Israel Law Review **49**(3) 2016, pp 391–408. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2016.
doi:10.1017/S0021223716000224

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

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

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

1. Introduction

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

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The author is grateful to Shoshana Barri for her assistance in the preparation of this article, and to participants in the Glasgow Conference on Occupations and Withdrawals (June 2006) and the Jerusalem Conference on the British Mandate (January 2016).

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

https://doi.org/10.1017/S0021223716000224 Published online by Cambridge University Press

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

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

2. LEGITIMACY VERSUS EFFECTIVENESS

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

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

https://doi.org/10.1017/S0021223716000224 Published online by Cambridge University Press

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

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

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

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

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

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

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

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

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

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

3. THE 1922 MANDATE

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

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

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

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

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

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

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

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

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

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

[12] Palestine Mandate (n 10).

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

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

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

[16] Cattan (n 1) 26.

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

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

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

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

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

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

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

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

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

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

[23] Crawford (n 2) 428–29.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

https://doi.org/10.1017/S0021223716000224 Published online by Cambridge University Press

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

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

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

[41] Winston Churchill, 'Zionism versus Bolshevism: A Struggle for the Soul of the Jewish People', *Illustrated Sunday Herald*, 8 February 1920, 5.

[42] The only explicit reference found in art 22 to the wishes of the population of the mandated territory is made in connection with the choice of the mandatory power for 'class A' Mandates ('The wishes of these communities must be a principal consideration in the selection of the Mandatory').

[43] eg, Jerome Wilson, 'Ethnic Groups and the Right to Self-Determination' (1996) 11 *Connecticut Journal of International Law* 433, 458 ('Wilson's aim in propagating the right of self-determination was to secure peace in Europe by preserving (and creating, out of the defeated German, Austro-Hungarian and Ottoman empires) a system of ethnically homogeneous nation states'); Feinberg (1970) (n 1) 42–43; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34 *New York University Journal of International Law and Politics* 513, 561–62.

[44] eg, Mark Levene, 'Nationalism and Its Alternatives in the International Arena: The Jewish Question at Paris, 1919' (1993) 28 *Journal of Contemporary History* 511.

[45] eg, Mark Levene, 'The Balfour Declaration: A Case of Mistaken Identity' (1992) 107 *The English Historical Review* 54, 75; Churchill (n 41) 5.

[46] Scott Atran, 'The Surrogate Colonization of Palestine, 1917–1939' (1989) 16 *American Ethnologist* 719, 720–21.

[47] Covenant of the League of Nations (n 17) art 22(1).

[48] eg, Weiler (n 27) 59.

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

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

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

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

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

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

[52] Crawford (n 2) 434.

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

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

4. THE PARTITION RESOLUTION

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

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

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

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

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

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

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

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

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

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

5. THE ESTABLISHMENT OF ISRAEL

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

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

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

[66] See Crawford (n 2) 432.

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

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

[69] Crawford (n 2) 432–33.

[70] ibid 433.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. CONCLUSION

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

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

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