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

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

Keywords: Palestine, Mandate, self-determination, boundaries

1. Introduction

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

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2. THE VERSAILLES ENVIRONMENT

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

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

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

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

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

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

3. SELF-DETERMINATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. THE DEVELOPMENT OF THE MANDATE SYSTEM

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

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

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

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

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

[25] Miller, ibid Ch III.

[26] ibid 111 ff.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[40] Margalith (n 23) 131.

[41] Wright (n 23) 59–60.

[42] ibid 60.

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

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

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

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

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

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

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

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

5. THE PALESTINE MANDATE

5.1. GENERAL

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

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

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

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

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

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

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

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

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

5.2. THE EXCEPTIONALITY OF THE PALESTINE MANDATE

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

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

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

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

[60] Pedersen (n 34) 35–40.

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

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

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

5.3. The Boundaries of the Mandate

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. IMPACT OF THE PALESTINE MANDATE TODAY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[89] See above n 78 and accompanying text.

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

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

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

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

7. CONCLUSIONS

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

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

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

[93] See text to n 81 above.
[94] *Legal Consequences for States of the Continued Presence of South Africa in South-West Africa* (n 85) [31].
[95] *Western Sahara* (n 84) [31]–[33].
[96] See, eg, Bernhardt Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (Cambridge University Press 2008); Carsten Stahn, *The Law and Practice of International Territorial Administration* (Cambridge University Press 2008); Ralph Wilde, *International Territorial*

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

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

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