 105.

²⁶³ In 1939, the Chairman of the *Permanent Mandates Commission* asked the Secretary of State for the Colonies MacDonald whether he viewed Palestine as falling under Article 22 (4) of the

ever doubted that Palestine was an “A”-Mandate, to which Article 22 (4) applied automatically.²⁶⁴

Based on these facts, it follows that no rules of customary international law were created in order to deal with the specific case of Palestine. By avoiding the issue of legality as far as possible, and, when that was not possible, by stressing the Mandate’s adherence to Article 22 (4) of the Covenant, states and the League of Nations actively prevented the development of divergent customary international law as far as Palestine was concerned.

Article 80 (1) U.N. Charter could and did not obviate any legal shortcomings the mandates had. Firstly, Article 80 (1) U.N. Charter, even if it had attempted to legalize any previous violations of the *Covenant of the League of Nations*, could not have had any bearing on the assessment of the legal situation prior to that provision coming into force. Secondly, there are doubts as to whether Article 80 (1) really sought to change the legal situation. Rather, most agree that this provision was meant to preserve the status quo. This is obviously at odds with the argument that the article retroactively legalized a previously unlawful situation because that would necessarily imply an automatic change in the status quo.²⁶⁵ The explicit preservation of the “rights . . . of any peoples” in Article 80, which would seem to include the preservation of the right not to accept an illegal situation, is a further bar to the contrary interpretation.²⁶⁶

Covenant: “It should, however, be remembered that the question whether paragraph 4 of Article 22 of the Covenant could be considered as applying to Palestine was one which had on occasion been disputed, and had given rise to differences of opinion.” MacDonald replied: “Without enlarging on the point or making enquiries of lawyers who might possibly disagree, he felt it was a matter which was open to some doubt.”; *Permanent Mandates Commission, Minutes of the Thirty-Sixth Session, Held at Geneva from June 8th to 29th, 1939, including the Report of the Commission to the Council, Fourteenth meeting; supra note 239.*

²⁶⁴ In 1937, the Chairman of the *Permanent Mandates Commission* Orts declared: “For the Mandates Commission, Palestine had never ceased to constitute a separate entity. It was one of those territories which, under the Covenant, might be regarded as “provisionally independent.”; League of Nations, *Permanent Mandates Commission, Minutes of the Thirty-Second (Extraordinary) Session, Devoted to Palestine, Held at Geneva from July 30th–August 18th, 1937, Tenth Meeting, supra note 66.* This statement can only be reconciled with the view that Palestine was an “A”-Mandate under Article 22 (4) of the Covenant.

²⁶⁵ Gilchrist, *supra note 121*, at 991; Gilchrist argues that Article 80 U.N. Charter was included because of the “fears of mandatory powers” that they might lose their “legal position in the mandated territories”; Quigley, *supra note 7*, at 88.

²⁶⁶ Quigley, *supra note 7*, at 88; The inclusion of the term “peoples” in U.N. Charter art. 80 has, however, been interpreted as specifically referring to Jewish rights in Palestine (for example, Wright, *supra note 21*, at 13). This argument is not convincing. All the communities living in mandated territories, especially also of the “B” and “C” categories, did not yet fulfil the criteria of

The conclusion therefore must be that the Mandate's terms were contrary to international law at the time of their approval and remained so until the mandate's termination.²⁶⁷

In truth, the Mandate was an expression of "double" hypocrisy: Palestine's inhabitants were not only refused self-determination, but the rules set up by the Allies in order to keep self-determination in check were also flouted, because they were still too generous to allow the implementation of the Balfour Declaration.²⁶⁸ Of course, this was the case because any indigenous administration in Palestine was extremely unlikely to cooperate with the European idea of settling Jews in Palestine, and creating a national home for them there.²⁶⁹ Therefore, British administrators had to be in place in order to enforce a concept the population was hostile to.

However, this does not automatically lead to the further conclusion that the entire Mandate was invalid. The fact that Palestine was a mandated territory remained and was in accordance with contemporary international law as reflected in the Covenant.

4.2.4.3. OTHER VIOLATIONS OF INTERNATIONAL LAW

Although the Allies had not bothered to consult the inhabitants of Palestine, the fact that the United States refused the Mandate, means that it was in

statehood, but, nevertheless, had rights under the respective mandate that were preserved under Article 80. There is therefore no reason to assume that Article 80 was adopted solely to protect Jewish rights in Palestine.

²⁶⁷ Even Bentwich, at the time of writing Attorney-General of the Government of Palestine, admits that there is "scarcely any clause of the Palestine Mandate which is without its legal and practical problems" (*supra* note 78, at 141); Pitman B. Potter, *The Palestine Problem Before the United Nations*, 42 AM. J.INT'L L. 859, 860 (1948); Potter goes even further, when he states: "The Arabs deny the binding force of the Mandate...and again they are probably quite correct juridically".

²⁶⁸ Kattan, *supra* note 6, at 4-5; Gresh, *supra* note 10, at 69.

²⁶⁹ Bentwich, *supra* note 78, at 139; he states that the "policy of the Jewish National Home" had "determined the particular character of the mandate for Palestine" and compares the mandate to British policy in Trans-Jordan in order to emphasize this point; in his article "Mandated Territories" (*supra* note 88, at 51) he reiterates that point: "the task of the Mandatory of Palestine is very much more difficult . . . It was clearly necessary . . . that the Mandatory should be able to exercise the powers inherent in the government of a sovereign state and should not have its functions limited to rendering of administrative advice and assistance."; Keith, *supra* note 97, at 77- 78; he compares the Palestine to the Iraq Mandate -where he sees Britain's role "reduced to the modest role contemplated in Article 22". He then argues that "in Palestine, on the other hand, the mandatory has and must retain sovereign power . . . ", and goes on to explain the difficulties Britain will have when trying to create a Jewish national home there; Stein, *supra* note 54, at 417 ("sui generis"); Salt, *supra* note 6, at 127; Quigley, *supra* note 7, at 48-49.

accordance with Article 22 (4) Covenant of the League of Nations that Britain, the inhabitants' second choice according to the *King-Crane-Commission*, was installed as mandatory power (even if that was mere coincidence).

Obliging Palestine to accept foreign, Jewish immigrants per se cannot be classified as contrary to international law as it then was.²⁷⁰ As already pointed out, the right of self-determination, which nowadays very likely would be seen to be violated by such an obligation, was not yet developed in international law. It is sometimes argued that the concept of a Jewish national home as such violated Article 22 (1) of the Covenant, because it could not be reconciled with the "principle that the well-being of such peoples form a sacred trust of civilization", as far as the Palestinian Arabs are concerned.²⁷¹ There is little doubt that the implementation, in practice, of the concept of a Jewish national home amounted to a clear violation of Article 22 (1) of the Covenant. Nevertheless, it does not seem justified to categorize the mere obligation to accept foreign immigrants -even if they were granted citizenship rights- as necessarily harmful to the indigenous population and therefore automatically illegal, especially when the safeguard clauses included in the Mandate are considered.

Based on the paternalistic, imperialist attitude evidenced by the whole mandates system, it could be argued plausibly -as indeed it was- that the Arabs would benefit from Jewish innovation and expertise, a sort of Imperial tutelage in proxy. As outrageous as such an attitude seems today, it cannot be denied that it provided the basic justification for the whole mandates system and was therefore reflected in the *Covenant of the League of Nations* and international law in general.

Furthermore, the fact that this obligation -for practical reasons- necessitated a violation of Article 22 (4) of the Covenant by requiring the imposition of a British administration on Palestine does not render the obligation itself illegal. Although hardly enforceable, it would have -at the time- been possible to legally impose such an obligation on an indigenous

²⁷⁰ Kattan, *supra* note 6, at 121; he believes this to be generally true, but not for areas classified as "A"-Mandates because he believes those "communities" had been granted the right of self-determination. As has been explained earlier, that view is not convincing.

²⁷¹ Crawford, *supra* note 216, at 429.

administration (receiving British “advice”), without Article 22 (4) of the Covenant being violated.²⁷²

As had already been foreshadowed by the *Churchill White Paper*²⁷³ and the Mandate, the Palestinian area east of the river Jordan was no longer part of this development. The Mandate –with few exceptions– allowed the British to decide which of the Mandate’s provisions they wished to implement there.²⁷⁴

Shortly after the Mandate had been approved, the British government issued “*The Palestine Order in Council*”.²⁷⁵ In its Preamble, the *Order in Council* reiterated the obligation to fulfil the Balfour Declaration, but its Article 86 categorically stated that

This Order In Council Shall Not Apply To Such Parts Of The Territory Comprised In Palestine To The East Of The Jordan And The Dead Sea As Shall Be Defined By Order Of The High Commissioner. Subject To The Provisions Of Article 25 Of The Mandate, The High Commissioner May Make Such Provision For The Administration Of Any Territories So Defined As Aforesaid As With The Approval Of The Secretary Of State May be prescribed.

Thus, the foundations of the “first partition” of Palestine had been laid.²⁷⁶ “Eastern” Palestine, under its ruler, Emir Abdullah, another son of the Sharif of Mecca’s and a British ally, was to become independent as the Kingdom of Trans-Jordan in 1946. Already in April 1923, however, Britain recognized Emir Abdullah as the ruler of Trans-Jordan, pending the establishment of a constitutional order there and the conclusion of a treaty between Britain and Trans-Jordan.²⁷⁷ That Treaty was concluded on 15th May 1923, and therein

²⁷² As already pointed out in the case of Iraq, the other mandated territories, which were much further advanced on the road to independence than Palestine, were also subject to various restrictions; Kattan, *supra* note 6, 121; Kattan believes the argument made here to be generally correct, but not applicable to areas classified as “A”-Mandates because, he argues, those “communities” had been granted the right of self-determination. As has been explained earlier, that view is not convincing.

²⁷³ Winston Churchill, “*The British White Paper*”, *supra* note 49.

²⁷⁴ Mandate for Palestine, *supra* note 201, art. 25; Kattan, *supra* note 6, at 53.

²⁷⁵ *The Palestine Order in Council*, 10th August 1922:

<http://content.ecf.org.il/files/M00929_PalestineOrderInCouncil1922English.pdf>.

²⁷⁶ This is confirmed by the Order in Council dealing with Palestinian citizenship (*Order in Council of His Majesty*, 24th July 1925). Palestinian citizenship was not to be granted to residents of Palestinian areas east of the Jordan; they became “nationals of Trans-Jordan”; Bentwich, *supra* note 133, at 106; Kattan, *supra* note 6, at 53.

²⁷⁷ *Report of His Britannic Majesty’s Government on the Administration under Mandate of Palestine and Transjordan for the year 1924*, Section II, para. 2; *supra* note 104.

Britain recognized Trans-Jordan as a state, albeit in need of further British support on its road to independence.

Although Trans-Jordan was technically still included in the Mandate, it in reality was becoming a completely separate entity. Trans-Jordan's administration was much closer to Iraq's, and thereby conformed much more to Article 22 (4) of the Covenant than the events in western Palestine, now Palestine.²⁷⁸ While the Mandate itself can hardly be reconciled with Article 22 (4) of the Covenant, its *implementation* in eastern Palestine, in the Emirate of Transjordan, nevertheless, was in accordance with the Covenant, which, as explained, is much more than can be said for (western) Palestine.

5. CONCLUSION

The British rule in Palestine was at no point consistent with international law. As has been shown, its occupation regime exceeded the legal limitations imposed on occupiers of enemy territory as laid down in the 1907 Hague Regulations. There can also be little doubt that the Palestine Mandate was not consistent with international law. As explained, it did not violate the Palestinian Arab's right to self-determination, as that concept had not yet developed into a legal right in international law, nor did it violate Article 22 (1) of the Covenant. However, the way Palestine was to be administered and the omission of any verifiable road map on the way to independence represented clear violations of Articles 20 (1), 22 (4) of the Covenant.²⁷⁹

This view was widely shared in Britain at the time. Shortly after the White Paper had been published, the British government suffered a reverse in the House of Lords. On 21st June 1922, the House of Lords passed the following motion:

²⁷⁸ This, according to Stein, despite "Eastern Palestine" being "smaller", "more backward", and only being able to "keep its head above water" with the help of British subsidies (*supra* note 54, at 415-416); Mansfield, *supra* note 159, at 208; he describes Trans-Jordan as "poor, undeveloped and thinly populated"; Barr, *supra* note 21, at 359; referring to Jordan being granted independence in 1946, Barr states: "The servile nature of Jordan's relationship with Britain was not a well-kept secret. Neither the United States nor the Soviet Union . . . would initially recognise Jordan as an independent state."; Quigley, *supra* note 7, at 46-48.

²⁷⁹ Kattan, *supra* note 6, at 55-56.

That the Mandate for Palestine in its present form is unacceptable to this House, because it directly violates the pledges made by His Majesty's Government to the people of Palestine in the Declaration of October, 1915, and again in the Declaration of November, 1918, and is, as at present framed, opposed to the sentiments and wishes of the great majority of the people of Palestine; that, therefore, its acceptance by the Council of the League of Nations should be postponed until such modifications have therein been effected as will comply with pledges given by His Majesty's Government.²⁸⁰

In the debate Lord Islington, the motion's proposer, described the Mandate as a "distortion of the mandatory system".²⁸¹ His motion was passed by a large majority.²⁸²

Even the British Foreign Secretary Balfour himself concurred:

The contradiction between the letters of the Covenant and the policy of the Allies is even more flagrant in the case of 'independent' Palestine than in that of 'independent' Syria What I have never been able to understand is how it can be harmonised with the declaration, the Covenant, or the instructions to the Commission of Enquiry In short, so far as Palestine is concerned, the Powers have made no statement of fact which is not admittedly wrong, and no declaration of policy which, at least in the letter, they have not always intended to violate.²⁸³

²⁸⁰ Hansard, *supra* note 44; for further details: *Palestine Mandate defeated in Lords*, N.Y. TIMES, June 22, 1922, at 4; Collins, *supra* note 4, 157; Ingrams, *supra* note 1, at 169 (PRO. CO. 733/22).

²⁸¹ Hansard, Palestine Mandate, H.L. Deb. 21st June 1922 vol 50 cc994-1033, c1000; *supra* note 44; "Palestine Mandate defeated in Lords", *The New York Times*.

²⁸² Lord Islington declared: "The first point I desire to make in relation to my Motion is that those provisions embodied in the Palestine Mandate are in direct conflict with the fundamental principles of the mandatory system. In order to make good that point I must ask your Lordships to listen to me while I read two governing Articles in the Covenant of the League of Nations which represent what I call the fundamental principles of the mandatory system. They are in Article 22, which states that '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 [...] . there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation.' Paragraph 4 of Article 22 goes on to say: 'Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised, 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.' The establishment of a Zionist Home under the Palestine Mandate, as applied to the Articles that I have explained, is directly inconsistent with the undertakings embodied in those two Articles." Hansard, Palestine Mandate, H.L. Deb. 21st June 1922 vol 50 cc994-1033, c997; *supra* note 44.

²⁸³ British Foreign Secretary Arthur Balfour in a Memorandum (11st August 1919) to Earl Curzon; extracts reprinted in Ingrams, *supra* note 1, at 73 (PRO. FO. 371/4183).

Of course, notwithstanding these sentiments, Balfour officially declared that the terms of the Mandate were “in conformity with the spirit” and “in compliance with” Article 22 of the Covenant.²⁸⁴

Nevertheless, in the end, the British failed to benefit from this disregard of international law. From the first until the last day of their reign in Palestine, they were confronted by unrest. This would lead to numerous commissions being sent out to Palestine,²⁸⁵ which came to contradictory conclusions of often dubious legality.²⁸⁶ Finally, Britain could only admit defeat. In 1947, Palestine was referred to the United Nations with Britain refusing to make any recommendations on its future status.²⁸⁷ In a speech to the House of Commons, British Foreign Secretary Bevin outlined the situation as follows:

His Majesty's Government have . . . thus been faced with an irreconcilable conflict of principles. There are in Palestine about 1,200,000 Arabs and 600,000 Jews. For the Jews, the essential point of principle is the creation of a sovereign Jewish State. For the Arabs,

²⁸⁴ The Chief of the British Delegation, Council of the League of Nations (Balfour), to the Secretary General of the League of Nations (Drummond), 6 December 1920; available at: U.S. Department of State, F.R.U.S., Papers relating to the foreign relations of the United States, 1921, Volume I, 105.

²⁸⁵ See, for example, the following selection: The Peel Commission (1937), *Palestine Royal Commission Report*, July 1937, Cmd. 5479 (often referred to as the *Peel Commission Report*, because Earl Peel had been the commission's chairman); *Palestine, Statement of Policy by His Majesty's Government in the United Kingdom*, July 1937, Cmd. 5513. For the full text, see also <<http://ufdc.ufl.edu/UF00023167/00001>>; *Policy on Palestine, Despatch dated 23rd December 1937, from the Secretary of State for the Colonies to the High Commissioner for Palestine*; for the full text, see: <<https://unispal.un.org/DPA/DPR/unispal.nsf/o/BBBC9DD3AED1E0E2852570D20077E7DE>>; The Woodhead Commission (1938), see: *Palestine Partition Commission, Report*, Cmd. 5854; *The MacDonald White Paper* (May 1939). For the full text of the White Paper (*Palestine, Statement of Policy, Cmd. 6019*), see: 20 League of Nations O.J. (1939) 363–369; also reprinted *Palestine, Text of the White Paper*, *TIMES*, May 18th, 1939, at 9.

²⁸⁶ Due to the Jew's minority status in Palestine, the Peel Commission, for example, concluded that the proposed new Jewish state would include 250,000 Jews and 225,000 Arabs, making it difficult to see how the prospective state's Jewish character was to be maintained. Therefore, the commission suggested a population transfer between the Jewish and Arab states, meaning, as a last resort, the compulsory transfer of Arabs out of the Jewish state (*Palestine Royal Commission Report*, Chapter XXII, paras. 39, 43, 390 (statistics), 391; Keay, *supra* note 9, at 252). This proposal was clearly incompatible with Articles 2, 6, and the Preamble of the Mandate. The British White Paper of 1939, on the other hand, advocated severe restrictions as far as Jewish immigration and land transfers to Jews were concerned. This was also clearly contrary to the Mandate. Indeed, the majority on the *Permanent Mandates Commission* at the League of Nations declared the new British policy to be “not in conformity with the Mandate” (1939 *Palestine, Statement of Policy, Cmd. 6019*. “Section II, Immigration”, “Section III, Land”); *British Policy in Palestine, Report of League Commission, Times, August 18th 1939, at 10*, the article goes on to state that the Commission voted 4:3 to declare British policy as incompatible with the Mandate. For extracts from the Commission's report, see: *Palestine Policy, TIMES*, August 18th, 1939, at 9; Keay, *supra* note 9, at 261.

²⁸⁷ Dajani, *supra* note 78, at 38; Shlaim, *supra* note 9, at 21; Mansfield, *supra* note 159, at 234; Keay, *supra* note 9, at 365.

the essential point of principle is to resist to the last the establishment of Jewish sovereignty in any part of Palestine

His Majesty's Government have of themselves no power under the mandate to award the country either to the Arabs or to the Jews, or even to partition it between them.

It is in these circumstances that we have decided that we are unable either to accept the scheme put forward by the Arabs or by the Jews, or to impose by ourselves a solution of our own. We have, therefore, reached the conclusion that the only course now open to us is to submit the problem to the judgment of the United Nations.²⁸⁸

All the British efforts at disguising their frequently unlawful conduct were to no avail. When Britain finally left Palestine, it could only claim a huge loss of resources, and a reputation tarnished by its inability to impose order in its mandated territory. Undoubtedly, international law had been damaged during this course of events, but even more so Britain's prestige and influence. The French diplomat, Robert de Caix, had predicted as much in 1917. When confronted with British plans for Palestine, he reacted with incredulity: "The question of an English protectorate over a Jewish Palestine scarcely arises The British government is certainly not dreaming of it It would, for very thin profit, provoke serious difficulties."²⁸⁹ The historian Elizabeth Monroe, referring to the Balfour Declaration, subsequently concluded: "Measured by British interests alone, it is one of the greatest mistakes in our imperial history."²⁹⁰ This history of blatant disregard of international law also goes a long way in explaining the Palestinians' past and current emphasis on issues of legality, often cited by others as evidence of Palestinian intransigence. Compromises will have to be made if there is to be a peaceful future. Without an admission of past wrongs, this will be much more difficult. An

²⁸⁸ For Ernest Bevin's speech before the House of Commons, see: Hansard, Palestine Conference (Government Policy), HC Deb 18 Feb 1947 vol 433 cc985-994, c988; <<http://hansard.millbanksystems.com/commons/1947/feb/18/palestine-conference-government-policy>>; extracts also reprinted in *The Times*, "Basis of British Decision on Palestine", 19th February 1947, 4. <<http://hansard.millbanksystems.com/commons/1947/feb/18/palestine-conference-government-policy>>; extracts also reprinted in *The Times*, "Basis of British Decision on Palestine", 19 February 1947, 4.

²⁸⁹ Robert de Caix; as quoted by Barr, *supra* note 21, at 35.

²⁹⁰ Elizabeth Monroe; as quoted by Shlaim, *supra* note 9, at 4.

acknowledgement of past injustices for what they were, on the other hand, might enable both parties to start anew on the road towards peace.