

Tears of the Olive Trees: Mandatory Palestine, the UK, and Reparations for Colonialism in International Law

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Received: 20 January 2022; Revised: 25 September 2022;

Accepted: 22 October 2022

Published Online: 23 December 2022

Abstract

The Palestinian people seek a reckoning for the failure of the UK to enable their self-determination during the League of Nations Mandate period and in 1948. The common view of international lawyers is that the law of self-determination only became applicable to colonial peoples in the second half of the 20th Century. Consequently, the UK, and the League Council, had a free hand on the question of the status of the Palestine Mandate. This is mistaken. The special clause of the League Covenant applicable to Palestine, providing for provisional independence, could not be lawfully bypassed. The UK's failure to comply with this was a violation of international law with ongoing consequences, thereby serving as a basis for contemporary accountability. This case study reveals the existence and potential of legal avenues for colonial reparations rooted in not generally-applicable legal norms but *sui generis* rules specific to the case at hand.

Keywords

Palestine – self-determination – racism – colonial accountability – League of Nations – League of Nations Covenant article 22 – Mandates – Palestine Mandate – UK – Balfour Declaration – Winston Churchill – *ultra vires* – law of international organizations

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لو يذكر الزيتون غارسه . . لصار الزيت دمعاً

(If the Olive Trees knew the hands that planted them, Their Oil would become Tears.)

MAHMOUD DARWISH*

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1 Introduction: The Dog in the Manger

I do not agree that the dog in a manger has the final right to the manger even though he may have lain there for a very long time. I do not admit that right. I do not admit for instance, that a great wrong has been done to the Red Indians of America or the black people of Australia. I do not admit that a wrong has been done to these people by the fact that a stronger race, a higher-grade race, a more worldly wise race to put it that way, has come in and taken their place.

WINSTON CHURCHILL¹

In the Greek fable of the dog in the manger, a dog, who cannot eat grain, is inside the manger, the trough used to feed grain to cattle, thereby preventing the cattle from sustenance.² This is commonly used, as in the above quotation of Winston Churchill, as a metaphor for a situation where one person is

* This is a line taken from the poem 'An As Sumoud' (about Resilience/Steadfastness), published in Arabic as

دار العودة، بيروت، 1993، صدر للمرة الأولى عام 1964. محمود درويش، قصيدة عن الصمود، ديوان أوراق الزيتون، الطبعة

(English translation: Mahmoud Darwish, 'An As Sumoud' (About Resilience/Steadfastness), in *Awraq Az Zaytoun* (Olive Leaves), 11th ed, Dar Al-Awda, Beirut, 1993, first published 1964). The combination of this phrase and an associated image in visual form (e.g. on posters) is iconic within Palestinian culture, as a lament for the oppression and suffering of the Palestinian people. See e.g., <https://www.palestineposterproject.org/poster/if-the-olive-trees-knew>.

1 Quoted in Roberts, Adam. *Churchill: Walking With Destiny* (London: Allen Lane, 2018), 541.

2 See Gibbs, Laura. *Aesop's Fables. A New Translation* (Oxford: Oxford University Press, 2008), number 163, page 178 (note that the fable is not attributable to Aesop, but is commonly included in collections of his fables – more information can be found at https://en.wikipedia.org/wiki/The_Dog_in_the_Manger).

preventing another from something the latter needs and which the first has no, or at least a less-justifiable, use for. Churchill uses it as a succinct and vivid articulation of two related things. In the first place, a racist justification for settler colonialism when this involves taking land from the indigenous inhabitants. This is permitted because of the race-based difference Churchill articulates between the settlers, on the one hand, and the indigenous inhabitants, on the other. The former are, relatively speaking, 'a stronger race, a higher-grade race, a more worldly wise race'. Because of this, the indigenous inhabitants do not have the 'final right' to their land even if they may have been there 'for a very long time'. And the racially-superior settlers can take 'their place'. In the second place, in consequence, since the taking of the land is justified, no 'wrong has been done.' In his metaphor, Churchill provides a complete treatment of the subject of the normative character of settler colonialism and reparations for this form of colonialism: a justification for the former, and an associated repudiation of the basis for the latter.

Churchill invoked his metaphor in the context of the 1937 Peel Commission proposal to partition Mandatory Palestine into Arab and Jewish states.³ For Churchill, the Arab population in Palestine were the dog in the manger. Jewish migrants to Mandatory Palestine, both at the time, and those who would follow in the run up to and after a Jewish nation state was established there, were the 'stronger race, a higher-grade race, a more worldly-wise race'. Because of this racist distinction between the two, the Arab population had no 'final right' over their land, and Jewish migrants, could 'take their place' (alongside, presumably, the Jewish people who were already there). If this were to happen, which came to pass in 1948 with the proclamation of Israel in a significant part of Mandatory Palestine, it would involve no 'wrong'.

Ever since 1948, and especially after 1967 with the occupation by Israel of the remainder of the territory of Mandatory Palestine, when it comes to the question of where international state responsibility lies for the oppression of the Palestinian people – the denial of their freedom, and the ongoing abuses perpetrated against them – this has been addressed primarily and even exclusively in terms of the behaviour and responsibility of the state of Israel. The position of other states has typically been addressed secondarily, with reference to this Israel-centric starting point. Should they do more to push for the end of the occupation and call out Israel for its abuses against the Palestinian people? Should they adopt sanctions against Israel, for example denying it the ability to trade, whether generally or at least as far as goods produced in settlements are concerned? Should they prosecute Israeli officials accused of committing international crimes before their courts?

3 Roberts, *Churchill* 2018 (n. 1), *ibid.*

The exclusively Israel-centric approach ignores the fact that there is one other state where more direct questions of responsibility and accountability also arise: the United Kingdom. As the colonial administering authority in what became Mandatory Palestine between 1918 and 1948, the UK implemented the policy set out in the Balfour Declaration of 1917.⁴ In that Declaration, Arthur Balfour, then UK Foreign Secretary, stated to Lord Lionel Walter Rothschild, that

His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine.⁵

The UK facilitated the realization of this commitment by incorporating its terms as the overall objective of the 'Mandate for Palestine', an instrument whose terms were approved in 1922 by the Council of the League of Nations (on which the UK sat – indeed, the 1922 meeting was held in a closed session of the Council at St James' Palace in London) that set out how the UK, as Mandatory, was to administer Mandatory Palestine, and which was determined by the Council to enter into force on 29 September 1923.⁶

4 Balfour, Arthur. *Letter to Lord Lionel Walter Rothschild*, 2 November 1917, WWI D.A, Official Papers (known as the Balfour Declaration, not to be confused with the 1926 Declaration on a different (also colonial) subject-matter).

5 Ibid.

6 The Mandate for Palestine, text approved by the League of Nations Council 19th Session, 13th Meeting, 24 July 1922, UN Library reference C.529. M.314. 1922. VI., available at <https://www.un.org/unispal/document/auto-insert-201057/> and https://avalon.law.yale.edu/20th_century/palmanda.asp (last accessed on 29 November 2022), entry into force on 29 September 1923, Minutes of the Meeting of the League of Nations Council held at Geneva on 29 September 1923, UN Library reference C.L.101.1923.VI., <https://www.un.org/unispal/document/auto-insert-204395/> (last accessed on 29 November 2022) (Mandate for Palestine, 1923). The 1922 approval of the text was accompanied by a resolution that the instrument, together with the Mandate instrument for Syria, would enter into force "as soon as the Governments of France and Italy have notified the President of the Council of the League of Nations that they have reached an agreement" concerning the Mandate for Syria. See UK Foreign Office, Memorandum of 16 August 1923 to the Secretary-General of the League of Nations, transmitted to the Council of the League 20 August 1923, Document C.5361923.VI and 1/30228/2413, available at <https://www.un.org/unispal/document/league-of-nations-memo-on-the-simultaneous-coming-into-force-of-the-british-mandate-for-palestine-and-of-the-treaty-of-versailles/>. In its Meeting of 29 September 1923, the Council "noted that, in view of the agreement between the Governments of France and Italy in respect of the mandate for Syria, the mandates for Palestine and Syria would now enter into force automatically and at the same

The UK then implemented this objective in practice.⁷ It facilitated Jewish-only migration to Palestine, without a corresponding migration policy concerning other population groups, including Arabs, who were the overwhelming majority in the territory.⁸ This enabled a demographic shift in favour of Jewish people in the territory. It provided for the transfer of land and property to Jewish people, including through compulsory expropriations and other confiscations from existing Arab owners/occupiers. It provided support for the development and establishment of provisional self-governing Jewish political institutions while denying support to and suppressing the activity of any corresponding, equivalent Arab institutions. Popular Arab dissent was violently and lethally suppressed, notably in the case of the Great Palestinian Revolt of 1936–9, a nationalist uprising against colonial rule and the policy of enabling the establishment of a Jewish national home in the territory. With the onset of war between the Arab and Jewish populations in Palestine following the UN General Assembly adopting the partition resolution in 1947, the UK adopted a ‘cut and run’ policy. It withdrew its presence in the first part of 1948. This paved the way for, and did nothing to stop, and protect the Palestinian people from, two related things. First, the proclamation of Israel in a significant part of the territory of Mandatory Palestine that year. Second, the associated forced displacement of a large number of the Arab population from the territory that would form the basis for the new state – the Nakba. The Palestinian people – the hands that planted the Olive Trees in Mahmoud Darwish’s poem – have long demanded a reckoning about these things.⁹

time” (Minutes, *ibid.*). See McTague, John. ‘Zionist-British Negotiations over the Draft Mandate for Palestine, 1920’. *Jewish Social Studies* 42(3/4) (1980), 281–292.

- 7 On the various matters covered in this paragraph, on which the literature is voluminous, see, e.g., the following, and the sources cited therein: Morphet, Sally. ‘The Palestinians and Their Right to Self-Determination’, in *Foreign Policy and Human Rights: Issues and Responses*, ed. Raymond J. Vincent (Cambridge: Cambridge University Press, 2009); Pedersen, Susan. *The Guardians: The League of Nations and the Crisis of Empire* (Oxford: Oxford University Press, 2015), 356–393; Kattan, Victor. *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891–1949* (London: Pluto 2009); Morris, Benny. *The Birth of the Palestinian Refugee Problem Revisited* (Cambridge: Cambridge University Press, 2nd ed. 2012); Erekat, Noura. *Justice for Some: Law and the Question of Palestine* (Redwood: Stanford, 2019); Khalidi, Rashid. *The Hundred Years’ War on Palestine, A History of Settler Colonialism and Resistance, 1917–2017* (New York: Metropolitan Books, 2020); Allain, Jean. *International Law in the Middle East: Closer to Power Than Justice* (Milton Park: Routledge, 2017), ch. 3.
- 8 On the demographic situation in the territory, see e.g. Pedersen, *Guardians* 2015 (n. 7), 366–367, 378–379, 388.
- 9 E.g. Erekat, *Palestine* 2019 (n. 7); Khalidi, *Palestine* 2020 (n. 7); Khalidi, Ahmad Samih. ‘As Palestinians mourn their Nakba, the UK must acknowledge its responsibility’. *The Guardian*, 15 May 2016, available at: <http://www.theguardian.com/commentisfree/2016/may/15/pales>

The 2017 centenary of the Balfour Declaration served as a reminder of the UK role. The year before, Mahmoud Abbas, President of the Palestine National Assembly, announced that Palestine would sue the UK for the Declaration.¹⁰ Writing on the date of the anniversary, he stated that ‘the British government should take the opportunity to make things right.’¹¹ It was suggested that one way the UK could do this would be to recognize Palestinian statehood.¹² No lawsuit was forthcoming. The UK demurred from recognizing Palestinian statehood, and UK government leaders took the opportunity to express pride in the Declaration. The Israeli and UK Prime Ministers, Benjamin Netanyahu and Theresa May, jointly attended a commemorative event,¹³ at which, it is reported, Theresa May stated that the UK is ‘proud of our pioneering role in the creation of the state of Israel.’¹⁴ The then UK Foreign Secretary, subsequently Prime Minister, Boris Johnson, a man who has written a biography of Winston Churchill and is frequently portrayed as inviting comparisons between himself and Churchill, issued the following statement from his office in the government ministry then called the UK Foreign and Commonwealth Office, linking back to another former Prime Minister, for something he did as Foreign Secretary:

It was here in this room, beneath this same gilded ceiling, that one chapter of the story began. On 2 November 1917 my predecessor Lord [sic] Balfour sat in the Foreign Secretary’s office, where I am writing now, and composed a letter to Lord Rothschild.

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tinians-nakba-uk-balfour-declaration-dispossession?CMP=Share_iOSApp_Other., last accessed on: 29 November 2022, and the statements cited in the following two notes.

- 10 Serhan, Yasmeen. ‘The Palestinian Lawsuit Against the Balfour Declaration’. *The Atlantic*, 28 July 2016, available at: <https://www.theatlantic.com/news/archive/2016/07/abbas-balfour-declaration-lawsuit/493424/>, last accessed on: 29 November 2022.
- 11 Abbas, Mahmoud. ‘Britain must Atone for the Balfour Declaration – and 100 Years of Suffering’. *The Guardian*, 1 November 2017, available at: <https://www.theguardian.com/commentisfree/2017/nov/01/arthur-balfour-declaration-100-years-of-suffering-britain-palestine-israel>, last accessed on 29 November 2022.
- 12 Ibid.
- 13 BBC News, ‘Balfour Declaration: Theresa May hosts Israeli PM for centenary’, 2 Nov 2017, available at: <https://www.bbc.co.uk/news/uk-41819451>, last accessed on: 29 November 2022.
- 14 Wintour, Patrick and Beaumont, Peter. ‘May Lauds UK Role in Creation of Israel at Balfour Centenary Dinner’. *The Guardian*, 2 Nov 2017, available at: <https://www.theguardian.com/world/2017/nov/02/may-netanyahu-balfour-declaration-israel-palestine>, last accessed on 29 November 2022.

I am proud of Britain's part in creating Israel and Her Majesty's Government will mark the Centenary of the Balfour Declaration ... in that spirit.¹⁵

The significance of the Balfour text, however, is not so much in the Declaration itself, and its adoption in 1917. At that stage, it was merely a political statement made by the Foreign Secretary to a prominent private individual. As will be explained further, is of dubious legal standing as a commitment binding on the UK, and, in any case, the UK had no authority over the territory in question at the time the statement was made. What makes the statement significant politically, practically and legally is what happened in 1923 and thereafter. 1923 is when, as mentioned, the incorporated version of the vision set out in the Declaration contained in the Mandate for Palestine, having been approved the previous year, entered into force through a decision of the Council of the League of Nations.¹⁶ This had a different international law status from the Declaration. It expanded out the general objective of the Declaration into a detailed set of objectives for colonial rule. Moreover, it is not simply the adoption of this instrument that it is significant. Also, crucially important is how the UK implemented its provisions in administering Mandatory Palestine. When it comes to Palestinian demands for a reckoning, and the question of addressing what legal instrument is relevant to these demands, it is the Mandate for Palestine of 1923 – its enactment by the League Council (including the UK), and subsequent implementation in practice by the UK – that ultimately counts, not the Balfour Declaration.¹⁷ For this, the key centennial anniversary is 2023. (Incidentally, the mistaken fixation on the significance of 1917 rather than 1923 reflected in Boris Johnson's quote above is ironic given that Johnson erroneously enobles Balfour. At the time of the Declaration he was simply the

15 Johnson, Boris. 'My Vision for Middle East Peace Between Israel and a New Palestinian State'. *Daily Telegraph*, 30 October 2017, reproduced on the UK Government website: <https://www.gov.uk/government/speeches/my-vision-for-middle-east-peace-between-israel-and-a-new-palestinian-state-article-by-boris-johnson-on-the-balfour-declaration>. On the mis-described title of Arthur Balfour as 'Lord' Balfour, see below, n. 118. On the invitation to make comparisons, see e.g. Purnell, Sonia. 'Boris Johnson Wants Us to See Him as Modern-day Churchill. Don't Fall for It'. *Prospect*, 10 November 2017, available at: <https://www.prospectmagazine.co.uk/politics/boris-johnson-wants-us-to-see-him-as-a-modern-day-churchill-dont-fall-for-it> (last accessed on 29 November 2022).

16 Mandate for Palestine, 1923 (n. 6).

17 Since, as indicated above, the League of Nations Council approved the terms of the Mandate for Palestine in 1922, the instrument is sometimes referred to with that date. However, it was not until the separate decision a year later that the instrument entered into force.

Right Honourable Arthur Balfour as a member of the House of Commons. He didn't become Lord Balfour until the year the text of the Mandate for Palestine was approved by the League Council – 1922 – and so did have this status at the time – 1923 – when this legal instrument entered into force).¹⁸

The predominant normative lens through which the legal effectiveness of this arrangement has been assessed is with reference to a general international law right of self-determination in international law vested in the inhabitants of the territory at the time. Some have suggested that the Mandate for Palestine, and its implementation, was necessarily a departure from such a legal right, the existence of which is sometimes associated, somewhat vaguely, with Wilsonian self-determination and the League of Nations generally, as opposed to the Mandate arrangements in particular.¹⁹ However, the overwhelming view of international law experts is that in the early phase of the period when the Mandate for Palestine entered into force and was implemented – 1923–1948 – there was no right of external self-determination – the right to be free from colonial rule – for colonial peoples in general, and so the inhabitants of the Palestine Mandate in particular (and therefore in this era, self-determination as a matter of general international law was limited to certain forms of internal autonomy, in particular places).²⁰ This right came later. Thus, according to this view, the Palestinian people may have that right now, but they did not have it then.²¹ In consequence, it is said, the UK and the League of Nations Council

18 One might say, then, that 1922 was the year that both Balfour himself, and his 1917 Declaration, were subject to a legal and political redesignation that profoundly upgraded their status (in the case of the Declaration, the upgrade process was set in train that year with the approval of the text, entry into force occurring the year after). For Balfour's ennoblement (of 5 May 1922), see Mosley, Charles, ed. *Burke's Peerage, Baronetage & Knighthood* (London: Burke's Peerage, 107th ed. 2003), 231–232 and *The London Gazette*, No. 32691, 3512, available at: <https://www.thegazette.co.uk/London/issue/32691/page/3512>, last accessed on: 29 November 2022. Another ironic feature of Boris Johnson's mistaken ennoblement of Balfour is that at the time of the Declaration Balfour was the Member of Parliament for the (now defunct) City of London constituency, covering a geographical area falling within the larger London region that came to be covered by the Mayoralty of London (an office with a different political status), a post which Johnson himself occupied. See [https://en.wikipedia.org/wiki/City_of_London_\(UK_Parliament_constituency\)](https://en.wikipedia.org/wiki/City_of_London_(UK_Parliament_constituency)) and https://en.wikipedia.org/wiki/Mayor_of_London.

19 See e.g. Berriedale Keith, A. 'Mandates': *Journal of Comparative Legislation and International Law Third Series* 4(1) (1922), 71–83, 78; Boustany, Wedi' F. *Palestine Mandate, Invalid and Impracticable: a Contribution of Arguments and Documents Towards the Solution of the Palestine Problem* (Beirut: American Press Beirut, 1936); Allain, *Middle East* 2017 (n. 7), 39.

20 E.g. Crawford, James. *The Creation of States in International Law* (Oxford: Oxford University Press, 2nd ed. 2007), ch. 3 sect. 3.2.

21 On this specific point, see, e.g., Crawford, *States* 2007 (n. 20), ch. 9, sect. 9.5, and Morphet, 'Palestinians' 2009 (n. 7). On the contemporary right of self-determination

had a free hand when it came to what approach they took to the question of the status of colonial territories.²² If they decided that all or part of the territory of Palestine was to be a 'national home for the Jewish people', including for the racist reasons set out by Winston Churchill, there was nothing, legally, impermissible about this. Such an account removes any international law basis for addressing Palestinian demands for a reckoning.

This approach to international law brings things back to the predominant contemporary focus on Israel. According to this account, the question of Palestinian liberation is, legally, only a subject addressed by norms that came into existence after the proclamation of Israel in 1948. Israel may be bound by the international law of self-determination and the law on the use of force to end the occupation of the Palestinian West Bank (including East Jerusalem) and Gaza.²³ And the latter area of law (specifically, the crime of aggression) if enforced, could lead to redress mechanisms against the Israeli state and Israeli officials on an individual level, whether before national jurisdictions or the International Criminal Court. And Israel must also end its discriminatory treatment of Arab/Palestinian citizens of Israel. But equivalent questions relating to the Mandatory period are, it is said, by virtue of the period itself, subject to a completely opposing normative position that rendered permissible, or at any rate did not prohibit, equivalent practices of the UK and UK officials.

Such a narrative feeds into the broader debates taking place in international law, on the question of redress and reparations for colonialism, which have taken on greater prominence in the context of the Movement for Black Lives.²⁴ In these debates, a similar account is sometimes given to foregoing

of the Palestinian people, see International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 ICJ Rep 136 (9 July 2004) para. 118; Cassese, Antonio. *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) 230–247 (and sources cited therein); and G.A. Res. 44/48(A–G) (8 December 1989); Morphet, 'Palestinians' 2009 (n. 7). 230–247; Crawford, id, 444; Wilde, Ralph. 'Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation' *Palestine Yearbook of International Law* 22 (2021) 3–74, sect. IV–VII. On self-determination in international law generally, see the sources cited below (n. 79).

22 Crawford, *States* 2007 (n. 20), 428.

23 I set this position out in Wilde, *Master's Tools* 2021 (n. 21).

24 On these debates, see, e.g., the following, and sources cited therein: *A Declaration of the First Abuja Pan-African Conference on Reparations For African Enslavement, Colonisation And Neo-Colonisation*, sponsored by The Organisation Of African Unity and its Reparations Commission, 27–29 April 1993, Abuja, Nigeria, available at: <http://www.shaka.misra.co.uk/abujaProclamation.htm> (last accessed on 29 November 2022); the CARICOM reparations initiative, <https://caricomreparations.org/> (last accessed on 29 November 2022); Achiume, Tendayi. *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, UN Doc. A/74/32,

account of the Palestine Mandate. International law facilitated imperialism and colonialism, it did not prohibit it.²⁵ A central strand of argumentation for contemporary efforts at redress has been to get around this inter-temporal normative challenge by making the case based on ongoing effects and legacies.²⁶ This temporal shift moves the clock forward into later periods of history where international law standards became different.

Others, such as Hilary Beckles, challenge the 'it was lawful at the time' narrative, in his case when it comes to the enslavement of people transported to and held in the Caribbean.²⁷ As a complement to such work, this article revisits the international law arrangements of the Mandate for Palestine, and re-evaluates and challenges the received wisdom. I argue that the law was completely different from how it is commonly understood. The League of Nations Mandates system operated on the basis of article 22 of the League of Nations Covenant, an international treaty forming part of the Treaty of Versailles.²⁸ Article 22 contained a crucial provision. For Mandates covering the former dominions of the Ottoman Empire, which included the Palestine Mandate, there was supposed to be provisional recognition of statehood, subject only to advice and assistance by the Mandatory authority. I argue that the League Council did not have the competence under the Covenant to vary these stipulations through the Mandate for Palestine instrument it brought into force in 1923. In consequence, the instrument provided no authority to the UK to depart from its obligations under article 22, and insofar as the UK did this in practice, it violated the Covenant and so the Treaty of Versailles.

What follows responds directly to the ongoing calls for redress raised by the Palestinian people. But by addressing the specific situation of the Mandate, it is hoped that the present article will also demonstrate the utility of exploring

New York, United Nations (2019); Beckles, Hilary. *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (Kingston, Jamaica: University of the West Indies Press, 2013); Araujo, Ana Lucia. *Reparations for Slavery and the Slave Trade: A Transnational and Comparative History* (London: Bloomsbury, 2017); Hall, Catherine, Draper, Nicholas, McClelland, Keith, Donnington, Katie, Lang, Rachel. *Legacies of British Slave-Ownership, Colonial Slavery and the Formation of Victorian Britain* (Cambridge: Cambridge University Press 2016) and the associated data provided by the Centre for the Study of the Legacies of British Slavery: <https://www.ucl.ac.uk/lbs/> (last accessed on 29 November 2022).

25 E.g. Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

26 E.g. Achiume, *Special Rapporteur Report* 2019 (n. 24), para. 49.

27 Beckles, *Reparations* 2013 (n. 23).

28 Treaty of Peace Between the Allied and Associated Powers and Germany, Signed in Versailles, 289 June 1919, entry into force 10 January 1920, (1919) UKTS 4 (Cmd. 153), Part 1, League Covenant 1919: Covenant of the League of Nations, 28 April 1919, available at: <https://www.refworld.org/docid/3dd8b9854.html>, last accessed on 29 November 2022 (League Covenant, 1919), art. 22.

the general theme of reparations through case studies, where sometimes, as here, the particularities of the situations are at odds with what might have been the more general normative picture at the time.

2 Applicable International Law Framework

The UK authority over Mandatory Palestine operated subject to the terms of article 22 of the League of Nations Covenant.²⁹ As mentioned, the Covenant was part of the Treaty of Versailles, to which the UK was bound. That treaty was signed in 1919 and entered into force in 1920.³⁰ Article 22 contained stipulations relating to the territories and associated populations in certain dominions of the defeated powers in the First World War. These were to be administered by the victorious powers, under a regime of international supervision, the League of Nations Mandates System.³¹ The administering states such as the

29 Ibid.

30 See above (n. 28).

31 On the mandates system, see the following, and sources cited therein, Olivier, Sydney. *The League of Nations and Primitive Peoples* (Oxford: Oxford University Press, 1918); White, Freda. *Mandates* (London: Jonathan Cape, 1926); Margalith, Aaron M. *The International Mandates* (Oxford: Oxford University Press, 1930); Wright, Quincy. *Mandates under the League of Nations* (Westport: Greenwood Press, 1968); League of Nations, *The Mandates: Origins, Principles, Application* (London: Allen & Unwin/League of Nations, 1945); Hall, H. Duncan. *Mandates, Dependencies and Trusteeship* (London: Stevens & Sons, 1948); Chowdhuri, Ramendra Nath. *International Mandates and Trusteeship Systems: A Comparative Study* (The Hague: Martinus Nijhoff, 1955); Robinson, Kenneth E. *The Dilemmas of Trusteeship: Aspects of British Colonial Policy Between the Wars* (London: Oxford University Press, 1965); Sagay, Itse, *The Legal Aspects of the Namibian Dispute* (Ile-Ife: University of Ife Press, 1975), chs 1 and 2 and sources cited therein; Northedge, Frederick Samuel. *The League of Nations: Its Life and Times 1920–1946* (Leicester: Leicester University Press, 1986), especially ch. 9; Dore, Isaak. *The International Mandate System and Namibia* (Boulder/London: Westview Press, 1985); Weeramantry, Christopher. *Nauru: Environmental Damage under International Trusteeship* (Oxford: Oxford University Press, 1992); Redgwell, Catherine. *Intergenerational Trusts and Environmental Protection* (Manchester: Manchester University Press, 1999), 147–149; Crawford, Neta. *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (Cambridge: Cambridge University Press, 2002), ch. 6; Bain, William. *Between Anarchy and Society. Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003), ch. 4; Anghie, *Imperialism* 2005 (n. 25), ch. 3, *passim* and sources cited therein; Crawford, *States* 2007 (n. 20), ch. 13; Pedersen, *Guardians* 2015 (n. 7); Hales, James C. ‘The Creation and Application of the Mandate System’. *Transactions of the Grotius Society* 25 (1939), 185–294 and sources cited therein note (a); Hales, James C. ‘The Reform and Extension of the Mandate System’. *Transactions of the Grotius Society* 26 (1940), 153–210; Lauterpacht, Hersch. ‘The Mandate under International Law in the Covenant of the League of Nations’, in *International Law*, eds. Hersch Lauterpacht and Eli Lauterpacht (Cambridge: Cambridge

UK performed this function as 'Mandatories on behalf of the League'.³² The territory and associated population of what became Mandatory Palestine was included in this system as a former dominion of the Ottoman Empire.³³

The stipulations of article 22 were general, and also varied across three different classes of territory and associated populations. Subsequent to the adoption of the Covenant, the classes became referred to as 'A', 'B' and 'C'.³⁴ The first class, 'A', covered former dominions of the Ottoman Empire and therefore included the territory and population of what became Mandatory Palestine.³⁵

University Press, 1970), vol. III, 29; Louis, William Roger. 'The Era of the Mandates System and the Non-European World', in *The Expansion of International Society*, eds. Hedley Bull and Adam Watson (Oxford: Clarendon Press, 1984); Reisman, W. Michael. 'Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations'. *Michigan Journal of International Law* 10 (1) (1989) 231–240; Anghie, Antony. 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations'. *NYU Journal of International Law & Politics* 34 (2002), 513–633; Matz, Nele. 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship'. *Max Planck Yearbook of United Nations Law* 9 (2005), 47–95; Wilde, Ralph. *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008), sect. 8.2.3, 8.3, 8.4 and 8.7.3, and sources cited therein. See also Permanent Court of International Justice, *Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Jurisdiction, PCIJ, Series A, No. 2 (1924); *Mavrommatis Jerusalem Concessions, Judgment*, PCIJ, Series A, No. 5 (1925); International Court of Justice, *International Status of South West Africa, Advisory Opinion*, ICJ Reports 1950, 128; International Court of Justice, *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections)*, ICJ Reports 1962, 319; International Court of Justice, *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)*, ICJ Reports 1966, 6; International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep 16, 21 June 1971; International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)*, ICJ Reports 1992, 240.

32 League Covenant, 1919 (n. 28), art. 22. On the legal status of Mandated territories, see, e.g., ICJ, *South West Africa Advisory Opinion* (n. 31) and the separate opinion of Judge McNair; Wright, *Mandates* 1945 (n. 31), *passim*, especially 62–3 and Part III; Hall, *Mandates* 1945 (n. 31), 72–77; Hales, 'Reform Extension Mandate' 1940 (n. 31), 179–180; Chowdhuri, *Mandates and Trusteeship* 1955 (n. 31), 90–91; Sagay, *Namibian Dispute* 1975 (n. 31), *passim* and especially 13; Anghie, *Imperialism* 2005 (n. 25), ch. 3, *passim* and especially 147–149; Crawford, *States* 2007 (n. 20) 568–74; Corbett, Percy E. 'What is the League of Nations?'. *British Yearbook of International Law* 5 (1924), 119–148, at 128–136 and sources cited therein. On the particular arrangement involving states acting on behalf of the League, see in particular Hales, *ibid*.

33 On the territories covered by the Mandates System, see Chowdhuri, *Mandates and Trusteeship* 1955 (n. 31), ch. v and especially 144; Crawford, *States* 2007 (n. 20), Appendix 2.

34 See the sources cited above (n. 31).

35 League Covenant, 1919 (n. 28), art. 22.

The 'Mandate for Palestine' instrument contained various, wide-ranging stipulations relating to Mandatory Palestine.³⁶ Its content was determined by the victorious allies at the end of the First World War, principally the UK; the League of Nations Council approved the text in 1922 and determined the instrument to be legally in force in 1923.³⁷

There are very important, contradictory divergencies between the stipulations of article 22 of the League of Nations Covenant applicable to Mandatory Palestine, on the one hand, and the stipulations of the Mandate for Palestine (and the link between that instrument and the Balfour Declaration), on the other hand. Fundamentally, these concern the provisions in article 22 concerning the intended future status of the territory, on the one hand, and the incorporation of the objective of implementing the Balfour Declaration into the Mandate for Palestine, on the other hand.

These divergencies have fundamental implications for the substantive content of the standards the UK had to comply with in its administration of Mandatory Palestine, and thus whether or not the UK's implementation of the Balfour Declaration approach to this administration was lawful. Given this, it is necessary to resolve which standards from which instrument were operative, in areas where contradictions are evident.

Various actors involved in and reacting to the process of adopting the Mandate for Palestine, and commentators, at the time, and ever since, highlighted these divergencies.³⁸ Some commentators suggested that they can be somehow reconciled – that, actually, there is no contradiction.³⁹ But most of the actors involved in and reacting to the process, including Balfour, and commentators at the time and since, proceeded from an assumption that there was a fundamental contradiction.⁴⁰ However, the matter has tended to be addressed and characterized by all concerned without considering whether it has implications for whether or not the League Council enjoyed the legal competence to contradict the Covenant and, if the Council did not have such

36 Mandate for Palestine, 1923 (n. 6).

37 See Pedersen, *Guardians* 2015 (n. 7); Chowdhuri, *Mandates and Trusteeship* 1955 (n. 31); Hall, *Mandates* 1945 (n. 31); Wright, *Mandates* 1945 (n. 31).

38 See, e.g., the discussion in Allain, *Middle East* 2017 (n. 7), 84–87, and sources cited therein, and the sources cited in the following notes.

39 E.g. Stoyanovsky, J. *The Mandate for Palestine* (London: Longmans, 1928); Jewish Agency For Palestine, *Memorandum Submitted to the Palestine Royal Commission on Behalf of the Jewish Agency for Palestine* (London: Jewish Agency For Palestine, 1936).

40 See, e.g., the sources cited in the following note, and the discussion in Allain, *Middle East* 2017 (n. 7). For Balfour, see, e.g., Memorandum from Arthur Balfour to Lord Curzon, 11 August 1919, UK Public Records Office, Foreign Office, 371/4183 (reproduced in Ingrams, Doreen. *Palestine Papers 1917–1922: Seeds of Conflict* (London: J Murray, 1972) 73–4).

competence, what the legal consequences of that were for the legal validity of the provisions of the Mandate for Palestine that contradicted article 22, and thus the legality of the UK actions whose lawfulness depended on such legal validity. So those who might be understood to be critics of the arrangement on the basis of a contradiction with article 22 of the Covenant, or at any rate point this contradiction out, framed, and continue to frame, their position as only a matter of the Council, as a collective League organ and/or as a matter of its individual States members, disregarding the law of the Covenant, sometimes characterising this act/collection of acts a 'violation' of the Covenant, without going on to consider whether this had any legal consequences for the legal effectiveness of the Mandate for Palestine and, in turn, the lawfulness of UK actions in the territory and in relation to its population.⁴¹ To ultimately the same effect, others assume, without even acknowledging, let alone justifying, that the Mandate for Palestine was validly adopted when it comes to the powers of the League of Nations Council – they do not consider the question of this validity.⁴² In consequence, the foregoing contradictions with article 22 are to be resolved in favour of it. However, if the question of validity on this basis is actually considered, and, when considered, critically assessed, rather than assumed, a completely different approach to the legal significance of these contradictions, and, from this, to the legal consequences of the contradictions, is revealed. Providing such an evaluation is the focus of the next section.

3 Relationship between the Balfour Declaration, the League of Nations Covenant and the Mandate for Palestine

The League Covenant stipulates in article 20 that

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

41 E.g. Boustany, *Palestine Mandate* 1936 (n. 19); Allain, *Middle East* 2017 (n. 7), 86. The particular idea that individual states members of the Council violated the Covenant, specifically article 20, in 'agreeing' to the Mandate for Palestine, is addressed further below, text accompanying note 52 *et seq.*

42 E.g. Berriedale Keith, 'Mandates' 1922 (n. 19) (seemingly implicitly) 81; Crawford, *States* 2007 (n. 20), 428–430; Shaw, Malcolm. 'The League of Nations Mandate System and the Palestine Mandate: What Did and Does It Say about International Law and What Did and Does It Say about Palestine?'. *Israel Law Review* 49(3) (2016), 287–308.

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.⁴³

A full treatment of the international legal status and significance of the Balfour Declaration in isolation from the League Covenant is, as will be explained, unnecessary for present purposes. In brief, the notion that it was somehow binding on the UK and more generally legally effective, is highly questionable, for a range of reasons (e.g., the question of it not meeting the test for a binding unilateral declaration international law; the UK's lack of any legal prerogative with respect to and/or control over the territory at the time the Declaration was made; the ambiguous language of the Declaration itself; and the significance to it of other, subsequent instruments). This is all ultimately irrelevant for the following reason. The effect of article 20 is to remove the possibility that the Declaration could, by itself (the incorporation of it in the Mandate for Palestine is a separate matter, addressed below), or as part of any other international legal instrument separate from the juridical regime operating under the Covenant, have any ongoing legal significance in relation to Mandatory Palestine, insofar as its provisions are incompatible with the Covenant stipulations applicable to Mandatory Palestine. This became the operative legal position running from 1920, when the League Covenant came into force, and the UK began its membership of the League of Nations.

As indicated above, the arrangement for the territory and population of Palestine to be placed under the Mandates system is based on, and various key stipulations relating to how the arrangement is to operate are contained in, article 22 of the Covenant. The Covenant does not contain any express stipulation for subsequent instruments to be adopted, like the Mandate for Palestine, by the League Council or by individual League members, to vary the effect of the stipulations contained in article 22. That article does provide that:

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.⁴⁴

This provision is expressly referenced in the preamble of the Mandate for Palestine.⁴⁵ It is potentially relevant to what the instrument stipulates

43 League Covenant, 1919 (n. 28).

44 League Covenant, 1919 (n. 28).

45 Mandate for Palestine, 1923 (n. 6).

regarding the 'degree of authority, control or administration' to be exercised by the UK in Mandatory Palestine. But it is limited to this subject, and cannot form the legal basis for other stipulations in the latter instrument that concern other matters. The foregoing potential relevance will be addressed further in due course.

The League of Nations Covenant could be amended, but it has never been suggested that the Mandate for Palestine constituted an amendment (let alone that the requirements for a valid amendment were complied with insofar as its provisions varied from the relevant provisions of the Covenant applicable to Mandatory Palestine).⁴⁶ The Council had general competence to deal with matters relating to the Mandates system ('The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world'⁴⁷). However, according to the general principles relating to the powers of international organizations, the Council's competence to act was limited, in that it had to stay within the bounds of the Covenant as the constituent instrument of the organization.⁴⁸ In consequence, the Council did

46 For the provision on amendment, see League Covenant, 1919 (n. 28) art. 26. For commentators who address the matter without suggesting that the Mandate for Palestine somehow constituted an amendment to the Covenant, see, e.g., Crawford, *States* 2017 (n. 20), 428–430; Shaw, 'Palestine Mandate' 2016 (n. 42).

47 League Covenant, 1919 (n. 28), art. 4.

48 On the powers of international organizations, see, e.g., and sources cited therein, Seyersted, Finn. *Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon the Conventions Establishing them?* (Copenhagen: Krohns Bog Trykkeri, 1963); Bowett, Derek. *The Law of International Institutions* (London: Stevens & Sons, 1982), *passim* and esp. 337–338; Sarooshi, Dan. *The United Nations and the Development of Collective Security* (Oxford: Oxford University Press 1999); Klabbbers, Jann. *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002), ch. 4; Sarooshi, Dan. *International Organizations and Their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005); White, Nigel. *The Law of International Organisations* (Manchester: Manchester University Press, 3rd ed. 2016), ch. 5; Akande, Dapo. 'International Organizations', in *International Law*, eds. Malcolm D. Evans (Oxford: Oxford University Press, 5th ed. 2018), ch. 8, sect. IV, from 239; Schermers, Henry, and Niels Blokker. *International Institutional Law* (Leiden: Brill/Nijhoff, 6th ed. 2018), ch. 3. Notable international decisions include International Court of Justice, *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports, 1949, 182–183; International Court of Justice, *Certain Expenses of the United Nations, Advisory Opinion*, ICJ Reports 1962, 151, 156–69, 177; ICJ, *Namibia Advisory Opinion* (n. 31), 16, paras. 45–53 (partly quoted below (n. 74)); International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996, 76, 78, para. 5; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para. 28; European Court of Human Rights, *Al-Jedda v the United Kingdom* [GC], no 27021/08, ECHR 2011, 53 *EHRR*; *ibid.*, *Nada v Switzerland*, no 10593/08,

not have the power to take action that contradicted the express provisions of the Covenant.⁴⁹ Thus, the Council could not validly approve any stipulations in the Mandate for Palestine which were incompatible with the express provisions of the Covenant in this way. Any such purported approval would involve the Council acting *ultra vires*.⁵⁰ As a result, the relevant approval would be without legal effect – void *ab initio*.⁵¹

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- Judgment of 12 September 2012, ECHR 2012; id., *Al-Dulimi and Montana Management Inc. v Switzerland* [GC], no 5809/08, Judgment of 26 November 2013, ECHR 2016. On the international legal status of the League of Nations, see e.g., Oppenheim, Lassa. *International Law*, vol. 1 (London: Longmans, Green & Co., 3rd ed. 1921), 269; Corbett, 'League' 1924 (n. 32); Fischer Williams, John. 'The Status of the League of Nations in International Law', in *Chapters on Current International Law and the League of Nations*, ed. John Fischer Williams (London: Longmans, Green & Co., 1929), 477–501; Eagleton, Clyde. 'International Organization and the Law of Responsibility'. *Recueil des Cours* (1950) 76 (1), 319–423, 334.
- 49 This is to be contrasted with action which, although not provided for in an express provision, is not in contradiction with any such provision. Provided this action is pursuant to one of the purposes and principles of the organization, it could fall within the lawful limits of the organization's powers. See ICJ, *Expenses Advisory Opinion* (n. 48), 168.
- 50 On the concept, significance and consequences of an international organization acting *ultra vires*, see the sources cited in note 48, and also Osieke, Ebere. 'The Legal Validity of Ultra Vires Decisions of International Organizations'. *American Journal of International Law* 77 (1983) 239–256; Akande, Dapo. 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?'. *International & Comparative Law Quarterly* 46 (2) (1997), 309–343.
- 51 Following the position that *ultra vires* acts are a nullity – without legal effect. An alternative view would be that such acts are in effect as if they are valid until set aside by a competent tribunal – voidable, not void *ab initio*. It is submitted that this view is not sustainable in international law, where compared to the situation in many domestic legal systems, recourse to judicial determinations is limited. In consequence, compliance 'enforced' through diplomatic pressure and auto-compulsion is of especial importance. An essential requirement for compliance and these sorts of 'enforcement' is that obligations are clear at the time when they apply. Such clarity cannot be left to depend on whether or not, and be provided only if, the accidental eventuality of judicial determination occurs (even if compliance based on judicial enforcement in particular is left to this eventuality). For commentary on these two different views, see the sources cited in the previous three notes. For support for the presently articulated view in particular, see, e.g., Osieke, 'Ultra Vires' 1983 (n. 50), 255; Akande, 'International Organizations' 2018 (n. 48) 242–243. This view is articulated in the context of the United Nations (but as a general doctrine applicable to international organizations) by Judge Morelli in his Separate Opinion to one of the canonical decisions on this subject, the *Certain Expenses Advisory Opinion*, thus:

In the case of acts of international organizations, and in particular the acts of the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the United Nations had to be considered as an invalid act, such

In a similar fashion, the states (including the UK) who agreed to, and voted for the approval by the Council of, the Mandate for Palestine, and the UK also in its actions with respect to Mandatory Palestine, including in its role as Mandatory, were bound to respect and comply with the provisions of the Covenant, as part of a binding international treaty, insofar as they related to Mandatory Palestine.⁵² This prohibited them from anything in the foregoing actions which did not respect and comply with the provisions of the Covenant. Any breach of such prohibitions was not only a violation of international law. Also, necessarily, it could not act as the basis for new, legally-valid arrangements which somehow trumped the prior relevant stipulations in the Covenant.

invalidity could constitute only the *absolute nullity* of the act. In other words, there are only two alternatives for the acts of the Organization: either the act is fully valid, or it is an absolute nullity, because absolute nullity is the only form in which invalidity of an act of the Organization can occur. An act of the Organization considered as invalid would be an act which had no legal effects, precisely because it would be an absolute nullity. The lack of effect of such an act could be alleged and a finding in that sense obtained at any time.

Judge Morelli, Separate Opinion, ICJ *Expenses Advisory Opinion* (n. 48), 222.

- 52 Based on the axiom that treaty provisions are binding. An authoritative recitation of this, in a treaty adopted later in the 20th Century but understood in this regard to reflect the general position inherent in the notion of international law itself, and treaties as sources of international law, is the 'pacta sunt servanda' provision in Vienna Convention on the Law of Treaties: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' Vienna Convention on the Law of Treaties, 23 May 1969, entry into force 27 January 1980, 1155 *UNTS* 331 (VCLT, 1980), art. 26. On this, see also below (n. 63). The present analysis is focusing on the legal position of the Council members *qua* Council members, and the legal significance of the Mandate for Palestine as an instrument adopted by the Council as an organ of the League of Nations. There is a separate question, beyond the scope of this article, as to whether that instrument can somehow be regarded as an agreement adopted by the states members of the Council, with potential consequential implications for the requirement in article 20 of the Covenant that Members 'solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms' of the Covenant. Jean Allain seems to characterize the Mandate for Palestine as an agreement between the states members of the Council which was, as such, a violation of the 'securities' referred to in article 22 which he links to the requirement in article 20 (it is debatable whether the reference to 'securities' is only to the remainder of article 22 rather than also other articles in the Covenant, but in any case article 20 itself is applicable to the terms of the Covenant generally, including those in article 22). However, he does not explain the rationalization for his characterization nor the legal consequences of the violation for the legal status of the Mandate for Palestine and the legality of the UK administration of the territory and its population pursuant to it. See Allain, *Middle East* 2017 (n. 7), 86.

The consequence of the foregoing, both as a matter of the legal powers of the League Council, and the legal obligations of the states parties to the Treaty of Versailles, is as follows. The operative international legal regime for Mandatory Palestine was constituted by the relevant provisions of the League Covenant taken together with only those elements of the Mandate for Palestine compatible with the former provisions. This approach will be followed when addressing the question of what the UK was required to do, and not do, when it came to the international legal status of the territory and its population as a matter of the Covenant-based applicable law. Before addressing that, it is necessary to appreciate the significance of how this applicable law operated on the basis of 'trusteeship'. Also, account needs to be given to the potential relevance of extra-Covenant international law in the field of self-determination. These matters will be the focus of the next two sections.

4 Trusteeship

An overall concept of 'trusteeship' applied to all the territories and associated populations of the Mandates System, on the basis of article 22 of the League of Nations Covenant.⁵³ According to this concept as set out in the article, whereas the territories had '... ceased to be under the sovereignty of the States which formerly governed them'⁵⁴ (as indicated, they had been detached from the defeated powers in the first world war), they were deemed to be '... inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world.'⁵⁵ This racist standard of societal incapacity was the alibi that formed the basis for an arrangement whereby

... the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it ...⁵⁶

53 See the sources cited above (n. 31) in particular Hales, 'Creation Application Mandate' 1939; Hales, 'Reform Extension Mandate' 1940; Chowdhuri, *Mandates and Trusteeship* 1955; Hall, *Mandates* 1945; Redgwell, *Intergenerational Trusts* 1999; Wright, *Mandates* 1945; Wilde, *International Territorial Administration* 2008.

54 League Covenant, 1919 (n. 28) Art 22.

55 Ibid.

56 Ibid.

The foregoing arrangement was in turn itself an alibi for the victorious powers to take control over the colonies of the defeated powers, and to assimilate them into their own dominions.⁵⁷ This is the counterpart to Churchill's racist basis for transferring land from indigenous inhabitants to people whose identity he regarded to constitute a 'higher-grade race'. With Churchill, the issue was who the colonial authority would give this authority up to. With article 22, it was a matter of the basis for the colonial authority itself.

In administering these territories and their populations, the colonial authorities were bound by the '... principle that the well-being and development of such peoples form a sacred trust of civilisation ...'⁵⁸ This trusteeship concept forming the basis for colonial rule drew on ideas that had already been invoked in relation to certain other earlier colonial arrangements, and was even sometimes included in international legal instruments.⁵⁹ It was widely regarded to be a disingenuous alibi, legitimating colonial domination through the cynical invocation of humanizing objectives.⁶⁰ More fundamentally, as indicated, the very basis for the humanizing objectives – that some people in the world are 'not yet able to stand by themselves' and require 'tutelage' by 'advanced nations' – rested on a racist concept of civilizational difference, the 'standard of civilization'.⁶¹ In the words of Neta Crawford,

57 See the sources cited above (n. 31), especially Wright, *Mandates* 1945; Hall, *Mandates* 1945; Chowdhuri, *Mandates and Trusteeship* 1955; Pedersen, *Guardians* 2015; Wilde, *International Territorial Administration* 2008.

58 League Covenant, 1919 (n. 28), art. 22. On the 'sacred trust', see also ICJ *South West Africa Advisory Opinion* (n. 31), 131–1.

59 See Wright, *Mandates* 1945 (n. 31); Hall, *Mandates* 1945 (n. 31); Chowdhuri, *Mandates and Trusteeship* 1955 (n. 31) discussing these linkages with other practices in the specific context of the Mandates and, on the trusteeship concept across a range of practices more generally, Bain, *Trusteeship* 2003 (n. 31) and Wilde, *International Territorial Administration* 2008 (n. 31), ch. 8 sect. 8.3.2, and sources cited therein.

60 See e.g. Bain, *Trusteeship* 2003 (n. 31); Wilde, *International Territorial Administration* 2008 (n. 31), ch. 8 sect. 8.5, and sources cited therein.

61 On the 'standard of civilization' and its racist character, see de Vitoria, Francisco. 'On the American Indians' (1539), in *Vitoria – Political Writings*, eds. Pagden, Anthony and Lawrance, Jeremy (Cambridge: Cambridge University Press, 1991), 231–292; Snow, Alpheus Henry. *The Question of Aborigines in the Law and Practice of Nations* (Washington, DC: US Government Printing Office, 1919); Wright, *Mandates* 1945 (n. 31) ch. 1; Gong, Gerrit W. *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984), *passim* and especially 14–21; Bain, *Trusteeship* 2003 (n. 31), 74–77 and sources cited therein; Anghie, *Imperialism* 2005 (n. 25), 25–34, 52–65, 150; Ibhawoh, Bonny. *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (New York: SUNY Press, 2006); Schwarzenberger, Georg. 'The Standard of Civilization in International Law', *Current Legal Problems* 8(1) (1955), 212–234; Wilde, *International Territorial Administration*

... colonialism was [understood by its proponents to be] justified and good because the inhabitants of the colonized lands were less-than-human savages who lacked the attributes Europeans believed were marks of civilization.⁶²

The foregoing considerations concerning perfidy notwithstanding, the adoption of the trusteeship norm in an international treaty established it as a set of legal obligations that were binding on the colonial authorities in Mandated territories. Obligations have to be interpreted as if they are good faith undertakings, even if there is, as was the case here, significant evidence of bad faith in this regard on the part of some of those states who consented to be bound by them.⁶³ Also significantly, these obligations are given a special character: they are collectively conceptualized as a 'sacred trust of civilization.'⁶⁴

The concept of trust conceives a relationship of control – here, the authority exercised by the Mandatory over the Mandate for Palestine – in a particular fashion. The 'trustee' – the Mandatory – is legally required to act only in the interests of the 'beneficiary' – the local population of the Mandate for Palestine. Not also in its own interests, nor in the interests of other particular groups. Thus the International Court of Justice stated in the context of another Mandate, that over South West Africa, that '[t]he Mandate was created, in the interests of the inhabitants of the territory.'⁶⁵ The trust concept is applied to the relationship between the two because of, as mentioned, a racist concept of relative capacity for self-administration ('advanced' versus 'not yet able ...') based on the aforementioned 'standard of civilization'.

2008 (n. 31), 305, 317, 318–19n107, 320, 326, 331n164, 351, 359, 387–8, 408–11, 413, 445 and sources cited therein.

62 Crawford, *Argument and Change* 2002 (n. 31), 140.

63 The assumption that obligations should be treated as if they have been taken on by states in good faith is reflected in the obligation that states then have to comply with these obligations in good faith. Such an obligation is regarded to be a general principle of law operative within the international legal system, for all international legal obligations, including those in treaty law. See Kotzur, Markus. 'Good Faith (Bona fide)'. *Max Planck Encyclopedia of Public International Law* 2009, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412?prd=MPIL#law-9780199231690-e1412-div1-6> (last accessed on 29 November 2022). For affirmation of it in the context of treaty law in the Vienna Convention adopted later in the twentieth century, see VCLT, 1980 (n. 52). Art 26 (quoted above, *ibid.*).

64 League Covenant, 1919 (n. 28), art. 22.

65 ICJ, *South West Africa Advisory Opinion* (n. 31), 132.

Moreover, because of the power imbalance between the two, the requirement to act only in the interests of the beneficiary needs to be secured by making this obligatory, given the possibilities of abuse – the risk of a breach of trust.⁶⁶ In the case of the Mandated territories, including the Mandate for Palestine, this was enabled by constituting the requirement as obligatory in international law (binding on the Mandatory state).⁶⁷ Relatedly, a further key component of a trusteeship regime is the need for accountability: compliance with the trusteeship requirement should not be left exclusively to auto-compliance by the trustee.⁶⁸ It is not enough to protect the beneficiary through the trusteeship obligation. Also, there needs to be third-party enforcement of the obligation – in the words of article 22, ‘securities for the performance of this trust’ being ‘embodied in this Covenant.’ These were provided by the Covenant through a role given to both the general decision-making body of the League, the Council, and the Mandates-specific body, the Permanent Mandates Commission.⁶⁹ This was subsequently supplemented by the Council creating a system whereby petitions could be sent to the League by communities in Mandated territories.⁷⁰ Moreover, each Mandate agreement, including the Mandate for Palestine, included an article acknowledging the possibility that there might be disputes between the Mandatory state and one or more other members of the League of Nations when it came to the interpretation or application of the Mandate agreement. If such a dispute arose, the latter state or states could refer the dispute for adjudication by the League of Nations Permanent Court of International Justice (PCIJ) in the Hague.⁷¹

66 See the sources cited above, n. 59.

67 Ibid.

68 For Edmund Burke, accountability ‘is of the very essence of every trust’. Burke, Edmund. ‘Speech on Mr Fox’s East India Bill, 1 December 1783’, reproduced in Burke, Edmund. *The Speeches of the Right Honorable Edmund Burke in the House of Commons, and in Westminster-Hall* (London: Longman & Ridgeway, 1816), vol. II, 406, 411. For the application of this requirement in the context of the Mandates arrangements, see, e.g., Hales, ‘Reform Extension Mandate’ 1940 (n. 31), 177; Chowdhuri, *Mandates and Trusteeship* 1955 (n. 31) 21–23, 36; Reisman, ‘Reflections’ 1989 (n. 31), *passim*.

69 See the sources cited above (n. 31).

70 Ibid.

71 Under article 26 of the Mandate for Palestine,

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice ...

Mandate for Palestine, 1923 (n. 6).

Embodying the trusteeship legal obligations in the Covenant in particular is also legally significant, because the Covenant is the constitution of the new plenary international organization, the League of Nations, and its provisions were applicable to member states in a particular fashion. Not only were all member states bound to comply with them as far as their own behaviour was concerned, and had an interest in compliance by other states insofar as this affected their own rights directly. Also, all member states, and the organization as a whole, had an interest in such compliance by all other states in a generalized sense (i.e., in the case of states, not only if their own direct rights were at stake). Hence in the preamble to the Covenant, the states parties pledge commitment to the following objectives, concerned with compliance with international legal obligations by all states as a general matter, not just when their own particular legal rights are affected:

by the prescription of open, just and honourable relations between nations,
 by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and
 by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another.⁷²

Indeed, this concept of a generalized international interest in legal compliance is the underlying rationale for the grafting of trusteeship obligations onto the conduct of administration in Mandatory territories. Necessarily, all states parties are affirming that it is important, in the interests of the affected populations, not because their own rights were at stake, that these obligations be included in the treaty. In doing this, all the states parties to the Covenant have asserted a legal interest, on a generalized, international basis, in there being such obligations in operation. A consequence of that is that all such parties have a legal interest in seeing such obligations complied with. Hence the decision to include the aforementioned institutional securities for the performance of the trust, which involved League member states directly, as members of both the Council and the Commission, and being given the possibility to refer disputes they might have with the Mandatory authority about

⁷² League Covenant, 1919 (n. 28), preamble.

the interpretation or application of the Mandate Agreement to the Permanent Court of International Justice.⁷³

The role of individual states, and the plenary international organization of its time, in implementing the 'securities', has implications for the post-League period, running up to today. At an organizational level, the United Nations inherited the legal function performed by the League with respect to any outstanding Mandated Territory, as was the case with Mandatory Palestine on the creation of the UN in 1945.⁷⁴ This institutional inheritance includes the International Court of Justice (which is an Organ of the United Nations – a constituent component), which as part of its more general jurisdictional inheritance from the Permanent Court of Justice (the equivalent body of the League of Nations), enjoys the competence to hear disputes concerning the interpretation and application of Mandate agreements referred to it on the same basis as would have happened before the PCIJ.⁷⁵ At a state

73 Thus the International Court of Justice prefaces its recitation of the League accountability mechanisms operating with respect to the Mandates arrangements as indicative of the 'essentially international character of the functions which had been entrusted to' the Mandatory authority. ICJ, *South West Africa Advisory Opinion* (n. 31), 133.

74 This inherited role existed not by virtue of any express stipulation to this effect (other than in the specific instance where Mandated territories could be formally transferred to the (UN-equivalent) Trusteeship System on the basis of art. 77.1a of the UN Charter) but because of the following factors. In the first place, the continued nature of the trusteeship obligations in international law despite the demise of the League (on which, see below, n. 104). In the second place, the equivalent status that the UN would have, as a general matter, to the League. And in the third place, the generalized nature of the powers of the General Assembly, which were thereby compatible with the taking on of this role. See the discussion in the ICJ *South West Africa Advisory Opinion* (n. 31), 136–138, in the context of the Mandate of South West Africa, and in particular the following statement at 137:

the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa [the administering authority in the Mandate] is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it.

The later *Namibia Advisory Opinion* (n. 31) affirmed the earlier position, articulating it at 16 in more general terms:

... the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligation, and competent to act accordingly.

75 In its Advisory Opinion of 1950 the ICJ held that because the United Nations succeeded the League of Nations and the ICJ succeeded the PCIJ, certain references to the predecessor organization and court could be applied as if they referred to their successors. In particular, the equivalent provision in the Mandate agreement for South West Africa (in

level, all states had and have an interest in seeing that the 'sacred trust' be complied with.⁷⁶

Finally, it is also legally significant that the role of the Mandatory state in administering the Mandated territory is conceptualized by article 22 in a particular fashion: as 'acting on behalf of the League'.⁷⁷ This does not mean that the Mandatory does not also act in an individual capacity. It does act in this capacity, bringing with it its international legal obligations, including those under the Covenant. Rather, the conceptualization of article 22 means that the organization as a whole is also legally implicated, which includes all the League member states collectively. This is reflected in the idea that, in the words of the International Court of Justice, the Mandate was created in the interest not only of the inhabitants of the territory, as indicated above, but also

article 7) to article 26 of the Mandate for Palestine was to be read to confer jurisdiction to the ICJ, and that South Africa was 'under an obligation to accept the compulsory jurisdiction of the Court' accordingly. ICJ *South West Africa Advisory Opinion* (n. 31), 138. In 1960 Ethiopia and Liberia brought cases to the ICJ against South Africa complaining that it was breaching its obligations under the Mandate with respect to South West Africa. The Court affirmed its earlier finding on the transferability of the dispute settlement function from the PCIJ to the ICJ. Furthermore, it held that although the League of Nations ceased to exist, and there were, therefore, no members of that organization, nonetheless states who had been members (Ethiopia and Liberia had been – Ethiopia as Abyssinia) could continue to act as 'Members of the League of Nations' for the purposes of being able to submit a dispute with the Mandatory to the ICJ on the basis of the provision in the Mandate agreement. ICJ, *South West Africa Cases, Preliminary Objections* (n. 31), 334–342. However, in the subsequent 1966 decision issued by a divided court with the casting vote of the President, it was held that the cases could not proceed because the two states did not have an interest or a right affected. ICJ, *South West Africa Cases, Second Phase* (n. 28). This decision was widely criticised and is regarded as a low point in the history of the ICJ, bearing in mind that it flew in the face of the notion of the generalized international interest understood to be embedded in the 'sacred trust'. For this reason, and also because of how the concept of *erga omnes* norms has become accepted (see the next note), is unlikely that the Court would reach the same finding now.

76 This implicates the concept of *erga omnes* norms: the issues at stake are treated in international law as reflecting 'community interests' which therefore operate against all creating a legitimate interest in relation to them on the part of all states. See International Court of Justice, *Barcelona Traction, Light and Power Company Limited*, Case (Second Phase), Judgment, 5 February 1970, ICJ Reports 1970, 3, paras. 33 and 34; International Court of Justice, *East Timor (Portugal v Australia)*, 1995 ICJ Rep 90 (30 June 1995), para. 29; ICJ, *Wall Advisory Opinion* (n. 21), paras. 88, 155–6; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, 2019 ICJ Rep. 95 (25 Feb. 2019) (ICJ, *Chagos Advisory Opinion*) para. 180.

77 League Covenant, 1919 (n. 28), art. 22. On this role, see further, Hales, 'Creation Application Mandate' 1939 (n. 31).

'of humanity in general,' and thus the arrangements constituted 'an international institution with an international object – a sacred trust of civilization.'⁷⁸ This link to humanity as a whole, and concept of an objective that is global in nature, reinforces the concept that all states have an interest in compliance with the trusteeship requirements. In this case it is not, as in the case earlier, because they have collectively agreed to adopt the requirements as legal obligations. Rather, it is because the particular state charged with following them in its administration of a Mandated territory is acting on their behalf in this role, them being the collective manifestation of the 'global', of humanity, and so when it acts, they are implicated.

The 'trusteeship' basis on which the UK administered Mandatory Palestine has consequences for the legality of UK acts and omissions between 1923 and 1948 insofar as this behaviour determined the international legal status of the population and territory. Is the general international law of self-determination also relevant in this regard?

5 Self-Determination – The 'Ultimate Objective of the Sacred Trust'

In contemporary international law, self-determination has two elements.⁷⁹ 'Internal' self-determination, which is the right of people within a state, such as, for example, the rights of minority peoples to freely use their own minority languages. 'External' self-determination is the right of a people to decide their own 'external', i.e., international status, for example to become an independent state. The latter manifestation of the right is near-universally regarded to apply to the Palestinian people today.⁸⁰ In what follows, the term 'self-determination' will be used to denote this latter form of the right.

78 ICJ *South West Africa Advisory Opinion* (n. 31), 132. See also Hales, 'Creation Application Mandate' 1939 (n. 31), esp. 204.

79 The literature on self-determination in international law is voluminous. See the following, and sources cited therein: Burri, Thomas and Thürer, Daniel. 'Self-Determination'. *Max Planck Encyclopedia of Public International Law*, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873?prd=EPIL> (last accessed on 29 November 2022); Summers, James. *Oxford Bibliographies – Self-Determination in International Law*, available at: <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0033.xml> (last accessed on 29 November 2022). For two canonical authorities on the general subject and the internal/external distinction, see Cassese, *Self-Determination* 1995 (n. 21), *passim*; Crawford, *States* 2017 (n. 20), ch. 3, sect. 3.2, and sources cited therein.

80 See the sources cited above (n. 18).

The International Court of Justice in its 1970 Advisory Opinion regarding Namibia, which, as South West Africa, had been a 'C' class Mandated Territory with South Africa as the Mandatory, stated that 'the ultimate objective' of the sacred trust was the self-determination and independence of the peoples concerned in Mandated territories.⁸¹ By 'self-determination' it meant 'external' self-determination. This potentially links the treaty-based 'sacred trust' of the Covenant with the right of self-determination in customary international law.

However, the relationship between the two is complicated. The *Namibia* statement was made by the Court after emphasizing how international law had evolved in the 50-year period since the League Covenant was adopted. The emphasis was on the implications for the status of what was then called Namibia at the time it issued its judgment. At this time, the application of the right of self-determination to the people of colonial territories generally, including former Mandated territories such as Namibia, was near-universally accepted as the position in international law.

At the time the Covenant was adopted, the position was quite different. There was no generalized right of self-determination enjoyed by colonial peoples.⁸² Nor, more narrowly, was there such a general right enjoyed by peoples inhabiting Mandated territories.⁸³ Indeed, the trusteeship concept in article 22 of the Covenant was at odds with how self-determination came to be understood after the Second World War. Then, it was as repudiation of the racist notion of dividing the world into peoples who were incapable, and others who were advanced, on which trusteeship was based. Self-determination was and is conceptualized as a right that people have on the basis of immediate realization, not when others deem they are 'ready'.⁸⁴ Put differently, the trusteeship concept of eventual, possible independence if development happens was replaced with an automatic, immediate right to freedom. The two are linked insofar as both are ostensibly based on eventual independence – this is perhaps what the ICJ meant by the 'ultimate object' – but the key difference was that the pathway to this was conceptualized differently – eventual, versus immediate.

81 ICJ, *Namibia Advisory Opinion* (n. 31), para. 31.

82 E.g. Cassese, *Self-Determination* 1995 (n. 21); Crawford, *States* 2007 (n. 20) ch. 3, sect. 3.2.

83 Ibid.

84 UN General Assembly, GA Res 1514 (XV) (14 December 1960), para. 3: 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.' See also *ibid.*, preamble, para. 5; International Court of Justice, *Western Sahara, Advisory Opinion*, 1975 ICJ Rep. 12 (16 Oct. 1975), para. 55; ICJ, *Chagos Advisory Opinion* (n. 76), para. 178.

As the *Namibia Advisory Opinion* indicates, 'eventual' had been displaced by 'immediate' for all colonial territories, including remaining former Mandated territories, by 1970 (when the opinion was issued, South Africa was still in control of what was then called Namibia, in violation of this right). There is a question as to when this shift happened – when the right of external self-determination emerged as generally applicable to colonies (including Mandates). A case could be made that this may have happened during the later lifespan of the Mandatory period in Palestine and by 1948. By that date, certain colonial peoples had become independent states (cf. the independence of India and Pakistan in 1947) and many more were to follow, on the basis of a right to self-determination, in the immediate period thereafter. Whether or not the right had crystallized within the Mandate time-period is beyond the scope of the present article (but the potential consequences of it being applicable in 1948, if this was the case, will be revisited below).⁸⁵ What is significant for present purposes is that this question is commonly regarded to be the only determinant of a Mandate-era right of independence on the part of the people of the territory.⁸⁶ This is a mistake, ignoring an alternative area of law which provides for such a right irrespective of whether, as a matter of general international law, the right of self-determination might apply.

6 Special Regime for 'A' Class Mandates

The special treaty-based regime for 'A' class Mandates in article 22 of the League of Nations Covenant was in operation from the start of the Mandate period. This special regime stipulates that the communities in 'A' class territories, so including the community in what would become the Mandate for Palestine,

... have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering

85 On the question of when the right crystallized, see, generally, the treatment of this by the authorities cited above (n. 79), and also the discussion and sources cited in the ICJ *Chagos Advisory Opinion* (n. 76) in both the Opinion itself, some of the associated declarations and separate opinions made by members of the Court, and some of the written and oral submissions, and other documents submitted to the Court by states in the proceedings, available at: <https://www.icj-cij.org/en/case/169> (last accessed on 29 November 2022).

86 For example by the commentators cited above (n. 82).

of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.⁸⁷

This arrangement is different from the trusteeship model applied to 'B' and 'C' class Mandates (and also the position of other colonies as a matter of general international law) where there was no commitment to independent statehood.⁸⁸ In the post-Second World War period such distinctions were no longer relevant because the right of self-determination was then regarded to be applicable to all colonial arrangements, including all three classes of Mandate. This was the point the ICJ was making in the *Namibia* dictum, since (what was originally called) South West Africa was a 'C' class mandate. But in the period from the start of the Mandate period, it meant that a special model of self-determination was applicable to the population of Mandatory Palestine in a way that it was not, for example, for the people of South West Africa.

The *sui generis* model of self-determination was not the same as the 'immediate' right to independence which became the general post-Second World War model. But it is close to it, through the requirement that independent statehood is the clear objective, and, moreover, that this should be 'provisionally recognized'. 'A' class Mandates were placed in a privileged category compared to all other colonies, including other classes of Mandate, as far as their position in general international law was concerned. This is not appreciated because of the lack of such entitlements for peoples in colonial territories generally, which only came decades later.⁸⁹ 'A' class Mandates are sometimes mistakenly lumped together into a general category whereby self-determination as it came to be understood after the Second World War did not have any relevance.⁹⁰ This important oversight treats the position of the people of these Mandated territories, such as the population of Mandatory Palestine, as if the status of their territory was to be determined at the discretion of the Mandatory authority. Such discretion did indeed prevail in the case of many other colonial territories (until the later emergence of the general right of self-determination in international law). However, things were different for 'A' class Mandates.

87 League Covenant, 1919 (n. 28), art. 22.

88 According to article 22, for 'B' class Mandates, 'the Mandatory must be responsible for the administration of the territory' under specific conditions, and 'C' class Mandates 'can be best administered under the laws of the Mandatory as integral portions of its territory'. Under either arrangement there is no express or implied temporal limitation. League Covenant, 1919 (n. 28), art. 22.

89 For example, Shaw, 'Palestine Mandate' 2016 (n. 42).

90 Ibid.

The *sui generis* regime of article 22 was to be in operation from the start of the Mandate. The community that was to be ‘provisionally recognized’ as an ‘independent nation’ was therefore that of Mandatory Palestine at that time, the population of which was 90% Arab-identifying.⁹¹

7 What Happened, and How This Violated Article 22

The Mandate for Palestine charged the Mandatory with ‘putting into effect’ the Balfour Declaration commitment ‘in favour of the establishment in Palestine of a national home for the Jewish people.’⁹² As a result,

The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions ...⁹³

In order to achieve this, Mandatory Palestine was to be under the full administrative authority of the Mandatory: ‘The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.’⁹⁴ These provisions were interpreted to form the basis for a policy whereby the UK exercised plenary authority over the territory for a significant period. This enabled a demographic alteration in its population, via Jewish immigration, to pave the way, together with the creation of self-governing Jewish institutions, for the proclamation of Israel in part of the territory.⁹⁵ Such an interpretation was incompatible with the terms of article 22 as they applied to Mandatory Palestine as an ‘A’ class Mandate. Bearing in mind what is indicated above about the supremacy of the League Covenant over any incompatible provisions in the Mandate for Palestine, the actions of the UK taken pursuant to these incompatible interpretations had no sound basis in international law. Indeed, they were a breach of the UK’s obligations under the Covenant.

The model of provisionally recognizing independent statehood, subject to ‘administrative advice and assistance’ as necessary, within the overall context

⁹¹ On that demographic characteristic, see, e.g., Pedersen, *Guardians* 2015 (n. 7), 378–379.

⁹² Mandate for Palestine, 1923 (n. 6), Preamble.

⁹³ *Ibid.*, art. 2.

⁹⁴ *Ibid.*, art. 1.

⁹⁵ See the sources cited above (n. 7) notably Pedersen, *Guardians* 2015.

of a 'sacred trust' rooted in securing the 'well-being and development' of the local population, necessarily required the following actions.⁹⁶ Relatedly, it also ruled out certain alternative approaches which were in fact taken.

The focus on the 'well-being and development' of the local population meant that the 'nation' that was to be 'provisionally recognized' was comprised of that population at the time the Covenant was adopted.⁹⁷ To seek to alter this demographic in order to enable a particular sub-population grouping (self-identifying as such), numerically supplemented through significant immigration, to form a state for members of that grouping only in part of the territory, as happened, was necessarily incompatible with what was required. The requirement was provisional recognition of statehood, for all the existing inhabitants, from the start of the Mandate, not, as happened, a prolonged, decades-long delay in this in order, in part, to allow the time for significant demographic changes.

Since the Mandatory was only to provide 'administrative advice and assistance', and only that which was necessary, in the context of a provisional recognition of independent statehood, then impliedly there was supposed to be provisional self-administration. Furthermore, this should have been based on representatives of the local population as it existed at the time the Mandate period began. Thus, there were two inter-related requirements concerning, first, the degree of authority exercised by the Mandatory and, second, the involvement of local representatives in governance. These two elements will be elaborated on in turn.

Beginning with the degree of authority to be exercised by the Mandatory: this was supposed to be limited. The terms of article 22 stipulate that the role of the Mandatory in relation to 'A' Class Mandates is restricted to 'the rendering of administrative advice and assistance'.⁹⁸ This limited function of 'advice and assistance' in relation to, rather than, say, the 'conduct' of, administration, fits a model whereby independent statehood was already to be provisionally recognized.⁹⁹ Impliedly, it was representatives of the local population who were to be involved in such conduct, as explained further below. As indicated above, article 22 provides that:

96 Quoted text from League Covenant, 1919 (n. 28), art. 22.

97 Ibid.

98 Ibid.

99 On the contrast with 'conduct', see the relevant provisions for 'B' and 'C' class mandates, extracted above (n. 88).

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.¹⁰⁰

The preamble of the Mandate for Palestine expressly references this provision, and in article 1 stipulates that '[t]he Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.'¹⁰¹ Insofar as article 1 might be interpreted to provide authority for the conduct of, rather than mere advice and assistance in relation to, administration, it is clearly at odds with the relevant stipulation in article 22. The separate clause in article 22 indicating a role for the Council in defining the degree of 'authority, control, or administration to be exercised by the Mandatory' is limited to circumstances where this degree of authority etc. has not already been agreed by the Members of the League. Clearly the Members of the League have agreed in general terms to the limited 'advice and assistance' role when it comes to 'A' Class mandates. It is written into the express terms of the Covenant, the foundational agreement between states members of the League. Thus this definitional competence given to the Council by article 22 is to operate within the terms of – the limits of – what has already been set by the Covenant (which varies for different classes of Mandate). It could not form the basis for somehow amending the provisions of article 22 on this matter insofar as they applied to Mandatory Palestine to provide a more expansive administrative competence than was permitted by these provisions. An interpretation to this effect would be incorrect. Put differently, if the Mandate for Palestine were to be described as a means through which the Council varied the provisions of article 22 of the Covenant in this manner, it would be a description of the Council acting, as indicated above, *ultra vires*. Such action would be without legal effect in the sense that the relevant Covenant provisions would continue to apply as if the relevant provisions of Mandate for Palestine had not been adopted.

The consequence of the foregoing is that the UK performance in fact of an administrative role in Mandatory Palestine had no legal basis and was, thus, *ultra vires* – beyond the UK's international legal competence. Equally, understanding it as necessary holding mechanism, to provide administrative rule following the detachment of the territory and its population from rule by the Ottoman Empire, pending a demographic shift involving Jewish migration and the building up of specifically Jewish institutions of self-rule, would be based

¹⁰⁰ League Covenant, 1919 (n. 28), art. 22.

¹⁰¹ Mandate for Palestine, 1923 (n. 6), art. 1.

on the bypassing of the terms of article 22. Such a basis had not been created, legally, through the adoption of the Mandate for Palestine.

Turning from the degree of authority exercised by the Mandatory to the related question of the exercise of governance by local representatives, the stipulations of article 22 had consequences for who had and were to have political rights in the territory, and how they were to be exercised. As mentioned, the implication of the provisional recognition of independent statehood, the general concept of the 'well-being and development' of the local population being at the heart of the arrangement as a 'sacred trust', combined with a limited role regarding territorial administration (only advice and guidance) to be performed by the Mandatory, implied the following. There was supposed to be provisional self-administration, based on representatives of the local population as that population was constituted at the time the Mandate period began. Put differently, political rights were to be accorded to and exercised by the representatives of the local population. Moreover, this was to happen from the start, since otherwise there would be an administrative vacuum.

However, the focus of the Mandate for Palestine is different. It references the 'establishment in Palestine of a national home for the Jewish people' and 'the establishment of the Jewish national home'¹⁰² This links the political future of the territory to Jewish people, necessarily focusing on Jewish political rights. By contrast, when it comes to 'non-Jewish communities in Palestine', it provides a safeguard that 'nothing should be done which might prejudice' their 'civil and religious rights' and the requirement of 'safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion'. By omission, the political rights of the existing majority non-Jewish population in the territory are excluded.

The terms of article 22 clearly and expressly articulate the 'well-being and development' of the local population in absolute, general terms. Given that the same community is to be provisionally recognized as an independent state, it follows that this community's 'well-being and development' necessarily includes political rights – of self-rule. Given the temporal aspect of 'provisional recognition', implying the position from the start of the Mandatory period, the community in question vested with such rights is the community as it was from that point. It might be said that the Mandate for Palestine could be interpreted to have somehow varied this. In the first place, by suspending not only the provisional recognition of statehood, but also the vesting of political rights in the existing, majority Arab population at the time implied in this. In the second place, by vesting such rights exclusively in current and potential

¹⁰² Mandate for Palestine, 1923 (n. 6), Preamble; art. 2.

future Jewish people in the territory. But such an interpretation would be contrary to the (express stipulations of the) Covenant. Thus it would be without legal validity when it comes to serving a lawful basis for any UK actions and omissions taken pursuant to these mistaken interpretations. Such actions and omissions were, relatedly, lacking in a valid legal basis and violations of the League Covenant.

In sum, the UK did not comply with what was required of it under the League Covenant and, indeed, violated this, by engaging in plenary administration for a prolonged, decades-long period. This was a breach of the 'sacred trust' the UK was legally required to honour in the Covenant.

8 Cut and Run in 1948

The UK role as administering authority ended with the abrupt withdrawal in 1948, the year in which the state of Israel was proclaimed covering part of the territory of Mandatory Palestine. A full treatment of the legal position regarding the status of the Palestine Mandate in 1948 is beyond the scope of this article, bearing in mind, *inter alia*, the involvement of the United Nations, notably the partition plan of 1947.¹⁰³ But the following key points can be made.

As determined by the International Court of Justice in the *South West Africa* Advisory Opinion and subsequently affirmed by the Court in the *Namibia* Advisory Opinion, the 'sacred trust' obligations under the League of Nations Covenant and associated Mandate Agreements continued to be binding for remaining Mandated territories and associated populations even as the League itself ceased to exist.¹⁰⁴ Thus the UK's obligations therein regarding the legal status of the territory and its population as indicated above under article 22 continued to operate and were applicable in 1948: the requirement of provisionally recognizing independent statehood for the population of Mandatory Palestine.

¹⁰³ On this, see, e.g., Crawford, *States 2017* (n. 20), ch. 9, sect. 9.5, and sources cited therein.

¹⁰⁴ In the *South West Africa Advisory Opinion*, the Court stated that

These obligations [in article 22 of the Covenant, and in certain provisions of the relevant Mandate Agreement for South West Africa] represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.

ICJ, *South West Africa Advisory Opinion* (n. 31), 133. See also more generally *ibid.*, 133–136. This was affirmed in the ICJ *Namibia Advisory Opinion* (n. 31), 55.

It may also be possible to make the case that by this stage, the right of self-determination in general international law was also applicable to this population, on an independent basis from the special, qualified regime in operation with respect to 'A' class mandates. They would have this right as inhabitants of the general class of colonial territories (including remaining Mandated territories) in relation to whom this right now applied. This separate, complementary entitlement, as explained above, if in operation would have required the UK to implement self-administration as an independent state in an immediate sense. If this as the case, then potentially, the UK's administration of the territory and population in 1948 was not only a continued violation of the Covenant obligations applicable to 'A' class Mandates, given there was supposed to be provisional independence subject to UK advice and assistance, not UK plenary administration. It was also a violation of the operation of the general right of self-determination which had subsequently come to be applicable to the population of the territory as a whole. It might be said, therefore, that by 1948 there was a double layer of entitlements (of the population)/obligations (of the UK), to the same effect, the first as a matter of the League of Nations Covenant, the second as a matter of the general law of self-determination.

However, the UK abrupt 'cut and run' action in 1948 was not an appropriate means of implementing these dual obligations (in the case of the Covenant obligations, doing so decades later than should have been the case). Some form of withdrawal from exercising plenary administration was essential for this, of course. But withdrawal *by itself* was manifestly insufficient, since it left things to be determined by the conditions in the territory which could not be relied upon to ensure that self-determination for the population of the territory could be implemented.

What actually happened – a unilateral declaration of independent statehood by the Jewish community of a state of Israel covering part of the territory – necessarily ran contrary to the wishes of the majority Arab population in Mandatory Palestine. This was a violation of their right to provisional independence under the Covenant and also (possibly, if applicable) their right to self-determination. As the administrative authority, the UK was required to use this position to ensure the implementation of these rights in what would come after the end of its administrative presence. It failed in discharging this legal requirement, in two respects. In the first place, by simply withdrawing in the face of plans by representatives of the Jewish community to declare unilateral independence over part of the territory as a Jewish state (necessarily insufficient as an arrangement to fully implement the right of self-determination of the Arab population of the territory affected). In the second place, by taking no steps regarding the legal status of the remainder of the territory and its

population. In this failure it enabled the violation of the aforementioned rights of the Arab majority population of the entire territory of Mandatory Palestine.

The contemporary inability of the Palestinian people to exercise their right of self-determination has its origins in this failure in 1948. Put differently, the violation of Palestinian self-determination that began with the UK's failure in 1948 (and, as indicated, before in unlawfully proceeding with and maintaining plenary administration in Mandatory Palestine rather than provisionally recognizing statehood) has continued ever since then, right up until today. Because of this, although from that date, the UK, as a result of its withdrawal, was not in the same position to bring the violation it had enabled to an end as it was during the period when it was in administrative control, and other international legal entities were able to, and indeed did, play a causal role in the violation (notably, obviously, Israel), the unbroken factual trajectory of the violation since 1948 means that the UK's responsibility for it (shared with other international legal entities) has operated ever since and continues today.

Also, finally, it is important to appreciate that because the law violated is conceptualized as a 'sacred trust', the aforementioned general interest that all states have in invoking this violation is in play. Thus not only the Palestinian people, and the State of Palestine, can potentially invoke UK responsibility. Also, other states, and the United Nations as the institutional manifestation of the international community, can do this on a 'general interest' basis.¹⁰⁵

9 Conclusion

The past is present. Not only, as is commonly appreciated, in the ongoing denial of self-determination of the Palestinian people and the link between this and Israel, both in its proclamation in 1948, and its occupation of the remaining parts of the land between the river and the sea from 1967. But also, as is much less commonly appreciated, in the origins in the actions and omissions of the UK in its role as Mandatory, the illegality of such actions and omissions, and the ongoing and therefore contemporary nature of the legal responsibility and legal consequences flowing from this.

In the UK, Churchill is commonly venerated for the role he played in the Second World War. The legacy of his leadership of the UK then lives on today in the UK's contemporary position in the world. But another legacy also lives on, with its underpinning in the ideas and associated policies of Churchill and how they were adopted and implemented by the UK: the notion that

¹⁰⁵ For an example of one particular basis, invoking the ICJ's inherited jurisdiction from the PCIJ via the dispute settlement clause in the Mandate for Palestine, see above (n. 75).

for racist reasons, a people should have their land and residence on that land taken away from them. However, for the Palestinian people, what also lives on are the international law rules which the UK had to breach in order to enable this.

Acknowledgements

The idea for the enquiry pursued in this article came out of conversations with Raja Shehadeh and Shawan Jabarin in Ramallah, Palestine, for which I am very grateful. Some of the ideas herein were presented at the conference 'On the Possibility and Impossibility of Reparations for Slavery and Colonialism' at Columbia University. My warm thanks to the discussant of my paper, Keston Perry, and the anonymous reviewers, and editors, of the present journal, for their valuable feedback and, in the case of journal staff, also editorial assistance, and to Sayf Abdeen, Wesam Ahmad, Ata Hindi and Karin Loevy for their kind practical assistance.

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