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ARTICLES

The West Bank as Occupied Territory: The Irrelevance of the Mandate and the Lack of Jordanian Sovereignty

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Abstract

This article considers two arguments raised by the Government of Israel to explain why it does not regard the West Bank as occupied territory and may therefore establish Israeli settlements there. The first is that this territory was not the sovereign territory of another state when occupied by Israel in June 1967; the second is that the trust created by the League of Nations Mandate over Palestine still applies in those parts of Mandatory Palestine that did not become the sovereign territory of another state in 1948. After a short introduction, the article argues that in the modern area, in which peoples have the right to self-determination, the law of belligerent occupation may apply in territory that was not the territory of a state before it was occupied. Relying on a large body of historical research, the article then shows that the mandate system was a compromise between the colonial aspirations of Britain and France and the principle of self-determination propagated by US President Woodrow Wilson. The Mandate did not give rights to Jews or the Jewish people. It merely obligated Britain to facilitate its commitment under the Balfour Declaration to create the conditions that 'will secure the establishment of the Jewish national home' in Palestine. This obligation, and its parallel right, ended with the termination of the Mandate and the establishment of the State of Israel, which was the ultimate realisation of a national home for the Jewish people in the land of Israel. Even if one were to accept the argument that the trust established by the Mandate continues to apply in the West Bank, in an era in which colonial ideas have been rejected, the conclusion is not that Jewish citizens of Israel have a right to settle there, but that the right of the Palestinian inhabitants of that area to self-determination should be respected.

Keywords: occupation; Mandate; West Bank; sovereignty; Israel

1. Introduction

Soon after the present government that was formed in December 2022, had committed itself to 'regularising' all outposts established in the West Bank without

formal government approval,[1] an attorney acting on behalf of Adalah, an Israeli non-governmental organisation (NGO), wrote to the government complaining that implementation of that commitment involved violation of the law of belligerent occupation.[2] In his reply to the letter, dated 19 June 2023, the Cabinet Secretary challenged the view that the West Bank is occupied territory and claimed that there is therefore no legal impediment to the establishment of Israeli settlements in the area. In his view, Israel applies the law of belligerent occupation as a matter of policy, although that law does not apply *de jure*.[3] In a memorandum relating to the jurisdiction of the International Criminal Court (ICC) over the situation in Palestine, the Attorney General of Israel also stated that the law of belligerent occupation does not apply *de jure* in the West Bank.[4] In a more recent brief submitted to the ICC in September 2024, the Attorney General claims that one cannot compare the situation in the West Bank and Gaza Strip to the situation in which one sovereign state gains control over the territory of another sovereign state. According to the Attorney General, '[t]he present situation is, however, qualitatively different – when Israel gained control over the West Bank and the Gaza Strip in 1967, these were not under the recognised sovereignty of any state (still less, a Palestinian state)'.[5]

The Cabinet Secretary based his claim that the West Bank is not occupied territory largely on the view of Professor Eugene Rostow, a professor of law and former Dean of Yale Law School, who held senior positions in the US State Department during the Johnson Administration. In an article published in 1979,[6] and in subsequent articles[7] and a 'Correspondence' with the Editor-in-Chief of the *American Journal of International Law*,[8] Rostow took issue with the designation of the West Bank and the Gaza Strip as occupied territory. He raised two arguments: firstly, that the League of

[1] Coalition Agreement between the Likud and Religious Zionist Party, Government of Israel, 28 December 2022, s 119, https://www.gov.il/BlobFolder/generalpage/government-documents37/he/Gov_Docs_gov37_co37.pdf.

[2] Suhad Bashara, 'Letter of the Decision of the Political-Security Cabinet regarding the "Regularization" of Outposts in the West Bank', 9 March 2023, https://www.adalah.org/uploads/uploads/Legalizing_Outposts_English_9_March_2023.pdf.

[3] Yossi Fuchs, 'Reply to Your letter to the Prime Minister dated 9 March 2023 regarding Decision B/6 of the Political – Security Cabinet on the Regularization of the Settlements in Judea and Samaria', 19 June 2023, https://www.adalah.org/uploads/uploads/Response_Cabinet_Secretary_19_June_2023.pdf.

[4] State of Israel, Office of the Attorney General, 'The International Criminal Court's Lack of Jurisdiction over the So-called "Situation in Palestine"', 20 December 2019, 24, https://www.gov.il/en/pages/20-12-2019.

[5] Public Redacted Version of 'Israel's Challenge to the Jurisdiction of the Court, pursuant to Article 19(2) of the Rome Statute', ICC-01/18, 23 September 2024, para 115.

[6] Eugene V Rostow, 'Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate' (1979) 5 *Yale Studies in World Public Order* 147.

[7] Eugene V Rostow, 'Israel's Settlement Rights Are Unassailable', *The New York Times*, 19 September 1983; Eugene V Rostow, 'A False Start in the Middle East', *Commentary*, October 1989, https://www.commentary.org/articles/eugene-rostow-2/a-false-start-in-the-middle-east/?amazon_payments_advanced=true.

[8] Eugene V Rostow, 'Correspondence' (1990) 84 *American Journal of International Law* 717. This Correspondence was written in response to Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' (1990) 84 *American Journal of International Law* 44. Roberts' paper was a revised version of a paper he presented at a conference organised in Jerusalem in 1988 by the Palestinian NGO Al-Haq. The papers presented at this conference were published in Emma Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of the Israeli Occupation of the West Bank and Gaza Strip* (Oxford University Press 1990).

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Nations Mandate over Palestine continues to apply in those parts of Palestine that had not become part of either Israel or Jordan; secondly, that only territory that had been the sovereign territory of another state becomes occupied territory when taken in war.[9] Contrary to the view of the international community that since the West Bank is occupied territory, it is forbidden for Israel to establishment settlements for its own citizens in that territory, Rostow argued that the right of Jews to settle in Palestine, which in his mind had been guaranteed in the Mandate, continues to apply in the West Bank and Gaza Strip. He refused to regard the Arab inhabitants of the West Bank and Gaza Strip as a people entitled to self-determination. In his mind, recognition of the right of the Arab inhabitants of Palestine to self-determination was rejected by the international community when it granted the Mandate to Great Britain and instructed Great Britain to facilitate the creation of a home for the Jewish people in Palestine.

Rostow's arguments were taken up by others,[10] and were adopted by the Edmond Levy Committee, which was established by the government in 2012 to prepare a report on regulating settlements in the West Bank.[11] Perhaps most importantly, as the letter of the Cabinet Secretary and the briefs to the ICC of the Attorney General reveal, Rostow's view was adopted by the present government in its attempt to dispute the status of the West Bank as occupied territory.

Rostow's arguments have received no traction in the international community, as evidenced by numerous resolutions of the UN Security Council[12] and UN General Assembly,[13]and two advisory opinions of the International Court of Justice (ICJ).[14]

[9] This was similar to the argument raised by Yehuda Blum in an article published in 1968: Yehuda Z Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 *Israel Law Review* 279.

[10] Talia Einhorn, *The Status of Judea & Samaria (the West Bank) and Gaza and the Settlements in International Law*, Jerusalem Center for Public Affairs, 2014, https://jcpa.org/article/status-of-settlements-in-international-law.

[11] Government of Israel, Report of the Committee to Examine the Status of Building in Judea and Samaria, 2012 (Levy Report) (in Hebrew), https://www.gov.il/BlobFolder/news/spokeedmond090712/he/documents_doch090712.pdf. For incisive criticism of the report see Orna Ben Naftali and Rafi Reznik, 'The Astro-Nomos: On International Legal Paradigms and the Legal Status of the West Bank' (2015) 14 *Washington University Global Studies Law Review* 399; Yesh Din, 'A Legal Analysis of the Report of the Committee to Examine the Status of Building in Judea and Samaria [the West Bank] ("The Levy Committee"): International and Administrative Aspects', January 2014, https://www.yesh-din.org/en/unprecedented-a-legal-analysis-of-the-report-of-the-committee-to-examine-the-status-of-building-in-judea-and-samaria-the-levy-committee; Nathaniel Berman, 'San Remo in Shilo: The Settlements and Legal History', *The Times of Israel*, 19 July 2012, https://blogs.timesofisrael.com/san-remo-in-shilo-the-settlements-and-legal-history.

[12] eg, UNSC Res 465 (1 March 1980), UN Doc S/RES/465(1980); UNSC Res 446 (22 March 1979), UN Doc S/RES/446(1979); UNSC Res 452 (22 July 1979), UN Doc S/RES/452(1979); UNSC Res 2334 (23 December 2016), UN Doc S/RES/2334(2016).

[13] See, eg, UNGA Res 2546 (11 December 1969), UN Doc A/RES/2546(XXIV); UNGA Res 3414 (5 December 1975), UN Doc A/RES/3414(XXX); UNGA Res 31/61 (9 December 1976), UN Doc A/RES/31/61; UNGA Res 77/126 (12 December 2022), UN Doc A/RES/77/126.

[14] ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 (*Wall* Advisory Opinion); ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion [2024] ICJ Rep 186 (*Occupation* Advisory Opinion). The only partial exception is the dissenting opinion of the Vice-President, Judge Julia Sebitunde, in *Occupation* Advisory Opinion, although while Judge Sebitunde

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All these organs of the United Nations have taken the view that the West Bank is occupied territory in which Israel is bound by the international law of belligerent occupation, as set out both in the Hague Regulations[15] and the Fourth Geneva Convention (GC IV).[16] This is also the opinion of most states and the International Committee of the Red Cross.[17] The Supreme Court of Israel has also held that the West Bank is subject to a regime of belligerent occupation.[18] Nevertheless, given the centrality of Rostow's arguments in the approach of the Government of Israel towards the legal status of the West Bank[19] and the legality of its settlement policy there, it is important to subject his arguments to a critical analysis. The object of this article is to provide such an analysis.

As seen above, the government's rejection of the status of the West Bank as occupied territory rests on two arguments:

(1) only territory of another state becomes occupied territory when captured in an armed conflict, and since Jordan did not have sovereignty over the West Bank when taken by Israel in the June 1967 War, the West Bank did not become occupied territory; and
(2) the British Mandate over Palestine granted the Jewish people rights in the whole of the territory of the Mandate and these rights continue to apply in the West Bank to this day. The latter argument is strongly tied to the (il)legality of establishing Jewish settlements in that area.

The next part of this article (Section 2) discusses the first argument – namely, that only territory that was part of the sovereign territory of another state becomes occupied territory when it is occupied in the course of an armed conflict. Section 3

mentioned the Mandate, she based her view on the right of the Jews in Eretz Yisrael/Palestine on the Bible.

[15] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910), *Martens Nouveau Recueil* (ser 3) 461 (Hague Regulations). Israel is not a party to the Convention but the Supreme Court has held that the Regulations are part of customary international law, which will be enforced by Israel's courts: HCJ 606/78 *Ayoub v Minister of Defence* (15 March 1979).

[16] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV). Israel ratified this Convention on 6 July 1951.

[17] Matthias Lanz, Emilie Max and Oliver Hoehne, 'The Conference of the High Contracting Parties to the Geneva Conventions of 17 December 2014 and the Duty to Ensure Respect for International Humanitarian Law' (2014) 96 *International Review of the Red Cross* 1115; Peter Maurer, 'Challenges in International Humanitarian Law: Israel's Occupation Policy' (2012) 94 *International Review of the Red Cross* 1503, 1506.

[18] The cases are too numerous to list. See, eg, HCJ 390/79 *Azat Muhammad Mustafa Dweiqat v Government of Israel* PD 34(1) 1 (1979); HCJ 393/82 *Jamiyat Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v IDF Commander in Judea and Samaria* PD 37(4) 785 (1983); HCJ 1661/05 *Gaza Coast Regional Council v The Israeli Knesset* PD 59(2) 481 (2005); HCJ 2164/09 *Yesh Din – Volunteers for Human Rights v Commander of the IDF Forces in the West Bank* (12 December 2011).

[19] According to a press report, in rejecting the recent *Occupation* Advisory Opinion (n 14), Prime Minister Netanyahu presented the Cabinet with an opinion by Professor Talia Einhorn, the Israeli academic proponent of Rostow's 'mandate argument': Chen Ma'anit, 'Netanyahu Presented the Government with a Draft Resolution Rejecting the Hague Advisory Opinion, that was written without the Cooperation of the Attorney General', *Ha'aretz*, 21 July 2024, https://www.haaretz.co.il/news/politi/2024-07-21/ty-article/.premium/00000190-d4e5-dbb4-a7d2-dfefdc370000.

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addresses the second argument: that the British Mandate over Palestine still applies in the West Bank; hence the West Bank is not occupied territory and there is no legal impediment to Israel establishing Jewish settlements in the area.

2. State sovereignty and the law of belligerent occupation

2.1. The argument of Yehuda Blum

Soon after the occupation began in June 1967, Professor Yehuda Blum, then a young lecturer in international law at the Hebrew University of Jerusalem and later Israel's representative at the United Nations, published an article in which he claimed that the international law of belligerent occupation does not apply in its entirety to Israel's actions in the West Bank.[20] Blum's argument was that Jordan had been an aggressor when it invaded the West Bank in May 1948 and had illegally annexed the territory in 1950. Hence it was not the sovereign power of the territory when it was conquered by the Israel Defense Forces (IDF) in 1967. Blum did not argue that the whole corpus of law relating to belligerent occupation does not apply in the West Bank, but only that those parts of this corpus of law, the purpose of which is to preserve the rights of the missing sovereign, do not apply. Blum's conclusion was:[21]

> Whenever, for one reason or another, there is no concurrence of a normal 'legitimate sovereign' with that of a 'belligerent occupant' of the territory, only that part of the law of occupation applies, which is intended to safeguard the *humanitarian* rights of the population. Conversely, ... the rules protecting the reversionary rights of the legitimate sovereign find no application, there being no such sovereign.

Blum did not elaborate which rules are regarded as those protecting what he termed the 'reversionary rights' of the legitimate sovereign, but from the context of his argument, it would seem that he was referring, first and foremost, to the obligation imposed on the occupying power in Article 43 of the Hague Regulations to respect the law in the occupied territory unless absolutely prevented from doing so.[22] What is notable is that Blum did not make the general argument that the West Bank is not occupied territory, and stated categorically that the humanitarian provisions of the law of occupation do indeed apply. Nevertheless, although the first military order promulgated by the military commander in the West Bank in June 1967 provided that the military courts established to try local residents accused of security offences must abide by the Geneva Convention,[23] the authorities now changed their

[20] Blum (n 9). For a recent critical discussion of this article see Eyal Benvenisti, 'An Article that Changed the Course of History' (2017) 50 *Israel Law Review* 269. For Blum's reaction to Benvenisti's article see Yehuda Z Blum, 'The Status of Judea and Samaria Revisited: A Response to Eyal Benvenisti' (2018) 51 *Israel Law Review* 165.

[21] Blum (n 9) 294 (emphasis in original).

[22] Blum discusses the decisions in two cases that reached the local courts in the West Bank and that addressed the power of the Israeli military commander to change the prevailing law. He discusses the limitations under Article 43 of the Hague Regulations (n 15) on the power of a military commander in occupied territory to change the prevailing law.

[23] Security Provisions Order (West Bank), 7 June 1967 (Israel), art 35.

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tune. Latching on to Blum's argument that there was no legitimate sovereign in the territory when Israel occupied it, they argued that the purely humanitarian Geneva Convention does not apply *de jure* in the area.[24] At the same time, they declared that Israel would abide by the Convention's humanitarian provisions.[25]

2.2. *Application of the Fourth Geneva Convention in the West Bank*

The authorities based their argument that GCIV does not apply in the particular circumstances of the West Bank on the reference in the second paragraph of Article 2 of the Convention to occupation of 'the territory of a High Contracting Party', namely the territory of another state. This argument, which was presented by Meir Shamgar when he served as Attorney General of the State of Israel,[26] contradicted the accepted view that, according to the first paragraph of Article 2, the Convention applies as soon as an armed conflict between states breaks out.[27] The second paragraph addresses only the situation in which occupation of territory did not meet armed resistance.[28] Hence the Geneva Convention applied as soon as the war with Jordan broke out in June 1967, and it continued to apply to territory occupied in that war.

It is not only the text and the background to the inclusion of the second paragraph that do not support the government's interpretation; this interpretation is inconsistent with the very object of the Geneva Conventions, which is to protect the victims of war and not the political interests of the parties to the armed conflict. Given this object, it makes little sense to make the protection of civilians in occupied territory dependent on the status of the territory captured in the course of an armed conflict. As the recent Commentary on the First Geneva Convention explains, adopting the Israeli interpretation would mean that any occupying power could avoid application of GCIV simply by disputing the sovereign status of the state that held the territory before it was occupied.[29]

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[24] David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd edn, Oxford University Press 2021) 55–60.

[25] ibid 60.

[26] Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) *1 Israel Yearbook on Human Rights* 262.

[27] Jean Pictet (ed), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Times of War* (International Committee of the Red Cross (ICRC) 1958) Commentary on Article 2, para 2.

[28] ibid 21–22. In referring to para 2 of Article 2 the Commentary states: 'The sense in which the paragraph under consideration should be understood is thus quite clear. It does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared. The paragraph only refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances. The wording of the paragraph ... is not very clear, the text adopted by the Government Experts being more explicit ... Nevertheless, a simultaneous examination of paragraphs 1 and 2 leaves no doubt as to the latter's sense: it was intended to fill the gap left by paragraph 1'. See also Dieter Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) *Receuil des Cours* 121, 132.

[29] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC and Cambridge University Press 2016) paras 323–27, https://ihl-databases.icrc.org/ihl/full/GCI-commentary. See also Eritrea-Ethiopia Claims Commission, Partial Award: Central Front – Ethiopia's Claim 2, 28 April 2004, para 29. Referring to both

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2.3. Lack of state sovereignty and occupation

The argument that only territory that was the sovereign territory of another state becomes occupied territory when conquered in a war was later adopted by Eugene Rostow.[30] As opposed to the argument that GCIV does not apply in the West Bank, this argument claims that even the Hague Regulations do not apply in such territory. Support for this argument may possibly be found in Section III of these Regulations. This section, which contains the rules of international law relating to occupied territory, carries the heading 'Military Authority over the Territory of the Hostile *State*' (emphasis added).

In his seminal article Blum accepted that the West Bank was not *terra nullius* when it was occupied by Israel in June 1967.[31] Relying on the study by Ramendra Nath Chowdhuri,[32] Blum presented six different theories regarding the issue of sovereignty in territories that were subject to a League of Nations mandate. He reasoned that whichever theory one adopts, it must be assumed that sovereignty was *somewhere*.[33] From this assumption it follows that on the termination of a mandate, no mandated territory becomes *res nullius* that is open to acquisition by the first comer.[34]

One of the theories listed by Blum attributes sovereignty to the inhabitants of the mandated territory. While ostensibly Blum did not dismiss any of the six theories, when he discussed the future sovereignty over the territory, he did not even consider the possibility that the sovereignty could be in the hands of the territory's inhabitants. He simply argued that since Jordan had been an aggressor and Israel had acted in self-defence when it occupied the West Bank, Israel had the stronger claim to sovereignty over the territory.[35]

For reasons best known to himself, Blum did not consider the implications of his acknowledgement that the West Bank was not *terra nullius* in 1967. Nor did he

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the Hague Regulations and GCIV, the Commission stated that 'neither text suggests that only territory the title to which is clear and uncontested can be occupied territory'.

[30] Rostow (n 6) 161.

[31] Blum (n 9) 283.

[32] Ramendra Nath Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (Martinus Nijhoff 1955).

[33] For discussion of the sovereignty issue in mandate territories see Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2015) 204–32. Pedersen writes that while the mandate system clearly held that the mandatory powers did not acquire sovereignty, it did not say where the sovereignty lay. She concludes (ibid 232) that 'what the mandates system did was less to deprive the mandatory power of sovereignty than to create spaces from which the sovereignty was banished altogether'. This is in line with one of the six theories mentioned by Blum, according to which in mandatory territory sovereignty was suspended. James Crawford was also of the opinion that the term 'sovereignty' was not applicable to mandate territories: James R Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 568–73.

[34] Blum (n 9).

[35] ibid. In a later article Blum notes that his approach was also the opinion of Julius Stone and Stephen Schwebel, with whom he discussed the matter: Blum (2018) (n 20). Stone mentioned this approach in his book: Julius Stone, *No Peace – No War in the Middle East* (1969) 38–40. Schwebel did not claim that Israel is not an occupier in the West Bank, but that since it gained control over the area in a defensive war Israel has the right to demand changes in the lines of the armistice agreements with its neighbouring countries: Stephen M Schwebel, 'What Weight to Conquest?' (1970) 64 *American Journal of International Law* 334.

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mention that since the end of the nineteenth century it has been accepted that territory, the inhabitants of which enjoy some form of social or political organisation, is not *terra nullius*.[36] While Blum wrote that former mandated territory is not open to acquisition by the first comer, he did not consider that the real reason is that the inhabitants of the territory are entitled to self-determination. In other words, Blum did not take into account the principle that emerged at the end of the First World War, that in the absence of a state that has sovereignty over territory, the sovereignty is in the hands of the territory's inhabitants.[37] Nor did he refer to two other important factors. As we discuss below, Britain's Mandate over Palestine was an 'A' Mandate, a status that was reserved for territories that had formerly been part of the Ottoman Empire.[38] Article 22 of the Covenant of the League of Nations states that the communities in such territories had reached the state of development so that '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'.[39] It follows that wherever the sovereignty rested while the mandatory power retained control over the territory, once that control ended, the people in the territory were entitled to exercise their right as independent nations that had been provisionally recognised by the League of Nations when it approved the Mandate.[40] UN General Assembly Resolution 181 gave effect to this principle when it recommended that two states be created in the territory of the British Mandate so as to enable the members of both national groups who inhabited the territory, Jews and Arabs, to exercise their right to self-determination.[41]

[36] ICJ, *West Sahara*, Advisory Opinion [1975] ICJ Rep 12, [80]: 'According to the State practice of that period, the territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*'. (The Court added that during that period such territories were not acquired by occupation, but by an agreement with the local rulers). It is indeed true that Blum wrote his article before this advisory opinion was delivered. However, as the Court explained, it was referring to state practice that existed in the nineteenth century. Hence in an advisory opinion commissioned by the Council of the League of Nations in 1920 to settle the dispute between Sweden and Finland over the Aaland Islands, a committee of eminent jurists opined that if territorial sovereignty of a state is lacking, the principle of self-determination of the people in the territory may come into play: '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', October 1920, https://www.ilsa.org/Jessup/Jessup10/basicmats/aaland1.pdf.

[37] See Section 3.1. below.

[38] Ruth Gordon, 'Mandates' (last updated February 2013), *Max Planck Encyclopedia of Public International Law [MPEPIL]* 1066, para 7.

[39] Covenant of the League of Nations (entered into force 10 January 1920) 108 LNTS 188. The text of the Covenant is available at https://avalon.law.yale.edu/20th_century/leagcov.asp.

[40] See Chowdhuri (n 32) 233–34. Although Blum relied on Chowdhuri's study, he ignored Chowdhuri's view that while during the Mandate sovereignty was in abeyance, once the goal of self-governance or independence was reached, 'sovereignty would automatically be vested in the people of the Trust Territory': ibid 236. Chowdhuri's study compares the mandate system with the UN trusteeship system. He refers to territories subjected to both regimes as 'Trust Territory'. He notes that the termination of the 'trusteeship' requires the consent both of the Administering Authority and a two-thirds majority in the UN General Assembly. Both these conditions were met when the Mandate over Palestine was terminated.

[41] UNGA Res 181 (II) (29 November 1947), Future Government of Palestine, UN Doc A/RES/181(II).

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Blum's view also suffers from an internal contradiction. If, as Blum admitted, the territory was not *terra nullius* in 1967, although it was not part of the sovereign territory of an existing state, no state could attain sovereignty over the territory by use of force, whether that use of force was lawful or not. Under the principle of self-determination developed at the end of the First World War (discussed below) with the termination of the rule over the territory by a foreign power it was for the inhabitants of the territory to decide on their political future. In an era in which the only actors recognised by international law were states and international organs, while peoples and individuals had no standing, it was possible to restrict the concept of occupation to the territory of one state that had been occupied by another. However, international law does not remain static, and this position of international law is no longer valid.

Article 1 of the UN Charter states expressly that one of the organisation's purposes is '[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.[42] Article 1 common to the International Covenant on Economic, Social and Cultural Rights (1966) and to the International Covenant on Civil and Political Rights (1966)[43] declares that '[a]ll peoples have the right of self-determination'. The ICJ has made it clear that in interpreting the Mandates of the League of Nations and other international instruments of the time, later developments in international law must be taken into account. These include the right of self-determination of peoples.[44]

In ignoring these principles, both Blum and Rostow were adopting attitudes that were unfortunately prevalent in the nineteenth century and the early part of the twentieth century. As Eliav Lieblich and Eyal Benvenisti explain in their book on the law of belligerent occupation, until the twentieth century international law was entirely Eurocentric. The prevailing view was that the law of belligerent occupation applied only in Europe, and not to the territories inhabited by what were termed 'uncivilised peoples' who were not capable, in European eyes, of governing themselves.[45] Lieblich and Benvenisti write:[46]

[42] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

[43] International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3; International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171.

[44] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion [1971] ICJ Rep 16 [53]. The Court stated: 'Viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last 50 years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned'.

[45] Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (2021) 91–97. The most extreme expression of this view is presented in Elbridge Colby, 'How to Fight Savage Tribes' (1927) 21 *American Journal of International Law* 279.

[46] Eliav Lieblich and Eyal Benvenisti, *Occupation in International Law* (Oxford University Press 2022) 46 (emphasis added).

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> In this sense, like most laws of war of the time, the law of occupation served some humanitarian purposes, but was also a colonial marker of distinction between subjects and non-subjects of international law. Only in the 20th century, with the advent of the principles of sovereign equality and self-determination, did international law cease to make that distinction formally. *These principles now require that the law of occupation apply to the territories of all states or peoples.*

The denial that territory that was not part of the sovereign territory of another state cannot be regarded as occupied territory was based, inter alia, on denial of the right of the Palestinians in the West Bank and Gaza to self-determination.[47] Rostow admitted that he regarded the notion of self-determination of peoples as problematic, absent any definition of the term 'peoples'.[48] He ignored the fact that the 'people' are, first and foremost, the inhabitants of a territory that is not part of an existing state.[49] As the ICJ held in the *Chagos* case, the right of self-determination of the *population* of a territory that was subject to foreign rule was established in the 1960s.[50] Hence, when Israel conquered the West Bank and Gaza in June 1967, the Palestinian inhabitants of these areas, which did not become part of the sovereign territory of another state after the end of the Palestine Mandate, were entitled to self-determination.[51] Of course, now that the Palestinians have gained universal recognition as a people and Israel itself has recognised the Palestinian people,[52] the Rostow-Blum view becomes even more problematic.

2.4. *Application* de jure *of the law of belligerent occupation*

When defending their actions in the Occupied Territories before the Supreme Court of Israel, counsel for the authorities have consistently relied on the customary law of belligerent occupation, as reflected in the Hague Regulations.[53] The Supreme Court

[47] Rostow (n 6).

[48] ibid 153: 'Despite its great political appeal, the idea of "self-determination" for all "peoples" is a puzzling and complex factor in the political life of an international system based on the existence and sanctity of states'.

[49] David Kretzmer, 'Reflections on the Right to Self-Determination in the Wake of the Nation-State Law: The Rights of Jews in Israel to Self-Determination', *Minerva Center for Human Rights Human Rights Blog*, 26 June 2022, https://openscholar.huji.ac.il/minervacenter/blog/kretzmer (in Hebrew).

[50] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion [2019] ICJ Rep 95 [144]–[162]. The Court stated that 'the legal régime of non-self-governing territories, as set out in Chapter XI of the Charter, was based on the progressive development of their institutions so as to lead the *populations* concerned to exercise their right to self-determination': ibid [147] (emphasis added).

[51] Allan Gerson, 'Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank' (1973) 14 *Harvard International Law Journal* 1, 43.

[52] Letter from Prime Minister Yitzhak Rabin to Yasser Arafat, Chairman of the Palestine Liberation Organization (PLO), 9 September 1993 (in which PM Rabin declares that 'the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process'), http://catalog.archives.gov.il/site/chapter/oslo-and-washington/%D7%90-412-3-%D7%9E%D7%9B%D7%AA%D7%91-%D7%A8%D7%91%D7%99%D7%9F-%D7%9C%D7%A2%D7%A8%D7%A4%D7%90%D7%AA-3-9-1993.

[53] For discussion of these cases see Kretzmer and Ronen (n 24) Ch 4.

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has held time and again that the regime of the West Bank is a regime of belligerent occupation.[54] Nevertheless, before international bodies, relying on the Blum-Rostow theory, government lawyers argue that the law of belligerent occupation does not apply *de jure* but that the authorities apply this law on grounds of policy. The most recent expression of this view is contained in a brief submitted to the International Criminal Court in September 2024, in which the Attorney General of Israel repeats the claim that Israel applies the rules of international law as a matter of policy:[55] 'notwithstanding its position regarding application of the law of occupation *de jure* under these circumstances'.

In making its claim that since Jordan lacked sovereignty the law of belligerent occupation does not apply *de jure* in the West Bank, not only does the government contradict the view of international bodies, it ignores the fact that the claim was dismissed by the Supreme Court of Israel. In the *Ha'etzni* case the petitioner had been brought to trial before a military court in the West Bank on a number of charges, including violation of a section of the Jordanian criminal code that had been applied in the West Bank during Jordan's rule over the area.[56] Relying on Blum's argument, counsel for the petitioner argued that since Jordan had not been the legitimate sovereign in the area, its laws were not valid when the IDF assumed control over the area. Thus, the proclamation of the military commander that prevailing law would remain in force was itself invalid.[57] Even though the Court accepted Blum's argument that Jordan was not a sovereign power in the West Bank before June 1967, it rejected the petitioner's argument. Justice Landau stated:[58]

[54] ibid 64–68.

[55] 'Israel's Challenge to the Jurisdiction of the Court …' (n 5) 116. It is to be noted that in this brief the Attorney General refers to 'the law of occupation'. In a memorandum relating to the ICC jurisdiction that the Attorney General published previously, the Attorney General states that Israel 'applies the humanitarian provisions of the international law of occupation (despite its principled position that they do not apply *de jure*)': Office of the Attorney General (n 4) para 39. The term 'the humanitarian provisions of the international law of occupation' obviously refers to the government's declaration that although GCIV does not formally apply in the West Bank, the IDF would comply with its humanitarian provisions. That declaration refers to GCIV and not to the Hague Regulations. The Attorney General's statement creates the impression that it is only the humanitarian norms of occupation that the government applies, even though it is of the opinion that they do not bind Israel *de jure*. This ignores the fact that the Supreme Court regularly relies on the Hague Regulations in order to justify infringements of the rights of the local population. A glaring example is the Court's reliance on the law of belligerent occupation in cases relating to construction of the Separation Barrier (Wall) in the West Bank. The Court justified taking and destroying private land and placing severe restrictions on the freedom of movement of Palestinians by citing various provisions of the Hague Regulations, as well as provisions of GCIV: Kretzmer and Ronen (n 24) 233–72.

[56] HCJ 61/80 *Elyakim Ha'etzni* v *State of Israel* (Minister of Defence) (17 April 1980).

[57] After gaining control over the West Bank, the IDF commander issued the Proclamation on Law and Administration (Proclamation No 2), 7 June 1967, in which he stated that the law in existence in the Area on June 7 would remain in force in so far as it does not conflict with the Proclamation itself or any other proclamations or order that he may issue. An English translation of the Proclamation is available in Shamgar (n 26) 450.

[58] *Ha'etzni* (n 56) 597 (emphasis added). In the case of *Elon Moreh* (HCJ 390/79 *Dweikat* v *Government of Israel* (22 October 1979)), decided a short time before *Ha'etzni*, Israeli settlers, who had been given leave to join the proceedings, relied on Blum's argument in arguing that the law of belligerent occupation was irrelevant. In that case the military commander had seized land, purportedly for military reasons. After mentioning Israel's argument that Jordan was not a sovereign power in the West Bank before it was

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> [One must not confuse] the question of sovereignty in Judea and Samaria according to international law, and the right and duty of the military commander to maintain public order in the area in order to preserve his control of the area and to institute a regime based on the rule of law, for the good of the residents there. *This right and this duty, which are based on the rules of customary international law, are expressed in Article 43 of the Hague Regulations*.

Mention of Article 43 is highly significant, as this provision comes into play only in occupied territory, defined in Article 42.[59] We see then that the Court made it quite clear that application of the customary international law on belligerent occupation, as expressed in the Hague Regulations, is not dependent on sovereignty of another state over the area when it was occupied. As the petitioner was challenging the very power of the authorities, the answer given by the Court could not have been based on a policy of these authorities to apply the law of belligerent occupation. It was clearly based on its view that this body of law applies *de jure*.

2.5. Summary

In the post-Second World War era, the view that only the territory of a sovereign state can be subject to belligerent occupation is no longer tenable. When the West Bank and Gaza were occupied by the IDF in 1967 these territories were certainly not part of Israel's sovereign territory.[60] Even if we accept Blum's view that Jordan was not the legitimate sovereign in the West Bank, that territory was not *terra nullius*. From the point of view of the territory's inhabitants, the IDF was certainly a 'hostile army'. Hence, once the territory was placed under the authority of that army it became occupied territory.[61] Its population retained their right to self-determination that had been frustrated when Jordan occupied and purported to annex the territory.

occupied by Israel, the Court stated that as the only basis for the seizure order was the international law of belligerent occupation, it had to decide the case according to this body of law.

[59] Article 42 of the Hague Regulations (1907) (n 15) states: 'Territory is considered occupied when it is actually placed under the authority of the hostile army'.

[60] The argument has been raised that under the principle of *udi possidetis juris*, Israel inherited the borders of British Mandatory Palestine. I have discussed, and rejected, this argument elsewhere: David Kretzmer, 'The Principle of *Uti Possidetis Juris* and the Borders of Israel', *Verfassungsblog*, 9 October 2024, https://verfassungsblog.de/the-principle-of-uti-possidetis-juris-and-the-borders-of-israel. I show that when they declared independence and thereafter, Israeli political leaders never claimed that Israel's borders were those of the Mandate. On the contrary, they accepted the *principle* of partition and, following the Armistice Agreement with Jordan, claimed that despite the clause in that Agreement that the Green Line was only a military line, that line had become the political border of the country. The principle of *udi possidetis juris* does not determine that the borders of a departing colonial regime are the borders of a state newly created in *part* of the territory of the departing regime, when that state never claimed that these were its borders.

[61] Hague Regulations (n 15) art 42.

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3. The League of Nations Mandate and the status of the West Bank

3.1. Background to the mandate system[62]

As the First World War neared its end, the imperial powers Britain and France were determined to extend their empires by gaining control over territories that were part of the Ottoman and German empires, mainly in the Middle East and Africa. To this end, these two imperial powers reached an agreement in 1916 to divide the Middle Eastern territories of the Ottoman Empire between themselves.[63] However, as the war drew to its end, another actor entered the field. In his speech to Congress on 18 January 1918, US President Woodrow Wilson laid out 14 points that should guide the peace arrangements to be made after the war.[64] These points included the notion that in determining the fate of territories that had been part of the defeated empires, 'the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined'. While not expressly mentioning the term 'self-determination', Wilson's principle is regarded as the first expression of the idea that self-determination of the people living in a given territory should be a guiding political principle in determining sovereignty over the territory.[65]

There was a clear clash between the colonial aspirations of Britain and France and Wilson's principle.[66] The mandate system was devised by South African Prime

[62] For a detailed description of the background to the mandate system see Pedersen (n 33) 17–44. For earlier discussions of this system see Jacob Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates* (Longmans 1928); Norman Bentwich, *The Mandates System* (Longmans 1930); Quincy Wright, *Mandates under the League of Nations* (University of Chicago Press 1930). See also Chowdhuri (n 32); Malcolm Shaw, 'The League of Nations Mandate System and the Palestine Mandate: What Did and Does It Say about International Law and What Did and Does It Say about Palestine' (2016) 49 *Israel Law Review* 287.

[63] On this agreement, known as the Sykes-Picot Agreement, see James Barr, *A Line in the Sand: The Anglo-French Struggle for the Middle East, 1914–1948* (WW Norton & Co 2012); Margaret MacMillan, *Paris 1919: Six Months that Changed the World* (Random House 2001) 382–88; Jonathan Schneer, *The Balfour Declaration: The Origins of the Arab-Israeli Conflict* (2010) 76–86, 220–36; Charles D Smith, *Palestine and the Arab-Israeli Conflict: A History with Documents* (7th edn, Bedford/St Martin's 2010) 63–66; Marina Ottaway, 'Learning from Sykes-Picot', Wilson Center, Middle East Program, *Occasional Paper Series*, Fall 2015, https://www.wilsoncenter.org/sites/default/files/media/documents/publication/learning_from_sykes_picot.pdf.

[64] President Woodrow Wilson, 'Wilson's Fourteen Points', 8 January 1918, https://www.loc.gov/collections/world-war-i-rotogravures/articles-and-essays/events-and-statistics/wilsons-fourteen-points. Point V is as follows: 'A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the Government whose title is to be determined'. A month after presenting his 14 points to Congress Wilson declared: 'Peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were chattels and pawns in a game, even the great game, now forever discredited, of the balance of power; but every territorial settlement involved in war must be made in the interest and for the benefit of the populations concerned, and not as part of any mere adjustment or compromise of claims against rival states': cited in Chowdhuri (n 32) 45.

[65] Derek Heater, *National Self-Determination: Woodrow Wilson and His Legacy* (MacMillan 1994); Allen Lynch, 'Woodrow Wilson and the Principle of "National Self-Determination": A Reconsideration' (2002) 28 *Review of International Studies* 419; Daniel Thürer and Thomas Burri, 'Self-Determination' (last updated December 2008), *Max Planck Encyclopedia of Public International Law [MPEPIL]* 873, para 4.

[66] President Wilson was not aware of the Sykes-Picot Agreement when it was made; however, he was totally opposed to the idea behind it. In 1917 he declared that he would not be prepared after the war

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Minister Jan Smuts as a way to reach a compromise between the two imperial powers and the United States.[67] Hence, the mandate system emerged, as Susan Pedersen puts it, out of the 'potent brew of liberal internationalism, imperial humanitarianism, and sheer territorial acquisitiveness'.[68]

It is important to appreciate the colonial background to the mandate system for two reasons. Firstly, the background should be taken into account when interpreting Article 22 of the League of Nations Covenant, which laid the legal foundation for the mandate system. Secondly, this background is highly relevant when attempts are made to base rights on this system in the world of the twenty-first century, in which colonial ideas are no longer a legitimate part of international law and international discourse.

3.2. *Article 22 of the Covenant*

Article 22 of the League of Nations Covenant states:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best

to see 'little groups of ambitious men who were accustomed to use their fellow men as pawns and tools': cited in Barr (n 63) 2.

[67] On the role of Smuts in devising the mandate system see Pedersen (n 33) 27; Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2009) §§ 418 in digital edition. Smuts presented his idea in a small booklet (Jan Christiaan Smuts, *The League of Nations: A Practical Suggestion* (1918)) in which he wrote that the League of Nations policy must be based on 'no annexation and self-determination of nations'. Mazower writes that Smuts regarded his proposal as a small gesture of Britain towards the United States, which paved the way for Britain to retain its empire. Smuts, the South African racist, was convinced that the white man had the task of protecting civilisation in Africa. He favoured 'imperial internationalism' based on the importance of protecting the existence of the British Empire (see Caroline Elkins, *Legacy of Violence: A History of the British Empire* (Bodley Head 2022) paras 128–30). According to his racist outlook, Smuts believed that his proposal was appropriate for countries that had been part of the Russian, Austro-Hungarian and Ottoman Empires, but not those of the German Empire, since they were in Africa and the Pacific Islands, which were inhabited by 'barbarians' who could not rule themselves. In the end, Smuts' proposal was not implemented in Europe, but only in territories of the Ottoman and German Empires outside Europe: Bentwich (n 62) 2. On Wilson's adoption of Smuts' proposal see Wright (n 62) 30–34; George Curry, 'Woodrow Wilson, Jan Smuts, and the Versailles Settlement' (1961) 66 *American Historical Review* 968; Karin Loevy, 'Reinventing a Region (1915–22): Visions of the Middle East in Legal and Diplomatic Texts Leading to the Palestine Mandate' (2016) 49 *Israel Law Review* 309, 332. According to Chowdhuri (n 32) 23, President Wilson had been presented with the idea of a mandate over former colonial territories even before he was presented with Smut's proposal. Chowdhuri admits, however, that it was Smuts' proposal that formed the basis of the discussions in drafting the League of Nations Covenant: ibid 24.

[68] Pedersen (n 33) 27.

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> undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.
>
> The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
>
> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Writing on the Covenant of the League of Nations in 1934, international lawyer Sir John Fischer Williams argued that unlike the other articles in the Covenant, Article 22 'is not legal or parliamentary in its phraseology, but is conceived in a more emotional and more humanitarian strain'.[69] It would seem to the more modern reader that the patronising tone reveals the colonial mindset that is reflected in Article 22.[70] The world is divided between the western 'civilised' states and other peoples who could not govern themselves. Hence the latter must be subject to the 'tutelage' of 'advanced' nations, ruled by the former 'as a sacred trust of civilisation'. Even those communities that were part of the Ottoman Empire that had reached the state of development where their independence could be provisionally recognised would, for the time being, be subject to the administrative advice and assistance of the mandatory powers. The very notion of 'a sacred trust of civilisation' is reminiscent of the colonial mindset, immortalised by Rudyard Kipling in his (in)famous poem 'The White Man's Burden'.[71] Be that as it may, in considering Article 22, a number of points must be stressed:

1. In governing territories inhabited by peoples who could not (in the minds of the colonial powers, of course) govern themselves, the well-being and development of those peoples 'form a sacred trust of civilisation'. No distinction is made between different groups of inhabitants of these territories. The

[69] John Fischer Williams, *Some Aspects of the Covenant of the League of Nations* (Oxford University Press 1934) 200.

[70] In this respect see John Strawson, *Partitioning Palestine: Legal Fundamentalism in the Palestinian-Israeli Conflict* (Pluto Press 2010) 53. Referring to international law at the time the Mandate was approved, Strawson writes: 'International law was at that time in a critical stage of its evolution but it remained a system of institutions and doctrines imprinted with its colonial origin'.

[71] The poem, which appears on the website of the Kipling Society, opens with the lines:

> Take up the White Man's Burden –
> Send for the best ye breed –
> Go bind your sons to exile
> To serve your captives' need;
> To wait in heavy harness
> On fluttered folk and wild –
> Your new-caught sullen peoples,
> Half devil and half child.

'The White Man's Burden' (1899), https://www.kiplingsociety.co.uk/poem/poems_burden.htm.

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well-being and development of all the inhabitants are subject to the 'sacred trust'. This principle gains expression in the text of the British Mandate over Palestine. Article 2 declares that, alongside its obligation to place the country under such conditions 'as will secure the establishment of the national Jewish home', the Mandatory Power has the responsibility for 'the development of self-governing institutions and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion'. Article 15 states: 'No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language'.[72]

2. Certain communities that were formerly part of the Turkish Empire were provisionally recognised as independent nations, subject to temporary rule by the mandatory powers. Mandates under this paragraph of Article 22 became known as 'A' Mandates. Since, until it was occupied by Britain, Palestine was part of the Turkish Empire, the Mandate of Britain over Palestine was an 'A' Mandate. The Mandate states expressly that it was entrusted to Great Britain 'for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations …'[73] In other words, the community in Palestine was provisionally recognised as an independent nation, and Britain was to govern the country according to 'the principle that the well-being and development of [the people of Palestine] form a sacred trust of civilisation'.[74]

While Palestine was provisionally recognised as a nation, the Mandate over Palestine also contained special provisions stating that Britain 'should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people'.[75] I now turn to the background and meaning of this commitment.

3.3. The Balfour Declaration and the San Remo Conference

In November 1917, the British Cabinet passed a resolution to adopt what later became known as the Balfour Declaration.[76] It is not my intention here to go into

[72] One month after the League Council had approved the Mandate, the British promulgated the Palestine Order in Council 1922, which was to become what was in essence the constitution of Palestine during the British Mandate. The Order in Council envisaged a legislative council that would be made up of 10 officials and 12 elected members. The legislative council's authority to enact Ordinances was to be subject to a number of restrictions, amongst which was passing an Ordinance 'which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion or language'. As a result of the objections of both Jews and Arabs, and their refusal to compromise, the legislative council was never established: Tom Segev, *One Palestine Complete: Jews and Arabs under the British Mandate* (Picador 2001) 400.

[73] Preamble to the Palestine Mandate, 1922, https://avalon.law.yale.edu/20th_century/palmanda.asp. The text of the League Covenant itself is available at https://avalon.law.yale.edu/20th_century/leagcov.asp.

[74] ibid.

[75] ibid.

[76] Arthur James Balfour, Letter to Lord Rothschild on the Establishment of a Jewish National Home in Palestine, 2 November 1917 (known as the Balfour Declaration). The text may be found at https://avalon.law.yale.edu/20th_century/balfour.asp.

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the background to this important document, which has been discussed by many others.[77] Suffice it to say that in the Balfour Declaration Britain declared that:[78]

> [it viewed] with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

Supporters of the idea that the Jews have a continuing right to settle in all parts of Palestine rest their view on the decision at the San Remo Conference to include the Balfour Declaration in the British Mandate over Palestine.[79] It is therefore important to clarify two points: one relates to the nature of the San Remo Conference; the other relates to negotiations that took place regarding the commitments of Britain in the Mandate.

In his letter of 19 June 2023 mentioned above, the Cabinet Secretary refers to the San Remo Conference as a League of Nations conference.[80] Nothing could be further from the truth. The San Remo Conference was not a meeting of the League, but a meeting of the 'Principal Allied Powers': namely, the countries that had been victorious in the war – Britain, France, Italy and Japan.[81] The object of the meeting was to draw up a peace treaty to be offered to Turkey, and to decide the fate of the territories of the Ottoman Empire that Turkey was going to be required to renounce in that treaty. It was at this meeting that it was decided that the Mandate over Palestine

[77] eg, Schneer (n 63); MacMillan (n 63) 410–17; Karin Loevy, 'The Balfour Declaration's Territorial Landscape: Between Protection and Self-Determination' (2021) 12(2) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 138; Shaul Arieli, 'What Did the Balfour Declaration Really Give to the Jewish People', *Ha'aretz*, 31 October 2024, https://www.haaretz.co.il/opinions/2024-10-31/ty-article-opinion/.premium/00000192-e247-dd31-a9be-fb4f69990000.

[78] Balfour Declaration (n 76).

[79] See, eg, Howard Grief, *The Legal Foundation and Borders of Israel under International Law* (2008). As Professor Feinberg pointed out, had the Balfour Declaration stood on its own, it would have had no legal significance; its legal significance rests on its inclusion in the Mandate: Nathan Feinberg, *On an Arab Jurist's Approach to Zionism and the State of Israel* (Magnes Press 1971) 22.

[80] Fuchs letter (n 3) para 7.

[81] Together with the US, two representatives of each of these countries had formed the Committee of Ten or Supreme Council, which in effect ran the Paris Peace Conference: MacMillan (n 63) 53–57. In December 1919 the US left the Committee of Ten and was invited to San Remo as an observer: Wright (n 62) 45, 54. On the background to the San Remo Conference see ibid 36–47. On the negotiations between Britain, France and Italy that led to the San Remo Conference see AE Montgomery, 'The Making of the Treaty of Sevres of 10 August 1920' (1972) 15 *The Historical Journal* 775. These negotiations were held in London, and ended at San Remo. San Remo was chosen as the site of the conference as the British wanted to avoid having the conference in France and insisted that it was Italy's turn to host the conference. The meetings between Britain, France and Italy were not held under the auspices of the League of Nations and the San Remo Conference was not a League of Nations conference. See also Ephraim Karsh, *The San Remo Conference 100 Years On; How the Jewish National Home Entered International Law* (Begin-Sadat for Strategic Studies 2020).

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would be entrusted to Britain and that the Mandate would include Britain's commitment under the Balfour Declaration.[82] The Mandate itself, which was approved by the League of Nations Council in July 1922, states expressly that it was the Principal Allied Powers that decided that the Mandate over Palestine be entrusted to Britain.[83]

At the San Remo Conference, a draft treaty to be submitted to Turkey was drawn up. Under this treaty – known as the Treaty of Sèvres – Turkey agreed to waive its sovereignty over all parts of the Ottoman Empire outside Turkey. It also agreed that Palestine would be administered by a Mandatory selected by the Principal Allied Powers, and that the said Mandatory would be responsible for putting the Balfour Declaration into effect.[84] While the Grand Visier Pasha signed the treaty, before it was ratified Kemal Atatürk became the ruler of Turkey. He refused to ratify the treaty;[85] hence it never entered into force. It was later replaced by the Treaty of Lausanne. The Treaty of Lausanne does not mention the Balfour Declaration, but it includes Turkey's agreement to renounce all territories beyond the borders of Turkey recognised in the Treaty, 'the future of these territories ... being settled or to be settled by the parties concerned'.[86]

The Principal Allied Powers decided at San Remo that Palestine and Mesopotamia (modern Iraq) would be ruled by Britain under a League of Nations Mandate, and that France would receive a Mandate over Lebanon and Syria. Britain demanded that the other Powers agree to incorporation of the Balfour Declaration in the Mandate over Palestine, and the other Powers reluctantly agreed.[87] These arrangements were not incorporated in a treaty or any other written agreement, and they therefore had no legal (as opposed to political) force. Besides, even if a written agreement had been signed, it would have bound only the states that were parties to it, and

[82] MacMillan (n 63) 406–407 ('At the San Remo conference in April 1920, where the terms of the treaty with the Ottoman empire were approved, the British and the French, their differences temporarily forgotten, awarded themselves mandates, the British for Palestine and Mesopotamia, the French for Syria. In theory these were not valid until they were confirmed by the League of Nations. Not surprisingly, a League dominated by Britain and France did this in 1922').

[83] At a meeting of the League Council that took place a month before final approval of the Palestine Mandate, Lord Balfour stressed that the Mandates were not created by the League, but by the Allied Powers themselves as 'a self-imposed limitation by the conquerors on the sovereignty of the territory that they conquered'. While Balfour's view was only one of the different views on sovereignty over Mandate territory, it stressed the fact that neither the League nor the Mandatory Power considered that the League itself had decided to grant Britain the Mandate over Palestine. According to Balfour, the task of the League Council was to confirm that the terms of the Mandate 'were in conformity with the principles of the League Covenant and that ... these terms would, in fact, regulate the policy of the Mandatory Powers in the mandated territory': *League of Nations Official Journal*, June 1922, 546.

[84] Treaty of Peace between the Allied and Associated Powers and Turkey (signed at Sèvres, 10 August 1920, not in force) [1920] UKTS No 11 (Treaty of Sèvres) art 95.

[85] On the wider reasons for the failure of the Treaty of Sèvres, see Montgomery (n 81). According to Montgomery, France and Italy had been out-manoeuvred during the London negotiations that preceded the San Remo Conference. They realised this and 'were to watch the crumbling of the Treaty of Sèvres with a satisfaction which had its roots in the London negotiations': ibid 787. In all events, the refusal to ratify the Treaty of Sèvres had nothing to do with the clause on the British Mandate over Palestine, but was motivated by the harsh territorial and financial conditions that the Treaty imposed on Turkey.

[86] Treaty of Peace with Turkey signed at Lausanne (entered into force 6 August 1924) 28 UNTS 11 (Treaty of Lausanne) art 16.

[87] Pedersen (n 33) 35.

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not the whole international community. In all events, even under the prevailing norms of international law, the states that took part in the San Remo Conference had no legal right or authority to decide on the fate of territories over which they had no sovereignty. Even though Turkey had been defeated in the war and parts of the Ottoman Empire were occupied by Britain and France, it was accepted that until such time as Turkey renounced its sovereignty over these parts of its empire, no other state could obtain sovereignty over them.[88] The very idea of the Treaty of Sèvres was to achieve official Turkish renunciation of its sovereignty over these areas, including Palestine. The renunciation was eventually contained in the Treaty of Lausanne, which was signed on 24 July 1923 and ratified by Turkey on 23 August 1923.

To summarise: the importance of the San Remo Conference was that a consensus was reached between the Principal Allied Powers (Britain, France, Italy, Japan) that Britian would receive the Mandate over Palestine and that the Mandate would include Britain's commitment under the Balfour Declaration. Absent a written treaty between these Powers, it is doubtful whether their resolutions had any legally binding force; but even if they did, they were binding only in the relations between those Powers. The legal status of the Balfour Declaration was achieved only by its incorporation in the Mandate that was approved by the Council of the League of Nations.

3.4. The terms of the Mandate

Following the decisions of the Principal Allied Powers at San Remo, intense discussions and negotiations took place between representatives of the British government and Zionist leaders on the terms of the Mandate that would be submitted for approval by the League of Nations.[89] Even before the San Remo Conference, the Zionist movement had submitted a draft of the Mandate to the British delegation at the Paris Peace Conference. Under this draft, drawn up by Felix Frankfurter, then a member of the American Zionist delegation and later a highly respected Harvard professor of law and Justice of the US Supreme Court, Palestine would be recognised as a Jewish Commonwealth.[90] This proposal was rejected out of hand. As is well known to all students of Zionist history, the Mandate does not refer to Palestine as the home of the Jewish people, but to the establishment of a national home for the Jewish people in Palestine.

The dominant figure in deciding the terms of the Mandate was Lord Curzon, who had replaced Lord Balfour as Foreign Secretary in October 1919. Lord Curzon was no fan of the Balfour Declaration. He had voted against it in the Cabinet in 1917.[91] While he was fully aware that Britain could not back down from its commitment in

[88] Shaw (n 62) 288–89.

[89] John J McTague Jr, 'Zionist-British Negotiations over the Draft Mandate for Palestine, 1920' (1980) 42 *Jewish Social Studies* 281; Malcolm Yapp, 'The Making of the Palestine Mandate' (1995) 1 *Middle East Lectures* 9.

[90] McTague (n 89).

[91] On Curzon's attitude see Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict* 1891–1949 (Pluto Press 2009) §§ 122–125; Yapp (n 89); David Gilmour, 'The Unregarded Prophet: Lord Curzon and the Palestine Question' (1996) 25 *Journal of Palestine Studies* 60.

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the Declaration, he was adamant on two points: (i) there would be no recognition of Jewish *title or rights* to Palestine; and (ii) no recognition would be given to Palestine as the home of the Jewish people, but only to the commitment of Britain to facilitate the establishment of a home for the Jewish people *in* Palestine.

Curzon's view carried the day. Hence it was that the Preamble to the Mandate does not recognise a right or title of the Jewish people to Palestine. Rather it declares 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'.[92]

There can be little doubt that this declaration amounted to important international political recognition of the Jewish people's claim to the establishment of a national home in Palestine. It is, doubtful, however, whether the declaration had any legal standing, even after the Council of the League of Nations approved the Mandate. The Mandate does not refer to a 'right', and in all events the League of Nations had no authority to recognise the rights of peoples over territory. The only power under Article 22 of the League Covenant was to approve the terms of the Mandate under which the mandatory powers would administer territory until such time as it would become independent.

The Mandate did not recognise the right or title of Jews to Palestine, nor even that they had a right to establish a *state* in Palestine. This was made perfectly clear by Winston Churchill, then British Colonial Secretary, in the White Paper that he published shortly before the Mandate was approved by the League Council.[93] In this White Paper, writing on behalf of the British government, Churchill declared:

> 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.

And he added:[94]

> In this connection it has been observed with satisfaction that at a meeting of the Zionist Congress, the supreme governing body of the Zionist Organization, held at Carlsbad in September, 1921, a resolution was passed expressing as the official statement of Zionist aims 'the determination of the Jewish people to live with the Arab people on terms of unity and mutual respect, and together with them to make the common home into a flourishing community, the upbuilding of which may assure to each of its peoples an undisturbed national development'.

[92] Yapp (n 89) argues that Curzon did not create a proper decision-making body for deciding the final wording of the Mandate. He left the matter to officials in his Ministry and did not lobby members of the Cabinet to accept his view. Curzon would have liked to weaken the connection of the Jewish people even more, but was forced to accept Balfour's version, which was incorporated in the Preamble to the Mandate.

[93] 'British White Papers: Churchill White Paper', *Jewish Virtual Library*, 3 June 1922, https://www.jewishvirtuallibrary.org/churchill-white-paper-1922.

[94] ibid.

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Many Jews, and non-Jews as well, hoped and thought that the Mandate would eventually lead to a state for the Jewish people in Eretz-Yisrael/Palestine, but one must distinguish between political aspirations and legal commitments. The Mandate did not recognise, either explicitly or implicitly, the legal right of the Jewish people to establish a state in Palestine.[95]

What about the rights of non-Jews who were the majority in Palestine when the Mandate was approved? The Balfour Declaration, and subsequently the Mandate, refer to the religious and civil rights of the non-Jewish communities. Those who wish to challenge the right of the Palestinian people to self-determination rely, inter alia, on the fact that there is no reference in the Mandate to the *political* rights of the non-Jewish communities.[96] In this regard a number of points must be stressed:

1. Britain's demand at San Remo that the Balfour Declaration be included in the Mandate over Palestine met with resistance from the French and Italian representatives. They demanded that reference to the political rights of non-Jews be included and dropped this demand only after the British delegation explained that, from the British point of view, the term 'civil rights' includes political rights.[97] This declaration of the British must be considered when interpreting Article 2 of the Mandate, which refers not only to the responsibility of the Mandatory Power to place the country under the conditions that 'will secure the establishment of the Jewish national home' but also to its 'responsibility for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion'.
2. Even if there is no express reference to the political rights of the non-Jews in Palestine in a document that was adopted in 1922, one cannot conclude that no such rights exist today, when self-determination of peoples has gained recognition as a protected right in international law.[98]

[95] On the meaning of the national home for the Jewish people see Loevy (n 77). Loevy shows that what lay behind the Balfour Declaration was not the idea of a Jewish state in Palestine but 'a European protected space in colonial territory'. See also Pedersen (n 33) 359 ('Neither the Balfour Declaration nor the Mandate for Palestine promised a Jewish state. Nor did those founding texts promise a Jewish "national home". What they promised, rather, was that the British government would "look with favour" ... on the Jewish effort to create that home themselves. The mandate was explicit on that point ... Indeed, the mandate instructed Britain to establish a common Palestinian citizenship and to foster self-governing institutions for the population as a whole').

[96] Rostow (n 8) 718 ('The term "civil rights" in that sentence is carefully distinguished from political rights'); Einhorn (n 10) 7.

[97] Pedersen (n 33) 35; Kattan (n 91) 131. It must be admitted that it is not entirely clear what the meaning of the term 'political rights' was at the time. Given that in 1920 there was no recognised *right* to self-determination, the term probably meant political rights within the domestic legal system, such as the right to vote in elections for representative bodies. Whatever it meant with regard to the 'non-Jewish communities', it must also have meant with regard to members of the Jewish community. The non-Jewish communities were not relegated to an inferior status in that only Jews had political rights.

[98] *Namibia* Advisory Opinion (n 44) [35] (in which the ICJ held that developments in international law 'leave little doubt that the ultimate object of the sacred trust was the self-determination and independence of the peoples concerned'). The Court repeated this view in *Western Sahara* Advisory Opinion [1975] ICJ Rep 12, 31–33. In its *Occupation* Advisory Opinion (n 14) [233], the ICJ went as far as to state that 'in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law'.

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Much has been written on the apparent contradiction between Article 22 of the League Covenant and the British Mandate over Palestine, in which Britain undertook to facilitate building a home for the Jewish people in Palestine, even though the inhabitants of Palestine were not asked their opinion on the matter, and the British were well aware that the Arab inhabitants of the country were opposed to this undertaking.[99] It is not my intention to discuss this apparent contradiction here. Suffice it to say that in interpreting the Mandate, one must try as far as possible to limit the apparent contradiction between the Mandate and Article 22, which provided the legal basis for approving Britain's Mandate over Palestine. In the present context this means that the well-being of all the inhabitants of Palestine must be a major consideration in the interpretation of the Mandate. One cannot interpret the Mandate as an instrument that addresses the interests of the Jews, and their interests alone. As mentioned above, the Mandate included express provisions demanding protection of the rights of all the inhabitants, and prohibiting discrimination.[100] This point has clear implications regarding the legal arrangements adopted in the territory after the Mandate ended, and especially after the State of Israel gained control over the whole territory of the Mandate in 1967. As the Mandate was about to end, the General Assembly of the United Nations appreciated this when, in Resolution 181 of 29 November 1947, it held that after the Mandate ended there must be an arrangement that recognises the rights of both national groups that constituted the population of Palestine.

Article 22 of the League Covenant was the only article that provided for granting a mandate to a member of the League to administer a territory that had been part of the territory of one of the empires that had been defeated in the First World War. It follows that Britain's obligations under the Mandate could not free her from respect for the principle that the well-being and development of the peoples in Palestine 'formed a sacred trust of civilisation'. The claim that the Mandate was a special case that departed from this principle is incompatible both with Article 22 and with the express statement in the opening paragraph of the Mandate that it was being entrusted to Great Britain 'with the purpose of giving effect to Article 22'.

3.5. Approval of the Mandate by the League of Nations

Even though Balfour was no longer Foreign Secretary, and Foreign Secretary Curzon was not enamoured with the idea that Britain would undertake the Mandate over Palestine,[101] the Prime Minister, Lloyd George, supported the Mandate, and the task of obtaining League approval for it was entrusted to Balfour.[102] Balfour faced

[99] eg, Letter of Lord Balfour to Prime Minister Lloyd George, 19 February 1919, in which Balfour wrote: 'The weak point of our position, of course, is that in the case of Palestine we deliberately and rightly decline to accept the principle of self-determination' (cited in Kattan (n 91) 121).

[100] See text preceding and following n 96 above.

[101] MacMillan (n 63) 424 (writing that Curzon expressed the view of many officials in the Foreign Office when he said to Balfour: 'Personally, I am so convinced that Palestine will be a rankling thorn in the flesh of whoever is charged with its Mandate, that I would withdraw from this responsibility while we yet can').

[102] Susan Pedersen, 'Writing the Balfour Declaration into the Mandate for Palestine' (2022) 45 *International History Review* 279. After being replaced as Foreign Secretary by Lord Curzon, Balfour remained in the Cabinet as Lord President of the Council.

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resistance from some members of the League.[103] Article 5 of the League Covenant adopted the principle of unanimity for decisions both of the League Council and of its Assembly. The Covenant did not specify which of these two bodies was to approve a Mandate and Balfour feared that if the decision were in the hands of the Assembly, in which all League members had a vote, the Mandate might not be approved. He therefore was adamant that the decision should be in the hands of the Council, in which there were only eight members, including the four Principal Allied Powers that had approved the Mandate at San Remo.[104] He managed to obtain France's agreement to this move, on condition that the Mandate over Palestine would not enter into force until France's Mandate over Syria and Lebanon was approved.[105] Approval of the latter Mandate was being blocked because of differences between France and Italy. After discussion of the draft submitted by Britain – in the course of which Britain agreed to a slight change in Article 28 of its draft, and members of the Council reached agreement on the wording of Article 14 relating to the Holy Places – on 24 July 1922, the Council approved the Mandate.[106] Following the agreement with France, the Council expressly stipulated that the Mandate over Palestine would enter into force only after France and Italy informed the Council that they had reached an agreement that would allow the Council to approve the French Mandate. On 29 September 1923, France and Italy informed the Council that they had reached agreement, and the Council decided that the Mandates over Palestine and Syria would enter into force immediately.[107]

The fact that the British Mandate (like all the other mandates) was confirmed by the Council, rather than the Assembly of the League of Nations, is significant. In his letter of 19 June 2023, the Cabinet Secretary, displaying unfortunate ignorance, states that the Mandate was approved unanimously by the League of Nations at San Remo. As stated above, the San Remo Conference was not a conference of the League, and the Mandate was not approved by the League at San Remo. Perhaps of greater importance is the fact that when the Mandate was approved, it was approved by the Council, which comprised only eight of the 51 members of the League. Hence one cannot even argue that approval of the declaration on 'the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country' is evidence of support for this declaration by the majority of states that were members of the League, let alone that it achieved unanimous support of the League of Nations.

[103] For example, the Vatican, which opposed the Mandate because it feared Jewish and Muslim control over the Christian holy places, had a strong influence over Italy and, it would seem, over other Catholic members of the League too: Pedersen, ibid 286.

[104] Pedersen (n 102). Besides the Principal Allied Powers (Britain, France, Italy, Japan), which were permanent members of the Council, the other members of the Council at the time were Belgium, Brazil, China and Spain.

[105] ibid.

[106] Minutes of Thirteenth (Public) Meeting of Council, held at St James Palace, London, on Monday 24 July 1922 at 3 pm, *League of Nations, Official Journal*.

[107] Minutes of Twenty-Third Meeting of Council, held at Geneva on Saturday 29 September 1923 at 10:30 am, *League of Nations Official Journal*.

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3.6. The validity of the Mandate

At the time of the Mandate and ever since there have been scholars and political figures who have argued that the Mandate over Palestine was illegal.[108] While, for the purposes of this article, these arguments are neither here nor there, in order to complete the picture of the Mandate, I shall briefly relate to them.

Critics have raised three main arguments against the Mandate's validity: (i) the Mandate was incompatible with Article 22 of the League Covenant, which was the only legal basis the League had for approving a mandate; (ii) the Mandate violated the right of the Palestinian majority in Palestine to self-determination; and (iii) the Mandate was approved by the League before Turkey had renounced its sovereignty over Palestine. In his book on the creation of states, James Crawford discussed and dismissed these arguments.[109]

Before addressing the arguments, mention must be made of the intertemporal principle according to which the legality of actions must be assessed according to the prevailing legal norms at the time those actions were taken.[110] In other words, the legal *validity* of the Mandate must be judged according to prevailing norms of international law in 1922, and not according to the norms of international law in the twenty-first century.[111]

The compatibility of the Mandate with Article 22 of the League Covenant was questioned when it was approved by the League Council, but the Council decided nevertheless to approve the Mandate.[112] Subsequently it was regarded as valid throughout the 1920s and 1930s during which time the Permanent Mandates Commission in Geneva reviewed Britain's reports as the Mandatory Power

[108] For presentation of the arguments against the validity of the Mandate see WF Boustany, *The Palestine Mandate: Invalid and Impracticable* (American Press 1936); Kattan (n 91) 54–63; 117–45; Strawson (n 70) 66–70. The most extreme view is presented by John Quigley, *Britain and its Mandate over Palestine: Legal Chicanery on a World Stage* (Anthem Press 2022). Quigley argues that the League of Nations was not authorised to grant a mandate over territory that was part of the Ottoman Empire until Turkey had renounced its sovereignty over the territory. As the Treaty of Sèvres was never ratified, Turkey had not renounced its sovereignty when the League Council approved the Mandate in July 1922, nor when it decided that the Mandate would enter into force in September 1923. However, Turkey ratified the Treaty of Lausanne in August 1923, thereby renouncing its sovereignty over Palestine, before the Council held on 29 September 1923 that the Mandate would enter into force. It is indeed true that the Treaty of Lausanne did not enter into force until all the parties to the treaty had ratified it in 1924. However, it would seem that Turkey's renunciation of its sovereignty became valid as soon as Turkey ratified the treaty. In all events, in the Treaty of Lausanne Turkey agreed to actions that had already been taken with regard to territories (including Palestine) over which it renounced its sovereignty: Feinberg (n 79) 14–16.

[109] Crawford (n 33) 428–30.

[110] On the meaning and scope of this principle see Marcus Kotzur and Christina Simmig, 'Intertemporal Law' (last updated November 2024) *Max Planck Encyclopedia of Public International Law* 1433; TO Elias, 'The Doctrine of Intertemporal Law' (1980) 74 *American Journal of International Law* 285; Steven Wheatley, 'Revisiting the Doctrine of Intertemporal Law' (2021) 41 *Oxford Journal of Legal Studies* 484.

[111] As we shall see below (text accompanying note 166), while the *validity* of a decision is determined by the law at the time the decision was made, in the *interpretation* of the continued application of the decision subsequent developments in international law must be considered. A decision that was lawful when made may be regarded as unlawful later when it clashes with a peremptory norm of international law. This distinction between the original validity and subsequent interpretation is especially relevant when considering developments in international law regarding individual and group rights.

[112] See Crawford (n 33) 429.

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and received petitions from individuals and groups in Palestine.[113] In 1924, the Permanent International Court of Justice heard a case in which Greece argued that Britain had violated terms of the Mandate.[114] None of the parties, nor the Court itself, raised doubts as to the legal validity of the Mandate. In two more recent cases before the International Court of Justice, judges of that court wrote about the Mandate and its implications for the rights of the Palestinians, without casting any doubt as to the Mandate's validity.[115] Furthermore, the discussions leading to the adoption of Article 80 of the UN Charter, and indeed Article 80 itself, are all based on the view that the Mandate was legally valid.[116] This view was clearly reflected in General Assembly Resolution 181 of 29 November 1947, in which the General Assembly held that the Mandate would end when Britain left Palestine.

Turning to the argument on self-determination, there is no doubt that Britain was fully aware that the terms of the Mandate were incompatible with the emerging political principle of self-determination.[117] However, at that time this principle had not gained recognition as a binding legal principle, let alone a legal right.[118] Therefore, the argument that the Mandate was incompatible with the self-determination of the people in Palestine was a perfectly legitimate and understandable *political* argument.[119] It did not, and could not, however, affect the *legal* validity of the Mandate.

Finally, it is indeed true that Turkey did not ratify the Treaty of Sèvres in which it would have expressed its agreement to inclusion of the Balfour Declaration in the Mandate over Palestine. However, this clause had nothing to do with the refusal of Kamal Atatürk to ratify the treaty. That refusal was based on a change in the facts on the ground that had been effected by territorial gains of Kamal Atatürk's Turkish National Movement, and rejection of the humiliating and harsh territorial and financial demands that the Treaty of Sèvres placed on Turkey.[120] The Treaty of Lausanne, which was far more sensitive to Turkey's interests, was signed in July 1923 and ratified by Turkey on 23 August 1923.[121] By this stage, the League of Nations had already approved the Mandate but it had not yet entered into force. The Treaty of Lausanne included Turkey's renunciation of 'all rights and titles whatsoever' over territories of the Ottoman Empire outside the borders of Turkey agreed in the Treaty, 'the future of these territories … being settled or to be settled by the parties concerned'. Renunciation of Turkish rights over Palestine was sufficient to allow the victorious powers to decide its fate and there was no need for Turkey to agree on how

[113] For a thorough discussion of the work of the Mandates Commission see Pedersen (n 33).

[114] PCIJ, *Mavrommatis Palestine Concessions (Greece v UK)*, Judgment (1924) (Ser B, No 3) 12.

[115] *Wall* Advisory Opinion (n 14) Separate Opinion of Judge El-Araby; *Occupation* Advisory Opinion (n 14).

[116] UN Charter (n 42). On these discussions see Feinberg (n 79).

[117] See Balfour's statement (n 99) and Kattan (n 91) 121–25.

[118] Crawford (n 33) 428; Kattan (n 91) 138.

[119] See Kattan (n 91) 121–42.

[120] MacMillan (n 63) 445–55. See also Montgomery (n 81) 775 (arguing that 'the failure of the Treaty of Sevres cannot be attributed to Kemal alone. The seeds of disaster lay in the conflicting interests of the Allies themselves').

[121] For the background to and differences between the Treaty of Sèvres and the Treaty of Lausanne see 'History – Lausanne Treaty', The Lausanne Project, https://thelausanneproject.com/history-lausanne-treaty.

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and by whom the territory would be governed. In any event, the future of Palestine as a British Mandate territory had already been settled, and Turkey agreed in the Treaty of Lausanne to what had been settled.[122] Finally, Turkey ratified the Treaty of Lausanne before the Council of the League of Nations decided on 29 September 1923 that the British Mandate over Palestine would come into effect. Hence, even if the treaty did not formally enter into force until all the other signatories had ratified it, Turkey had already renounced its sovereignty over Palestine when the Mandate came into effect.[123]

To summarise: I maintain that we must accept James Crawford's analysis and conclusion. As the Mandate was approved by the League of Nations Council and was retained in force under Article 80 of the UN Charter, its legal validity was clear.

3.7. The Mandate: An agreement between the League of Nations and Britain

What was the legal status of the Mandate? This question arose before the ICJ in the *Namibia* case. In that case the ICJ held that a League of Nations mandate was an international agreement between the League and the mandatory power.[124] There is nothing in the League of Nations Covenant to suggest that decisions of the League Council, such as the decision to approve a Mandate, imposed any legal obligations on members of the League (other than the obligation to respect the agreement between the League and the mandatory power), not to mention states that were not members when the decision was made. At the time, the legal doctrine in international law was that an international agreement does not generally give rights to or impose duties on persons or states who were not parties to the agreement.[125] This view was reflected many years later in a judgment of the Supreme Court of Israel.[126]

Under Article 26 of the British Mandate over Palestine, Britain did indeed agree that if any dispute were to arise between it and a member of the League of Nations regarding implementation or interpretation of the Mandate, if the dispute could not be settled by negotiation, the Permanent Court of International Justice would have

[122] Crawford (n 33).

[123] But cf Quigley (n 108) (arguing that since the Mandate was approved before the Treaty of Lausanne entered into force the Mandate had no validity).

[124] ICJ, *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections [1962] ICJ Rep 319, 331 ('The Mandate, in fact and in law, is an international agreement having the character of a treaty or convention. It is an instrument having the character of a treaty or convention and embodying international engagements for the Mandatory as defined by the Council and accepted by the Mandatory').

[125] Wright (n 62) 119 (explains that since the populations of the mandatory area were not parties to the agreement, they were not able to acquire rights according to it). See also Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331, art 34 (which relates to the obligations and rights of third party states). On developments in international law regarding the rights of the individual see Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) Ch 2.

[126] CA 22/55 *Custodian of Absentee Property v Samara* (12 December 1956). In this case the respondent was the resident of a village in the 'Triangle' that was included on the Israeli side of the Armistice Line with Jordan. In challenging the order expropriating his property, the respondent relied on Israel's commitment in the Armistice Agreement to respect the property rights of villagers in the 'Triangle'. The Supreme Court held that a third party had no rights under the Agreement, which bound only the states that were parties to it.

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jurisdiction to hear it. One could argue that the implication was that the commitments of the Mandatory Power were not only to the League, but to all its members. This argument was rejected by the ICJ in the *South West Africa* case (*Ethiopia and Liberia v South Africa*). The Court held that the provision in Article 26, which also appeared in the Mandate of South Africa over Namibia, did not mean that the Mandatory Power had a general legal obligation towards each member state of the League to fulfil its obligations under the Mandate.[127] Even if we reject this highly controversial view of the ICJ, the right of member states towards the Mandatory Power was only the right to demand that it fulfil its obligations towards the League under the Mandate.

As the Mandate was an agreement between the League of Nations and the Mandatory Power, the obligations under the Mandate lasted for as long as that agreement remained in force. When, with the approval of the UN General Assembly, the Mandate ended, those obligations ended too, and became matters of purely historical interest. The fact that the League Council had approved them as part of Britain's Mandate did not give them validity in any other context.

3.8. The right of Jews to settle in the Land of Israel

The main legal argument of those who have advanced the right of Jews to settle in the West Bank after Israel gained control over the area in 1967 rests on the British Mandate. This argument – first advanced by Professor Rostow, later adopted in the Edmond Levy Report (2012),[128] and more recently presented in the Cabinet Secretary's letter of 19 June 2023 – rests on three propositions:

1. The Mandate recognised a right of Jews to settle in all parts of Mandatory Palestine.
2. That right was a right *erga omnes*.
3. That right continues to exist after the British Mandate ended.

As we have seen above, the British refused to include in the Mandate any reference to the right or title of Jews, or of the Jewish people, to Eretz Yisrael/Palestine, nor even a *right* to establish a home in Palestine. After recognising the historical connection of the Jewish people with Palestine as grounds for reconstituting their national home, the Mandate made Britain 'responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home'. It also held that 'while ensuring that the rights and position of other sections of the population are not prejudiced', the British administration in Palestine 'shall facilitate Jewish immigration under suitable conditions

[127] ICJ, *South West Africa* cases *(Ethiopia v South Africa; Liberia v South Africa)*, Judgment of 19 July 1966 [1966] ICJ Rep 6. It must be admitted that this judgment was highly controversial. The Court was evenly split and the decision was based on a casting vote of the Court's president, Sir Percy Spenser. The Court held that the provision referring to a dispute between the Mandatory Power and a member of the League related to the case in which that member had a 'special interest' which, it claimed, the Mandatory Power had violated. It would seem that such a 'special interest' existed in the case of *Mavrommatis Palestine Concessions (Greece v Great Britain)* (n 114). The Permanent Court of International Justice held that it had jurisdiction to examine whether Britain had violated terms of the Mandate when it refused to recognise the concessions of a Greek national granted to him under contracts with the Ottoman authorities.

[128] Levy Report (n 11).

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and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes'.[129]

There is no doubt that, as clauses in a treaty between Britain and the League of Nations, these clauses imposed legal obligations on Great Britain. However, as stated above, those obligations were towards the League of Nations, and possibly to all members of the League,[130] and not towards the beneficiaries of the Mandate.[131] Even if we assume, however, that the beneficiaries had rights under the Mandate, those rights were rights towards Great Britain. In other words, for as long as the Mandate was in force, the third-party beneficiaries could demand that Britain fulfil its treaty obligations. Those obligations, and the corresponding right to demand their fulfilment, ended when the Mandate itself ended.

The claim that Jews have the right to continue to settle in all parts of Mandatory Palestine is based on the obligation of Britain 'to encourage ... close settlement by Jews on the land'. Consistent with the notion that the Mandate did not recognise rights or entitlements of Jews, this provision obligated Britain only to encourage close settlement of Jews on the land, and even then the obligation was limited by Britain's obligation to ensure that other sections of the population were not prejudiced. Hence, assuming the Mandate did grant a right to Jews who were the intended beneficiaries of the Mandate, their right regarding settlement was simply the right to demand that Britain encourage such settlement, subject to the reservation regarding other sections of the population. It was not a right to settle in all parts of Palestine, but the right to demand that the Mandatory Power encourage settlement. This could not be, and was not, a right *erga omnes*.

Under Article 25 of the Mandate, Britain was authorised to exclude application of its obligations regarding the national home for the Jewish people in the territory east of the Jordan River.[132] Hence, there is some basis to the argument that the British were not authorised to exclude application of these obligations in the territory west of the Jordan. However, this has no implications regarding the right of Jews to settle in Palestine. All it means is that while the Mandate was in force, Britain's obligation to encourage close settlement of Jews related to the whole of Palestine west of the

[129] Article 4 of the Mandate for Palestine provides: 'An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration to assist and take part in the development of the country'. Under para 2 of this article the Zionist Organization was recognised as such an agency, for 'so long as its organization and constitution are in the opinion of the Mandatory appropriate'.

[130] See discussion in Section 3.7 above.

[131] See fn 125 above.

[132] In September 1922, after the Mandate had been approved but before it entered into force, Britain informed the League Council that in accordance with its authority under Article 25 of the Mandate, it would not be implementing its obligations relating to the Jewish national home in Transjordan. In May 1923 Britain recognised an independent government in Transjordan headed by the Emir Abdallah. The British move was approved by the League Council. Contrary to the generally accepted view, Transjordan was not intended to be part of the British Mandate; it was a British protectorate and the British asked for it to be included in the Mandate: Bernard Wasserstein, *Israelis and Palestinians: Why Do They Fight? Can They Stop*? (Profile Books 2003) 102–07. See also Arieli (n 77).

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Jordan (subject, always, to ensuring the rights and interests of other sections of the population).[133] As stated above, to the extent that a right existed, although the Jews were not a party to the agreement between the League and Britain, it was a right to demand that *Britain* encourage settlement and not a right to settle wherever they chose to settle.

3.9. Article 80 of the UN Charter

With the dissolution of the League of Nations after the end of the Second World War and the establishment of the United Nations, a legal problem arose regarding the status of territories that had been administered under a mandate from the League. The UN Charter did not retain the mandate system. In its stead, it recognised the possibility of subjecting certain territories, including those held under a mandate, to a trusteeship.[134] Subjecting such territories to a trusteeship was not automatic. According to Article 77(2) of the Charter, the territories that would be subject to a trusteeship, and under what terms, would be 'a matter for subsequent agreement'.

Article 80 addresses the question of the status of mandate territories that had not been made subject to a trusteeship.[135] Did the mandate end with the dissolution of the League of Nations, or were the mandatory powers still obligated to respect the terms of the mandate? Article 80 stipulates that nothing in Chapter XII of the Charter concerning trusteeships 'shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties'. In other words, even though the League of Nations, which had approved the Mandate, no longer existed, Britain was still obligated to comply with its undertakings under the Mandate. To the extent that Jews had a right to demand that Britain fulfil its Mandate obligations, *this* right continued to exist after the League of Nations was dissolved and no trusteeship had been established in place of the Mandate. When the Mandate ended with the approval of the UN General Assembly, Britain no longer had any obligations under the Mandate and so, obviously, the right to demand that it fulfil its Mandate obligations was no longer relevant.[136]

[133] It may be added that Transjordan was separated from the territory west of the Jordan before the Mandate entered into force on 29 September 1923. Hence the area east of the Jordan river was not part of the territory of the Mandate from the day it entered into force.

[134] UN Charter (n 42) art 77.

[135] Shaw (n 62) 303.

[136] Professor Feinberg wrote that the use in Article 80 of the word 'peoples' (and not 'people') implies that the UN wanted to ensure that 'the rights guaranteed to the Jewish people by the Palestine Mandate were still valid and operative': Nathan Feinberg, *The Arab-Israel Conflict in International Law* (Oxford University Press 1970) 40. At the same time, Feinberg stated that with the end of the Mandate and the establishment of the State of Israel, 'the status of the Jewish people in international law – as the bearer of the right to a national home in Palestine – was indeed extinguished'. According to Feinberg, although the constitutive recognition of the right granted to the Jewish people to establish a national home in Palestine ended, the declarative recognition of the Jewish people's existence and its historical connection with Palestine remained valid: ibid 26–27. The implications of Feinberg's view are clearly that, with the end of the Mandate and the establishment of the Jewish state, the Jewish people no longer had a right to territory of the Mandate that was not part of the sovereign territory of state. See also Quigley (n 108) 146–47.

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3.10. The trusteeship argument

Professor Rostow based his claim that the parts of Palestine that were not included in Israel's sovereign territory were subject to a trust of some sort on the advisory opinion of the ICJ in the *Namibia* case.[137] In that case, South Africa continued its control over Namibia even though its Mandate over the territory had been terminated by the General Assembly. In this context, the ICJ held that South Africa was bound by the duties of a trustee over the territory, and that the members of the United Nations were bound to see that it fulfilled these duties. Rostow was aware, of course, of the significant difference between that case and the case of the West Bank, in which the Mandatory Power had relinquished its control over the territory. However, he argued that a trust continues even when the original trustee denies or resigns. Applying this to the territory of the British Mandate, he argued that the trust continued even after the UN General Assembly had approved Britain's decision to end the Mandate and no longer had control over the territory. The trust would be terminated only if the territory were made subject to a UN trusteeship or another state were established in the area.

Rostow's argument ignores the fact that the mandate system was created in order to give a particular state the 'mandate' to administer a territory as trustee of a 'sacred trust' until the territory became independent. It was not a system to define the status of territories that were no longer part of a recognised state. The mandate system created an exception to the emerging political principle of self-determination, in creating a mechanism for provisional administration over the territory until the principle could be implemented.[138] When the UN General Assembly confirmed Britain's decision to terminate the Mandate, it recommended that the people of Palestine should exercise their right to self-determination in two states: a Jewish state and an Arab state. The United Nations could have decided to subject the territory of Palestine to a trusteeship. Although the US submitted a plan for it to do so,[139] the proposal was dropped after Israel declared its independence.[140] The fact that a Palestinian state was not established in 1948 in no way diminishes the right of the Palestinians in the part of Palestine that did not become part of Israel to exercise their right to self-determination.

Rostow's trust argument has received little support in the international community.[141] However, let us assume for the moment that the 'sacred trust' created by the Mandate over Palestine continues in force after the Mandate ended. What are the implications? As mentioned above, the 'sacred trust' mentioned in Article 22 of the League Covenant was a sacred trust for all the peoples in the mandated

[137] Rostow (n 6).

[138] See the characterisation of 'mandate' in the MPEPIL: 'The mandate system was created in the aftermath of World War I to resolve the question of jurisdiction over the colonial territories detached from the defeated nations of Germany and the Ottoman (Turkish) Empire … Under this system, selected nation States were granted mandates to govern selected territories on behalf of the League of Nations' (Gordon (n 38)).

[139] Thomas J Hamilton, 'U.S. Trustee Plan for Palestine Gets Cool U.N. Greeting', *The New York Times*, 21 April 1948, https://www.nytimes.com/1948/04/21/archives/us-trustee-plan-for-palestine-gets-cool-un-greeting-new-zealand.html.

[140] Gail J Boling, 'The U.S.– Proposed "Trustee Agreement" for Palestine: The UN-Styled Plan that Could Have Avoided Forcible Displacement of the Palestinian Refugees in 1948' (2003) 21(2) *Refuge* 70.

[141] See Crawford (n 33) 567.

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territories until such time as they would gain their independence. The Jews in Eretz Yisrael/Palestine have gained their independence; the other people in the territory – the Palestinian Arabs – have not. Hence the implication of Rostow's view is that the UN has a duty to make sure that the trust is not abused and that the Palestinians who are subject to the sacred trust will obtain their independence too. This was indeed the view taken by the International Court of Justice in its advisory opinion in the *Wall* case. The ICJ stated:[142]

> The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine ... This responsibility has been described by the General Assembly as 'a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy' (General Assembly resolution 571107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

Rostow's trust argument was also taken up by a UN committee. In a recent report this UN committee accepts Rostow's argument that the trust over Palestine continues after the end of the Mandate. The Committee claims, however, that Rostow ignored Article 5 of the Mandate, which states that the Mandatory Power must ensure that no part of the area is transferred to the sovereignty of a foreign government. The Committee argues that in the area that is not part of its territory, Israel is a foreign power that may not transfer part of its population into the area of the trust.[143]

Paradoxically, if one is to accept Rostow's argument that the West Bank is still subject to a trust, and to apply the *Namibia* precedent to the present situation, we ineluctably reach the conclusion that Israel has become the trustee of the territory. This is actually consistent with the view that an occupying power has a duty of trust towards the inhabitants of the occupied territory.[144] The duty of the Mandatory Power to place the country under conditions that will allow creation of the Jewish home has been fulfilled. The trust now relates to the duty to further the rights of the Palestinian inhabitants of the land, including their right to self-determination.

We see then that the trust argument is a double-edged sword. Rostow regarded the Mandate as an instrument that subjected all the rights of the other inhabitants of Palestine to what he regarded as the right of Jews to settle in all parts of the land. Hence he opined that the implications of the continuing trust over the West Bank were that that right continues to be valid. However, as we have shown here, the Mandate did not recognise a *right* of Jews to settle in all parts of Mandatory Palestine

[142] *Wall* Advisory Opinion (n 14) [49].

[143] Committee on the Exercise of the Rights of the Palestinian People, 'The Legality of the Israeli Occupation of the Occupied Palestinian Territory, Including East Jerusalem' (20 September 2023), UN Doc A/78/378, 29.

[144] Orna Ben-Naftali, Michael Sfard and Hedi Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018) 14–16.

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and was certainly mindful of the rights of the non-Jewish inhabitants of the land. When it confirmed Britain's decision to end the Mandate, the UN General Assembly recommended a future government over the territory that would allow both Jews and Arabs to realise their right to self-determination. Since the Jews have exercised their right, any trust that still exists must imply the duty to the further exercise by the Palestinian Arabs of their right to self-determination.

3.11. General Assembly Resolution 181

A great deal has been written about this resolution, adopted by a two-thirds majority in the General Assembly of the United Nations on 29 November 1947.[145] In discussing this famous resolution, two questions arise:

1. Did the General Assembly have the authority to confirm Britain's decision to end the Mandate that had been approved by the Council of the League of Nations?
2. Did the General Assembly have the authority to make a *binding* decision on the form of government that would be established in the area when the Mandate ended?

In the present context we are not concerned with the second question, about which there is broad agreement that the answer is negative. According to Article 10 of the UN Charter the General Assembly does not have the authority to make decisions that bind UN member states, not to mention peoples who are not and could not be members of the UN, but merely to discuss and make recommendations on questions and matters within the scope of the Charter. Hence the widely held view is that the Partition Plan was a recommendation.[146] If there was an organ of the United Nations that could have bound states to accept the Partition Plan, that organ was the Security Council. However, despite the request of the General Assembly that the Security Council give effect to its recommendation, the Security Council refrained from doing so.

Turning to the first question: the fact that the General Assembly did not have the authority to adopt a binding resolution on the future form of government in Palestine after the British Mandate ended does not mean that it did not have the authority to approve Britain's decision to end the Mandate. The Council of the League of Nations had the authority to approve the termination of a mandate that a member state had been granted. Which body in the UN had this authority after dissolution of the League? This question arose before the International Court of Justice in the case of South Africa's mandate in *Namibia* (*South West Africa*).[147] In this case the Court held that the UN General Assembly had the authority to terminate South Africa's Mandate over Namibia because of South Africa's violation of its terms. If the General Assembly has the authority to terminate a League of Nations mandate based

[145] UNGA Res 181 (II) (n 41).

[146] Indeed, some were of the opinion that the resolution was binding, but the common opinion is that it was merely a recommendation; see Robbie Sabel, *International Law and the Arab-Israeli Conflict* (2022) 93; Feinberg (n 79).

[147] *Namibia* Advisory Opinion (n 41).

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on violation of its terms, it also must have the authority to approve the decision of the mandatory power to end the mandate.

UNGA Resolution 181 states that the General Assembly '[t]akes note of the declaration by the mandatory Power that it plans to complete its evacuation of Palestine by 1 August 1948'. The first article in the Partition Plan, which forms part of that resolution states that '[t]he Mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948'.

Following this resolution the British Colonial Secretary announced on 11 December 1947 that Britain would be leaving Palestine on 15 May 1948. In the light of these developments the considered view of virtually all experts is that the Mandate over Palestine ended on the day on which Britain withdrew its forces from the country, namely 15 May 1948, which is, of course, the day on which Israel became an independent state.[148] This view was also expressed in a judgment of the Supreme Court of Israel.[149]

Professor Rostow advanced the view that the Mandate was never terminated and that it continues to apply in those parts of Palestine in which no state had arisen.[150] But his view had no traction. As mentioned, other experts – including James Crawford, Nathan Feinberg and Malcolm Shaw – all took the view that the Mandate ended after Britain withdrew from the Mandate with the approval of the UN General Assembly.[151] In its advisory opinion on the construction of the separation barrier the ICJ took this view too.[152] From the numerous resolutions of the UN Security Council in which it refers to the West Bank as occupied territory, it is abundantly clear that this is also the position of the Security Council.[153] Israel never raised the claim that the Mandate continues to apply in parts of Eretz-Yisrael/Palestine. It accepted the UN Security Council Resolution 242 of November 1967 in which there is not a hint that some of the territories Israel occupied in 1967 are still subject to the terms of a League Mandate. The principles laid down in that resolution – 'withdrawal of Israel from territories occupied in 1967, the termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace' – are not consistent with the view that some of these territories are still subject to the terms of a mandate.

[148] Sabel (n 146); Feinberg (n 79) 121; Shaw (n 62); Crawford (n 33) 567, 580.

[149] HCJ 222/68 *Chugim Leumi'im v Minister of Police* (15 September 1970) para 18 (Justice Silberg) ('The "establishment of the State" and the "end of the Mandate" are one and the same thing. Since the State was established when the Mandate ended, and the Mandate ended when the State was established').

[150] Rostow (n 6) and (n 8); Eugene V Rostow, 'Historical Approach to the Issue of Legality of Jewish Settlement Activity', *The New Republic*, 23 April 1990; Eugene V Rostow, 'Are the Settlements Legal? Resolved', *The New Republic*, 21 October 1991.

[151] See Crawford (n 33) 567, 580; Feinberg (n 79) 121; Shaw (n 62) 303 (in his words: 'What is indisputable, it is believed, is that the internationally valid Mandate was brought to an end by the deliberate and intentional relinquishing of its authority by Britain midnight on 14–15 May 1948, as validated and authorised by the UN General Assembly Res 181(II), the Partition Resolution, that declared that the Mandate would terminate a soon as possible and not later than 1 August 1948').

[152] *Wall* Advisory Opinion (n 14) para 162.

[153] See UN Security Council Resolutions listed in note 12 above,

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It is interesting to note in this context that Rostow, who was involved in 1967 in drafting UNSC Resolution 242, argued that since this resolution did not demand immediate Israeli withdrawal from territories conquered in the 1967 War, Adam Roberts was mistaken when he regarded the West Bank as occupied territory.[154] It seems to me that in making this argument Rostow was assuming that an occupation is by its very nature unlawful, and that the occupying power therefore is obligated to end the occupation immediately and unconditionally.[155] In this he was mistaken. Resolution 242 emphasised 'the inadmissibility of the acquisition of territory by war'[156] and held that Israeli armed forces must withdraw 'from territories occupied in the recent conflict'. Nevertheless, it tied that withdrawal to termination of all claims of belligerency and 'to respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognised borders free from acts or threats of force'. Thus, Resolution 242 implicitly recognises that when territory is occupied in the course of a war of self-defence, withdrawal from the occupied territory may be made dependent on peaceful resolution of the conflict between the warring parties. However, this does not in any way imply that the territory taken in the course of the war is not occupied territory in which the international law of belligerent occupation applies. In any event, despite his involvement in drafting the resolution, Rostow's view of the meaning and implications of the resolution has not been widely accepted. In fact, the meaning of the resolution has generated a great deal of discussion in the literature, exposing a wide range of views on the issue.[157]

[154] Rostow (n 8). As noted there, the 'Correspondence' was written as a reaction to Roberts (n 8).

[155] Authorities are divided on the very question of whether an occupation may be lawful or unlawful. One view, promoted by Yoram Dinstein, is that occupation is a purely factual situation that is neither lawful nor unlawful. Another view assesses an occupation in the light of *jus ad bellum*. Hence if the territory is taken in a war of aggression the occupation is unlawful, while if it is taken in a war of self-defence, it may be lawful (see Lieblich and Benvenisti (n 46) 65–66). Even if we accept that an occupation is not unlawful per se, there is a strong argument that it may become unlawful if the occupying power violates basic principles of the law of belligerent occupation. See Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law* 551; Yaël Ronen, 'Illegal Occupation and Its Consequences' (2008) 41 *Israel Law Review* 201; Ariel Zemach, 'Can Occupation Resulting from a War of Self-Defense Become Illegal?' (2015) 24 *Minnesota Journal of International Law* 313. In its *Wall* Advisory Opinion (n 14), rather than holding that the occupation of the West Bank by Israel was (or had become) unlawful, the ICJ held that Israel's continued presence in the area is unlawful.

[156] As is well known, the English text refers to 'territories occupied', while the French text refers to '*des* territoires occupés' and the Spanish text refers to 'de *los* territorios que ocuparon'. The use of the definite article in both the French and Spanish versions of the resolution is the basis for the demand that Israel withdraw from every inch of territory occupied in 1967.

[157] On the background to the text of Resolution 242 see David McDowall, 'Clarity or Ambiguity? The Withdrawal Clause of UN Security Council Resolution 242' (2014) 90 *International Affairs* 1367. For presentation of Israel's understanding of the Resolution see Ruth Lapidoth, 'The Misleading Interpretation of UN Security Council Resolution 242 (1967)' (2011) 23 *Jewish Political Studies Review* 7. For differing views on the interpretation of the resolution see, eg, Winston P Nagan and Aitza M Haddad, 'Recognition of Palestinian Statehood: A Clarification of the Interests of the Concerned Parties' (2012) 40 *Georgia Journal of International and Comparative Law* 341 (arguing that Israel's settlement activity flies in the face of Resolution 242 and is therefore unlawful); John McHugo, 'Resolution 242: A Legal Reappraisal of the Right Wing Israeli Interpretation of the Withdrawal Phrase with reference to the Conflict between Israel and the

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3.12. The Mandate and other international instruments

One of the inexplicable assumptions implicit in the Rostow argument is that the Mandate is some kind of 'supra international document' that trumps all subsequent developments in international law, including decisions of the most important international organs, including the UN Security Council. I write that this is an assumption, since none of the people who have supported the 'Mandate argument' have ever explained on what theory they base the primacy of the Mandate.[158] Unlike Article 25 of the UN Charter, which provides that decisions of the Security Council bind all member states, there was no provision in the League of Nations Covenant under which decisions of the Council or Assembly bound members. Furthermore, unlike Article 103 of the UN Charter, which gives priority to the Charter obligations of UN members over their other treaty obligations, the League Covenant did not give primacy to members' Covenant obligations.

There are numerous resolutions of the UN General Assembly and Security Council declaring that Israel is an occupying power in the West Bank and, as such, is bound by its obligations under the Fourth Geneva Convention. Leaving aside the General Assembly resolutions, which are not legally binding, a strong case can be made that at least some of the Security Council resolutions include decisions that are binding. Article 25 of the Charter stipulates that the member states accept and agree to carry out all 'decisions' of the Security Council. In the *Namibia* case, the ICJ rejected South Africa's argument that only Security Council resolutions passed under Chapter VII of the Charter are binding.[159] Even resolutions passed under Chapter VI may be binding, all depending on the Council's intention, as reflected, inter alia, in the language used in the resolution.[160] Hence, for example, in UNSC Resolution 2334 (23 December 2016) the Security Council reiterated its '*demand* that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard'.[161]

Palestinians' (2002) 51 *International* and *Comparative Law Quarterly* 851 (arguing that the resolution requires Israeli withdrawal from all the territories taken in 1967); Eugene Kontorovich, 'Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal' (2015) 16 *Chicago Journal of International Law* 127 (arguing that the Resolution requires only partial Israeli withdrawal from territories taken in 1967).

[158] Professor Feinberg wrote in 1936 that by its approval of the Mandate, the League of Nations obliged member states to help Britain in fulfilling its obligations according to the Mandate and, in any case, they were not permitted to do anything to prevent Britain from fulfilling its role. Feinberg did not provide any reference for this opinion, and eventually narrowed down this opinion: Nathan Feinberg, *Some Problems of the Palestine Mandate* (Shoshani's Printing Co Ltd 1936) 113. As Britain's obligations lost their validity with the end of the Mandate, it is clear that the obligations of other countries (according to Feinberg's view) had no meaning either.

[159] *Namibia* Advisory Opinion (n 44).

[160] Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?' (1972) 21(2) *International and Comparative Law Quarterly* 270 (arguing that there is no basis in the text of the Charter to suggest that only decisions adopted under the Security Council's powers under Chapter VII of the Charter are binding). See also *Occupation* Advisory Opinion (n 14) Joint Opinion of Judges Tomka, Abraham and Aurescu, para 51 ('It is important to note that not only the resolutions adopted under Chapter VII of the Charter of the United Nations are binding. As the Court has explained in the *Namibia* Advisory Opinion, a careful analysis of the language of a resolution is required before a conclusion can be made as to its binding effect').

[161] UN Security Council Res 2334 (23 December 2016), UN Doc S/RES/2334(2016) (emphasis added).

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Use of the term 'demand', as opposed to the term 'calls upon' used in other parts of the same resolution, may very well imply that the Security Council intended that this be a binding decision.[162]

The Security Council has also decided on various occasions that the establishment of Israeli settlements in the West Bank is illegal and that Israel must cease building such settlements.[163] What legal argument can be advanced that the claimed right under the Mandate of Jews to settle in all parts of Palestine overcomes a decision of the Security Council that establishment of settlements for Israelis in the West Bank is a violation of international law and that Israel must evacuate its settlements? As mentioned above, the League Covenant did not contain a clause similar to Article 25 of the UN Charter, under which all members agreed to accept decisions of the League Council; nor did it contain a clause similar to Article 103 of the Charter, according to which in the event of a clash between the obligations of a UN member state under the Charter and its obligations under any other treaty, its obligations under the Charter shall prevail.

International law did not freeze in 1922, when the British Mandate over Palestine was approved by the Council of the League of Nations. Much has happened in international law since 1922. In the present context, the most important developments are the total rejection of colonialism and colonial regimes and the development of the right of peoples to self-determination.

The question of the continued validity of an international instrument that is no longer compatible with customary international law arose in the *Namibia* case, concerning South Africa's Mandate over Namibia. As we saw above,[164] in that case the ICJ held that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.

The potential tension between instruments that were valid under the prevailing norms of international law at the time they were made and subsequent developments in international law was mentioned by Max Huber in his famous decision in the *Islands of Palmas* arbitration.[165] In this decision Huber mentioned two parts to

[162] *Namibia* Advisory Opinion (n 44) Joint Opinion of Judges Tomka, Abraham and Aurescu; Dan Joyner, 'Legal Bindingness of Security Council Resolutions Generally, and Resolution 2334 on the Israeli Settlements in Particular', *EJIL:Talk!*, 9 January 2017, https://www.ejiltalk.org/legal-bindingness-of-security-council-resolutions-generally-and-resolution-2334-on-the-israeli-settlements-in-particular; Abraham Joseph, 'Why the UN Resolution on Israeli Settlements is Binding', *The Wire*, 30 December 2016, https://thewire.in/world/un-resolution-israeli-settlements-binding; cf Orde F Kittrie, 'What UNSCR 2334 Could Mean Beyond the United Nations, and How the Trump Administration Can Respond', *Lawfare*, 27 December 2016, https://www.lawfaremedia.org/article/what-unscr-2334-could-mean-beyond-united-nations-and-how-trump-administration-can-respond. The debate on whether specific SC resolutions relating to the Israel/Palestine conflict are binding has continued: see Eiran Sthoeger, 'Resolution 2728 on Israel/Gaza is Significant, but it Is Not a Binding Council Decision', *EJIL:Talk!*, 23 April 2024, https://www.ejiltalk.org/resolution-2728-on-israel-gaza-is-significant-but-it-is-not-a-binding-council-decision; Eirik Bjorge, 'Resolution 2728 (2024) is a Binding Council Resolution', *EJIL:Talk!*, 26 April 2024, https://www.ejiltalk.org/resolution-2728-2024-is-a-binding-council-resolution; Akira Kato, 'Really Binding? Security Council Resolution 2728 (2024) and Non-State Actors', *EJIL:Talk!*, 9 September 2024, https://www.ejiltalk.org/really-binding-security-council-resolution-2728-2024-and-non-state-actors.

[163] See UNSC Resolutions listed in n 12 above.

[164] See n 44 above.

[165] *Islands of Palmas Case (Netherlands v United States)*, 4 April 1928, II *Reports of International Arbitral Awards* 829.

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the intertemporal principle: the creation of rights and the continued existence of rights. While the creation of a right is determined by the law in force at the time it was created, 'the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law'.[166] In our context, even if we were to assume that the Mandate created the right of Jews to settle in all parts of Palestine (an assumption, it will be recalled, that I rejected above), the continued existence of that right must take into account subsequent developments in international law.[167] These developments include the prohibition on acquisition of territory by use of force, the right to self-determination of peoples, and the prohibition on an occupying power to transfer part of its civilian population into occupied territory.

Resting Israel's rights in the West Bank and its right to settle its citizens there on what was, as we saw above, essentially a colonial regime, and denying the right to self-determination of the other people who live in the land, might have been persuasive arguments 100 years ago. In the world of the twenty-first century, their only effect is to lend credence to the growing number of people in the world who claim that Israel is a colonial regime.

3.13. Concluding comments on Rostow's view

In ending my criticism of Rostow's 'Mandate argument', a number of points are worth mentioning. Rostow presented his view before the competent organs of the UN expressed their opinion on the matter. Rostow assigned major significance to the advisory opinion of the ICJ in the *Namibia* case, and even criticised those who attacked this opinion as being based on colonial ideas.[168] Rostow passed away before the ICJ delivered two advisory opinions in which it held that the West Bank (including East Jerusalem) is subject to a regime of belligerent occupation.[169] We cannot know whether Rostow would have given these opinions the same weight he gave to the *Namibia* opinion, even if he disagreed with the Court's reasoning.

In his main article on the Mandate argument Rostow claimed that the founders of the League of Nations 'established the mandate system in order to liberate peoples who had lived in the colonies and protectorates of empire, and launch their new states on a footing of dignity and equality'.[170] Rostow obviously did not examine the founding documents of the mandate system; nor did he have the advantage of access to the impressive work recently published by contemporary historians who expose the colonial background and purposes of the system.[171] It seems, then, that

[166] ibid 845. On this distinction of Huber see Wheatley (n 110).

[167] See the *Namibia* Advisory Opinion (n 44) para 53 ('Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such').

[168] Rostow (n 6).

[169] *Wall* Advisory Opinion (n 14); *Occupation* Advisory Opinion (n 14).

[170] Rostow (n 6) 155

[171] See especially Pedersen (n 33); Mazower (n 67); MacMillan (n 63); Elkins (n 67).

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Rostow's argument was based on false premises. If one considers the colonial background to the mandate system in general, and to the British Mandate over Palestine in particular, it is difficult to accept Rostow's conclusions.

Finally, in deciding on the position of international law on a given question, the greatest weight must be given to the views of states and to decisions of international organs, first and foremost among which are the International Court of Justice and the UN Security Council. When disputes are considered by the ICJ, the views of academic experts may serve only as 'subsidiary means for the determination of the rules of international law'.[172] They cannot prevail when they are contrary to the position of almost all states, the ICJ and the UN Security Council, and, one may add, the highest judicial body of the state involved.[173]

4. Conclusions

In this article I have discussed two arguments raised to refute the accepted view that the West Bank is occupied territory: the lack of a state that was the sovereign power in the territory when occupied by Israel in 1967, and the notion that the Mandate still applies in those parts of Mandatory Palestine in which no state was established.

The first argument might have been valid in the nineteenth century and at the beginning of the twentieth century, when only states were actors in international law, and the right of peoples to self-determination had not yet been recognised. It is no longer valid in a world in which peoples have the right not to be subject to foreign rule, so that when no state has sovereignty over a populated territory the population of the territory has the right to self-determination. When such territory is conquered in war it becomes territory in which the international law of belligerent occupation applies.

The 'Mandate argument' ignores the fact that as Britain was bound by a 'sacred trust' towards all the inhabitants of Palestine, the Mandate was concerned not only with Britain's commitment to facilitate the establishment of a national home for the Jewish people, but also with its responsibility to ensure the rights of all the inhabitants of the land. The Mandate was an agreement between the League of Nations and Great Britain that came to an end when, with the approval of the UN General Assembly, Britain withdrew from the Mandate and relinquished control over Palestine. The 'Mandate argument' also rests on the false assumption that the Mandate recognised a non-restricted *right* of the Jews to settle throughout Palestine, a right that was unconnected with Britain's commitments under the Mandate, is *erga omnes* and continues to exist after the Mandate ended. It largely ignores the fact that

[172] Statute of the International Court of Justice (entered into force 24 October 1945) 1 UNTS XVI, art 38, specifies the source to which the ICJ must resort in deciding disputes on the basis of international law.

[173] For the view of the Supreme Court of Israel on the regime in the West Bank see Kretzmer and Ronen (n 24) 64–68. Rostow also took a rosy view of the Supreme Court's judgments. In his 1990 'Correspondence' (n 8) he claimed that '[t]he Israeli courts apply the [Geneva] Convention routinely': ibid 719. Having examined all the cases relating to the Occupied Territories written between 1967 and 1990, I know of no case in which the Court applied the Geneva Convention. In fact, when cases involving paras 1 and 6 of Article 49 of the Convention reached the Supreme Court, the Court refused to apply those provisions, as it held that they are not part of customary international law that is enforced by Israeli courts: Kretzmer and Ronen (n 24) Ch 4.

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the demand of the Jews for a national home was realised when the State of Israel was created and admitted to the United Nations. Even Professor Nathan Feinberg, who was of the opinion that the Mandate gave the Jewish people the right to a national home in the land of Israel, wrote that with the termination of the Mandate and the establishment of the State of Israel, the Jewish people's status in international law as the possessors of that right was extinguished.[174]

As an 'A' Mandate, the people in Palestine were provisionally recognised as a nation that would be able to exercise its right to self-determination when the Mandate ended. When the UN General Assembly approved termination of the Mandate it recommended that the two national groups in the country should realise this right in two independent states. Since a Jewish state exists, even if we assume that the trust created by the Mandate still has some force in the West Bank, that trust does not involve furthering the establishment of a national home for the Jewish people; rather it involves ensuring that the Palestinian inhabitants of the territory enjoy all their rights, including their right to self-determination.

Not surprisingly, the two arguments discussed in this article have received scant support from other states, international bodies or leading experts in international law. Nevertheless, from time to time the Government of Israel still raises them. In the Introduction I referred to the letter of the Cabinet Secretary of June 2023. A more recent example is the Prime Minister's response to the advisory opinion on the *Legal Consequences Arising from Israel's Policies and Practices in the Occupied Territories* in which the ICJ held that Israel's prolonged presence as an occupying power in the West Bank has become illegal. PM Netanyahu assumed he could refute the Court's opinion by presenting the Cabinet with an opinion written by the Israeli proponent of the 'Mandate argument'.[175]

Impressive research by and scholarship of prestigious contemporary historians have exposed the colonial background and character of the League of Nations mandate system. For the reasons presented in this article, arguments challenging the West Bank's status as occupied territory, and basing the legal justification for Israel's present status and settlement policies in the West Bank on the British Mandate over Palestine are unpersuasive. They are also misguided, since they lend credence to the growing campaign to delegitimise the very existence of the State of Israel on the basis of its purported colonial character.

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[174] See n 136 above.
[175] Ma'anit (n 19).

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