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Legal Liminalities: Conflicting Jurisdictional Claims in the Transition from British Mandate Palestine to the State of Israel

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INTRODUCTION

This article examines the termination of the British Mandate for Palestine, the 1948 War, and the establishment of the State of Israel by probing the paradoxical ways in which the Israeli state self-consciously identified with and against its Mandate predecessor during this period of "betwixt and between."[1] By asserting that the Mandate administration's jurisdiction existed wholesale until 15 May 1948 *and* that complete Israeli jurisdiction followed immediately thereafter, Israeli actors predicated their own jurisdictional claims—not the least, over highly contentious areas such as Western Jerusalem—on those of their predecessors. At the same time, however, Israeli actors contested their predecessor's decisions made prior to 15 May. Israel thereby positioned itself as both an heir to and rebel against British Mandatory administration jurisprudence. Indeed, by specifically staking its claim on being a "completely different political creature" from its British predecessor, Israel retained its British colonial legal structures as the "ultimate standards of reference."[2]

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[1] Victor Turner, *The Forest of Symbols: Aspects of Ndembu Ritual* (Ithaca: Cornell University Press, 1967), 97.

[2] Ibid., 108.

The first part of this article explores the Israeli trial of Frederick William Sylvester, a British citizen accused of spying against the Jewish state during the 1948 War, while the second part illustrates that, although the Israeli judiciary and executive relied on the Mandate administration's juridical skeleton for cases such as Sylvester's, they repeatedly questioned Mandate laws and legal decisions they deemed antagonistic to Zionist interests. Across a wide array of global examples, the doctrine of state succession—the legal relationship between nascent states and their predecessors—is "largely confused and resistant to simple exposition."[3] The questions plaguing the process of state succession were myriad: Did the change in sovereignty equally impact all domains of law or was there a difference, for example, between private law and public law? If there was a continuity of law, were judicial decisions made by the predecessor's courts binding? What about precedent? Far from purely procedural matters, these questions, as Martti Koskenniemi has noted, offered nascent states the opportunity to "re-imagine and propagate externally their relationship to the *ancien régime*."[4] It is specifically for this reason that nascent states adopted such varied practices. As one Israeli Supreme Court justice remarked, although there is a voluminous literature on the legal effects of the change of states, "we do not have 'precedents' [*halakhot*]; we only have 'practices' [*halikhot*]."[5] This article seeks to show that the confusing, internally inconsistent, and liminal practices that Israel adopted reflected both the equivocal past relationship between Zionism and the British Mandate and the emerging character of the nascent state.

Yet, despite the ostensibly novel approach that Israel took, this article argues that elements of the Israeli relationship with its Mandatory predecessor display a broader uncertainty that marked the practices of numerous nascent states in the twentieth century. The historiographies on post-World War I European states emerging from empire and Asian and African states created during post-World War II decolonization have shown that the prolonged processes of independence and succession entailed the termination and recycling of aspects of their predecessors' states as well as the production of new modes of governance.[6] In so doing, they have moved

[3] Matthew C. R. Craven, "The Problem of State Succession and the Identity of States under International Law," *European Journal of International Law* 9, 1 (1998): 142–62, 143.

[4] Martti Koskenniemi, "Report of the Director of Studies of the English-Speaking Section of the Centre," in Pierre Michel Eisemann and Martti Koskenniemi, eds., *State Succession: Codification Tested against the Facts* (London: Martinus Nijhoff, 2000), 68.

[5] Civil Appeal [henceforth CA] 28/52, *Palas v. Ministry of Transportation*, 9 Piskei Din [henceforth PD] 436, 447 (1955).

[6] On post-World War I Central Europe see, for example, Günter Bischof, Fritz Plasser, and Peter Berger, eds., *From Empire to Republic: Post-World War I Austria* (New Orleans: University of New Orleans Press, 2010). For post-World War II Asia and Africa, see Anil Kalhan, "Colonial Continuities: Human Rights, Terrorism, and Security Laws in India," *Columbia Journal of Asian Law* 20, 1 (2006): 93–234; Leander Schneider, "Colonial Legacies and Postcolonial

beyond older debates as to whether independent entities were completely discontinuous from their predecessors or, alternatively, were "a mechanical, unambiguous, and overdetermining reproduction of the colonial."[7] As Frederick Cooper has said in the context of French Africa, "The *process* of decolonization, not just the heritage of colonialism, shaped the patterns of postcolonial politics."[8] Neither continuity nor rupture alone capture these transitions.

Recent scholarship on Israel/Palestine has begun to wrestle with the question of Israel's place among other post-imperial and post-colonial states.[9] Whereas older scholarship was fixated on either promoting or contesting the oft-touted Israeli nationalist claims about political discontinuity between the British Mandatory administration and the State of Israel, recent works have begun to probe the "protracted, muddled, and violent process" through which Israeli officials constructed the new state.[10] Shira Robinson has shown how Israeli officials transformed Mandatory categories of citizenship into two levels of citizenship determined along

Authoritarianism in Tanzania: Connects and Disconnects," *African Studies Review* 49, 1 (2006): 93–118; Mairi S. MacDonald, "Guinea's Political Prisoners: Colonial Models, Postcolonial Innovation," *Comparative Studies in Society and History* 54, 4 (2012): 890–913; Rohit De, "'Commodities must be controlled': Economic Crimes and Market Discipline in India (1939–1955)," *International Journal of Law in Context* 10, 3 (2014): 277–94; William Gould, Taylor C. Sherman, and Sarah Ansari, "The Flux of the Matter: Loyalty, Corruption and the 'Everyday State' in the Post-Partition Government Services of India and Pakistan," *Past & Present* 219, 1 (2013): 237–79.

[7] Jean-François Bayart, "Postcolonial Studies: A Political Invention of Tradition?" *Public Culture* 23, 1 (2011): 55–84, 70. Nationalist accounts generally argue for complete discontinuity. Scholarship critical of the successor nation-states, especially work written as part of the wave of postcolonial critique, maintains that the nation-states were reproductions of the colonial state.

[8] Frederick Cooper, "Labor, Politics, and the End of Empire in French Africa," in *Colonialism in Question: Theory, Knowledge, History* (Berkeley: University of California Press, 2005), 230.

[9] Derek J. Penslar, "Is Zionism a Colonial Movement?" in Ethan B. Katz, Lisa Moses Leff, and Maud S. Mandel, eds., *Colonialism and the Jews* (Bloomington: Indiana University Press, 2017), 275–300; Eitan Bar-Yosef, *Villah Ba-g'ungel: Afrikah Ba-Tarbut Ha- Yisre'elit* [Villa in the jungle: Africa in Israeli culture] (Jerusalem: Van Leer Institute, 2013). A growing body of literature places Israel/Palestine alongside other postcolonial states, particularly India/Pakistan. See Faisal Devji, *Muslim Zion: Pakistan as a Political Idea* (Cambridge: Harvard University Press, 2013); Alexandre Kedar, "Expanding Legal Geographies: A Call for a Critical Comparative Approach," in Irus Braverman et al., eds., *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014), 95–112; Yael Berda, "Colonial Legacy and Administrative Memory: The Legal Construction of Citizenship in India, Israel and Cyprus" (PhD diss., Princeton University, 2014).

[10] Israeli nationalist scholars have adopted a discontinuous view of the transition, while scholarship focusing on Israel's treatment of Palestinians in 1948 and after casts the transition as the moment when Zionist settler colonialism (nearly) seamlessly replaced its British colonial predecessor. For an example of the former, see Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley: University of California Press, 1997); of the latter, Alina Korn, "Crime and Legal Control: The Israeli Arab Population during the Military Government Period (1948–66)," *British Journal of Criminology* 40, 4 (2000): 574–93.

ethnic and national lines, with Jews enjoying first-class citizenship and Palestinian Arabs relegated to second-class status, while Yael Berda's work examines the role that colonial categories of suspicion and loyalty played in shaping Israeli institutions.[11] While this article echoes Robinson and others' exposition that the Israeli state building process was complex, it strikes out on its own. Current scholarship focuses on how the nascent state navigated the multitude of challenges that arose specifically from the advent of statehood. Robinson, for example, compellingly shows how Israeli officials realized their ethnically particularist vision vis-à-vis Palestinian Arabs. In contrast, this article focuses on the Israeli-British nexus and demonstrates that, even as they responded to unfolding realities, Israeli officials struggled with their British predecessor even in its absence. The enduring presence of the image of the British in Israeli minds, courthouses, and jurisprudence stands in opposition to the common portrayal of the "overnight" expiration of empire and the Palestine Mandate.[12] Rather than simply seeing the Mandate as having elapsed, and before nostalgia for it set in, Israelis grappled with their anxiety as to whether it had truly passed into the past.[13] Further, this article bridges the historiographic divide between Israel and twentieth-century nascent states. There has been a general reluctance to view Israel as a postcolonial state given that it utilized its newly attained sovereign power to carry out colonial practices against its Palestinian population. Here I will argue that even those colonial practices are inscrutable, absent an analysis of the Israeli state's post-imperial modes of thought and action.[14] If Partha Chatterjee is correct that these new states were "derivatives" of their imperial and colonial predecessors, then the Israeli case offers a powerful example of the contradictions, anxieties, and liminalities that defined the process of becoming one such derivative state.[15]

CONSTRUCTING THE JURISDICTIONAL IMPORTANCE OF 15 MAY 1948

With the termination of the Mandate, its British administration in Palestine formally relinquished any legally recognized jurisdiction in the country and

[11] Shira Robinson, *Citizen Strangers: Palestinians and the Birth of Israel's Liberal Settler State* (Stanford: Stanford University Press, 2013), 72; Berda, "Colonial Legacy."

[12] Lahav, *Judgment in Jerusalem*, 79.

[13] On nostalgia, see Eitan Bar-Yosef, "Bonding with the British: Colonial Nostalgia and the Idealization of Mandatory Palestine in Israeli Literature and Culture after 1967," *Jewish Social Studies* 22, 3 (2017): 1–37.

[14] Joseph Massad, "The 'Post-Colonial' Colony: Time, Space, and Bodies in Palestine/Israel," in Fawzia Afzal-Khan and Kalpana Seshadri-Crooks, eds., *The Pre-Occupation of Postcolonial Studies* (Durham: Duke University Press, 2000), 311–46.

[15] Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse?* (London: Zed Books, 1986); Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993).

intentionally did not name a successor.[16] In the resulting legal void, the nascent Israeli state, which had declared its establishment the previous afternoon, asserted its claim to jurisdiction in the country beginning on 15 May in order to avoid what future Attorney General Yaʿakov Shimshon Shapiro termed "a period of legal chaos [*tohu va-vohu*]."[17] From the outset, Israel consciously refused to delineate the territory over which it claimed jurisdiction out of the hope that it would conquer more territory before the fighting ended.[18] Within the areas in Palestine that the 1947 UN Partition Plan had designated to be part of the Jewish state, Israel did not encounter explicit contestation to its jurisdictional claims. In areas outside of the slated Jewish state, however, the claim-making process would be far more complicated. Struggling to deflect the Arab invasion and quell internal Jewish opposition, the Israeli state was initially hesitant to violate the terms of the partition plan and risk alienating the international community. Later Israeli claims to have had universal jurisdiction beginning on 15 May over all areas it militarily controlled did not match the reality on the ground on that day, but rather represented a rewriting of the legal script.

Western Jerusalem was the most prominent example of this revision.[19] Because the November 1947 UN General Assembly's resolution for the partition of Palestine called for Jerusalem to be internationalized, and since significant fighting between Jews and Arabs took place in the city before and after 15 May, the Israeli claim to jurisdiction would not cleanly align with political and military reality. Even with the Israeli claims to legal continuity, which aligned with general international legal principles of the continuity of municipal law, it was not clear that Israel would have *jurisdictional* authority in Jerusalem as of 15 May.[20] Precisely for this

[16] Great Britain, Colonial Office, and Foreign Office, *Palestine, Termination of the Mandate, 15th May, 1948: Statement Prepared for Public Information* (London: HMSO, 1948).

[17] Israel State Archives (henceforth ISA), G-2/111, 23 Jan. 1948, Shapiro to Joseph, 3. This phrase, which appears in the creation story in Genesis 1:2, roughly translates as "chaos and desolation." Given its origin, the term seems to evoke a chaos that accompanies creation, in this case that of the State of Israel.

[18] Amihai Radzyner, "A Constitution for Israel: The Design of the Leo Kohn Proposal, 1948," *Israel Studies* 15, 1 (2010): 1–24, 5, 9; Yoram Shachar, "'ha-Tyutot ha-Mukdamot shel Hakhrazat ha-'Atsma'ut' [The early drafts of the Declaration of Independence]," *Tel-Aviv University Law Review* 26, 2 (2002): 523–600.

[19] This played out in Acre, though in a fashion different from Jerusalem, highlighting the complicated and unsmooth jurisdictional transition between Mandate Palestine and Israel. The city was not slated to be in the Jewish state in the UN partition plan, but the Israeli military conquered the city between 13 and 17 May. Given the problematic international legal status of the Jews in the city, the Israeli state refrained from declaring the city to be under military rule until July 1948. Yonatan Fain, *Kakh Nolda: Hakamat Maʿarekhet ha-Mimshal be-Yisraʾel 1947–1951* [Birth of a state: the establishment of the Israeli governmental system] (Jerusalem: Carmel, 2009), 147.

[20] Ian Brownlie and James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), 414.

reason, as the Israeli military solidified its rule in Western Jerusalem in August 1948, the Israeli Provisional Government—established in accordance with the UN partition plan—and judiciary would adamantly declare that their jurisdiction had in fact commenced on 15 May. Thus, though that date did not constitute a self-evident inaugural date of universal Israeli jurisdiction, Israeli actors actively and retroactively imbued it with jurisdictional importance.

When the first truce set in on 11 June, the uncertain Israeli stance in Jerusalem left jurisdictional control there ambiguous. After witnessing over five months of fighting between Jewish and irregular Arab forces within and outside of the city, on 14–15 May Jerusalem was effectively partitioned on an east-west axis between Jordanian forces and the Haganah, the largest Zionist paramilitary organization. There was little change in the positions of the forces following the first week of fighting, but the Jewish-controlled western side remained under siege and persistent Jordanian shelling.[21] Moreover, the Provisional Government's authorities in Jerusalem faced many internal challenges. Jordanian military advances led to waves of internal Jewish refugees streaming into other parts of Jerusalem and the Israeli Defense Forces' (IDF's) mass conscription of Jews exacerbated draft-dodging and flight from the city.[22] In response to the Provisional Government's unwillingness to declare that Jerusalem was to be within the territory of the State of Israel, the Jewish dissident groups IZL (ha-Irgun ha-tseva'i ha-le'umi be-Erets-Yisra'el, The National Military Organization in the Land of Israel) and LHY (Lohamei herut Yisra'el, Fighters for the Freedom of Israel) refused to recognize the IDF's authority in Jerusalem (thought they had done so elsewhere in the country) and they continued to exist as independent bodies. They tended to cooperate militarily with the Haganah, but in many cases independently confiscated Jewish and Arab properties and robbed Jewish civilians in Western Jerusalem, which sparked internal Jewish clashes.[23] The British consulate's fear in early July 1948 that IZL was on the

[21] Yitzhak Levy, *Tish'a Kabin: Yerushalayim be-Keravot Milhemet ha-'Atsma'ut* [Nine measures: Jerusalem in the battles of the war of independence] (Tel-Aviv: Ma'arakhot, Israeli Defense Forces, Ministry of Defense, 1986).

[22] The Israeli Defense Forces were officially created on 26 May 1948. Regarding Jewish civilians in Jerusalem during the 1948 War, see Central Zionist Archives, S90/630, 22 June 1948, "Urgent Measures to Stabilize the Economy of Jerusalem"; Anita Shapira, "Jerusalem in 1948: A Contemporary Perspective," *Jewish Social Studies: History, Culture, Society* 17, 3 (2011): 78–123; Arnon Golan, *Shinui Merhavi Totsa'at Milhamah: ha-Shetahim ha-'Arviyim lishe-'Avar bi-Medinat Yisra'el, 1948–1950* [Wartime spatial changes: former Arab territories within the State of Israel, 1948–1950] (Sedeh Boker: Ben-Gurion Heritage Center: Beer Sheva; Beer Sheva University Press, 2001). Regarding Palestinian civilians in Jerusalem, see Itamar Radai, "The Collapse of the Palestinian-Arab Middle Class in 1948: The Case of Qatamon," *Middle Eastern Studies* 43, 6 (2007): 961–82.

[23] Shapira, "Jerusalem in 1948," 107; Levy, *Tish'a Kabin*, 336–37.

verge of staging a "coup d'état" in Jerusalem against the Provisional Government, though likely unfounded, further indicates the IDF's precarious position in the city.[24] British diplomats and military men continued to be involved in the city through their links to the Jordanian Arab Legion, underscoring the tenuous Israeli position.[25] After 15 May, the various British and foreign citizens who had remained in Jerusalem found themselves caught on different sides of the battle lines.[26] To maintain contact with one another, they established a committee to coordinate arrangements with both the Israeli and Jordanian forces. This committee also remained in communication with British officials and other national and international representatives. Rather than being firmly under Israeli control, Jerusalem was in a period of flux in which Jewish Israeli, Jordanian, and British actors' claims to authority coexisted uneasily and at times contradicted each other.

The nebulous lines of military and political authority shaped the Israeli state's legal claims regarding Jerusalem. In the years preceding the UN Partition resolution, the *Yishuv* leadership had advocated for the partition of Jerusalem and the inclusion of the western side of the city within the nascent Jewish state. After 29 November, the Jewish Agency accepted the UN's call for the city's internationalization. Yet by late April 1948, following the outbreak of intercommunal violence after the UN vote, the British Mandatory administration's unwillingness to cooperate with the UN, and the United States' eventual withdrawal of support for the partition plan, internationalization seemed nearly impossible to implement. While the Jewish Agency and the Provisional State Council continued to officially endorse internationalization, they prepared for the partition of the city. In late April, the Jewish Agency created the Jerusalem Emergency Committee to run the daily administration of Jewish Jerusalem and "establish authority in the event that the Partition Resolution [and the internationalization of Jerusalem] proved unworkable."[27] Appointed as its head was Dov (Bernard) Joseph, a Montreal-born Zionist who had served in the Jewish Legion in the First World War and later practiced as a lawyer in Palestine. Even after the outbreak of the interstate war and the de facto partition of Jerusalem, the Provisional Government refrained from officially declaring Western Jerusalem part of the State of Israel. Several days after 15 May, Joseph

[24] British National Archives, FO 371/68654, 9 July 1948, Jerusalem to Foreign Office.

[25] Ilan Pappé, *Britain and the Arab-Israeli Conflict, 1948–51* (Basingstoke: Macmillan in association with St Antony's College, Oxford, 1988), chs. 1–2.

[26] Regarding the Foreign Office's preparations for the continued presence of British nationals in Palestine following 15 May, see ibid.; ISA, P-10/940 5.1948- 7.1948, "News Bulletin" of the British Community-Jerusalem.

[27] Motti Golani, "Zionism without Zion: The Jerusalem Question, 1947–1949," *Journal of Israeli History* 16, 1 (1995): 39–52, 46; Dov Joseph, *The Faithful City: The Siege of Jerusalem, 1948* (New York: Simon and Schuster, 1960).

issued a statement that various areas in Western Jerusalem "were under the administration of the Israel Defense Forces [*muhzakim bi-yadei tzva ha-hagana li-Yisra'el*]."[28] This was not a claim of legal standing, only of administrative control. Only in late July 1948 would the Israeli government begin to alter its claims to legal standing in Jerusalem. Importantly, this was a response to the unfolding Sylvester trial, which accentuated the Provisional Government's tenuous stance in Jerusalem.

On 8 July 1948, the last day of the first Israeli-Arab truce, members of IZL seized five British nationals employed by the Jerusalem Electric Corporation. Among them was Frederick William Sylvester, who would become the center of attention in what came to be known as the Sylvester trial. A thirty-two-year-old native of South Wales, he had served in the Palestine Police Force between 1938 and 1944 and, after a stint back in Britain, had returned to Palestine in early 1947 and eventually found work with the Electric Corporation. With Sylvester and the others in custody, IZL issued a statement accusing them of "serious charges of espionage."[29] IZL claimed the five had possessed an unlicensed wireless transmitter and had been using it to transmit the landing spots of Jordanian mortars to the British consulate located on the Eastern Jordanian side of the city, thus aiding the Jordanians in their attacks on Western Jerusalem. On 16 July, after a short-lived diplomatic crisis, London, the Israeli Provisional Government, and IZL reached an agreement whereby the five Britons were handed over to IDF forces in Jerusalem.[30] In return, the Israeli Provisional Government promised that they would be interrogated, tried, and prosecuted. On 26 July, the Israeli police issued an arrest warrant for the five men charging them with a variety of offenses, including breaching several parts of the 1945 British Official Secrets Ordinance.[31] While this arrangement reduced tensions, it also exposed the Israeli Provisional Government's inability to control communications between the eastern and western sides of Jerusalem, its incapacity to rein in IZL, and the continued British presence in the city.

During this period other postcolonial states in the decolonizing empire detained British citizens, often on suspicion of espionage, yet the Israeli decision to put these five men on trial seems to have been unique. For instance, after arresting the British reporter Alexander Campbell outside of Rangoon for aiding Karen separatists, the Burmese government simply

[28] Criminal Appeal (henceforth CrimA) 1/48 *Sylvester v. Attorney General* 1 PD 5 (1949).] While the term *muhzak* literally means "held," I follow Medzini's translation, "administered"; Meron Medzini, ed., *Israel's Foreign Relations: Selected Documents*, vol. 1 (Jerusalem: Ministry for Foreign Affairs, 1976), 219–20.

[29] British National Archives, FO 371/68654, 8 July 1948, Jerusalem to Foreign Office.

[30] See the numerous queries in the British Parliament from 8 Nov. 1948; ISA G-14/5672.

[31] ISA P-11/940, 26 July 1948, arrest warrant issued by Y. Meltz.

expelled him using legislation inherited from the British.[32] The Israeli Provisional Government was cognizant of the international backlash likely to accompany a change in Jerusalem's legal status, but also that the existent legal ambiguity was untenable given the pending trial. Speaking to the Provisional State Council, Foreign Minister of the Israeli Provisional Government Moshe Shertok laid out this reality:

> The detainment of the five Britons, the ongoing investigation against them, and the trial, which might be held against them, have led to a variety of claims regarding the legality of the arrest, the manner of the arrest, the responsibility of the Israeli government and the question of the adherence of various bodies to the State of Israel in that territory. It is our desire to certainly be responsible for occurrences in the territory of Jerusalem and it is our desire to take a hold of the legislative, judiciary, and executive tools, which are needed to have full and undivided responsibility. The intention is to include all of Hebrew Jerusalem and the road to Jerusalem within the jurisdictional area of the State of Israel.[33]

In early August, in an attempt to administer control over the past, Israeli officials proclaimed their jurisdiction over Jerusalem. On 2 August, ostensibly heeding Shertok's statement, Minister of Defense David Ben-Gurion declared Jerusalem "administered territory [*shetah muhzak*]" (to be distinguished from *shetah kavush*, occupied territory) and averred that Israeli law must be retroactively applied to Western Jerusalem beginning on 15 May 1948.[34] That same day he issued another proclamation naming Dov Joseph military governor of the administered territory in Jerusalem.[35]

Yet proclamations alone could not head off legal complications. Though Ben-Gurion claimed to place Western Jerusalem under Israeli law, Israeli legal authorities determined that he lacked the necessary and recognized legal power to do so. In a 9 September 1948 communication with Minister of Justice Pinchas Rosen, Attorney General Shapiro found no precedent in either international or municipal law for Ben-Gurion's move. With the upcoming Sylvester trial, slated to begin on 15 September, foremost in his mind, Shapiro recommended that Jerusalem's legal status be clarified immediately so the 1945 British Official Secrets Ordinance, which stipulated that transmitting information that harmed the interests of "the state" constitutes espionage, be deemed applicable to the Israeli state.[36] "I will not be surprised if the attorneys of the English contest my authority to sign the charge sheet, and, regarding the basic indictment, claim that the Official

[32] Richard Duckett, *The Special Operations Executive (SOE) in Burma: Jungle Warfare and Intelligence Gathering in World War II* (London: I. B. Tauris, 2017), 192.

[33] *The Provisional State Council: A Protocol of Discussions* (Tel-Aviv: State of Israel, 1948), meeting 29 July 1948, 9.

[34] Medzini, *Israel's Foreign Relations*, 1: 219–20.

[35] This appointment was made official in an Israeli Defense Force proclamation on 2 August 1948. See CrimA 1/48 Sylvester, 21.

[36] 1945 British Official Secrets Ordinance. *Palestine Gazette*, no. 1417, 677–79.

Secrets Ordinance does not apply to the protection of the state of the Israeli Defense Forces."[37] This state of affairs so perturbed Shapiro that he stated, "Honestly, I am less concerned about the complications after the war from the perspective of international law than I am about the complications that will arise in our courts. The difficulties in respect to international law can be removed during the peace arrangements and the final arrangements regarding the situation of Jerusalem. In contrast, the current complications can only be removed by an appropriate law from the State Council."[38] Rosen adhered to Shapiro's advice to give teeth to Ben-Gurion's proclamation and pushed legislation through, and the Provisional State Council approved the 1948 Areas of Jurisdiction and Powers Ordinance on 16 September 1948. It stated that, retroactively as of 15 May, "Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel."[39] Though couched in universal language, Shapiro's move was obviously an effort to place Jerusalem under Israeli jurisdiction. Over the following months, the Provisional Government fortified this jurisdictional claim with administrative moves, including by relocating several governmental ministries to Western Jerusalem.[40]

The legal standing of these retroactive statements was put to the test in the Sylvester trial. Following through on its agreement with IZL, the Provisional Government examined the charges against the Britons. Eventually, only two of the five were put on trial, since the other three were released for lack of evidence and returned to England. On 29 August 1948, the Israeli state prosecutor pressed charges against Sylvester and his colleague William Hawkins. The trial began in the Jerusalem District Court on 15 September, with judges Benyamin Halevi and Eliahu M. Mani presiding.[41] Jacob Salomon, a prominent Zionist lawyer involved in the capture of Haifa, and Pinchas Rabinovitch, another veteran Zionist attorney, represented the defendants.[42] On 8 October, the District Court acquitted Hawkins but found Sylvester guilty of all three charges and sentenced him to eight years in prison. The defendant then filed an appeal with the Israeli Supreme Court,

[37] ISA G-2/6915, 9 Sept. 1948, Shapiro to Rosen, 3.
[38] Ibid., 2.
[39] 1948 Area of Jurisdiction and Powers Ordinance, 5708-1948, 1 LSI 64 (1948). It was published in the official gazette on 22 Sept. 1948.
[40] Yossi Katz and Yair Paz, "The Transfer of Government Ministries to Jerusalem, 1948–49: Continuity or Change in the Zionist Attitude to Jerusalem?" *Journal of Israeli History* 23, 2 (2004): 232–59.
[41] Gad Stoltz was the third judge, but he died in the middle of the trial.
[42] Also involved in the defense was Jacob Stoyanovsky, a prominent Jewish international lawyer in Palestine. See ISA P-1/932, 10 Oct. 1948, Horowitz to Slaughter and May.

which had only been established in Jerusalem in September given the insecure conditions there.[43] Hearing its first criminal appeal, the Court meticulously reexamined the evidence used to indict Sylvester and determined that there was reasonable doubt that Sylvester had intended to act in a manner prejudicial to the interests of the Israeli state. In turn, the Court, composed of President of the Supreme Court Moshe Smoira, along with judges Menachem Dunkelbloom and Yitzhak Olshan, acquitted Sylvester. More importantly, however, the Court affirmed the substantive decision that the case did indeed fall under Israeli jurisdictional purview. Various Israeli and foreign newspapers and individuals, including United States Supreme Court Justice (and Zionist) Felix Frankfurter, and later Israeli scholars, lauded the court's *de novo* review and its ultimate decision as indicative of stability and the absence of political involvement in the Israeli justice system, and also as exemplifying the Supreme Court's championing of defendants' rights. Yet the decision was deeply political, since it affirmed that Israeli had retroactive jurisdiction in Jerusalem back to 15 May.[44] While the judiciary displayed differences with the executive during this period, their interests aligned when it came to constructing and deconstructing the jurisdictional relationship between Mandate Palestine and the State of Israel.[45]

As Attorney General Shapiro had anticipated, the defense had contested the Israeli jurisdictional claim over Jerusalem during the period in which the alleged espionage occurred. They argued that throughout the period during which Sylvester and Hawkins were accused of committing their offences—between 19 May 1948 and the beginning of the first truce on 11 June 1948—the Israeli Provisional State Council did not claim complete jurisdiction over Western Jerusalem. The defense acknowledged that the Israeli state had declared Mandate law to be valid in the State of Israel as of 19 May, and that the Israeli Provisional Government had officially published this law on

[43] Even though the Supreme Court heard appeals following the Sylvester case, it still did not serve as the Court of High Justice and it did not hear administrative and constitutional law cases in the first instance during this period. Instead, the Tel Aviv District Court heard these cases, a fact that further accentuated the liminal nature of the transition period. I thank a *CSSH* reviewer for pointing this out.

[44] For instance, the newspaper *HaMashkif* praised the court's decisions as "the highest expression of Israeli justice"; see *HaMashkif*, 17 Nov. 1948. For Frankfurter's assessment, see ISA G-14/5672, 11 Mar. 1949, Frankfurter to Shwarz. For a positive scholarly view of the Sylvester trial, see Mordechai Kremnitzer, "Mishpatim bithoniyim ve-zekhuyot ne'eshamim: silvester n' ha-yo'etz ha-mishpati le-memshelet Yisra'el [Security trials and the rights of defendants: *Sylvester v. The Attorney General to the Israeli Government*]," in Daphne Barak-Erez, ed., *First Judgments: Reflections upon Decisions of the Israeli Supreme Court during the First Year of Israel's Independence* (Tel-Aviv: ha-Kibuts ha-me'uhad, 1999), 17–21.

[45] Regarding the judiciary and the executive's shared interests and outlooks, see Daphne Barak-Erez, "ve-Higadeta le-Vinkha: Historia ve-Zikaron be-Veit ha-Mishpat [And you shall tell your son: history and memory in the court room]," *Tel-Aviv University Law Review* 26, 2 (Nov. 2002): 773–802.

21 May, but maintained that at that time Western Jerusalem still lay outside of the State of Israel's jurisdiction. Even though Joseph's proclamation in mid-May stated that Western Jerusalem was under the administration (*be-hezkato*) of the IDF, the defense argued that this did not grant the Israeli state full legal jurisdiction in the city since it was not an annexed territory (*shetah mezoraf*). Western Jerusalem only came under fully fledged Israeli jurisdiction after the Israeli military explicitly claimed jurisdiction in the city on 2 August and after the Israeli government validated this on 16 September.[46]

According to the defense, since Jerusalem was not under Israeli jurisdiction at the time in question, Israel could not prosecute the defendants under the 1945 British Official Secrets Ordinance. Any Israeli attempt to try the Britons for espionage in Jerusalem would necessitate retroactively asserting that the actions that they had allegedly carried out were illegal and that the Israeli state had jurisdiction over them. This, the defense said, was an impermissible "legal absurdity" that constituted ex post facto law and went against the basic inadmissibility of *nullum crimen, nulla poena sine lege* (no crime, no punishment without law).[47] They cited Maxwell's treatise *On the Interpretation of Statutes* and a 1936 Palestine High Court case affirming that the court will not retroactively apply legislation unless the legislation expressly states that it applies retroactively. Likewise, they referred to the Talmudic legal principle that there is no punishment without a warning: "It is a nearly universal law, in all states and in the tradition of Israel (*masoret yisra'el*), that a person cannot be tried for an offence unknown at the time of its performance."[48]

By claiming that the charges against Sylvester were predicated on ex post facto law, the defense called into question the nature of the Israeli legal link to its predecessor. In the view of the defense, even if the Israeli state adopted Mandate law immediately following the termination of the Mandate, this did not mean that Israel's ability to implement this law necessarily followed in a wholesale, uniform fashion.[49] Though it spent little time discussing its own, alternative conception of the formation of Israeli jurisdiction, the defense viewed the legal relationship between Mandate Palestine and Israel as fragmented. The legal vacuum left by the end of the Mandate was not

[46] ISA P-12/940, Trial Proceedings of Criminal Case [henceforth CrimC] (Jer) 2/48 *Attorney General v. Sylvester and Hawkins*, 84–85; ISA P-11/940, CrimC (Jer) 2/48 *Attorney General v. Sylvester and Hawkins*, 4 (1948); ISA P-11/940, 4 Nov. 1948, Trial Proceedings of CrimA 1/48 *Sylvester v. Attorney General*, Hearing 3, 3.

[47] ISA P-11/940, 4 Nov. 1948, Trial Proceedings of CrimA 1/48 Sylvester, Hearing 3, 9.

[48] ISA P-12/940, Trial Proceedings of CrimC (Jer) 2/48 *Attorney General v. Sylvester and Hawkins*, 84–85. The court cited HC 67/36, *Shawa v. Assistant District Commissioner, Southern District, Gaza*, 3 PLR 146 (1936).

[49] The defense seems to have conflated the principle against ex post facto law—that is, the promulgation and application of a law retroactively—with its claim against retroactive Israeli *utilization* of *inherited* British law, a law that was already on the books.

automatically filled by Israeli jurisdiction. Instead, jurisdictional continuity emerged in different stages and, importantly, was contingent upon explicit Israeli claims to jurisdiction. To this end, the defense contended that the legal status of Tel Aviv, the de facto capital of the nascent state, differed from that of Jerusalem following 15 May. Jurisdiction was not naturally occurring but depended on claim-making.

Both the Israeli District Court and the Supreme Court rejected this argument. In the process, they claimed jurisdiction as a natural occurrence that directly flowed from the British Mandate administration to the Israeli state. Discussing the legal identity of the "state" referred to in the 1945 British Official Secrets Ordinance, the District Court opined that in the aftermath of 15 May, "This is the necessary result of the termination of the British Mandate for Palestine and the establishment of the State of Israel."[50] According to the District Court, there was no alternative, a claim that aligned with the broader Israeli reasoning behind the classification of Jerusalem as an "administered territory" and not as an "occupied territory." Adamant that Israel did not wrest away Jerusalem from any foreign power, the Israeli executive claimed that the city (or at least its western part) seamlessly transitioned to becoming an administered Israeli territory.[51] In this telling, if nature abhorred a vacuum, so too did jurisdiction.

With its affirmation of continuous jurisdiction, the Israeli judiciary actively upheld the Israeli executive's proclamations and ordinances that claimed jurisdiction in Jerusalem beginning on 15 May. That they were all retroactive was deemed of secondary legal importance. This was argued in two ways. First, both the District Court and the Supreme Court determined that the crimes that the defendants had allegedly committed ex post facto were universal crimes.[52] Rather than being legal acts that were retroactively rendered crimes—law—the acts that the defendants allegedly committed were criminal in their nature from the outset. Both courts cited the controversial 1942 American case *Ex parte Quirin* (in which the U.S. Supreme Court affirmed the jurisdiction of a United States military tribunal to try eight German spies and saboteurs), Lassa Oppenheim's *International Law* (the sixth edition edited by Hersch Lauterpacht), and the ruling by the International Military Tribunal at Nuremberg regarding the universal criminality of espionage.[53] According to this logic, even if the Israeli state's

[50] ISA P-11/940, CrimC (Jer) 2/48, *Attorney General v. Sylvester and Hawkins*, 4 (1948).

[51] ISA G-2/6915, 9 Sept. 1948, Attorney General to Minister of Justice; See also ISA G-14/5672, Jan. 18, 1950, Rowson (Rosenne) to Attorney General with Jacob Robinson's 3 Jan. 1950 memo attached.

[52] CrimA 1/48 Sylvester, 29.

[53] Regarding the use of retroactive law at Nuremberg and subsequent postwar trials, see Devin O. Pendas, "Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–1950," *Central European History* 43, 3 (2010): 428–63.

specific laws were not yet valid in Jerusalem at the time of the defendant's crime—something the courts steadfastly rejected—the two would have nonetheless been subject to trial for their actions. In fact, the District Court maintained that by charging them with espionage and not war crimes, the Israeli state was doing an "act of righteousness [*ʿasa hesed*]" for the defendants by protecting them from significantly heavier punishments and even death.[54]

Second, the Supreme Court turned to English precedent to argue that even if retroactive laws were not desired in principle, "There are circumstances in which the security of the state is involved that necessitate retroactive legislation."[55] The precedent it cited was *Phillips v. Eyre*, the infamous English case dealing with the legality of the Governor of Jamaica Edward John Eyre's violent suppression of the 1865 Morant Bay Rebellion. It is striking that the Court's resorted to this case, which at its time had brought to fore heavily debated and contested questions of emergency, the limits of law in colonial settings, and colonial uses of violence.[56] It is unclear whether this brief citation signified the Supreme Court's relative apathy toward underlying juridical and ethical problems within colonial law or its active identification with imperial law. After all, it did not discuss the original context of the citation. The use of this precedent did, however, illustrate the complex Israeli relationship with its British legal legacy. Whereas the Court of England determined that Eyre's retroactive introduction of martial law, though certainly undesirable, rendered his actions legal and therefore unprosecutable in England, the retroactive introduction of law in the Sylvester trial enabled the Israeli state to claim jurisdictional continuity with the British Mandate and prosecute Sylvester.

This malleability of law was even more pronounced given that the exoneration of Eyre was inextricably linked to an entrenched racial rule of colonial difference that privileged the colonizer and served to normalize both private and state colonial violence.[57] The Sylvester trial, by contrast, marked an instance in which a post-imperial judiciary utilized British colonial law to prosecute British citizens for alleged crimes. The case thereby served as an early precursor to what Jean and John Comaroff have termed the "juridification of the past" and the use of law against a former imperial

[54] ISA P-11/940, CrimC (Jer) 2/48, *Attorney General v. Sylvester and Hawkins*, 7 (1948); CrimA 1/48 Sylvester, 25–26.

[55] CrimA 1/48 Sylvester, 25–26.

[56] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003), 109–17.

[57] This literature is extensive. Hussain, *Jurisprudence of Emergency*; R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005).

power.[58] Even while later instances of this juridification differed from the Sylvester trial insofar as they often took place in the metropole—the Kenyan lawsuits seeking compensation for victims in the Mau Mau Uprising proceeded in British courts—both exemplified that the law was a double-edged sword that could be wielded against the British.[59]

The Israeli judiciary also sought to minimize the scope of the chaos in Jerusalem in the historical and legal record, and constructed a narrative in which the city was under firm Israeli control during the period in which Sylvester was accused of having spied. That he had been able to transmit information without permission from the Israeli authorities for an extended period—a fact that ostensibly pointed to a deeper systemic Israeli lack of control in Western Jerusalem—posed a challenge to the judiciary's narrative of continued jurisdiction. Astonishingly, however, the Supreme Court construed the fact that Sylvester had not applied for an official permit for his transmitter as affirming Israeli control of the Western Jerusalem. He did not pursue a permit, the Court said, since he and the other British citizens remaining in Jerusalem had already notified the Jewish Agency of their intention to utilize transmitters in early 1948. In the post-15 May period, Sylvester believed that there was no need to once again notify the Jewish Agency and the IDF since, "It was well known that, in the eyes of the inhabitants of the country, Jews and non-Jews alike, the Jewish Agency symbolized the Jewish government."[60] In papering over the Israeli state's precarious position in Jerusalem, the Israeli Supreme Court's narrative mirrored other states' claims of jurisdictional continuity amidst the turmoil of political transition. For example, in the 1945 case *L. and J. J. v. Polish State Railways*, the Polish Supreme Court faced the question of whether German or Polish law was in force between early 1945 when Polish forces occupied the area around Danzig and November 1945 when the Polish government officially decreed that Polish law was binding in the "Recovered Territories." Despite the chaos that accompanied the (re)establishment of Polish control east of the Oder-Neisse line and the ensuing expulsion of Germans, the Polish Supreme Court determined, "From the moment that the civil administration was taken over and organs of administration were set up on the spot … all provisions of law issued for all the Polish State have also had binding force in the Recovered Territories, whilst all provisions contrary to the legal order recognized by the Polish State ceased to be binding."[61]

[58] Jean Comaroff and John L Comaroff, *Theory from the South: Or, How Euro-America Is Evolving toward Africa* (London: Routledge, 2016), ch. 6.

[59] Caroline Elkins, "Alchemy of Evidence: Mau Mau, the British Empire, and the High Court of Justice," *Journal of Imperial and Commonwealth History* 39, 5 (2011): 731–48.

[60] CrimA 1/48, Sylvester, 45.

[61] *L. and J. J. v. Polish State Railways*, 24 *International Law Reports* 77, 78 (1948) (Pol.).

Like the Polish court's assertion of an instantaneous transition, Israeli claimed that they stepped into the shoes of the Mandate power immediately after it relinquished its jurisdiction in Jerusalem.

While proclaiming that Israeli jurisdiction began on 15 May, Israeli officials affirmed that the Mandate administration's jurisdiction had existed up until that point. For instance, the Tel Aviv District Court held that, although an order from the Judicial Committee of the Privy Council (which served as an appellate court to the Palestine Supreme Court) reached the parties following 15 May, that it was made prior to 15 May made it binding.[62] The Israeli legislature and executive's view of 15 May as a concrete day in which the legal change of guard occurred came through in contemporaneous legislation. Various laws, including the 1948 Prevention of Terrorism Ordinance, which was passed on 23 September following the assassination of UN Mediator Count Folke Bernadotte and granted Israeli authorities draconian police powers, and the 1949 Law to Cancel the 1926 Administration of Russian Properties Ordinance were retroactively brought into effect beginning on 15 May.[63] In this way, Israeli actors insisted upon adjoining their assumption of jurisdiction with the Mandate's relinquishment of it, to create "continuity."

Yet, as much as Israel sought to cast Israeli jurisdiction as wholly continuous with that of the British Mandate, it evaded this same logic when it posed extractive demands. Although Israeli officials made myriad claims to benefits and rights reserved to successor states under international legal doctrines, despite their emphatic declaration that they were not the official successors to the British Mandate, when it came to whether Israel would assume the duties and obligations of the expired Mandate regime they were quick to assert discontinuity.[64] For instance, while senior legal advisor Shabtai Rosenne determined that there were international legal grounds for the Jewish state to collect tax arrears due to the Mandatory government, Israeli officials also insisted that they had limited responsibility to repay Jewish and Arab taxpayers whom the Mandatory authorities owed money, reasoning that Israel was not a recognized successor.[65] Similarly, while the

[62] CA 2(TA) 91/45, *Forer v. Guterman*, 4 *Hamishpat* 55 (1949).

[63] ISA K-61/437, 24 July 1949, Law to Cancel the Administration of Russian Properties Ordinance, 1926.

[64] Shabtai Rosenne, "Israel and the International Treaties of Palestine," *Journal Du Droit International* 77, 4 (1950): 1141–75.

[65] ISA G-14/119, 7 Apr. 1948, memo by Rowson (Rosenne). See also CA 24/48 *Shimshon Palestine Portland Cement Factory Ltd. v. The Attorney General*, motion 41/49 4 PD 143 (1950); CA 28/52 Palas v. Ministry of Transportation 9 PD 436, 440 (1955); High Court of Justice [henceforth HCJ], 21-23/48 Sofer v. Minister of Police 2 PD 365 (1949); HCJ 113/49 Sifri v. Ministry of Justice 4 PD 613 (1950). Regarding the Israeli refusal to repay many Palestinian taxpayers and release money from their bank accounts, see Sreemati Mitter, "A History of Money in Palestine: From the 1900s to the Present" (PhD diss., Harvard University,

Israeli state submitted monetary claims on behalf of its citizens against the former Mandatory power, it refused to offer any form of compensation itself.[66] Israeli officials also espoused the view that they were not bound by international treaties to which the Mandatory power had been party. Whereas the British had reached agreements with other former colonies and territories that had obtained independence (such as Iraq), whereby the rights and obligations of treaties were passed onto the nascent states, there was no such agreement with Israel.[67] In turn, although Israeli officials such as Rosenne recognized that it would be diplomatically expedient for the Israeli government to reaffirm its adherence to most of its treaties, the official Israeli stance was, "The Government of Israel cannot accept … that there has been a succession."[68]

Although cynical, the Israeli unwillingness to take on these duties was not wholly exceptional. For one, legal thinkers such as C. H. Alexandrowicz justified this approach, claiming that it is "clear that the Israeli Government is not a successor to the Mandatory Power" and "there is, of course, no succession of political rights and duties" in respect to treaties governed by international law.[69] Moreover, other states had acted similarly. Colonial powers themselves often declined to accept treaty responsibilities and obligations that had been assumed by the precolonial leaders of acquired territories.[70] So too had states emerging from imperial and colonial rule. The Irish Free State had proclaimed that obligations arising from their predecessor's treaties were not inherently binding.[71] Pakistan declined to enforce arbitration treaties to which British India had signed.[72] Tanganyika refused to consider British treaties as automatically applying to itself.[73] Rosenne himself pointed to post-World War I Czechoslovakia and Poland to argue, "There is one golden rule operative whenever a new State or a new international personality is created, namely, that such State or international

2014), https://dash.harvard.edu/bitstream/handle/1/12269876/Mitter_gsas.harvard_0084L_11308.pdf?sequence=4 (last accessed 22 Nov. 2019).

[66] See generally ISA P-14/26; ISA G-61/304.

[67] A. P. Lester, "State Succession to Treaties in the Commonwealth," *International and Comparative Law Quarterly* 12, 2 (1963): 475–507.

[68] ISA G-12/5674, 23 May 1949, memo by Rowson (Rosenne).

[69] Charles Henry Alexander, "Israel in Fieri," *International Law Quarterly* 4, 3 (1951): 423–30, 426, 429.

[70] Matthew C. R. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2007), 46.

[71] See Irish Free State Debates, 11 July 1933, cited in J. Mervyn Jones, "State Succession in the Matters of Treaties," *British Yearbook of International Law* 24 (1947): 360–75, 367.

[72] *Yangtze (London) Ltd. v. Barlas Brothers (Karachi) and Co.*, 34 *International Law Reports* 27 (1961) (Pak.).

[73] "Problems of State Succession in Africa: Statement of the Prime Minister of Tanganyika," *International and Comparative Law Quarterly* 11, 4 (1962): 1210–14.

personality is, from the point of view of pre-existing treaty obligations appurtenant to its territory, a *tabula rasa* so to speak."[74] This claim of a *tabula rasa* would later be espoused by international anticolonial jurists such as Mohammed Bedjaoui who rejected as neocolonialism attempts to impose an obligation on independent states to continue colonial treaties.[75] Still, and as the following section shows in respect to jurisdiction, the coexistence of Israel's recognition of Mandatory jurisdiction until 15 May along with a contradictory approach to the resolution of outstanding legal claims spoke to a view of the legal past that was not only instrumental but also liminal.

DECONSTRUCTING THE JURISDICTIONAL IMPORTANCE OF 15 MAY 1948

Despite their claim that 15 May marked a moment of legal continuity, the Israeli executive and judiciary simultaneously sought to articulate their opposition to the Mandatory predecessor by refuting its jurisdictional authority prior to that date. This manifested in two ways. First, on several occasions they retroactively claimed that Israeli jurisdiction had commenced prior to 15 May. Second, they selectively contested, revoked, and corrected laws and verdicts that were issued prior to 15 May. Once they had looked back into the past in order to infuse the date with jurisdictional significance, the Israeli executive and judiciary did not stop there; in the process they revised their recognition that the Mandatory administration had jurisdiction until then.

The pre-state *Yishuv* narrative of a deep-seated British hostility toward the Zionist project brought about this Israeli questioning of the Mandate administration's jurisdiction that supposedly existed until 15 May. Prior to 1939, the *Yishuv* had developed under the umbrella of British colonial protection. The 1939 White Paper, which called for a single state in which Jews and Arabs would be proportionally represented, however, sparked a Zionist discourse of British betrayal. The British, according to this narrative, were duplicitous and treacherous—the "Perfidious Albion" of which the French had longed warned.[76] If prior to 1939 *Yishuv* leaders had entertained the possibility of converting the League of Nations Mandate for Palestine into a British crown colony, following Whitehall's White Paper they repeatedly invoked the terms of the Mandate to castigate British policies.[77] While this suspicion of the Palestine administration and Whitehall only increased after World War II, it did not preclude continued Zionist

[74] Rosenne, "Israel and the International Treaties," 1141. See also ISA HZ-9/2419, 27 Aug. 1948 memo by Rosenne, "The Binding Force of the Treaties of the Mandatory Power on Israel."
[75] Craven, *Decolonization of International Law*, 84.
[76] Arie M. Dubnov, "On Vertical Alliances, 'Perfidious Albion' and the Security Paradigm," *European Judaism* 52, 1 (2019): 67–110.
[77] Derek Jonathan Penslar, "Declarations of (In)Dependence: Tensions within Zionist Statecraft, 1896–1948," *Journal of Levantine Studies* 8, 1 (2018): 25–28.

cooperation with Mandate authorities.[78] Still, in the period leading up to the 1948 War, this antagonistic discourse mixed with increasing distrust. Even as the British prepared for their departure, many Zionists believed that this was a ruse. Once the Mandate officially ended and the interstate Israeli-Arab war commenced, one *New York Times* reporter described the Israeli struggle against its Arab neighbors as still very much a continuation of "the old struggle with the mandatory power" (though she did offer a more ambivalent future outlook).[79] The London-based *Times* decried the Sylvester trial as a performance in which Israeli newspapers gleefully espoused their "vicious hatred of all things British."[80] In spite of the crucial role that Britain had played in the consolidation of the *Yishuv,* "it was that enmity and not the convergence of interests between Britain and the Zionist movement which was imparted to the Israeli street, and in large measure also to the chroniclers of Israel's history."[81]

As part of their divergence from the British, Zionists grew increasingly fearful that Britain had surreptitiously planted legal mechanisms that would undermine Israeli sovereign aspirations, and they adopted an increasingly skeptical view of British jurisdiction. As the violence increased in late 1947, British officials laid the legal foundations for the Palestine administration's withdrawal. These included amendments to administrative law, directives to transfer assets out of Palestine branches of British companies, and laws to move property under the control of the Custodian for Enemy Property to the UK. To expedite these laws, the British promulgated an ordinance that waived the requirement that laws be published in the official gazette before coming into force. Forty-two ordinances were subsequently passed.[82] Upon learning about these ordinances in the last days of the Mandate, Zionist officials, who were already operating under the assumption that the Jewish state would utilize the legal system in place at the end of the Mandate, feared that they would be tacitly giving legal validation to these "hidden laws," which would potentially harm the nascent state. One solution was to modify the prospective legislation and determine that the Israeli state would continue the legal reality in place on 1 April 1948, rather than 14 May.[83]

[78] Regarding the continued Zionist cooperation with the British during and after World War II, see Tom Segev, *One Palestine, Complete: Jews and Arabs under the British Mandate* (New York: Metropolitan Books, 2000), 483.

[79] "Israel's Anti-British Policy Is Held a Temporary Phase," *New York Times*, 13 Jan. 1949.

[80] "Britons Committed for Trial: A Vitriolic Press," *The Times*, 21 Aug. 1948.

[81] Motti Golani, *The End of the British Mandate for Palestine, 1948: The Diary of Sir Henry Gurney* (New York: Palgrave Macmillan, 2009), 215.

[82] The Palestine administration published a booklet listing forty-two ordinances in May 1948. Government of Palestine, *Legislation Enacted and Notices Issued Which Have Not Been Gazetted* (Jerusalem: Government Printer, 1948). See also British National Archives, FO 371/82622; ISA G-1/5666; ISA G-24/5671; ISA G-26/115.

[83] ISA G-26/115, 18 May 1948, Hannah to Sharef.

After the Israeli Government rejected this, it enacted legislation declaring that "an unpublished law has no validity and never had any," thus annulling these laws.[84] The underlying anxiety and subsequent resort to retroactive legislation mirrored the Israeli actions in the Sylvester trial. Importantly, however, whereas the Israeli response to Sylvester entailed affirming the significance of 15 May, now the Israeli response required that it wrest away the pre-15 May legal past from the Mandate's grasp in order to erase any potential legal future imprinted with British colonial control.

This same backward-facing legislative revisionism occurred in other domains. Laws that were deemed to have been explicitly antagonistic to the *Yishuv* were repealed. The Provisional State Council's inaugural piece of legislation, the 1948 Law and Administration Ordinance, which stipulated that Mandate law would continue in the State of Israel, nullified several laws. These included several provisions of the 1941 Immigration Ordinance and portions of the 1945 Defence (Emergency) Regulations, which restricted Jewish immigration, as well as the 1940 Land Transfers Regulations, which reduced Jewish land acquisition.[85] These laws had been introduced as part of the 1939 White Paper and were, according to the *Yishuv*, an egregious violation of the obligations laid out in the League of Nations' Mandate for Palestine. The Land Transfer Regulations was "an illegal 'law.'"[86] The British had upheld these laws (though often without strictly applying them) despite persistent Zionist calls for their abrogation. Given these laws' notoriety, the ordinance not only repealed them (as of 19 May or, perhaps, 15 May 1948), but also retroactively revoked their legality from the moment of their promulgation. Regarding the restrictions on Jewish immigration, the Law and Administration Ordinance stipulated, "Any Jew who at any time entered Palestine in contravention of the laws of the Mandatory Government shall, for all intents and purposes, be deemed to be a legal immigrant retroactively from the date of his entry into Palestine."[87] Boats confiscated under the 1941 Immigration Ordinance were also returned to their owners.[88] The ordinance also determined, in respect to land acquisitions, "No judgment given on the basis of such Regulations shall be a bar to the lodging of a new claim in the same matter." Although this last clause did not retroactively approve all land acquisitions that the Mandate had rejected, that was presumably because it was recognized that it would be impossible to track

[84] *Divre Ha-Keneset*, Meeting 70, 24 Aug. 1949, 1365.

[85] Law and Administration Ordinance, 5709-1948, 1 LSI 1 (1948). Not all provisions of the 1941 Immigration Ordinance were revoked. I thank a *CSSH* reviewer for pointing this out.

[86] Joseph Weitz, *Hitnahalutena Bi-Tekufat Ha-Sa'ar, Nisan 696-Nisan 707* [Our settlement activities in a period of storm and stress, 1936–1947] (Merhavyah: Sifriyat po'alim, 1947), 15.

[87] Law and Administration Ordinance, 5709-1948 §13.

[88] Administrative Appeal (AdmA) 1/49, *Zur Shipping Company Ltd. v. Attorney General*, 4 PD 288 (1950).

past agreements that had not been completed. The stipulation permitting new claims to be submitted was more manageable, and still retroactively nullified the Mandate administration's restrictions.

More fundamentally, the Israeli judiciary broke with its predecessor's evaluation of the legal standing of the League of Nations' Mandate for Palestine. Issued on 24 July 1922, that Mandate had marked the culmination of Zionist diplomatic efforts for international recognition "in favor of the establishment in Palestine of a national home for the Jewish people," language taken directly from the 1917 Balfour Declaration.[89] While the text stated that the Allied Powers selected Britain as the Mandatory power for Palestine, the Palestine administration's judiciary subsequently determined that it was not, on its own, binding in Palestine courts. Rather, the Mandate's terms only had the "force of treaty obligations," and its provisions were "enforceable in the Courts only in so far as they are incorporated by the Palestine Order-in-Council, 1922, or any amendment thereof."[90] Palestine's courts continued to adhere to this interpretation, including when asked whether the provisions of the 1939 White Paper violated the terms of the Mandate.[91] The Mandatory administration thereby elevated its laws and legal decisions over claims made under the aegis of the League of Nations Mandate. In contrast to this restrictive reading of the Mandate, in 1948 Israel's Supreme Court determined that its terms were legally binding. Whereas the courts in Mandatory Palestine had claimed "that the Mandate was not part of the law of the land, save in so far as it had been introduced by an Order-in-Council," the Israeli Supreme Court stated, "This court inclines to a different opinion and is prepared to consider whether a law passed in Palestine during the Mandate contradicts the terms of the Mandate."[92] By elevating the Mandate's terms to a quasi-constitutional status, the Israeli judiciary empowered itself to re-read and contest Mandatory laws.

It should be noted that, while other nascent states also contested their legal past, Israel's simultaneous refutation of the British past and elevation of the Mandatory text seems to have been distinctive. Beyond altering the laws of their predecessor states prospectively from the date that they assumed control of their territory, these new states also claimed power to retrospectively change laws prior to the transition. Often, these claims were linked to uncertainty as to when the new state had in fact emerged. The United States

[89] For the full text of the Mandate for Palestine, see "The Palestine Mandate," Avalon Project, Yale Law School, 2008, http://avalon.law.yale.edu/20th_century/palmanda.asp (last accessed 25 Dec. 2019).
[90] HCJ 55/25, *Husseini v. Government of Palestine*, 1 PLR 50 (1925).
[91] HCJ 19/47, *Rosenblatt v. The Registrar of Lands*, 5 ALR 499 (1947).
[92] HCJ 5/48, *Leon v. Acting District Commissioner of Tel Aviv*, 1 PD 58 (1948).

had rejected the British determination that British subjects who were domiciled in territory that became that of the United States ceased to be British beginning on 3 September 1793 (the signing of the Treaty of Paris). Instead, it claimed that this change in nationality occurred thirteen years earlier, on 4 July 1776 (the Declaration of Independence).[93] In the more recent past, several European governments revoked the validity of their predecessor's legal authority. After World War I, the Polish Supreme Court held that Poland had continued to exist since the third partition of 1795 and that the law of the land was Polish law rather than laws of Austria, Prussia, or Russia.[94] Following World War II, several European states retroactively contested the jurisdictional regimes of the occupying Axis governments. Edvard Beneš's "theory of legal continuity" nullified all laws that had been promulgated following the March 1939 German invasion of Czechoslovakia. According to Beneš's theory, the Munich Pact was voided once the British and French failed to secure the preservation of rump Czechoslovakia. Consequently, "all that had come to pass after Munich … was null and void … Beneš remained president, the First Republic still existed, and, most importantly for postwar retribution, Czechoslovakia's criminal code and especially its laws against sedition applied throughout the occupation to all of the dismembered country."[95] In a similar fashion, the Provisional Government of the French Republic determined that the Vichy regime was illegal, and that the French Third Republic and its laws had remained in place during the war.[96]

Although they did not make claims to the continuity of sovereignty à la Beneš or de Gaulle, states emerging from empire also extended their jurisdictions into the colonial past. After the 1948 War, Jordanian courts dealt with cases that had taken place both prior to May 1948 and in territory outside of the West Bank (the territory that Jordan conquered during the war).[97] The 1952 Egyptian Decree on Treason, legislated in the aftermath of the Free Officers' coup, claimed jurisdiction over any offense since September 1939.[98] That the Israelis only selectively rejected the past while simultaneously predicating their claims on the ostensible legitimacy of the League of Nations Mandate underscores the ambivalence that the Zionist leadership felt toward the Mandatory period.

[93] Paul Weis, *Nationality and Statelessness in International Law* (Alphen aan den Rijn, Netherlands; Germantown, Md.: Sijthoff & Noordhoff, 1979), 146.
[94] *Republic (Poland) v. Felsenstadt*, 1 *International Law Reports* 33 (1922) (Pol.).
[95] Benjamin Frommer, *National Cleansing: Retribution against Nazi Collaborators in Postwar Czechoslovakia* (New York: Cambridge University Press, 2005), 79.
[96] Peter Novick, *The Resistance Versus Vichy: The Purge of Collaborators in Liberated France* (London: Chatto & Windus, 1968), ch. 8.
[97] *Ottoman Bank v. Jabaji*, 21 457 (1954) (Jor.); E. Theodore Mogannam, "Developments in the Legal System of Jordan," *Middle East Journal* 6, 2 (1952): 194–206, 205.
[98] Yoram Meital, *Revolutionary Justice: Special Courts and the Formation of Republican Egypt* (New York: Oxford University Press, 2017), 213–16.

The second domain in which Israeli officials enacted past-looking laws concerned Palestinian refugees and their property. The legal regime dealing with Palestinian "absentees" developed in a piecemeal fashion. Still, Israeli officials consistently determined that it applied beginning on 29 November 1947. Any individual who had therefore been a citizen or subject of one of the enemy Arab states, had lived there, or had been a citizen of Mandate Palestine and left their "ordinary place of residence in Palestine" for somewhere outside of the country or for a place in Palestine "held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment" beginning on 29 November 1947 was deemed an "absentee" and their property was placed under the control of the Custodian of Absentee Property. Determining where Palestinians were during the course of the war proved extremely complicated and led to a wide array of petitions and complaints from aggrieved "absentees," (including those who fell within the notorious category of "present absentees"). Nevertheless, Israeli officials time and again upheld 29 November 1947 as the start date for this legislation. According to Yehoshua Palmon, the prime minister's chief advisor on "Arab affairs," the government chose that date because it was when Mandatory governance had effectively ended. Even in places where Mandatory government offices continued to operate, claimed Palmon, "this did not trump the fact [*eina hazaka yoter min ha'uvda*] that in these places there were battles between Jews and Arabs with no intervention from the Mandatory authorities."[99] Once again, this Israeli practice of backdating its legislation was not anomalous; it paralleled Indian and Pakistani evacuee property laws enacted during the partition of British India. Although those two states only gained formal independence on 15 August 1947, their legislation classified individuals who had left their homes beginning 1 March 1947 as "evacuees." This resemblance is perhaps unsurprising given that Israel modeled its absentee legislation on Pakistani and, to a lesser extent, Indian laws.[100]

This notion that while the Mandate administration held jurisdiction in Palestine it was increasingly unable to properly administer justice as 15 May 1948 approached underlay the Israeli willingness, even desire, to reexamine past legal decisions of the Mandatory authorities. In fact, as alluded to in Palmon's comments, the British government's refusal to cooperate with the UN in implementing partition, the Mandate administration's sporadic interventions in halting the escalating intercommunal violence, and that

[99] ISA GL-35/17097, 1 Jan. 1949, Palmon to Porat.

[100] Regarding the Israeli transplantation of Pakistani evacuee property law, see Kedar, "Expanding Legal Geographies." See also my article, "Uncertain Comparisons: Zionist and Israeli Links to India and Pakistan in the Age of Partition and Decolonization" (currently under review).

individual British soldiers participated in attacks on Jews all led Zionists to believe that the Mandate administration was not only failing to maintain law and order but was intentionally bringing about widespread chaos in Palestine in the period leading up to 15 May. As the Zionist legal journal *ha-Praklit* stated regarding the British decision to terminate the Mandate: "The nation, which takes pride in its culture and its gentle manners was not able to or not willing to decorate this momentous step [i.e., its termination of the Mandate] with any decoration of decency (*haginut*). It is leaving while slamming the door in anger and with a desire to destroy, damage, and create chaos (*lehashhit, lehabel, liztor tohu va-vohu*)."[101]

The Mandate administration's handling of its judicial system only amplified these embittered views. Whereas other Mandate institutions were either officially terminated or effectively paralyzed in the interval leading up to the Mandate's termination, the courts continued to operate until 14 May.[102] Rather than ameliorate tensions, their continued activity in the midst of a deteriorating security situation exacerbated Zionist beliefs that the Mandate judiciary had an anti-Zionist bias and was unjust. On 21 January 1948, Chief Justice William Fitzgerald announced the courts would continue to operate despite the escalating violence.[103] *Ha-Praklit* claimed that the general instability in Palestine rendered the court's activity in Jerusalem untenable and called on the courts to permit specific cases to be either postponed or moved to Tel Aviv (especially when both parties were Jewish).[104] Yet, since the Mandate courts were primarily concerned with portraying themselves as responsible for law and order and since they wanted to reach verdicts in cases still open (especially those with financial implications), they ignored these calls.[105] Against this backdrop, the Israeli state saw itself as having the right and even the need to hear cases that had not reached Mandate courts, reexamine cases that had been heard, and accept appeals. While British courts continued to operate in the Haifa enclave until the last British personnel departed on 30 June, several cases from the pre-15 May period fell into the laps of the Israeli judiciary. The Israeli executive and judiciary's decisions in these cases, in turn, illuminate their views of the Mandate regime's jurisdiction on the eve of its termination.

[101] See "Questions of the Hour," *ha-Praklit* 5 (Mar.–Apr. 1948): n.p.
[102] Golani, *End of the British Mandate*, 104.
[103] See *Palestine Post*, 22 Jan. 1948, "Court Can't Consider Plea of Insecurity."
[104] See "Questions of the Hour," *ha-Praklit* 5 (Jan. 1948): n.p.
[105] Gavriel Strasman, *'Ote ha-gelimah: toldot 'arikhat ha-din be-Erets Yisra'el* [Wearing the robes: a history of lawyering in Eretz Israel] (Tel Aviv: Lishkat 'orkhe ha-din be-Yisra'el; Sifriyat Ma'ariv, 1984), 216–17. It is not entirely clear to what extent the Mandatory courts succeeded in completing their cases. See *Palestine Post*, 23 Jan. 1948, "60 Trials Postponed."

In *Katz-Cohen v. Attorney General*, the Israeli judiciary established its prerogative to judge criminal cases that had occurred before 15 May.[106] The case dealt with the alleged murder of a Jewish woman in Tel Aviv by her husband on 21 April 1948. Since the murder occurred in Tel Aviv, which by this point in time was essentially under Jewish autonomy, it did not reach the British courts before the end of the Mandate.[107] The Israeli Tel Aviv District Court heard the case and, on 23 September 1948, found the husband guilty of murder.[108] The defendant appealed the verdict to the Israeli Supreme Court. In addition to denying having murdered his wife, he argued that, since the alleged murder had taken place prior to the creation of the state, it lay outside of the Israeli court's jurisdiction. The defendant reasoned that because criminal offenses, including murder, are not simply crimes against fellow citizens but also crimes against "law and order and against the public interest," the state is responsible for punishing such acts. Therefore, in cases in which there is a change of sovereignty, the successor state, barring specific legislation, is not responsible for punishing criminals and, in fact, lacks the legal mandate to do so "whether the crime was a misdemeanor, a felony, or an offense [*pesha'*, *'avon*, *o khet*]."[109]

On 2 September 1949, the Supreme Court, in a panel composed of judges Moshe Smoira, Simcha Assaf, and Shneur Zalman Cheshin, upheld the District Court's decision. They emphatically rejected the defense's logic. In the words of Moshe Smoira, "Feelings of justice rise in revolt against a claim such as this which would imply that there is a vacuum in the criminal law brought about by the transition from sovereign to sovereign.…"[110] The Supreme Court held that the defendant had wrongly blurred the lines between the question as to whether Israel was the legal successor to the British Mandate and that of whether municipal law is impacted by a change in sovereignty. After determining that the former question was not at issue in the case at hand, the Court cited the international legal treatises of Hyde and Oppenheimer to establish the "important principle of *continuity* of the law despite a change in sovereignty." In contrast to the White Paper laws that the Provisional Government revoked, the laws of homicide carried over. Beyond insisting that it was simply trying to continue a prior justice system, the Supreme Court pronounced that it could seamlessly step in as the arbiter of a legal past over which it had not, at the moment of the alleged homicide, held any

[106] In the files of the *Yishuv*'s emergency committee is a draft of a law that mandated the continuation of criminal proceedings that had begun prior to 15 May. That law was never put into effect. See ISA G-38/110, 16 Feb. 1948, Cohen to Goitein, and attached Criminal Proceedings (Transfer of Proceedings) Order 1948.

[107] Strasman, *'Ote ha-gelimah*, 231.

[108] The following information is based on the Supreme Court's verdict in the appeal.

[109] HCJ 3/48, *Katz-Cohen v. Attorney General*, 2 PD 681, 691.

[110] Ibid., 693.

authority. Indeed, the defendant's insistence that it is "not the individual, but the injured community that demands the punishment of the offender" provided the grounds for this claim. Since "the community in Palestine against which this crime was committed" remained intact throughout this period, the Court held that it had the jurisdiction to judge this case. Even if the State of Israel had not existed at the time of the crime, the Jewish community in Palestine had every right to demand that justice be carried out.

In a series of later cases, the Israeli judiciary ruled on civil and criminal matters that occurred prior to 15 May 1948. In early January 1949, the Supreme Court, in *Bank Ha-Po'alim v. Karvzov*, reversed a verdict the Tel Aviv District Court had reached on 12 May 1948 regarding a contested bank deposit.[111] In *Wahib Saleh Kalil*, it determined that it had jurisdiction over a murder that occurred prior to 15 May in an area that the UN partition plan did not allocate to the Jewish State but which came under Israeli control during the 1948 War.[112] In a series of trials involving Yoseph Schreiber, a Jew convicted along with four others in the Haifa District Court of selling meat at inflated prices in violation of the 1944 Prevention of Exorbitant Prices Ordinance, the Court determined that the Mandate court's hearings had occurred in an "empty vacuum" and, in turn, remanded the case for a rehearing.[113] Contrary to Pnina Lahav's interpretation that this decision exemplified the Israeli judiciary's attempts to "disconnect the emerging Israeli system from the Mandate," it in fact demonstrated the continued Israeli entanglement with its predecessor's jurisdiction and judicial decisions.[114]

This jurisdictional breach was most pronounced in the case of 'Aziz Abraham Mizrahi. On 22 January 1947, the Palestine Court of Criminal Assizes found Mizrahi, a Jew from Tiberias, guilty of murdering his brother-in-law and sentenced him to death.[115] Even though his sentence was commuted to life imprisonment, Mizrahi was one of the few prisoners not released from prison by the end of the Mandate. In June 1948, he submitted a request to the Israeli Provisional Government for a full pardon.[116] Willing to hear Mizrahi's appeal, yet hesitant to simply grant a pardon, Minister of Justice Pinchas Rosen assembled a committee composed of himself, Minister of Interior Yitzchak Gruenbaum, and Minister of Religions and War Victims Rabbi Yehuda Leib Fishman to investigate the request and reexamine the

[111] CA 37/48, *Bank Ha-Po'alim v. Karvzov*, 2 PD 143 (1949).
[112] CrimA 65/49, *Wahib Saleh Kalil*, 4 PD 75 (1950).
[113] CrimA 5/48, *Schreiber v. Attorney General*, 2 PD 148, 152 (1949).
[114] Lahav, *Judgment in Jerusalem*, 83.
[115] *Palestine Post*, 23 Jan. 1947, "Death Sentence for Tiberias Man." See also CA 8/47, *Aziz Abraham Mizrahi v. Attorney General*, 14 PLR 47 (1947).
[116] ISA G-21/5396, 23 Sept. 1948, Chizik to Ben-Gurion.

evidence upon which Mizrahi had been convicted.[117] When the committee submitted its report on 6 February 1949, the three members agreed that Mizrahi's trial was significantly flawed and they had serious doubts regarding his guilt. Yet they disagreed over how to proceed: Fishman and Rosen believed he should simply be released through a pardon, while Gruenbaum preferred that the details of the case be reinvestigated, and that Mizrahi be granted a retrial. Aware that mandating an investigation and a retrial would require the Israeli legislature to pass specific legislation on the matter, however, Gruenbaum conceded and recommended a pardon.[118] In a discussion within the Provisional Government that followed, Ben-Gurion rejected a proposal that the matter simply be postponed for a week, at which point Mizrahi would be released as part of a planned general pardon. Doing so, according to Ben-Gurion, did not address the basic issue of Mizrahi's innocence: "You cannot mix the two matters. With the general pardon we are determining that although the man is a murderer, with the establishment of the Jewish state we are granting him a pardon and he is free. In the case of Mizrahi we are determining that he must be released since there was injustice."[119] This statement conveys the notion that while the pardon released criminals and forgave them for their crimes, it did not erase their past crimes.[120] In Ben-Gurion's opinion, the pardon was thus an inadequate tool for releasing Mizrahi since the Provisional Government desired to not only terminate his prison sentence but also to nullify the British judgment and expunge the alleged crime from his record. Shortly thereafter, the discussion came to an end with the Provisional Government unanimously voting both to grant Mizrahi a pardon and recognize his innocence.[121] This ad-hoc pardoning of Mizrahi was coupled with the Israeli executive's decision not to pursue legislation that would have presumably enabled the Israeli judiciary to reexamine all British Mandate verdicts, thus sidestepping the responsibility for a broader Israeli intervention in the British past. We cannot tell whether this decision was an ideological one or (more likely) a logistical one, but it is apparent that the pardoning once again demonstrated that Israel viewed the Mandate administration's judicial decisions as non-binding and reversible.

[117] ISA G-21/5396, 31 Aug. 1948, Rosen to the Government and Sharef; ISA G-21/5396, 9 Sept. 1948, Rosen to Sharef; ISA G-21/5396, 28 Oct. 1948, Rosen [?] to Sharef.

[118] *Tirshomet Yeshivot ha-Memshalah ha-Zemanit* [Provisional government session protocol] (Jerusalem: Government Printer, 1948–1949), 6 Feb. 1949, 52.

[119] Ibid.

[120] Shlomo Yifrah, "The 1949 General Pardon Ordinance and Its Effect on Previous Charges," *HaPraklit* 6 (1949): 217–19.

[121] *Tirshomet Yeshivot*, 6 Feb., 53.

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CONCLUSION

As this article has argued, the transition from British Mandate Palestine to the State of Israel blurred the boundaries between the past and the present and between Israel and its Mandatory predecessor. In the Sylvester case, the Israeli executive and judiciary constructed their claims to jurisdictional sovereignty to make them continuous with those of the British Mandate administration. In Israeli eyes, the Mandate period had concluded and had entered the realm of the past. Yet, in many other circumstances, the act of glancing backward in time to ostensibly contest Mandatory laws and judicial decisions revealed a far more equivocal stance toward the past. In addition to taking an adversarial stance vis-à-vis the British Mandatory regime, the Israeli executive and judiciary belied the pastness of their predecessor. By eagerly seeking to settle legal accounts with the expired British Mandate, they sought to remake the past and implicitly questioned whether the past was in fact behind them.

In the years to come, the unstable character of Israel's jurisdictional claims in relation to those of the British Mandate would persist, even though the Israeli Supreme Court gradually ended its reliance on British precedent.[122] In the 1961 Jerusalem District Court trial of Adolf Eichmann, the question arose as to whether Israel had the jurisdiction to try Eichmann for alleged crimes that had occurred prior to the state's existence. The Court determined that it had jurisdiction based on the *Katz-Cohen* precedent. That the State of Israel did not exist at the time of Eichmann's crimes did not preclude the "community" of "the Jewish People" of which the *Yishuv* "constituted an integral part," from retroactively applying the 1950 Nazis and Nazi Collaborators (Punishment) Law.[123] If in the Eichmann trial Israel claimed jurisdiction extending back prior to 1948, when it came to questions of jurisdiction in the territories of Mandate Palestine occupied during the 1967 War, Israeli jurists cast 1948 as a pivotal moment. In an internal memo, Shabtai Rosenne, then the legal advisor to the Ministry of Foreign Affairs, asserted that the Gaza Strip, but not the Sinai Peninsula, was included within the "State of Israel" as it appeared in the Areas of Jurisdiction and Powers Ordinance, 1948. This law, which, again, had been promulgated in anticipation of the Sylvester trial, gave retroactive effect to Israeli law beginning on 15 May 1948, including in areas that were only "held" by Israeli military forces.[124] While Rosenne did not claim outright that Israel

[122] See CA 376/46, *Rosenboim v. Rosenboim*, 2 PD 235 (1949).

[123] *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem*, vol. 5 (Jerusalem: Trust for the Publication of the Proceedings of the Eichmann Trial, in co-operation with the Israel State Archives and Yad Vashem, the Holocaust Martyrs' and Heroes' Remembrance Authority, 1992), 2100.

[124] ISA G-5691/15, 11 Nov. 1956, Rosenne Legal Opinion 43/56, "Regarding the Legal Status of the New Territories that Were Recently Conquered by the IDF," 2–3.

had retroactive jurisdiction in the Gaza Strip commencing on that date, Yehuda Blum effectively rendered the intervening nineteen years during which the West Bank was held by Jordan and the Gaza Strip by Egypt legally invisible. In his influential 1968 article, "The Missing Reversioner: Reflections on the Status of Judea and Samaria" (the arguments of which the international legal community never accepted), Blum argued that the Jordanians and Egyptians were not the legitimate sovereigns in the areas of Mandate Palestine that they held after the 1948 War. In turn, he suggested, "Since in the present view no State can make out a legal claim that is equal to that of Israel, this relative superiority of Israel may be sufficient, under international law, to make Israel possession of Judea and Samaria virtually indistinguishable from an absolute title, to be valid *erga omnes.* The same conclusion would hold good also in respect of the 'Gaza Strip' … as well as in respect of certain minor Palestinian border areas which were held by the Syrians—who had invaded them in 1948—until June, 1967."[125]

The tensions that marked this transition reveal a more complex relationship between the British Empire and the State of Israel than present historical work has allowed. Modulating between emulation and contestation, cooperation and resistance, admiration and suspicion, the relationship between Zionism and Britain during the Mandate period left behind an equivocal and unstable legacy in the years after 1948. As I have shown here, Israeli jurisdictional claims expressed these contradictions and liminality. At the same time Israeli officials sought to extend Israel's legal regime into the past in order to throw off British Mandatory control, they utilized and reaffirmed the integral place of British colonial legal and jurisdictional institutions in the nascent state. This inexorable Israeli bond to its colonial predecessor reveals the importance of positioning Israel as a post-imperial entity and studying the lasting and ambivalent British legacies that persist to this day in Israel/Palestine. Moreover, the similarities and differences that Israel shared with other post-imperial nation-states underscore the importance of pursuing underexplored comparisons and especially in further probing how these nascent states cast themselves as breaks from their predecessors while often retaining their inherited legal structures.

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[125] Yehuda Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," *Israel Law Review* 3, 2 (1968): 295 n60.

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Abstract: This article explores the legal and temporal dimensions of the transition from British Mandate Palestine to the State of Israel on 15 May 1948. I examine the paradoxical character of Israeli jurisdictional claims during this period and argue that it reveals the Israeli state's uncertainty as to whether the Mandate had truly passed into the past. On one hand, Israel recognized the validity of the Mandate administration's jurisdiction until 15 May; I employ the Israeli trial of the British citizen Frederick William Sylvester to demonstrate how Israel even predicated its own jurisdictional claims on their being continuous with those of its predecessor. In this case, the Mandate administration was cast as having entered the realm of the past. Conversely, the Israeli state contested Mandate laws and legal decisions made prior to 15 May to assert its own jurisdictional claims. In the process, Israeli officials belied their efforts to bury their predecessors in the past and implicitly questioned whether the past was in fact behind them. By simultaneously relying upon and disavowing past British legal decisions, the Israeli state staked a claim on being a "completely different political creature" from its British predecessor while retaining its colonial legal structures as the "ultimate standards of reference." Israel's complex attitude toward its Mandate past directs our attention to how it was created against the backdrop of the receding British Empire and underscores the importance of studying Israel alongside other post-imperial states that emerged from the First World War and the mid-century decolonizing world.

Key words: Israel, British Mandate Palestine, post-imperial law, jurisdiction, precedent, ex post facto law