

# THE UNIQUE CHARACTER OF THE MANDATE FOR PALESTINE

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

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It had to be recognized that the Palestine mandate was absolutely unique. There was no analogy in any other mandate for the proposal to set up in Palestine, a country where there was already a considerable population of Arabs, a national home for another people – the Jews.

Malcolm MacDonald, Secretary of State for the Colonies,  
before the League of Nations Permanent Mandates Commission, 29 June 1939.<sup>1</sup>

## 1. INTRODUCTION

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

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<sup>1</sup> League of Nations Permanent Mandates Commission, Minutes of the Thirty-Sixth Session, held at Geneva (Switzerland), 8–29 June 1939, Fourteenth Meeting, 16 June 1939, <https://unispal.un.org/DPA/DPR/unispal.nsf/9a798adb322aff38525617b006d88d7/d54db2b34342ae5d052565e9004f24df?OpenDocument>. The remark was made at the closure of a debate in which Mr MacDonald used all his rhetorical skills to prove that the Palestine Mandate was unique.

<sup>2</sup> Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90.

<sup>3</sup> The Statute refers to ‘information’ which may induce the Prosecutor to open an investigation *proprio motu*.

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

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

<sup>4</sup> Covenant of the League of Nations (entered into force 10 January 1920) (1920) 1 *League of Nations Official Journal* 3.

<sup>5</sup> Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.

<sup>6</sup> Francis Boyle, 'The Creation of the State of Palestine' (1990) 1 *European Journal of International Law* 301, 301–02.

<sup>7</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.

<sup>8</sup> James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press 2001) 7, 14.

<sup>9</sup> John Quigley, 'The Palestine Declaration to the International Court: The Statehood Issue' in Chantal Meloni and Gianni Tognoni (eds), *Is There a Court for Gaza?* (TMC Asser Press 2012) 429.

<sup>10</sup> Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict*, (Pluto Press 2009) 117–45.

<sup>11</sup> John Dugard, 'Britain's Betrayal of the Sacred Trust in Palestine', *Middle East Monitor*, 4 May 2015.

<sup>12</sup> Letter from the United Kingdom Foreign Secretary, Arthur James Balfour, to Baron Walter Rothschild, 2 November 1917 (*The Times*, 17 November 1917).

<sup>13</sup> Partly also by the Palestine Mandate as far as Transjordan was concerned.

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

## 2. THE UNIQUE CHARACTER OF THE MANDATE FOR PALESTINE

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

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

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

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

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

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

<sup>14</sup> 'League of Nations, The Mandates System: Origin – Principles – Application', Series of League of Nations Publications, April 1945, UN Doc LoN/1945.VI.A.1.

<sup>15</sup> Cecil Roth and Geoffrey Wigoder (eds), *The New Standard Jewish Encyclopedia* (Massada Press 1975) 247.

<sup>16</sup> n 12; Walter Laqueur, *A History of Zionism* (Schocken Books 1978) 181–205; Martin Gilbert, *Israel: A History* (Black Swan 1998) 34–35. cf also Jonathan Schneer, *The Balfour Declaration: The Origins of the Arab-Israeli Conflict* (Bloomsbury 2010) 75–86.

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

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

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

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

<sup>18</sup> The text is included in Wallace, *ibid* 55–56.

<sup>19</sup> J Stoyanovsky, *The Mandate for Palestine* (Longmans, Green and Co 1928) 41–42

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

<sup>21</sup> Stoyanovsky (n 19) 24–27.

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

## 2.2. THE BENEFICIARIES AND THEIR RIGHTS

### 2.2.1. PROVISIONS OF THE MANDATE

The unique character of the Palestine Mandate follows, first, from the beneficiaries of the rights granted and, secondly, from the corresponding duties of the Mandatory power.<sup>23</sup>

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

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

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

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<sup>23</sup> Norman Bentwich, 'Mandated Territories: Palestine and Mesopotamia (Iraq)' [1921–22] *British Yearbook of International Law* 48, 51; Manka Spiegel, *Das Völkerrechtliche Mandat und seine Anwendung auf Palästina* (Verlag Der Universitäts – Buchhandlung Leuscher & Lubensky 1928) 74.

<sup>24</sup> Stoyanovsky (n 19) 41–42.

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

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

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

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

### 2.2.2. THE JEWISH NATIONAL HOME

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

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<sup>25</sup> French Mandate for Syria and the Lebanon (1923) 17 *American Journal of International Law*, Supplement: Official Documents, 177.

<sup>26</sup> 'Palestine: Correspondence with the Palestine Arab Delegation and the Zionist Organisation', Cmd 1700, June 1922.

<sup>27</sup> Stoyanovsky (n 19) 41–42.

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

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

### 2.2.3. THE NON-JEWISH COMMUNITIES

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

<sup>28</sup> UNSCOP, Report to the General Assembly, 3 September 1947, Vol 1, UN Doc A/364, 3, para 76 (UNSCOP Report, September 1947) (based on the 1936 Peel Commission Report).

<sup>29</sup> Quoted by Benny Morris, *1948: A History of the First Arab-Israeli War* (Yale University Press 2008) 10.

<sup>30</sup> See the Foreword of Lord Balfour in Nahum Sokolow, *History of Zionism* (2 vols, London 1919) xxxiii, as quoted by Stoyanovski (n 19) 70.

<sup>31</sup> Martin Gilbert, *Churchill and the Jews* (Pocket Books 2007) 71.

<sup>32</sup> *ibid.*

<sup>33</sup> Quoted by Martin Gilbert, *Exile and Return: The Emergence of Jewish Statehood* (Steinmatzky's Agency Ltd 1978) 127.

<sup>34</sup> cf Nathan Feinberg, 'The Recognition of the Jewish People in International Law' in John Norton Moore (ed), *The Arab-Israeli Conflict, Vol I* (Princeton University Press 1974) 59, 69.

<sup>35</sup> Quoted by Nathan Feinberg, 'The Arab-Israel Conflict in International Law' in Norton Moore, *ibid* 386, 431.

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

#### 2.2.4. SUMMARY

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

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

<sup>36</sup> Minutes of the Palestine Meeting of the Supreme Council of the Allied Powers, held in San Remo at Villa Devachan, 24 April 1920, Office for Israeli Constitutional Law (2015), <http://www.israellegalfoundation.com/sanremominutes.html>.

<sup>37</sup> Kattan (n 10) 61. cf also Natasha Wheatley, ‘Mandatory Interpretation: Legal Hermeneutics and the New International Order in Arab and Jewish Petitions to the League of Nations’ (2015) 227 *Past and Present* 205, 207, who observes that the text of the Mandate denied the Arabs all political rights.

<sup>38</sup> Laqueur (n 16) 455.

<sup>39</sup> Permanent Mandates Commission (n 1) Fourteenth Meeting, 16 June 1939, <https://unispal.un.org/DPA/DPR/unispal.nsf/9a798adbf322aff38525617b006d88d7/d54db2b34342ae5d052565e9004f24df?OpenDocument>.

<sup>40</sup> cf also Grief (n 22) 116–35.



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

### 2.3. THE POWERS AND DUTIES OF THE MANDATORY POWER

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

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<sup>41</sup> French Mandate (n 25) 177.

<sup>42</sup> Palestine Correspondence (n 26) letter dated 21 February 1922.

<sup>43</sup> *ibid.*, letter dated 1 March 1922.

<sup>44</sup> cf also Kattan (n 10) 78–98.

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

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

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

### 2.4.1. HISTORICAL CONNECTION

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

<sup>45</sup> Spiegel (n 23) 74.

<sup>46</sup> British White Paper, 3 June 1922, Yale Law School, Avalon Project, ‘Documents in Law, History and Diplomacy’, 2008, [http://avalon.law.yale.edu/20th\\_century/brwh1922.asp](http://avalon.law.yale.edu/20th_century/brwh1922.asp) (Churchill White Paper).

<sup>47</sup> Later from post-exilic times, in general, called Jews.

<sup>48</sup> Stoyanovski (n 19) 66.

George, the British Prime Minister, using the Biblical phrase ‘from Dan to Beersheva’ when referring to territory destined for the Jewish national home.<sup>49</sup>

#### 2.4.2. GROUNDS FOR RECONSTITUTING THEIR NATIONAL HOME

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

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

<sup>49</sup> Grief (n 22) 25.

<sup>50</sup> Theodor Herzl, *Der Judenstaat* (Leipzig und Wien 1896); cf also Shlomo Avineri, *Theodor Herzl and the Foundation of the Jewish State* (Weidenfeld & Nicolson, trans Haim Watzman 2013).

<sup>51</sup> From the Hebrew word for ‘ascent’, meaning in this connection the return to *Eretz Yisrael* – the Land of Israel, *The New Standard Jewish Encyclopedia* (n 15) 71–74.

<sup>52</sup> The text can be found in Israel Cohen (ed), *Speeches on Zionism by the Right Hon. The Earl of Balfour* (Arrowsmith 1928) 40–73. cf also Laqueur (n 16) 203.

<sup>53</sup> Cohen, *ibid* 60.

<sup>54</sup> *ibid* 60.

was in the Middle Ages, as it was in earlier times, so it is now'.<sup>55</sup> His appeal to his noble friends is unequivocal.<sup>56</sup>

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

Spiegel similarly observes:<sup>57</sup>

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

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

### 3. THE RETREAT OF THE MANDATORY POWER

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

#### 3.1. THE CHURCHILL WHITE PAPER

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

<sup>55</sup> *ibid* 61–62.

<sup>56</sup> *ibid* 62.

<sup>57</sup> My translation from the original: 'durch die Gewährung dieser Heimstätte soll einer seit zwei Jahrtausenden verfolgten und entrechteten Nation Gerechtigkeit widerfahren und den Antisemitismus, jenem Erzübel, das Zusammenleben und die Zusammenarbeit der Völker mit den Juden bisher vergiftet hat, die Spitze abgebrochen werden: Spiegel (n 23) 76. Manka Spiegel was a lawyer from Graz (Austria).

<sup>58</sup> Churchill White Paper (n 46).

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

### 3.2. THE PASSFIELD WHITE PAPER

#### 3.2.1. CONTENT

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

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

<sup>59</sup> Gabriel Sheffer, ‘Intentions and Results of British Policy in Palestine: Passfield’s White Paper’ (1973) 9 *Middle Eastern Studies* 43, 44.

<sup>60</sup> Prime Minister’s Statement, HC Deb 3 April 1930, vol 237, cc 1466–7, 1466.

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

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

### 3.2.2. CRITICISM

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

<sup>61</sup> *ibid* 1466 (emphasis added).

<sup>62</sup> 'Palestine: Statement of Policy by His Majesty's Government in the United Kingdom', HMSO, October 1930 (Passfield White Paper).

<sup>63</sup> *ibid* para 28 (quotation marks in the original).

<sup>64</sup> Carly Beckerman-Boys, 'The Reversal of the Passfield White Paper, 1930 – I: A Reassessment' (2015) 51 *Journal of Contemporary History* 1, 2.

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

### 3.3. THE MACDONALD WHITE PAPER

#### 3.3.1. CONTENT

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

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

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

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<sup>65</sup> Gilbert, *Churchill and the Jews* (n 31) 93–94.

<sup>66</sup> Beckerman-Boys (n 64) 1–2.

<sup>67</sup> Rory Miller, ‘Introduction’ in Rory Miller (ed), *Britain, Palestine and Empire* (Ashgate 2010) 9.

<sup>68</sup> ‘Palestine Royal Commission Report, Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty’, HMSO, July 1939.

<sup>69</sup> TG Fraser, ‘A Crisis of Leadership: Weizmann and the Zionist Reactions to the Peel Commission’s Proposals, 1937–8’ (1988) 23 *Journal of Contemporary History*, 657, 670–71.

<sup>70</sup> Churchill White Paper (n 46).

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

### 3.3.2. DEFENCE AND CRITICISM IN THE PERMANENT MANDATES COMMISSION

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

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

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

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<sup>71</sup> League of Nations Permanent Mandates Commission, Minutes (n 1).

<sup>72</sup> HC Deb 22 May 1939, vol 347, cc 1937–2056, col 1951; on the Hogarth message cf also Kattan (n 10) 47.

<sup>73</sup> League of Nations Permanent Mandates Commission, Minutes (n 1) Fourteenth Meeting.

<sup>74</sup> *ibid.*



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

### 3.3.3. CRITICISM FROM CHURCHILL AND WEIZMANN

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

<sup>75</sup> Grief (n 22) 208.

<sup>76</sup> Gilbert (n 33) 230.

<sup>77</sup> Quoted in UNSCOP, Report to the General Assembly, ‘Continuation of the Discussion of the Question of Palestine’, 29 November 1947, Vol. 1, UN Doc A/PV.128, 42, para 79.

<sup>78</sup> Jewish Agency for Palestine, ‘The Jewish Case Against the Palestine White Paper, Documents Submitted to the Permanent Mandates Commission of the League of Nations’, 1939, 5.

<sup>79</sup> *ibid* 8.

<sup>80</sup> *ibid* 26–27.

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

#### 4. THE UNIQUE CHARACTER OF THE MANDATE: CHALLENGES AFTER ITS TERMINATION

##### 4.1. UNITED NATIONS SPECIAL COMMITTEE ON PALESTINE (UNSCOP)

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

##### 4.2. ARTICLE 80 CHARTER OF THE UNITED NATIONS

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

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

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<sup>81</sup> UNSCOP Report, September 1947 (n 28) para 146.

<sup>82</sup> *ibid* para 172.

<sup>83</sup> UNGA Res 181(II) (29 November 1947), 'Future Government of Palestine', UN Doc A/RES/181(II).

<sup>84</sup> UN Charter (n 5) art 80(1) (emphasis added).

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

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

#### 4.3. THE INTERNATIONAL COURT OF JUSTICE

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

Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.

This view is confirmed by Article 80, paragraph 1, of the Charter, which maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System.

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

<sup>85</sup> Grief (n 22) 257.

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

<sup>87</sup> Grief (n 22) 257.

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

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

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

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

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

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

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

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

<sup>92</sup> *ibid* [118].

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

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

<sup>95</sup> *ibid* 478, referring to Genesis 12:7.

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

#### 4.4. ACADEMIC WRITINGS

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

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

<sup>97</sup> cf inter alia Quigley (n 9) 429–40.

<sup>98</sup> John Quigley, ‘The Oslo Accords: More than Israel Deserves’ (1997) 12 *American University International Law Review* 285. His view of the history of Palestinian Arabs is not only uncommon, but also incorrect; cf inter alia Joan Peters, *From Time Immemorial: The Origins of the Arab-Jewish Conflict over Palestine* (Harper and Row 1984).

<sup>99</sup> John Quigley, ‘Competing Claims to the Territory of Historical Palestine’ (2002) 59 *Guild Practitioner* 76, 79.

<sup>100</sup> Francis Boyle, *Palestine, Palestinians and International Law* (Clarity Press 2003). cf also Boyle (n 6) 301.

<sup>101</sup> Boyle, *ibid* 38.

<sup>102</sup> Kattan (n 10) 78–98.

<sup>103</sup> *ibid* 117–45.

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

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

## 5. LEGAL CONSEQUENCES

### 5.1. THE LEGITIMACY OF ISRAEL AS A JEWISH STATE

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

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<sup>104</sup> Dugard (n 11); John Dugard, 'A Tale of Two Sacred Trusts: Namibia and Palestine' in Tiyanjana Maluwa (ed), *Law, Politics and Rights: Essays in Memory of Kader Asmal* (Martinus Nijhoff 2014) 287.

<sup>105</sup> 'Findings of the Final Session of the Russell Tribunal on Palestine', Brussels, 16–17 March 2013, <http://www.russelltribunalonpalestine.com/en/full-findings-of-the-final-session-en>.

<sup>106</sup> Oren Ben-Dor, 'CfP: International Law and the State of Israel: Legitimacy, Responsibility and Exceptionalism', University of Southampton, 17–19 April 2015, *Critical Legal Thinking* 10 April 2014, <http://criticallegalthinking>.

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

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

## 5.2. 'OCCUPIED TERRITORIES' AND SETTLEMENTS

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

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[com/2014/04/10/cfp-international-law-state-israel-legitimacy-responsibility-exceptionalism](http://www.cambridge.org/2014/04/10/cfp-international-law-state-israel-legitimacy-responsibility-exceptionalism) (emphasis in the original).

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

<sup>108</sup> cf also Eugene V Rostow, 'Notes and Comments' (1990) 84 *American Journal of International Law* 717.

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

### 5.3. PALESTINIAN SELF-DETERMINATION

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

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

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

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<sup>109</sup> Palestine Correspondence (n 26)

<sup>110</sup> cf Henry Cattán, *Palestine and International Law* (Longman 1973); Division of Palestinian Rights, *The Origins and Evolution of the Palestine Problem: 1917–1988* (United Nations 1990).

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



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

## 6. FINAL REMARKS

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

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<sup>112</sup> cf, eg, Nissim Bar-Yaacov, ‘The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip’ (1990) 24 *Israel Law Review* 485.